

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's approval of a zone
4 change.

5 **MOTION TO INTERVENE**

6 Doris Bickham, Betty L. Michalski and Jean D. Frers,
7 the applicants below, move to intervene on the side of
8 respondent. There is no opposition to the motion, and it is
9 allowed.

10 **FACTS**

11 The subject property is 13.98 acres designated
12 "Residential" on the county comprehensive plan map and zoned
13 Rural Residential - 5 acre (RR-5) on the county zoning map.¹
14 There is Rural Residential - 1 Acre zoning, with fully
15 developed 1 to 2 acre lots, to the north. To the immediate
16 west is a 9.8 acre parcel zoned RR-5, and to the west of
17 that is the Stonebrook residential subdivision and other
18 small lots of 1 to 2 acres, zoned RR-1. There is a street
19 stub within the Stonebrook subdivision to allow future
20 street connection to the east from the Stonebrook
21 development. To the immediate east is a parcel zoned RR-5
22 on which is located a church. To the east and north of the

¹Because the comprehensive plan provides that all land within the urban growth boundary is to be designated "UGB," we understand the "Residential" plan designation to apply only to rural lands.

1 church property is rural-tourist and rural-commercial
2 zoning, and to the east and southeast of the church property
3 is more RR-1 zoning.

4 **FIRST ASSIGNMENT OF ERROR**

5 Petitioner contends there is not substantial evidence
6 in the record to support the county's decision that there is
7 adequate water for the uses proposed on the land.
8 Petitioner cites comprehensive plan Goal 11, Policy 6.a and
9 Rural Land Development Code ("RLCD") 47.030 B (3).²

²Comprehensive Plan Goal 11, Policy 6 states in relevant part:

"In order to obtain a change of zone, it will be necessary to demonstrate compliance with applicable Statewide Planning Goals and conformance with the texts of the Josephine County Comprehensive Plan, Zoning Ordinance, and other implementing ordinances. At a minimum, such changes should demonstrate:

"a. Physical capability of the land to support permitted uses: e.g. adequate water supply, septic suitability, soil quality, and adequate access.

"* * * * *

"c. Availability of adequate public facilities and services to support the projected intensity of use.

"* * * * *"

RLDC 47.030(B) states in relevant part:

"A request for a change of Zone designation shall be reviewed against the following criteria:

"* * * * *

"3. Demonstrate the carrying capacity of the land to support the uses permitted in the proposed Zone (as defined in Section 11.030(64), adequate access as defined in section 11.030(9) and any other physical characteristics determined applicable in the pre-application conference);

1 The property has two wells, one of which was drilled
2 before well logs were required. The other well was drilled
3 in 1965, and its well log reflects a yield of 12 gallons per
4 minute (GPM). The county staff's well log data for the
5 section in which the subject property is located indicate
6 135 wells with an average yield of 17.35 GPM; staff data
7 indicate an average of 21.78 GPM in the quarter-section
8 where the property is located. The staff report indicates
9 that the Water Master has no evidence of problem water
10 quality on this property, and states that the groundwater
11 information "is adequate to demonstrate at least the
12 potential for the minimum of 5 GPM generally required for
13 domestic water by lending institutions." Record 59.

14 The cited evidence establishes the capacity of the land
15 that is the subject of the application to support the

"4. The property [affected] by the proposed change of Zone will have available adequate public facilities and services to support the projected intensity of uses in the proposed Zone.

"* * * * *"

RLDC 11.030(64) provides the following definition:

"CARRYING CAPACITY. The ability of land to support proposed development as determined by an evaluation of suitability for sewage disposal, the adequacy of the domestic groundwater supply (quantity and quality), the presence of adequate off-site roads, the suitability of soil and terrain to support on-site roads; the presence or absence of flood, fire or erosion hazards, and the applicability of other special land use concerns (e.g., watershed protection, protection of wildlife and fishery habitat, the presence of scenic easements, airport flight paths, the availability of emergency services, etc.)."

1 permitted uses. However, petitioner contends that the zone
2 change will allow up to 12 dwellings on the property, and
3 that the county cannot determine that the land has the
4 capacity to support water for 12 dwellings unless there are
5 12 wells drilled and producing on the property. We
6 disagree. The county could reasonably conclude, from the
7 evidence of a producing well on the property and the well
8 logs of the numerous other wells in the vicinity, that the
9 land has an adequate groundwater supply for 12 dwellings,
10 particularly when petitioner has identified no contrary
11 evidence in the record. The county's standard requires no
12 more.

13 This assignment of error is denied.

14 **SECOND ASSIGNMENT OF ERROR**

15 The petition for review asserts that the county board
16 of commissioners violated statewide Goal 1 by failing to
17 consider the recommendation of its planning commission. The
18 gravamen of the assignment is that the planning commission
19 minutes do not clearly reflect whether the planning
20 commission recommended approval or denial, and there is no
21 evidence of discussion of the planning commission action by
22 the board of commissioners.

23 Petitioner does not establish any prejudice to his
24 substantial rights or identify any violation of the county's
25 acknowledged citizen participation program. Moreover,
26 petitioner conceded at oral argument that this issue was not

1 raised before the local hearings body. We will not
2 consider it further here. ORS 197.835(3).

3 This assignment of error is denied.

4 **THIRD ASSIGNMENT OF ERROR**

5 Petitioner contends there is not substantial evidence
6 to support the county's finding that there is adequate law
7 enforcement service, a requirement of comprehensive plan
8 Goal 11, Policy 6 and of RLDC 47.030 (B) (4). The
9 application and staff report indicate that the area is
10 served by the Josephine County Sheriff, and that the Merlin
11 sheriff's substation is located less than a mile away.
12 Petitioner's argument is based on a letter from the
13 Josephine County sheriff, dated July 5, 1995, and addressed
14 "To Whom It May Concern," which states in part:

15 "The Sheriff and the Sheriff's office have the
16 knowledge, desire, and ability to provide adequate
17 law enforcement for this community. The current
18 funding level for the Sheriff's Office makes it
19 impossible to provide this service." Record 47.

20 The county adopted detailed findings explaining why the
21 sheriff's letter did not demonstrate a lack of adequate law
22 enforcement services. After determining that the letter was
23 not directed to the particular application but was rather
24 general in nature and written in the context of a pending
25 levy vote to restore funding, the board of commissioners
26 adopted the following interpretation of the word "adequate"
27 in the relevant plan provision:

28 "The criteria regarding adequacy must relate to

1 the specific circumstances of the request and not
2 to general circumstances of the county. Evidence
3 must show a condition or circumstance regarding
4 the specific land that creates a risk or hazard
5 that is materially different from other lands in
6 the neighborhood or the county as a whole. The
7 circumstance must relate to a condition in the
8 land, that is some peculiar characteristic of the
9 property that makes the extension or provision of
10 public facilities or services inadequate." Record
11 23.

12 Petitioner identifies no basis under ORS 197.829 to
13 reject the county's interpretation as it applies to the
14 sheriff's letter.

15 This assignment of error is denied.

16 **FOURTH ASSIGNMENT OF ERROR**

17 Petitioner contends the county failed to demonstrate
18 compliance with Goal 14.³ The county's only finding on this
19 issue states:

20 "It was found that a discussion of Goal 14 does
21 not apply as Rural Residential 1 Acre zoning is
22 indeed rural and not an urbanizing land use
23 subject to the goal." Record 20.

24 Petitioner argued below that the one-acre "small lot
25 zoning" allowed by the county's decision requires either an
26 exception to Goal 14, or a full Goal 14 urbanization
27 process.⁴ Goal 14 is not applicable, and an exception is

³Goal 14 is "[t]o provide for an orderly and efficient transition from rural to urban land use."

⁴The statewide goals do not independently apply to our review of a zone change request if the comprehensive plan contains specific policies or other provisions which provide the basis for the zoning ordinance amendment. ORS 197.835(7)(b); Opus Development Corp. v City of Eugene, 28

1 not required, if the decision will not convert rural land to
2 urban uses. 1000 Friends of Oregon v. LCDC (Curry Co.), 301
3 Or 447, 477, 724 P2d 268 (1986) ("Curry County"). We
4 understand the county to have found that RR-1 zoning does
5 not allow urban uses. However, the county's finding merely
6 states a conclusion and provides no explanation why one-acre
7 lots at this location do not allow an urban use.⁵

8 The county has not demonstrated why this decision will
9 not allow urban uses. Intervenors contend that the county
10 has done so legislatively, by adopting a zoning ordinance
11 that allows RR-1 zoning on rural land. That argument is
12 circular, because the zoning ordinance itself requires a
13 showing of compliance with "applicable Statewide Planning
14 Goals" before a change from RR-5 to RR-1 can be approved.

15 As we discuss in greater detail in Doob v Josephine
16 County, __ Or LUBA __ (LUBA No. 96-090, February 5, 1997), a
17 determination that a decision does not allow urban uses must
18 address the relevant site-specific factors identified in
19 Curry County. These include the location of the use

Or LUBA 670, 677 (1995). However, in this case the specific plan policy for zone changes, which is quoted in footnote 2, requires "compliance with applicable Statewide Planning Goals * * *" Comprehensive plan Goal 11, Policy 6.

⁵The record includes a letter from the Department of Land Conservation and Development("DLCD"), which both contends that the zone change would violate Goal 14 and urges that any decision be delayed pending county compliance with rural community planning required by OAR 661 Division 22. Record 98.

1 relative to urban growth boundaries and availability of
2 urban services. Curry County, 301 Or at 505, 508-511.
3 Neither parcel size nor the presence (or absence) of urban
4 services such as public water and sewer is necessarily
5 determinative. The county may not simply rely on the
6 acknowledged status of its zoning ordinance if the ordinance
7 and acknowledgment order do not establish a determination by
8 LCDC that zoning at one-acre density complies with Goal 14
9 regardless of where it may be sited. See Shaffer v. Jackson
10 County, 16 Or LUBA 871, 874 (1988). There is nothing in
11 this record concerning the acknowledgment of the county's
12 plan and zoning ordinance to establish such a determination.

13 This assignment of error is sustained.

14 The county's decision is remanded.