BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LENNAR NORTHWEST, INC.,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

FRIENDS OF JENNINGS LODGE
and PATRICIA REINERT,
Intervenors-Respondents.

LUBA No. 2015-100

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Kelly S. Hossaini, Portland, filed a petition for review and response to cross-petition and argued on behalf of petitioner. With her on the brief was Miller Nash Graham & Dunn LLP.

Nathan K. Boderman, County Counsel, Oregon City, filed a joint response brief and argued on behalf of respondent. With him on the brief were Stephen L. Madkour, County Counsel, Chris Tackett-Nelson, Certified Law Student, Carrie A. Richter, Garvey Schubert Barer, and Dorothy S. Cofield.

Carrie A. Richter, Portland, filed a joint contingent cross-petition and joint response brief, and William K. Kabeisman argued on behalf of intervenor-respondent Friends of Jennings Lodge. With her on the joint contingent cross-petition were Garvey Schubert Barer and Dorothy S. Cofield.

Dorothy S. Cofield, Beaverton, filed a joint contingent cross-petition and joint response brief and argued on behalf of intervenor-respondent Patricia Reinert. With her on the joint contingent cross-petition were Carrie A. Richter and Garvey Schubert Barer.

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

REMANDED 05/03/2016

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a hearings officer's decision denying a zone change.

FACTS

The subject property includes 16.77 acres and is located in the Jennings Lodge neighborhood of the county. The property is zoned Immediate Urban Low Density Residential R-10 (R-10), and is bounded on the east by Southeast River Road and on the south by Southeast Jennings Avenue (Jennings Avenue). The Willamette River is located in close proximity to the western boundary of the property. The property is located approximately one-third of a mile west of the McLoughlin Boulevard commercial corridor.

The property is developed with a number of structures, including dwellings, an auditorium and other structures that have historically been used as a retreat and meeting facility for a church. The property is level except on its western edge, where it slopes steeply downwards towards the west. The property contains 423 trees, most of which are mature Douglas Fir trees.

Petitioner applied for a zone change to an Immediate Urban Low Density Residential R-8.5 (R-8.5) zoning district and for subdivision approval to create 72 lots ranging in size from approximately 6,800 to 12,700 square feet, with two open space tracts totaling approximately one acre.[1] The hearings officer

[1] Clackamas County Zoning and Land Development Ordinance (ZDO) 1014.04(B)(2) allows "flexible-lot-size developments" in the R-8.5 and R-10

denied the zone change application, and because of that denial, also denied petitioner's subdivision application without addressing the criteria that applied to the subdivision application. This appeal followed.

REPLY BRIEF/WAIVER

Petitioner moves for permission to file a reply brief to respond to waiver arguments in the response brief. The reply brief is allowed.

In several portions of the response brief, the county and intervenors-respondents (together, respondents) argue that petitioner is precluded from raising the issues raised in the first assignment of error under ORS 197.763(1) and ORS 197.835(3). Petitioner replies that the issues that petitioner raises were raised during the proceedings below by many participants, including petitioner, intervenors-respondents, and others. We agree. Petitioner also responds that some of the issues petitioner raises are directed at the adequacy of findings in the decision, which were not adopted until after the close of the hearings at which petitioner might have had an opportunity to object and that petitioner may raise the issues. We agree. *Lucier v. City of Medford*, 26 Or LUBA 213 (1994).

INTRODUCTION

ORS 215.427(3) provides that the county's approval or denial of an application for a zone change "shall be based upon the standards and criteria

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zoning districts, and provides that the smallest lot permitted is 80% of the minimum parcel size specified in the applicable zoning district.

that were applicable at the time the application was first submitted." ORS 197.175(2)(d) similarly requires the county to make land use decisions "in compliance with the acknowledged plan and land use regulations."

The criteria for zone changes are set out at Clackamas County Zoning and Land Development Ordinance (ZDO) 1202.03. As relevant here, ZDO 1202.03(A) requires the county to determine that "[t]he proposed zone change is consistent with the applicable goals and policies of the Comprehensive Plan." Accordingly, the criteria that apply to the zone change are the "applicable goals and policies of the" Clackamas County Comprehensive Plan (CCCP).

CCCP Chapter 4, Land Use contains six residential land use goals that we set out in full later in this opinion. CCCP Chapter 4, Land Use also contains seventeen "Low Density Residential Policies," Policies 4.R.1 through 4.R.17.[2] As relevant here, Policy 4.R.2 lists seven "factors" that "guide the determination of the most appropriate zone" for low density residential areas (Factors):

> "Zoning of Immediate Urban Low Density Residential areas and conversion of Future Urban areas to Immediate Urban Low Density Residential shall include zones of 2,500; 5,000; 7,000; 8,500; 10,000; 15,000; 20,000, and 30,000 square feet (R-2.5

[2] "Low Density Residential areas" are described as "those planned primarily for single-family residential development, with a range of lot sizes from 2,500 square feet for attached single-family dwellings to 30,000 square feet for sites with environmental constraints."

through R-30). The following factors guide the determination of the most appropriate zone:

"[1] Physical site conditions such as soils, slope, and drainage:

a. Land with soils subject to slippage, compaction or high shrink-swell characteristics shall be zoned for larger lots.

b. Land with slopes of:

- Less than 20 percent shall be considered for the R-2.5 through R-8.5 zoning districts.

- 20 percent and over shall be considered for the R-10 through R-30 zoning districts.

c. Land with hydrological conditions such as flooding, high water table or poor drainage shall be zoned for larger lots.

"[2] Capacity of facilities such as streets, sewers, water, and storm drainage systems.

"[3] Availability of transit: Land within walking distance (approximately one-quarter mile) of a transit stop should be zoned for smaller lots implemented by the R-2.5, R-5, R-7, and R-8.5 zoning districts.

"[4] Proximity to jobs, shopping, and cultural activities: Areas in proximity to trip generators shall be considered for smaller lots implemented by the R-2.5, R-5, R-7, and R-8.5 zoning districts.

"[5] Location of 2,500- and 5,000-square-foot lots: Location of 2,500 and 5,000 square foot lots, implemented by the R-2.5 and R-5 zoning districts, may be allowed in Corridor design type areas and where permitted by Community and Design Plans located in Chapter 10.

> "[6] Need for neighborhood preservation and variety: Areas that have historically developed on large lots where little vacant land exists should remain zoned consistent with the existing development pattern. Otherwise, unless physical or service problems indicate to the contrary, areas of vacant land shall be zoned for lots of 8,500 square feet or smaller.
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> "[7] Density average: To achieve an average of 7,500 square feet or less per lot in low density Future Urban areas when conversion to Immediate Urban low density residential occurs, the R-10 zone shall be limited to areas with 20 percent slope and greater. Flexible-lot-size land divisions and other buffering techniques shall be encouraged in those areas immediately adjacent to developed subdivisions with lots of 20,000 square feet or more to protect neighborhood character, while taking full advantage of allowed densities."

The Factors are the county's "standards and criteria" for approving or denying the zone change, within the meaning of ORS 215.427(3).

Stated simply, the hearings officer concluded that Factors 1, 2, and 3 supported a determination that R 8.5 is the most appropriate zone for the property, that Factor 4 is "neutral," and that Factor 6 supported a determination that the current R-10 zone is the most appropriate zone for the property.[3] Record 6-15. The way in which the hearings officer applied the Factors to determine "the most appropriate zone" is the subject of petitioner's assignment of error.

[3] The hearings officer determined that Factors 5 and 7 did not apply to the determination, and no party challenges that conclusion.

The hearings officer also determined that the only applicable "goal[] and polic[y] of the Comprehensive Plan" within the meaning of ZDO 1202.03(A) that applies to petitioner's zone change application is Policy 4.2.R set out above. Intervenors-respondents Friends of Jennings Lodge and Patricia Reinert (intervenors) assign error to that conclusion in their cross petition for review and argue that other CCCP goals and policies are applicable to the zone change application. We address petitioner's challenges to the hearings officer conclusions first, before turning to the cross petition for review.

PETITIONER'S ASSIGNMENT OF ERROR

Petitioner argues that the hearings officer improperly construed Factors 2, 3, 4, and 6 in a manner that is inconsistent with the express language of the Factor, as explained below. We review the hearings officer's construction of ZDO 1202.03(A) and the CCCP goals and policies to determine whether it is correct. ORS 197.835(9)(a)(D); *Gage v. City of Portland*, 319 Or 308, 317, 877 P2d 1187 (1994). For the reasons explained below, we agree with petitioner that the hearings officer improperly construed the Factors.

A. Factor 2

Factor 2 requires the hearings officer to consider the "[c]apacity of facilities such as streets, sewers, water, and storm drainage systems" in

determining the most appropriate zone.[4] The hearings officer found that Factor 2 "slightly supports" R-8.5 zoning:

> "[t]he parties vigorously dispute whether the proposed stormwater plan is adequate to satisfy ZDO requirements, but it is at least potentially possible to provide a storm drainage system. While there are some issues with street capacity and storm drainage capacity, [Factor 2] at least slightly supports a zone change to R 8.5 zoning." Record 9.

Later in the decision, the hearings officer concluded that Factor 2 is "less weighty than some of the other [Factors,]" and that "[w]hile [Factors 1 and 2] might be dispositive in determining that a property should not be zoned for smaller lots, I believe they are less important in determining that a property should be rezoned for smaller lot sizes when other [Factors] point the other way." Record 15. Petitioner argues that nothing in the text of Policy 4.R.2 or the CCCP or the ZDO supports giving less weight to Factor 2. We agree, as we explain below in our discussion of Factor 6.

B. Factor 3

Factor 3 requires the hearings officer to consider the

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[4] Factor 2 is similar to the other approval criteria set out in the ZDO, ZDO 1202.03(B) and (C). ZDO 1202.03(B) requires the county to determine that any need for sanitary sewer, surface water management, and water can be accommodated within the applicable service provider's capital improvement plan. ZDO 1202.03(C) requires the county to determine that "[t]he transportation system is adequate * * * and will remain adequate with the approval of the proposed zone change." The hearings officer found that ZDO 1202.03(B) and (C) were met, and no party challenges that conclusion. Record 16-17.

> "[a]vailability of transit: Land within walking distance (approximately one-quarter mile) of a transit stop should be zoned for smaller lots implemented by the R-2.5, R-5, R-7, and R-8.5 zoning districts."

The hearings officer recognized that there is a TriMet bus stop on River Road located less than one-quarter mile (approximately .08 miles) from the Jennings Avenue entrance to the property and approximately .15 miles from the River Road entrance. The hearings officer concluded that the transit stop on River Road is "within walking distance" of the property, and that Factor 3 "slightly supports" the zone change to R-8.5. Petitioner argues that to the extent the hearings officer concluded that Factor 3 supports a conclusion that the most appropriate zone is R-8.5, but that it is not as important as Factor 6, nothing in the text of Policy 4.R.2 or the CCCP or the ZDO supports giving less weight to Factor 3 and greater weight to other Factors.

We agree with petitioner. Nothing in the text of Policy 4.R.2 or the CCCP or the ZDO supports giving less weight to Factor 3. Having concluded that the property is "within walking distance * * * of" at least two transit stops, Factor 3 provides that the property "should be zoned for smaller lots implemented by" R-8.5 or smaller. Factor 3 guides a determination that the most appropriate zone is R-8.5 or smaller.

The hearings officer also noted that nearby bus stops on McLoughlin Boulevard are approximately .29 miles and .37 miles from the property, slightly over one-quarter mile from the property. The hearings officer concluded that the transits stops on McLoughlin Blvd are not "within walking distance"

because the roads between the property and the transit stop lack sidewalks and are busy. Petitioner argues that the hearings officer's conclusion that the McLoughlin Blvd stops are not "within walking distance" of the property is inconsistent with the express language of Factor 3, and improperly relies on limiting considerations—lack of sidewalks and heavy traffic volumes—to discount Factor 3, when there is no support for those limiting considerations in the text of Factor 3.[5]

We agree. Factor 3 uses the phrase "walking distance" and guides that if a property is located within "walking distance (approximately one-quarter mile)" of a property the property should be zoned for a maximum lot size of 8,500 square feet. There is nothing in the language that allows consideration of the quality of the walk depending on whether sidewalks are present or the amount of traffic in determining whether a transit stop is located "within walking distance (approximately one-quarter mile)" of the property.[6]

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[5] We do not understand the hearings officer to have concluded that it is not possible to walk from the property to the transit stops on River Road and McLoughlin Boulevard, only that there are not currently sidewalks to those stops.

[6] As we understand it, petitioner's proposed subdivision would add a sidewalk to one of the River Road transit stops, and petitioner offered to construct a sidewalk to the other River Road stop, but county planning staff decided that the money for the second sidewalk would be better spent on other improvements.

C. Factor 4

Factor 4 guides the hearings officer to consider:

> "[p]roximity to jobs, shopping, and cultural activities: Areas in proximity to trip generators shall be considered for smaller lots implemented by the R-2.5, R-5, R-7, and R-8.5 zoning districts"

The hearings officer concluded that the property is in proximity to jobs and shopping trip generators, but that "there are not many jobs from the commercial corridor near the subject property [and] the shopping is very limited[.]" Record 11. The hearings officer concluded that Factor 4 "does not strongly favor or disfavor" the zone change. Record 12. The hearings officer did not explain what evidence led to his conclusion.

Petitioner argues that the hearings officer's conclusion that Factor 4 does not favor R-8.5 zoning as the "most appropriate zone" improperly construes Factor 4 by dismissing the jobs and shopping based on an unexplained qualitative dismissal of proximate jobs and shopping that is not supported by the express language of Factor 4. We agree. Factor 4 guides the hearings officer to consider whether jobs and shopping are in proximity to the property, and dictates that properties in proximity to jobs and shopping "shall be considered for smaller lots" allowed by R-8.5 zoning and zoning that allows ever smaller lot sizes. The hearings officer impermissibly evaluated Factor 4 by discounting the proximity to jobs and shopping based on an unexplained qualitative dismissal of the proximate jobs and shopping that is not supported

by the express language of Factor 4. The express language of Factor 4 guides a conclusion that the most appropriate zone is R-8.5 or lower.

D. Factor 6

Factor 6 guides the hearings officer to consider the:

> "[n]eed for neighborhood preservation and variety: Areas that have historically developed on large lots where little vacant land exists should remain zoned consistent with the existing development pattern. Otherwise, unless physical or service problems indicate to the contrary, areas of vacant land shall be zoned for lots of 8,500 square feet or smaller."

The hearings officer concluded that the property is in an area that has historically developed on large lots where little vacant land exists, and that consequently it should remain zoned R-10. Record 13. Although not specifically stated, we understand the hearings officer to have determined that a change from R-10 to R-8.5 zoning is not "consistent with the existing development pattern." The hearings officer concluded that Factor 6 "strongly favors retaining the R-10 zoning of the property." Record 14.

Petitioner first argues that the hearings officer's conclusion that the property is in an "[a]rea[] that [has] historically developed on large lots" improperly construes the word "area" to consider only the area west of River Road in the Jennings Lodge neighborhood, in closest proximity to the property, and the hearings officer should have considered a larger area that encompassed areas close to McLoughlin Boulevard that contain many lots smaller than R-10. According to petitioner, the larger "area" in which the subject property is

located is transitioning to higher densities and the hearings officer should have considered a larger "area."

Respondents respond that the hearings officer properly construed Factor 6 to consider the "area" as encompassing the Jennings Lodge neighborhood in which the subject property is located, which has almost exclusively R-10 zoning and larger lots. We agree with respondents that the hearings officer properly construed the word "area" in Factor 6 to consider the Jennings Lodge neighborhood and that the evidence in the record supports a conclusion that the subject property is in an area that has historically developed on large lots.

Petitioner next argues that the hearings officer's findings are inadequate because they fail to explain why R-8.5 zoning is not "consistent with the existing development pattern," and argues that R 8.5 zoning is consistent with the existing development pattern because R-8.5 zoning is only slightly denser than R-10 zoning. Respondents respond that changing the zoning to R-8.5 would impose a "different" development pattern than would be inconsistent with "the existing development pattern." Respondents point to the existence of the two distinct zones, R-8.5 and R-10, and argue that the different zones support a conclusion that a change to R-8.5 zoning is not "consistent with the existing development pattern," or there would be no need for the two separate zones.

We agree with petitioner that the hearings officer's findings are inadequate to explain why a change from R-10 to R-8.5 zoning is not

"consistent with the existing development pattern." The phrase "development pattern" is not defined, but under respondents' interpretation the phrase is synonymous with "zoning." We reject that interpretation, because the county most likely would have used the word "zoning" in place of "development pattern" if it had intended that meaning. The hearings officer must explain his understanding of the meaning of "consistent with the existing development pattern," taking into consideration that (1) ZDO 1014.04(B)(2) allows lots that are zoned R-10 to be smaller than the 10,000 square foot minimum lot size by 20%, and accordingly allows the creation of new lots as small as 8,000 square feet in the R-10 zone, *see* n 1; and (2) the evidence in the record demonstrates that subdivisions with lots smaller than 10,000 square feet have been created in the R-10 zone in the Jennings Lodge neighborhood under that ZDO provision. Record 41. It is the "existing development pattern," not the existing zoning, that is the focus in Factor 6.

Finally, petitioner argues that the hearings officer improperly construed Factor 6 by weighting it as more important than others, without support for that weighting in the any language of the CCCP, the ZDO, or state law. As we explain above, the hearings officer denied the zone change, because he concluded in relevant part that:

> "As discussed earlier, under Sub-Policies 4.R.2.1–.7 there is a balancing test to determine the most appropriate zoning. Sub-policies 4.R.2.1 and 4.R.2.2 both weigh towards rezoning the property. Those sub-policies, however, are less weighty than some of the other sub-policies. Sub-policy 4.R.2.1 and 4.R.2.2 only deal

> with whether the property is even available for smaller lot sizes due to topographical or utility characteristics. While they might be dispositive in determining that a property should not be zoned for smaller lots, I believe they are less important in determining that a property should be rezoned for smaller lot sizes when other sub-policies point the other way. Subpolicy 4.R.2.3 regarding walking distance to transit stops slightly favors allowing the proposed zone change, while sub-policy 4.R.2.4 regarding proximity to jobs, shopping, and cultural activities is basically neutral. Sub-policies 4.R.2.5 and 4.R.2.7 do not apply. Sub-policy 4.R.2.6 strongly favors retaining the current R-10 zoning.
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> "The balancing test essentially comes down to balancing the fact that the topography and available utilities would accommodate R-8.5 zoning and the property has a transit stop nearby against the need for neighborhood preservation and variety. * * *
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> " * * * * *
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> " * * * While the applicant argues that ten additional lots on such a large property would similarly not stand out, I believe that rezoning this property would have a very noticeable effect on the existing neighborhood. Furthermore, creating such a large island of R-8.5 zoning in a sea of R-10 would fragment the neighborhood. As opponents state, 'it is difficult to imagine a more intact, historically developed, large lot area than Jennings Lodge.' In my opinion, the need to protect such an existing intact R-10 neighborhood that has historically developed on large lots and has little vacant land outweighs the fact that the property could accommodate R-8.5 zoning and has a bus stop nearby. Therefore, the proposed zone change is not consistent with the applicable goals and policies of the comprehensive plan. ZDO 1202.03(A) is not satisfied." Record 15-16.

As the quoted findings above make clear, in denying the zone change, the hearings officer weighed Factor 6 more heavily than other Factors that he determined support the zone change (Factors 1, 2, and 3). Petitioner argues that the hearings officer's weighting of Factor 6 to deny the zone change is

inconsistent with the express language of Factor 6 and the other Factors, because nothing in Policy 4.R.2 or the CCCP or the ZDO support that weighting.

Respondents respond that the Factors present competing choices and that the hearings officer properly balanced and weighed the seven Factors in choosing which Factors to emphasize. Respondents cite *Waker Associates v. Clackamas County*, 111 Or App 189, 826 P2d 20 (1992), and LUBA decisions that reviewed a local government's balancing of conflicting requirements under relevant comprehensive plan policies, in which the court and LUBA acknowledged the necessity of engaging in a balancing process in order to determine whether a proposed action was consistent with conflicting goals and policies in a comprehensive plan or code. *Cotter v. Clackamas County*, 36 Or LUBA 172, 182-83 (1999) (balancing competing plan policies necessary where the applicable goals and policies required the county to determine whether the proposed recreational vehicle park use satisfied the applicable goals and policies "on balance"); *Doob v. City of Grants Pass*, 48 Or LUBA 587, 597 (2005) (balancing of several plan policies that are at cross purposes is necessary to reach a decision about the preferred plan text amendment language).

In addition, intervenors argue that the CCCP goals and policies in CCCP Chapter 6, Housing, which we discuss in more detail below in our resolution of the cross petition for review, and the Chapter 4, Land Use first Residential goal

to protect the character of existing low-density neighborhoods provide relevant context to support the hearings officer's weighing of Factor 6 over the other Factors.[7] According to intervenors, "[p]lan Goals 4 and 6 and their implementing policies make abundantly clear that zone changes are allowed only when doing so will not compromise the character, lifestyle and values of existing neighborhoods." Cross Petition for Review 20. Petitioner responds that many other plan goals and policies refer to increasing density under the circumstances present here, and intervenors' reliance on only the plan goals and policies that support their desire to elevate Factor 6 above all other Factors is inconsistent with the text of the CCCP when read as a whole.

We agree with petitioner that the hearings officer improperly construed Policy 4.R.2 and the Factors by unduly weighting Factor 6 without support for that weighting in anything in the text of the ZDO or the CCCP. In *Waker*, which respondents rely on, the county hearings officer denied a conditional use permit for a golf course on EFU land. The applicable approval criteria for the conditional use required a determination that the use "not conflict with" the county's agricultural goals set out in its comprehensive plan. The county's agricultural goals emphasized competing priorities and thus, the proposed use was compatible with some of the agricultural goals in the plan, such as those that sought to enhance the county's economy, but conflicted with other goals

[7] Intervenors make their argument in their second assignment of error in the cross petition for review.

that sought to preserve farmland. The court approved of the hearings officer's balancing of the conflicting goals, stating "it is not possible to approve or disapprove a use in those situations without engaging in a balancing exercise." The court agreed with LUBA's remand of the decision to the county in order for the hearings officer to explain why the first agricultural goal weighed more heavily than the others. *Id*. at 193-94.

The Factors are not competing plan policies of the type at issue in *Waker*, and do not otherwise work at cross purposes or present competing choices of the type at issue in cases in which balancing several conflicting comprehensive plan policies may be required. In other words, the Factors are not "incompatible in operation[.]" *See Columbia Riverkeeper v. Clatsop County*, 238 Or App 439, 457-58, 243 P3d 82 (2010) ("[i]t is only when the standards themselves are incompatible in operation—by requiring both approval and disapproval of any generic application—that an overarching reconciliation of clashing standards is necessary"). Policy 4.R.2 directs the county to consider the Factors to "guide the determination of the most appropriate zone." Nothing in the language of Policy 4.R.2 or any of the Factors suggests that some factors should be given greater weight than others. Factors 1-4 and 6 require consideration of (1) soils, slopes and drainage on the property; (2) capacity of public facilities; (3) proximity to a transit stop; (4) proximity to trip generators such as jobs, shopping and cultural activities; and (5) the need for neighborhood preservation and variety, to determine whether

they present constraints or opportunities for higher density housing. On the present record, at least four of the seven Factors should guide the county to approve the requested R-8.5 zoning or a denser zone. Two Factors were found to be inapplicable. At most only one Factor, Factor 6, should guide the county to deny the requested rezoning. Accordingly, the language of Policy 4.R.2 requires the county to consider and evaluate *each* of the Factors to determine "the most appropriate zone[.]" Instead of doing that, the hearings officer improperly assigned dispositive weight to Factor 6, improperly assigned lesser weight to Factors 1-4, and engaged in improper application n of limiting considerations that have no basis in the language of Factors 1-4 to conclude the Factors were either neutral or weakly support R-8.5 zoning.

We also reject intervenors' reliance on selected provisions of the CCCP to make their case that Factor 6 is more important than the other factors, because that selective reliance is not supported by the CCCP when read as a whole. CCCP Chapter 4 and 6 simply do not direct the county to weight neighborhood preservation policies as more important than the policies furthered by the other factors, such as increasing density on flatter lands and in proximity to transit and trip generators such as jobs, shopping and cultural activities, and where public facilities are available. The hearings officer improperly dismissed or downplayed the policies advanced by all those other factors in favor of a single policy that encourages zoning to maintain larger lots in large lot neighborhoods where there is little vacant land. In doing so, the

hearings officer improperly construed the Factors by giving Factor 6 more weight, without support for that weighting in anything in the express language of the CCCP or the ZDO.

On remand, the hearings officer must consider each of the Factors equally and determine the most appropriate zone without giving undue weight to any of the Factors.

Petitioner's assignment of error is sustained.

CROSS PETITION FOR REVIEW

As explained above, the hearings officer determined that the only applicable CCCP goals and policies are Policy 4.R.2 Factors 1 through 7. That conclusion is the central dispute between intervenors-respondents/cross-petitioners (intervenors) and the county.

A. First Assignment of Error

1. Chapter 4 (Land Use), First Residential Goal

CCCP Chapter 4, Land Use, contains six residential land use goals.[8] The first listed residential goal is to "[p]rotect the character of existing low-density

[8] The goals of the Residential section of Chapter 4 are:

- Protect the character of existing low-density neighborhoods.
- Provide a variety of living environments.
- Provide for development within the carrying capacity of hillsides and environmentally sensitive areas.

neighborhoods." In their first assignment of error, intervenors argue that the first Residential goal is an "applicable goal and policy" of the CCCP within the meaning of ZDO 1202.03(A), and that the hearings officer erred in failing to apply it to the proposed zone change.

In response to the argument below, the hearings officer found that Factors 1 through 7 implement the six residential goals and that the residential goals therefore do not also apply directly as standards and criteria:

> "I agree with opponents that the goal does direct the County to protect the character of existing low-density neighborhoods, but I do not agree that the goal alone provides such protection. While the goal does direct the County to protect the character of the existing low-density neighborhoods, the goal says nothing about how that protection should be achieved. Whether the goal is mandatory or not I think the goal directs the County to protect the character of existing neighborhoods, and the County has done that through the implementation of the specific policies in 4.R.2.[Factors] 1-7. In particular, 4.R.2.6 discussed later appears to provide this protection. * * * [S]ub policy 4.R.2.6 is a specific way to provide that protection. To the extent the first residential goal is an applicable goal for purposes of ZDO 1202.03(A), sub-policy 4.R.2.6 implements that goal." Record 7 (footnote omitted).

Petitioner responds that the hearings officer's interpretation that the goals are not independently "applicable" to the zone change application because the

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- Provide opportunities for those who want alternatives to the single-family house and yard.
- Provide for lower-cost, energy-efficient housing.
- Provide for efficient use of land and public facilities, including greater use of public transit.

seven Factors implement the goals is correct. We agree. Some of the language in Factors 1 through 7 is related to and appears to be intended to implement some of the residential goals. For example, Factor 6 relates to and appears to implement the first Residential goal; Factor 1 implements the third residential goal to "[p]rovide for development within the carrying capacity of hillsides and environmentally sensitive areas[;]" and Factor 3 implements the sixth Residential goal to "[p]rovide for efficient use of land and public facilities, including greater use of public transit." Based on that language, the hearings officer could correctly conclude that the first residential goal is not directly applicable, because that goal has been specifically implemented by Factor 6.

2. Chapter 4, Land Use, Policy 4.R.1.2

Intervenors also argue that Policy 4.R.1.2 applies directly to the zone change application.[9] CCCP Chapter 4 Policy 4.R.1 addresses the comprehensive plan designation of land, while Policy 4.R.2 addresses the appropriate zoning based on the plan designation.

Policy 4.R.1.2 provides in relevant part that "[a]reas which are currently developed at low density and where little need exists for redevelopment" may be designated on the comprehensive plan as "low density residential."

[9] Intervenors argue that all seventeen of the Low Density Residential policies in CCCP Chapter 4 are applicable to the zone change, but only develop their argument with regard to Policy 4.R.1.2. Cross Petition for Review 13-14.

According to intervenors, Policy 4.R.1.2 requires petitioner to demonstrate a "need [] for redevelopment." Cross Petition for Review 13.

Petitioner responds, and we agree, that Policy 4.R.1.2 does not apply where the comprehensive plan designation of the subject property is already "Low Density Residential" and no change to the comprehensive plan designation is proposed. Accordingly, Policy 4.R.1.2 is not "applicable" and no demonstration that a "need exists for redevelopment" is required.

3. CCCP Chapter 6 (Housing), Policies 6.D.1.1 – 6.D.1.6 and 6.D.1.13

CCCP Chapter 6, Housing, includes two "housing" goals and eight categories of policies regarding housing: "Housing Choice," "Affordable Housing," "Neighborhood Quality," "Urban Infill," "Multifamily Residential," "Common-Wall Units," Manufactured Dwellings," and "Density Bonus." Intervenors argue that the Urban Infill policies quoted in the margin are "applicable * * * policies" within the meaning of ZDO 1202.03(A) and that the hearings officer erred in failing to apply the policies to the zone change application.[10]

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[10] The Urban Infill Policies set out in CCCP Policy 6.D.1 that intervenors argue are applicable to the zone change application are:

> "Make use of existing urban service capacities without damaging the character of existing low-density neighborhoods by:
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> "6.D.1.1 Providing higher-density residential land use plan designations.

In response to the argument below, the hearings officer first considered the first two sentences of the Residential section of Chapter 4, Land Use, which provide:

> "This section of the Land Use Chapter primarily addresses the location and density of housing. Chapter 6, Housing, establishes policies for other aspects of housing such as structure type, affordability, and design."

The hearings officer interpreted that language to mean that CCCP Chapter 4 applies to housing location and density through application of zoning districts,

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> "6.D.1.2 Locating higher-density land use plan designations at locations that have minimum impact on existing low-density neighborhoods.
>
> "6.D.1.3 Encouraging development within Immediate Urban Areas where services are available (see the Immediate Urban Policies section in Chapter 4, *Land Use*).
>
> "6.D.1.4 Allowing greater flexibility for two- and three-family dwellings (see Policies 6.F.1 through 6.F.5).
>
> "6.D.1.5 Establishing a transportation policy that encourages investments to improve the existing system prior to making investments in new roads (see the policies in the Roadways section of Chapter 5).
>
> "6.D.1.6 Protecting existing neighborhoods by designating compatible land uses in existing low-density neighborhoods. (see the Low Density Residential Policies section in Chapter 4).
>
> " * * * * *
>
> "6.D.1.13 Protecting the privacy of existing residences by buffer requirements where appropriate."

while CCCP Chapter 6 applies to housing design and type.[11] The hearings officer reasoned that because a residential zone change proposes only a change in the zoning, and therefore the possible density of housing, but does not propose development or any particular type of housing, the goals and policies of the CCCP's "Housing" chapter do not apply to a zone change proposal. The

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[11] The hearings officer found:

> "Initially, opponents argue that a number of comprehensive plan goals and policies are applicable regarding development of the property. For instance, opponents argue that various goals and policies from Chapter 6 Housing are applicable and the proposal is inconsistent with those goals and policies. For instance, the second Housing Goal in Chapter 6 provides: 'Protect the quality, lifestyle, and values of existing neighborhoods.' While at first blush this goal might seem applicable, the first sentence of Chapter 4 provides:
>
> > "This section of the Land Use Chapter primarily addresses the location and density of housing. Chapter 6, Housing, establishes policies for other aspects of housing such as structure type, affordability, and design."
>
> "As the above quote makes clear, the Chapter 4 applies to location and density of housing, while Chapter 6 applies to design and affordability. This makes perfect sense because a zone change in and of itself does not propose any development or any types of housing. Therefore arguments that the proposed subdivision would have streets, trees, and home styles that would clash with the existing neighborhood are misplaced in challenging a zone change because a zone change request does not propose any specific streets, trees, or home styles. Goals and policies under Chapter 6 Housing are not applicable goals and policies for purposes of ZDO 1202.03(A)." Record 5-6 (original footnote omitted).

hearings officer also relied on the language of Policy 6.D.1.6, which specifically references the Low Density Residential Policies in CCCP Chapter 4, discussed above. Given that express language of the CCCP, the hearings officer concluded that goals and policies in CCCP Chapter 6 are not "applicable" within the meaning of ZDO 1202.03(A).

According to intervenors, the Urban Infill policies quoted at n 10 apply because density is referenced in the policies, and the policies also require the county to preserve the character and quality of existing neighborhoods. Intervenors also argue that CCCP Chapter 6 Housing policies are not implemented by the ZDO and accordingly they apply to the zone change proposal. Petitioner disputes that argument, pointing out that ZDO Section 300 includes development standards that govern uses and development in the R-10 and R-8.5 zoning districts, and include considerations of compatibility, function, and aesthetics of housing development. As petitioner views it, ZDO Section 300 is the implementation of any CCCP Chapter 6 direction to consider neighborhood *character* in housing development.

We think the hearings officer's interpretation of the relationship between CCCP Chapters 4 and 6 is correct. The first two sentences of CCCP Chapter 4 strongly support an interpretation that the county intended Chapter 4 to apply to zoning decisions such as the decision at issue in this appeal, but that Chapter 6 applies to decision about what type of housing should be built on

residentially zoned land after it is zoned and the maximum possible density is known. In addition, the introductory section of the CCCP explains:

> "How to Use This Plan
>
> " * * * * *
>
> "The Land Use chapter defines land use categories, specifies the site conditions used to qualify land for each category of use, and explains allowed uses or uses which may be established under certain conditions. Other chapters contain policies that are less site specific. Cross-references are provided where pitfalls to using the Plan are anticipated."

We understand that explanation of the purpose of Chapter 4 to support the hearings officer's conclusion that the only policies that apply to the zone change are in CCCP Chapter 4, Land Use. The fact that CCCP Chapter 6 uses the word density and cross references Chapter 4 does not make the Urban Infill Policies "applicable" to the zone change.

4. Character of the Neighborhood

In their final argument under the first assignment of error in the cross petition for review, we understand intervenors to argue that the hearings officer erred in failing to consider whether the zone change would affect the "character of the neighborhood," and to evaluate the impact of the zone change on the "livability, lifestyles and values" of the Jennings Lodge neighborhood.[12] Cross

[12] The hearings officer found that "* * * arguments that the proposed subdivision would have streets, trees, and home styles that would clash with the existing neighborhood are misplaced in challenging a zone change because

Petition for Review 16. We understand intervenors' argument to be a variation of and dependent on their argument that certain goals and policies in CCCP Chapter 6 Housing, discussed above, that relate to consideration of the character of the existing neighborhood in determining appropriate housing types are "standards and criteria" that apply to the zone change. ORS 215.427(3). For the reasons explained above, we agree with the hearings officer that the goals and policies of CCCP Chapter 6, Housing, do not apply to the zone change application. Accordingly, absent intervenors' identification of any "standards and criteria" that require the hearings officer to consider "livability, lifestyles and values" of the Jennings Lodge neighborhood, their argument provides no basis for reversal or remand of the decision.

The first assignment of error in the cross petition for review is denied.

B. Second Assignment of Error

Intervenors' second assignment of error does not assign error to any aspect of the hearings officer's decision. Rather, the second assignment of error argues that the hearings officer *correctly* concluded that Factor 6 weighs more heavily than the other Factors in determining the most appropriate zone, and argues that the hearings officer's decision is supported by text and context found in CCCP Chapters 4 and 6. We reject that argument above. Accordingly,

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a zone change request does not propose any specific streets, trees, or home styles." Record 6.

the second assignment of error provides no basis for reversal or remand of the decision.

The second assignment of error in the cross petition for review is denied.

C. Third Assignment of Error

In their third assignment of error, intervenors argue that three of the Storm Drainage Policies of CCCP Chapter 7, Public Facilities and Services are "applicable" to the zone change application.[13] The hearings officer concluded that the Chapter 7 policies are not applicable to the zone change because the policies are directed at development and zone changes do not propose development. Record 6. Intervenors argue that a zone change qualifies as "development" when it is consolidated with an application for a subdivision, as here. Intervenors also argue that even if Policy 19.0 only applies where

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[13] The three policies provide in relevant part that it is the county's policy to:

> "19.0 Require all new developments to meet the development standards of the appropriate service provider.
>
> " * * * * *
>
> "21.0 Require that urban stormwater runoff be minimized by nonstructural controls, where feasible, to maintain the quality and quantity of runoff in natural drainage ways. These areas may be calculated as part of the required open space.
>
> "22.0 Require runoff from impervious surfaces to be collected and treated, as required by the appropriate service provider, prior to discharge to a natural drainage way capable of accepting the discharge."

development is proposed, Policies 21.0 and 22.0 are not limited to "new developments" and apply to a zone change.

Petitioner responds that the hearings officer correctly concluded that the zone change is not development. Petitioner also responds that the hearings officer correctly concluded, based on the express language of the three policies, that the policies direct the county to require certain standards of public facilities when development occurs. Petitioner argues that the hearings officer's interpretation of the policies is supported by ZDO Sections 1006 and 1008, which implement the policies and other policies in CCCP Chapter 7. ZDO Section 1006 is entitled "Water Supply, Sanitary Sewer, Surface Water, and Utilities Concurrency," and ZDO Section 1008 is entitled "Storm Drainage," and both require development proposals to meet the standards of the appropriate service provider, minimize stormwater runoff, and treat stormwater prior to release. We agree with petitioner and the hearings officer that the CCCP Chapter 7 policies identified by intervenors do not apply to the zone change application, because intervenors have not established that the zone change is "development," and because the policies are implemented by ZDO provisions.

The third assignment of error in the cross petition for review is denied.

CONCLUSION

We sustain petitioner's assignment of error above. Accordingly, the county's decision is remanded.