

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

DEC 16 9 57 AM '81

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2			
3	MICHAEL G. HESTON,)	
)	
4	Petitioner,)	LUBA NO. 81-108
)	
5	v.)	FINAL OPINION
)	AND ORDER
6	CITY OF HILLSBORO, OREGON,)	
)	
7	Respondent.)	

8 Appeal from City of Hillsboro.

9 Michael Heston, Hillsboro, filed a petition for review and argued the cause for himself.

10 Larry Brisbee, Hillsboro, filed a brief and argued the cause for Respondent City of Hillsboro.

12 Don Piper, Hillsboro, filed a brief and argued the cause on his own behalf as participant.

13 Maggie Resko, participant, filed a memorandum on her own behalf.

15 Bagg, Referee; Reynolds, Chief Referee; Cox, Referee; participated in the decision.

17 Affirmed. 12/16/81

18 You are entitled to judicial review of this Order.
19 Judicial review is governed by the provisions of Oregon Laws
20 1979, ch 772, sec 6(a).

1 BAGG, Referee.

2 NATURE OF THE DECISION

3 Petitioner Michael Heston appeals the denial of a request
4 for a zone change for residential property within the City of
5 Hillsboro. The change requested was from single family
6 residential (R-7) to duplex residential (A-1). The county
7 decision bears the designation ZC 24-80.

8 FACTS

9 Much of what follows is about density (units per acre) and
10 the city's method of calculating density. The reason for this
11 emphasis is that petitioner bases much of his argument on
12 matters of density.

13 Several applications for development of this property have
14 been proposed by Petitioner Heston. Of these, the most
15 relevant to this appeal other than ZC 24-80 is a planned unit
16 development, PUD 3-80, requested in September of 1980. PUD
17 3-80 was a proposal for a planned unit development having 26
18 single family units. The application was approved by the
19 planning commission, and the city council enacted an ordinance
20 amending the city zoning ordinance to show approval of the
21 planned unit development approval on October 21, 1980. Under
22 the City of Hillsboro zoning ordinance, a planned unit
23 development acts as an overlay in a residential zone and is one
24 means of increasing density in a residential zone. The
25 property upon which planned unit development 3-80 was granted,
26 and the property subject to this appeal, is zoned single-family

1 residential (R-7). Single-family residential is a low density
2 zone.

3 Petitioner asked for a modification of planned unit
4 development 3-80 which involved changes in the design of the
5 planned unit development, but not the density. That
6 modification was denied on June 9, 1981.

7 The subject zone change was requested in May of 1980. The
8 zone change was pending before the city but not acted upon
9 until June of 1981, when the petitioner asked that the zone
10 change be scheduled for hearing. The council scheduled the
11 matter for hearing and denied the zone change on August 18,
12 1981. Petitioner appeals the denial of a zone change to LUBA.

13 The parcel contains 4.65 acres, and the city found .9 acres
14 of the total is in public right of way. The city also found a
15 portion of the property is within the 100-year floodplain of
16 Rock Creek, but the county does not give an exact figure of
17 acreage within the floodplain. Record 5. The county found
18 that its housing goal policies were satisfied by approval of
19 the PUD and found additionally that "the density as called for
20 by the medium density designation [in the comprehensive plan]
21 is satisfied given the approval of the PUD." Record 7. The
22 city found that approval of PUD 3-80 satisfied concerns of the
23 neighbors but that the requested zone change application did
24 not satisfy those concerns. The city noted that there was
25 considerable opposition to the proposed A-1 zoning for this
26 property. The city also noted the following:

1 "The PUD 3-80, as approved for the parcel, was
2 accepted, in part, due to its considerations for the
3 topography and other natural features of the subject
4 parcel. Approval of the A-1 zone could allow for the
5 subdivision of the subject parcel with less
6 consideration for those factors and is an appropriate
7 concern in reaching the decision on this matter."
8 Record 7.

9 The parties are in agreement that the City of Hillsboro
10 Comprehensive Plan calls for medium density residential
11 development on this property. The parties also agree that
12 medium density residential development results in densities
13 from 7-12 units per acre.¹ It is not precisely clear,
14 however, in the county comprehensive plan as to how that
15 density is calculated, but portions of the comprehensive plan
16 do give some indication. In a supplemental memorandum
17 submitted to the Board, the City of Hillsboro advises that it
18 computes density by excluding streets and other areas of public
19 right of way that do not fit the definition of "buildable land"
20 as that definition is contained in the city's comprehensive
21 plan. Section 3(II) "Definitions" defines buildable lands as
22 "land in urban and urbanizable areas that are [sic]
23 suitable, available and necessary for residential
24 use."

25 In Section 6 (III)(B)(1), the plan provides that land within
26 the 100-year floodplain is not to be used for "housing,
27 business, industry or other structures." Also, the plan
28 provides in Section 8(III)(B) as follows:

29 "Lowering density requirements and intensity of
30 development from what the land is designated shall be

1 considered an appropriate limitation on a use in a
2 natural disaster and hazard area."

3 We read this provision to allow the city to lower densities
4 whenever it sees a natural hazard to exist. We also read the
5 plan to include flood hazard as such a natural hazard.

6 We understand the city's density calculations for this
7 property would, as claimed by the city at the hearing before
8 the Board, and stated in the subsequent memorandum, be based
9 on gross acreage minus existing rights of way and minus land
10 designated to be within the 100-year floodplain.

11 ASSIGNMENT OF ERROR NO. 1

12 "Respondents [sic] action denies petitioner [sic]
13 right to develop in a timely manner and responding to
14 market conditions, subject property to allowable
15 density."

16 Petitioner argues he has been prohibited from developing
17 his property to the medium density allowed by the City of
18 Hillsboro Comprehensive Plan. Petitioner cites PUD 3-80 and
19 its tentative approval of 26 units and divides the 26 units
20 into 4.65 acres. Petitioner arrives at a 5.59 unit per acre
21 figure which petitioner claims is below the density provided
22 for in the comprehensive plan. Petitioner argues that this low
23 density figure circumvents the city's own density
24 requirements. Petitioner says the city has a burden to show
25 how it is that if a lesser density is allowed on a parcel that
26 the city can still meet its density requirements. Petitioner
says there has been no such showing.

1 Respondent disagrees. Respondent states that the
2 petitioner's application for planned unit development (PUD
3 3-80) was found by the planning commission to comply with the
4 density requirements in the comprehensive plan. Respondent
5 says that the issue is whether the city may insist upon a
6 development as approved or whether it must allow a zone change
7 application. Respondent asserts once the petitioner has
8 convinced the city of the merits of a planned unit development,
9 he should be required to accept the planned unit development
10 rather than change to some other proposal. Respondent
11 acknowledges that changes may be made in development proposals,
12 but as third parties rely on grants that the city may make,
13 changes in proposals should not be allowed absent a showing of
14 changed conditions.

15 We do not find that the plan precisely defines what is
16 meant by medium density residential. However, the record in
17 this case shows the staff to have considered density both in
18 terms of gross density and net density. That is, during the
19 course of the proceeding, the staff gave two sets of density
20 figures to the city council. The staff gave calculations of
21 density based on net developable area to arrive at a total net
22 density for the project of 8.173 units per acre, and the staff
23 also gave a calculation using gross acreage to arrive at a
24 gross density of 5.5 units per acre. Record 186. The findings
25 do not say which figure is responsive to the comprehensive
26 plan, but the city's conclusion that the PUD met the

1 comprehensive plan density requirements must mean that the city
2 considers density to be net density calculated on the basis of
3 "buildable land" (i.e., gross land, minus rights of way and
4 floodplain).

5 In response to a request from the Board, calculations of
6 density on this property were made given three separate sets of
7 figures. The variance in the figures below is the result of
8 floodplain calculations. The differences in floodplain figures
9 are significant because petitioner claims erroneous floodplain
10 elevations were used. The result of erroneous floodplain
11 elevations would be a reduction in petitioner's buildable land
12 and an inflated unit per acre density calculation, according to
13 petitioner.²

14 The calculations furnished by the city are as follows:

15 "(a) Floodplain at 148' (R186,196,200)

16 "2.412 acres Designated Medium Density
17 "1.435 acres Designated Floodplain
18 ".713 acres Existing Street Right of Way

19 "4.65 Total

20 "26 Units
"2.412 acres = 10.78 Units per acre

21 "(b) Floodplain at 144'

22 "3.181 acres Designated Medium Density
23 ".769 acres Designated Floodplain
24 ".713 acres Existing Street Right of Way

25 "4.65 Total

26 "26 Units
"3.181 acres = 8.173 Units per acre

1 "(c) Floodplain at 144'

2 "3.318 acres Designated Medium Density

3 .619 acres Designated Floodplain

4 " .713 acres Existing Street Right of Way

5 "4.65 Total

6 "26 Units

7 "3.318 acres = 7.84 Units per acre"³

8 In other words, under any of the possible means of calculating
9 density (other than using gross acreage), the city approval of
10 PUD 3-80 falls within the city's medium density designation in
11 the comprehensive plan, as interpreted by the city.

12 The city has not, then, violated its comprehensive plan as
13 the city plan may be interpreted to call for net and not gross
14 density figures.⁴ We further believe the city in this case
15 has no obligation to approve a zone change where an existing
16 development proposal is approved for the land and meets all
17 comprehensive plan requirements including density levels. It
18 is pointless and burdensome to require the city to approve
19 proposal on top of proposal where each proposal achieves all
20 the same comprehensive plan goals. Petitioner here has shown
21 no firm reasons why the city should grant the zone change.⁵

22 The first assignment of error is denied.

23 ASSIGNMENT OF ERROR NO. 2

24 The second assignment of error alleges:

25 "Respondents [sic] finding of fact are [sic] not
26 supported by substantial evidence in the record.
27 [Respondents] Failed to adequately address planning
28 and zoning requirements [sic] Goal II violation."

1 Petitioner's second assignment of error alleges that the
2 city's findings are not supported by substantial evidence and
3 do not address relevant planning and zoning requirements.
4 The Board does not view this assignment of error as one based
5 on Goal 2. The petitioner's arguments are about substantial
6 evidence and whether the findings respond to appropriate
7 criteria, not about the findings or other potential Goal 2
8 concerns. We will treat this assignment of error as a claim
9 that the city acted arbitrarily and lacks substantial evidence
10 to support the decision.

11 Petitioner specifically attacks the council's findings on
12 traffic, open space policies and schools and claims that these
13 considerations are not addressed in the zone change process or
14 in a subdivision plat approval, but only in the comprehensive
15 plan. Petitioner says the council placed too much emphasis on
16 PUD 3-80. Petitioner lastly notes that the Corps of Engineers
17 found that there were .619 acres in the floodplain. Petitioner
18 includes this figure to show that the city's calculation of
19 land subject to flooding was in error. Floodplain acreage has
20 a bearing on how much land is available to petitioner for
21 density calculation purposes.

22 The city states that the real issue in the appeal is
23 density, and the city concludes that density "is the same
24 whether he develops the property in accordance with the
25 approved planned unit development or the conventional zone
26 change." Respondent's Brief at 23.

1 The city's findings seem at times to stray from the matter
2 of the zone change. The references in the city's findings to
3 traffic and neighborhood considerations are spoken of in
4 relation to an earlier application by the petitioner and not
5 the zone change. Indeed, the city's findings in ZC 24-80 deal
6 more with the matter of the procedural history of the case and
7 the fact that the PUD application 3-80 better met neighborhood
8 considerations than the zone change application. Further, we
9 understand from a staff letter in the record that the city
10 believed the relevant criteria for the change were to be found
11 in the Hillsboro Comprehensive Plan. The city listed several
12 policies in the housing goal, the energy goal and the
13 transportation goal. The findings do not reflect these
14 policies clearly.⁶ However, this lack of clarity need not
15 result in our returning the case to the city if one reason for
16 denial of the proposal is supported by an adequate factual base
17 and is responsive to relevant criteria.

18 The parties do not dispute that an important consideration
19 in this case is the matter of density. As discussed in
20 Assignment of Error No. 1, the city found that the density
21 called for on this property by the comprehensive plan was from
22 7-12 units per acre. The city also found that the earlier
23 planned unit development proposal, still approved, PUD 3-80,
24 met that density requirement.⁷ As discussed above, the
25 city's comprehensive plan does not clearly set out how density
26 is to be calculated. However, the city comprehensive plan does

1 speak in terms of "buildable land" and limits development
2 within floodplain and hazard areas. Also, the staff report
3 appears to calculate density to include "net" density. We can
4 conclude that the city's finding that PUD 3-80 satisfies
5 comprehensive plan density requirements is a reasonable
6 interpretation of the comprehensive plan and the fact. The
7 petitioner has not claimed with particularity that the basic
8 facts of lot size and right of way width are wrong. Petitioner
9 also has not claimed the floodplain elevation of 144 feet is
10 wrong. As these figures are not challenged, we conclude the
11 city's findings about density are adequately supported in the
12 record.⁸

13 Further, as we have said in assignment of error no. 1, the
14 City of Hillsboro is under no obligation to approve a zone
15 change when an existing and approved development meets all
16 comprehensive plan criteria and where petitioner cannot point
17 to change conditions or other important planning issues
18 favoring one proposal over another.

19 The second assignment of error is denied.

20 ASSIGNMENT OF ERROR NO. 3

21 The third assignment of error states:

22 "Respondent has not, by this action, violated or
23 failed to properly implement Goal X, - Housing."

24 In this assignment of error, clarified by petitioner at the
25 hearing before the Board, petitioner argues that the density
26 approved in PUD 3-80 is less than that possible in the

1 requested A-1 and, therefore, violates the comprehensive plan.
2 This violation of the city comprehensive plan results in a
3 violation of Goal 10. Petitioner alleges that the city, by its
4 denial of a zone change to medium level densities, is unable to
5 satisfy Goal 10's requirement that there be a variety of
6 housing types within local planning jurisdictions. Petitioner
7 further says that an unfair burden is placed on the rest of the
8 city to assimilate densities and types of housing that somehow
9 petitioner feels have been violated by the city's action.

10 Petitioner's argument rests on the assumption that medium
11 density is called for in the plan and needed to meet Goal 10.
12 As we believe petitioner has not shown a violation of the
13 comprehensive plan, we find no violation of Goal 10.⁹

14 The third assignment of error is denied.

15 The action of the City of Hillsboro is affirmed.
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FOOTNOTES

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4 We are not able to find a definition of density levels in
5 the copy of the comprehensive plan supplied in the record.

6 2
7 The staff report for this planned unit development shows a
8 floodplain elevation of 144 feet resulting in a net buildable
9 area of 3.181 acres and a net density of 8.173 acres.

10 3
11 We do not know why there is a difference between the city
12 finding of .9 acres of land within rights of way (see page 3,
13 supra) and the various right of way figures used in this set of
14 calculations. Also, we do not understand why, in (b) and (c),
15 above, the same floodplain elevation results in different
16 acreages within the floodplain. The difference in figures does
17 not change the outcome of the case, however, that a net density
18 of from 7-12 units per acres exists here.

19 4
20 Even if we were mistaken in our view that the city
21 calculates density in terms of net buildable acres, the result
22 in this case would probably be the same. The city plan allows
23 the city to lower specified densities because of hazards. See
24 pg 4, supra, Comprehensive Plan, Sec 8(III)(B).

25 5
26 We understand the reference by petitioner to "market
conditions" to be simply an argument for greater density.

27 6
28 "Housing Goal, policies A, B, C, D, L, M, N, O, Q, S, U,
29 and Implementation Techniques A and F
30 "Energy Goal, policies A, E and F
31 "Transportation Goal, policies B, D, E, F, G and H"

32 7
33 "Denial of the proposed A-1 achieves satisfying the
34 concerns of the neighborhood residence and acknowledges
35 appropriate levels of citizens involvement in reviewing this
36 proposal, while the existing PUD 3-80 satisfies the density
requirements called for by the comprehensive plan of the city."

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We believe petitioner must do more than simply say a finding is not supported. Petitioner must explain whether he means there are no facts on the matter at all in the record, whether he means the facts that are there are not enough (and why) or whether he means the facts are wrong. See Howell v. Hood River Co., Or LUBA _____ (LUBA No. 81-093, 1981); Lee v. Portland, 3 Or LUBA 31 (1981).

9

In the supplemental memorandum submitted to the Board, petitioner attempts to introduce a technical memorandum that could be read to suggest that the City of Hillsboro Comprehensive Plan requirements concerning density only concern gross density. That is, the city is speaking of units per gross acre when it lists the maximum density in medium density residential districts as 12 units per acre. This information is submitted too late. The petitioner should have provided this information to the city at the proceeding below. To give this information to the Land Use Board of Appeals at this point risks our second guessing the city on its interpretation of its own ordinance based upon information that the city did not have before it when it considered petitioner's request.



STATE OF OREGON

INTEROFFICE MEMO

TO: MEMBERS OF THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION

DATE: 11/30/81

FROM: THE LAND USE BOARD OF APPEALS

SUBJECT: HESTON V. HILLSBORO
LUBA NO. 81-103

Enclosed for your review is the Board's proposed opinion and final order in the above captioned appeal.

Petitioner arguably raises two goal issues. In petitioner's second assignment of error, he claims a Goal 2 violation, but we read his assignment of error to be an assertion that the city's findings are not supported by substantial evidence. We do not view such an assertion to fall within the scope of Goal 2.

Petitioner's third assignment of error alleges a violation of Goal 10. The violation of Goal 10 results from petitioner's belief that the city has not allowed the subject property to be developed to medium level density. Apparently, petitioner believes medium level density is necessary to comply with Goal 10. As medium level density is called for in the comprehensive plan, and as the petitioner says the city has violated the comprehensive plan, petitioner claims Goal 10 has been violated. We find the city did allow the property to be developed to medium level density. As we do not find a violation of the city comprehensive plan, we do not find a violation of Goal 10 as alleged by petitioner.

The Board is of the opinion that oral argument would not assist the commission in its understanding or review of the statewide goal issues involved in this appeal. Therefore, the Board recommends that oral argument before the commission not be allowed.



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Affirmed. 11/30/81

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

