BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

STEVE MATIACO, JOHN JUNGWIRTH
and CAROLE MATIACO,
Petitioners,

vs.

COLUMBIA COUNTY,
Respondent,

and

COLUMBIA COUNTY CITIZENS FOR ORDERLY GROWTH
and JENNIFER KIRKPATRICK,
Intervenors-Respondent.

LUBA No. 2002-029

FINAL OPINION
AND ORDER

Appeal from Columbia County.

A. Richard Vial, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief were Christopher M. Tingey and Vial Fotheringham LLP.

No appearance by Columbia County.

Kristin L. Udvari, Portland, filed the response brief and argued on behalf of intervenors-respondent. With her on the brief was Ball Janik LLP.

BASSHAM, Board Member; HOLSTUN, Board Chair; BRIGGS, Board Member, participated in the decision.

REMANDED 06/06/2002

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal county denial of conditional use permits to build three single-family dwellings on three parcels zoned Primary Forest (PF-76).

MOTION TO INTERVENE

Columbia County Citizens for Orderly Growth and Jennifer Kirkpatrick (intervenors) move to intervene on the side of the county. There is no opposition to the motion and it is allowed.

MOTION TO FILE REPLY BRIEF

Petitioners request leave to file a reply brief, pursuant to OAR 661-010-0039. Intervenors object, arguing that the reply brief does not address any "new matter" raised in the response brief. We agree. The proposed reply brief simply reiterates arguments made in the first and second assignments of error in the petition for review. The motion to file a reply brief is denied.

FACTS

Petitioners own five contiguous undeveloped parcels located in Township 4 North, Range 2 West, Section 19, zoned PF-76. The five parcels range from 9.48 to 15.02 acres in size. Approximately 534 acres of Section 19 consist of land zoned PF-76, divided into 12 parcels. Approximately four acres of Section 19 consist of lands zoned for community service (CS-1), in two parcels. The remainder of Section 19 consists of lands zoned Rural-Residential (RR-5), divided into 13 parcels, at least nine of which are developed with dwellings. The portion of Section 19 zoned PF-76 is designated Major Habitat and is subject

to the county's Big Game Range Overlay (BGR).[1] As relevant here, the BGR zone imposes a residential density standard of one dwelling unit per 38 acres.[2]

In September 2001, petitioners filed five separate applications with the county to construct single-family dwellings on each parcel, pursuant to the "template test" at OAR 660-006-0027 and corresponding land use regulations. To satisfy the CCZO 1193 density standards, petitioners submitted a statement that 11 dwellings currently exist within Section 19, or one dwelling per 58 acres. *See* Record 2028.

County planning staff prepared an individual staff report for each application, each of which recommended approval of each application on the grounds that one additional dwelling would not violate the density standard. The planning commission chose to address all five applications together. Staff submitted a supplemental report finding that 14 dwellings currently existed within Section 19, and therefore that only two of the five

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[1]The parties dispute whether the entirety of Section 19 is designated Major Habitat or only that portion zoned PF-76. The challenged decision appears to proceed under the assumption that only the portion of Section 19 zoned PF-76 is designated Major Habitat. We need not resolve the parties' dispute on this point.

[2]Columbia County Zoning Ordinance (CCZO) 1191 through 1193 govern the BGR overlay zone, and provide in relevant part:

> "1191 Purpose: To protect sensitive habitat areas for the Columbian white-tailed deer and other Big Game by limiting uses that conflict with maintenance of the areas. This section shall apply to all areas identified in the Comprehensive Plan as a major or peripheral big game range or Columbian white-tailed deer range. The major habitat designation is applied to all land in the primary forest zone. The peripheral habitat designation is applied to all land in the forest-agriculture zone.
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> "* * * * *
>
> "1193 Development Standards: In the Big Game Range zone the following standards shall apply:
>
> ".1 Big Game habitat density standards:
>
> "A. Major Habitat – 1 dwelling unit per 38 acres with clustering."

applications could be approved consistent with the density standard. Record 80.[3] The planning commission approved two of the proposed dwellings, but denied dwellings on the three westernmost lots furthest from the access road, on the grounds that allowing more than two dwellings would increase the dwelling density within Section 19 beyond the one dwelling per 38 acres standard specified in CCZO 1193.

Petitioners appealed the planning commission denial of three dwellings to the board of commissioners, while opponents appealed the approval of two dwellings. Prior to the hearing before the county board, planning staff issued a report recommending approval of the three denied permits, on the grounds that the CCZO 1193 density standard does not apply to the 640 acres of Section 19, but rather to the 534 acres zoned PF-76. Record 1327. Staff found that only one dwelling currently existed in the portion of Section 19 zoned PF-76, and therefore, in staff's view, allowing all five proposed dwellings would not exceed the density standard.

At the public hearing on February 6, 2002, petitioners submitted additional evidence supporting their view that only 11 dwellings currently exist in Section 19. Intervenors submitted testimony that 15 dwellings currently exist in Section 19. On February 13, 2002, the board of commissioners deliberated and voted to affirm the planning commission, denying the three disputed dwelling applications, and approving two dwellings. The county's final decision, issued February 20, 2002, interprets CCZO 1193 to require consideration of all dwellings in the entire section, and concludes that petitioners had failed to demonstrate there were fewer than 14 dwellings in Section 19. This appeal followed.

[3]The parties appear to agree that if the 640 acres of Section 19 is the denominator for the dwelling density standard, then the standard is violated if the proposed dwelling results in more than 16 dwellings within the section (640 acres divided by 17 dwellings equals a density of approximately one dwelling per 37 acres).

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the county erred in failing to exclude dwellings located in the RR-5 zone from the dwelling density calculation under CCZO 1193. According to petitioners, the county's comprehensive plan identifies lands zoned rural residential as "impacted" lands and specifies that "impacted" lands are exempt from the BGR density standard.[4] CCZO 1193 implements the comprehensive plan big game habitat area policies. Because "impacted" rural residential lands are not subject to the BGR policies, petitioners argue, calculations of dwelling density under CCZO 1193 should not include such lands or

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[4]The Columbia County Comprehensive Plan (CCCP) provides, in relevant part:

> "The Oregon Department of Fish and Wildlife [ODFW] has recommended the following dwelling unit densities per section in big game habitat areas:
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> > "Major Habitat – 1 unit per 38 acres using clustering techniques.
> >
> > "Peripheral Habitat – 1 unit per 19 acres using clustering techniques.
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> "The majority of the areas designated in Columbia County as either Major or Peripheral Big Game Range are zoned Primary Forest (PF-38), Forest-Agriculture (FA-19), and Primary Agriculture (PA-38). Activities permitted within these zones are generally considered compatible with big game habitat. * * *
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> "Portions of the Major and Peripheral Big Game Range have been found 'built and committed' and are zoned rural-residential because of previous residential impact. This zone allows residential development at densities higher than those recommended by [ODFW]. Lands within this zone correspond with those areas recognized and mapped as 'impacted' by the [ODFW]. Substantial conflicts between big game and residential use already exist in these areas. Because of this, little additional impact for big game is expected in areas zoned for rural residential use. Notwithstanding the lack of detail on the Wildlife Overlay Impact map (Map 44), all exception areas shall be considered impacted and exempt from the standards of the Wildlife Overlay District." CCCP 228.
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> "While there are conflicting uses for big game, they cannot be completely prohibited without negative consequences. Therefore, the County will adopt a program to protect big game habitat but allow limited impact from conflicting uses. The County shall adopt the density standards recommended by the [ODFW] for all Major and Peripheral Habitat areas except those identified as impacted by previous residential development. * * * Areas for which 'built and committed' exceptions have been taken shall be considered impacted and zoned for rural residential use. Because of existing conflicts in these areas, no additional standards to protect big game in rural residential zones are proposed." CCCP 230.

the dwellings that are located on such lands. Viewed in this manner, petitioners argue, there is no reasonable dispute that the proposed dwellings do not violate the density standard.

The board of commissioners' decision rejects petitioners view of the pertinent comprehensive plan and code provisions, interpreting those plan and code provisions to require consideration of the entire section, and not just that portion of Section 19 designated Major Habitat.[5] Petitioners' arguments under this assignment of error are, in essence, an argument that the county misconstrued the applicable law. In reviewing a governing body's interpretation of a local comprehensive plan or land use regulation, LUBA must affirm that interpretation unless it is inconsistent with the text of the local provision, its purpose or the policy underlying the provision. ORS 197.829(1).[6]

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[5]The challenged decision states, in relevant part:

> "A[n] issue related to calculation of the density standard was whether or not dwellings in the rural residential and community service institutional zones should be counted as dwellings for purposes of the density calculation. * * * According to the applicants' theory, the [RR-5] and [CS-1] dwellings should not be counted because they are 'exempt from the standards of the Wildlife Overlay District.' The Board disagrees with the applicants' argument that the code specifically says, when doing the count, one should take out the impacted areas. Rather the code requires a calculation of dwellings 'per section.' Neither the Comprehensive Plan nor Zoning Ordinance say that impacted areas in the section should be excluded from the calculation. The Board of County Commissioners finds that both the Comprehensive Plan and Zoning Ordinance require density to be calculated based on the Section. In the Comprehensive Plan, p. 228, under the discussion of potential conflicting uses, the Plan states, 'The [ODFW] has recommended the following dwelling unit densities *per section* in big game habitat areas . . . (Emphasis added.) Similarly, [CCZO] 1193 states, 'if clustering is not feasible, then the ODFW recommended density standard *per section* shall be applied.' (Emphasis added.) The Board further finds that the [comprehensive plan] language excluding rural residential and other exception properties from the standards of the [BGR] does not mean that those properties should not be included in a density calculation for primary forest zoned property. Rather, the Board interprets this language to mean that the existence of big game habitat on rural residential or other exception property will not subject those properties to the same conflicts analysis and density standards for development to which primary forest lands are subjected. The Board finds that the policy of protecting sensitive habitat areas justifies the more restrictive interpretation of the density calculation. If the rural residential dwellings were excluded from the calculation, then many more of the County's primary forest parcels would qualify for dwellings, eventually leading to a * * * more urban density. The Board finds that such a result would be contrary to the big game habitat provisions found in the [CCCP] and [CCZO]." Record 32-33 (emphasis original).

[6]ORS 197.829(1) provides, in relevant part:

We understand petitioners to argue that the county's interpretation is reversible under ORS 197.829(1)(b) or (c) because it is contrary to the above-quoted provisions of the comprehensive plan, which exempt rural residential lands from the standards of the BGR zone. However, as the county's decision explains, the fact that rural residential lands are exempt from the density standard does not necessarily mean that dwellings within rural residential zones may not fall within the frame of reference required in applying the density standard to lands subject to that standard. The CCZO 1193 density standard of "one dwelling per 38 acres" is meaningless unless given some frame of reference. The county's interpretation, as well as that offered by petitioners, provides such a frame of reference. While it may seem more logical that the frame of reference required by CCZO 1193 should be coextensive with the boundaries of the BGR zone, we do not agree with petitioners that the county's contrary view is inconsistent with the purpose or underlying policy of CCZO 1193, and thus reversible under ORS 197.829(1)(b) or (c). Further, as the county's decision notes, the pertinent CCCP and CCZO provisions twice refer to the prescribed dwelling densities in relation to the "section." The county's interpretation that the required frame of reference is the "section" is consistent with the text of CCZO 1193.

The first assignment of error is denied.

"[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:

"(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

"(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation; [or]

"(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

SECOND ASSIGNMENT OF ERROR

The board of commissioners' decision denied three of petitioners' five applications because it ultimately concluded that approving more than two dwellings would cause the dwelling density in Section 19 to exceed the "one dwelling per 38 acres" density standard. That conclusion was based on the county's finding that 14 dwellings currently exist in Section 19:

> "* * * The Board finds that the density is determined by identifying the number of dwellings in the section. * * * The existence of dwellings is determined by the County's Rural Address Map. According to the address map, there are 14 dwellings in Section 19. Evidence was submitted into the record which attempted to prove to the Board that 14 dwellings is not an accurate number. However, the Board finds that determining the number of dwellings by the address map is the most effective method. For example, the applicants gave oral testimony that one of the 'dwellings' that the staff had counted from the address map is actually a shack where no one is living, and should not be considered a dwelling for density purposes. The Board finds that if the Board were required to determine the status of each addressed structure (*i.e.* whether it is livable, whether it is burned and able to be rebuilt, etc.), the density determination would be too onerous to implement. Likewise, an opponent of the applications presented oral testimony that there are more than 14 dwellings in the section that are not shown on the address map. The Board finds that if any of these additional dwellings do exist, it is questionable whether they are legally sited because of their lack of address. The Board finds that it would not be fair to count possibly illegal dwellings in the density standard which would possibly exclude otherwise qualifying dwellings. In any event, the Board finds that neither the applicants nor any of the opponents provided substantial evidence in the record to show that there are actually any more or less than 14 dwellings in Section 19." Record 32.

Petitioners argue that, even assuming that Section 19 as a whole is the proper frame of reference for the CCZO 1193 density standard, the county's finding that there are currently 14 dwellings within Section 19 misconstrues the applicable law and is not supported by substantial evidence. Petitioners contend that the county erred in relying on the staff count based on the rural address map, in the face of the contrary evidence submitted by petitioners.

The evidence petitioners submitted regarding the number of existing dwellings in Section 19 consists of a table at Record 71, which lists the tax lots within Section 19, noting whether each lot is improved with a dwelling or not. According to the table, 13 parcels and nine dwellings exist on lands zoned RR-5, two parcels and one dwelling exist on lands zoned CS-1, and 12 parcels and one dwelling exist on lands zoned PF-76, for a total of 11 dwellings. The table notes that tax lot 1700 has a "shack" on it, but does not count that structure as a dwelling. Accompanying the table are two letters from the owners of tax lot 801 and 601, which are zoned PF-76 and CS-1, respectively. The owners of tax lot 801 state that years ago there may have been two dwellings on the property, but that only one remains today. Record 72. The owners of tax lot 601 state that their property is developed with a church and accessory building, but no dwelling. Record 73.

Petitioners argue that the rural address map is unreliable, because it apparently reflects that a church, a long-demolished structure, and an uninhabitable shack are existing dwellings. Petitioners note that the CCZO definition of "dwelling unit" suggests that a "dwelling" must be habitable.[7] According to petitioners, no reasonable factfinder would rely on the staff count of 14 dwellings, which apparently attributed "dwellings" to tax lots 1700, 601 and 801, based on the rural address map.

Petitioners face an uphill battle in challenging the county's denial on evidentiary grounds. In bringing an evidentiary challenge to a county's denial, the petitioner must show that the evidence in the record demonstrates that the proposed use complies with applicable criteria as a matter of law. *Jurgenson v. Union County Court*, 42 Or App 505, 510, 600 P2d 1241 (1979); *Horizon Construction, Inc. v. City of Newberg*, 28 Or LUBA 632, 641-42 (1995). In other words, petitioners must establish that the evidence is such that a reasonable

[7]CCZO 100.17 defines "dwelling unit" to mean "[a] single unit providing complete, independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking, and sanitation."

trier of fact could only conclude that the proposal complies with applicable criteria. *Horizon Construction, Inc.*, 28 Or LUBA at 641.

ORS 215.416(8) and (9) require the county to base approval or denial of a permit on standards and criteria set forth in the zoning ordinance, accompanied by a brief statement that explains the relevant criteria, states the facts relied upon, and explains the justification for the decision based on the criteria and facts set forth.[8] Findings of noncompliance with applicable criteria must, at a minimum, suffice to inform the applicant either what steps are necessary to obtain approval or that it is unlikely that the application will be approved. *Commonwealth Properties v. Washington County*, 35 Or App 387, 400, 582 P2d 1384 (1978); *Eddings v. Columbia County*, 36 Or LUBA 159, 162 (1999).

In the present case, the evidence and arguments regarding the number of dwellings in Section 19 evolved considerably during the county's proceedings below. Petitioners' applications simply stated, without cited support, that there are 11 dwellings in Section 19. County staff responded that they counted 14 dwellings in Section 19. Record 80. However, the staff count of 14 dwellings is simply a statement to that effect, and does not relate dwellings to particular tax lots, or provide any explanation of how staff arrived at that figure. The county's findings indicate that the figure was derived from addresses on the rural

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[8]ORS 215.416 provides in relevant part:

> "(8)(a) Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole.
>
> "* * * * *
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> "(9) Approval or denial of a permit or expedited land division shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

address map. The rural address map is not in the record, and there is no explanation of how information is placed on the map, how or when that information is updated, and how addresses on the map correlate with actual dwellings. Despite these problems, had the evidence and testimony on this point proceeded no further, there is no doubt that the county could rely upon the staff count to find noncompliance with the density standard.

In response to the staff count, petitioners submitted evidence supporting their contention that only 11 dwellings existed in Section 19. In contrast to the staff count, petitioners' evidence specifically related dwellings to particular tax lots. In addition, petitioners presented specific evidence disputing the existence of three dwellings apparently included in the staff count.[9] In response, opponents presented oral testimony that identified 15 dwellings in Section 19.

The county's initial response to petitioners' evidence and argument was to declare that "the existence of dwellings is determined by the County's Rural Address Map." Record 32. If that statement means that the county categorically rejects all methods or evidence to establish the number of dwellings other than the rural address map, that limited view of the county's fact-finding obligations is without support in any law cited to us. We agree with petitioners that the county misconstrued the applicable law, to the extent it viewed the rural address map as the *only* source of evidence the county would consider in determining the existence of dwellings under the density standard. *See Friends of Linn County v. Linn County*, 37 Or LUBA 280, 285 (1999) (county may not refuse to accept or consider evidence

[9]Because the staff count does not correlate the alleged 14 dwellings with the tax lots in Section 19, it is impossible to tell from this record whether the staff count included the "shack" on tax lot 1700, a dwelling on the church property on tax lot 601, and more than one dwelling on tax lot 801, as petitioners presume. If not, petitioners' evidentiary critique of the rural address map and the staff count may be misdirected. On the other hand, there is nothing in the record to suggest that the staff count of 14 dwellings does *not* include the disputed dwellings on tax lots 1700, 601 and 801. No party identifies any other possible candidates. Under these circumstances, we are not inclined to fault petitioners for failing to eliminate that uncertainty, which stems from the nonspecific and conclusory staff count, and not from any lack of effort on petitioners' part. Nonetheless, for the reasons explained below, the county may wish to take up and resolve on remand the issue of whether the staff count includes the disputed dwellings on tax lots 1700, 601 and 801.

relevant to an approval criterion); *Silani v. Klamath County*, 22 Or LUBA 734, 739 (1992) (same); s*ee also Lawrence v. Clackamas County*, 164 Or App 462, 469, 992 P2d 933 (1999) (hearings officer applied incorrect legal standard in according staff findings "considerable deference" in *de novo* review of staff decision pursuant to ORS 215.416(11)).

Apparently as an alternative to that categorical view, the county's decision "finds that neither the applicants nor any of the opponents provided substantial evidence in the record to show that there are actually any more or less than 14 dwellings in Section 19." Record 32. That statement presumably reflects the county's choice to rely on the staff count, based on the rural address map, over the differing counts provided by petitioners and the opponents. The county's decision provides some explanation for why it prefers the staff number over either competing count. With respect to the opponents' dwelling count, the findings surmise that any identified dwellings not found on the rural address map were not legally sited, and rejects that evidence for that reason.

With respect to the alleged shack on tax lot 1700, the county's findings explain that the difficulty of establishing whether dilapidated dwellings are habitable or can be rebuilt prompts the county to rely on the rural address map, as the "most effective method." *Id.* However, that explanation appears to have nothing to do with the probity or weight of petitioners' evidence and much to do with the county's apparent view that the rural address map is the only source of evidence the county will consider in determining the existence of dwellings. As explained above, that view is erroneous. Absent some authority in the county's code or elsewhere, we do not believe the county can categorically reject one type or source of relevant evidence in favor of another type or source.

That is not to suggest, of course, that we necessarily agree with petitioners' arguments regarding the significance of the code definition of "dwelling unit," much less that we agree petitioners have demonstrated as a matter of law that the structure on tax lot 1700 is not a dwelling, for purposes of the density standard. It may be that, having considered

petitioners' evidence regarding tax lot 1700, or other evidence on that point, the county will reach the same disposition. It may also be that the county may interpret applicable local provisions in a manner that renders petitioners' evidence irrelevant to compliance with CCZO 1193. However, in review of the decision before us, we conclude that the county erred in applying a legal standard under which the county essentially refused to consider petitioners' evidence and arguments regarding whether the structure on tax lot 1700 should be counted as a "dwelling unit," as the CCZO and CCCP use that term. Therefore, remand is appropriate for reconsideration under the proper standard. *Lawrence*, 164 Or App at 469.

The county's findings do not address petitioners' argument or evidence regarding tax lots 601 and 801 at all. As noted above, petitioners submitted evidence that structures that staff apparently counted on those lots as dwellings either do not exist at all or are nonresidential church structures. To the extent the county implicitly rejected that evidence under the view that it need only consider evidence from the rural address map, the county erred, as explained above.

In addition, the absence of findings addressing petitioners' evidence and arguments regarding tax lots 601 and 801 is also a basis for remand. As the evidence and issues developed before the county, the existence or nonexistence of the disputed dwellings on tax lots 601 and 801 assumed a critical importance, and was apparently the basis for denial for two of petitioners' applications. Nothing in the record cited to us contradicts the direct testimony of the landowners of tax lots 601 and 801 that the alleged dwellings do not exist. There is no explanation or support cited in the record for county staff's apparent belief that the alleged dwellings exist on tax lots 601 and 801. As noted, that belief is apparently based on information found on the rural address map. However, that map is not in the record, and there is no explanation in the record or from the parties for why information on the map leads to the conclusion that the alleged dwellings exist on tax lots 601 and 801.

Given the specific, direct evidence produced by petitioners regarding tax lots 601 and 801, and the absence of support in the record for the staff's apparent position that dwellings exist on those lots, we do not believe that it is consistent with ORS 215.416(9) for the county's findings simply to declare, without any explanation, that the county prefers the staff figure and is not persuaded by petitioners' evidence. In our view, some considered response to petitioners' evidence and argument regarding tax lots 601 and 801 was necessary to satisfy the county's obligations under ORS 215.416(9). Accordingly, remand is necessary to provide an adequate response.[10]

The second assignment of error is sustained.

The county's decision is remanded.

[10]The proceedings on remand could take a number of different forms, and we do not intend to prescribe any particular approach. However, it would seem logical for the county to first identify which tax lots in Section 19 county staff believes are developed with existing dwellings. One oddity the parties do not discuss is the fact that the staff's final report to the board of commissioners states that staff finds only one dwelling in the PF-76 zone. Record 1327. Under petitioners' theory, the initial staff count of 14 dwellings included *three* dwellings on lots within the PF-76 zone: two on tax lot 801 and the "shack" on tax lot 1700. Under petitioners' count, there is only one dwelling in the PF-76 zone. Either staff backed off its initial position that there are 14 dwellings in Section 19, or it found more than 10 dwellings in the RR-5 and CS-1 zoned portion of Section 19. In short, it is doubtful that the county can meaningfully address petitioners' evidence and arguments unless it first identifies which tax lots in Section 19 county staff believes are developed with existing dwellings.