

NATURE OF THE DECISION

Petitioner appeals a county decision that denies his request for a comprehensive plan map amendment from Low Density Residential and Medium Density Residential to High Density Residential and a related zoning map amendment from Urban Low Density Residential (R-10) and Medium High Density Residential (MR-2) to High Density Residential (HDR).

FACTS

Petitioner’s property is located in the Clackamas Regional Center Area Design Plan Boundary (hereafter CRC area), which is a planning subarea that covers an area that extends from a short distance south of the Clackamas Town Center Regional Shopping Center located at the Sunnyside Road interchange with Interstate 205 north to the area of the Johnson Creek Boulevard interchange with Interstate 205. Most of the CRC area lies west of Interstate 205. That part of the CRC area west of Interstate 205 is generally bisected by 82nd Avenue which is a north/south arterial that runs generally parallel to and a short distance west of Interstate 205.

Both 82nd Avenue and Johnson Creek Boulevard, which is an east/west arterial that intersects 82nd Avenue near the north end of the CRC area, are designated as Regional Corridors. The area around the Clackamas Town Center Regional Shopping Center is designated as a Regional Center. As explained later in this opinion, the relationship of petitioner’s property and these Regional Corridors, which are located to the north and west of petitioner’s property, and the Regional Center, which is located to the south, has particular relevance in applying one of the comprehensive plan policies that the county applied to deny the requested map amendments.

Petitioner’s property is located on the east side of Interstate 205. The eastern one-third of petitioner’s property has a comprehensive plan designation of Low Density Residential and is zoned R-10. The western two-thirds of petitioner’s property adjoins Interstate 205 and is divided from the eastern 1/3 of the property by Schumacker Road. The western 2/3 of the property has a comprehensive plan designation of Medium Density Residential and is zoned MR-2. Petitioner

1 seeks a High Density Residential comprehensive plan designation for the entire property, and a
2 corresponding zoning designation of HDR, which would allow residential development at an
3 approximate density of 25 units per acre.

4 In an April 30, 2002 staff report, county planning staff recommended that petitioner's
5 request for a comprehensive plan map and zoning map amendment be denied. On February 10,
6 2003, the county planning commission recommended that the request be denied. The county board
7 of commissioners conducted a public hearing in this matter on June 18, 2003. The board of
8 commissioners continued that hearing to July 23, 2003 to allow time for the board of commissioners
9 to conduct a site visit. On July 23, 2003, the board of commissioners voted to deny the request.
10 That decision was reduced to writing and signed on August 7, 2003, and this appeal followed.

11 **FIRST ASSIGNMENT OF ERROR**

12 Petitioner contends that the county's decision is not supported by substantial evidence and
13 he is entitled to the requested comprehensive plan and zoning map amendments as a matter of law.
14 The county's succinct response to this assignment of error is set out below:

15 "* * * The Planning Staff Report/Recommendation, which was adopted as findings
16 and conclusions of the Board [of County Commissioners], compared the plan
17 designation policies for Low Density Residential, Medium High Density Residential
18 and High Density Residential and concluded that both the existing and proposed
19 plan designations were appropriate based on those policies. Given this equipoise,
20 the Board [of Commissioners] turned to other applicable Comprehensive Plan
21 policies, and determined to deny the application based on its inconsistency with two
22 policies specific to the CRC Design Plan area:

23 "1.1 Land Use designations shall generally increase in level of intensity in areas
24 close to the Regional Center and Corridors.

25 "2.2 Land use designations shall maintain the character of existing neighborhoods
26 by providing for uses and improvements that are consistent with the type
27 and scale of existing development.

28 "Early in his argument, petitioner states: 'In this case the question is the effect on the
29 neighborhood.' Much of his following argument continues in that same vein, trying
30 to make the case that approval 'will not have a detrimental effect on the nearby
31 residential area' and in fact would 'benefit the community.' Petitioner is answering

1 the wrong question, however. The issue is not whether there is substantial evidence
2 to support the petitioner’s claim that approval of this application would not have a
3 detrimental effect, but rather whether there is substantial evidence to support the
4 [Board of Commissioners’] conclusion that approval of this application would be
5 inconsistent with Policies 1.1 and 1.2.

6 “There can be no dispute that the finding that Policy 1.1 would be violated is
7 supported by substantial evidence. To the south toward the Regional Center (as
8 well as to the east), the property is designated Low Density Residential. The
9 property directly to the north, toward the Johnson Creek Boulevard Corridor, is
10 designated Medium High Density Residential. To the west, across I205, the
11 property is designated Medium Density Residential. All of these designations are
12 less intense than the proposed High Density Residential; therefore if this application
13 was granted, the land use intensity in any direction toward the Regional Center or
14 the [Regional Corridors] would decrease, rather than increase as directed by Policy
15 1.1. Approval of this request would create an isolated island of High Density
16 Residential, just what this policy is aimed at preventing.” Respondent’s Brief 3-4.

17 The county goes on to point out that the record shows there is no existing multi-family development
18 in the immediate area of petitioner’s property. Therefore, the county argues, the county’s finding
19 that the proposal would not “maintain the character” of the existing neighborhood in contravention of
20 Policy 1.2 is also supported by substantial evidence.

21 For the reasons set out in the county’s brief, the first assignment of error is denied.

22 **SECOND ASSIGNMENT OF ERROR**

23 Under this assignment of error, petitioner argues that it was error for the chair of the board
24 of commissioners to allow the staff planner in this matter to accompany the chair on his site visit.

25 At the beginning of its July 23, 2003 hearing, one member of the board of commissioners
26 disclosed that he conducted a site visit at the subject property on July 9, 2003 and generally
27 disclosed what he saw. The chair of the board of commissioners made a similar disclosure
28 regarding his site visit. However, the board chair also disclosed that he was accompanied on that
29 site visit by Mike McCallister, the county staff planner who prepared the staff reports for both the

1 planning commission and the board of commissioners in this matter.¹ We understand petitioner to
2 argue that he was entitled “to refute testimony regarding the property” that the county staff planner
3 may have provided on that site visit.

4 As the county points out, there are at least two problems with petitioner’s second
5 assignment of error. First, to the extent this assignment of error alleges improper *ex parte* contacts,
6 ORS 215.422(4) specifically provides that “[a] communication between county staff and the
7 planning commission or governing body shall not be considered an *ex parte* contact.” *Nehoda v.*
8 *Coos County*, 29 Or LUBA 251, 257 (1995). Moreover, there is no suggestion that the county
9 planner provided any “testimony” on that site visit. A second problem with this assignment of error
10 is that petitioner was present when the board of commissioners disclosed the site visit and the board
11 chair disclosed that the county planner accompanied him. Although petitioner testified and
12 presented argument immediately after the board of commissioners disclosed its site visit, petitioner
13 did not inquire whether the county planner provided any evidence to the board of commissioners
14 that it might rely on in making its decision or request an opportunity to rebut such testimony.
15 Neither did petitioner argue the presence of the county planner at that site visit was improper.
16 Having failed to register any objection to the county planner’s presence at the board chair’s site visit
17 at the July 23, 2003 hearing, petitioner may not raise that objection for the first at LUBA in this
18 appeal. *See Mulford v. Town of Lakeview*, 36 Or LUBA 715, 721-22 (1999) (petitioner may
19 not assign error to adequacy of *ex parte* contact disclosure where petitioner had an opportunity to
20 object to the adequacy of the disclosure locally and failed to do so); *Simmons v. Marion County*,

¹ At oral argument before LUBA, petitioner noted that the board chair’s statement in the minutes of the July 23, 2003 board of commissioners’ hearing refers to “Mike” and does not mention a last name. Record 19. However, petitioner also stated at oral argument that he orally confirmed with planner Mike McCallister that he was the person who accompanied the board chair on the site visit. The minutes of the July 23, 2003 board of commissioners’ hearing indicate there were only two Mikes present—staff planner Mike McCallister and County Counsel Mike Judd. In the same paragraph where the board chair refers to “Mike” he refers to County Counsel as “Mr. Judd.” *Id.* There does not appear to be any reasonable question that the Mike who accompanied the board chair on the site visit was Mike McCallister. However, even if the referenced Mike was County Counsel, that would not affect our disposition of the second assignment of error. *See Richards-Kreitzberg v. Marion County*, 31 Or LUBA 540, 541 (1996) (communications between county counsel and local governing body are not *ex parte* contacts).

1 22 Or LUBA 759, 773-74 (1992) (local objection to procedural error is required to preserve the
2 right to assert that procedural error as a basis for remand at LUBA); *Baida v. City of Medford*, 44
3 Or LUBA 473, 479 (2003) (“[t]o preserve * * * right to present issues at LUBA under ORS
4 197.763(1) and ORS 197.835(3), petitioner must give * * * ‘fair notice’ of [an] alleged error, so
5 that the [local government] has a reasonable opportunity to recognize the alleged error and address
6 the alleged error in its decision”).

7 The second assignment of error is denied.

8 The county’s decision is affirmed.