BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KENNETH THOMAS,	)	
	)	
Petitioner,	)	LUBA No. 98-043
	)	
vs.	)	FINAL OPINION
	)	AND ORDER
WASCO COUNTY,	)	
	)	
Respondent.	)	

Appeal from Wasco County.

Michael J. Lilly and Todd Sadlo, Portland, filed the petition for review and argued on behalf of petitioner.

Wilford K. Carey, Hood River, filed the response brief and argued on behalf of respondent.

GUSTAFSON, Board Chair; HANNA, Board Member, participated in the decision.

REMANDED 9/24/98

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

Petitioner appeals the county's approval of a conditional use permit for a dwelling not in conjunction with forest or farm use in the county's Forest/Farm 10-acre minimum (FF-10) zone.

FACTS

The subject property is a vacant five-acre lot on the southern periphery of a 25-lot subdivision created in 1912. The subdivision is zoned FF-10 and is comprised of one to 10-acre lots, most of which are developed with dwellings and small hobby farms. The subject property slopes up to and abuts petitioner's 1000-acre commercial forestry operation to the south, which is on land zoned Forestry-2/80-acre minimum (F-2/80). The subject property is vegetated with Oregon White Oak, pine trees and brush, and has soils with an agricultural capability rating of class III and a forest siting rating of class 6.

On July 7, 1997, the applicant submitted a request for a conditional use permit to build on the property a single-family nonresource dwelling, that is, a dwelling not in conjunction with farm or forest uses. The county's FF-10 designation is a nonresource designation, and does not presume Goal 3 (Agriculture) or Goal 4 (Forestry) standards or obligations. A nonresource dwelling is allowed in the FF-10 zone as a conditional use, subject to conditional use

standards in the county's land use development ordinance (LDO) 5.020. A nonresource dwelling on a substandard lot of record in the FF-10 zone is subject to additional criteria at LDO 11.020.

The county planning director administratively granted the applicant's conditional use permit on August 28, 1997. Petitioner appealed the planning director's approval to the county planning commission, which denied the appeal, approving the permit. Petitioner then appealed that decision to the county court, which on February 4, 1998, denied the appeal. The county court's decision approves the conditional use permit and adopts the findings and conclusions of law stated in a February 4, 1998 staff report.

This appeal followed.

FIRST, TENTH AND THIRTEENTH ASSIGNMENTS OF ERROR

In these assignments of error, petitioner argues that the county misconstrued LDO 5.020 in adopting an approach that allows the county to weigh or balance the appropriateness or desirability of the proposed conditional use against any adverse impacts, in determining whether the proposal complies with the conditional use criteria at LDO 5.020.

LDO 5.020 states, in part, that in judging whether the conditional use proposal should be approved or denied, the county

> "shall weigh the proposal's appropriateness and desirability or the public convenience or necessity to be served against any adverse conditions that

would result from authorizing the particular development at the location proposed, and to approve such use, shall find that the following criteria are either met, can be met by observance of conditions, or are not applicable." (Emphases added.)

LDO 5.020 then lists 11 criteria to be applied to a proposed conditional use.[1]

Petitioner argues that the county adopted an incorrect interpretation or approach regarding the application of LDO 5.020 that permeates its entire analysis. The challenged decision states:

"Wasco County has language in its conditional use approval criteria [at LDO 5.020] that sounds similar to criteria applied to goal 3 lands. It is critical to note, however, that these criteria must be considered by the Court when weighing 'any adverse' conditions against the 'appropriateness, desirability or the public convenience or necessity to be served.' Ultimately the Court must make a determination that the criteria are met, can be met with conditions or are not applicable. This determination is based on a weighing of the facts,

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[1]The relevant LDO 5.020 criteria are as follows:

"A. The proposal is consistent with the goals and objectives of the Comprehensive Plan and implementing Ordinances of the County.

"B. Taking into account location, size, design and operational characteristics of the proposed use, the proposal is compatible with the surrounding area and development of abutting properties by outright permitted uses.

"* * * * *

"J. The proposed use will not significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to or available for farm or forest use.

"K. The proposed use will not force a significant change in accepted farm or forest practices on surrounding lands devoted to or available for farm or forest use."

> not a requisite finding of no adverse impacts. This is a significantly different test than the more absolute 'pass or fail' application of nonfarm dwelling criteria on the County's goal 3 land." Record 20 (emphasis in original).

Petitioner contends that the county's interpretation is contrary to the express terms of LDO 5.020 because it allows the county to engage in a weighing process instead of determining whether or not the proposed use complies with the applicable criteria. Petitioner argues that applicable criteria are "pass or fail" in that the proposed use must comply with those criteria or the county cannot approve it. Petitioner urges us to find that the county's interpretation of LDO 5.020 is contrary to the express terms of that provision and cannot be affirmed. ORS 197.829(1)(a); see also Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992).

The county responds that it did not, as petitioner contends, construe LDO 5.020 to allow the county to weigh the pros and cons of the proposed use instead of applying and finding compliance with the conditional use criteria. According to the county, it interpreted LDO 5.020 as not requiring a standard of "no adverse impact," i.e., that the county can apply and find compliance with the conditional use criteria notwithstanding some adverse impacts to surrounding farm and forest operations. The county argues that the challenged decision employs that interpretation by applying each of the 11 criteria at LDO 5.020 and finding that the proposed use, as conditioned, meets those criteria. The

county contends that its interpretation is based on and is consistent with the express language of LDO 5.020 and thus we should defer to that interpretation. ORS 197.829(1)(a).

We agree with the county that petitioner is challenging an interpretation that the county did not make. The county did not engage, as petitioner suggests, in a freewheeling balancing of pros and cons instead of applying the LDO 5.020 conditional use criteria. Rather, it appears to have applied those criteria with the understanding that the proposed use may comply notwithstanding some adverse impacts. That understanding is consistent with the terms of LDO 5.020, quoted above, as well as the terms of the LDO 5.020 criteria. For example, LDO 5.020(J) requires a finding that the proposed use will not "significantly" increase the cost of farm or forest practices on surrounding lands, which implies that some increase in such costs is permissible. Petitioner has not established any basis for us to reverse or remand the city's interpretation of LDO 5.020.

The first, tenth and thirteenth assignments of error are denied.

SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR

In the second and third assignments of error, petitioner argues that the county misconstrued and made inadequate findings regarding LDO 5.020(A), which requires that the proposed use be consistent with goals and objectives in the

comprehensive plan, and LDO 11.020(B)(2),[2] which requires that the proposed nonresource dwelling be consistent with "farm and forest use policies" in the comprehensive plan. In the fourth assignment of error, petitioner argues that the county's findings regarding LDO 5.020(A) and 11.020(B)(2) are not supported by substantial evidence.

The challenged decision addresses both LDO 5.020(A) and 11.020(B)(2) by considering whether the proposed dwelling is consistent with comprehensive plan provisions directed at the FF-10 zone, particularly its stated purpose. The purpose of the FF-10 zone is to "provide for the continuation of forest and farm uses on soils which are predominantly class VII and forest site class 6 and 7; and to preserve open space for forest uses (other than strictly commercial timber production) and for scenic value in the Gorge." The county interprets this purpose as being "designed to ensure the preservation of open space values for a variety of uses, including non-commercial small-scale timber and woodlot, and scenic value or rural character, as accomplished by the minimum lot size of the [FF-10] zone." Record 23. The challenged decision finds that the proposed dwelling is consistent with this purpose because it preserves 90 percent of the parcel for scenic values and small-scale resource use, and finds that commercial

[2]LDO 11.020(B)(2) requires a finding that:

> "The proposed non-farm or non-forest dwelling is not inconsistent with the farm or forest use policies as provided for in the Comprehensive Plan."

forest standards regarding dwellings applicable to resource lands are not applicable to lands zoned FF-10. Record 24. The decision also discusses language in the comprehensive plan indicating that timber production is not a significant use for the FF-10 zone, and that no conflicts with timber production activities such as spraying are likely in the zone. Record 26.

Petitioner argues, first, that the county misconstrued both LDO 5.020(A) and 11.020(B)(2) in failing to identify, discuss or find compliance with farm or forest use policies in the comprehensive plan other than policies applicable to the FF-10 zone. The county responds that the only farm or forest use policies applicable to the subject property are those specific to the FF-10 designation, because such lands are not resource lands subject to standards and policies developed under Goals 3 and 4, and thus the county did not err by failing to identify and apply other, general farm or forest use policies based on Goals 3 and 4.

The challenged decision does not expressly interpret either LDO 5.020(A) or 11.020(B)(2) to require only consideration of plan policies specific to the FF-10 zone, however, that view is clearly manifest in the county's discussion and application of both provisions and the comprehensive plan. The county's implicit interpretation is adequate for our review. ORS 197.829(2). Petitioner has not established that the county's view of LDO 5.020(A) or

11.020(B)(2) is inconsistent with the text, purpose or policy of either provision. Accordingly, we affirm it. ORS 197.829(1)(a) to (c).

Petitioner argues next that the county failed to make adequate findings regarding comprehensive plan provisions specific to the FF-10 zone. In particular, petitioner contends that the comprehensive plan imposes a 10-acre minimum lot size in order to preserve small-scale resource uses and the other values protected by the FF-10 zone, and that the county fails to adequately explain why a nonresource dwelling on a substandard lot will provide for the continuation of those values or is otherwise consistent with the plan policies specific to the FF-10 zone.

We disagree with petitioner that the county's findings in this respect are inadequate. LDO 11.020 specifically allows nonresource dwellings on substandard lots, subject to special criteria. The challenged decision explains at some length why the proposed nonresource dwelling is consistent with the purpose of the FF-10 zone, emphasizing that the dwelling and associated development covers less than 10 percent of the property and thus 90 percent of the property remains available for small-scale resource use, scenic values and other values protected by the FF-10 zone, which the county understands to include limited rural residential use.

Finally, petitioner argues that the county's findings regarding LDO 5.020(A) and 11.020(B)(2) are not supported by

substantial evidence. In particular, petitioner contends that there is no evidence that the proposed nonresource dwelling allows for the continuation of small-scale resource use, given that development such as required fire breaks will cover an unspecified additional portion of the five-acre property. Further, petitioner argues that there is no evidence to support the county's findings that the surrounding area in the FF-10 zone is committed to rural residential uses.

The county responds that the challenged decision discusses and cites to evidence that the surrounding area zoned FF-10 is almost completely built-out with residences and small hobby farms. The county argues that fire breaks merely entail removing fuel loads such as downed limbs and shrubs from the ground within a specified distance from the dwelling and thus the fire breaks are not inconsistent with future use of the property for small-scale farm or forest use. Substantial evidence is evidence a reasonable person would rely upon to reach a conclusion, notwithstanding that different reasonable people could draw different conclusions from the evidence. Adler v. City of Portland, 25 Or LUBA 546 (1993). We agree with the county that its findings regarding LDO 5.020(A) and 11.020(B)(2) are supported by substantial evidence in the two respects petitioner challenges.

The second, third and fourth assignments of error are denied.

FIFTH AND EIGHTH ASSIGNMENTS OF ERROR

In the fifth assignment of error, petitioner argues that the county made inadequate findings with respect to LDO 5.020(B), which requires that the county find the proposed use is "compatible with the surrounding area and development of abutting properties by outright permitted uses," by considering "location, size, design and operational characteristics." In the eighth assignment of error, petitioner makes similar arguments with respect to LDO 11.020(B)(1), which requires a finding that a proposed nonresource dwelling on a substandard lot "is not incompatible with farm and forest uses in the area, and does not interfere with the farm or forest practices."

A. LDO 5.020(B)

With respect to LDO 5.020(B), petitioner argues that the county made inadequate findings because (1) the county failed to describe or find compatibility with specific outright permitted uses in the FF-10 or F-2/80 zone; (2) the county failed to address specific evidence showing the proposed use presents a fire risk to and is incompatible with petitioner's operation; and (3) the county failed to identify or impose conditions sufficient to ensure that the proposed dwelling will be compatible with surrounding uses and thus comply with LDO 5.020(B).

Adequate findings must (1) identify the relevant approval standards, (2) set out the facts relied upon, and (3) explain

how the facts lead to the conclusion that the request satisfies the approval standards. Le Roux v. Malheur County, 30 Or LUBA 268, 271 (1995).

The challenged decision devotes four pages to considering the nature of the surrounding area and the uses permitted in both the FF-10 and F-2/80 zones, and examining the location, size, design and operational characteristics of the proposed dwelling. The decision states that farm and forest uses and houses in conjunction with those uses are permitted uses in the FF-10 zone but that the purpose of the FF-10 zone, to provide for part-time, small-scale resource uses, qualifies the type and scale of such uses. The decision then finds that the proposed use is compatible with those permitted uses, so understood, as well as the actual land use pattern in the area, which is largely 10-acre rural residential uses. The decision concludes that the proposed use complies with LDO 5.020(B), finding that it "cannot be deemed incompatible with the commercial forest use to the south when the impacts of this single dwelling do not expose forest lands to significantly higher impacts than are already present on previously developed adjacent lands." Record 29. The decision discusses fire risks from the proposed dwelling and finds no evidence of any increased risk or impacts beyond those caused or necessitated by the existing developed lots abutting petitioner's operation.

We disagree with petitioner's first argument, that the county failed to describe the permitted uses in the surrounding area. The terms of LDO 5.020(B) do not require a listing of every possible subcategory of use permitted in the FF-10 and F-2/80 zones and an analysis of compatibility keyed to each use. The county's general description of permitted uses in each zone and its explanation why the type and scale of permitted uses are qualified in the FF-10 zone are adequate.

We also disagree with petitioner's third argument, that the conditions imposed are inadequate to ensure the compatibility of the proposed use with petitioner's forestry operation. Petitioner argues that the discussion of LDO 5.020(B) mentions only one condition, a condition that the applicant sign a farm/forest management easement. Petitioner contends that this single condition is wholly inadequate to ensure compatibility between the proposed use and petitioner's operation, particularly with respect to fire risks. However, the challenged decision imposes 16 conditions of approval, a number of which are directed at fire risks and other impacts. The county finds that "[a]s conditioned," the proposed use is reasonably compatible with permitted uses in the resource zone to the south. Record 27. We do not understand the county to have found that compliance with LDO 5.020(B) depends solely on the single condition that the applicant sign a farm/forest management easement.

However, for reasons expressed more fully below with respect to LDO 11.020(B)(1), we agree with petitioner that the county failed to address evidence regarding specific impacts from the proposed use and that, given that evidence, the county's explanation as to why the proposed use is compatible with permitted uses is inadequate.

B. LDO 11.020(B)(1)

Petitioner contends that the county's findings regarding LDO 11.020(B)(1) are inadequate because they fail to describe the farm or forest uses and practices on surrounding parcels or explain why the proposed dwelling is compatible with those practices. Petitioner cites Veatch v. Wasco County, 23 Or LUBA 492, 496 (1992), where we held that the LDO 11.020(B)(1) compatibility standard required the county to "determine what the farm and forest uses are in [an] identified area and determine whether the proposed nonresource dwelling will be 'incompatible' with or will 'interfere' with those practices." Petitioner argues that he testified regarding the farm and forest practices on his property, but the county failed to recite those practices or explain why the proposed dwelling would not interfere with those practices, other than to conclude that the proposed dwelling would not cause significantly higher impacts than are already caused by existing residential development adjacent to petitioner's forestry operation.

Although the challenged decision describes a few of the farm and forest practices occurring in the area in general and on petitioner's land in particular, it does so only in passing, in addressing particular challenges petitioner raised below. Instead, the county relies almost exclusively on its conclusion that the proposed dwelling will not cause any greater impacts or incompatibility than existing residential uses. The county applies that conclusion essentially as a shortcut to the analysis required by LDO 11.020(B)(1), which requires a description of farm and forest uses and practices in the area, and an explanation why the proposed nonresource dwelling is not incompatible with and does not interfere with those practices.

The challenged decision essentially reasons that existing residential uses are compatible with petitioner's operations, the proposed use will have no significant impact beyond the existing impacts, and thus the proposed use is also compatible. The difficulty with the county's syllogism is that it fails to address petitioner's testimony, at Record 139, that the proposed dwelling itself, and not just existing residential uses in general, will require petitioner to change his forestry practices and incur additional costs. Petitioner specifically mentioned increased fire patrols, construction and maintenance of a fire buffer stripped of all vegetation along the common border, and the provision of a water supply for fire suppression purposes.

The county is not required to address all conflicting evidence in its findings, but the findings must address and respond to specific issues raised in the local proceedings that are relevant to compliance with approval standards. Thomas v. Wasco County, 30 Or LUBA 302, 310 (1996). The county's explanation may be valid to the extent the record demonstrates only that residential uses in general have impacts on farm and forest practices, and that the proposed dwelling causes no increase in impacts above and beyond the existing level. However, where a party has alleged increased costs and impacts on resource uses attributable to the proposed dwelling itself, it is incumbent on the county to address those allegations in explaining why the proposed dwelling is compatible with and does not interfere with farm and forest practices in the area.

We conclude that the county's findings regarding LDO 11.020(B)(1) are inadequate because they fail to describe the farm and forest practices in the surrounding area. The county's findings are also inadequate because they fail to explain why the proposed use is compatible with and does not interfere with petitioner's forestry operation, given evidence that the proposed use may have impacts on petitioner's forestry operation distinct from those of existing residential uses. The county makes the same findings, based on similar reasoning, with respect to the compatibility standard at LDO

5.020(B), and, for the same reasons, we conclude those findings are also inadequate.

The fifth and eighth assignments of error are sustained, in part.

SEVENTH ASSIGNMENT OF ERROR

Petitioner argues that the county misconstrued LDO 11.020(B)(1) in finding that its discussion of LDO 5.020(B) "fully addressed" the requirements of LDO 11.020(B)(1).

The challenged decision refers to its discussion of the compatibility requirement at LDO 5.020(B) as fully addressing the compatibility requirement at LDO 11.020(B)(1), and provides two additional pages of discussion, the gist of which is that the proposed dwelling will cause no more incompatibility or interference with farm and forest uses in the area than is already caused by similar existing residential development in the area. Record 52-53.

Petitioner argues that the county misconstrued LDO 11.020(B)(1) in treating compliance with LDO 5.020(B) as constituting compliance with LDO 11.020(B)(1), because the two standards are not identical. Petitioner explains that, unlike LDO 5.020(B), the criteria at LDO 11.020 have no preface allowing a "weighing" or balancing of the appropriateness of the proposal against adverse impacts, but instead require straightforward compliance with its criteria. Petitioner does not argue that the county expressly applied a "weighing" analysis with respect to any criteria in LDO 11.020; instead,

we understand petitioner to argue that the cross-reference to the county's findings under LDO 5.020(B) improperly imports the "weighing" analysis and implicitly applies that analysis to the LDO 11.020 criteria.

We determined in the first assignment of error that the county had not, as petitioner contended, construed LDO 5.020 to allow a freewheeling weighing of evidence regardless of compliance with that provision's criteria. Instead the county interpreted LDO 5.020 as not requiring the complete absence of adverse impacts. The county's finding that its discussion of LDO 5.020(B) "fully addresses" the requirements of LDO 11.020(B)(1) does not necessarily imply that any "weighing" analysis under LDO 5.020(B) also applies to LDO 11.020. However, we agree with petitioner that the county's finding with respect to LDO 11.020(B)(1) is inadequate because it adopts the discussion of LDO 5.020(B) without addressing the differences between the two standards or explaining why a discussion of the requirements at LDO 5.020(B) can, without more, demonstrate compliance with the requirements of LDO 11.020(B)(1).

The seventh assignment of error is sustained.

SIXTH AND NINTH ASSIGNMENTS OF ERROR

Petitioner argues that the county's findings of compatibility required by LDO 5.020(B) and 11.020(B)(1) are not supported by substantial evidence. Petitioner contends that the record contains conflicting evidence regarding the

location of the proposed dwelling, with the result that the dwelling may be placed as close as 40 feet from petitioner's forestry operation, making it impossible to build the required fire breaks and to ensure the compatibility of the dwelling with surrounding uses.

The challenged decision states that, according to the "amended site plan," the dwelling will be located approximately 225 feet from the south property line and 300 feet from the north property line. Record 29. However, according to petitioner, the only site plan in the record is the initial site plan, which shows the house located 125 feet from the south line and shows lot dimensions that make the location identified by the challenged decision impossible. Petitioner argues that the county has no idea where the dwelling will be located and has not required a particular location, and therefore the dwelling could be located as close as the 40-foot setback line.

The county responds that the initial site plan included in the record incorrectly describes the lot dimensions and that the county mistakenly failed to submit the amended site plan to LUBA. The county attaches to its brief a copy of the amended site plan, which differs from the initial site plan in showing the correct site dimensions and in showing the dwelling located 225 feet from the south boundary and 300 feet from the northern boundary, instead of 125 and 225, respectively.

The amended site plan is not in the record and thus may not be considered in determining whether the challenged decision is supported by substantial evidence. Nonetheless, petitioner's substantial evidence challenge is not well taken. The challenged decision, as well as the planning commission decision and all staff reports, adopts and relies exclusively on the amended site plan and the dimensions and location it depicts rather than the initial site plan. Petitioner does not contend that the initial site plan correctly describes the five-acre subject property and the proposed location of the dwelling,[3] and thus the initial site plan undermines the county's conclusions based on the amended site plan. Rather, petitioner argues that the inadvertent absence of the amended site plan from the record submitted to LUBA means there is no evidence at all in the record supporting the county's findings regarding the location of the proposed dwelling. We disagree. The record is replete with statements that the proposed dwelling will be located 225 feet from the south property line. The challenged decision refers to and adopts the specific distances and location depicted in the amended site plan. Those statements and references and the adoption of measurements are evidence that supports the county's findings. We conclude that those findings are supported by substantial evidence in the record as a whole.

[3]The initial site plan understates the subject property's lot dimensions by approximately one-third.

Petitioner also alleges, in the sixth assignment of error, that the county's findings regarding the nature of other uses on surrounding parcels in the FF-10 zone are unsupported by substantial evidence. In the challenged decision, the county examined tax information and developed a chart placing the surrounding parcels into various categories: rural (residential) tract, farm use, forest use, commercial use and developed or undeveloped properties. Petitioner objects to the county's characterization of the surrounding uses as dominated by mixed nonfarm residential use and small-scale hobby farms, contending that, viewed as a matter of acreage rather than types of uses, petitioner's 1000-acre forestry operation "dominates" the surrounding area, undermining the county's finding that land uses in the area are dominated by nonresource uses. Further, petitioner objects to the county's reliance on tax information, arguing that tax records are inadequate to support conclusions regarding the nature of uses in the area, absent some demonstrated connection between tax status and uses actually occurring on the property, citing 1000 Friends of Oregon v. LCDC) Lane Co., 305 Or 384, 406, 752 P2d 271 (1988).

Neither objection is well taken. Petitioner has not established that LDO 5.020(B) or other authority requires the county to characterize the surrounding area according to acreage rather than type of use. Further, petitioner's reliance on 1000 Friends is misplaced. 1000 Friends was an

acknowledgment case addressing whether Lane County erred in determining the minimum lot size in EFU zones necessary for a farm to qualify for a farm dwelling. The court held that the county erred in relying exclusively on tax lot sizes, which bear no relationship to actual farm sizes. 305 Or at 407. In the present case, the county compiled information found in tax records to categorize the uses and development status for each parcel in the area. Unlike the tax lot information used in 1000 Friends, the information compiled by the county in the present case appears relevant to and probative of the nature of the surrounding uses. Petitioner has not established that LDO 5.020(B) or any other authority requires more.

The sixth and ninth assignments of error are denied.

ELEVENTH AND TWELFTH ASSIGNMENTS OF ERROR

Petitioner argues that the county's findings regarding LDO 5.020(J) are inadequate and not supported by substantial evidence. LDO 5.020(J) requires the county to find that the proposed use will not significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to or available for resource uses.

Petitioner repeats his argument in the eighth assignment of error that, in order to determine whether the proposed dwelling significantly increases the cost of resource practices, the county must first identify the farm and forest practices occurring on surrounding lands, i.e. petitioner's commercial forestry operation. Petitioner relies on a line of

cases involving the statutory analogue to LDO 5.020(J) at ORS 215.296(3)(b)(B), which governs conditional use permits on resource lands,[4] for the proposition that the county must identify farm and forest practices in the area before it can make a meaningful determination whether the proposed dwelling significantly increases the cost of those practices.

Petitioner contends that the challenged decision mentions only a few of the farm and forest practices on his land, without systematically inquiring into or establishing what those practices are. Further, petitioner states that the county ignored the evidence in his testimony regarding his farm and forestry practices and increased costs to his operation caused by nearby residential uses as well as the proposed use.

The county responds that cases and statutes involving conditional use permits on resource land are inapposite, because the FF-10 zone is not resource land. The county acknowledges that it cannot interpret or apply local ordinances that are required by statutory standards in ways that are inconsistent with those statutory standards. See Leathers v. Marion County, 144 Or App 123, 131, 925 P2d 148 (1996). However, the county argues that standards developed for resource lands should not and need not be applied in the

[4]Petitioner cites to Donnelly v. Curry County, ___ Or LUBA ___ (LUBA No. 96-101, November 3, 1997), slip op 22; DLCD v. Klamath County, 25 Or LUBA 355, 366 (1993); and Schellenberg v. Polk County, 21 Or LUBA 425, 440 (1991).

same manner to nonresource lands, and thus the county was not required to identify specific farm and forest practices on surrounding lands. In any case, the county argues, identification of specific farm and forest practices is unnecessary, because the county determined in the challenged decision that the proposed dwelling will have no significant impact on farm or forest practices beyond those already caused by existing residential uses in the area.[5]

For the reasons expressed in our discussion of the eighth assignment of error, we agree with petitioner that the county is required to identify the farm and forest practices on surrounding lands, and that the county's explanation regarding why the proposed dwelling will have no significant impact is inadequate. Regardless of whether the county is obligated to apply LDO 5.020(J) in the FF-10 zone consistently with ORS 215.296(3)(b)(B), the county cannot provide an adequate explanation why the proposed use will not significantly increase the cost of accepted farm or forest practices on

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[5]For example, the challenged decision addresses petitioner's testimony regarding changes to his forest practices by stating:

> "[T]here are existing nonfarm/nonforest dwellings due east and west of the subject parcel. If [petitioner] feels it will be necessary to [change tree species and cut rotations], the existing nonresource dwellings must already require him to do this. Approval of the [proposed dwelling] will require him to continue this existing management activity, and as such, will not require him to change this practice. If this practice is already being conducted, [petitioner's] cost will remain the same. If this practice is not already being conducted, the one new home will not cause him to suddenly begin this practice when his parcel is already surrounded by many nonresource dwellings." Record 48.

surrounding lands without first identifying what those practices consist of. The fact that the FF-10 zone is no longer a resource zone is immaterial, as LDO 5.020(J) by its terms requires a determination regarding farm and forest practices on surrounding lands, not limited to lands within the same zone as the subject property. Further, the county has failed to address evidence that the proposed dwelling may cause significant increases to the cost of farm and forest practices on petitioner's property, or explain why, given that evidence, the proposed dwelling complies with LDO 5.020(J).

Petitioner also contends, in the twelfth assignment of error, that the county's findings regarding LDO 5.020(J), particularly the threat of fire posed by the proposed dwelling, are not supported by substantial evidence. Petitioner argues that the addition of a fourth dwelling to the three already adjacent to petitioner's operation increases the risk of fire from residential uses in the immediate area by 25 percent. Petitioner contends the extra costs and measures he testified to (increased patrols, fire buffer, fire suppression well) are warranted by and directly attributable to the increased risk of fire posed by the proposed dwelling.

The county responds that the record supports the county's finding that the proposed dwelling presents no greater fire threat than already exists, citing in particular to comments by the fire marshal of the local fire district, that "the proposed use will not create any further fire danger, in fact

it would possibly reduce the danger due to cleanup and maintenance of the parcel." Record 34. The county argues that because there is substantial evidence the proposed dwelling presents no greater fire threat than already exists, there is also substantial evidence supporting the county's finding that the proposed dwelling will not cause any significant increase in the cost of farm and forest practices.

Where the evidence is conflicting, if a reasonable person could reach the decision made by the local government in view of all the evidence in the record, LUBA will defer to the local government's choice between the conflicting evidence, notwithstanding that reasonable people could draw different conclusions from the evidence. Canby Quality of Life Committee v. City of Canby, 30 Or LUBA 166, 175 (1995). The city's finding that the proposed dwelling presents no greater risk of fire than already exists is supported by substantial evidence. However, it does not necessarily follow that the same evidence also provides substantial support for the county's finding that the proposed dwelling will not significantly increase the cost of farm and forest practices on petitioner's land. The county cites to no evidence contrary to petitioner's testimony regarding the increased costs he testified are attributable to the proposed dwelling. While the county is not necessarily obligated to find, based on that testimony, that the proposed dwelling significantly increases the cost of farm or forest practices, it must

explain why other substantial evidence in the record supports the county's findings. For these reasons, we conclude that the county's findings regarding LDO 5.020(J) are not supported by substantial evidence.

The eleventh and twelfth assignments of error are sustained.

FOURTEENTH AND FIFTEENTH ASSIGNMENTS OF ERROR

Petitioner argues that the county's findings regarding LDO 5.020(K) are inadequate and not supported by substantial evidence. LDO 5.020(K) requires a finding that the proposed use will not force a significant change in accepted farm or forest practices on surrounding lands devoted to or available for farm or forest use.

Petitioner repeats his argument, resolved above, that the county erred in failing to identify the accepted farm and forest practices on surrounding lands. In addition, petitioner contends that the county erred in finding that petitioner is not entitled to use accepted forest practices on portions of his property that are near existing and approved dwellings. Petitioner apparently refers to the county's finding that:

> "Accepted practices vary from the heart of a resource zone to the edge. Exposure to risks generated by non-resource uses are bound to be greater the nearer a resource property is to a non-resource zone." Record 49.

Contrary to petitioner's characterization, the county did not find that petitioner could not use accepted forest

practices near existing dwellings, but rather that the nature of accepted practices varies the closer the practice is to a nonresource zone. Petitioner does not explain why the finding the county actually made provides a basis for reversal or remand.

Petitioner also contends that the county's finding of compliance with LDO 5.020(K) is not supported by substantial evidence. Petitioner repeats the same arguments made with respect to LDO 5.020(J), contending that he testified to specific changes in his farm and forest practices attributable to the proposed dwelling. The county makes the same responses.

For the reasons stated above, we conclude that the county's findings regarding LDO 5.020(K) fail to identify the farm and forest practices on surrounding lands and are thus inadequate. Further, the county's findings regarding LDO 5.020(K) are not supported by substantial evidence because they fail to address evidence that the proposed dwelling will change petitioner's farm and forest practices, or explain why LDO 5.020(K) is satisfied, notwithstanding those alleged changes.

The fourteenth and fifteenth assignments of error are sustained, in part.

SIXTEENTH AND SEVENTEETH ASSIGNMENTS OF ERROR

Petitioner argues that the county's finding of compliance with LDO 11.020(B)(4) is inadequate and not supported by

substantial evidence. LDO 11.020(B)(4) requires the county to find that the "substandard lot-of-record shall have a sufficient area and otherwise be capable of being served by a domestic water supply and sewage disposal system approved by the appropriate sanitary authority."

The county found that:

> "With two conditions, the request is consistent with [LDO 11.020(B)(4)].
>
> "A condition requiring the applicant to obtain approval from the Wasco County Sanitarian on a subsurface sewage disposal system prior to the issuance of zoning approval on a building permit shall ensure compliance with [LDO 11.020(B)(4)].
>
> "A condition requiring domestic water supply and [that] electrical service to the functioning well be in place prior to issuance of zoning approval on a building permit will ensure compliance with [LDO 11.020(B)(4)]." Record 56.

Petitioner argues that the county failed to find, as it must, that the subject property is of sufficient size to support a sewage disposal system and a well, in particular a well that is intended not only for domestic uses but also for fire suppression. In Thomas, we held that:

> "A local government may find compliance with applicable criteria by either (1) finding that an applicable approval standard is satisfied, or (2) finding that it is feasible to satisfy an applicable approval standard and imposing conditions necessary to ensure that the standard will be satisfied. * * * The county cannot, however, rely on the impositions of conditions alone; conditions do not excuse the county from first establishing that the relevant criterion can be satisfied." 30 Or LUBA at 311 (citations omitted).

The challenged decision makes no effort to find either that LDO 11.020(B)(4) is satisfied or that it is feasible to satisfy that provision with conditions imposed to ensure compliance. In particular cases, the feasibility of compliance need not be explicitly stated. See Tenly Properties Inc. v. Washington County, ___ Or LUBA ___ (LUBA No. 97-110, April 15, 1998), slip op 11-12 (stating principle). However, here petitioner contends that there is no evidence in the record that the subject property is of sufficient size or capable of being served by a domestic well. Petitioner argues that a groundwater study in the record indicates that wells in the area should optimally be placed every 10 acres, and thus it is incumbent on the county to explain why the applicant's substandard five-acre lot is large enough, and otherwise properly spaced between other wells, to support a well for the domestic and fire suppression purposes required. Petitioner notes that the county only requires a "functioning well" without any requirements for minimum volume or any indications of what capacity is necessary to satisfy the domestic and fire suppression demands placed on the well.

The county responds that imposing conditions that require obtaining sewer and establishing a functioning well is adequate to ensure compliance with LDO 11.020(B)(4), and further that the recommendation to space wells at least 10 acres apart is merely optimal, and that, at least in some cases, a minimum five-acre spacing is permissible. The county

cites to the same section in the groundwater study as petitioner does, as evidence supporting a finding that the five-acre subject property is a sufficient size and is otherwise capable of being served by a well. The language relied upon states, with apparent reference to areas including the subject property:

> "For sections where aquifer type and performance are known and drilling density is highest, well spacing may be one well per 10 acres (optimum) without undue risk. Because there are indications that higher densities may be feasible, an additional 10 percent of locations may be at closer spacing, for a total of about 70 wells per section allowable, with a 10-acre optimum and a 5-acre minimum spacing. Obviously there should be flexibility in applying this as a guideline." Record 276.

The language both parties rely on appears to indicate that well spacing of less than 10 acres should be evaluated on a case-by-case basis, where higher density has been shown to be feasible. The county does not cite to any evidence that it is feasible to establish an adequate water supply on the subject property. In the absence of such evidence, we agree with petitioner that, to the extent the county made findings with respect to LDO 11.020(B)(4), those findings are not supported by substantial evidence. Further, we agree with petitioner that the county's findings are inadequate because they fail to establish that the subject property is of sufficient size or otherwise capable of being served by domestic water, or that it is feasible, with conditions, for the proposed use to comply with LDO 11.020(B)(4).

The sixteenth and seventeenth assignments of error are sustained.

The county's decision is remanded.