LAND USE
BOARD OF APPEALS
MAY 12 1 20 PM '83

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NESO PROPERTIES, INC., Petitioner, vs. TILLAMOOK COUNTY, Respondent.	LUBA No. 83-004 FINAL OPINION AND ORDER

Appeal from Tillamook County.

Timothy V. Ramis, Portland, filed the Petition for Review and argued the cause on behalf of Petitioner.

Lynn Rosik, Tillamook, filed the brief and argued the cause on behalf of Respondent Tillamook County.

Lois A. Albright, Pacific City, filed the brief and argued the cause on behalf of Participant-Respondents Elizabeth Trowbridge and The Concerned Neskowin Property Owners.

BAGG, Board Member; COX, Board Member; participated in this decision.

REMANDED 05/12/83

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a), as amended by Oregon Laws 1981, ch 748.

BAGG, Board Member.

NATURE OF THE DECISION

Petitioner appeals a denial of a zone change application from low density residential (R-1) to a low residential/planned unit development (R-1-PD) designation. The requested designation would permit the construction of a planned unit development.

FACTS

The subject property is known as "The Knoll" and is ocean view property west of Highway 101 and south of Proposal Park in Tillamook County. It is within the Neskowin urban growth boundary. The parcel is 7.05 acres in size, and the applicant, NESO Properties, Inc., proposes to develop the site with 44 multi-family units in ten separate structures. Some of the units would be duplexes, and others four-plexes.

The property is on a hillside rising from 13 feet above mean sea level to 155 feet above mean sea level. The north and south slopes are steep, the north slope having a grade of 1:1 (45%). The easterly 1 to 200 feet of the property is low and marshy with a creek flowing through the southeast portion. This area, approximately 1.7 acres in size, is proposed to be maintained as open space. There exists no sewer service, and there is some dispute as to how sewer service would be provided. Petitioner claims sewer service will be provided by the Neskowin Lodge Resort system, but Respondent County asserts there is no sewage disposal service available largely because

of deficiencies in the Neskowin Lodge Resort system. Petitioner advises water service will be supplied by the Neskowin Regional Water District. The property is above an area called "The Cove," an unplatted subdivision. There are some 36 homesites in the area, 18 of which contain single family homes and one containing a duplex. The property was zoned R-1 in 1972, and the R-1 zone does not permit duplexes. In order to place multi-family dwellings on the property, a zone change was necessary. The planned unit development overlay zone will make possible multi-family dwellings on this property.

Under the county's land use ordinance, a PUD is initially reviewed by planning department staff. That review is to insure that the plan is consistent with the county's comprehensive plan and to see that the proposed development can be serviced by the required utilities. See Tillamook County Land Use Ordinance, Section 3.080. After this initial review, the applicant asks for a zone change under Section 9.020. The matter is then referred to the planning commission and eventually to the the Board of Commissioners, if an appeal is taken from the planning commission. In order for the zone change to be granted, the standards in Sections 9.020(2) and 9.020(3) must be met. The standards are:

> "The planning department shall employ the following procedure and criteria in the analysis of a zone map amendment request:

"a. Prepare a land use analysis of the site and affected surrounding area in the form of a map and text.

"b. The above mentioned land use analysis shall consider the following land use factors:

1. Size, shape and orientation of land parcel.

2. Topography, drainage and other physical site characteristics.

"3. Ownership identification of parcel.

"4. Economic and population data for affected area.

"5. Traffic circulation and traffic standards where relevant.

"6. Compatibiity of the proposed new zone with the pattern of existing zoning and developed land usages in the site vicinity.

"7. Photographs, when necessary.

"8. Aesthetic factors.

"9. Water supply and sewerage.

"10. Other factors where relevant (e.g, nuisance characteristics if any). Section 9.020(2).

"The planning commission shall employ the following procedure and criteria in consideration of the Department report and in consideration of the proposed new zone with respect to its possible allowance or disallowance."

"a. Study and discussion of department report, considering all zoning and land use factors outlined in the report.

"b. Give paramount attention to the effect of the proposed new zone on the existing developed land use pattern in the site vicinity, and particularly with respect to the factor of land use compatibility.

"c. A zone change shall not be granted if it would be detrimental priorities surrounding or adjacent to the area requested for zone change.

"d. A zone change shall not be granted if it is in conflict with the adopted comprehensive plan.

"e. A zone change shall not be granted if it would adversely affect the public health, safety and general welfare." Section 9.020(3).

In this case, the planning commission approved the application, and the Board of Commissioners overturned the approval. This appeal followed.

FIRST ASSIGNMENT OF ERROR

"RESPONDENT MISCONSTRUED THE APPLICABLE LAW."

"A. The Tillamook County Land Use Ordinance Does Not Require the Consideration of a 'Broad Range of Uses.'"

Petitioner understands the county to have examined all the uses possible under its ordinance rather than simply the residential use proposed. The effect of this alleged error is to subject the proposal to review for uses the applicant does not contemplate.

According to the county and participants, under the Tillamook County ordinance scheme, the county considers whether or not it wants a planned unit development in the area at all. This broad consideration exists because the PUD overlay zone permits "any uses permitted in any zone except uses and conditional uses permitted only in an M-1 (commercial) zone." Tillamook Land Use Ordinance, Section 3.080(2)(a). The county acknowledges that this system is "rather complicated," but

nonetheless necessary because of the broad power associated with this change to a PUD overlay designation. When the county decides that a PUD overlay zone may be appropriate, the applicant submits a site plan in conjunction with a conditional use application for the actual development. Therefore, at the time of the zone change application, a preliminary site plan is provided by the developer, and a final site plan is submitted in conjunction with a conditional use application. Ordinance Section 3.080(3)(e)(1). The county and participants argue that the county's consideration of a wide range of uses is therefore appropriate under the ordinance.

As we review the county's findings, it is not clear what uses the county considered other than the one proposed. There is no discussion in the findings that would lead the reader to assume that the county was considering anything but this particular development when it drew its findings and made its decision. We deny this subassignment of error because the county does not appear to have done the act the petitioner complains about. We do not reach the issue of whether the county may consider a "broad range of uses" under its ordinance.

"B. The Respondent Misconstrued Tillamook COunty Land Use Ordinance, Section 9.020 by Examining the Zone Surrounding Petitioner's Proposed Development Rather than the Existing Developed Uses."

Petitioner quotes a portion of ordinance, Section 9.020(3)(b), supra, which requires the county to give attention

to the affect of the proposed new zone on existing land use patterns. Particular attention is to be given to the matter of compatibility. Petitioner points to the county's finding claiming that the south beach and The Cove area have always been zoned for single-family residence as an example of improper emphasis on zoning and failure to look to the existing uses.

Respondent and participants deny the county failed to look to local land uses. They assert the applicant simply did not meet his burden to show compatibility with existing uses.[1] They claim the reference to the R-1 zone in the finding is only evidence of the land use pattern, which happens to be single-family residential with the exception of the one duplex noted above.

Respondent County adds there is testimony from property owners which supports the conclusion that the proposal is "incompatible with the single-family residential character of the area." Record at 12. Respondent cites to letters from property owners which confirm that this area is composed of single family dwellings. See Record at 28, 38, 43, 44, 50, 51, 52, 57, 128, 132, 136.

The county found, among other things, that The Cove area was comprised of single family dwellings and lots for single family dwellings. Record at 9. There is evidence in the record that some of the properties have been or are used for more than one family. From the testimony of neighbors, the

county found

> "that the main concerns of the neighboring property owners are the possible changes in character of the surrounding area from a single family residential area to a higher density, transient neighborhood and the impact of the proposed development on existing and new roads, sewer and water service, and beach access." Record at 10-11.

The county board then concluded the area was residential, and there was a strong desire to retain single family zoning to protect the character of the neighborhood. The county then said that multi-family use, if developed as a planned unit development, is "incompatible with the long standing land use pattern" of the area. Record at 12. The county also found the terrain was steep and "the steepness of the terrain raises questions as to whether relatively dense multi-family development could occur without increasing the risk of slides in the area." Ibid. The county recited there were health and safety issues raised, particularly with respect to roads and bridges and the sewer system, but the county did not elaborate on these concerns. Record at 14. The county said it gave weight to the opinions of surrounding property owners

> "who felt that a planned development on a steep hill over a residential area would be harmful to the general welfare of residents of the area. It could alter the character of the area in a significant way. The possibility of high density residential development or commercial development is one which could adversely affect the quiet residential character of the area." Record at 14.

We believe these findings show the county considered existing uses in the area and not simply the neighboring

zone(s). How adequately the county considered those uses is a separate issue.

We deny this subassignment of error.

"C. The County Erred in Applying Criteria Which Are Not Relevant Until Preliminary Plat Approval."

Here, petitioner argues the county looked prematurely at the steepness of the terrain and from this review concluded the development was subject to hazards. Petitioner posits that matters of terrain and geology are to be considered at a later stage in the approval process. Petitioner claims an applicant first must seek a rezone and secondly go after a preliminary plat approval. Tillamook County Ordinance, Section 3.080 and 6.030. Section 3.080 requires the applicant to give a preliminary development plan which goes to the planning department for a review, that review then goes on to the planning commission. Petitioner traces the application process as a two-step process that first involves acceptance of the planning staff report and an approved application and second requires the planning department to employ specific conditional use approval criteria. Petitioner argues matters of geology are to be presented at the conditional use approval stage, the stage governed by Section 6.030. Section 6.030(2) requires the county to look to the effect of the proposed use while the earlier stage, that of the zone change under Section 9.020(3)(b), only looks at the effect of the proposed new zone on the existing uses.

Respondent County argues the criteria of Section 9.020(3) require consideration of the possible detrimental effects of the zone change. Respondent says to argue the county cannot consider the possible adverse affects of changing the zone to allow more intensive uses would be to write the criteria in Section 9.020 out of the ordinance. Respondent County claims such an affect is unreasonable and unwarranted.

We agree that the county is entitled to consider matters of public health, safety and welfare, as part of, "the effect of the proposed new zone" on the area. See Miller v City of Portland, 2 Or LUBA 363, 55 Or App 633, 639 P2d 680 (1982); Meyer v City of Portland, __ Or LUBA ___ (LUBA No. 82-077, 82-078, 1983).

We deny this subassignment of error. The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

"RESPONDENT'S FINDINGS ARE CONCLUSORY [sic] AND INADEQUATE TO EXPLAIN THE BASIS OF THE DECISION."

"A. Respondent's Findings Failed to Resolve the Conflict Between the Applicant's Compliance with the Comprehensive Plan and the Apparent Noncompliance with Other Criteria in the Zoning Ordinance."

Petitioner urges that where there is a conflict between one criterion and another, and when an applicant has shown consistency with a portion of these criteria, the findings must resolve the conflicts and explain the county's choice of one criterion over another. Deters v Clackamas County, 1 Or LUBA 217 (1980). Petitioner says the county failed to so explain

its decision. Petitioner cites as conflicting plan policies those policies that encourage cluster development in lands such as the subject land.

> "Tillamook County will encourage the utilization of moderately and steeply sloping land by providing for flexibility in subdivision standards for setbacks and the location of sidewalks and utilities. Cluster development is encouraged in these areas. Standards shall ensure emergency access, off-street parking, adequate vision on public streets, adequate storm drainage and no increase in geologic hazards." Goal 10. Section 3.5, Tillamook County Comprehensive Plan.

Petitioner then cites Policy 3.6 which encourages planned unit developments to make effective use of land, provide efficient public service and reduce the impact of residential development on natural resources. Petitioner argues these policies, and the finding at page 15 of the record indicating the proposal is in compliance with the comprehensive plan, are in conflict with the county's choice of "general welfare" and "compatibility" standards in 9.020 as grounds for denial. Petitioner advises it has no way of knowing what value the county places on the plan criteria and those placed on the development criteria at Section 9.020(3)(a) through (e).

The county responds that it was not required by law to resolve any alleged conflict. The county argues the petitioner was required to comply with the requirements of both the comprehensive plan and the land use ordinance, and it is quite possible to have compliance with the policies in the comprehensive plan while at the same time failing to meet the burden of proof required in specific approval ordinance

provisions such as those at Section 9.320.

We agree with Respondent County. The plan contains general policies that guide the county and its drafting of ordinances. There is nothing inconsistent between a call for increased use of planned unit developments and the denial of a specific planned unit development on grounds found in an implementing ordinance. The problem, if any, exists in what standard is used to measure compatibility. See discussion under "B," infra.

We deny this subassignment of error.

"B. The County's Conclusion that Petitioner's Proposed Planned Development is Incompatible with Existing Development is not Supported by Factual Findings."

Petitioner argues the county has not adequately explained how petitioner failed to meet the applicable criteria. In conclusion no. 2, the county said the uses in a planned unit development overlay zone were not compatible with the "single family residential character of the area." Record at 12. The county fails to explain what facts it used to reach this conclusion, alleges petitioner. Petitioner discounts Finding 13 in which the county discusses neighborhood opposition to the proposal. Petitioner states there is no showing that petitioner's evidence about compatibility was considered. See discussion under assignment of error no. 7, infra. Petitioner asserts these errors result in violations of LCDC Goal 2 and ORS 215.416(6).[1]

Respondent County denies petitioner's claim. According to respondents, comments from neighbors on what exists in the area

is evidence enough to support the county's conclusion that this fairly intensive planned unit development would not be compatible with existing uses.

The county's conclusion is not sufficient in that the county does not explain what it means by compatible. We understand from the findings that the county viewed the area to be predominately of single family structures and uses. However, the county ordinance provides a means to enlarge the R-1 zone through the use of a planned unit development overlay so as to allow other than single family dwellings. The county needs to explain in greater detail why the overlay is not appropriate here. To do so requires a definition of compatibility and a discussion of exactly how the proposal is not compatible. See also discussion under Assignment of Error No. 3(B), infra.

We sustain this subassignment of error.

"C. The County Erred in Concluding that Petitioner's PD is Incompatible with Existing Development by Failing to Provide a Factual Basis for thier [sic] Characterization of the Existing Development."

This subassignment of error echoes sub B, supra. Whether or not there exists a factual basis in the record for the county to conclude that the proposed use is not compatible with existing uses need not be discussed here. Without adequate findings explaining compatibility, we will not search the record to see whether adequate findings could be made. So. of Sunnyside Neighborhood League v. Clackamas Co., 280 Or 3, 569

P2d 1063 (1977).

"D. The County Erred in Making Conclusions Concerning the Effect of the Topography of Petitioner's Property on Petitioner's Proposed PD."

The county's conclusion number 3 states:

"The steepness of the terrain raises questions as to whether relatively dense multi-family development could occur without increasing the risk of slides in the area." Record at 12.

Petitioner argues this conclusion about topography violates ORS 215.416(6) because it is not supported in the findings; that is, there is no explanation of how the county arrived at this conclusion. Petitioner goes on to argue that there is no showing of any evidence to support the conclusion.

Petitioner adds Finding No. 9 states that there has been no geologic study of the site. Petitioner claims to have submitted a geologic engineering report. Petitioner states that while the commission may choose not to rely on the report, it must indicate that it has considered that evidence which undermines its conclusion as to steepness. Sane Orderly Development v. Douglas County, 2 Or LUBA 196 (1980); Filter v Columbia County, 3 Or LUBA 345 (1981).

The county concedes that conclusion no. 3 "is not artfully phrased." The county argues, however, a common sense reading is that multi-family development is relatively more dense than single family development.

As to the matter of a geologic study, the county admits that the geologic study was performed. However, even if it

failed to consider the geologic study, Respondent County argues the decision to deny the zone change is still supported by other conclusions showing that other necessary criteria have not been met. See Heilman v City of Roseburg, 30 Or App 71, 591 P2d 390 (1979).

We can agree that Conclusion No. 3 is not supported by adequate findings insofar as the county may have relied on its mistaken view that there had been no geologic study performed. However, the findings do include Finding No. 8 which states the development will be located on The Knoll "which is substantially a grade of 2:1, and at times a 1:1 grade." Record at 10. This finding is supported in the record and is sufficient to support a conclusion regarding the steepness of terrain. We must add, however, that Conclusion No. 3 really holds nothing. It is phrased as an expression of concern. It does not say that development may not occur or that development may occur. As such, it is surplusage and not fatal to the decision.

The error in the county's failure to address the geologic report is that in so doing the county has failed to address conflicting evidence. See Record 198-199. It may be that the evidence about slope is enough to sustain conclusion no. 3. However, the county was under a duty to explain why it chose not to use the study. See Clemens v. Lane County, 4 Or LUBA 63 (1981); aff'd 57 Or App 583, 646 P2d 633; rev den 293 Or 634 (1982).

This subassignment of error is sustained insofar as it alleges the county failed to address conflicting evidence supplied in the geologic report.

"E. The Findings as a Whole are Inadequate and Violate ORS 215.416."

As we understand this argument, petitioner believes confusion exists because of a finding which mistakenly identifies the existing zoning to be R-1 "medium density residential" instead of the proper R-1 low density residential. The petitioner argues the county must clarify the confusion because without such clarification, petitioner cannot know what standards, criteria and facts were used against him.

Respondent County replies that all involved in this land use decision were aware of the actual zoning of the property.

We do not believe a scrivener's error may be the basis for overturning this decision. We agree with the respondent that the petitioner was well aware of the appropriate zoning on this property, and we do not believe it necessary to overturn a local decision on a clerical slip of the tongue.

This subassignment of error is denied. Assignment of error no. 2 is sustained in part as discussed above.

THIRD ASSIGNMENT OF ERROR

"THE COUNTY'S FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD."

"A. Finding Number 9 is Unsupported by Substantial Evidence and is Directly Contravened by the Record."

Finding number 9 states there was no geological engineering

report. As earlier, the county has conceded that this finding is in error, that a geologic report had indeed been performed.

This subassignment of error is sustained.

"B. Findings Nos. 5 and 13 and Conclusion No. 2, Paragraph 5, are Unsupported by Substantial Evidence in the Whole Record."

Finding number 5 says that The Cove area is composed of single family dwellings. Conclusion 2, Paragraph 5 states that the existing land use pattern is single family residential. Finding 13 states that the application would result in higher density.

Petitioner argues there is no land use inventory that would provide a factual basis for these findings and conclusion. Petitioner advises that its expert presented an inventory which included statements that some of the houses were duplexes. See Record 191. Therefore, not only is there insufficient evidence to support a conclusion of incompatibility, but there is conflicting evidence as to what actually exists in the area, asserts petitioner. Petitioner goes on to say that density would not change under the PD designation, and therefore finding 13, that the application would result in higher density, is unfounded.

The county argues the petitioner has dismissed the testimony of property owners who live in the area and know the use of their homes and the uses of their neighbors' homes. The county asserts this evidence is sufficient to sustain the conclusion.

Generally, we believe testimony of neighbors is sufficient evidence to establish the land use pattern in an area. In this case, however, petitioner had expert testimony that conflicted with that of the neighbors on the matter of what uses existed in the area. The county should have addressed this testimony at least to the extent necessary to fully explain its conclusion that the area is single family residential. Without a discussion of this evidence, the county's conclusions how the proposed use will or will not fit into the area are without adequate support. Filter v. Columbia County, supra.

With respect to Finding No. 13 about density, all the finding does is recite concerns of the neighboring property owners. The neighbors feared there would be a "possible change of character of the surrounding area from a single family residential area to a high density, transient neighborhood...." Record at 11. We do not believe a narrative in the findings about concerns of the neighbors is reversible error. The county decision does not appear to rely on Finding 13 entirely, and it does not, as petitioner characterizes, hold that the application would result in a higher density.

This subassignment of error is sustained. Assignment of error no. 3 is sustained because the county failed to adequately address conflicting evidence on the character of the neighborhood.

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FOURTH ASSIGNMENT OF ERROR

"RESPONDENT'S CRITERIA IN SECTION 9.020(3) VIOLATE ORS 215.050(2) BY FAILING TO IMPLEMENT THE COUNTY'S COMPREHENSIVE PLAN."

Petitioner cites Comprehensive Plan Policies 3.5, 3.6 and 3.8 of Goal 10 of the county comprehensive plan. Petitioner argues these policies support application for a planned unit development, and denial of the proposal placed the county in conflict with its comprehensive plan. Petitioner claims the policies are clear in that they encourage use of flexibility devices such as planned unit development overlay zones in order to allow efficient land use development practices (Section 3.6), to increase possibilities for multi-family housing (Section 3.8) and to reduce the impact of residential development on natural resources (Section 3.6). Petitioner argues it is the county's responsibility to provide criteria for balancing these benefits against any detrimental effects that might exist, and the county has an obligation to state how the policies of the plan are to be implemented in the criteria of Section 9.020(3). According to petitioner, the ordinance standards do not implement the comprehensive plan.

The county defends the ordinance on the ground that Section 9.320 is a site specific implementing provision which does not conflict with the comprehensive plan. As we understand respondent, it says compliance with the comprehensive plan is not the only requirement for approval. An applicant must meet all criteria including site specific development criteria.

We find no obvious conflict between the provisions of Section 9.020 of the county development ordinance and the county comprehensive plan. The county comprehensive plan policies encouraging planned unit developments and high density developments do not alone mean the county is without the power to deny such developments where they fail to meet other plan or ordinance criteria. In this particular case, the county found that this planned unit development proposal did not meet one of the requirements in Section 9.320. Specifically, the county found the development failed to meet a compatibility requirement in Section 9.020(3). The problem with the county's finding is not the fact that it tested the development against Section 9.020(3), but that it did not adequately explain how it was that the proposal failed to meet Section 9.020(3). This problem is not, as alleged by petitioner, one of conflict between comprehensive plan and ordinance, but a problem of how the county applied the ordinance to this proposal.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

> "THE COUNTY ERRED IN DENYING THIS APPLICATION BECAUSE ITS GENERAL CRITERIA FOUND IN SECTION 9.020(3) OF THE TILLAMOOK COUNTY LAND USE ORDINANCE ARE UNREASONABLY VAGUE AND THEREBY VIOLATE ORS 215.416(5)."

ORS 215.416(5) provides:

> "Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance of the appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to

> the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county."

See pp. 3-5 for the criteria in Section 9.020. Petitioner argues that the standards are vague. In particular, petitioner objects to Section 9.020(3)(e) which prohibits a zone change "if it would adversely affect the public health, safety and general welfare." Petitioner argues this standard is impermissibly vague.

Respondent claims the criteria are not vague and cites Lee v Portland, 3 Or LUBA 31, 57 Or App 798, 646 P2d 662 (1982) which held, in part, that the City of Portland standard requiring that the use "is desirable to the public convenience and welfare and not detrimental or injurious to public health, peace or safety, or to the character and value of the surrounding properties" was a legally acceptable standard.

We believe, taken as a whole, the standards in Section 9.020 are sufficient. The health and welfare standard is a part, not the whole, of the test the applicant must meet. While we can agree a "health, safety and welfare" standard alone may be vague, the standard, when combined with others in Section 9.320, is sufficient to require "a careful examination to insure that the proposed use will benefit the neighborhood and surrounding properties." 57 Or App at 802. Section 9.020 provides sufficient evidence to advise an applicant of what is required of him.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

"THE COUNTY'S DECISION VIOLATES THE LCDC GOALS AND ORS 197.175(2)(c)."

Petitioner alleges a violation of statewide Goal 2 and statewide Goal 10. Petitioner argues that Goal 2 requires an analysis of the proposal against the goals. Petitioner argues the county should have addressed Goal 10, Housing, and Goal 7,[2] Areas Subject to Natural Disasters and Hazards. Failure to do so means that the county has violated ORS 197.175(2)(c) requiring the county to apply the goals prior to acknowledgment of its plan and implementing ordinances.

While we agree that the county has an obligation to discuss each applicable goal, we do not agree that if the county denies an application for reasons other than statewide land use planning goals, it must include a discussion of conformity or non-conformity with the goals in its order. In this case, the county denied the permit on other grounds. We therefore find no Goal 2 violation in the county's omission of a goals analysis.

The Goal 10 allegation is based upon petitioner's view that as the property is located within the Neskowin urban growth boundary, and is presumably buildable land, the county has an obligation to explain the impact of its decision on its availability to provide needed housing. In other words, the denial of this development may affect the county's ability to

provide housing and thereby meet its obligation under Goal 10, according to petitioner.

Goal 10 places an affirmative duty on the county to provide adequate housing. However, this property is presently zoned for low density rural residential development. There has been no claim the R-1 zoning is wrong or fails to comply with Goal 10. The county has not reduced the density available to the property by this decision, but has simply prohibited a development which might provide greater density. We do not believe the county is under any obligation to explain the effect of its decision on Goal 10 when all that is done is the maintenance of an unchallenged status quo. See Heston v Hillsboro, 4 Or LUBA 319 (1981) and Heilman v City of Roseburg, 39 Or App 71, 591 P2d 390 (1979).

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

> "RESPONDENT'S VAGUE ZONING STANDARDS, COUPLED WITH RELIANCE ON NEIGHBORHOOD OPINIONS UNDER THOSE STANDARDS, VIOLATES PETITIONER'S RIGHT OF EQUAL PROTECTION OF LAW GUARANTEED BY ARTICLE I, SECTION 20 OF THE OREGON CONSTITUTION."

Article I, Section 20 of the Oregon Constitution provides:

> "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to any citizens."

Petitioner argues that neighborhood objections were given a role in this decision, and the opinions of the neighbors were part and parcel of the criteria used to deny this application.

Petitioner argues that under the analysis in Anderson v Peden, 284 Or 313, 587 P2d 59 (1978), the county's reliance on this neighborhood opposition is impermissible. By allowing neighborhood opinion to play a role in the decision, petitioner claims, the county has discriminated in favor of the neighbors and against others, in this case, the petitioner.

Respondent County argues that the county considered the testimony of the neighboring property owners on matters of neighborhood character, roads, sewers, water service and beach access. Respondent county denies the proceeding was a sham or the result of some sort of mob rule. The county adds the Anderson case does not preclude a county from considering evidence submitted by persons familiar with the neighborhood, at least insofar as that evidence bears on objective factors in the decision. See Anderson v Peden, 284 Or at 329. See also, Heilman v City of Roseburg, 39 Or App at 77.

Participants argue that though neighborhood opposition is not a factor to support denial, evidence given by the neighbors can be used in considering the application. Participants quote Anderson v Peden, supra, at 329 as authority that a local government may consider

> "the evidence submitted by the persons most familiar with the neighborhood insofar as it bears on the objective factors important to the future of the area affected by the proposed use."

Participants argue that Section 9.320(3) requires findings on compatibility, and there are no better persons to testify as to

compatibility than persons living in the immediate area.

We do not see that the county has based its decision on objection of the neighbors. We do understand the county has relied on neighborhood testimony to support its conclusion that the proposed use is not compatible with the uses there existing. We do not believe this reliance is impermissible, as alleged. However, as noted under the discussion of assignment of error 3, supra, the county should have addressed evidence that was contrary to that of the neighbors.

This assignment of error is denied.

CONCLUSION

This matter is remanded to Tillamook County for further proceedings not inconsistent with this opinion.

FOOTNOTES

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[1] Presumably petitioner refers to that part of Goal 2 that requires "an adequate factual base for such decisions and actions."

ORS 215.416(6) states:

"Approval of denial of a permit shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant in the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

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[2] Petitioner mentions Goal 7, but does not discuss it sufficiently for us to conclude that he is assigning an error under Goal 7.

STATE OF OREGON INTEROFFICE MEMO

TO: MEMBERS OF THE LAND CONSERVATION AND DEVELOPMENT COMMISSION

DATE: 4/5/83

FROM: THE LAND USE BOARD OF APPEALS

SUBJECT: NESO PROPERTIES, INC. V. TILLAMOOK COUNTY LUBA NO. 83-004

Enclosed for your review is the Board's proposed opinion and order in the above captioned appeal.

Petitioner's allegations of statewide goal violation are found in assignment of error no. 6. Petitioner alleges violation of Statewide Goal 2 on the ground that Goal 2 requires an analysis of a land use proposal against statewide planning goals. We agree that the county has an obligation to discuss each applicable goal, but we do not believe a county should be required to do so where it denies a particular application for reasons other than statewide goal compliance (or lack of it). In this case, the county denied a request for reasons found in its own land development ordinance.

Petitioner alleges a violation of Goal 10 on the theory that the county is obliged to explain the impact of this particular development on its ability to provide needed housing. The proposal would allow a planned unit development (with relatively high density) to exist in an area otherwise zoned as low density residential. The petitioner did not attack the low density residential zoning on the property, and we recommend that where there has been no Goal 10 challenge to existing zoning, denial of a proposal that would change the zoning does not require findings upon Goal 10.

The Board is of the opinion that oral argument would not assist the commission in its understanding or review of the statewide goal issues involved in this appeal. Therefore, the Board recommends that oral argument before the commission not be allowed.

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BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NESO PROPERTIES, INC.,	)	
	)	
Petitioner,	)	LUBA No. 83-004
	)	
vs.	)	
	)	PROPOSED OPINION
TILLAMOOK COUNTY,	)	AND ORDER
	)	
Respondent.	)	

Appeal from Tillamook County.

Timothy V. Ramis, Portland, filed the Petition for Review and argued the cause on behalf of Petitioner.

Lynn Rosik, Tillamook, filed the brief and argued the cause on behalf of Respondent Tillamook County.

Lois A. Albright, Pacific City, filed the brief and argued the cause on behalf of Participant-Respondents Elizabeth Trowbridge and The Concerned Neskowin Property Owners.

BAGG, Board Member; COX, Board Member; participated in this decision.

Remanded 04/06/83

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a), as amended by Oregon Laws 1981, ch 748.

BEFORE THE
LAND CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF OREGON

NESO PROPERTIES, INC.,	)	
	)	
Petitioner,	)	LUBA No. 83-004
	)	
vs.	)	LCDC DETERMINATION
	)	
TILLAMOOK COUNTY,	)	
	)	
Respondent.	)	

The Land Conservation and Development Commission hereby approves the recommendation of the Land Use Board of Appeals in LUBA 82-004.

DATED THIS 29 DAY OF APRIL 1983.

FOR THE COMMISSION:

James F. Ross, Director
Department of Land Conservation
and Development

RE:af
3590B/63C