4/18/78

Before the Land Conservation and Development Commission of the State of Oregon

SEAMAN, et al, *Petitioners,*

vs.

CITY OF DURHAM, *Respondent*

[LCDC No. 77-025]

OPINION AND RECOMMENDATION ON JURISDICTION

Allen L. Johnson, Hearings Officer

SUMMARY

Petitioners challenged an ordinance of respondent, which amended the definition of the City's A-1 Multi-Family Zoning District to reduce the allowable density of residential units from 10 to 5 per acre. The petition alleged violations of goals 2, 3, 10, 13, and 14. *Held:* The ordinance violated Goal 10 and was therefore invalid. It tightened area restrictions, raised the minimum cost of new housing, and did not promote flexibility in housing types; respondent had not shown by compelling reasons how it had complied with Goal 10 in so doing.

ISSUES

1 Goal 10 — Implementation on Regional Level.

The guidelines for Goal 10 contemplate the ultimate implementation of the goal to be on a regional level. It refers to the "financial capability" of "Oregon households," strongly suggesting that towns must look beyond their borders in assessing housing needs.

2 Intent to Decrease Diversity of Housing Types and Prices Violates Goal 10.

Planning that shows an intent to decrease the diversity of housing types and prices in a city runs directly contrary to the purposes of Goal 10.

3 Goal 10 — "Least Cost" Doctrine.

The goal does not forbid a municipality to plan and zone substantial areas for low-density or multiple-family housing. The only requirement is that the planning jurisdiction do its part toward solving the housing needs of the area's residents of all income levels, as far as is reasonably possible given the constraints of land, materials, and similar costs.

NATURE OF PROCEEDINGS

This is a review proceeding brought by 19 private persons under ORS 197.300(1)(d) to review an ordinance adopted by the City Council of the City of

Durham on July 20, 1977, amending the definition of the city's A-1 Multi-Family Zoning District to reduce the allowable density of residential units from 10 to 5 per acre.

Description of Parties

The petition alleges that the amendment has reduced the value of property owned by Petitioners in the affected area. Respondent is apparently an incorporated city in Washington County on the Portland urban fringe. Petitioners have named as other persons whose interests have been substantially affected all owners of property in the affected area (Appendix C to petition). Fourteen of 27 tax lots listed are owned or under contract to one or more of the Petitioners, if the exhibits are accurate.

Issues Raised by Petition

The following goal violations are alleged:

1. Goal 2, Planning, in that the reduction allegedly doesn't conform to Washington County's Comprehensive Framework Plan, under which the area should be considered "urban." Petitioners also claim that one stated purpose of the change in density was to keep out transient and unproductive types and that such a reason is inconsistent with LCDC and Washington County goals of providing for variety in cost and type of housing. Finally, Petitioners claim that Goal 2 was violated because the density change will force incompatible development, contrary to good planning principals.
2. Goal 3, Agriculture, in that the reduction in density will force the development of agricultural soils elsewhere in the county.
3. Goal 10, Housing, in that no consideration was given to LCDC housing guidelines and in that the stated reasons for the change were discriminatory. A violation of the County plan is alleged on the same basis.
4. Goal 14, Urbanization, in that the property is within the urban growth boundary established by the county, services are available, and the property is ideally located, so that the reduction in density works against the goal of orderly and economic development and use of services and facilities.
5. Goal 13, Energy, on the ground that the reduction in density will foster urban sprawl and associated inefficiencies.

Motion to Dismiss

The City of Durham has filed a motion to dismiss on the ground that the petition is so vague and fails in so many ways to conform to the Commission's procedural rules that the Commission should not accept jurisdiction. The specific defects alleged are as follows:

1. Addresses and phone numbers of individual Petitioners were not provided. OAR Ch. 660, 01-005(2) and (3).

2. No statement as to what part of ORS 197.300(1) the petition is being filed under. OAR 660, 01-050(6).

3. No statement of facts showing how the interests of petitioners are substantially affected. OAR Ch 660, 01-050(10).

4. No map, sketch, or diagram of area affected. OAR 660, 01-050(14).

5. No designation of record. OAR 660, 01-050(15).

6. No statement regarding prior filings. OAR 660, 01-050(16).

The petition was filed shortly after the Commission adopted its new temporary rules. At the time I first wrote to the parties, on September 26, 1977, I sent them copies of the temporary rules. It seems reasonable, under the circumstances, to permit the Petitioners to file an amended petition in conformity with the rules. I find that the petition is lacking in the respects indicated except for item three. The petition does allege that the change in definition of the zone will reduce the value of the petitioners' property and it appears from the petition that all petitioners own or are buying property affected by the ordinance in question. If these allegations are accurate, the petitioners clearly have interests that are substantially affected and have standing.

I have directed Petitioners to file an amended petition conforming with the new rules. Respondent has not contended and I find nothing to indicate that the petition was untimely filed, that the Commission lacks jurisdiction, or that Petitioners have filed under the wrong statutory provision. (The September 15, 1977, cover letter of attorney for Petitioners, which accompanied the petition, specifies ORS 197.300 (1)(d).) On the contrary, it appears that potential goal violations have been alleged, however imperfectly that standing has adequately been alleged, and that the Commission does have jurisdiction.

Previously Filed Pleading

In a letter to the hearings officer, dated September 28, 1975, counsel for Petitioners stated that a Writ of Review proceeding had been filed in Washington County Circuit Court and enclosed a copy of the petition. Petitioners in the Case (Washington County Circuit Court Case No. 37-929) are the same as in this case. Respondents are the Durham City Council and Planning Commission and their members. The same decision, adoption of Ordinance 61-77 on July 20, 1977, is brought into question. The errors alleged are as follows:

1. That petitioners were denied rights to rebut and have access to evidence.

2. That members of the planning commission owned property that would be beneficially affected by the change.

3. That the planning director participated in a dual capacity as a planning director and city council member.

4. That certain members of the planning commission are married to certain members of the council, giving rise to conflicts and bias.

5. That the decision was not supported by substantial evidence as to traffic problems, transient types and the harm they would cause, if any, impact on schools, and what was wrong with the existing density.

The Commission is required to strike allegations in petitions before it, which are the same or substantially the same as and involve the same legal or factual issues as are contained in pleadings previously filed in court proceedings. 1977 Or Laws 664(22)(3). Assuming that the petition forwarded by counsel for Petitioners was filed prior to September 16, the filing date of the petition herein, there appears to be no substantial overlap. The question of goal violations is not raised in the writ of

review proceeding, and the various procedural irregularities are not raised in this proceeding, with the possible exception of the discrimination issue. If it later appears that the overlap on this point is substantial, the Commission can always defer to the court at that time.

CONCLUSION

For the reasons set forth above, I recommend that the Commission assume jurisdiction and that this case proceed to the merits. In the event that the Commission agrees, this opinion and recommendation should be adopted as the Commission's findings of fact and conclusions of law in support of its order.

Dated this 23rd day of October, 1977.

OPINION AND FINAL ORDER

This case came before the Commission on February 24, 1978, for hearing on the recommendation and opinion of the hearings officer dated February 12, 1978. Counsel for both parties appeared and argued at the hearing. Upon consideration of the opinion and of the briefs, exceptions, and argument of the parties, the Commission determined, on motion duly made and seconded, to adopt the recommendation of the hearings officer subject to the following revisions:

1. The Commission does not consider the exception procedure set forth in Goal 2 to be applicable. Accordingly, lines 15-18 of Page 14 of the hearings officer's recommendation are modified to read as follows:

> . . . the burden is upon the planning jurisdiction to show by compelling reasons [through the Goal Two exceptions procedure, why it should not have to comply] how it has complied with Goal 10. That has not been done in this case. (Deletions are in brackets; new langugage is underlined)

2. The Commission wishes to emphasize the need for a regional determination of housing need as the basis for the city's determination as to its fair share of responsibility to satisfy the needs of the region and the city itself for low-cost housing. The recommendation and opinion of the hearings officer has been revised accordingly and is set forth below as the Commission's opinion, findings of fact, and conclusions of law in support of this order.

OPINION OF THE COMMISSION

Nature of Proceeding

This is a petition for review proceeding brought under ORS 197.300(1)(d) for review of Ordinance No. 61-77, adopted by the City of Durham on July 20, 1977.

The ordinance amends the definition of an A-1 zone in the city's comprehensive plan to reduce the permitted density of single-family dwellings from one per 8,000 square feet to one per 15,000 square feet and to reduce the permitted density of dwelling units in duplexes or multiplexes from one per 4,000 square feet to one per 8,000 square feet.

The city's comprehensive plan, adopted by ordinance dated April 28, 1975, designates a strip of land along the town's main arterial, S.W. Upper Boone's Ferry Road, as A-1. The property remains zoned A-2 under a 1972 ordinance, but its

effective maximum permitted density is limited by the plan. See *Baker v. City of Milwaukie*, 271 Or 500, 510, note 10, 533 P2d 772 (1975).

The strip of land, about 30 acres, comprises 12.4 percent of the city's 237 acres. Durham's population, according to a recent census update, is about 250 people. The city has no stores or other commercial activities, althogh a small portion is zoned for professional commercial. It has two small light industrial zones with light industry in them. The remainder of the city is zoned single-family residential with a minimum lot size of 15,000 square feet. Existing multiple family uses consist of two multiplexes, both within the A-1 strip. One has 12 units, the other four. Both conform to the 4,000 square foot per dwelling unit limit imposed by the old A-1 plan text.

The city is located in a rapidly growing area of Washington County. It sits between Tigard and Tualatin. Interstate Route 5 (I-5) runs through a "general commercial" area adjoining it to the east. A vicinity map and a more detailed map showing the city's planning zoning designations are attached to this opinion as Exhibits A and B.

The 18 Petitioners own property within the A-1 area. They contend that the density decrease violates several LCDC goals, with special emphasis on the housing goal. The significant issues presented by their petition are (1) whether the Commission's goals require suburban residential cities to provide a variety of housing types, (2) how compliance is to be measured, and (3) whether Durham has complied.

Procedural and constitutional issues other than goal violations are being litigated by Petitioners in a writ of review proceeding (Washington County Circuit Court Case 37-929). One of these issues is whether the Oregon Constitution or United States Constitution prohibits "exclusionary zoning" of the type allegedly being practiced by Durham. Petitioners may not litigate that issue here, but they contend that the spirit of recent state and federal cases requiring towns to consider regional housing needs and provide their "fair share" of low-income housing is embodied in the Commission's housing goal.

Petitioners ask that the ordinance in question be declared void.

Record on Review

Based upon stipulation of the parties, the Commission finds the record before the city to be as follows:

1. Items 1-39 on Respondent's designation of record. These are, for the most part, minutes of Planning Commission and City Council meetings dating from 1972, dealing with adoption of the city's comprehensive plan and with the amendment brought into question here. They also include the city's "Comprehensive Plan Zoning Map," (Item 30), staff and Planning Commission findings (Item 30), and copies of the relevant ordinances.
2. Tapes of March 2, 1977, Planning Comm. hearing on proposed text change, April 6 Planning Comm. hearing, May 18 City Council hearing, June 15 Council meeting, and June 28 City Council special meeting.
3. June 2, 1977, letter to Council from Spencer Vail, planning consultant.
4. May 18, 1977 letter to Council and Planning Comm. from Tigard School District.
5. Younger and Neu report on impact of proposed zone change.

Items 3-5 are attached to the petition. Item 4 was read into the record at the May 18, 1977, hearing. Mr. Neu, representing two of the Petitioners, presented written

material presumably consisting of Item 5 at the same hearing (Tape of 5/18/77 meeting, side 2(a)).

Findings of the City

Item 30 in Respondent's designated record is a two-page document entitled "Findings to Support Decision of Planning Commission to Recommend Approval of A-1 Text Change," and is dated May 16, 1977. It is unsigned. The minutes of the April 16, 1977, special meeting of the Planning Commission reflect its decision to recommend approval to the City Council but contain no reference to findings. The minutes of the June 28, 1977, meeting at which the City Council approved the plan text change state that the May 16 document was read into the record, but the tape reveals that only the first page was read (6/28/77 tape, foot 28ff). The "Statement of Intent and Purpose" in the A-1 zoning text was read, and midway in the roll-call vote, Council President Mary Taylor read into the record her own statement addressing Goal 10 and expressing agreement with the Planning Commission findings. Item 36, Document Four, in Respondent's designated record.

None of these statements or findings were adopted formally. The Commission simply voted on a motion to adopt the ordinance. Item 35.

Analysis and Recommendation

The Commission could choose not to treat the May 16 document as the city's findings. In that event, it would remand to the city for clarification of its position with respect to those findings. As the Commission has said in a number of recent decisions involving both legislative and quasi-judicial decisions, it cannot adequately review local government action and enforce the Goals without a proper statement of findings and reasons to assist it in determining how the local governing body arrived at its decision. See, especially, report and recommendation of hearings officer in LCDC Case No. 77-004 and Court cases cited in that report.

However, it is the Commission's opinion that no real purpose would be served by such a course. It was clearly the city's intent to rely upon the May 16 document as its findings, and the Commission will treat them as such.

The decision to redefine the A-1 zone was, in the Commission's opinion, essentially legislative in nature, although it is aware that the Circuit Court has held otherwise in the writ of review proceeding. The amendment was initiated by the city for policy reasons, not upon application by private parties. It involves more than a tenth of the city's land area and affects numerous property owners. Nevertheless, it also involves facts of an essentially adjudicative nature and the Commission shall, in this opinion, accept those findings of adjudicative fact contained in the May 16 document that are supported by substantial evidence in the whole record.

The Ordinance Violates Goal 10:

The Commission finds, for the reasons set forth in this opinion, that the density reduction should be declared void as in violation of the housing goal and that the matter should be returned to the city for such action, if any, as is consistent with the Commission's determination and this opinion.

[1] This case turns on the meaning and intent of the LCDC Housing Goal. Goal 10 is short and to the point:

> Goal: To provide for the housing needs of citizens of the state.

Buildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density.

Buildable Lands — refers to lands in urban and urbanizable areas that are suitable, available and necessary for residential use.

Household — refers to one or more persons occupying a single housing unit.

Since 1977 Or Laws Ch 664 § 19, became effective on July 22, 1977, it has been clear that cities are not required to conform strictly to guidelines. It should have been clear even before then that the Commission considers them only suggested means to the mandatory ends described in the goals.

Yet they are instructive and may validly be considered for the light they cast on the intent of the drafters of the goals. The housing guidelines reflect a great concern for variety in shelter costs, for dispersal of low-income housing thoughout urban areas, and for affirmative incentives to achieve the goal, if necessary. See Guidelines A(1) and B(2) to B(5). The guidelines also contemplate the ultimate implementation of the goal to be on a regional level. Guideline B(6). Perhaps most important, the goal itself refers to the "financial capability" not of residents of the municipality but of "Oregon households," strongly suggesting that towns must look beyond their borders in assessing housing needs.

The housing goal clearly says that municipalities are not going to be able to do what they have done in metropolitan areas in the rest of the country. They are not going to be able to pass the housing buck to their neighbors on the assumption that some other community will open wide its doors and take in the teachers, police, firemen, clerks, secretaries and other ordinary folk who can't afford homes in the towns where they work.

The LCDC, in adopting Goal 10, was doing just what the courts in many urban states have been doing in recent years. The development is examined approvingly and at length in a leading planning law treatise, which introduces the topic with these observations:

If anything is clear in American planning law, it is that the state courts (and some lower federal courts) have been moving rapidly towards a major reversal in the law on exclusionary zoning directed against lower-income groups. At least in several states, and probably in most states, there is a strong probability that in the near future municipal autonomy to use zoning for such purposes will be sharply reduced . . . .

This change . . . is the result of several different factors. First, because of changes in the age structure of the population, this country is moving into a period when there will be heavy pressure for several types of housing, all of which are now prohibited on most of the available vacant land. Two groups in the population are now increasing rapidly — the aged . . . and the young married couples.

In the second place, the recent development of public policy in the other critical areas has cast considerable light on the implications of the exclusionary suburban pattern . . . (For) a decade or two now it has been apparent that, if current trends continue, there is considerable likelihood of a pattern of largely black (and poor) central cities surrounded by largely white (and middle class) suburbs — a pattern whose implications appeal to very few thoughtful people. 3 Williams, *American Land Planning,* Law Section 66.01 (1975).

Goal 10 speaks of the housing needs of Oregon households, not the housing needs of Durham households. Its meaning is clear: planning for housing must not be

parochial. Planning jurisdictions must consider the needs of the relevant region in arriving at a fair allocation of housing types. Goal 10 represents the broader interests of all Oregon households.

In this respect, Goal 10 is consistent with common sense and human nature. Local officials cannot be expected to concern themselves too deeply about the requirements of outsiders, especially when their constituencies have interests that conflict with those of the outsiders. It is only proper for these officials to consider their first responsibility to be their constituents.

It becomes necessary, therefore, to assure that broader interests are represented in planning decisions such as housing, which have significance and impacts extending far beyond municipal borders. In some states, these interests have been found by courts to be protected by state constitutions. See *So Burl Cty NAACP v. Tp of Mt Laurel*, 67 NJ 151, 336 A2d 713, app dism and cert den 423 US 808 (1975); *Appeal of Girsh*, 437 Pa. 237 263 A2d 395 (1970). In others, they are protected by statute. See Mass Gen Laws Ann 40B, Secs. 20-23; Cal Gov't Code Sec 65302c. Federal programs such as HUD's Housing Opportunity Plan and the 1974 Housing and Community Development Act of 1974 have stimulated numerous local and regional planning bodies to institute "fair-share" plans designed to assure that each town provides its fair share of low-cost housing needed by the region. See Rose, "Is There a Fair Share Housing Allocation Plan that is Acceptable to Suburban Municipalities?," 12 Urban Law Annual, reprinted in Rose and Rothman, *After Mount Laurel,* (Center for Urban Policy Research: 1977) at page 124, n. 3. (For a highly successful metropolitan program in which local government applications for state and federal park, highway, sewer, and other public works grants are ranked and awarded according to the applicant's record in providing its share of the region's low and moderate-income housing, see McFall, "Fair Share Housing: The Twin Cities Story," *Planning,* August 1977, at pp. 22-31.)

In Oregon, Goal 10 and the goals and objectives of regional planning agencies such as CRAG reflect the same regional orientation to the housing problem.

[2] Nothing in the record suggests that Durham, in amending its plan, gave any consideration to low-cost housing needs of its own residents and workers, much less those of the region. The record clearly shows a contrary intent, namely, to decrease the diversity of housing types and prices. Such planning runs directly contrary to the purposes of Goal 10.

Implementation:

Durham is part of a planning region, and the Commission considers the CRAG planning area to be the appropriate region against which to measure Durham's Goal 10 housing responsibilities. Durham is free to perform the necessary surveys and planning steps to ascertain its fair share of the region's responsibility for satisfying that need. However, the planning agency for the region, Columbia Region Area Governments (CRAG), will be making those studies and preparing a fair share housing element for its regional comprehensive plan shortly, and Durham may choose to await the outcome of that study.

This Commission is neither authorized nor inclined to plan for Durham. Its role in this proceeding is akin to that of a court, and it believes that CRAG is best equipped to solve the problem. As the New Jersey Supreme Court has noted:

> Of primary significance is the difference between the situation of an administrative planning agency functioning under authorizing legislation and that of a court dealing with an

attack . . . on the zoning ordinance of an isolated municipality. The former is dealing with a comprehensive, predetermined region and can render or delegate the making of allocations with relative fairness to all of the constituent municipalities or other subregions within its jurisdiction. *Madison*, supra at 371 A2d 1217

CRAG's housing element will come before the Commission for a general compliance reivew in due course. For now, the Commission will limit itself to seeing that local jurisdictions, which clearly lack meaningful diversity of housing, do not turn the screws down even further. The Commission trusts that this decision will signal its commitment to the spirit of Goal 10 and encourage planning jurisdictions throughout the state to give it proper attention in their efforts to bring their plans into overall compliance with the LCDC goals.

The literature in this area is multiplying rapidly as lawyers, courts, and planners deal with the inevitable problems of implementation. These problems include the definition of the demographic planning area that must be considered by a town, the definition of a town's fair share of lower cost housing, the use of incentives in enforcement powers, the detection of subterfuges and token efforts and the like.

[3] One such concept, which the Commission considers to be important, is the "least cost" doctrine, which recognizes that land and materials prices as well as statewide building standards are beyond the direct control of the planning jurisdiction. That doctrine has been stated as follows by the New Jersey Supreme Court:

To the extent that the builders of housing in a developing municipality . . . cannot through public assisted means or appropriately legislated incentives . . . provide the municipality's fair share of the regional need for lower income housing, it is incumbent on the governing body to adjust its zoning regulations so as to render possible and feasible the "least cost" housing, consistent with standards of health and safety, which private industry will undertake, and in amounts sufficient to satisfy the deficit in the hypothesized fair share *Madison,* supra, at 371 A2d 1207. See also, 3 *Williams* at 66.12c

The Commission wishes to emphasize that Goal 10 does not forbid a municipality to plan and zone substantial areas for low-density or multiple-family housing. The only requirement is that the planning jursidiction do its part towards solving the housing needs of the area's residents of all income levels, as far as is reasonably possible given the constraints of land, materials, and similar costs.

The question in this case and in all compliance reviews, then, is, "Has the planning jurisdiction in question done its part?" The question is easy to answer if the plan provisions in question are obviously aimed in the opposite direction, as is the case here. It will be more difficult where the city or county has tried, but hasn't, perhaps, tried hard enough. Just because it won't be easy, however, doesn't mean it can't be done.

Ordinance 61-77 violates Goal 10:

Ordinance 61-77 tightens area restrictions and raises the minimum cost of new housing in a town where area restrictions were extremely tight to start with. It does not promote flexibility in housing types. It frustrates flexibility in housing types and promotes the kind of economic and social homogeneity that Durham's city officials freely admit is the city's main reason for existence. As the city's brief says,

Durham was originally incorporated in order to keep this small and historical community a low-density residential community with as little manufacturing or industry as possible. . .

From at least 1972 to the present, a major concern of the City of Durham has been to remain a low-density community. (Resp. Br. 2)

One of the major motivations is the desire to "provide a liveable environment away from the pressures and problems of the inner cities." (Resp. Br. 2)

The density reduction obviously furthers this generally worthy and certainly understandable objective. Other reasons given by the City of Durham include the fear of increased traffic on Boone's Ferry Road, protection of property values overcrowded schools, air and noise pollution, and maintenance of open spaces (Page 2 of proposed findings)

The availability of public services such as sewer and water is ingeniously used by the city to justify lowering the density:

It is apparent at this time that the growth of the City is going to occur at a different rate tha contemplated by the zoning plan, since sewer and water facilities are now available, an would allow for a faster and larger growth than was anticipated. Therefore, in order t maintain the carrying capacity of the air, land and water resources a downzoning of th multiple housing area, A-1 was regarded as necessary, to prevent overcrowding of the lar and maintain open spaces. Page 2 of proposed findings.

The low-cost housing issue is directly addressed by the city as follows:

Since the City of Durham already offers two different locations of apartment buildings f low-cost housing, there is a public need for middle-income housing apartments. The ar now zoned multiple housing presently contains not only the low-cost apartments but ma single-family residences. This text change would allow for any property owner owning la in the A-1 district to construct a single-family residence, if he so wished. It also would all the owner to construct multiple dwellings of either low, middle, or high cost. Page 2 proposed findings.

These findings do not describe the two locations. The only location described in t record is the Chester Berning apartment, consisting of 12 dwelling units on one ac Tape of 4/6/1977 PC meeing, side 1, 300'ff. The Commission does not rely up the representation of counsel for Petitioners, on oral argument, that the o multiple family housing are the Berning apartments and another four-pl However, if what he said is true and if those are the two locations, they don't sati Goal 10 without supporting data as to the extent of the need for such housing. A is, the findings that there are two locations and the implied finding that they sat the Goal 10 requirement for a diversity of housing types are unsupported substantial evidence in the record.

There is no evidence in the record to provide a basis for evaluating the finding need for middle income apartments. The evidence was, and the Commission fi that land costs in the 30-acre strip at the time of the adoption of the ordinance v $5,000 per dwelling unit at 4,000 square feet per unit and $10,000 per dwel unit at 8,000 square feet per dwelling unit, increasing monthly tenant rental landscaping costs by $70 per month, or 28 percent. See Younger and Neu Re attached to petition, and testimony of Younger and Neu at 5/18/77 hearing. (of side one and beinning of side two of tape.)

The Commission finds that there was no substantial evidence in the reco support a finding that overcrowding of schools was likely. The only substa evidence on that point was the letter of Robert A. Greenwood of Tigard Sc District. That letter, dated May 18, 1977, and read into the record at the hea pointed out that the district had recently secured approval of a bond levy

planned to open two new elementary schools in the fall of 1979, that they should "take care of the enrollment growth expected in the next few years," that a district survey had revealed that about four apartment units yield "one school child," not the four estimated by the city, and that the district wouldn't have difficulties in housing students if the A-1 criteria were left unchanged. (See letter attached to petition).

The Younger and Neu report also points out that much of the 30 acres is already developed, an issue never addressed by the city. Younger and Neu estimate the amount of vacant land at 8.36 acres and the amount of developed land at 21.61. In the absence of conflicting evidence, we find this to be approximately accurate. It also appears that Boone's Ferry Road is a major thoroughfare heavily burdened by rapid commercial, industrial, and residential development in the area. There is no evidence in the record to support the city's position that the additional traffic created by retaining the 4,000 square foot standard would be significant.

Even accepting all of the findings set forth in the May 16 document, together with Councilperson Taylor's statement of June 28, 1977, the Commission does not find that they justify a density reduction in a city that provides no significant new opportunities for low- or lower-middle income residential development.

Where the record affimatively shows, as this one does, that the city's main goal is to retain low-density residential zoning and where the ordinance under review reduces rather than increases the selection of housing, the burden is upon the planning jurisdiction to show by compelling reasons how it has complied with Goal 10. That has not been done in this case.

CONCLUSION

The real spirit and intent of Ordinance 61-77 is, in the Commission's opinion, embodied in the remarks of its principal proponent, Planning Director John E. Sattler, also a member of the City Council. He stated that one of the main purposes of the change was to discourage "transient types" (April 6 Minutes). This attitude is reflected in comments throughout the hearings as well as in the city's summary information sheet, which argues that retention of the higher density will bring in "people who are nonproductive community participants" (Item 27).

The plush Kingsgate subdivision of $60,000 to $90,000 homes going in across from the A-1 area will occupy most of the remaining buildable land in town and will do much to preserve the dominant low-density residential character of the town. If Durham is to play any part in accomplishing the purpose of Goal 10, it won't be by way of the decreasing moderate densities of the existing A-1 designation.

The Commission finds that Durham City Ordinance 61-77 violates Goal 10 for the reasons set forth herein. The ordinance is therefore invalid.

Dated this 18th day of April, 1978.