

Dec 14 3 37 PM '88

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

1
2
3 LAWRENCE PARDEE, W. LOUIS)
LARSON, MARY ANN LARSON,)
4 D. RICHARD FISCHER, LOUISE E.)
FISCHER, and L & F INVESTMENT)
5 COMPANY,)
6 Petitioners,)
7 vs.)
8 CITY OF ASTORIA,)
9 Respondent,)
10 and)
11 OCEAN FOODS OF ASTORIA, INC.,)
12 Intervenor-Respondent.)

LUBA Nos. 88-049
88-050
88-051

FINAL OPINION
AND ORDER

13 Appeal from the City of Astoria.

14 Peggy Hennessy and Edward J. Sullivan, Portland, filed the
15 petition for review. Peggy Hennessy argued on behalf of
16 petitioners. With them on the brief was Mitchell, Lang and
Smith.

17 No appearance by respondent City of Astoria.

18 P. Stephen Russell, III, Portland, filed a response brief
19 and argued on behalf of intervenor-respondent. With him on the
brief was Copeland, Landye, Bennett and Wolf.

20 HOLSTUN, Chief Referee; SHERTON, Referee; participated in
the decision.

21 AFFIRMED

12/14/88

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

1 Opinion by Holstun.

2 NATURE OF THE DECISION

3 Petitioners appeal three decisions in this consolidated
4 review proceeding. The first grants a variance from an
5 off-street parking requirement for an ice processing facility.
6 The second approves a conditional use permit for the ice
7 processing facility. The third is a zoning ordinance text
8 amendment permitting ice processing facilities as an outright
9 use, rather than as a conditional use, in the Aquatic Two
10 Development (A-2) zone. The amendment also removes off-street
11 parking requirements in a six block portion of the A-2 zoned
12 downtown waterfront area.

13 MOTION TO INTERVENE

14 Ocean Foods of Astoria, Inc. (Ocean Foods), moves to
15 intervene in this proceeding. Ocean Foods was the applicant
16 for the conditional use permit, variance and zoning ordinance
17 amendment. There is no opposition to the intervention, and it
18 is allowed.

19 FACTS

20 Ocean Foods is a seafood processor with production
21 facilities located on pilings on submerged A-2 zoned land in
22 the Columbia River at the foot of 9th Street in Astoria. The
23 A-2 zone allows seafood processing plants as an outright
24 permitted use. Because the plant requires a substantial
25 quantity of ice as a part of the seafood packing process, the
26 applicant sought, through a conditional use permit, to replace

1 its ice house with an ice processing plant. Ice processing
2 facilities are a conditional use in the A-2 zone.

3 The present operation includes only 20 off-street parking
4 places, whereas the Astoria Zoning Ordinance (ZO) requires one
5 space for every two employees at an industrial establishment.
6 Ocean Foods has 137 employees and, therefore, is non-conforming
7 with respect to the number of parking places provided. The
8 addition of the ice processing plant will not add additional
9 employees. However, all parties apparently agree, unless a
10 variance is granted, Ocean Foods will have to conform to
11 current off-street parking requirements, and provide a total of
12 69 off-street parking spaces, if a conditional use permit for
13 the proposed ice processing plant is approved.

14 Ocean Foods also applied for an amendment to the text of
15 the city's zoning ordinance to allow cold storage or ice
16 processing facilities as an outright permitted use in the A-2
17 zone, provided they are used in conjunction with a seafood
18 processing facility. This amendment also exempts a six block
19 area of the downtown waterfront from the ordinance's off-street
20 parking requirements.

21 Prior to the challenged zoning ordinance text amendment,
22 only the A-2 zone continued to require off-street parking for
23 uses in the downtown area between 8th and 14th Streets. The
24 Tourist Oriented Shoreland (S-2A) and Central Commercial (C-4)
25 zones do not require off-street parking for uses in this
26 area.¹

1 The planning commission approved all three applications,
2 and petitioners appealed the decisions to the city council.
3 The city council affirmed the planning commission's approvals,
4 and this appeal followed.

5 FIRST ASSIGNMENT OF ERROR

6 "Respondent misconstrued Z01.110 in approving a
7 variance from the off-street parking requirements of
8 the zoning ordinance and its decision violates
9 ORS 227.173(2)."

10 The zoning ordinance establishes criteria for granting
11 variances. Z01.110 is the general provision applicable to all
12 variances, and it provides as follows:

13 "Criteria for Granting Variances. Variances to a
14 requirement of this ordinance, with respect to lot
15 area and dimensions, setbacks, yard area, lot
16 coverage, height of structures, vision clearance,
17 decks and walls, and other quantitative requirements,
18 may be granted only if, on the basis of the
19 application, investigation and evidence submitted by
20 the applicant, all four expressly written findings are
21 made:

22 "1. That a strict or literal interpretation and
23 enforcement of the specified requirement would
24 result in practical difficulty or unnecessary
25 hardship and would be inconsistent with the
26 objectives of the comprehensive plan; and

"2. That there are exceptional or extraordinary
circumstances or conditions applicable to the
property involved or to the intended use of the
property which do not apply generally to other
properties in the same zone; and

"3. That the granting of the variance will not
be detrimental to the public health, safety, or
welfare or materially injurious to properties or
improvements in the near vicinity; and

"4. That the granting of the variance would
support policies contained within the
comprehensive plan.

1 "Variances in accordance with this subsection should
2 not ordinarily be granted if the special circumstances
3 on which the applicant relies are a result of the
actions of the applicant or owner or previous owners."

4 Petitioners complain that the applicant, Ocean Foods, did not
5 meet the above-quoted standards.

6 A. Practical Difficulty or Unnecessary Hardship

7 First, petitioners complain that there was no showing of
8 practical difficulty or unnecessary hardship as required by
9 Z01.110.1. Petitioners say that the applicant failed to
10 establish there are conditions inherent in the land
11 distinguishing this property from others in the general
12 neighborhood. According to petitioners, all the properties in
13 this neighborhood are affected by the parking shortage.

14 Petitioners claim there is no greater hardship upon this
15 applicant than on any other user in the A-2 zone. Petitioners
16 assert the city's findings do not explain why Ocean Foods
17 cannot make use of its property without the variance.
18 According to petitioners, without such a showing the city
19 cannot find the applicant satisfied this criterion.

20 The city's finding in this regard is as follows:

21 "There is no adequate off-street parking available
22 between 8th and 14th Streets downtown. The lack of
23 off-street parking is noted in several elements of the
24 Comprehensive Plan, and is reflected in the zoning
25 ordinances' provisions with respect to C-4 zoned
26 property downtown, exempting such property from
off-street parking requirements, and more recently in
the City's adoption of a special provision with
respect to S-2A zoned property between 8th and 14th
Streets which exempted such properties from complying

1 with the off-street parking requirements. Applicant's
2 site for the proposed new dock and ice house is zoned
3 A-2, to be constructed on pilings in the Columbia
4 River. Astoria's ordinances prohibit the use of
5 submerged lands such as Applicant's for off-street
6 parking. Similarly, Astoria's zoning ordinances
7 designate A-2 zoned property for water dependent uses,
8 and not for parking lots. Accordingly, unless
9 Applicant is exempted from the off-street parking
10 requirements, Applicant can make no use of its
11 property in the A-2 zone. This constitutes practical
12 difficulty or unnecessary hardship. The objectives of
13 the Comprehensive Plan include making use of aquatic
14 zoned properties for water-related and water-dependent
15 uses such as those proposed by Applicant. Granting
16 the variance would be consistent with the objectives
17 of the Comprehensive Plan." Record 55-56.

18 Respondent replies the finding is adequate to show
19 compliance with Z01.110.1. The condition inherent in the land
20 affecting the applicant's property, according to respondent, is
21 that applicant's property is submerged. According to this
22 view, the applicant is prohibited by city ordinance from using
23 such land for off-street parking, and there is no supply of
24 adjacent upland which could be devoted to off-street parking.
25 The adjacent upland is developed and occupied. Respondent adds
26 that contrary to petitioners' contention, while all A-2 zoned
27 properties may be submerged properties, they do not all suffer
28 from lack of backup upland property restricting their ability
29 to provide adequate off-street parking. Respondent concludes
30 the criterion of Z01.110.1 is met because the applicant is
31 legally prevented from building parking places on aquatic land
32 and is physically unable to provide parking on the adjoining
33 shoreland due to lack of available space.

34 Practical difficulty or unnecessary hardship is a demanding

1 standard, requiring a demonstration that the benefits of
2 property ownership would be prevented by strict enforcement of
3 the zoning ordinance. Erickson v. City of Portland, 9 Or App
4 256, 261, 496 P2d 276 (1972); Corbett/Terwilliger/Lair Hill
5 Neigh. Assoc. v. City of Portland, ___ Or LUBA ___ (LUBA Nos.
6 86-063 and 86-064, Sept. 9, 1987), slip op 17; Standard Supply
7 Co. v. Portland, 1 Or LUBA 259, 263 (1980). We find the city's
8 order does not show the applicant will suffer such practical
9 difficulty or unnecessary hardship.

10 The Astoria code allows an off-street parking requirement
11 to be met by making off-site property available for off-street
12 parking. ZO.905.5. The city found that there is no available
13 off-street parking on upland between 8th and 14th Streets, and
14 petitioners have not challenged the evidentiary support for
15 that finding. However, there is no discussion in the city's
16 order about whether the applicant might provide off-street
17 parking by utilizing land other than that between 8th and 14th
18 Streets.²

19 Without establishing that off-street parking for the
20 proposed ice plant could not be provided for elsewhere in the
21 city, the city could not conclude the property would be
22 vitually useless without the variance.

23 This subassignment of error is sustained.

24 B. Exceptional or Extraordinary Circumstances

25 Petitioners next claim the city's decision does not
26 illustrate that the applicant's property suffers from

1 exceptional or extraordinary circumstances not applicable
2 generally to other properties in the same zone. Z01.110.2.
3 Petitioners argue that the following finding is not adequate:

4 "Applicant's property is located between 8th and 14th
5 Streets downtown, which suffers from a severe lack of
6 off-street parking availability. A-2 zoned properties
7 in the city extend from the Astoria Bridge to 14th
8 Street and from 17th Street to 21st Street on the
Columbia River. The population densities and traffic
conditions existing between 8th and 14th Streets are
peculiar to that area and are not shared by the other
A-2 zoned properties." Record 56.

9 Petitioners argue the lack of off-street parking is a
10 problem shared by other A-2 zoned properties between 8th and
11 14th Streets. Therefore, the applicant's circumstances are not
12 "extraordinary" as required by the ordinance.

13 Respondent says petitioners incorrectly contend that the
14 applicant is entitled to a variance only if the applicant's
15 site is the only parcel in the A-2 zone suffering from a
16 particular set of circumstances. According to respondent, it
17 is sufficient if the circumstances in question do not apply
18 generally in the subject zoning district. Respondent maintains
19 this is the case here because, although all properties between
20 8th and 14th Streets in the A-2 zone suffer from the inability
21 to meet off-street parking requirements, other A-2 zoned
22 properties in the city do not share this limitation.

23 We do not share respondent's understanding of the city's
24 finding. The finding simply notes that population densities
25 and traffic conditions between 8th and 14th Streets are not
26 shared by other A-2 zoned properties. The finding does not

1 state that the other A-2 zoned properties have adequate
2 off-street parking available. Thus, the city's decision does
3 not establish that the inability to provide off-street parking
4 is an extraordinary circumstance not generally applicable to
5 other property in the A-2 zone. We conclude the city's
6 decision does not satisfy Z01.110.2.

7 This subassignment of error is sustained.

8 C. Injury to Properties in the Vicinity

9 Petitioners argue the city misinterpreted the requirement
10 of Z01.110.3 that the granting of a variance not be detrimental
11 to public health, safety or welfare or materially injurious to
12 properties or improvements in the near vicinity. In response
13 to this criterion, the city found as follows:

14 "The Applicant is requesting a variance because of the
15 construction of the new dock and relocation of a new
16 ice house to the new site. Applicant's request will
17 not increase the demand for off-street parking
18 generated by the Applicant's business. In short,
19 there should be no effect whatever on off-street
20 parking availability as a result of granting the
21 variance. There is no evidence to suggest that
22 Applicant's current operations and its failure to meet
23 the off-street parking requirements with respect to
24 its current operations are detrimental to the public
25 health, safety or welfare or materially injurious to
26 properties or improvements in the near vicinity. In
fact, granting the variance should have no effect on
properties or improvements in the near vicinity.
Evidence was presented at the public hearing that
there have been no injury accidents in the vicinity of
the site within the last seven (7) years, and that the
only accidents reported by the police department were
located in the vicinity of 8th and Astor Streets, and
involved trucks backing into parked cars." Record
57-58.

26 As we understand petitioners' argument, the grant of the

1 variance is injurious to surrounding properties because it
2 results in fewer available parking spaces than if the
3 off-street parking requirements were met. Petitioners argue
4 the city mistakenly compared the impacts of granting the
5 variance to the present situation, rather than to the situation
6 which would exist if the proposed development were approved
7 without a variance.

8 Respondent argues that the city had a clear basis upon
9 which to make its determination of compliance with this
10 provision of the code. Without a variance, 49 additional
11 off-street parking spaces would be provided. With the
12 variance, there is no change in the number of off-street
13 parking places provided, and issuance of the variance simply
14 maintains existing parking availability.

15 The code requires that there be no detrimental effect to
16 public health, safety and welfare or material injury to
17 properties or improvements in the near vicinity. The existing
18 parking situation would be maintained under the variance,
19 rather than changed. The city specifically found the existing
20 situation does not have the proscribed detrimental effects.
21 Petitioners do not challenge this finding. We, therefore,
22 decline to find error as alleged.

23 This subassignment of error is denied.

24 D. Comprehensive Plan Policies

25 Petitioners next challenge compliance with a number of
26 comprehensive plan (CP) policies. Petitioners argue Z01.110.4,

1 quoted supra, "requires compliance with applicable
2 comprehensive plan provisions." Petition for Review 9. We
3 consider each challenge separately.

4 1. CP.010.1

5 "The physical capabilities and limitations of the land
6 will be the basis for the type of development that is
permitted."

7 Petitioners argue that the lack of available parking spaces
8 is a physical limitation on the uses which may be permitted on
9 the land. Petitioners claim that the land is already developed
10 beyond its capacity, and a variance from parking requirements
11 violates CP.010.1.

12 Respondent argues that petitioners perceive restrictions in
13 this portion of the plan which simply do not exist. Respondent
14 argues that this section of the plan is aspirational. CP.010.1
15 is a guide to implementation of the plan through the
16 establishment of zoning classifications; it is not a decision
17 making standard, according to respondent.

18 We agree with respondent. CP.010.1 appears in the "General
19 Development Policies" section of the plan. The General
20 Development Policies section is followed by a large number of
21 sections establishing more explicit policies for specific
22 geographic and functional areas.³

23 We believe the more general policies included in CP.010,
24 CP.015 and CP.020 are carried out through policies included in
25 subsequent sections of the plan directed at specific geographic
26 and functional areas.⁴ These general policies are not

1 mandatory approval criteria that must be addressed and
2 specifically supported by a particular variance request. We
3 reject petitioners' claim that the variance decision must be
4 remanded because it violates CP.010.1.⁵

5 2. CP.015.1

6 "It is the primary goal of the plan to maintain
7 Astoria's existing character by encouraging a compact
8 urban form, by strengthening the downtown core and
9 waterfront areas, and by protecting the residential
10 and historic character of the city's neighborhoods.
11 It is the intent of the plan to promote Astoria as the
12 commercial, industrial and cultural center of the
13 area."

14 Respondent claims CP.015.1 is a direction of general
15 intent, and is not a standard to be applied to each individual
16 land use decision, providing the decision meets other
17 applicable plan and ordinance standards. As explained under
18 our discussion of CP.010.1 supra, we agree.

19 3. CP.020.4

20 "The downtown area will be protected as the commercial
21 center of the region through policies discouraging
22 strip commercial development, encouraging the
23 establishment of additional parking areas, and
24 promoting the concepts of limited malls and 'People
25 Places.'"

26 As explained supra, the policies under CP.020 are
27 implemented through other policies and do not represent
28 independent approval criteria applicable to variance requests.
29 We note that CP.020.4 explicitly provides it will be
30 implemented through other policies.

31 //

1 4. CP.055.2

2 "The city supports efforts to improve the parking
3 problem in the downtown, and to provide landscaping
4 and other improvements. However, the C-4 zone will
5 continue to not require off street parking."

6 Petitioners allege the city's finding, that the C-4 zone
7 does not require off-street parking, is not responsive to
8 whether a variance in the A-2 zone will support efforts to
9 improve the downtown parking problem. See Record 45-46.

10 While we agree that the finding is not responsive to the
11 criterion, we do not believe the criterion requires that
12 improvement to the parking problem in the downtown area be
13 demonstrated in each and every land use decision. As
14 respondent notes,

15 "any variation from the specific provisions of a
16 zoning ordinance will necessarily be less consistent
17 with the comprehensive plan policies upon which such
18 ordinance was based than would a proposal which
19 complied with the ordinance in all respects."
20 Intervenor-Respondent's Brief 17.

21 We do not believe the plan is offended in the manner
22 suggested by petitioners.

23 5. CP.055.3

24 "Zoning actions must not detract from the vitality of
25 the downtown as the commercial center of the region.
26 Strip development is to be generally discouraged."

27 Petitioners note the downtown area has an acknowledged
28 shortage of parking spaces. Petitioners argue that the
29 variance, by allowing the applicant's employees to continue
30 competing for limited parking spaces, detracts from the

1 vitality of the downtown area.

2 Respondent answers there is little in the plan to support
3 petitioners' assertion that the vitality of the downtown area
4 "is entirely controlled by the number of available on-street
5 parking spaces * * *." Intervenor-Respondent's Brief 18.
6 Respondent notes most of the downtown area is zoned C-4, a zone
7 that does not require off-street parking.

8 As regards the parking requirement, the city apparently
9 ~~interprets CP.055.3 to require that zoning actions not "deny~~
10 existing users the ability to expand or adapt their operations
11 because of the lack of off-street parking * * *." Record 46.
12 This is a limited and narrow interpretation of CP.055.3, but it
13 is supported, as respondent notes, by the failure of the city
14 to require provision of off-street parking in the zone it
15 applied to the bulk of the downtown area. We find no fault in
16 the city's interpretation and application of CP.055.3.

17 6. CP.055.5

18 "Shoreland zone policies and standards will be
19 designed to encourage public access along the downtown
waterfront."

20 Petitioners quarrel with the city's finding that because
21 the proposed construction does not extend to the end of 10th
22 Street, there will be no interference with public access.
23 Petitioners also argue the city's findings improperly address
24 whether the proposed construction will interfere with public
25 access to the waterfront, rather than the parking availability
26 impacts of the variance itself.

1 We conclude this policy, which only encourages public
2 access, is not a mandatory approval standard for individual
3 land use decisions. More importantly, the policy clearly is
4 directed at design of other policies and implementation
5 standards. We decline to find the city in error as alleged.

6 7. CP.205.1

7 "The downtown core of Astoria, generally extending
8 from Sixth to Sixteenth Streets, and from the
9 waterfront to Exchange Street is the retail, service
10 and government center of the area. The city, through
11 its zoning actions and support of the Astoria Downtown
12 Development Association, will promote the Downtown."

13 8. CP.205.2

14 "The city will continue to work toward the
15 establishment of public parking areas in the downtown
16 area."

17 Respondent's finding is as follows:

18 "The Applicant's site is located downtown where there
19 is simply no adequate off-street parking available, as
20 recognized by the city's Comprehensive Plan and zoning
21 ordinances which exempt much of the area near
22 Applicant's site from the off-street parking
23 requirements. Granting the Applicant's variance is
24 consistent with promoting downtown as the commercial
25 center of the region." Record 49.

26 Petitioners argue the conclusion of consistency in these
findings does not logically follow from the lack of available
parking in other areas. As a result, petitioners claim the
city failed to show compliance with the standard. Petitioners
additionally argue the variance conflicts with these economic
policies because the variance will have an adverse effect on
retail, service and government business. According to
petitioners, such an adverse effect would be a direct result of

1 inadequate public parking. Were the applicant held to the
2 required number of off-street parking spaces, parking spaces on
3 the street would be available for patrons of these other
4 services, according to this argument.

5 Once more, we find these policies, with their rather vague
6 charges to "support," and "work toward" particular ends, do not
7 require the city to ensure the ordinance's off-street parking
8 requirements are met by each proposed land use, providing the
9 standards for a variance from those requirements are met.

10 9. CP.205.3

11 "The importance of the downtown waterfront in terms of
12 aesthetics, public access and business improvement
13 cannot be overemphasized. The city shall provide
14 public access wherever feasible, and shall protect
15 existing access. The city supports the concept of the
16 'People Places Plan,' and encourages local
17 organizations in the construction and maintenance of
18 waterfront parks and viewing areas."

19 10. CP.275.5

20 "Improved access to the Columbia River and to Youngs
21 Bay for residents and visitors alike has been a long
22 standing public need. The city Planning Commission,
23 Parks Department and other city agencies will actively
24 participate in cooperative measures to institute such
25 access through concepts like the People Places
26 System. Because of the scarcity of non-commercial and
non-industrial waterfront properties, publicly-owned
park holdings along watercourses should be dedicated
in perpetuity. Park planning in these areas will
respect natural water resources such as marshlands,
tideflats and beaches, and also be cognizant of public
safety, maintenance and similar factors."

11. CP.360.12

"The 'People Places' concept is recognized as a user
of the city's transportation system. The city will
continue to support the 'People Places' concept
through the provision of street rights-of-way,

1 application for funding for construction of
2 facilities, and the use of zoning regulations to
3 insure continued public access to the waterfront.
4 Private developers should be encouraged, and in some
5 places required, to provide public access in
6 conjunction with new development."

7 The city addresses these policies with the following
8 finding:

9 "The People Place System Plan identifies the foot of
10 10th Street as the proposed site of a public access
11 facility. The Applicant's new dock and ice house will
12 not extend to 10th Street and will not interfere with
13 the construction of such a facility." Record 50.

~~14 Petitioners argue that the issue is not whether~~
15 construction will extend into 10th Street, the issue is whether
16 the off-street parking variance will have an adverse impact on
17 public access. Petitioners complain that the applicant failed
18 in its burden to prove that the proposed variance is consistent
19 with these comprehensive plan policies.

20 It is our view that providing the city adequately addresses
21 the standards for a variance, the plan policies quoted above
22 are not offended. In addition, we do not believe these
23 policies require any particular result in this case. That is,
24 the policies are not approval criteria for land use decisions,
25 but goals which the city must work to achieve. They are not
26 bases for a denial where a development otherwise complies with
27 the plan and zoning regulations. Therefore, we do not find
28 error as alleged.

29 This subassignment of error is denied.

30 //

1 E. Self-created Special Circumstances

2 Finally, Z01.110 also states that variances "should not
3 ordinarily be granted" if the special circumstances upon which
4 the applicant relies are self-created. The city found the
5 special circumstances relied upon by the applicant were (1) the
6 location of its plant where off-street parking facilities are
7 not available; and (2) the relocation of an existing use which
8 would not generate more off-street parking demand. Record 58.
9 Petitioners argue that these circumstances are the
10 responsibility of the applicant or its predecessors.

11 It is clear from the city's findings that the applicant did
12 not create the present situation. The land is submerged and
13 the city code prohibits parking on submerged land. We do not
14 understand the applicant to have created his own hardship.

15 However, even if we agreed with petitioners that the
16 applicant's hardship is self-created, Z01.110 only provides
17 that variances based on such hardship "should not ordinarily be
18 granted." Petitioners offer no explanation for why, even if
19 the hardship were self-inflicted, a variance should not be
20 granted in this case.

21 This subassignment of error is denied.

22 The first assignment of error is sustained, in part.

23 SECOND ASSIGNMENT OF ERROR

24 "Even if respondent's findings were sufficient to
25 satisfy the necessary standards under Z01.110, there
26 is not substantial evidence in the record to support
 such findings."

1 Petitioners argue there is not substantial evidence showing
2 the subject property suffers from practical difficulties or
3 unnecessary hardships not shared by others in the A-2 zone.
4 For that reason, petitioners argue, the variance violates
5 Z01.110.1. Petitioners note that the applicant did introduce
6 evidence of a parking problem between 8th and 14th Streets in
7 the A-2 zone, but the applicant did not show that there were
8 exceptional or extraordinary circumstances applicable to this
9 area not generally applicable to other properties located
10 elsewhere in the A-2 zone. Such a showing is necessary,
11 according to petitioners, before the granting of a variance may
12 be sustained. Z01.110.2.

13 Further, petitioners argue the evidence in the record does
14 not show that the variance will be consistent with plan
15 policies requiring the city to encourage establishment of
16 additional parking areas and support efforts to improve the
17 parking problem. See, CP.020.4 and CP.055.2 and our discussion
18 in subsections D3 and 4 of the first assignment of error,
19 supra. Petitioners add there is also a lack of evidence
20 showing the variance is consistent with plan policies to
21 encourage public access to the waterfront. See, CP.055.5,
22 CP.205.3, CP.275.5, CP.360.12.

23 There is evidence to show there is not as much backup
24 parking space near applicant's site as in some other A-2 zoned
25 areas. However, that is not the same as showing there is no
26 land available for off-street parking. Respondent cites

1 statements by the applicant in testimony before the city
2 council and planning commission and in the application simply
3 saying there is no off-street parking available to Ocean
4 Foods. Record 68, 189, 210, 212. The record does not,
5 however, include any supporting evidence or speak in detail
6 about this conclusion. Therefore, we agree with petitioners
7 that the findings showing compliance with Z01.110.1 and
8 Z01.110.2 are not supported by substantial evidence.

9 With regard to the evidentiary support for the city's
10 determinations of compliance with the plan policies cited by
11 petitioners, we note that under subsections D3-5 and 8-10 of
12 the first assignment of error, we found that these policies are
13 not approval standards for individual land use actions by the
14 city. Thus, the city's determinations of compliance with these
15 policies are surplusage and whether or not such determinations
16 are supported by substantial evidence in the record is of no
17 consequence. Morley v. Marion County, ___ Or LUBA ___ (LUBA
18 No. 87-095, February 3, 1988), slip op 17; Bonner v. City of
19 Portland, 11 Or LUBA 40, 52 (1984).

20 The second assignment of error is sustained, in part.

21 THIRD ASSIGNMENT OF ERROR

22 "Respondent misconstrued Z01.115 in approving a
23 variance, without substantial evidence in the whole
24 record, from the off-street parking requirements of the
25 zoning ordinance."

26 Z01.115 provides as follows:

"Variances to requirements of this ordinance with
respect to off-street parking and loading facilities

1 may be authorized as applied for or as modified by the
2 city planning commission, if, on the basis of the
3 application, investigation, and the evidence submitted
4 by the applicant, all three (3) of the following
5 expressly written findings are made:

6 "1. That neither present nor anticipated future
7 traffic volumes generated by the use of the site
8 or use of sites in the vicinity reasonably
9 require strict or literal interpretation and
10 enforcement of the requirements of this
11 ordinance; and

12 "2. That the granting of the variance will not
13 result in the parking or loading of vehicles on
14 public streets in such a manner as to materially
15 interfere with free flow of traffic on the
16 streets; and

17 "3. That the granting of the variance will not
18 create a safety hazard or any other condition
19 inconsistent with the general purpose of this
20 ordinance or policies contained within the
21 comprehensive plan."

22 A. Requirement for Strict Interpretation and Enforcement

23 Petitioners first say there is a severe shortage of
24 off-street parking in the downtown area. Record 56. No one
25 disagrees. Petitioners charge that the grant of the variance
26 will result in 49 unaccommodated vehicles which otherwise would
be provided with parking places. Petitioners argue that strict
compliance with the off-street parking requirements was
legislatively determined to be necessary to improve parking
availability in the downtown area, and current non-compliance
may not be used to justify continued and increased levels of
non-compliance.⁶ Petitioners next claim there is not
substantial evidence to support a finding of compliance with
Z01.115.1.

1 The city found as follows:

2 "With respect to traffic volumes and relative traffic
3 safety of the area, see Finding IV B.11 (c) above
4 [reference is to the city's finding regarding
5 compliance with Z01.110.3]. Granting the variance
6 will not increase traffic volume or demand for
7 off-street or on-street parking. There have been no
8 major changes in the use of the surrounding sites in
9 several years that would increase traffic volumes or
10 demand for parking." Record 59.

11 The finding is supported by evidence about the traffic
12 safety history of the area. The record includes police
13 department correspondence stating

14 "there does [sic] not appear to be any major problems
15 with traffic flow or parking in the area." Record 203.

16 This evidence generally supports the city's conclusion that
17 there will be no increase in traffic volume or demand for
18 off-street or on-street parking due to the proposed use or
19 future uses of surrounding sites which would require strict
20 application of off-street parking requirements. It is
21 significant that there will be no increase in the number of
22 employees. Thus, there will be no additional traffic or
23 parking demands over and above those presently existing at the
24 site, which the record shows present no major problems.

25 This subassignment of error is denied.

26 B. Interference with Traffic Flow

The second part of petitioners' claim of error is that
there will be interference with traffic, parking and loading on
the streets.

The city's finding is as follows:

1 "Granting the variance will not result in the parking
2 or loading of vehicles on public streets in such a
3 manner as to materially interfere with the free flow
4 of traffic on the streets. Granting the variance will
5 not add any traffic or any parking demand. Evidence
6 with respect to traffic safety history of the area
7 indicates that to the extent there is parking or
8 loading of vehicles on public streets by businesses in
9 the area, it does not materially interfere with the
10 free flow of traffic in the vicinity." Record 60.

11 Petitioners argue the applicant cannot claim entitlement to the
12 variance simply because the applicant is not presently in
13 compliance with current requirements and anticipates no change
14 in use. Petitioners also challenge the city's reliance on the
15 traffic safety history of the area to demonstrate that the
16 present parking and loading of vehicles on-street does not
17 materially interfere with the traffic flow in the vicinity,
18 citing evidences of frequent traffic obstruction. Record 34.

19 We do not find the city to have violated this criterion.
20 There will be no change in the number of employees and no
21 change in the current parking and loading situation. The city
22 specifically found the current situation does not result in
23 material interference with free flow of traffic. The city's
24 finding is supported by substantial evidence in the letter from
25 the police department stating there are currently no major
26 problems with traffic flow in the area. Record 203.

27 This subassignment of error is denied.⁷

28 C. Z01.115.3

29 Petitioners conclude with a catchall argument that the
30 variance is not consistent with applicable plan policies and,

1 therefore, violates Z01.115.3. We have already addressed the
2 issue of consistency with plan policies under subsection D of
3 the first assignment of error.

4 The third assignment of error is denied.

5 FOURTH ASSIGNMENT OF ERROR

6 "Respondent misconstrued Z01.025 in approving the ice
7 processing facility as a conditional use because the
8 applicant does not qualify for a variance and
9 therefore cannot satisfy the off-street parking
10 requirements for Z01.025(3)."

11 Z01.025 provides as follows:

12 "Basic Conditional Use Standards. Before a
13 conditional use is approved, findings will be made
14 that the use will comply with the following standards.

15 ** * * * *

16 "3. The site has an adequate amount of space for any
17 yards, buildings, drives, parking, loading and
18 unloading areas, storage facilities, utilities,
19 or other facilities which are required by city
20 ordinances or desired by the applicant."

21 Petitioners say the site does not have adequate space for
22 off-street parking, and this proposal was approved on the
23 assumption the applicant would be able to obtain a variance
24 from parking requirements. Because, in petitioners' view, the
25 applicant has not satisfied applicable variance criteria, the
26 applicant has not met the standard for a conditional use permit.

27 We agree with petitioners. Without the variance, the
28 conditional use standard controlling parking is not fulfilled,
29 and the conditional use permit may not be granted.

30 Therefore, the fourth assignment of error is sustained.

31 //

1 FIFTH ASSIGNMENT OF ERROR

2 "Respondent misconstrued the applicable plan policies
3 in finding that the proposed amendment is consistent
4 therewith and failed to show compliance with the
5 statewide planning goals."

6 Our review of the challenged amendment to the zoning
7 ordinance under this assignment of error differs in two
8 important respects from our review of the variance and
9 conditional use permit decisions challenged under the first
10 four assignments of error.

11 First, the variance and conditional use permit are
12 reviewable for compliance with the acknowledged comprehensive
13 plan and land use regulations and are not reviewable for
14 compliance with the statewide planning goals. See Byrd v.
15 Stringer, 295 Or 311, 316-317, 666 P2d 1332 (1983). On the
16 other hand, the zoning ordinance amendment must, in addition to
17 complying with the acknowledged plan and land use regulations,
18 comply with the goals. ORS 197.835(4); see Oregon Shores
19 Conservation Coalition v. Lincoln County, 14 Or LUBA 446
20 (1986).⁸

21 Second, plan policies can apply in different ways to
22 different types of land use decisions. Plan policies may apply
23 directly to decisions such as conditional use permits and
24 variances; they may apply only to plan or land use regulation
25 amendments; or they may apply to several types of land use
26 decisions. Furthermore, regardless of the types of decisions
plan policies apply to, those policies may constitute mandatory

1 approval criteria or they may merely state considerations or
2 aspirations.

3 As we recently noted, local governments can make
4 application of their policies clearer and more predictable by
5 explicitly stating how the policies are to be implemented,
6 e.g., by application to zone text or map changes, conditional
7 use permits, design reviews, etc. Miller v. City of
8 Ashland, ___ Or LUBA ___ (LUBA No. 88-038, November 22, 1988).
9 However, in the more typical situation, the plan does not
10 specify whether plan policies apply to a particular type of
11 decision or at what stage of development approval a policy is
12 intended to apply. That is the situation we face with the City
13 of Astoria's plan. In such circumstances, we look to the
14 parties to explain (1) why, based on the language of the policy
15 and the context in which the policy appears, the policy applies
16 to the challenged land use decision; and (2) whether the policy
17 is a mandatory approval criterion or merely a consideration.
18 With this standard of review in mind, we turn to the parties'
19 arguments under the fifth assignment of error.

20

21 A. Change of Ice Processing Facility from Conditional to
Outright Use

22 This portion of the city's zoning ordinance amendment
23 changed ZO.357.3.a, one of the water-related industrial uses
24 listed as a conditional use in the A-2 zone, to read:

25 "cold storage and/or ice processing facilities
26 independent of seafood processing facilities."
(Amended language emphasized.)

1 This change was adopted in part to parallel a similar provision
2 in the A-1 zone and to make it "clear that * * * cold storage
3 and/or ice processing facilities are conditional uses only if
4 they are independent of seafood processing facilities." Record
5 5.

6 Petitioners recognize that retention and expansion of water
7 dependent uses, such as seafood processing facilities, is a
8 priority in the A-2 zone. ZO.355 provides that in the A-2
9 zone, water-dependent uses shall have the highest priority.
10 Petitioners go on, however, to cite the following finding from
11 a recent plan amendment:

12 "An examination of the seven-block area of the Astoria
13 waterfront between 2nd and 9th Streets reveals a
14 preponderance of nonwater-dependent uses. These
15 include industrial supply companies, gas stations, oil
16 dealers, a tank farm, and a real estate office. The
17 only water-dependent use is a fish processing plant at
the foot of 9th Street. The only vacant land is the
block behind the recently constructed
marina-condominium complex. It is, therefore,
determined that the area is not suitable for
water-dependent uses." CP.170.9.

18 Petitioners argue that this provision, specific as to the
19 seven block area between 2nd and 9th Streets and stating that
20 water-dependent uses are not suitable for this area, takes
21 precedent over the more general provision in the A-2 zone.
22 Petitioners conclude that water-dependent uses are therefore
23 not of the highest priority in the subject area.

24 We understand petitioners to claim, therefore, that the
25 ordinance amendment is not appropriate, considering the

26 / / /

1 comprehensive plan requires that zoning actions "not detract
2 from the vitality of the downtown as the commercial center of
3 the region." CP.005.3. Petitioners contend that the
4 applicant's use is an industrial use, does not have a high
5 priority as a water-dependent use, and detracts from the
6 preeminence of the downtown area as a commercial center by
7 providing inadequate parking.

8 In addition, petitioners cite Z01.025, the conditional use
9 section of the ordinance, which provides safeguards to assure
10 that conditional uses are compatible with the surrounding
11 area. Petitioners argue that to allow an ice processing
12 facility as an outright permitted use "deprives the city of the
13 opportunity to monitor or condition that use." Petition for
14 Review 27.

15 Respondent replies that CP.170.9, is not applicable. The
16 applicant's proposed ice plant is not in the area mentioned in
17 that provision, but rather is located between 9th and 10th
18 Streets. Record 299. Additionally, respondent argues the plan
19 provision recognizes the applicant's use as an exception to the
20 city's general recognition of the area as unsuitable for
21 water-dependent uses. Indeed, plan provision states

22 " * * * The only water-dependent use is a fish
23 processing plant at the foot of 9th Street. * * *"
CP.170.9.

24 We agree with respondent that this plan provision does not
25 indicate any legislative intent to limit water-dependent use of
26 the applicant's property.

1 The only finding adopted by the city in support of its
2 amendment to ZO.357.3.a making ice processing facilities a
3 conditional use only if independent of seafood processing
4 facilities is as follows:

5 "The retention and expansion of water-dependent uses
6 is the highest priority of the A-2 Zone. The proposed
7 amendment to ZO.357(3)(a) is consistent with the
8 intent of the Zone. Seafood processing plants and
9 their accessory uses are water-dependent and all
10 water-dependent uses should be permitted with
11 standards. By making such uses permitted with
12 standards rather than conditional uses, the burden on
13 developers of water-dependent facilities is reduced.
14 The proposed amendment therefore is a positive step
15 toward promoting the retention and expansion of such
16 industries and has potential to add to the vitality of
17 the downtown." Record 8.

12 CP.055.3 provides "zoning actions must not detract from the
13 vitality from the downtown as the commercial center of the
14 region. Strip commercial development is to be generally
15 discouraged."

16 We understand petitioners to argue that because the
17 applicant's use is industrial it cannot be consistent with a
18 policy to protect the downtown area as the "commercial center
19 of the region." In other words, petitioners would interpret
20 "commercial center of the region" as encompassing only
21 commercial uses.

22 We do not read the policy in CP.055.3 so narrowly. The
23 plan's description of the downtown area clearly recognizes that
24 it includes marine waterfront industries and that the mixture
25 of uses in the downtown area is an advantage contributing to
26 its vitality. CP.050. Furthermore, the C-4 zone is the zone

1 the city applies to most of its downtown area. The purpose
2 statement of the C-4 zone provides:

3 "This district is intended to be the commercial center
4 of the Astoria urban area. It is designed to serve as
5 the focal point for retail trade, professional,
6 financial and governmental activities. The uses
7 permitted are intended to be compatible with the
8 locale's pedestrian orientation and, as a result,
9 off-street parking is not required for uses which are
permitted out-right. The district is not suitable
for: low intensity uses requiring a large tract of
land, most types of repair services, warehouses,
wholesale establishments and other uses which would
detract from the purpose or character of the area."

10 We note that although the purpose statement suggests
11 "warehouses" and "wholesale establishments" are not suitable,
12 the C-4 zone allows as conditional uses "light manufacturing"
13 "wholesale trade, mini-storage, and other distribution
14 establishments." ZO.330.2A; ZO.330.7.

15 Petitioners do not explain how this zoning ordinance
16 amendment to permit an ice processing facility as part of a
17 currently permitted industrial use in the A-2 zone violates
18 CP.055.3. Since the zones applied to the downtown commercial
19 area do not proscribe non-commercial uses, we cannot say the
20 challenged zoning ordinance amendment violates this policy. We
21 read the city's findings to conclude the zoning ordinance
22 amendment will facilitate retention of an existing waterfront
23 industrial use with resulting benefits to the vitality of the
24 downtown commercial area. We find no fault with the city's
25 reasoning.

26 Petitioners next challenge the city's failure to adopt

1 findings addressing the

2 "policies addressed under * * * the first assignment
3 of error, particularly those addressing public parking
4 (CP.055(2), CP.255(2)), the public access to the
5 waterfront (CP.055(5), CP.170(10)(a), CP.205(3),
6 CP.275(5), CP.360(12)), and protection of the downtown
7 area as the commercial center of the region
8 (CP.020(4), CP.050, CP.055(3), CP.205(1))." Petition
9 for Review 27-28.

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1 explain why the allegedly applicable plan policies are offended.

2 This subassignment of error is denied.

3 B. Removal of Off-Street Parking Requirements

4 This part of the city's decision amending its acknowledged
5 zoning ordinance amended the A-2 zone, ZO.361, "Additional
6 Development Standards and Procedural Requirements," to add a
7 new subsection 10 as follows:

8 "10. Uses located between 8th and 14th Streets are
9 not required to provide off-street parking or
10 loading. Uses located in other portions of the A-2
Zone shall comply with access, parking and loading
standards in Section ZO.885 to ZO.905."

11 Petitioners argue the city erred by failing to address a
12 number of comprehensive plan policies⁹ and by incorrectly
13 finding compliance with the plan policies it did address.

14 With regard to the plan policies the petitioners claim the
15 city improperly failed to address, see n 9, we find those
16 policies are either inapplicable or too indirectly implicated
17 to fault the city for failing to adopt specific findings to
18 address those policies. To the extent those policies express
19 relevant issues the city was required to address, they are
20 addressed in the findings the city did adopt to address the
21 plan policies discussed infra.

22 1. CP.020.4¹⁰

23 CP.020.4 establishes a policy of protecting the downtown
24 area through policies "encouraging the establishment of
25 additional parking areas * * *." The city found other zones in
26 the area do not require off-street parking. The city also

1 noted that the very limited space available for provision of
2 parking results in the practical necessity of constructing
3 multi-story parking structures. The city found there is
4 "little opportunity * * * for businesses to provide off-street
5 parking without going to the expense of constructing
6 multi-story parking structures." Record 7. The city noted it
7 had adopted a downtown parking plan which

8 "* * * does not recommend that businesses be obligated
9 to provide off-street parking on an individual basis.
10 Instead, the plan identifies opportunities for
11 creating new public parking areas and sets out a
12 strategy for financing and constructing new lots." Id.

13 In addition, we note the city has adopted a policy specifically
14 stating "the city will continue to work toward establishment of
15 public parking areas in the downtown area." CP.205.2.

16 We understand the above quoted finding to recognize the
17 downtown area's continuing parking problems, but to state the
18 city intends to address that problem through construction of
19 public parking facilities, rather than by requiring off-street
20 parking as a condition of expansion of existing businesses in
21 the affected area of the A-2 zone. We believe that is a choice
22 within the city's discretion and, therefore, the challenged
23 amendment to the A-2 zone does not violate CP.020.4.

24 2. CP.055.2

25 This policy states "the city supports efforts to improve
26 the parking problem in the downtown, * * * . However, the C-4
27 zone will continue to not require off-street parking."

28 The city's finding addressing this plan policy is as

1 follows:

2 "Parking is not required in the C-4 zone because
3 opportunities are not available to individual
4 businesses to provide adequate parking. Businesses in
5 the A-2 zone located between 8th and 14th Streets face
6 the same constraints as businesses located in the C-4
7 zone and in the S-2A zone between 8th and 14th
8 Streets. It is therefore logical to extend the same
9 exclusion from off-street parking requirements
specified in the C-4 zone and the S-2A zone to the
specified area of the A-2 zone. As detailed in the
downtown parking plan (1987), the city efforts to
improve parking conditions will focus on public
projects. Businesses will not be required to resolve
the problem individually as reasonable opportunities
do not exist." Record 8.

10 For the reasons explained in our discussion of CP.020.4, we
11 do not believe the challenged amendment violates CP.055.2.

12 3. CP.055.3

13 As noted earlier in this opinion, this policy requires that
14 zoning action "not detract from the vitality of the downtown as
15 the commercial center of the region." After noting that other
16 zones in the area do not require businesses to provide
17 off-street parking, the city found that requiring off-street
18 parking in this area of the A-2 zone where provision of such
19 parking is difficult would discourage business expansion or
20 location of new businesses. Record 8-9. We understand the
21 city to find that such discouragement of business expansion of
22 location would detract from the vitality of the downtown area
23 more than the parking impacts of the zoning ordinance
24 amendment. In view of the city's apparent choice to pursue the
25 parking problem in a different manner by constructing public
26 parking facilities, we find no basis upon which to question the

1 city's finding of compliance with CP.055.3.

2 4. CP.170.10.c

3 CP.170.10.c provides:

4 "New traffic generating uses proposed for the downtown
5 waterfront area shall be reviewed for their impacts on
6 traffic and parking and the operation of existing
7 water dependent uses located in the area. Adequate
8 roads, parking and loading areas shall be provided so
9 as not to compound the congestion problem. Off-street
10 parking may be required."

11 The city finding addressing this policy is as follows:

12 "The proposed amendment to ZO.357.3.A acknowledge
13 [sic] the limited land area available for adequate
14 parking and acknowledges the policy to promote the
15 vitality of the area as a regional commercial area.
16 The need for adequate parking areas to relieve
17 downtown congestion was recognized in the downtown
18 parking plan (1987). The provision of needed parking
19 is being actively pursued by the city and will be
20 accomplished through public projects. Given that the
21 national average cost for developing parking
22 structures is approximately \$7,000/stall and the cost
23 of constructing an over-water parking deck is
24 approximately \$6,500/stall, requiring businesses in
25 the downtown area to individually provide required
26 parking would present a major economic constraint to
27 development." Record 9.

28 We do not read CP.170.10.c to require that the city address
29 existing parking problems by requiring, through its zoning
30 ordinance, that off-street parking be provided as a condition of
31 development. While such a measure certainly would be
32 consistent with CP.170.10.c, it is not required. The policy
33 does not say when needed parking must be provided and
34 specifically provides only that off-site parking may be
35 required. The city policy expressed in the challenged finding,
36 and in plan policies, of addressing its parking problem in the

1 downtown area through publicly funded parking structures, is
2 well within the city's legislative discretion and does not
3 conflict with CP.170.10.c. We agree with the city that its
4 decision to amend the A-2 zone to eliminate off-street parking
5 requirements in the subject area does not offend CP.170.10.c.

6 This subassignment of error is denied.

7 C. Failure to Show Compliance With Statewide Planning Goals

8 Petitioners correctly note the challenged zoning ordinance
9 amendment must comply with statewide planning goals. ORS
10 197.835(4). However, the only goal violation petitioners
11 allege is a failure to comply with Goal 2 because the city
12 improperly applied the plan provisions discussed supra. We
13 have already determined that the city's decision does not
14 conflict with the cited plan policies. Petitioners identify no
15 other goal provisions it believes are violated by the city's
16 decision. We will not search for applicable goal provisions
17 that may be offended by the city's decision. See, Chemeketa
18 Industries Corp. v. City of Salem, 14 Or LUBA 159, 165 (1985).

19 This subassignment of error is denied.

20 The fifth assignment of error is denied.

21 The fifth assignment of error is the only assignment
22 challenging the city's zoning ordinance amendment. Because we
23 deny the fifth assignment of error, we therefore affirm the
24 city's decision adopting the zoning ordinance amendment.
25 Furthermore, the parties agree, and we concur, that if we
26 affirm the city's zoning ordinance amendment, the parts of this

1 consolidated appeal challenging the city's decisions on the
2 variance and conditional use permit should be dismissed as
3 moot. We include our determinations concerning the disputed
4 variance and conditional use permit decisions under the first
5 four assignments of error only to facilitate a speedy
6 resolution of this matter in the event of appeal and reversal
7 or remand of the portion of our decision denying the fifth
8 assignment of error. Cf. ORS 197.805; ORS 197.835(10)(a).

9 The city's decision amending the zoning ordinance,
10 challenged in LUBA No. 88-051, is affirmed. Petitioners'
11 challenges of the city's decisions granting a conditional use
12 permit and a variance in LUBA Nos. 88-049 and 88-050 are
13 dismissed.

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FOOTNOTES

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4 The A-2 zone extends along the waterfront from the Astoria
5 Bridge east to 14th Street and from 17th Street to 21st
6 Street. Other zones applied to the downtown area are the S-2A
7 zone, a tourist oriented shorelands zone applied to certain
8 shorelands in the downtown area, and the C-4 zone, applied to
9 the balance of the downtown area.

7 2
8 Respondent claims there is "simply no adequate upland
9 property which could be devoted to off-street parking, since
10 the upland property is developed and occupied," and cites us to
11 portions of the record allegedly demonstrating this.
12 Intervenor-Respondent's Brief 5 and 6. However, the citations
13 given (Record 48-49, 55-56, 68, 189, 210) do not reflect this
14 claimed fact.

12 3
13 The plan identifies eight geographic subareas and adopts
14 policies specific to each subarea. CP.030 through CP.105.
15 Specific policies are also contained in the plan for functional
16 areas including urban growth, shorelands and estuaries,
17 economic development, housing, historic preservation, parks,
18 public facilities, transportation, air, water and land,
19 geological and flood hazards, energy, forestry resources, and
20 natural resources.

18 4
19 As explained, infra, the policies adopted for specific
20 geographic and functional areas include some policies that
21 establish mandatory approval standards for land use actions and
22 some policies that provide general direction or considerations.

21 5
22 Respondent also argues that if the literal language of
23 CP.010.1 is followed, then there can be no justification for a
24 variance based upon circumstances inherent in the land. That
25 is, ZOl.110 provides that a variance may be granted because of
26 circumstances inherent in the land which would create
unnecessary hardship without the grant of the variance. This
provision is not consistent with the plan provision which
requires that each development (or class of developments) adapt
to the physical capabilities and limitations of the land.

1 We agree with the respondent's analysis. The comprehensive
2 plan, if read as petitioners read it, would appear to prohibit
3 variances under the city's code. We therefore decline to adopt
4 the reading offered by petitioners.

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7 We are not certain of the basis for petitioners' claim that
8 there will be an increased level of non-compliance.

9 _____
10 7

11 Petitioners also challenge the city's findings of
12 compliance with ZO.900.2 and ZO.900.3. Those subsections
13 provide:

14 "Buildings or structures to be built or substantially
15 altered and which receive and distribute material or
16 merchandise by truck shall provide and maintain
17 off-street loading berths in sufficient numbers and
18 sizes to handle adequately the need of the particular
19 use."

20 "Vehicles in the berth shall not protrude into a
21 public right-of-way or sidewalk. When possible,
22 loading berths shall be located so that vehicles are
23 not required to back or maneuver in a public street."

24 Although compliance with ZO.900.2 and ZO.900.3 may entail
25 considerations that overlap to some extent considerations
26 relevant to compliance with ZO.115.2, petitioners do not
27 explain why the challenged findings of compliance with ZO.900.2
28 and ZO.900.3 should have any impact on the adequacy of the
29 city's findings that the variance criterion of ZO.115.2 is
30 met. Of course, if the proposal does not comply with ZO.900.2
31 and ZO.900.3, that would mean the city should have granted a
32 variance to those provisions as well. However, petitioners do
33 not allege failure to obtain a variance from these provisions
34 as error. All that part B of the third assignment of error
35 alleges is misapplication of ZO.115.2. As to that allegation
36 of error, we conclude the adequacy of the city's findings of
37 compliance with ZO.900.2 and ZO.900.3 provides no basis for
38 reversal or remand.

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41 Citing Ford v. Polk County, 7 Or LUBA 232, 244, aff'd, 65
42 Or App 567 (1983) and Friends of Benton County v. Benton
43 County, 4 Or LUBA 112, 119 (1981), intervenor-respondent
44 argues, incorrectly, that the city was not required to
45 demonstrate that the amendment to its acknowledged zoning

1 ordinance text complies with the goals. The cited cases
2 involve a conditional use approval and a subdivision approval,
3 not an amendment to an acknowledged zoning ordinance. Under
4 ORS 197.835(4) "an amendment to an acknowledged * * * land use
5 regulation [must] comply with the goals. * * *" We do not
6 understand intervenor-respondent to argue we should find the
7 amendment to the zoning ordinance text complies with the goals
8 because it is "consistent with specific related land use
9 policies contained in the acknowledged comprehensive plan
10 * * *." ORS 197.835(4)(a).

11 _____
12 9
13 The comprehensive plan policies petitioners argue the city
14 improperly failed to address in its findings are as follows:
15
16 CP.010.1, CP.015.1, CP.055.1, CP.205.1, CP.205.2,
17 CP.205.3, CP.275.5, CP.360.12.

18 Each of these comprehensive plan policies is quoted, supra,
19 under the first assignment of error.

20 _____
21 10
22 The plan policies discussed in subsections 1 through 3 of
23 this subassignment of error were quoted supra under the first
24 assignment of error.

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