BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ALLIANCE FOR RESPONSIBLE LAND USE IN DESCHUTES COUNTY, HOWARD PAINE and WILLIAM BOYER, Petitioners, vs. DESCHUTES COUNTY, Respondent, and PMR DEV. CO. LLC, Intervenor-Respondent.	LUBA Nos. 96-145 and 96-146 FINAL OPINION AND ORDER

Christine M. Cook, Portland, filed the petition for review and argued on behalf of petitioners.

No appearance by respondent.

Liz Fancher, Bend, filed the response brief and argued on behalf of intervenor-respondent.

GUSTAFSON, Referee, HANNA, Chief Referee, participated in the decision.

REMANDED 03/14/97

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Gustafson.

NATURE OF THE DECISION

Petitioners appeal a county ordinance adopting a hearings officer's decision to approve a zone change, and a decision of the board of county commissioners (board) not to hear petitioner's appeal of the hearings officer's decision.[1]

MOTION TO INTERVENE

PMR Dev. Co., LLC (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

Intervenor applied to the county for a comprehensive plan amendment and zone change on property located within the City of Sisters urban growth boundary (UGB), immediately adjacent to the City of Sisters. Prior to the comprehensive plan amendment, the property was designated Urban Area Reserve (UAR). The amendment, which has not been challenged in this appeal, removed the "Reserve" designation. Consequently, the subject property is now designated Urban Area.[2] The zone change application sought to change the

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[1]The appealed ordinance adopts only a portion of the hearings officer's decision. The hearings officer's decision also recommends approval of a comprehensive plan amendment. That portion of the decision is not subject to this appeal.

[2]Intervenor applied for the comprehensive plan amendment at the county's request. Intervenor argued that a comprehensive plan amendment was not

zoning designation of portions of the subject property from UAR-10 to Urban Standard Residential (RS), and the remainder from UAR-10 to Urban Area High Density Residential (RH).

Following hearings, the county hearings officer approved the zone change and recommended approval of the comprehensive plan amendment. Petitioners appealed the zone change request to the board, which, through Ordinance 96-075, declined to hear the appeal. At the same time, the board adopted Ordinance 96-062, which approves the zone change. The comprehensive plan amendment recommendation was not appealed and subsequently was approved by the board.

Petitioners appeal Ordinances 96-062 and 96-075.

JURISDICTIONAL CHALLENGES

In the response brief, intervenor moves to dismiss this appeal on the bases of mootness and claim preclusion. Additionally, intervenor challenges our jurisdiction on the basis that petitioners did not exhaust administrative remedies. In the assignments of error, intervenor also argues that each of the individual assignments is barred by the doctrines of issue preclusion and finality.

First, intervenor argues petitioners failed to exhaust their administrative remedies by failing to appeal the comprehensive plan amendment. Intervenor reasons that

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necessary, on the basis that the removal of the "Reserve" designation would be "self-activating" following the zone change. The county disagreed, finding that the removal of the "Reserve" designation required a discretionary determination as to whether 75% of the area within the City of Sisters had developed.

because the comprehensive plan policies applicable to the plan amendment were also applicable to the zone change approval, petitioners were required to appeal the plan amendment in order to preserve the appeal of the zone change. Intervenor is incorrect. The zoning ordinance and comprehensive plan are two distinct documents, as are the approval criteria for the amendment of each. An amendment to the comprehensive plan does not compel an identical amendment to the zoning ordinance. Petitioners were not required to exhaust administrative remedies available to the plan amendment approval in order to appeal the zone change.

Intervenor next argues the appeal of the zone change is moot, since the comprehensive plan amendment removed the "Reserve" designation from the property and because the county was bound to amend the zone to conform to the current comprehensive plan designation. According to intervenor, "the zone designation of the PMR property must be consistent with the Plan map designation of RH and RS, leaving no room for further consideration of an appeal of a zone change application which seeks to retain urban reserve zoning for the PMR Property." Response Brief 8. Intervenor concludes that the fact of the comprehensive plan amendment "renders Petitioners' challenge to the RH and RS zoning imposed by the County moot." Id.

To support its arguments, intervenor relies primarily on Turner v. Washington County, 70 Or App 575, 689 P2d 1318

(1984), Hastings Bulb Growers v. Curry County, 25 Or LUBA 558 (1993), aff'd 123 Or App 642 (1994) and Baker v. City of Milwaukie, 271 Or 500, 533 P2d 772 (1975). Intervenor misconstrues these cases. In Turner, the county approved a planned unit development (PUD) based on provisions of the county's unacknowledged comprehensive plan. That plan was amended and acknowledged during the pendency of the PUD appeal. The Court of Appeals determined that LUBA's remand of the PUD approval to consider statewide planning goal issues was moot because of the intervening plan acknowledgment. Contrary to intervenor's suggestion, Turner does not moot or alter applicable zone change approval criteria because of an amendment to an acknowledged comprehensive plan during the pendency of a zone change application. ORS 215.428(3) clearly provides otherwise, requiring that zone change approvals be based upon the standards and criteria in effect when the application was submitted.[3]

Relying on Hastings Bulb Growers, intervenor argues that ORS 215.428(3) does not apply here, because this case

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[3]ORS 215.428(3) states:

> "If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

involves a comprehensive plan amendment. In Hastings Bulb Growers, this Board acknowledged that ORS 215.428(3) does not apply to comprehensive plan amendments. However, unlike that case, there is no comprehensive plan amendment subject to this appeal. This appeal involves only a zone change approval, to which ORS 215.428(3) applies.

Finally, relying on Baker v. City of Milwaukie, intervenor argues that zoning must correspond directly to the comprehensive plan, and that once the county removed the Reserve designation from the comprehensive plan, it was mandated to conform its zoning to that amended plan. According to intervenor, petitioners' appeal of the zone change is moot since, if successful, the appeal would impermissibly render the zoning different from the comprehensive plan designation. Intervenor misreads Baker. Baker recognizes that zoning cannot allow more intensive uses on property than are allowed by the comprehensive plan. It does not prohibit more restricting zoning than would be permitted under the comprehensive plan. See, e.g., Fifth Avenue Corp. v. Washington County, 282 Or 591, 622 n22, 581 P2d 50 (1978); Marracci v. City of Scappoose, 26 Or App 131, 552 P2d 552, rev den 276 Or 133 (1976). Petitioners' appeal of the zone change appeal is not moot by reason of the unappealed plan amendment.

Next, intervenor argues petitioners should be barred from challenging the zone change on the basis of "claim

preclusion" since the zone change and unappealed plan amendment "involve the same claims or 'aggregate of operative facts which compose a single occasion for * * * relief.'" Petition for Review 9 (citing Joines v. Linn County, 24 Or LUBA 456, 463 (1993)). On this basis, intervenor urges that petitioners should be precluded from "asking LUBA to prevent Respondent from conforming its zoning map to its comprehensive plan map." Id. at 10. According to intervenors, claim preclusion is necessary "to prevent a conflict between the two documents." Id.

As discussed above, no conflict exists when uses allowed under a zoning ordinance are more restrictive than those permitted under a comprehensive plan. Moreover, the doctrine of claim preclusion is not applicable to the type of situation presented in this appeal.

In Joines v. Linn County, we reiterated the Oregon Supreme Court's explanation of the applicability of the doctrine of claim preclusion:

> "[Claim preclusion] applies when a subsequent action is brought by one party against another party to a prior suit. If the two cases involve the same 'claim, demand, or cause of action,' then the judgment in the first suit not only bars all matters determined, but also every other matter which might have been litigated and decided as incident to or essentially connect therewith either as a claim or a defense. Waxwing Cedar Products v. Koennecke, 278 Or 603, 610, 564 P2d 1061 (1977), quoting Western Baptist Mission v. Griggs, 248 Or 204, 209, 433 P2d 252 (1967)." Joines, 24 Or LUBA at 462.

A basic tenet of the claim preclusion doctrine is that claims resolved in a previous proceeding cannot be relitigated in a subsequent proceeding. The claim intervenors urge should be precluded in this case stems from a single proceeding, in which the county made two determinations. Intervenor argues that because only one of the determinations was appealed, review of that appealed decision would constitute "relitigation" of the unappealed decision. Intervenor is incorrect. While the comprehensive plan amendment is final and cannot be relitigated through the appeal of the zone change, the zone change has been properly appealed. Claim preclusion does not preclude a final decision on the merits of the zone change appeal.

Finally, intervenors claim each of the individual assignments of error is barred by the doctrines of issue preclusion and finality. We find neither doctrine applicable to this appeal. In appropriate situations, issue preclusion can be invoked to "prevent an administrative agency from deciding an issue differently than it did in a previous decision." Nelson v. Clackamas County, 19 Or LUBA 131, 137 (1990). It is only applicable "in a subsequent proceeding when an issue of ultimate fact has been determined by a valid and final determination in a prior proceeding." Fisher Broadcasting v. Department of Revenue, 321 Or 341, 347, 898 P2d 1333 (1995) (emphasis added). This case involves a single proceeding for which no ultimate fact

regarding the zone change has yet been conclusively determined. Issue preclusion does not preclude this Board from considering the merits of an appeal of the county's decision, solely on the basis that the county applied some of the same criteria to a related decision that was not appealed.

Lastly, intervenor argues that the doctrine of finality precludes petitioners from raising issues that could have been raised in an appeal of the comprehensive plan amendment. Intervenors misconstrue the doctrine, which precludes consideration of issues in a subsequent appeal which could have been but were not raised in an earlier appeal of the same decision. The finality of a comprehensive plan amendment does not preclude an appeal of the zone change.

Intervenor's motion to dismiss is denied, as are its other jurisdictional challenges.

FIRST ASSIGNMENT OF ERROR

The Sisters Urban Area Zoning Ordinance (SZO) Section 23 (3), Standard A requires county zone changes within the Sisters Urban Area to establish conformance with the Sisters Urban Area Plan (SUAP). Petitioners challenge the county's finding of compliance with the SUAP Urbanization Policy 3 (Policy 3), which states:

> "In order to assure the economic provision and utilization of future public facilities and services, the present city should develop at 75%

capacity before expanding into the reserve area."

The county found, and both intervenor and petitioner agree, that as used in this policy, "present city" means the 1979 City of Sisters.[4] Based upon a developed lands study prepared by intervenor, the county determined that over 75% of the lands included within the 1979 Sisters city limits has been developed, in compliance with this policy. Petitioners allege the county's findings of compliance with this policy misconstrue the law, are inadequate, and are not supported by substantial evidence in the record.[5]

Petitioners rely on an inventory attached to the comprehensive plan to argue that in 1979, the City of Sisters included exactly 417 acres. The inventory is actually two inventories, one adopted in 1979, based on 1978 figures (Table 10), and one adopted in 1981 (Table 10A).

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[4]The hearings officer decision rejects an argument made by one of the opponents to the application during the local proceedings that the "present city" should be interpreted to mean the city as it exists today. Petitioners do not challenge that finding on appeal. In fact, in the context of another argument, petitioners quote the SUAP definition of "Urban Reserve" which confirms that the reference date from which city growth is to be measured is 1979:

> "Urban Reserve: Those rural open lands lying immediately adjacent to the city limits that are needed for eventual urban expansion before the year 2000 but not until at least 75% of the present (1979) city limits has developed."

[5]In the petition for review, petitioners argue at length that Policy 3 is a mandatory criterion, although they acknowledge in their argument that the county does not dispute this contention. Although it is couched in terms that could be considered aspirational (i.e. "should"), both the decision and the record reflect that the county considers compliance with this policy to be mandatory.

Both inventories include under "buildable acreage" the number 417. Neither includes a narrative to indicate how or when the 417 acreage number was established. From those inventories, petitioners conclude that Policy 3 must be read to mean that before property within the urban reserve could be developed, 75% of the 417 acres listed on the inventory must be developed.

Intervenor responds that nothing in Policy 3 suggests that either Table 10 or Table 10A is the measurement by which the 75% development is to be based. Intervenor explains:

> "The 417 figure is listed in a table in the resource inventory section of the Plan and claims to inventory the City of Sisters as of June, 1978. * * * It does not purport to inventory the 1979 City for purposes of Urbanization Policy 3. The figure is not referenced in any plan policy. No plan provision indicates that the figure should be used when applying Urbanization Policy 3." Response Brief 24.

Intervenor also points out that the inventory figures are not precise. For example, both Table 10 and 10A use the same acreage figure of 417, yet county records verify that at least two large parcels were annexed into the city in 1980. Intervenor explains that because of the lack of certainty in the county records, and because Policy 3 does not specify the acreage from which future growth is to be measured, intervenor developed a methodology by which it determined the exact acreage within the city in 1979. It used Tables 10 and 10A in developing that methodology, but

refined the acreage based on additional county records. Intervenor's methodology resulted in a developed lands study, which establishes the 1979 acreage figures to be either 382.27 or 388.

The county determined that Policy 3 does not mandate the use of a plan inventory to establish the 1979 city limits. Rather, the county interpreted Policy 3 to allow the methodology developed by intervenor. The county accepted intervenor's methodology and found that through its developed lands study, intervenor established that at least 75% of the 1979 city of Sisters had developed.

Petitioners argue that the county's interpretation of the Policy 3 requirements is clearly wrong and directly misinterprets that policy. According to petitioners, "[a] comprehensive plan provision cannot be interpreted to mean something other than what it clearly states, and a decision maker cannot amend a comprehensive plan by interpretation in a quasi-judicial decision. 417 does not mean 382.27 or 388." Petition for Review 20.

Petitioners read into the comprehensive plan much more than it "clearly states." Despite their insistence, Policy 3 does not clearly establish 417 acres as the number by which future growth must be measured, and we are aware of no other comprehensive plan provision that requires the county to adopt the acreage cited in the Table 10 or 10A inventory. Nothing to which we have been cited indicates that the

county was precluded from interpreting its plan to permit establishment of a methodology from which the figure contemplated in Policy 3 could be derived.

We are required to affirm the county's interpretation of its own regulations, unless those regulations are clearly wrong. ORS 197.829; Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992) As the Court of Appeals recently explained, this means we must defer to the county's interpretation unless it is "indefensible." deBardelaben v. Tillamook County, 142 Or App 319, ___ P2d ___ (1996). In this instance, while petitioners disagree with the figure the county used to measure its development since 1979, and while petitioners' figures could also be defensible, the county's interpretation of its own regulations is not indefensible, and we defer to it.

The first assignment of error is denied.[6]

SECOND ASSIGNMENT OF ERROR

Petitioners next challenge the county's finding of compliance with the SUAP Urbanization Policy 4 (Policy 4), which states:

> "Marginal agricultural lands within the urban growth boundary shall be classified as 'urban reserve,' to be used for limited agricultural purposes until such time as other non-agricultural

[6]Petitioners also contend in this assignment of error that the findings are inadequate and lack substantial evidence. Petitioners do not, however, argue those legal bases independent of their primary argument that the county misconstrued its plan, and we do not address them further.

> lands develop first or until a demonstrated public need, consistent with these policies, can be shown to exist."

Petitioners argue that the findings with regard to both of the alternative bases for compliance with Policy 4 misconstrue the county's plan, are inadequate, and are not based on substantial evidence in the record.

A. Development of Other Non-Agricultural Lands

Before the county, development opponents challenged that two other parcels designated UAR and several individual parcels within the city constituted "other non-agricultural lands" that Policy 4 required be developed prior to removal of the "reserve" zoning designation from the subject property. Opponents also argued that policy 4 mandated that all such non-agricultural lands be developed before the reserve designation could be removed.

Intervenors responded, and the county agreed, that the two other UAR-designated parcels were in the same category as the subject property, and that Policy 4 does not require other properties with the same designation be given development priority over the subject property. The county also agreed that one of the residentially zoned parcels within the city was in agricultural use, and therefore did not have development priority. With regard to the other residentially zoned parcels within the city, the county found that they "may not be developable" due to unavailability of sewer or because they may be currently

used as septic drainfields. The county did not expressly respond to opponents' contention that Policy 4 mandates all other non-agricultural properties be developed first, but concluded that "there are no non-agricultural lands within the Sisters UGB that have priority for development over the subject property." Record 23.

Petitioners appear to argue that one of the UAR-designated properties, owned by the US Forest Service, (the USFS property) constitutes "other non-agricultural properties" because it is not designated agricultural, there is no evidence that the property is actually agricultural, and in fact is forested. However, with regard to the subject property, the hearings officer specifically found:

> "The record indicates the subject property is <u>not</u> zoned for agriculture, although it has been utilized for agricultural purposes. Moreover, the Hearings Officer finds this parcel is by definition 'marginal' agricultural land because it was designated as 'urban reserve' when the plan was adopted." Record 22. (Emphasis in original.)

The hearings officer did not explicitly apply this interpretation to the other UAR-designated properties. However, we find no basis to interpret Policy 4 differently in relation to other UAR-designated properties than the hearings officer applied it to the subject property. Thus, because the USFS property has been designated "urban reserve," for purposes of Policy 4 it is by definition "marginal agricultural land." We find no error in the county's conclusion that other UAR-designated properties do

not have development priority over the subject property.[7]

With regard to the residentially zoned properties within the city limits, petitioners do not appear to challenge the county's finding that the one residentially zoned property that is actually in active agricultural use should not have development priority. They do, however, challenge the county's finding regarding the other residentially zoned properties.

Petitioners correctly point out that the county found only that these other properties may not be developable because of sewer constraints, or because of their use as septic drainfields. The county did not, however, specifically find that any of the identified properties are undevelopable. Without a finding that the specific identified properties are unavailable for development, the county cannot factually support its conclusion that "there are no non-agricultural lands within the Sisters UGB that have priority for development over the subject property." Record 23.

Intervenor urges that we should nonetheless affirm the county's finding, based on our authority under ORS

[7]Petitioners' argument also suggests that part of the USFS property may not be UAR-designated, but actually is within the city limits, and developable as residential property. The only citation petitioners provide for this contention is written argument by individual opponents. In our review of the record we could not determine the factual basis for petitioners' assertion, and could not identify any USFS property within the city limits zoned for residential development. Because we cannot determine to what property petitioners refer, we cannot respond to their argument.

197.829(2) to interpret local provisions in the first instance. Presumably, the interpretation intervenors urge us to make is whether Policy 4 requires every "other non-agricultural" property to be developed before any UAR-designated property may be developed. Intervenors urge that requiring prior development of every such property would be illogical and in direct conflict with Policy 3. Petitioners argue that the language of Policy 4 clearly and unequivocally mandates such development. We need not reach that interpretative question, however, because the county's factual finding is deficient regardless of how Policy 4 is interpreted. The hearings officer's finding that other residentially-zoned property "may not be developable" does not factually justify the conclusion that "there are no non-agricultural lands" with priority for development. This factual inadequacy in the findings cannot be remedied by an interpretation of how much development Policy 4 requires.

Because of this deficiency in the county's findings, the county has not yet established compliance with the first of the two alternative bases for compliance with Policy 4. However, this deficiency requires remand only if the county's other basis for finding compliance with Policy 4 is also deficient.

B. Public Need

Petitioners argue the city's conclusion that there is a public need to remove the "Reserve" designation from the

subject property is not supported by substantial evidence in the record.[8]

The county made specific findings to establish that there is a public need for additional land for housing within the city of Sisters. Petitioners disagree with the conclusions the county reached based upon the facts in the record. They construe the facts differently, and argue that the facts compel an opposite conclusion, i.e., that there is no public need for additional land for housing within the Sisters city limits. The question before us, however, is not whether petitioners' analysis of the facts is defensible, but whether the facts in the record can support the county's conclusion.

As a review body, we are authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(7)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. City of Portland v. Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Bay v. State Board of Education, 233 Or 601, 605, 378 P2d 558 (1963); Carsey v. Deschutes

[8]Petitioners also argue the city misconstrued the term "need" as applied in this policy, and conclude that no deference is owed the county's interpretation. However, petitioners do not establish how the county misconstrued the term "need," independent of their argument that the factual basis upon which the county concluded there was a public need did not satisfy the "need" standard. Without any explanation of how petitioners interpret the Policy 4 "need" standard or how the county's interpretation is wrong, we are unable to address their allegation.

County, 21 Or LUBA 118, aff'd 108 Or App 339 (1991). In reviewing the evidence, however, we may not substitute our judgment for that of the local decision maker. Rather, we must consider and weigh all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decisionmaker's conclusion is supported by substantial evidence. Younger v. City of Portland, 305 Or 346, 358-60, 752 P2d 262 (1988); 1000 Friends of Oregon v. Marion County, 116 Or App 584, 588, 842 P2d 441 (1992).

Petitioners disagree with the county's evaluation of the evidence in this case, and make plausible arguments as to how the facts could support a contrary conclusion. Petitioners' arguments do not, however, establish that a reasonable person could not reach the county's conclusion, based upon the facts before it. We cannot reweigh the evidence, or substitute our judgment for that of the county. There is substantial evidence in the record to support the county's conclusion that the public need component of Policy 4 has been satisfied.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners contend the county's findings of compliance with Standard D of SZO 23(3) misconstrue the law, are inadequate and are not supported by substantial evidence. SZO 23(3), Standard D requires that the county establish "that there is a public need for the change of the kind in

question."

The county's findings of compliance with this standard, as well as petitioners' arguments against compliance, incorporate the findings, and arguments against those findings, of public need under Policy 4. On the same basis, we agree that the county's findings establish compliance with this standard.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners contend the county misconstrued the law and made inadequate findings not based on substantial evidence in finding compliance with SZO 23(3), Standard E, which requires

> "that the need will be best served by changing the classification of the particular piece of property in question as compared with other available property."

The county's findings do not expressly interpret what Standard E requires. The findings recite the benefits of changing the designation on the subject property. They also discuss the need for residential zoning of this property due to the constraints of existing RH designated property within the city. They do not, however, provide any comparison of the subject property to either other UAR-designated property or to other property within the city with zoning designations other than RH or RS. Petitioners argue, and we agree, that Standard E requires such a comparison.

Intervenor disputes that Standard E requires a comparison of other properties within the city. Intervenor argues:

> "[T]he findings of need required for compliance with Policy 4 require proof of need for more residential land than presently available for development in the city. It would be illogical to look to the area that lacks an adequate supply of land for the additional residential development lands needed by the community. For these reasons, the comparison required by this section of the zoning ordinance must be made with other reserve lands which are theoretically capable of supplying additional, needed residential land." Response Brief 37.

The problem with intervenor's argument is that it is not in accord with the language of Standard E and it does not take into account the possibility of rezoning land within the city to accommodate a need for more residential development. The language of Standard E requires a comparison of all other available property, not just other UAR-designated property.

Petitioners cite to both the USFS property, and other RS-zoned property in the city, for which they argue the required comparison has not been completed. Regarding the USFS property, intervenor's response brief includes a detailed analysis of why the subject property compares favorably to the USFS property. While such an analysis could justify a finding of compliance with Standard E, that analysis is not in the county's findings. The findings include no comparison of the USFS property to the subject

property. Nor do the findings compare the subject property to the other, RS-zoned properties identified by petitioners.

In order to satisfy Standard E, the county must compare the subject property to both other UAR-designated properties and to other properties identified by petitioners within the city to determine whether the public need will be best served by changing the zoning of the subject property as compared to the others.

The fourth assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR

Petitioners contend the county misconstrued the law, and made inadequate findings not based on substantial evidence in finding compliance with SZO 23(3), Standard F, which requires "that there is proof of a change of circumstances or a mistake in the original zoning."

The county found, and we agree, that by establishing compliance with Policy 3, which authorizes removal of the reserve designation when 75% of the 1979 City of Sisters has developed, intervenor has established a change of circumstances sufficient to establish compliance with this standard.

The fifth assignment of error is denied.

The county's decision is remanded.