BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PATRICIA C. SMULLIN and CAROLE ANNE BROWN, Petitioners, v. JACKSON COUNTY, Respondent.	LUBA NO. 83-005 FINAL OPINION AND ORDER

Appeal from Jackson County.

Kris Jon Gorsuch and Daniel A. Ritter, Salem, filed a brief and argued the cause for Petitioners. With them on the brief were Harland, Ritter, Saalfeld & Griggs.

John L. Dubay, Medford, filed a brief and argued the cause for respondent.

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

Remanded. 6/8/83

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.

COX, Board Member.

NATURE OF PROCEEDING

Petitioners seek reversal of a December 15, 1982 decision by the Jackson County Board of Commissioners which rezoned their property from farm residential (F-5) to exclusive farm use (EFU). The contested decision is part of ordinance 82-33 which rezoned numerous other properties and adopted, in permanent ordinance form, a revised comprehensive plan and zoning maps, as well as amended the comprehensive plan's exceptions maps.

ALLEGATIONS OF ERROR

Petitioners set forth four assignments of error as follows:

1. "The Jackson County Board of Commissioners' Decision to rezone and redesignate the Petitioners' property from F-5 to EFU was quasi-judicial, required detailed findings and these findings must be supported by substantial evidence. The County's failure to make appropriate findings constitutes reversible error."

2. "In the alternative, Statewide Planning Goal 2 requires that all land use decisions, legislative or quasi-judicial, be suppoted by 'an adequate factual base.' The decision of the Jackson County Board of Commissioners to rezone and redesignate the subject property from F-5 to EFU was inconsistent with the facts. For this reason it should be reversed."

3. "In the alternative, Statewide Planning Goal 2 imposes upon the County the duty to make findings or provide an explanation as to why it believed its legislative ordinance complied with the Statewide Planning Goals. The County failed to make appropriate findings or explanations addressing the relevant standards or criteria of Statewide Planning Goal 3. The decision should be reversed."

4. "In the alternative, if LUBA finds that the County's decision to rezone and redesignate the subject property was a legislative act and that Goal 2 does not establish a legal requirement that the County's explanation for its decision be based upon an adequate factual base, then the County's decision must nevertheless be reversed as arbitrary and capricious and, therefore, violated the Due Process Clause of the 14th Amendment to the United States Constitution, in that the decision was unreasoned and in disregard of the evidence in the record. The decision should be reversed."

FACTS

In order to write an opinion in this case, we find ourselves in the multi-mirrored funhouse of the legislative quasi-judicial land use decision arcade. In an effort to find our way out of this mental maze of cloudly distinctions and sharply contrasted inconsistencies, it is necessary that we have a good grasp of all the facts. While some may perceive the following rendition of the history of this case to be too voluminous, we can only offer our condolences. Without any further ado, these are the facts.

The Jackson County Comprehensive Plan has recently been acknowledged by the Land Conservation and Development Commission as being in compliance with statewide goals. The comprehensive plan had not been acknowledged at the time the subject proceedings were conducted. Ordinance 82-33 is the culmination of a series of ordinances which resulted from the May 14, 1982 decision by the Land Conservation and Development Commission (LCDC) that the then Jackson County Comprehensive Plan was not in compliance with the statewide goals. Beginning

in September of 1982, the county notified its residents of a series of public hearings scheduled for the receipt of testimony regarding numerous proposed zone changes. The change of zone on the subject property was but one of the impacted parcels of property. As a result of hearings, the Jackson County Board of Commissioners adopted a series of ordinances which amended the comprehensive plan LCDC had found to be unacknowledgeable. The first such ordinance was Ordinance 82-26 which was adopted on the 20th day of October, 1982. Ordinance 82-26 amended the comprehensive plan by adopting new "comprehensive plan divisions" entitled such things as General Introduction, and Map Designation, as well as amending other "divisions or sections of the comprehensive plan." Included in the 82-26 ordinance was an amendment to the policy statement for the plan. Of particular interest to the matter before this Board is the net effect of the ordinance 82-26 adoption. In effect, that ordinance consolidated the then existing EFU zoning classifications, which consisted of four basic subheadings, into one classification. This new single EFU classification changed the requirement that the use merely had to "predominantly" meet criteria and characteristics to the requirement that the use had to completely meet the criteria and characteristics. In addition, the old EFU criteria had minimum lot sizes and the result of the October 20, 1982 ordinance was to do away with minimum lot sizes in the EFU zone. Also, the ordinance (82-26) changed the text of the

exclusive farm use district zoning ordinance.

A companion ordinance also adopted on October 20, 1982 was 82-27. Ordinance 82-27 was entitled "a consolidated land development ordinance for Jackson County by combining the existing zoning and land division ordinances and making various amendments thereto." In effect, ordinance 82-27 adopted by reference the land development ordinance of Jackson County, the Ashland-Jackson urban growth boundary agreement, amended the Phoenix urban growth boundary, and accomplished other ends not directly related to this case.

On November 10, 1982, Jackson County adopted ordinance no. 82-31 entitled "an emergency ordinance adopting amendments to the Jackson County Comprehensive Plan (1980)." Ordinance 82-31 contains four sections. Section 1, from all outward appearances, is identical to the material cited above that was contained in Ordinance 82-26, i.e. amending the Jackson County Comprehensive Plan. In addition to Section 1, the ordinance contained Sections 2, 3 and 4. Those sections stated as follows:

> "Section 2. The Official Comprehensive Plan and Zoning Map, consisting of 18 separate maps, each of which is dated contemporaneously with this Ordinance and signed by the Chairman of the Jackson County Board of Commissioners, is hereby adopted, and incorporated by this reference in the Jackson County Comprehensive Plan.
>
> "Section 3. The Official Comprehensive Plan and Zoning Map, which was adopted on August 29, 1980, as part of Ordinance No. 80-17, the Jackson County Comprehensive Plan, is hereby repealed with the Official Comprehensive Plan and Zoning Map, adopted by

Section 2 of this Ordinance.

> "Section 4. This ordinance being necessary to the health, welfare, and safety of the people of Jackson County, an emergency is declared, and it shall take effect immediately upon adoption." Record 8-9.

Thus not only did Ordinance 82-31 repeat Ordinance 82-26, it, for the first time, applied specific zoning designations to individual pieces of property, and it enacted the changes with an emergency clause. There was no emergency clause in Ordinance 82-26, thus it would not have had effect for 60 days. Thus, by Ordinance 82-31, as of November 10, 1982, there existed a "new" official comprehensive plan and zoning map.

Also on November 10, Jackson County passed Ordinance 82-32 which was entitled:

> "An emergency ordinance adopting a consolidated land development ordinance for Jackson County by combining the existing zoning and land division ordinances and making various amendments thereto."

What Ordinance 82-32 appears to have accomplished is that it adopted the existing zoning and land division ordinances as amended and combined those into one land development ordinance. The net effect of reading Ordinance 82-31 with Ordinance 82-32 is that as of November 10, 1982, the complete comprehensive plan, plan map and implementing ordinances had been adopted and pressed into operation via an emergency clause. Therefore, as of November 10, Jackson County had in effect a new comprehensive plan, plan map and implementing ordinance which were thought to be in compliance with the statewide goals and, therefore, ready for acknowledgment by the

LCDC.

Now we get to Ordinance 82-33, the subject of this appeal. Ordinance 82-33 was adopted on December 15, 1982, and had as its title

> "AN ORDINANCE ADOPTING AMENDMENTS TO THE JACKSON COUNTY LAND DEVELOPMENT ORDINANCE OF 1982, FILE 82-3-OA." (Emphasis added) Appendix 1, Petitioner's Brief.

In the recital section of the Ordinance 82-33, it is confusing as to what exactly the Jackson County Commissioners were attempting to do. They state in recital 2 that:

> "At that [Comprehensive Plan Ordinance 82-26 and Land Development Ordinance 82-27] adoption, the Plan and Zoning Maps were not adopted because the Board and Planning Commission had not completed deliberations on all properties affected by legislative rezoning."

The Ordinance 82-33 doesn't mention Ordinances 82-31 or 82-32 which, in fact, adopted by emergency the plan and zoning maps as well as the development ordinance for the county. Further, in recital number 3, the county states:

> All deliberations having been completed, it is appropriate to adopt the revised plan and zoning maps in the form of a permanent ordinance, and to amend the exceptions maps in the comprehensive plan."

Apparently, reading recital no. 3 with the title of this ordinance, it was the comprehensive plan and zoning maps as well as Ordinances 82-32 and 82-31 which were permanently adopted (emergency ordinances have only a 120 day life in Jackson County).

For the purposes of this appeal, the above mentioned ordinances can be described as accomplishing the following

things. The October 20, 1982 ordinances (82-26 and 82-27) adopted the criteria and characteristics of the new map designations as well as adopting the comprehensive plan. Those ordinances did not contain emergency clauses and, therefore, would not be effective for 60 days. The November 10, 1982 ordinances (82-31 and 82-32) readopted what had been accomplished by the October 20, 1982 ordinances plus they adopted new zoning maps. Those maps reflected the placement of the existing (as of October 20, 1982) map designation on individual properties. The November 10 ordinances added the emergency clause which has a limited life of 120 days. It was Ordinance 82-33, which was adopted on December 15, 1982, that superseded all the prior ordinances (i.e. 82-26, 82-27, 82-31, 82-32) and adopted their contents as the permanent law of the county.

The subject property, consisting of approximately 47 acres, is known as Coker Butte. It is a steep butte rising on the easterly side of the Jackson valley. The property is leased to California-Oregon Broadcasting, Inc. and atop the rocky summit there stands a television translator relay system. The petitioners' property was zoned F-5 in August of 1980 when the county originally adopted its comprehensive plan. It was the purpose of the F-5 farm residential zone to buffer EFU zones and to provide for areas where second income agricultural uses could operate free from urban conflict. The F-5 zone was not intended to be a farm use zone under ORS Chapter 215. The farm

residential policies of the 1980 comprehensive plan stated that areas designated F-5 are either committed or needed for rural homesite development and are adjacent to EFU land.

The EFU zone placed on the property by the November 10, 1982 ordinance action was established to regulate the use of land which is being used for or which offers the greatest potential for food and fiber production (LDO 218.010; Record Volume II, page 6). Residences are permitted on the EFU property only under very limited conditions. EFU land, pursuant to the newly adopted comprehensive plan and in compliance with Statewide Goal 3, must contain predominantly SCS Class I-IV soil or be land suited for farming or necessary to permit farming practices on adjacent or nearby property.

Petitioners appeared at public hearings beginning in September of 1982 and presented orally and in writing evidence indicating that the subject property was a steep rocky parcel of ground. It was pointed out that the property is not irrigated presently and there is no possibility of irrigating the land because it has no water rights. Also, due to the steepness of the slope, irrigation is not feasible.

According to the Jackson County planning staff's interpretation of a 1969 Jackson County area soil survey, the subject property contains approximately 60 percent Class IV soil (Volume II, page 17, 44, 53-63). However, petitioners provided expert testimony that the survey upon which the planning staff had based its conclusion was done with aerial

photos and it was possible that no field checks were done on the subject property. The same expert testified that the boundary lines used in the 1969 survey were approximate locations and not absolute. In addition, the expert pointed out slope was not measured on every ownership and that, overall, the 1969 preliminary report was subject to revision and improvement.

After establishing the possible faulty nature of the data relied on by the county planning staff, petitioners introduced evidence of a detailed soil survey they had caused to be conducted using some 47 sample points on the property. The conclusion of that detailed site specific study was that the soil on the property consists predominantly of SCS Class VIe soils. The remaining soil is SCS Class IVe. Record, Volume II, page 35. The letter "e" identifies soils which have high erosion potential. Record, Volume II, page 22. Petitioners also had the slopes of the subject property mapped by a registered civil engineer. It was the engineer's conclusion that the slope of the subject property was considerably steeper than that indicated by the US Soil Survey, Record, Volume II, page 33. In addition, petitioners presented evidence that the subject property was not land suitable for farming. It had not been farmed in recent years and two prior attempts at farming the lower portions of the property were unsuccessful. Record, Volume II, page 25, 26 and 47.

The properties immediately to the south of the subject

parcel are developed in small rural, hobby-type farm tracts of one to five acres and are zoned R-5 or F-5. The southerly and westerly boundaries of petitioners' property border the City of Medford urban growth boundary. The property is approximately 350 yards from the Medford city limits on the west and 450 yards from the Medford city limits on the south. Substantially all the property immediately to the west of the subject is zoned light industrial (LI) and is either developed or in the process of being developed for such uses. That portion on the west which is not zoned LI is zoned F-5. Only at the extreme northwesterly corner of the premises is it adjacent to farmland and most of its northerly boundary contains an extremely steep slope, wooded with oak and manzanita. The property is served, for domestic use only, with Medford public water through a contract between the City of Medford Water Commission and the Coker Butte Water Users Association. The Bear Creek Valley Sanitary Authority can provide a sewer main within 400 feet of the subject property and proceedings have already been instituted to connect the subject property to that sewer system.

All the above testimony and evidence was presented to the Board of County Commissioners after notification to the property owner that a rezoning was proposed. Notices of the hearings were by placement in newspapers of general circulation. All the evidence had been submitted prior to October 20, 1982, the date the initial ordinances above

described were adopted. On December 22, 1982, petitioners were notified by an individually addressed letter from the Director of the Jackson County Department of Planning that their property had been rezoned to exclusive farm use.

DECISION

Petitioners first allege that the action taken by respondent regarding their property was quasi-judicial in nature and, therefore, required detailed findings supported by substantial evidence. They claim the county failed to make the appropriate findings and, therefore, committed reversible error. This issue gets us into the middle of the quasi-judicial, legislative land use decision-making debate that has evolved in the courts of this State since the Supreme Court decision in Fasano v. Wash Co. Comm., 264 Or 574, 507 P2d 23 (1973). In Fasano, the Supreme Court rejected what it felt at that time was the rule in a majority of jurisdictions that when a zoning ordinance was amended at the instance of the owner of the land to which the amendment applied that action was, like the enactment of an ordinance of general application, a legislative act and thereby entitled to presumptive validity. 264 Or at 579. The court stated its reason for rejection of that majority trend as follows:

> "At this juncture we feel we would be ignoring reality to rigidly review all zoning decisions by local governing bodies as legislative acts to be accorded a full presumption of validity and shielded from less than constitutional scrutiny by the theory of separation of powers. Local and small decision groups are simply not the equivalent in all respects

of state and national legislatures. There is a growing judicial recognition of this fact of life:

> 'It is not a part of the legislative function to grant permits, make special exceptions, or decide particular cases. Such activities are not legislative but administrative, quasi-judicial, or judicial in character. To place them in the hands of legislative bodies, whose acts as such are not judicially reviewable, is to open the door completely to arbitrary government.' Ward v. Village of Skokie, 26 I112d 415, 186 NE2d 529, 533 (1962) (Klingbiel, J., specially concurring)." 264 Or at 580.

The Fasano court then went on to state:

> "Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited review, and may only be attacked upon constitutional grounds for an arbitrary abuse of authority. On the other hand, a determination whether the permissible use of a specific piece of property should be changed is usually an exercise of judiical authority and its propriety is subject to an altogether different test." 265 Or 580-581.

The Fasano court holding rested upon its conclusion that a county's power to zone had been conditioned by the legislature upon the conformity of zoning ordinances to a comprehensive plan. It held, in other words, that zoning changes of the kind before the Washington County Commissioners in Fasano would necessarily involve factfinding and the application of general policy as embodied in the comprehensive plan to a discreet situation and were, therefore, quasi-judicial rather than legislative in nature. The Fasano opinion assumed that the exercise of "administrative, quasi-judicial or judicial" authority is readily recognizable as such, and the court proceeded to examine the criteria applicable to zone change

decisions of that kind and in addition to offer some brief remarks on questions of procedure. Fasano, 264 Or at 588.

Since the Fasano decision of 1973, many changes have taken place in the development of land use law in the State of Oregon. Prior to 1973 cities were not required to adopt a comprehensive plan. In 1973, the legislature adopted such a requirement and in 1977 provided a procedure for LCDC review of such plans for compliance with the statewide planning goals. Oregon Laws 1973, ch 80, secs 18, 32; Oregon Laws 1977, ch 776, sec 18. The statutes now provide a deadline for compliance of the plans with the goals and also authorize LCDC to grant extensions of time. In 1979, writ of review procedures by which most land use cases were reviewed in the circuit courts were removed and placed under the jurisdiction of the Land Use Board of Appeals. Oregon Laws 1979, ch 772, as amended by Oregon Laws 1981, ch 748. In addition, under provisions of the Land Conservation and Development Commission's powers, local governments are required to adopt comprehensive plans which are consistent with statewide goals. Once those plans are acknowledged, the necessity to apply the goals drops away and the provisions of the comprehensive plan control. It was this acknowledgment procedure that Respondent Jackson County was engaged in when the subject action took place.

Also since Fasano it has become evident that in the context of land use decisions, it is not readily recognizable when a local government is acting in a legislative versus an

adminsitrative quasi-judicial posture. Numerous Court of Appeals and Supreme Court decisions have been issued since the Fasano case, each attempting to explain more succinctly how the local government was suppose to determine whether it was setting in its legislative function or quasi-judicial function. With such knowledge it could then decide on the kind of notices and hearings to be provided the individual landowner. In 1978, the Court of Appeals issued its opinion in Neuberger v. City of Portland, 37 Or App 13, 586 P2d 351 (1978). In that opinion, the Court of Appeals laid down a fairly simple rule for deciding when a zone change proceeding was quasi-judicial rather than legislative. The Court of Appeals held

> "* * * A zone change proceeding is necessarily quasi-judicial when it is undertaken at the instance of a single applicant or a combination of applicants with united interest in the parcel they seek to have rezoned." 37 Or App at 16

The Court of Appeals' decision was appealed to the Supreme Court which entered its decision reversing the Court of Appeals in Neuberger v. City of Portland, 288 Or 155, 603 P2d 771 (1979).

In rendering its decision in the Neuberger appeal, the Supreme Court referred to its then recent decision in Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm'rs., 287 Or 591, 601 P2d 769 (1979). The Neuberger court pointed out that when it decided Strawberry Hill, it had indicated:

"When a particular action by a local government is

directed at a relatively small number of identifiable persons, and when that action also involves the application of existing policy to a specific factual setting, the requirement of quasi-judicial procedures has been implied by the governing law." Neuberger, 288 Or at 161.

The court then went on to indicate the two factors that had been identified in Strawberry Hill (i.e. relatively small number of identifiable persons and an action involving the application of existing policy to a specific factual setting) were frequently present in cases in which it had held that quasi-judicial functions were exercised. It pointed out, however, that each factor is a separate indicator of the possible need for adjudicatory procedures. The court stated:

"The reasons, moreover, are different in each instance." Neuberger, 288 Or at 162.

The Supreme Court in Neuberger continued to explain that when specific facts are to be determined in order that pre-existing criteria may be applied, procedures similar to those used in adjudications are important in order to assure that factual determinations will be made correctly. It then went one step further and said that even though the decision-maker is not entirely bound by pre-existing criteria, if a relatively small number of persons is directly affected the law may nevertheless require a formal hearing procedure. In quoting Strawberry Hill, the court stated that a formal adjudicatory hearing procedure is required in such instances

"* * * to provide the political safeguards of fair and open procedures for the relatively few individuals adversely affected, in lieu of the political

safeguards in which our system relies in large scale policy choices affecting many persons." 288 Or at 162.

The Neuberger court then identified an additional factor to be considered in deciding whether the process is quasi-judicial or legislative. That factor is whether the process was bound to result in a decision. See also Sunnyside Neighborhood v. Clackamas County, 280 Or 3, 569 P2d 1063 (1977).

In summary, what has evolved since the Fasano decision is best summarized in Neuberger v. City of Portland with its reference to other case law. That evolvement has developed into a system of three main areas of inquiry to aid in determining when a proceeding requires quasi-judicial safeguards. Those three areas of inquiry can be applied to a certain fact situation to aid a reviewing body in making the determination. The three factors or areas of inquiry are: (1) is the action directed at a closely circumscribed factual situation or a relatively small number of persons? (2) Is the decision based upon application of existing policy to a specific factual setting? (3) Was the process bound to result in a decision? In conceptual terms, it appears that what the Supreme Court has fashioned is the means to test whether the action taken is of a nature that the legislative protections, i.e. popular vote and representative government, are unable to guarantee protection of an individual or small group of individuals' property rights. In a sense, we have a continuum from proceedings impacting general, jurisdiction-wide

decisions, to proceedings dealing with questions of a specific nature which affect such a limited number of voters those voters are unable to effectively protect themselves because of their lack of collective political clout. The further one moves along the continuum, the more likely it is that the proceeding must be governed by quasi-judicial protections. With the foregoing review of the status of the law in mind, we will apply the specific factual setting of this case to the three areas of inquiry above identified.

Is the action directed at a closely circumscribed factual situation or a relatively small number of persons?

A review of facts surrounding this decision leads us to believe that the above question must be answered in the affirmative. Even though the Jackson County Board of Commissioners was considering the rezoning of numerous parcels of land at the same time they considered the subject property, the issue and facts before them varied from parcel to parcel. It was not a question of whether all F-5 land should be rezoned EFU but rather their inquiry concerned imposing upon specific parcels various zoning designations. The county had to choose between options depending on the existing zoning and characteristics of each parcel of property. For example, their choices included F-5 to Woodland Resource (WR), EFU to F-5, Open Space Reserve (OSR) to WR, OSR to EFU, F-5 to OSR, etc. Record, Volume I, pages 23, 25, 29, 32, 47, 54 and 63. In the subject case only the petitioners will be affected by the

decision whether or not to rezone this particular parcel from F-5 to EFU. As an indication of the proceedings specificity the petitioners were individually notified of the decision regarding their parcel. From our reading of the case law, it makes no difference that Ordinance No. 82-33 was directed at the entire county. The criteria for and characteristics of EFU property were established on October 20, 1982, by Ordinances No. 82-26 and 82-27. Those criteria were applied to particular pieces of property, including the subject property, on November 10, 1982 when new maps were adopted by emergency ordinance. Therefore, as will be discussed below, there was an application of existing policy to a specific piece of property. We believe that such a proceeding was directed at a more "closely circumscribed factual situation and a relatively small number of persons" than to a broad-based, jurisdiction-wide legislative proceeding.

Is pre-existing policy being applied to a specific factual setting?

We believe the correct answer to this inquiry is yes! The EFU land characteristics, criteria and policy were established some 20 days before, the map designation element of the comprehensive plan was adopted. Even though the effective date for ordinances 82-26 and 82-27 was not until 60 days later, the criteria, characteristics and policies had been established and were, for purposes of this inquiry, the law of the county. The act of applying those map designation elements to the specific

property in question on November 10, 1982, was the application of existing policy to a specific factual setting. The fact that the entire sequence of five ordinances set forth in the facts section of this opinion were part of a large scale county-wide revision of the comprehensive plan is not determinative. Large scale decisions of specific applicability frequently, if not inevitably, require of the decisionmaker both the creation and the application of policy. Cf. Marbet v. Portland General Electric, 277 Or 447, 460, 561 P2d 154 (1977); Neuberger, supra. Here, the fact that an existing EFU code provision was applied to the specific property requires us to answer the question "is pre-existing policy being applied to a specific factual setting" in the affirmative.

There was a great deal of information before the Board of County Commissioners which indicated this was not EFU land. The staff report was contradicted and testimony indicated that the land was of no value for farming purposes. It was that type of information which the county must have been weighing when it decided to apply the EFU zone to this property rather than leaving it at the F-5 designation which at that time existed. Such a decision-making process, when limited to a specific factual setting is more quasi-judicial than legislative in nature.

Was the process bound to result in a decision?

This question creates for this Board the most difficulty in applying the three factors of inquiry to the subject rezoning.

Nearly all the court decisions referring to the quasi-judicial versus legislative dichotomy in land use proceedings have looked at the question of whether the zone change was undertaken at the instance of a single applicant or a combination of applicants with united interests in the parcel they seek to have rezoned. Neuberger v. City of Portland, 37 Or App at 16. Here, the proceeding was undertaken at the instance of entities other than the property owner. Arguably, the proceeding was undertaken at the instance of Jackson County. However, we believe it was undertaken at the instance of LCDC because it had refused to acknowledge the Jackson County Comprehensive Plan until modifications to Jackson County's EFU zoning and its agricultural lands policy were completed. State statutes require Jackson County to have an acknowledged comprehensive plan. It was the requirement of modifications that gave impetus to the efforts which ultimately resulted in the subject property being rezoned. Jackson County was required to conduct hearings to obtain necessary information to implement Goal 3 and, therefore, the agricultural lands policy and the EFU zone.

Statewide Goal 2 requires that all land use plans identify issues and problems, inventories and "other factual information for each applicable statewide planning goal," evaluation of alternative courses of action and ultimate policy choices. It is also Goal 2 which requires that all land use plans and implementation ordinances of Jackson County be adopted only

after public hearing. Goal 2 also requires that opportunities be provided for review and comment by citizens and affected governmental units during preparation, review and revision of plans and implementation ordinances. In Henthorn v. Grand Prairie School Dist., 287 Or 683, 601 P2d 1243 (1979), the court held that the fact a school board was obligated to make a decision on the basis of information produced at hearing required by statute was important to its conclusion that the proceedings were quasi-judicial and, therefore, subject to judicial review under a writ of review. In Henthorn, the Supreme Court overruled the Court of Appeals' decision at 39 Or App 351, 591 P2d 1198 (1979). In holding that the proceedings before the school board under ORS 342.835(2) did not involve the performance of a "judicial or quasi-judicial function," so as to be subject to a writ of review under ORS 334.040, the Court of Appeals said:

> * * * If the board was required to determine facts from testimony or other evidence and to exercise its judgment on the facts found, we would hold that function to be quasi-judicial." 39 Or App at 355.

The court held, however, that the school board was not required to make a factual determination. In disagreeing with the Court of Appeals, the Supreme Court reviewed the legislative history of ORS 342.835(2) and held:

> * * * it is implicit that the legislature intended that the teacher at least have an opportunity at the hearing to offer evidence in an effort to contest the 'reasons for nonrenewal' and to demonstrate that such 'reasons' are false; that the board will at least consider such evidence in good faith, and will then

> make a 'determination' or 'decision' whether or not to make final its previously 'intended action,' and that some kind of 'appeal' to the courts was also intended by the legislature, although one limited to 'the procedures at the hearing' and 'whether notice of non-renewal was timely given.'" 287 Or at 691.

The import of the Henthorn decision to the decision before this Board is it indicate that in considering whether Jackson County was involved in a process bound to result in a decision, we must look to requirements placed on Jackson County by the Land Conservation and Development Commission. As in Henthorn, Jackson County was required by the Legislature, through LCDC adopted statewide goals and procedure, to make a decision on the basis of information produced at a hearing. In Henthorn, such a requirement was strongly relied on it aiding the Supreme Court to decide the proceedings before the Grand Prairie School District were quasi-judical. Similar requirements placed upon Jackson County lead us to conclude the process in which it was involved when dealing with petitioners' property also required that it provide petitioners procedural protections guaranteed under the quasi-judicial process. It follows, therefore, that given our belief the function being performed by Jackson County was quasi-judicial, the process employed by the county required it to make a decision or determination. Henthorn v. Grand Prairie School Dist., 287 Or at 691.

CONCLUSION

As a result of applying the analytical tools suggested by Neuberger and related cases, we conclude that when Jackson

County was applying the EFU zone to petitioners' property, it was involved in a process not sufficiently subject to the political safeguards upon which our system of government relies in making legislative decisions. Rather, it was incumbent on the county to provide petitioners the more individualistic safeguards offered by the quasi-judicial process. The county's decision was directed at a closely circumscribed factual situation affecting only the two people who own the subject property. The process in which the county found itself was bound to result in a decision and the county was required to apply pre-existing policy and code provisions to a specific factual setting.

The county did not make findings of the type required for quasi-judicial decision making. Among other things, it allowed petitioners to introduce evidence through experts and other documentation which specifically refuted the general data submitted by its staff. The county failed to address that evidence which went to the core of the question of whether the petitioners' property was in fact EFU land. Failure to make appropriate findings and provide quasi-judicial safeguards such as individual notice and a chance to examine opposing witnesses is cause to remand this decision. Sane Orderly Development v. Douglas County Bd. of Comm'rs, 2 Or LUBA 196 (1981). Since petitioners' other assignments of error are stated in the alternative, we do not address them.

Remanded for further proceedings not inconsistent with this opinion.

BAGG, Concurring.

I concur in the result in this case because I believe petitioners submitted sufficiently detailed evidence about soil type to require a response from the county. The evidence was not discussed by the county, and I view this omission to be error. I base my view on Gruber v. Lincoln County, in which we held:

> "Where, as here, there is an articulate challenge to a proposed designation and there is no plan policy controlling the decision and eliminating competing choices for land use decisions, the 'rationale' for the particular decision must be evidenced some place in the plan or supporting documents (i.e. the record):" Gruber v. Lincoln County, 2 Or LUBA 180, 188 (1981).

I do not agree that this decision is "quasi-judicial" in character. As I understand the facts of the case, the county was required to review its resource land designations and, in particular, its agricultural land designations. The task before the county was no different than the task before any county (or city): to adopt plans and ordinances in order to comply with statewide land use planning goals. ORS 197.175.

Here, the policies in the new comprehensive plan and the criteria for the new plan map designations were adopted on October 20, 1982, but were not to be effective for 60 days. November 10, 1982 saw the enactment of ordinances readopting the October 20 ordinances with emergency clauses in order to make them effective immediately. There followed, on December

15, adoption by regular ordinance of all previous ordinances. Whether the adoptions are considered effective November 10 or December 15 is not important, what is important is that all the documents were part of the same legislative package and all took effect at the same time. With these enactments, the county was making new standards and criteria to determine what lands would be subject to resource designations. These acts occurred at the same time the new land use designations were applied to specific properties. I conclude the county was creating new criteria, not just applying existing criteria to specific properties.

I do not view the application of the new criteria to petitioners' property to be an individualized quasi-judicial act. In any proceeding where land use designations are first enacted or changed, there will be consideration of individual parcels. The county had many choices it could make as to what zone to impose on specific parcels depending upon the characteristics of the property. It was, therefore, the county governing body's legislative duty to consider individual ownerships in drawing the new land use map. I do not see this duty, shared by all local jurisdictions in Oregon under ORS 197.175, to be quasi-judicial in this instance. Petitioners were in the company of many other landowners, all subject to this review of resource lands in Jackson County.

I agree the county was obliged to act to make its plan and ordinances conform to statewide goals. I do not believe this

obligation was at all like the obligation created by the filing of an application for a land use permit, a zone or plan change, or a road or street vacation. Such applications set in motion a chain of events that must reach a conclusion (barring withdrawal of the application). In this case, the county was not obliged to act because of some individual request, but was obliged to act because of a state law applicable to all local governments. The county had to bring its plan and ordinances into compliance with statewide land use laws and rules. I do not believe the statewide goals and ORS 197.175 together equal standards and a duty to act that is quasi-judicial.