

DEC 18 4 48 PM '80

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

3 THE McINTYRE-COOPER COMPANY,     )  
4                   Petitioner,             )  
5                   v.                             )  
6 BOARD OF COMMISSIONERS OF         )  
7 WASHINGTON COUNTY,                 )  
8                   Respondent.             )  
9                   and                             )  
10 FRIENDS of 87th AVENUE,            )  
11                   Intervenor-Respondent    )

LUBA No. 80-099  
FINAL OPINION  
AND ORDER

12  
13                   Appeal from Washington County.

14                   Kevin L. Hanway, Portland, filed the Petition for Review  
15 and argued the cause for Petitioner McIntyre-Cooper Company.

16                   Gregory S. Hathaway, Hillsboro, filed the brief and argued  
17 the cause for Respondent Washington County.

18                   Frank Josselson, Portland, filed the brief and argued the  
19 cause for Intervenor-Respondent Friends of 87th Avenue.

20                   REYNOLDS, Chief Referee; COX, Referee; BAGG, Referee;  
21 participated in this decision.

22                   AFFIRMED                             12/18/80  
23                   COX, DISSENTING OPINION

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

1 REYNOLDS, Chief Referee

2 NATURE OF THE PROCEEDING

3 Petitioner appeals Washington County's denial of a request  
4 to change the zone on a 1.92 acre parcel of property from RU-3  
5 (Low Density Residential) to RU-20 (High Density Residential).

6 ASSIGNMENTS OF ERROR

7 Petitioner sets forth two assignments of error. In its  
8 first assignment of error, petitioner contends that the county  
9 erred in denying the zone change request on the basis of  
10 comprehensive plan policies and a zoning ordinance which set  
11 forth as goals preservation of the neighborhood character.  
12 Such policies, according to petitioner, violate Goal 10  
13 (Housing) and hence, cannot be relied upon as a basis for  
14 denial.

15 Petitioner's second assignment of error asserts that the  
16 county erred in basing denial in part on flooding problems.  
17 Petitioner contends that under the county's comprehensive plan  
18 flooding is a matter to be addressed at the time of site  
19 review, not at the time a zone change request is made.

20 STATEMENT OF FACTS

21 Petitioner requested a zone change on a 1.92 acre parcel of  
22 property from RU-3 (Urban Low Density Residential) to RU-20  
23 (Urban High Density Residential). Petitioner proposed to build  
24 26 townhouse condominium units in clusters of 3 to 4 units.  
25 The property is located on Southwest 87th Avenue, two-tenths of  
26 a mile north of the intersection of Southwest 87th and Canyon

1 Lane. Southwest 87th deadends 500 feet north of the proposed  
2 site.

3 The immediate neighborhood surrounding the site is  
4 comprised of older residences which are generally well  
5 maintained with medium to large size lots. Approximately  
6 one-tenth of a mile south of the proposed site, between the  
7 proposed site and Canyon Lane, is a 32 unit apartment  
8 building. Additional apartment buildings and retail and  
9 commercial services are located on Canyon Lane close to the  
10 intersection of Canyon Lane and Southwest 87th. No such  
11 services exist on Southwest 87th north of Canyon Lane with the  
12 exception of the 32 unit apartment building previously  
13 mentioned.

14 The county adopted the findings, conclusions and order of  
15 the hearings officer, who found that the proposed project would  
16 generate additional traffic creating a hazard to pedestrians  
17 as well as children using the street to ride their bicycles.  
18 This traffic, according to the hearings officer, would disrupt  
19 the tranquility and privacy of homes along 87th Avenue. The  
20 hearings officer also found that the zone change would  
21 introduce new housing types into the immediate neighborhood.  
22 He found that while in the general vicinity (as opposed to the  
23 immediate neighborhood) of the proposed site, there were  
24 several large apartment complexes and retail and commercial  
25 establishments, the "immediate neighborhood" was "effectively  
26 cutoff" from these, with the exception of the 32 unit apartment

1 building. As a result, the hearings officer found that the  
2 Southwest 87th Avenue neighborhood "has the privacy,  
3 tranquility and natural beauty of a semi-rural area even though  
4 it is located less than one-tenth of a mile from high density  
5 residential and commercial uses." Finally, the hearings  
6 officer found that development of the proposed site would  
7 probably contribute to flooding the yards of some residences  
8 located in the immediate neighborhood. The area has already  
9 experienced floods from a natural stream which crosses the  
10 property.

11 From the above findings, the hearings officer concluded  
12 that the petitioner had failed to sustain its burden of showing  
13 why the proposed zone change should be granted at this time.  
14 He concluded that the zone change would radically alter the  
15 character of a well maintained, older residential neighborhood  
16 and that the petitioner had not shown it was in the public  
17 interest to change the character of the neighborhood. No  
18 evidence had been introduced by the petitioner as to whether  
19 alternative sites were available, and the hearings officer  
20 concluded this factor was relevant on the question of whether  
21 this particular neighborhood should be changed if the proposed  
22 use could be introduced into other areas which would not  
23 experience such a change. The hearings officer concluded that  
24 the comprehensive plan does not require high density zoning  
25 solely because of a proposed site's location to  
26 retail/commercial and transportation services. According to

1 the hearings officer, what was required and was not  
2 demonstrated by the applicant was compliance with certain  
3 policies set forth in the comprehensive plan. Those policies  
4 require (1) provision of a variety of living environments while  
5 ensuring that each neighborhood has a specific character and  
6 preservation of that character and (2) protection of  
7 residential land from encroachment by incompatible uses and  
8 preservation of the character and values displayed by existing  
9 residential areas.

10 OPINION

11 Petitioner does not challenge any of the county's findings  
12 for want of substantial evidence. Petitioner's appeal is  
13 limited to whether the county applied the proper legal  
14 standards in denying the zone change request. Petitioner's  
15 first assignment of error is that the county relied upon  
16 policies set forth in its comprehensive plan and zoning  
17 ordinance, which policies are themselves in violation of Goal  
18 10 (Housing). The policies, as set forth above, enable the  
19 county to deny a proposed zone change, if the proposed change  
20 is found not to be in harmony with the neighborhood or does not  
21 preserve neighborhood character. Petitioner contends LCDC has  
22 consistently held that such policies violate the housing goal  
23 and cites us to LCDC's Housing Policy (known as the St. Helens  
24 Policy Paper) adopted by the commission on July 12, 1979. The  
25 policy states:

26 "Where a need has been shown for housing within

1 an urban growth boundary at particular price ranges  
2 and rent levels, housing types determined to meet that  
3 need shall be permitted in a zone or zones with  
4 sufficient buildable land to satisfy that need. This  
5 policy shall not be construed as an infringement on a  
6 community's prerogative to (1) set approval standards  
7 under which a particular housing type is permitted  
8 outright, (2) impose special conditions upon approval  
9 of a specific development proposal, or (3) establish  
10 approval procedures. However, approval standards,  
11 special conditions and procedures applicable to both  
12 (1) must be clear and objective and (2) must not have  
13 the effect, either of themselves or accumulatively, of  
14 discouraging, such as through unreasonable costs or  
15 delay, the needed housing type."

9 What the above policy does is to require a jurisdiction to  
10 provide as an outright permitted use somewhere within the  
11 jurisdiction a housing type in sufficient quantities to satisfy  
12 and for which there is an identified need. In order for one to  
13 successfully claim that this policy has been violated, that  
14 person would need to establish that (1) there is an identified  
15 need for a particular housing type, and (2) there is an  
16 insufficient amount of buildable land zoned to satisfy that  
17 need.<sup>1</sup>

18 In applying its comprehensive plan and zoning ordinance  
19 policies with respect to preserving the character of existing  
20 neighborhoods, Washington County did not violate LCDC's housing  
21 policy based upon the facts in this case. First, petitioner  
22 introduced no evidence that the housing type which he proposed  
23 for this site could not be satisfied from other lands already  
24 zoned high density residential or otherwise appropriate for  
25 such zoning. The hearings officer found in his order that  
26 "there was no evidence that the applicant considered possible

1 alternatives for the site." Petitioner does not challenge this  
2 finding nor does petitioner point us to anywhere in the record  
3 where such evidence exists.

4 Secondly, petitioner failed to establish an identified need  
5 within the area or within Washington County for the housing  
6 type for which the zone change was sought. Other than  
7 reference to the comprehensive plan designation,<sup>2</sup> the only  
8 evidence of need cited to us by the petitioner concerns a  
9 statement by petitioner's attorney before the hearings officer  
10 as follows:

11 "Seems to me the public interest is quite  
12 straightforward. Your plan has designated this as  
13 high density. We've indicated the basis and the  
14 justification for that in previous comment that the  
15 vacancy rate in this zip code area of about 2,800  
multiple family units has declined 1% and is now in  
the area of 4% vacancy. That is a low vacancy. That  
vacancy is going down. That indicates there is need  
for this kind of multiple family housing in this area."

16 There is no evidence in the record other than the opinion  
17 of petitioner's attorney, whether a 4% vacancy rate in the "zip  
18 code area" in which this site is located constitutes a low  
19 vacancy or that such a vacancy rate demonstrates a need for the  
20 kind of multiple housing (e.g., condominiums) petitioner  
21 proposed. The hearings officer was certainly entitled to  
22 disregard the opinion of petitioner's attorney as to the effect  
23 of a 4% vacancy rate. In any event, this is hardly evidence  
24 from which this Board can conclude that petitioner proved as a  
25 matter of law a need for the housing type proposed. See  
26 Jurgenson v. Union County Court, 42 Or App 505, \_\_\_P2d \_\_\_

1 related to the issue of whether the proposed development would  
2 be in harmony with the existing neighborhood. The second  
3 assignment of error is denied.

4 Affirmed.

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1 (1979).

2 Having failed to introduce any evidence that Washington  
3 County is not providing sufficient lands for multi-family  
4 housing, and having failed to prove an identified need for such  
5 housing within Washington County, or at least within the area  
6 of the proposed site, petitioner has failed to demonstrate how  
7 Washington County's reliance on its comprehensive plan and  
8 zoning ordinance policy in this case violates Goal 10.

9 Petitioner's first assignment of error is, accordingly, denied.

10 Petitioner contends in its second assignment of error that  
11 the county erred in denying the proposed development on the  
12 basis of flooding problems because whether or not flooding may  
13 result from development of the proposed site is a matter for  
14 the county to consider at the time of site review, not at the  
15 time of a zone change request. We needn't address this  
16 contention, however, because whether this development might  
17 cause flooding to be increased on residences in the area is a  
18 matter which the county could properly consider relative to the  
19 issue of whether this development would be in harmony with the  
20 neighborhood. Where the focus is on the impact of the proposed  
21 development on neighboring residences, if the development is  
22 likely to increase flooding on nearby residences, evidence with  
23 respect thereto is certainly proper at a zone change hearing.  
24 Accordingly, we conclude that it was not error for the county  
25 to conclude in its order that the proposed development would  
26 exacerbate flooding problems as this conclusion properly

1 COX, Referee, Dissenting.

2 I dissent from the majority opinion. The applicant has  
3 requested a rezone to bring its property into accord with  
4 density levels allowed by Washington County's Comprehensive  
5 Plan. The pertinent facts are not disputed. The property is  
6 urban and within an area containing high density residential  
7 and commercial uses. My disagreement with my learned  
8 colleagues is founded on a property owners right to rely on and  
9 request local government to comply with the comprehensive plan  
10 designation controlling specific land. I am aware of the Court  
11 of Appeals holding in Marracci v. City of Scappoose, 21 Or App  
12 131, 552 P2d 552, rev. den. (1976). I think that case is ripe  
13 for reconsideration with regards to its impact on urban growth  
14 boundary infill, and it is not controlling in this fact  
15 situation anyway. The county's determination in the case at  
16 bar was patently arbitrary within the meaning given that  
17 concept in Marracci, supra.'

18 We learned in Baker v. City of Milwaukie, 271 Or 500, 533  
19 P2d 772 (1975) that a comprehensive plan is basically the  
20 constitution governing land use within the plan's scope and  
21 ultimately the zone placed on each parcel of land must conform  
22 to the "constitution." In this case the property owner is  
23 asserting his rights under the "land use constitution" and the  
24 county is saying he has failed to show need or address  
25 alternative sites, standards rejected in Neuberger v. City of  
26 Portland, 288 Or 155 (1980) (no legislative criteria requiring

1 those considerations is pointed to by respondents) and the  
2 proposed use is incompatible with the neighborhood, a standard  
3 severely limited by LCDC in the May 13, 1980, City of Milwaukie  
4 Acknowledgement Continuance Order. See also LCDC St. Helens  
5 Housing Policy Paper, July 12, 1979. Denial of petitioner's  
6 request on such previously discredited grounds is clearly  
7 arbitrary.

8       The majority would require the applicant to prove its  
9 proposed use could not be satisfied from alternative sites  
10 appropriate for a zone allowing such use. Such a standard is  
11 not legislated by respondent and without such a legislated  
12 requirement should not be the basis for denial, Neuberger,  
13 supra. The alternative site requirement places far too heavy a  
14 burden on the applicant. It essentially requires the applicant  
15 to catalogue all alternative sites and compare and contrast its  
16 land with those sites. Such detail is not required by  
17 Washington County's "land use constitution." The comprehensive  
18 plan designates the property for the use and density proposed.  
19 It does not prioritize all similarly designated sites nor does  
20 it set forth a timing schedule which requires other sites be  
21 used before applicants. The law merely requires that the  
22 applicants property when developed comply with the plan. The  
23 applicant is proposing to develop its property in accord with  
24 the plan.

25       Based on the record before us I can only conclude that the  
26 county has set up a straw-man (need and other available site

1 requirements) and denied the applicant's request because it  
2 failed to knock down the straw-man. The county should not be  
3 allowed to require the property owner to perform a function  
4 (prioritization) which the county has not notified applicant is  
5 required of it and which the county has failed to do itself.  
6 In fact, the county has placed the requirement of  
7 prioritization upon itself if it is going to use it as a  
8 quasi-judicial decision making tool. As the applicable  
9 comprehensive plan states:

10 "Plans for Washington County will be implemented  
11 through public and private actions. To insure the  
12 needs of the residents are met and a full range of  
13 services are provided within each community, a process  
14 must be established whereby private and public actions  
15 can work in concert to carry out the Plan. It will  
16 require government to inventory the existing land use,  
transportation and community facilities on a  
continuing basis. Through the monitoring of private  
and public actions, needs can be identified and data  
supplied to private developers before decisions are  
made about the development of individual tracts of  
land. Government must assume a leadership role whereby

17 "A monitoring process will be established in  
18 order to coordinate public and private actions in  
19 implementing the goals, policies, and strategies  
20 of this Plan." (emphasis added). Washington  
County Comprehensive Framework Plan, November,  
1973, revised January 1977 (page 147).

21 The facts show all public facilities and services needed to  
22 serve the proposed development are in place or available. A  
23 reasonable (non-arbitrary) basis for denying applicant's  
24 request may be the present lack or unavailability of necessary  
25 facilities and services. That is not, however, the stated  
26 basis for respondent's denial. The discussion of facilities in

1 respondent's order relates to impact on neighboring  
2 homeowners. The alleged impact on the neighborhood all comes  
3 from testimony of homeowners and is an insufficient basis for  
4 denying an upzoning request which complies with the  
5 comprehensive plan.

6 First of all, neighborhood compatibility should have been  
7 considered during the comprehensive plan adoption procedure.  
8 Second, LCDC has rejected the homeowner impact standard in the  
9 City of Milwaukie Acknowledgement Continuance Order (supra).  
10 There, Milwaukie had proposed that impact on homeowners  
11 residing in the area be a basis for deferring upzoning. The  
12 LCDC report held neighborhood pressure couldn't be used to  
13 discourage needed housing at contemplated densities. Such  
14 action LCDC concluded would be violative of statewide Goal No.  
15 10.

16 As regards petitioner's second assignment of error, I also  
17 dissent from the majority holding. The majority based its  
18 opinion on an interpretation of respondent's ordinance which  
19 would allow, as part of its policy of "protecting the harmony  
20 of the neighborhood," consideration of drainage hazard issues  
21 during a rezoning hearing. Such an interpretation gives too  
22 much scope to an overly vague standard on the one hand and  
23 ignores respondent's flood plain and design review ordinances  
24 which specifically address the issue of drainage on the other  
25 hand. Washington County's flood plain ordinance states in  
26 pertinent part:

1           "Delineation of the drainage hazard area shall be  
2 established from a drainage study by a registered  
3 engineer. Such delineation shall be based on mean sea  
4 level datum and be field located from recognized valid  
5 bench marks. The delineation and computations shall  
6 then be submitted to the Director of Public Works for  
7 review.

8           "Alteration of the existing topography of  
9 drainage hazard areas may be made only after approval  
10 of a site plan by the Planning Director, pursuant to  
11 the provisions of Chapter 120 (Design Review) and  
12 payment of the prescribed review fees. The plan shall  
13 include both existing and proposed topography and a  
14 plan for alternate drainage. (emphasis added).  
15 Washington County Zoning Ordinance Chapter 130 ,  
16 Section 135-2.

17           Washington County's Design Review Ordinance provides for a  
18 review of all plans by the Planning Director for promotion of  
19 the county's police power protection as well as to:

20           "...promote the general welfare by encouraging  
21 attention to site planning and giving regard to the  
22 natural environment, creative project design and the  
23 character of the neighborhood or area. (emphasis  
24 added). Washington County Zoning Ordinance Chapter  
25 120, Section 121.

26           The design review procedures allow for denial of plans (with  
right of appeal) which create or increase drainage problems.

The citizens are protected from drainage problems and  
neighborhood character is considered at that time.

To deny applicant's proposal at the zone change stage  
because of alleged drainage problems is to require far too much  
detail and related expense from an applicant before it is even  
determined whether a zone change will be allowed. That is why  
the design review ordinance provides the protections and  
standards necessary to address flooding and drainage problems.

1 Once the zone change is granted then the applicant will be more  
2 willing to risk the investment necessary to address and offer  
3 solutions to any flooding problems relative to the planned  
4 project. At the zone change stage the project likely hasn't  
5 been sufficiently designed to know what flooding or drainage  
6 problems will exist once the final design is agreed upon. It  
7 is only after design completion that solutions or lack thereof  
8 can be determined and the project given the go ahead or  
9 scrapped by the planning director.

10 I would reverse the county's decision.

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FOOTNOTES

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6 Even if this were established, however, the individual  
7 would not be entitled to force the jurisdiction to accept the  
8 individual's application for re-zoning. The county still has  
9 the right to exercise its reasonable discretion in accordance  
10 with the statewide goals in determining which lands should be  
11 zoned to satisfy the need identified. If it stalls or  
12 unreasonably delays making this determination, the individual  
13 could institute appropriate proceedings to compel the  
14 jurisdiction to comply with the St. Helens policy paper.

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18 The comprehensive plan designation for this property allows  
19 a density of between 4.6 and 31 housing units per net acre.  
20 While, in an appropriate case, a comprehensive plan designation  
21 may be evidence of "need" for a particular use, the broad  
22 designation in this case is slight, if any, evidence of an  
23 "identified need" for condominium units at a density of 13  
24 units per acre.

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