

AUG 2 1 59 PM '88

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

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2  
3 RALPH and CAROLYN YOUNGER, ROBERT )  
and DEBBIE RUSSELL, LOU and KATHY )  
4 JAFFE, RAYMOND and CATHERINE A. )  
HONERLAH, ROBERT HARDIN, JR. and )  
5 KRISTY HARDIN, MARILYN SCHULTZ, )  
DR. ROBERT J. and SUSAN NELSON, )  
6 ANTHONY and REGGIE BARSOTTI, RON )  
and JANE CEASE, JOE B. and JO )  
7 HANSEN, TIMOTHY and MARCIA NATHMAN, )  
THE NEIGHBORHOOD PROTECTION )  
8 COALITION, WILLIAM A. GAYLORD, and )  
STEWART A. MARTIN, )

9                   Petitioners, )

10                   vs. )

11                   CITY OF PORTLAND, )

12                   Respondent, )

13                   and )

14                   FRED MEYER REAL ESTATE PROPERTIES, )  
15                   LTD., and HYSTER COMPANY, )

16                   Participants-Respondent. )

LUBA No. 86-046

FINAL OPINION  
AND ORDER ON REMAND

17                   On remand from the Court of Appeals.

18                   Mark J. Greenfield and Edward J. Sullivan, Portland, filed  
19 memoranda on remand. With them on the memoranda was Mitchell,  
Lang & Smith.

20                   Kathryn Beaumont Imperati, Portland, filed memoranda on  
21 remand.

22                   Susan M. Quick, Portland, filed memoranda on remand.

23                   BAGG, Chief Referee; HOLSTUN, Referee; participated in the  
24 decision.

25                   AFFIRMED

08/02/88

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

1 Opinion by Bagg.

2 PROCEDURAL HISTORY

3 This case is before us on remand from the Supreme Court.  
4 Younger v. City of Portland, 305 Or 346, \_\_\_ P2d \_\_\_ (1988).  
5 In reviewing our decision, Younger v. City of Portland, 15 Or  
6 LUBA 210 (1987), and that of the Court of Appeals, Younger v.  
7 City of Portland, 86 Or App 211, 739 P2d 50 (1987), the Supreme  
8 Court questioned our application of the substantial evidence  
9 test.<sup>1</sup> In our opinion, we concluded the city's order was  
10 supported by substantial evidence in the whole record. In  
11 reaching that conclusion, we relied in part on Christian  
12 Retreat Center v. Board of Commissioners of Washington County,  
13 28 Or App 673, 560 P2d 100, rev den 278 Or 553 (1977); and  
14 Home Builders Association of Metropolitan Portland v. Portland  
15 Metropolitan Service District, 54 Or App 60, 633 P2d 1320  
16 (1981). The Supreme Court found it was not clear that we  
17 considered all of the evidence in the record including evidence  
18 which fairly detracted from the evidence relied upon by the  
19 city. The Supreme Court observed that the opinions we cited  
20 were "somewhat ambiguous with respect to whether substantiality  
21 must be evaluated by considering the whole record." Younger,  
22 supra, 305 Or at 359. The court explained

23 "LUBA's opinion suffers from the same ambiguity as the  
24 statement quoted from Home Builders. LUBA states that  
25 the evidence supporting the city's decision is  
26 'substantial' or 'sufficient to form the basis for a  
decision' but does not state whether the  
substantiality of that evidence was evaluated in  
isolation or upon the whole record. Although from

1 other statements in its opinion we have little doubt  
2 that LUBA would have reached the same result had it  
3 correctly evaluated the substantiality of the evidence  
4 supporting the city's decision, we believe that the  
5 appropriate course, in light of our limited scope of  
6 review, is to remand the case to LUBA so that LUBA can  
7 make its own evaluation of the evidence.

8 "We emphasize that the question LUBA is to decide on  
9 remand is simply whether, in light of all the evidence  
10 in the record, the city's decision was reasonable.  
11 \* \* \* Obviously, for a decision to be reasonable, it  
12 need not be the decision that LUBA would have made on  
13 the same evidence."<sup>2</sup> Id. at 360.

14 Our task, then, is to review the city's decision in the  
15 light of the standard articulated by the Oregon Supreme Court  
16 and determine whether the city's decision is supported by  
17 substantial evidence in the whole record.

18 To aid us in this responsibility, we requested the parties  
19 submit memoranda discussing the court's decision and the  
20 evidence in the record. The court's decision is sufficiently  
21 broad to require us to consider the substantiality of the  
22 evidence with respect to all evidentiary questions considered  
23 in our first review of this case. However, the parties have  
24 limited their arguments to the city's conclusion that certain  
25 economic policies in the city's comprehensive plan are  
26 satisfied by the proposed development. Specifically,  
petitioners contend

"(1) that the City's plan policies require that this  
proposal have a beneficial impact on the existing  
Hollywood Business District, and (2) there is no  
substantial evidence in the whole record that the  
proposed Hyster/Fred Meyer One-Stop Shopping Center  
will have a positive impact on the Hollywood Business  
District. Instead, the evidence clearly shows that  
the proposed use will undermine and harm businesses

1 located in the Hollywood Business District."  
2 Petitioners' Memorandum on Remand at 2.

3 According to petitioners, we must find that the evidence in  
4 the record, viewed as a whole, would allow a reasonable person  
5 to conclude, as did the city, that the Hollywood Business  
6 District (HBD) will be benefited by the project.

7 We agree with petitioners' characterization of our task on  
8 remand. As requested by the parties, our review shall be  
9 limited to the economic issues discussed in petitioners'  
10 opening memorandum on remand.

#### 11 COMPREHENSIVE PLAN CRITERIA

12 The Supreme Court's charge requires us to consider the  
13 city's findings of compliance with applicable comprehensive  
14 plan policies. In reviewing the city's decision and findings  
15 for substantial evidence, we must determine what the plan  
16 policies mean. McCoy v. Linn County, 90 Or App 271, \_\_\_  
17 P2d \_\_\_ (1988); Gordon v. Clackamas County, 73 Or App 16, 698  
18 P2d 49 (1985). The city's view of its comprehensive plan  
19 policies, as expressed in the findings, is not materially  
20 different from that expressed by petitioners.<sup>3</sup> Petitioners  
21 assert the plan policies require the applicant to show and the  
22 city to find the project will not harm existing business  
23 districts.

24 In our original opinion in this case, we noted the city's  
25 policies

26 "do not prohibit damage or harm to existing businesses  
or enterprises. In this case, the city's goals and

1 policies do not rule out changes in the economic  
2 climate, nor do they prohibit approval of the  
3 businesses which may be in direct competition with  
4 existing businesses." Younger, 15 Or LUBA at 225.

5 We believe it is necessary to clarify our above quoted  
6 notation. While we adhere to our view of the city's policies,  
7 it is not sufficient simply to say the plan does not prohibit  
8 competition or damage to existing businesses. The city council  
9 found the Fred Meyer proposal will benefit the HBD business  
10 climate generally. Record 31-34, 79-85. The city council said  
11 the proposal will "enhance the business environment within the  
12 HBD \* \* \*." Record 82. The city apparently viewed the plan  
13 policies not to prohibit all competition and all damage to all  
14 existing businesses in the Hollywood district. However, the  
15 city's findings show it interpreted relevant policies to  
16 require the Hyster/Fred Meyer to have a positive impact on the  
17 HBD as a whole. We agree with that interpretation. It is  
18 reasonable to assume that nearly any project of the scale  
19 proposed in this case will have at least some positive and some  
20 negative impacts. We believe it is the total impact that the  
21 policies require to be positive.

22 Petitioners' challenge in the petition for review, restated  
23 in its memoranda on remand, centers on Portland Comprehensive  
24 Plan Goal 2 and Plan Policies 2.11, 5.9, 5.10 and 5.12. We  
25 consider each policy in turn.

26 Goal 2 requires, in part, that the city retain the  
character of the established business centers. Policy 2.11

1 requires the city to

2 "[e]xpand the role of major established commercial  
3 centers which are well served by transit. Strengthen  
4 these centers with retail, office, service and  
labor-intensive industrial activities which are  
compatible with the surrounding area \* \* \*."

5 Petitioners argue Policy 2.11 prohibits creation of a new  
6 commercial node (the new Fred Meyer store) some four blocks  
7 away from the boundaries of the HBD. Petitioners view the  
8 evidence to show the city's decision will negatively impact  
9 businesses in the HBD. Therefore, according to petitioners,  
10 the new Fred Meyer One-Stop Shopping Center weakens, rather  
11 than strengthens, the established HBD.

12 Policy 5.9 requires the city to

13 "[p]romote and enhance the special character and  
14 identity of Portland's districts and strips."

15 Policy 5.9's requirement to promote and enhance the  
16 character of Portland's commercial district is violated,  
17 according to petitioners, by a proposal which undermines an  
18 established district such as the HBD. Petitioners recognize  
19 that the HBD is predominantly one of small shops, but these  
20 small shops rely on the district's large anchor store, the  
21 existing Hollywood Fred Meyer, to draw customers to the HBD.  
22 Petitioners assert that the evidence shows the Hollywood Fred  
23 Meyer store will lose business because of the new and larger  
24 Fred Meyer facility at the Hyster site. Petitioners say "[i]f  
25 the anchor is harmed, the whole district is harmed because the  
26 small stores themselves cannot generate sufficient business."

1 Petitioners' Reply Memorandum at 12.

2 Policy 5.10 requires the city to

3 "[e]ncourage and strengthen the economic vitality of  
4 the city by ensuring that there is an adequate supply  
5 of commercially zoned land so that businesses may  
6 expand in a manner consistent with the city's historic  
7 commercial development pattern."

8 Under this policy there are objectives petitioners believe to  
9 be violated by the city's decision. They are:

10 "A. Sustain the role of established commercial areas  
11 to preserve shopping and employment opportunities  
12 for City residents.

13 "B. Promote the concentration of commercial  
14 activities in the established districts and  
15 strips.

16 Policy 5.10 requires encouragement and strengthening of the  
17 economic vitality of the city. Petitioners say Objectives A  
18 and B requiring the city to sustain the role of established  
19 commercial areas and promote concentration of commercial  
20 activities in the established districts and strips is violated  
21 by the city's decision. The economic damage petitioners say  
22 the district will suffer as a result of the new Fred Meyer  
23 store does not satisfy the plan objective to "sustain" this  
24 established business district.

25 Petitioners add that Objective C is also relevant. It  
26 states:

27 "Where appropriate need is identified, commercial  
28 areas may be located consistent with this policy in  
29 the Comprehensive Plan."

30 Petitioners agree with the city that this policy allows the  
31 city to provide for commercial expansion, but the manner of

1 expansion must be consistent with other objectives requiring  
2 the city to sustain the role of established commercial  
3 centers. Petitioners say this important qualification remains  
4 unmet by the city's decision.

5 Policy 5.12 requires the city to

6 "[p]romote a business environment within commercial  
7 districts and strips that is conducive to formation,  
8 retention and expansion of commercial businesses."

9 One of its objectives calls for the city to encourage the  
10 location of new commercial businesses in

11 "established commercial districts and strips and,  
12 where appropriate, new commercial areas."

13 Petitioners argue that this objective allows new commercial  
14 areas only where establishment of such new areas will not be to  
15 the detriment of existing commercial districts and strips.

16 In sum, petitioners argue that each of these policies  
17 prohibit the "undermining or harming" of the HBD. Petitioners'  
18 view is that the land use decision on review in this proceeding  
19 harms the HBD and therefore does not enhance, strengthen or  
20 expand the district as required by the policies quoted.

#### 21 INTRODUCTION TO THE EVIDENCE

22 As discussed earlier, the issue in this case is whether  
23 there is substantial evidence in the whole record to support  
24 the city's view that the proposed Hyster/Fred Meyer One-Stop  
25 Shopping Center will have a positive impact on the HBD and not  
26 be detrimental to the economic climate of that district.<sup>4</sup>

The city's view rests, in part, upon evidence it believes

1 shows that there is sufficient economic growth in the area to  
2 support not only the new Fred Meyer store but also the existing  
3 Hollywood Fred Meyer store and the surrounding HBD.<sup>5</sup> The  
4 city also found that dollars were leaving the Northeast  
5 Portland area, including the HBD, and one of the benefits of  
6 the new Fred Meyer store is to encourage area residents to shop  
7 closer to home. The city found that businesses in the HBD  
8 would benefit from cross-shopping from the Hyster Fred Meyer,  
9 just as they benefit from cross-shopping from the Hollywood  
10 Fred Meyer. Further, the city found that a significant number  
11 of shoppers, while drawn to the new Fred Meyer store, will  
12 continue to shop at the old store, thereby providing the  
13 existing Fred Meyer store with continued healthy business.  
14 Finally, the city relied on prior experiences of new Fred Meyer  
15 stores moving into close proximity with older existing stores.  
16 From this evidence, the city concluded the addition of a new  
17 Fred Meyer store will not significantly damage the existing  
18 Hollywood Fred Meyer store.

19 Our review, then, considers all of the evidence touching  
20 upon these underpinnings of the city's final conclusion that  
21 the HBD will not suffer from creation of the new store, but  
22 rather will benefit from it.

#### 23 ECONOMY OF NORTHEAST PORTLAND

24 Petitioners rely on the testimony of Dr. Ed Whitelaw. Part  
25 of Dr. Whitelaw's testimony asserts the new shopping center  
26 will not generate more purchasing power, but simply

1 redistribute that which exists. Dr. Whitelaw noted the  
2 population in the trade area of the new store dropped between  
3 1970 and 1980, and employment levels in the Portland area have  
4 not yet made it back to where they were in 1980. Record  
5 1711-1713. This redistribution, according to Dr. Whitelaw,  
6 will hurt the businesses at the old Hollywood Fred Meyer store,  
7 and, consequently, businesses in the HBD generally.

8 The city does not dispute Dr. Whitelaw's view that  
9 population has declined, but argues there is substantial  
10 evidence to support the city's view that spendable income in  
11 the area is on the rise. The city relied on the applicant's  
12 economic expert, Wallace M. Hobson, who reported an increase in  
13 real per capita income in the region from 1981 to 1985. Record  
14 83-84, 1416.<sup>6</sup>

15 We understand the city's position to be, to the extent  
16 retail sales at the Hyster Fred Meyer are attributed to  
17 increasing disposable income in the area, such sales do not  
18 represent redistribution of sales from the Hollywood Fred Meyer  
19 or the HBD.<sup>7</sup> The city also found that there was considerable  
20 retail leakage from businesses in Northeast Portland. That is,  
21 persons living in Northeast Portland were shopping in other  
22 areas of the city. Record 200. One of the benefits of the new  
23 Fred Meyer store will be to encourage area residents to shop  
24 closer to home, including within the existing HBD, according to  
25 the city. The city relied on rebuttal testimony by Hobson and  
26 Associates which contradicts petitioners' views on leakage.

1 The rebuttal states, in part,

2 "If, as Hobson & Associates contends, the demand for  
3 retail services has remained healthy in the northeast  
4 district concomitant with the constriction in supply  
5 due to closures, then we would expect to find  
6 higher-than-normal leakage of retail dollars out of  
7 the area. The reason we measured leakage was to  
8 determine whether this situation existed. In fact,  
9 the finding of significant leakage of expenditures on  
10 convenience retail goods substantiates the assertion  
11 that demand for retail services presently exceeds  
12 supply in the northeast district.

13 "Fred Meyer will recapture some of this leakage;  
14 however, this should be viewed as a return to normal  
15 rather than as a gratuitous reslicing of the pie.  
16 Other portions of this leakage will be recaptured by  
17 other merchants in Hollywood and the Northeast  
18 District as households get back in the habit of  
19 shopping closer to home. Recapture of leakage would  
20 be a withdrawal of 'windfall' sales dollars from a  
21 wide range of stores spread over a broad geographic  
22 area which are now benefitting from closures of stores  
23 in the Hollywood area. The marginal withdrawal from  
24 each store would not be large enough to constitute a  
25 noticeable shift of jobs: the leakage estimated by  
26 Hobson & Associates is only about three quarters of  
one percent of total retail sales in the Portland  
Metropolitan Area." Record 199-200.

See Record 1842-1844 for a discussion of how Hobson &  
Associates arrived at these conclusions.

#### CROSS-SHOPPING

The city argues that businesses in the established HBD will  
benefit from cross-shopping, i.e., persons shopping at the new  
Fred Meyer store will also visit stores in the HBD because a  
majority of the businesses in the HBD do not compete with the  
goods and services offered by the new Fred Meyer store. Record  
82-83. The city's conclusion is based upon studies by Edward  
L. Grubb and Marilyn L. Stubbs. Record 1978-2026, 2424-2488.

1           Petitioners quarrel with the notion the HBD will benefit  
2 from cross-shopping. Petitioners point to a city finding that  
3 a one-stop shopping center "allows shoppers to convert multiple  
4 need shopping trips to a single trip travelling to one site."  
5 Record 82. Petitioners refer to a study prepared by the  
6 applicant's expert, Dr. Thomas R. Gillpatrick, that shows  
7 one-stop shopping centers divert customer expenditures away  
8 from smaller stores. Record 2489-2493, 2509-2510. Petitioners  
9 point out the new Fred Meyer store and the existing Hollywood  
10 store will offer the same products, and there will be direct  
11 competition between them. The new store is considerably larger  
12 offering approximately 44,000 square feet for groceries  
13 compared to only 16,500 in the existing Hollywood Fred Meyer  
14 store. Record 2075, 2043.

15           Respondent Fred Meyer presented evidence showing that 82.1%  
16 of existing shoppers will shop not only at the new store but  
17 also at the old store. Record 2469. Thus, while 49.7% of  
18 existing shoppers are likely to stop at the new store, that  
19 does not mean the same number will cease shopping at the  
20 existing store, according to Fred Meyer. Record 3082-3083.<sup>8</sup>

21           To bolster its claim the HBD would not be damaged, the city  
22 relied on evidence comparing the impact of new Fred Meyer  
23 stores on established business districts. The study conducted  
24 by Dr. Grubb reviewed the impact of new Fred Meyer stores on  
25 established business districts of old downtown Beaverton,  
26 downtown Gresham, and the commercial strips near the Glisan and

1 Stadium Fred Meyer stores. See Record 1978-2026.

2 Approximately 94% of the businesses surveyed in suburban and  
3 urban locations believed that the new Fred Meyer store built  
4 near them had a positive or neutral impact on their  
5 businesses. Record 1994. Some 77% did not believe customers  
6 bypassed their store to shop only at the Fred Meyer facility,  
7 and 75% did not find it difficult to compete with Fred Meyer.  
8 Record 1993<sup>9</sup>

9 The city also cites the Hobson report on this issue:

10 " \* \* \* the best evidence to prove that the Hollywood  
11 District will not be harmed is to look at what has  
12 occurred in similar areas surrounding existing Fred  
13 Meyer stores. We presented the results of a survey to  
14 existing small businesses which are located within a  
15 mile or so of existing Fred Meyer stores. These  
16 businesses overwhelmingly agree that Fred Meyer is an  
17 excellent neighbor and has either a positive or  
18 neutral effect on their businesses."<sup>10</sup> Record 2092.

15 As to petitioners' claim that the existing Hollywood Fred  
16 Meyer store will be damaged and lose its position as an anchor  
17 for the HBD generally, the city responds that the petitioners  
18 cite no authority that direct competition is negative. The  
19 city notes the range of merchandise will be dramatically  
20 different between stores. Respondent Fred Meyer cites the  
21 report by Drs. Grubb and Gillpatrick cited by petitioners.  
22 Fred Meyer notes this study in fact refutes petitioners' notion  
23 that a one-stop shopping center will necessarily harm the  
24 existing store. Dr. Grubb found

25 "The findings do indicate that a real heterogeneity  
26 does exist and therefore the need for different  
stores, including one-stop shopping, is real. This

1 means the potential for two Fred Meyer stores does  
2 exist. Record 3078.

3 "The researchers have never denied that some  
4 competition would exist between stores. One would  
5 meet the needs of the people of Hollywood, a more  
6 neighborhood store, while the Hollywood West store  
7 would be a larger store serving a different clientele,  
8 particularly in terms of household goods and home  
9 improvement products." Record 3082.

10 The report concludes:

11 "D. In summary, the purposes of the 'Survey of  
12 Hollywood Fred Meyer Customers' were to develop a  
13 profile that would better describe the customers  
14 of the store and to determine if a large enough  
15 portion of the customers would continue to shop  
16 at the Hollywood store. The results do support  
17 the conclusion that a continued market does exist  
18 for the Hollywood Fred Meyer and that the Fred  
19 Meyer organization is correct in making a  
20 commitment to revitalize and continue to operate  
21 the Hollywood Fred Meyer store." Record 3083.

22 Also, the figures cited by petitioners show that many  
23 present Hollywood Fred Meyer store customers will continue to  
24 shop at the Hollywood Fred Meyer store. These figures are  
25 sufficient to show that the Hollywood store will retain its  
26 role as an anchor for the community, according to Fred Meyer.  
Respondent Fred Meyer cites to evidence that the existing store  
can continue to operate profitably. Record 3262. Fred Meyer  
points out that it is already operating profitably with the  
existence of two other Fred Meyer stores in the vicinity. See  
Record 2447-2449. Fred Meyer argues the Grubb study shows that  
the retailer can operate several stores in close proximity  
without sacrificing the success of the stores. See Record  
2007.<sup>11</sup>

1           Petitioners continue by citing a decline of business of the  
2 Raleigh Hills Fred Meyer store upon the opening of the  
3 Beaverton Fred Meyer facility. The Beaverton store is 1.8  
4 miles away from the older Raleigh Hills store. Fred Meyer  
5 responds that a study by Dr. Grubb shows the new Beaverton  
6 store did not have a significant negative effect on the  
7 existing Raleigh Hills store. The study found:

8           "Revenue did not increase at the same rate in the  
9 Raleigh Hills store as in the new Beaverton store, but  
10 there was improvement on a per square foot basis,  
11 allowing the store to continue as a profitable  
12 operation. The opening of the new store, while having  
13 a dampening effect, did not cause Fred Meyer to close  
14 its successful Raleigh Hills store. If the percentage  
15 increases in revenue for the two stores are compared  
16 for 1984 as compared to 1986, the total percentage  
17 gross in average revenue per square foot is 114.74%.  
18 Most firms would be very happy to have this growth  
19 over a competitive difficult 10 year period." Record  
20 2005.

21           The Grubb report includes a graph showing the percentage of  
22 growth of revenue per square foot for the Raleigh Hills store  
23 dropped after construction of the new Beaverton store.  
24 Record 2007. However, beginning with the year 1982, four years  
25 after construction of the Beaverton store, the percentage of  
26 growth in revenue per square foot at the Raleigh Hills store  
27 began to climb. We are not cited to information on drop in  
28 total dollar revenues or sales, if any, at the Raleigh Hills  
29 store. However, the record includes a chart showing percentage  
30 change in sales per square foot for various Fred Meyer stores.  
31 Record 2004. From the year 1978-1984, the Beaverton store  
32 experienced a continuing rise in sales per square foot. The

1 Raleigh Hills store, in contrast, lost sales between  
2 1978-1979. Growth occurred from 1980-1984, however, and the  
3 final year of the survey illustrates that the Raleigh Hills  
4 store was in a slightly better position in 1984 than in 1978.

5 We understand this data to suggest that while there may be  
6 initial decrease in sales and growth as a result of  
7 construction of the new store, the older store will continue to  
8 experience growth and increased sales.

9 MARKET DIFFERENCES

10 In addition to evidence about the economic climate of the  
11 area, cross-shopping and the effect of the new store on the  
12 Hollywood Fred Meyer, the city relied on the Hobson report's  
13 view that the market for the new store is not the same as the  
14 HBD market area.

15 "The results of the analysis presented below indicate  
16 that there will be no significant negative impact on  
17 the HBD from the proposed Hollywood West Fred Meyer  
for the following reasons:

- 18 "1. Because the HBD trade area extends primarily in  
19 an easterly direction, as opposed to being  
20 oriented to the west toward the proposed  
21 Hollywood West Fred Meyer, shopping in the  
22 Hollywood Business District will continue to be  
23 more convenient in terms of access and travel  
time for most of the HBD trade area residents.
- 24 "2. Sixty-eight percent of the HBD merchants provide  
25 goods and services which are not competitive with  
26 the new Fred Meyer.
- "3. The most important criteria for convenience goods  
shopping is proximity to home. Because the  
proposed Fred Meyer will not meet this criteria  
for a majority of the HBD trade area residents,  
the impact of shifting shopping patterns is  
expected to be minimal. Additionally, the anchor

1           tenant in the HBD is the existing Hollywood Fred  
2 Meyer, which offers the same goods that will be  
3 offered in similar departments in the proposed  
4 Fred Meyer.

5           "4. The market analysis presented in the previous  
6 sections of the report demonstrated sufficient  
7 market support for both retail centers." Record  
8 2072.

9           From this, the city concluded the evidence establishes that  
10 the HBD will not be harmed by the new project. Also, the  
11 influx of money to the general area, along with a return of  
12 customers who presumably now shop out of the area, will provide  
13 economic benefit to HBD.

14 PETITIONERS' ADDITIONAL CLAIMS

15           Petitioners make other claims in support of their view that  
16 the HBD will suffer as a result of the new store's construction  
17 and operation. First, petitioners argue the city erroneously  
18 found the Hyster site is part of the HBD. See Record 79.  
19 Petitioners state there is evidence clearly showing that the  
20 west edge of the HBD is one half mile east of the Hyster site.  
21 Record 3146.

22           The city argues there is testimony in the record showing  
23 the HBD is not four blocks, but one block from the site.  
24 Record 53-54, 81, 373. Also, respondent argues that even if  
25 the four block measure is used, the site is sufficiently close  
26 for a reasonable person to consider the project a logical  
27 extension of an established business district.

28           We are not certain what difference it makes whether the  
29 city expands the boundaries of the HBD or chooses not to expand

1 the boundaries. There is no suggestion that it is not within  
2 the city's power to expand the HBD. It is not clear from this  
3 record how business districts are established within the city,  
4 or how the city changes the boundaries once established.

5 The city did not amend the HBD as part of its decision.  
6 Had it done so, this fact would not eliminate the requirement  
7 to consider the impact of this new facility on the existing  
8 commercial businesses within the HBD. In particular, Policy  
9 5.12 requiring the city to "[p]romote a business environment  
10 within commercial districts and strips that is conducive to  
11 formation, retention and expansion of commercial businesses"  
12 protects existing commercial establishments.

13 Next, petitioners argue Policy 2.11, calling for expanding  
14 the role of major established commercial centers well served by  
15 transit is violated by this development. Petitioners argue  
16 that evidence shows there will be a negative impact on the  
17 transit developments in the Hollywood area. See Record  
18 3146-3148.

19 As with the other policies cited by petitioner, we agree  
20 the city's decision may not, consistent with Policy 2.11, have  
21 the effect of damaging the HBD. However, we find nothing in  
22 Policy 2.11 which necessarily prohibits creation of a business  
23 or business center away from a light rail station. There are,  
24 as the city and respondent point out, other forms of public  
25 transit available to the site. See Record 47-49, 108-111.

26 CONCLUSION

1           Whether the HBD will be benefited or damaged by the  
2 proposed Hyster Fred Meyer is the critical question determines  
3 compliance with the comprehensive plan goal and policies  
4 identified by petitioner. We conclude the evidence in the  
5 record is such that a reasonable decision maker could reach  
6 either conclusion.

7           The record supports the city's conclusion that a portion of  
8 the Hyster Fred Meyer's sales will be attributable to economic  
9 expansion in the market area. Capture of these sales will not  
10 significantly affect the HBD.

11           The record also shows a portion of the Hyster Fred Meyer's  
12 sales will come from persons who would otherwise make their  
13 purchases at the Hollywood Fred Meyer. This diversion of sales  
14 potentially violates the city's plan in two ways. First, the  
15 continued existence of the Hollywood Fred Meyer may be  
16 threatened. Second, shoppers diverted from the Hollywood Fred  
17 Meyer also represent a potential loss of cross-shopping sales  
18 because those shoppers may or may not continue to cross-shop at  
19 HBD businesses.

20           In concluding the HBD would not be harmed, the city relied  
21 on survey data that showed a majority of Hollywood Fred Meyer  
22 shoppers would continue to do at least some of their shopping  
23 at the Hollywood Fred Meyer. This, with the lack of direct  
24 competition in product lines, is substantial evidence in  
25 support of a conclusion that the loss of cross-shopping to the  
26 HBD will not be severe. In addition, the record supports a

1 conclusion that capture, by the new Fred Meyer, of shoppers not  
2 currently shopping at the Hollywood Fred Meyer and HBD will  
3 provide potential cross-shopping benefits to the HBD.

4 The city's decision is based on numerous studies and  
5 opinions of experts. The testimony of the experts reveals some  
6 difference of opinion on the effects of the new Hollywood Fred  
7 Meyer store. The parties do not challenge the qualifications  
8 of each other's experts, but the experts utilized on each side,  
9 reached somewhat different conclusions about the issues.<sup>12</sup>

10 The city council, when confronted with believable evidence  
11 on both sides, is charged with the responsibility of deciding  
12 which evidence it chooses to follow. In this case, it followed  
13 the evidence submitted by the applicants and on behalf of the  
14 applicants. Given the nature of the evidence on both sides, we  
15 believe the city was within its right to rely on the evidence  
16 it chose. That is, the evidence furnished by the petitioners'  
17 expert and petitioners' view of portions of respondent Fred  
18 Meyer's evidence does not so undermine the evidence relied upon  
19 by the city as to render the city's evidence not substantial.

20 We conclude, therefore, the city's view that the HBD will  
21 ultimately be enhanced by the new Fred Meyer rather than harmed  
22 by the new store is supported by substantial evidence in the  
23 record, considering all of the evidence furnished.

24 The city's decision is sustained.  
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FOOTNOTES

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ORS 197.835(8)(a) provides, in part, that LUBA shall reverse or remand a land use decision under review if it finds

"The local government or special district:

"\* \* \* \* \*

"C. Made a decision not supported by substantial evidence in the whole record,"

"\* \* \* \* \*"

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2  
The Supreme Court embraced the following discussion in Universal Camera v. Labor Bd., 340 US 474, 71 S.Ct 456, 91 L. Ed 456 (1951) wherein the court stated:

"The substantiality of evidence must take into account whatever in the record fairly distracts from its weight. This is clearly the significance of the requirement \* \* \* the courts consider the whole record." Id. at 487.

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In their briefs, the city's and respondent Fred Meyer's view of the comprehensive plan policies cited by petitioners is different. With respect to Goal 2 and Policy 2.11, respondents quarrel with petitioners' assertion that the policy means that only transit-oriented commercial uses may be located in a commercial district well served by transit. Respondents claim that LUBA correctly noted that the policies do not require the commercial projects be denied if they are not next to a light rail station. Younger, 15 Or LUBA at 220. Further, the city argues that it does not interpret the term "transit" in its plan to mean only light rail. The city points out there are, after all, other forms of transportation, including buses. We agree with respondents.

With respect to Policy 5.9 of the comprehensive plan requiring the city to promote and enhance "the special character and identity of Portland's commercial districts and strips," the city argues that this policy is directed toward the physical characteristics of the commercial district or

1 strip, not to the economic climate in the district. That is,  
2 the focus of the policy is not the business environment, but  
3 the physical character and identity of these areas. The city  
4 argues that there is nothing in the Fred Meyer proposal which  
will alter the character of the area by removing businesses or  
replacing them.

5 We do not agree. While the interpretation offered in the  
6 city's brief is reasonable, the city's findings treat the  
policy as addressing the economic climate of the district, not  
just the physical environment. See Record 79-81.

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9 Although quantitative data exists from which the parties  
10 draw conclusions about expected impacts of the proposal,  
anticipating the overall impact of the proposal on the HBD is a  
somewhat subjective proposition.

11 All parties agree a symbiotic relationship exists between  
12 Fred Meyer shopping facilities and proximate businesses because  
of cross-shopping. That is, persons shopping at Fred Meyer  
13 stores also shop at other stores in the vicinity. All parties  
also agree some people who now shop at the Hollywood Fred Meyer  
14 will do some or all of their shopping at the Hyster Fred Meyer,  
if it is built.

15 However, the significance of existing cross-shopping to  
16 businesses in the HBD from the Hollywood Fred Meyer is not  
stated with precision. Similarly, the magnitude of expected  
17 cross-shopping from the proposed Fred Meyer and how that will  
impact the total amount of cross-shopping in the HBD is not  
18 stated with precision. What the record contains is an enormous  
amount of evidence that bears indirectly on these issues.  
19 Petitioners argue that evidence shows the HBD will be damaged,  
and respondents argue the evidence supports the opposite  
conclusion adopted by the city.

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22 As summarized by Respondent Fred Meyer, the principal  
evidence relied upon is taken from the following:

- 23 "1. 'Public Need Evaluation Impact Analysis,' by  
24 Leland and Hobson, Urban Land Economic/Market and  
Development Analysis. (Combines earlier reports)  
(December 1985) (LGR 2031-2105.)
- 25 "2. 'Addendum to Public Need Impact Analysis,' by  
26 Leland and Hobson. (LGR 3560-67.)

- 1       "3. 'Retail leakages from Northeast Portland,' by  
2       Leland and Hobson. (LGR 1842-55.)
- 3       "4. 'Rebuttal to Issues Raised in Proceedings Before  
4       City Council for the City of Portland,' by Hobson  
5       and Associates. (LGR 190-200.)
- 6       "5. 'Rebuttal to Issues Raised in Proceedings before  
7       the Hearings Officer.' (LGR 230-282.)
- 8       "6. 'Fred Meyer Project Business Impact Analysis,' by  
9       Edward L. Grubb (Ph.D.) and Marilyn L. Stubbs  
10       (MBA) (January 2, 1986). (Combines earlier  
11       reports) (LGR 1978-2026.)
- 12       "7. 'Study of the Nature of Consumer Demand for  
13       Retail Goods in Selected Portland Neighborhoods,'  
14       by Dr. Tom Gillpatrick (September 9, 1985). (LGR  
15       2489-2522).
- 16       "8. 'Response to 'Addendum to Staff Report and  
17       Recommendation,' by Dr. Grubb and Dr. Gillpatrick  
18       (October 26, 1985). (LGR 3077-83).
- 19       "9. 'Business Impact Analysis,' by Dr. Grubb and Ms.  
20       Stubbs (September 10, 1985). LGR 2424-88.)
- 21       "10. Rebuttal letter to Commissioner Schwabe, from Dr.  
22       Gillpatrick (February 11, 1986). (LGR 3945-46.)
- 23       "11. Resumes: Grubb (LGR 2022-26); Gillpatrick (LGR  
24       2364-69); Hobson (LGR 2362)." Respondent Fred  
25       Meyer Reply Memoranda on Remand, pp. 9-10.

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19       We note, as does respondent Fred Meyer, that this figure is  
20       not taken directly from the market area or HBD, but from a  
21       larger area which includes the HBD.

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22       Of course, some of the sales attributable to increasing  
23       disposable income that would go to the Hyster Fred Meyer  
24       presumably would have gone to the Hollywood Fred Meyer and the  
25       HBD.

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26       The city says, in addition, the evidence shows that over  
27       68% of the businesses in the HBD will not compete with the new

1 store. The non-competitive businesses include gas stations,  
2 restaurants, cleaners, music stores, beauty salons, and second  
hand stores. Record 2072-77.

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5 Petitioners complain that people shopping at the new Fred  
6 Meyer store will not travel the distance to cross-shop within  
7 the HBD. Petitioners do not site any particular evidence for  
this claim, and while there may be some basis for skepticism,  
we do not find the claim to be sufficient to render  
unreasonable the city's finding that such cross-shopping will  
occur.

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10 Petitioners complain that only survivor businesses were  
11 surveyed in order to arrive at the claim that neighboring  
12 businesses were happy with new Fred Meyer establishments. We  
13 are cited to nothing in the record to suggest what percentage  
14 of businesses near the new Fred Meyer stores were forced to  
close because of the construction of a new Fred Meyer facility  
or for other reasons. While the surveys may well have been  
improved or more reliable if failed businesses had been  
included, it is not obvious that the omission makes those  
surveys unreliable or evidence upon which a reasonable person  
would not rely.

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17 The city also considered the "Study of the Nature of  
18 Consumer Demand for Retail Goods in Selected Portland  
Neighborhoods" by Thomas R. Gillpatrick. This study considered  
the business advantages of one-stop shopping centers (that is,  
service to consumers and profitability) and states, in part,

19 "In conclusion, successful retailers must innovate and  
20 adapt their merchandising strategies to met the  
21 changing demands of the marketplace. Firms and  
communities that do not change with the times are  
unable to remain competitive in a very competitive  
22 market environment. The merchandising mix of the  
proposed Fred Meyer site is consistent with current  
23 retail growth trends. The existing supply of retail  
outlets appears to be inadequate with respect to both  
24 the quality and quantity of local demand. The  
proposed Fred Meyer store would help meet local needs  
and contribute to the economic well being of the  
25 community." Record 2510.

26 This study does not directly compare the effects of a new

1 Hollywood Fred Meyer store on the existing Hollywood store.  
2 The report does state the Hollywood Fred Meyer is an example of  
a successful retailing operation.

3 The "Response To 'Addendum To Staff Report And  
4 Recommendation'" by Grubb and Gillpatrick justified the  
5 methodology used to arrive at some of the conclusions regarding  
6 the profitability of two Fred Meyer stores in close proximity  
7 and the comparability of the Gresham/Beaverton Centers to the  
Hollywood West Trade area. It also discussed the conduct of  
the interviews used to gather raw statistical information and  
some questions about review of the trade area study.  
Record 3077-3083.

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9 We are mindful there are differences in data relied upon by  
10 Dr. Whitelaw and, in particular, Hobson & Associates. We have  
11 no means for reconciling the differences in raw data, and we do  
12 not believe it is our job to do so. There is nothing to which  
13 we are cited in this record to suggest that either Dr. Whitelaw  
14 or Hobson & Associates were clearly wrong in their choice of  
15 data. Therefore, the choice as to which body of data to  
16 believe is legitimately the city's.