

LAND USE  
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

AUG 21 10 00 AM '80

3 RUSS DETERS and )  
4 WILLIAM SCHNEIDER, )  
5 )  
6 Petitioners, )

LUBA No. 80-020

v. )

7 BOARD OF COUNTY COMMISSIONERS )  
8 FOR THE COUNTY OF CLACKAMAS, )

FINAL OPINION  
AND ORDER

9 Respondents, )

10 NORTH CLACKAMAS CITIZENS )  
11 ASSOCIATION, )

12 Respondent. )

13 Appeal from Clackamas County.

14 J. David Bennett, Portland, filed the Petition For Review  
15 and argued the cause for Petitioners Deters and Schneider.  
16 With him on the Petition For Review were Keane, Harper,  
17 Pearlman and Copeland.

18 Beth Blount, Oregon City, filed the Brief and argued the  
19 cause for Respoondent Clackamas County.

20 Fred A. Granata, Portland, filed the Brief and argued the  
21 cause for North Clackamas Citizens Association. With him on  
22 the Brief were Dressler and Granata.

23 REYNOLDS, Chief Referee; COX, Referee; BAGG, Referee;  
24 participated in the decision.

25 REVERSED and REMANDED.

8/21/80

26 You are entitled to judicial review of this Order.  
27 Judicial review is governed by the provisions of Oregon Laws  
28 1979, ch 772, sec 6(a).

29 NOTE: The Land Conservation and Development Commission does  
30 not adopt the following portions of LUBA's opinion herein.  
31 These portions are, therefore, pursuant to Oregon Laws 1979, ch  
32 772, sec 6, not part of the final order in this case.

33 "the paragraph at line 15, page 16 through line 1,  
34 page 17 and the specially concurring opinion at line 1,  
35 page 20 through line 8, page 22."

1 REYNOLDS, Chief Referee

2 NATURE OF THE DECISION

3 Petitioners appeal the denial by Clackamas County of their  
4 request for a zone change on their property from R-10, single  
5 family residential, 10,000 square foot minimum lot size, to  
6 planned medium density residential. Petitioners also appeal  
7 the county's denial of a conditional use permit which, together  
8 with the zone change, would allow petitioners to develop the  
9 property with 56 condominium units. The county's decision was  
10 the result of an appeal filed by the North Clackamas Citizens  
11 Association of the county hearings officer's approval of the  
12 zone change and conditional use permit.

13 ASSIGNMENTS OF ERROR

14 Petitioners set forth six assignments of error which are,  
15 essentially, as follows:

16 1. The appeal of the hearings officer's decision was not  
17 timely filed with the county board.

18 2. The county board allowed new testimony to be introduced  
19 during the hearing on the appeal.

20 3. The county board's review of the hearings officer's  
21 decision is limited to whether the hearings officer erred in  
22 his decision. Absent finding of error, the county may not  
23 reverse the hearings officer's decision.

24 4. The county board erred in failing to consider statewide  
25 planning goals.

26 5. The board's action was arbitrary and capricious in that

1 the board relied on unsubstantiated conclusions of NCAA and  
2 others concerning traffic with the result that there was  
3 insufficient evidence for the county to deny the requests on  
4 the basis of adverse traffic impacts.

5 6. To deny the requested use would result in petitioners'  
6 property not being suitable for any use, and therefore,  
7 constitutes an unconstitutional taking of petitioners' property.

8 STATEMENT OF FACTS

9 Petitioners applied to Clackamas County for a zone change  
10 and conditional use permit to develop approximately five acres  
11 of property located at the northwest corner of the intersection  
12 of southeast Webster and southeast Thiessen Roads in Clackamas  
13 County with 56 condominium units as a planned medium density  
14 residential development. Webster Road is designated as a  
15 secondary arterial, runs generally in a north-south direction  
16 and connects with the Milwaukie Expressway (I-205) about 3/4 of  
17 a mile north of its intersection with Thiessen Road. Thiessen  
18 Road is also designated as a secondary arterial and runs  
19 generally in an east-west direction.

20 At the time of the initial application, the property was  
21 zoned R-10, single family residential, 10,000 square foot  
22 minimum lot size. The property was, however, designated urban  
23 planned residential medium density by the 1974 Clackamas County  
24 Comprehensive Plan, a designation which would permit  
25 development at the proposed density.

26 The property is located in an area described by the

1 county's order as follows:

2 "The property in the vicinity of the subject  
3 property is generally suburban in character. However,  
4 the immediate vicinity has a mixture of multi-family,  
5 single family and commercial uses. There are service  
6 stations developed on the three other corners of the  
7 Webster-Thiessen intersection. The Westwood Shopping  
8 Center is located a short distance east of the  
9 property. There are multi-family developments located  
10 just south of the shopping center on Webster Road.  
11 There is a large vacant parcel on the east side of  
12 Webster Road, north of Thiessen Road. Development to  
13 the north consists of a partially developed  
14 residential subdivision. Properties to the west are  
15 developed as single family residential areas. There  
16 is also a single family residential development  
17 located across Thiessen Road from the subject  
18 property."

19 The application for zone change and conditional use permit  
20 received a favorable recommendation from the county planning  
21 staff and was granted by the county hearings officer. The  
22 hearings officer's written decision on the zone change was  
23 entered on December 12, 1979, and the written decision on the  
24 conditional use permit was entered on December 13, 1979. On  
25 December 26, 1979, the North Clackamas Citizens Association  
26 (NCCA) filed its Notice of Appeal of the hearings officer's  
27 order granting the zone change together with the required  
28 filing fee with the county planning division. The same action  
29 was taken on December 27, 1979, with respect to the approval of  
30 the conditional use permit. This was done in accordance with a  
31 Clackamas County form entitled "Procedure For Review By The  
32 Board of County Commissioners," which form appears in the  
33 record.

34 The county board on January 28, 1980, conducted a hearing

1 on the appeal. The hearing was conducted on the record,  
2 although persons who had testified at the hearing before the  
3 hearings officer were allowed to summarize their testimony.  
4 The board had before it in the record a verbatim transcript of  
5 the hearing before the hearings officer including the county  
6 planning staff's favorable report. The hearing began with a  
7 very brief presentation by a member of the county planning  
8 staff who outlined the nature of the request. Numerous  
9 citizens then spoke in opposition to the request. Their  
10 opposition centered primarily on the adverse traffic situation  
11 on Thiessen and Webster Roads and their concern as to added  
12 traffic which would result from the addition of 56 residential  
13 units. At the conclusion of the testimony in opposition to the  
14 granting of the zone change, a representative of the  
15 petitioners and petitioners' attorney made a presentation to  
16 the county board. At no time did petitioners' attorney make  
17 any objections as to the procedures employed by the county in  
18 conducting the hearing.

19 After all the testimony had been received, the county board  
20 voted unanimously to reverse the hearings officer's decision  
21 and deny the zone change and conditional use permit.<sup>1</sup>

22 Petitioners filed a request for reconsideration with the  
23 board which request was considered on March 17, 1980. The  
24 request for reconsideration was based on the fact that  
25 petitioners did not believe a proper presentation had been made  
26 by the planning staff before the board at the January 28, 1980

1 hearing. The board by unanimous vote denied the motion for  
2 reconsideration.

3 On April 21, 1980, the board entered a six page order  
4 allowing the appeal of the NCCA and denying the zone change and  
5 conditional use permit sought by the petitioners. The order  
6 further contained written findings denying the motion for  
7 reconsideration.

8 OPINION

9 Before discussing petitioners' assignments of error  
10 individually, we turn to the county's position that denial of  
11 the zone change was required because the Clackamas County  
12 Comprehensive Plan, as revised, did not allow the use requested  
13 by petitioners. While it is true, as mentioned in footnote 1  
14 of this opinion, that the county had voted to change the  
15 designation of petitioners' property between the time of its  
16 hearing on the appeals filed by NCCA and the time of entry of  
17 its final order denyinig the request, these changes were not  
18 finalized, and thus not effective, until the comprehensive plan  
19 as revised was adopted by ordinance on or about June 30, 1980.  
20 Thus, the fact that the county made a preliminary decision to  
21 change the comprehensive plan prior to entry of its final order  
22 on April 21, 1980, concerning the zone change and conditional  
23 use permit does not make the requested use in conflict with the  
24 comprehensive plan within the meaning of Baker v City of  
25 Milwaukie, 271 Or 500, 533 P2d 772 (1975).

26 We deal next with petitioners' individual assignments of

1 error. It is clear from the record that the NCCA filed its  
2 appeals with the planning division within fifteen days of the  
3 date of the hearings officer's written decision. Petitioners  
4 argue that the record shows the appeals were late because the  
5 fees associated with the appeals were not filed with the county  
6 clerk until after the fifteen day time limit. Section 11.41 of  
7 the zoning ordinance for Clackamas County provides only that an  
8 appeal, together with requisite fees, be filed with the  
9 planning director within 15 days of the written decision of the  
10 hearings officer. The fact that the planning department may  
11 have waited a day or two to transmit the notice of appeal and  
12 the required fees to the county clerk is immaterial for  
13 purposes of determining whether the appeal was timely filed  
14 with the county.

15 Petitioners' second assignment of error asserts that the  
16 board improperly admitted testimony during the appeal hearing.  
17 First, petitioners made no objection to the procedure being  
18 followed by the county. In the absence of an objection, which  
19 could have cured the alleged defect, petitioners may not assert  
20 on appeal that it was error for the county to fail to follow  
21 the proper procedures. See Sunnyside Neighborhood Association  
22 v. Clackamas County, 280 Or 3, 569 P2d 1063 (1977). Secondly,  
23 no new testimony was received by the county board, only a  
24 summary of the testimony which had been presented before the  
25 hearings officer. Clackamas County Ordinance Sec. 11.46 does  
26 not prohibit, specifically, the reiteration of testimony

1 previously presented; it only limits the introduction of new  
2 testimony.<sup>2</sup>

3       Concerning the third assignment of error, there is nothing  
4 in the Clackamas County ordinance to suggest that the county  
5 board of commissioners is limited in its review of a hearings  
6 officer's decision to reversing only if the county board  
7 determines that the hearings officer's decision was not  
8 supported by substantial evidence or was otherwise legally in  
9 error. Sec. 11.47 of the Clackamas County Ordinance governing  
10 review simply states that the Board of Commissioners may  
11 "affirm, rescind or amend the action of the hearings officer."  
12 We interpret this ordinance as granting the county board  
13 discretion to reverse the hearings officer's decision simply on  
14 the basis that it reaches a different result based on the facts  
15 in the record. See also Heilman v. City of Roseburg, 39 Or App  
16 71, 591 P2d 390 (1979).

17       Petitioners' fourth and fifth assignments of error are not  
18 so easy to resolve. We discuss the fifth assignment first. It  
19 concerns the question of whether the county's conclusion as to  
20 the traffic situation is supported by adequate evidence in the  
21 record and, if so, is grounds for concluding that the requested  
22 zone change did not comply with the comprehensive plan.

23       Sec. 11.32 of Clackamas County's Zoning Ordinance specifies  
24 what a proponent of a zone change is required to prove in order  
25 to be granted the change:

26       "B. The petitioner seeking a zoning map change



1 pursuant to the provisions of this Section must show by a  
2 preponderance of the evidence the following unless  
otherwise provided for in this Ordinance:

3 1. Granting the request fulfills a public need;  
4 the greater departure from present land use  
patterns, the greater the burden of the applicant;

5 2. The public need is best carried out by  
6 granting the petition for the proposed action,  
and that need is best served by granting the  
7 petition at this time;

8 3. The proposed action is consistent with the  
Comprehensive Plan;

9 4. The factors listed in ORS 215.055 were  
10 consciously considered, these facts include:

11 a. The public health, safety and general  
12 welfare and shall be based on the following  
13 considerations, among others: The various  
14 characteristics of the various areas in the  
15 County, the suitability of the areas for  
16 particular land uses and improvements, the  
17 land uses and improvements in the areas,  
18 trends in land improvement, density of  
development, property values, the needs of  
economic enterprises in the future  
development of the areas, needed access to  
particular sites in the areas, natural  
resources of the County and prospective needs  
for development thereof, and the public need  
for healthful, safe aesthetic surroundings  
and conditions;

19 5. Proof of significant change in a neighborhood  
20 or community or mistake in the planning or zoning  
21 for the property under consideration may be  
additional relevant factors to consider and;

22 6. Applicant must show that the application  
complies with the LCDC goals.

23 C. In all cases, the Hearings Officer shall enter  
24 findings based on the record before him to justify his  
decision."

25 The county appears to have based its decision to deny the  
26 re-zoning and conditional use requests on factor (B.3), the

1 failure of the re-zoning request to be consistent with the  
2 comprehensive plan.<sup>3</sup> The order states as follows:

3 "As to the appropriateness of the immediate  
4 development of the subject property to the intensity  
5 approved by the 1974 Comprehensive Plan, traffic  
6 pattern and flow is of vital concern in the  
7 development of the subject property. The proposed  
8 development is at the intersection of Webster and  
9 Thiessen Roads and would contribute to the traffic on  
10 each of those roads. Webster Road and Thiessen Road  
11 are both designated as secondary arterials by the 1974  
12 Clackamas County Comprehensive Plan. There was  
13 conflicting evidence presented to the Hearings Officer  
14 regarding the current number of vehicle trips in the  
15 area. According to the staff report, the traffic  
16 engineer of Clackamas County has estimated the vehicle  
17 trips in the area to be approximately 10,000 per day.  
18 According to the testimony of Dan Foggia, that figure  
19 is extremely low. He testified from a 1979 report of  
20 the State of Oregon that there are 15, 559 trips on  
21 Webster Road alone going north and south at Thiessen  
22 Road. In addition, there are 9,900 trips on Thiessen  
23 Road from Webster Road to Vista Lane by the south  
24 boundary of the subject property, and 8,050 trips from  
25 Johnson Road heading west on Thiessen Road toward the  
26 shopping center. Even if some of these trips  
duplicate the trips from Webster to Vista Lane, there  
are at least 30,000 vehicle trips in the area instead  
of 10,000. The staff report states that the capacity  
of Webster Road is 15,000 vehicle trips per day at its  
current level of improvement. According to the State  
figure of 15,500 trips per day, it is already too  
small for the existing traffic. The uncontroverted  
testimony before the Hearings Officer was that the  
proposed development would generate approximately 500  
vehicle trips per day. The additional 500 trips in  
the area would cause significant traffic problems and  
endanger the safety of residents who drive or walk on  
these roads. In addition, the evidence presented by  
Jack V. and Ona Smith, Mr. and Mrs. Carl Landerholm,  
John Hilley, Delbert Slocum, Jack and Gladys Pegg, and  
the North Clackamas Citizens Association, convinces  
this Board that Webster and Thiessen Roads in the  
vicinity of their intersection are dangerously  
overcrowded. It is well settled law that the  
Comprehensive Plan only establishes a long-range  
maximum limit on the possible intensity of land use; a  
Plan does not simultaneously establish an immediate  
minimum limit on the possible intensity of land use.

1 There is no obligation imposed on the County to  
2 immediately make a more restrictive zoning ordinance  
3 consistent with a less restrictive Comprehensive  
4 Plan. It is the Board's judgment that because of the  
5 tremendous traffic congestion at the intersection of  
6 Webster and Thiessen Roads, it is not now appropriate  
7 to conform zoning with the 1974 Plan designation for  
8 that area. If at some future time Webster Road and  
9 Thiessen Road were improved to accommodate the current  
10 level of traffic and the proposed increase from  
11 development such as this, the Board would consider a  
12 zone change at that time."

13 As previously mentioned, the 1974 comprehensive plan  
14 designated petitioners' property planned medium density  
15 residential and the density proposed by petitioners is within  
16 the limits allowed by such a designation. This is,  
17 essentially, all we know about the 1974 plan because its  
18 provisions were not made part of the transmitted record. The  
19 staff report submitted to the hearings officer did state,  
20 however, that the proposed zone change was consistent with at  
21 least the housing elements of the 1974 comprehensive plan:

22 "Approval of this application will be consistent  
23 with the Comprehensive Plan. The Planned Medium  
24 Density zone is specifically designed to implement the  
25 Planned Medium Density Residential land use  
26 designation of the Comprehensive Plan (see Section  
27 36.1B). Approval of the application will be  
28 consistent with the urban containment philosophy of  
29 the Comprehensive Plan by encouraging development  
30 where adequate services are available. Also, approval  
31 of the application will be consistent with the Shelter  
32 Element of the plan by encouraging the development of  
33 additional housing types, and by providing affordable  
34 means of housing for the county's residents."

35 The planning staff also stated that there was a need to  
36 re-zone this land for planned medium density residential due to  
37 a shortage of available land in Clackamas County:

1           "The applicant's proposal would allow the  
2 development of the property with a 56 unit condominium  
3 complex, fulfilling the need for moderate-income  
4 owner-occupied housing in this vicinity. Studies of  
5 available properties currently zoned for medium  
6 density indicate that approximately 80% of the  
7 available medium density land in Clackamas County is  
8 located within the city limits of Wilsonville. There  
9 is a definite shortage of medium density land in the  
10 Clackamas area, and this area is experiencing the most  
11 pressure from increased development. The need for  
12 additional moderate-income housing is greatest in this  
13 area, and does exist at this time."

14           We have reviewed the record and can find no evidence of  
15 lack of need to re-zone petitioners' property planned medium  
16 density residential or that it would be inconsistent with the  
17 provisions of the comprehensive plan relating to housing.

18           Once a proponent of a zoning change demonstrates that the  
19 requested use is consistent with the comprehensive plan  
20 designation for the property, unless the plan itself conditions  
21 designation of the property for that use upon compliance with  
22 certain additional standards, in order for the governing body  
23 to deny the requested use on the basis that it is not  
24 consistent with the comprehensive plan it must state its  
25 reasons for the decision and those reasons must be supported by  
26 substantial evidence in the record. In other words, the one  
27 seeking the zone change need not, in order to meet his initial  
28 burden of proof, negate all possible reasons why the re-zoning  
29 should not be allowed. However, if the comprehensive plan  
30 specifies that the use shall only be allowed provided such  
31 things as traffic impacts of the proposed development can be  
32 adequately dealt with, then the proponent must present evidence

1 on such matters in order to meet his primary burden of showing  
2 compliance with the comprehensive plan.

3 In the present case no provisions of the comprehensive plan  
4 have been brought to our attention which would suggest that  
5 allowance of this density was conditioned upon petitioner  
6 demonstrating that the development's impact on traffic would be  
7 within acceptable limits. Therefore, in order for the county  
8 to deny the request on the basis that traffic impacts resulting  
9 from the development were unacceptable, it had to base its  
10 decision on the presence of substantial evidence in the record  
11 to this effect.

12 The basis for the county's denial of the requested zone  
13 change was that

14 "...because of the tremendous traffic congestion  
15 at the intersection of Webster and Thiessen Roads, it  
16 is not now appropriate to conform zoning with the 1974  
17 Plan designation for that area." Order page 3  
18 (emphasis added).

19 The evidence in the record supporting the county's  
20 conclusion as to "tremendous traffic congestion at the  
21 intersection" consisted of persons testifying as to the traffic  
22 build-up at these intersections during peak traffic hours. The  
23 NCCA submitted a written response in which it stated that

24 "By county estimates, conservative at  
25 best...23,350 automobiles are involved with this  
26 intersection daily."

27 Mr. Foggia, a developer of a residential subdivision  
28 adjacent to petitioners' property, testified that

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1  
2 "Now, at the peak traffic, at the peak traffic,  
3 which is in the morning or at night from 4 o'clock on  
4 to, oh, maybe 6 o'clock in the evening there's no way  
that a fire truck or a rescue truck could get through  
there in that intersection to meet the needs."

5 He also testified that the "traffic jam is sometimes a quarter  
6 of a mile to a half a mile long from Thiessen on Webster now  
7 heading north at say 5 o'clock...as they wait for the light  
8 change. It's very slow." There was additional testimony that  
9 it was difficult to enter onto Webster during certain times of  
10 the day near the intersection because of the build-up of  
11 traffic at the intersection.

12 This evidence is sufficient for the county to conclude that  
13 there is, at present, a problem of traffic congestion during  
14 peak traffic periods at the intersection of Thiessen and  
15 Webster Roads. This conclusion is not sufficient, however,  
16 given other testimony and evidence in the record, to justify  
17 the county in concluding that development of the property as  
18 provided for in the comprehensive plan is inappropriate or not  
19 consistent with the comprehensive plan. The hearings officer  
20 found that there was evidence in the record that: 1) there  
21 will be modifications to the signalization of the  
22 Webster-Thiessen intersection designed to improve the traffic  
23 problem at that intersection; 2) the property was proposed to  
24 be developed with access only to Webster Road in an area where  
25 it will have the least impact upon traffic at the intersection;  
26 and 3) at least a large portion of the traffic would be

1 expected to travel north toward the I-205 interchange and come  
2 back from the north to the property thus avoiding the  
3 Webster-Thiessen intersection altogether. Thus, while  
4 development of the property was expected to generate 500  
5 vehicle trips per day, the county made no finding nor was there  
6 evidence in the record from which such a finding could have  
7 been made as to the actual impact which granting the zone  
8 change would have on the intersection itself. This failure  
9 coupled with evidence concerning absence of impact on the  
10 intersection and evidence of and specific mention by the county  
11 in its order concerning planned improvement to the  
12 signalization of the intersection, render the county's  
13 conclusion as to an impermissible level of congestion at the  
14 intersection which would result from this development without  
15 substantial evidentiary support.<sup>4</sup> Petitioners' fifth  
16 assignment of error is, accordingly, sustained.

17 Petitioners' fourth assignment of error alleges that the  
18 county erred in not considering the statewide planning goals in  
19 denying the requested zone change and conditional use.  
20 Respondents assert that inasmuch as the county's denial was  
21 based upon the requests' failure to comply with the  
22 comprehensive plan, no analysis of the statewide goals was  
23 necessary. If necessary, respondents contend that the record  
24 reveals the county considered the goals in any event.

25 This assignment is actually an alternative argument to the  
26 fifth assignment of error. In view of our conclusion on the

1 fifth assignment of error that the county's denial on the basis  
2 of conflict with the comprehensive plan was not supported by  
3 substantial evidence, this assignment is probably no longer ripe  
4 for discussion. We would, therefore, normally not address this  
5 assignment. However, Oregon Laws, 1979, ch 772, sec 5,  
6 requires the Board to make recommendations to LCDC when  
7 statewide goal issues are raised in the petition for review.  
8 No exception is made for those appeals which are reversed by  
9 the Board for non-goal related reasons and for which,  
10 therefore, discussion of goal issues becomes sometimes simply  
11 an academic exercise. While we believe an argument could be  
12 made that the legislature did not intend such results, we will  
13 err on the side of caution and address petitioners' fourth  
14 assignment of error.

15 \* [If the county's decision that the requested re-zoning and  
16 conditional use did not comply with the comprehensive plan had  
17 been supported by adequate facts and an adequate statement of  
18 reasons, it would not have been necessary for the county to  
19 also address the statewide goals relevant to the requests.  
20 Whereas in order to grant a requested zone change prior to  
21 acknowledgment of the comprehensive plan the proponent must  
22 prove consistency with the plan and with the statewide goals,  
23 in order to deny a request a governing body need only conclude  
24 that the request violates the comprehensive plan, or that it  
25 violates one or more of the statewide goals. Cf Jurgenson v  
26 County Court, 42 Or App 505, \_\_\_ P2d \_\_\_ (1979); Heilman v.



1 City of Roseburg, 39 Or App 71, 591 P2d 390 (1979).]

2        Since we are addressing this issue, we believe it is  
3 important to mention that evidence of conflict with one goal of  
4 either the comprehensive plan or the statewide goals is not  
5 necessarily a sufficient basis for denial without consideration  
6 of other applicable plan or statewide goals. For example,  
7 where the governing body is faced with a proposal for a housing  
8 development that may help meet a known housing need in the  
9 community and is proposed for land available for housing, the  
10 governing body is not free to deny that development solely  
11 because the jurisdiction may lack a plan which satisfies Goal  
12 12's requirement for "a safe, convenient and economic  
13 transportation system" to serve the community as impacted by  
14 the development. In such a situation, the jurisdiction must  
15 balance the adverse impacts of allowing the development against  
16 the need for the development and must explain why it decided  
17 the adverse impacts outweigh the identified need. This example  
18 is markedly different from a situation in which a housing  
19 development is sited for agricultural land as defined in Goal  
20 3. In that situation, the governing body would be quite  
21 justified in denying the housing development simply on the  
22 basis that Goal 3 prohibits the conversion of agricultural land  
23 for such uses unless a valid exception is taken.

24        Thus, generally speaking, where a proposed use would  
25 violate a comprehensive plan provision or statewide goal (e.g.  
26 Goals 3,4,7, or 18), then a denial based upon a finding of

1 violation, without more, would probably be sufficient. Where,  
2 however, development would only seem to conflict with a plan  
3 provision or statewide goal (e.g. Goals 11,12 or 13) but would  
4 further or promote some other goals (e.g. Goals 9 or 10) then  
5 the jurisdiction must balance the adverse effects against the  
6 positive benefits and explain its decision. In short, under  
7 this latter situation, a denial based upon conflict with a goal  
8 absent analysis of other relevant goals would not be sufficient.

9 Had the county in the instant case properly found that the  
10 zone change and conditional use requests violated the  
11 comprehensive plan in one or more respects, it would not have  
12 been necessary for the county to address in its findings the  
13 relevant statewide goals in order to deny the request. Because  
14 its conclusion as to violation of the comprehensive plan was  
15 not sufficient from an evidentiary or analytical standpoint, in  
16 order to validly deny the requests it had to do so on the basis  
17 of violation of the statewide goals. The county's order,  
18 however, contains no analysis of the statewide goals.  
19 Accordingly, to the extent the county was required to consider  
20 and make findings concerning the goals, given its failure to  
21 properly base denial on non-compliance with the comprehensive  
22 plan, petitioners' fourth assignment of error is sustained.<sup>5</sup>

23 Petitioners' final assignment of error is that no other  
24 uses of the property besides those permitted under the planned  
25 medium residential classificaton are suitable and that to deny  
26 the requested classification would in effect constitute a

1 "taking" of petitioners' property without compensation. In  
2 view of the foregoing, we need not address this assignment.

3 For the foregoing reasons, the order of Clackamas County is  
4 reversed and remanded for further proceedings consistent with  
5 this opinion.

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1 COX, Referee.

2 Specially Concurring.\*

3 \*[As regards petitioners fourth assignment of error, based  
4 on the facts before this Board, the two Statewide Goals of  
5 importance here are Goal 10 "[t]o provide for the housing needs  
6 of citizens of the state," and Goal 12 "[t]o provide and  
7 encourage a safe, convenient and economic transportation  
8 system." Respondent Clackamas County's decision, by  
9 implication, gave preference to the transportation policies set  
10 forth in Goal 12 over Goal 10's policies. While in some cases  
11 such a decision may be justified, the evidence herein does not  
12 support respondent's conclusion.

13 The evidence indicates a shortage of property zoned medium  
14 to high density residential available within the urban growth  
15 boundary governing Clackamas County. The subject property is  
16 designated by the comprehensive plan as medium density and  
17 appears to be within Metropolitan Service District's urban  
18 growth boundary acknowledged by LCDC. In order to contain  
19 urban sprawl and at the same time provide housing for Oregon's  
20 citizens, great weight must be given to Goal 10 considerations  
21 when presented with facts as we have in this case. The mere  
22 fact that difficulty with inter-urban transportation systems  
23 may arise when attempting to meet increased congestion problems  
24 resulting from higher density living is not enough to overcome  
25 the preference given to Goal 10 concerns. There may well be  
26 situations where difficulties in adjusting transportation

1 systems to service increased density demands may be severe  
2 enough to outweigh the Goal 10 benefits to be derived from a  
3 proposed development. The evidence, however, does not support  
4 such a conclusion in this case.

5 Another concern which needs addressing is that the evidence  
6 indicates Clackamas County has provided in its Comprehensive  
7 Plan that condominiums only be allowed as conditional uses. In  
8 other words in no zone does Clackamas County allow condominiums  
9 as an outright permitted use even though non-owner occupied  
10 multi-family dwellings are permitted outright in certain  
11 zones. Such treatment of condominiums is in violation of Goal  
12 10 because it discriminates against certain classes of home  
13 buyers by making it more difficult for builders to provide that  
14 type of housing. Since Goal 10 requires plans encouraging  
15 housing units at varying price ranges commensurate with the  
16 financial capabilities of Oregon households, respondents  
17 decision to single out condominiums for special treatment is  
18 without justification. As condominiums tend to be of a lower  
19 cost to purchasers, the elimination of or severe restriction on  
20 their availability by zoning provisions hits hardest at those  
21 most pressed to afford decent housing such as the young family,  
22 the elderly, and others of low income. As was stated in  
23 Southern Burlington County N.A.A.C.P. et al v. Township of  
24 Mount Laurel, 57 NJ 151, 336 A2d 713, 724 (1975):

25 "We conclude that every such municipality must,  
26 by its land use regulations, presumptively make  
realistically possible an appropriate variety and

1 choice of housing. More specifically, presumptively  
2 it cannot foreclose the opportunity of the classes of  
3 people mentioned for low and moderate income housing  
4 and in its regulations must affirmatively afford that  
5 opportunity, at least to the extent of the  
6 municipality's fair share of the present and  
7 prospective regional need therefor. These obligations  
8 must be met unless the particular municipality can  
9 sustain the heavy burden of demonstrating peculiar  
10 circumstances which dictate that it should not be  
11 required to do so."

12 See also Seaman v. City of Durham, LCDC 77-025 (1977) and LCDC  
13 Housing Policy.]

1 FOOTNOTES

2 1

3 During the pendency of petitioners' requested zone change  
4 and conditional use permit the county was engaged in the  
5 process of updating its 1974 comprehensive plan. The August,  
6 1979, draft which was apparently before the hearings officer  
7 continued to designate petitioners' property as planned medium  
8 residential. On January 31, 1980, however, the county voted to  
9 change the comprehensive plan designation for petitioners'  
10 property to low density residential. According to the county's  
11 brief, this change resulted from numerous hearings on the  
12 comprehensive plan held between the time of the hearings  
13 officer's decisions on the zone change and conditional use  
14 requests and January 31, 1980. While reference was made to  
15 these hearings by at least one commissioner during the appeal  
16 hearing on January 28, 1980, nothing from these proceedings was  
17 entered into the record of the zone change and conditional use  
18 requests.

19 We were informed during oral argument held on July 2, 1980,  
20 that the county had formally adopted by ordinance its revised  
21 comprehensive plan on or about June 30, 1980.

22 2

23 Section 11.46 provides as follows:

24 The Board of County Commissioners may admit  
25 additional testimony and other evidence without  
26 holding a de novo hearing or hear the entire matter de  
27 novo, if it is satisfied that the testimony or other  
28 evidence could not have been presented at the initial  
29 hearing. In deciding such admission, the Board of  
30 County Commissioners shall consider:

31 (A) Prejudice to parties;

32 (B) Convenience or availability of evidence  
33 at the time of the initial hearing;

34 (C) Surprise to opposing parties;

35 (D) When notice was given to other parties  
36 as to an attempt to admit; and

37 (E) The competency, relevancy and  
38 materiality of the proposed testimony or other  
39 evidence.

40 Upon the decision to admit additional testimony  
41 or other evidence, or to hear the entire matter de

1 novo, the presentation of such testimony and evidence  
2 shall be governed by the procedures applicable to the  
3 presentation of such matters at the initial hearing.

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4 Apparently the county denied the conditional use request  
5 because it concluded that re-zoning the property so as to allow  
6 a density of 12 units per acre was inappropriate.

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7 Implicit, at least, in the county's order is that while  
8 multi-family is not consistent with the comprehensive plan,  
9 single family would be consistent. The county, however, had no  
10 evidence before it as to the traffic impact single family  
11 development would cause and, thus, could not explain why the  
12 level of impact caused by single family development would be  
13 acceptable but that caused by condominiums would not be  
14 acceptable.

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12 Even if we interpreted the county's finding concerning  
13 congestion at the intersection to be a Goal 12 finding, and  
14 even if this finding were supported by substantial evidence in  
15 the record, the order would still be deficient because it fails  
16 to balance the transportation problems against the need for  
17 multi-family housing and to explain the result reached.