

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 ARLENE NEUMAN, LEESA BRIGHT,)
5 NANCY DUNN and ANDREW BENNETT,)
6)
7 Petitioners,)
8)

9 vs.)

10 CITY OF ALBANY,)
11)
12)
13 Respondent,)
14)

15 and)

16)
17 LARRY E. BAKER and)
18 ELIZABETH I. BAKER,)
19)
20 Intervenors-Respondent.)

LUBA No. 94-121

FINAL OPINION
AND ORDER

21
22
23 Appeal from City of Albany.

24
25 Leesa Bright, Albany, filed the petition for review and
26 argued on her own behalf.

27
28 No appearance by respondent.

29
30 Robert T. Scott, Albany, filed the response brief and
31 argued on behalf of intervenors-respondent. With him on the
32 brief was Scott & Norman.

33
34 KELLINGTON, Referee; HOLSTUN, Chief Referee; SHERTON,
35 Referee, participated in the decision.

36
37 REMANDED 12/01/94

38
39 You are entitled to judicial review of this Order.
40 Judicial review is governed by the provisions of ORS
41 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city ordinance approving a zone
4 change for a 1.276 acre parcel from Residential Single
5 Family (R-10) to Neighborhood Commercial (NC).¹

6 **MOTION TO INTERVENE**

7 Larry E. Baker and Elizabeth I. Baker, the applicants
8 below, move to intervene on the side of respondent. There
9 is no objection to the motion, and it is allowed.

10 **FACTS**

11 Intervenors submitted concurrent applications for a
12 zone change, a conditional use permit for a convenience
13 store and site plan review approval. The city bifurcated
14 review of the applications and reviewed the zone change
15 application first.

16 The planning commission denied the proposed zone change
17 on the basis that the zone change does not comply with
18 Albany Development Code (ADC) 2.550(2).² Intervenors
19 appealed the planning commission decision to the city
20 council. After a public hearing, the city council approved

¹The subject property is designated Low Density Residential (LDR) on the city's comprehensive plan map. However, a plan amendment is not required for the proposed zone change because the LDR designation allows the NC zone.

²ADC 2.550(2) requires the following determination:

"Existing or anticipated transportation facilities are adequate for uses that are permitted under the proposed zone designation."

1 the proposed zone change. This appeal followed.³

2 **FIRST THROUGH SEVENTH ASSIGNMENTS OF ERROR**

3 Petitioners argue the challenged decision erroneously
4 fails to apply Albany Comprehensive Plan (plan) Goal 12 to
5 the proposed zone change. Petitioners also contend the
6 proposal violates plan Goal 12.

7 Intervenors contend that petitioners failed to raise
8 the issue of the proposal's compliance with plan Goal 12
9 during the proceedings below, and may not raise this issue
10 in an appeal to LUBA.⁴ ORS 197.835(2); ORS 197.763(1).⁵

³The challenged decision is not attached to the petition for review as required by OAR 661-10-030(2)(e). It is difficult to determine what documents comprise the challenged decision. As far as we can tell, the challenged decision is composed of the documents at Record 12-19 and Record 23-29.

⁴Intervenors also argue that petitioners failed to raise below issues that are raised in subsequent assignments of error. However, our disposition of the waiver issue under these assignments applies equally to intervenors' waiver arguments advanced in response to other assignments of error.

⁵ORS 197.835(2) provides that LUBA's scope of review is limited as follows:

"Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.763. A petitioner may raise new issues to [LUBA] if:

"(a) The local government failed to follow the requirements of ORS 197.763[.]

"* * * * *"

ORS 197.763(1) provides:

"An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before

1 Our review of the challenged decision is limited under
2 ORS 197.835(2) and ORS 197.197.763(1) only where the local
3 government complies with the requirements of ORS 197.763.
4 ORS 197.763(3)(b) and (f) require the local government to
5 list in the notices of public hearing mailed prior to its
6 first evidentiary hearing, the plan and land use regulation
7 criteria that apply to the proposal. Here, the notice of
8 the initial public hearing did not identify any
9 comprehensive plan standards as applicable to the proposal.
10 Record 177. Therefore, the notice is inadequate.⁶ Eppich
11 v. Clackamas County, 26 Or LUBA 498, 502-03 (1994). Where
12 the notice of public hearing fails to conform to
13 ORS 197.763, petitioners may raise issues before this Board
14 even though those issues may not have been raised during the
15 proceedings below. Friends of the Metolius v. Jefferson
16 County, 25 Or LUBA 411, 414, aff'd 123 Or App 256, adhered
17 to 125 Or App 122 (1993).

18 We turn next to the merits of petitioners' arguments

the local government. Such issues shall be raised with sufficient specificity so as to afford the [local government decision maker] and the parties an adequate opportunity to respond to each issue."

⁶The plan is made generally applicable to the subject zone change application through ADC 2.550(5), which requires:

"The intent and purpose of the proposed zoning district best satisfies the goals and policies of the Comprehensive Plan."

There is no dispute the challenged decision applies some plan provisions to the proposal.

1 concerning plan Goal 12.⁷ Plan Goal 12 concerns
2 transportation and consists of 19 policies and 17
3 implementation strategies. The following is an example of
4 the requirements provided by plan Goal 12. Plan Goal 12,
5 Policy 3 provides:

6 "As part of the development review process,
7 evaluate the adequacy of transportation to, from,
8 and within the site."

9 ADC 2.550(5) requires a demonstration that a proposed
10 zone change "best satisfies" the intent and purpose of the
11 goals and policies of the city's comprehensive plan. In
12 this regard, the challenged decision applies some plan
13 provisions, but not others. The challenged decision is
14 silent concerning the applicability of the provisions of
15 plan Goal 12 to the proposed zone change. Petitioners'
16 argument that plan Goal 12 contains applicable standards is
17 not untenable. This is because the language of plan Goal 12
18 does not unambiguously establish that it is inapplicable to
19 the challenged decision. Terra v. City of Newport, 24 Or
20 LUBA 438 (1993). Under these circumstances, the city
21 council must interpret the provisions of plan Goal 12 and
22 explain in its decision whether and how they apply to the
23 proposed zone change. Gage v. City of Portland, 123 Or App

⁷Petitioners raise no issue in their petition for review concerning the proposal's compliance with Statewide Planning Goal 12 or the Transportation Planning Rule (TPR) (OAR 660-12-000 to 660-12-070). Therefore, we express no position concerning the applicability of the TPR or the proposal's conformance with it.

1 269, ____ P2d ____, on reconsideration 125 Or App 119 (1993),
2 rev'd on other grounds 319 Or 308 (1994); Towry v. City of
3 Lincoln City, 26 Or LUBA 554 (1994). This Board may not
4 interpret plan Goal 12 in the first instance. Weeks v. City
5 of Tillamook, 117 Or App 449, 454, 844 P2d 914 (1992).
6 Rather, we must review the city council's interpretation of
7 plan Goal 12, as expressed in the challenged decision, and
8 determine whether that interpretation is "beyond colorable
9 defense." Zippel v. Josephine County, 128 Or App 458, 461,
10 ____ P2d ____ (1994). On remand, the city council must
11 explain in its decision whether the provisions of plan
12 Goal 12 apply to the proposal, and if so, explain how they
13 are satisfied.

14 The first through seventh assignments of error are
15 sustained.

16 **EIGHTH THROUGH ELEVENTH ASSIGNMENTS OF ERROR**

17 Petitioners argue the proposal is inconsistent with
18 ADC 12.060, 12.200 and 12.530.⁸ ADC Article 12 is entitled

⁸ADC 12.060 provides:

"General Provisions. No development shall occur unless the development has frontage or approved access to a public street currently open to traffic. A currently non-opened public right-of-way may be opened by improving it to city street standards.

"Streets (including alleys) within and adjacent to a development shall be improved in accordance with the standards in this Article. In addition, any new street or additional street width planned as a portion of an approved street plan shall be dedicated and improved in accordance with this article.

1 "Public Improvements." ADC 12.000 provides:

2 "Overview. This article contains the city's

"Where the City Engineer determines that a required street improvement would not be timely, the City Engineer may accept a Petition for Improvement/Waiver of Remonstrance for a future assessment district."

ADC 12.200 provides:

"Street Abutting New Development. Sections of existing streets not meeting the city standards which directly abut new development shall be constructed partial width to the appropriate city standard by the developer provided that a partial street improvement is determined by the city engineer to be adequate to handle the projected traffic loading. The design of the improvement shall consider the ultimate design of the fully widened street. For the purposes of this section, 'development' means a land division, new commercial or industrial development, construction of multi-family residential units or a manufactured home or recreational vehicle park.

"Where the city engineer determines that the street improvement would not be timely, he may accept a future improvement assurance as described in Section 12.600."

ADC 12.530 provides:

"General Provisions. The review body will approve a development request only where adequate provisions for storm and flood water run-off have been made as determined by the City Engineer. The storm water drainage system must be separate and independent of any sanitary sewerage system. Where possible, inlets should be provided so surface water is not carried across any intersection or allowed to flood any street. Surface water drainage patterns and proposed storm drainage must be shown on every development proposal plan. All proposed storm sewer plans and systems must be approved by the City Engineer as part of the tentative plat or site plan review process.

"Ditches are not allowed without specific approval of the City Engineer. Open natural drainageways of sufficient width and capacity to provide for flow and maintenance may be permitted. For the purposes of this article, an open natural drainageway is defined as a natural path which has the specific function of transmitting natural stream water or storm water run-off from a point of higher elevation to a point of lower elevation."

1 standards for those public improvements which
2 relate to the development process.

3 "The following is a list of the main headings of
4 this article.

5 "• General Provisions • Water

6 "• Streets • Sanitary Sewer

7 "• Sidewalks • Storm Drainage

8 "• Bikeways • Improvement Assurances

9 "• Utilities-General • Addresses and Street
10 Names"

11 ADC 12.010 provides:

12 "Purpose. The provisions in this article for new
13 improvements are intended to address the city's
14 concerns relative to public health, safety, and
15 welfare."

16 ADC 12.020 provides:

17 "Relationship to Other Regulations. This article
18 is intended to supplement other municipal
19 ordinances. In the event of a conflict between a
20 provision of this article and another city
21 ordinance, that ordinance which most specifically
22 deals with the issue in question shall control.
23 Whenever possible, the two provisions shall be
24 interpreted in a manner which renders the
25 provisions of both ordinances consistent. Only
26 when such interpretation is impossible will one
27 provision be deemed to supersede the other."

28 A glossary to the ADC defines the term "development" as
29 follows:

30 "Any manmade change to improved or unimproved real
31 estate, including but not limited to construction,
32 installation, or change of a building or other
33 structure, land division, establishment or
34 termination of a right of access, storage on the
35 land, drilling and site alteration such as due to

1 land surface mining, dredging, paving, excavation,
2 or clearing."

3 The challenged decision adopts the following findings
4 concerning the applicability of ADC 12.200:

5 "ADC 12.200 requires sections of existing streets
6 which directly abut new development, and do not
7 meet city standards, to be improved. Development,
8 for the purposes of ADC 12.200 is defined as a
9 land division, new commercial or industrial
10 development, construction of multi-family
11 residential units or a manufactured home or
12 recreational vehicle park. A zoning map amendment
13 does not meet this definition of development, or
14 the definition found in the ADC glossary."

15 We defer to this interpretation of the term
16 "development," as it is not clearly contrary to the express
17 words policy or context of ADC Article 12 and, therefore, is
18 not beyond colorable defense. Further, while the challenged
19 decision is silent concerning the applicability of ADC
20 12.060 and 12.530 to the proposed zone change, we believe
21 the city's interpretation of "development" for purposes of
22 ADC 12.200 applies to other provisions of ADC Article 12,
23 including ADC 12.060 and 12.530.⁹

24 Petitioners argue the evidence in the record
25 establishes the proposal's noncompliance with ADC 12.060,

⁹The challenged decision states the following concerning ADC 12.060:

"At the time development is proposed on the subject property, street improvements on Gibson Hill Road, Scenic Drive, and the extension of Oak Grove Drive may be required if they are found to be timely, as described in [ADC] 12.060 and 12.200." Record 15.

1 12.200 and 12.530. However, because the city's
2 interpretation that these ADC regulations are inapplicable
3 to the proposed zone change must be sustained, petitioners'
4 evidentiary arguments provide no basis for reversal or
5 remand of the challenged decision.¹⁰

6 The eighth through eleventh assignments of error are
7 denied.

8 **TWELFTH THROUGH FIFTEENTH ASSIGNMENTS OF ERROR**

9 Under these assignments of error, petitioners contend
10 the challenged decision violates (1) plan Goal 14, Policy
11 11c;¹¹ (2) plan Goal 14, Policy 12;¹² (3) plan Goal 14,

¹⁰We address petitioners' arguments under these assignments concerning the proposal's compliance with ADC 2.550(3), infra.

¹¹Plan Goal 14, Policy 11c establishes the following requirements:

"Provide opportunities for neighborhood commercial facilities to be located within an accessible distance of the area they are intended to serve. Neighborhood Commercial uses shall:

"* * * * *

"c. Be limited in number, size, and location. Generally, new sites shall be less than five acres in total area and shall be located at least one-half mile in travel distance from any other commercial site which provides or is available to provide for similar commercial needs. Zone change applications for new neighborhood commercial sites must demonstrate that the chosen site is superior or equal to viable alternative sites within the same market area based on exposure to traffic flows and other market indicators, accessibility and convenience to the market area, and compatibility with surrounding uses."

¹²Plan Goal 14, Policy 12 provides:

1 Policy 15;¹³ and (4) plan Goal 14, Implementation Methods
2 1a, b and d.¹⁴

"Discourage future strip commercial development and promote clustered commercial opportunities and the infilling of existing commercial areas which will foster:

- "a. Efficient and safe utilization of transportation facilities.
- "b. A variety of attractive and comfortable shopping opportunities that encourage shopping in a number of stores without auto use.
- "c. Compatibility between land uses, particularly adjacent residential neighborhoods.
- "d. Efficient extension of public facilities and services."

¹³Plan Goal 14, Policy 15 provides:

"Encourage land use patterns and development plans which take advantage of density and location to reduce the need for travel dependency on the private automobile, facilitate energy-efficient public transit systems, and permit building configurations which increase the efficiency of energy use."

¹⁴Plan Goal 14, Implementation Methods 1a, b and d provide:

"Maintain joint management agreements between the City of Albany and Linn and Benton Counties to ensure continued protection and orderly development of the urbanizing area in conformance with the Comprehensive Plan. Such agreements should include:

- "a. A mutual notification procedure for City or County actions which affect the other jurisdiction.
- "b. Concurrence between the City and County before any Plan or zoning changes affecting the UGB or urbanizable area can occur.

"* * * * *

- "d. Methods to arrive at consensus between the City and County regarding planning and development actions of mutual concern."

1 The challenged decision addresses plan Goal 14,
2 Policies 11 and 15. The city's determination that the
3 proposal complies with plan Goal 14, Policy 11c, is as
4 follows:

5 "The subject property is less than five acres in
6 total area and is located at least one-half mile
7 in travel distance from any other commercial site
8 which provides or is available to provide for
9 similar commercial needs. No viable alternative
10 sites have been identified by the applicant, staff
11 review, or comments by affected parties. The
12 subject property is superior in respect to traffic
13 exposure to traffic flows and accessibility
14 because it is located at the intersection of two
15 Major Collector streets." Record 19.

16 These findings are inadequate. The findings fail to
17 explain why other commercial sites within one-half mile of
18 the subject property are inadequate to accommodate
19 neighborhood commercial uses. The findings do not identify
20 the market area for analysis, as required by Goal 14, Policy
21 11c. Further, the findings are unresponsive to plan Goal
22 14, Policy 11c because they simply state no one pointed out
23 to the city decision maker any alternative sites. However,
24 the burden of establishing compliance with approval
25 standards belongs to the applicant. Forest Park Estate v.
26 Multnomah County, 20 Or LUBA 319 (1990). The applicant
27 therefore must carry the burden of establishing that there
28 are no viable alternative sites, as required by plan
29 Goal 14, Policy 11c. Once the applicant (or other
30 participants) provides evidence concerning potential
31 alternative sites and why they are not "viable," it is the

1 city's responsibility to adopt findings identifying the
2 sites examined and to explain why those sites are not viable
3 alternative sites within the meaning of that policy.

4 The findings concerning plan Goal 14, Policy 15 state
5 the following:

6 "Changing the zoning of the subject property * * *
7 will provide an opportunity for North Albany
8 residents in proximity to the proposed development
9 to minimize the length of vehicle trips for the
10 frequently occurring needs typically offered by
11 neighborhood commercial enterprises.

12 "The proposed development is at the intersection
13 of two Major Collector streets, which most likely
14 will be transit routes in the future, therefore,
15 the proposed development will support energy
16 efficient transit. * * *

17 "Changing the zoning of the subject property will
18 provide an opportunity for North Albany residents
19 in proximity to the proposed development to
20 minimize the length of vehicle trips for some
21 frequently occurring needs such as gasoline, milk,
22 bread, etc. that are offered at convenience
23 stores. The location of the subject property at
24 the intersection of two Major Collector streets
25 maximizes the accessibility, and provides the
26 shortest trip for the most residents." (Emphasis
27 supplied.) Record 19.

28 Petitioners do not challenge these findings. However,
29 petitioners do challenge the evidentiary support for the
30 above emphasized findings addressing the requirement to
31 "facilitate energy-efficient public transit systems" in plan
32 Goal 14, Policy 15. No party identifies any evidence in the
33 record on the point. Therefore, we must sustain
34 petitioners' challenge.

1 Regarding plan Goal 14, Policy 12 and the above cited
2 plan Goal 14 implementation methods, we do not understand
3 the challenged decision to adopt any position concerning
4 them. For the reasons explained in previous portions of
5 this opinion, it is for the city to determine the
6 applicability of, and the proposal's compliance with, those
7 plan provisions in the first instance. We may not adopt
8 such an interpretation for the city council.

9 The twelfth through fifteenth assignments of error are
10 sustained.

11 **SIXTEENTH ASSIGNMENT OF ERROR**

12 Petitioners argue the challenged decision violates
13 ADC 2.550(5) because the proposed zone change does not "best
14 satisf[y] the goals and policies of the Comprehensive Plan."
15 As we understand it, petitioners also argue the proposal is
16 contrary to the purpose of the NC zoning district as stated
17 in ADC 4.020.¹⁵ Petitioners contend:

18 "Not only do Petitioners feel that this is an
19 inappropriate site for [NC zoning], but contend
20 that the Respondent's conclusions are inconsistent
21 with the underlying policies of the Comprehensive
22 Plan, express language of the Comprehensive Plan

¹⁵ADC 4.020 provides the NC zone is intended:

"* * * primarily for small areas of retail establishments
serving frequently recurring nearby residents' needs in
convenient locations. The NC District is typically appropriate
to small clusters or service centers within residential
neighborhoods. Generally, uses located within NC Districts
should have as their primary market area the population within
a one-half mile radius."

1 and are in direct violation of the Policies of the
2 Comprehensive Plan and the Development Code."
3 Petition for Review 26.

4 Petitioners' arguments under this assignment of error
5 are unfocused and insufficiently developed and, for that
6 reason, do not warrant review. Deschutes Development Corp.
7 v. Deschutes County, 5 Or LUBA 218, 220 (1982).

8 The sixteenth assignment of error is denied.

9 **SEVENTEENTH THROUGH TWENTIETH ASSIGNMENTS OF ERROR**

10 Under these assignments of error, petitioners contend
11 the proposal violates (1) ADC 2.550(3);¹⁶ (2) plan Goal 11;
12 (3) plan Goal 11, Policy 2; (4) plan Goal 11, Policy 3; and
13 (5) plan Goal 11, Implementation Measure 6.¹⁷

¹⁶ADC 2.550(3) provides:

"Existing or anticipated services (water, sanitary sewers, storm sewers, schools, police and fire protection) can accommodate potential development within the subject area without adverse impact on the affected service area."

¹⁷Plan Goal 11 states it is the goal of the city to:

"Provide for public protection needs of all Albany's citizens by maintaining high standards of police and fire protection."

Plan Goal 11, Policy 2 states it is the goal of the city to:

"Ensure that all development can be provided with adequate police and fire protection."

Plan Goal 11, Policy 3 states:

"Work with county, state and federal agencies to coordinate improvement of city and county law enforcement and justice services."

Plan Goal 11, Implementation Measure 6 requires the city to:

1 Intervenors identify no findings concerning the
2 proposal's compliance with plan Goal 11. Therefore, the
3 challenged decision must be remanded for such findings.

4 Concerning the proposal's compliance with ADC 2.550(3),
5 the findings are inadequate. Regarding storm water
6 drainage, the findings determine:

7 "The existing roadside ditches cannot accommodate
8 potential development on the subject property
9 without adverse impact on the affected service
10 area, unless the flow of storm water from the
11 subject property is limited to the flow rate that
12 has historically run off the property prior to
13 development." Record 16.

14 The challenged decision goes on to impose the following
15 condition of approval:

16 "The flow rate of storm water from any proposed
17 development on the subject property shall be
18 limited to the flow rate that has historically run
19 off the site prior to development, until such time
20 as a public storm drainage system adequate to
21 accommodate post-development runoff is in place."
22 Id.

23 In view of the fact that the subject property is currently
24 undeveloped, these findings and the quoted condition make
25 very little sense. It may be the city wishes to defer a
26 determination of compliance with ADC 2.550(3) to a later

"Consider the long-range needs for fire and police protection services such as:

"a. Determining facility needs and future locations.

"b. Establishing strategies for implementation and maintenance."

1 proceeding. However, if the city wishes to defer a
2 determination of compliance with ADC 2.550(3), at a minimum,
3 it must identify in the challenged decision feasible
4 engineering solutions to accommodate storm water runoff and
5 require that such solutions be in place prior to
6 development. Bartels v. City of Portland, 20 Or LUBA 303
7 (1990); see also Meyer v. City of Portland, 67 Or App 274,
8 678 P2d 741 (1984).

9 Finally, regarding police and fire services,
10 petitioners argue the record lacks evidentiary support for
11 the city's conclusion that police and fire services are
12 available to serve the subject property. We have reviewed
13 the evidence in the record cited by the parties, including
14 the countervailing evidence cited by petitioners. We
15 believe a reasonable decision maker could conclude as the
16 city did that police and fire services are available to
17 accommodate the proposed development without an adverse
18 impact on the affected service area. See 1000 Friends of
19 Oregon v. Marion County, 116 Or App 584, 842 P2d 441 (1992).
20 Therefore, we deny petitioners' assignments of error
21 alleging lack of evidentiary support for the findings of
22 compliance with ADC 2.550(3) regarding police and fire
23 services.

24 The seventeenth through twentieth assignments of error
25 are sustained, in part.

1 **TWENTY-FIRST ASSIGNMENT OF ERROR**

2 "The city's failure to fully consider and enact
3 appropriate assurances in response to documented
4 concerns relating [to the] above goal violations
5 is reversible error."

6 This assignment of error is inadequately developed to
7 warrant review. Deschutes Development Corp., supra.

8 The twenty-first assignment of error is denied.

9 **TWENTY-SECOND AND TWENTY-THIRD ASSIGNMENTS OF ERROR**

10 Petitioners argue the challenged decision was
11 erroneously adopted as an emergency ordinance and that this
12 deprived them of their substantial right to seek a
13 referendum on the challenged decision. However, intervenors
14 correctly point out that quasi-judicial land use decisions
15 are not subject to referendum. Dan Gile and Associates,
16 Inc. v. McIver, 113 Or App 1, 831 P2d 1024 (1992).
17 Therefore, these assignments of error provide no basis for
18 reversal or remand of the challenged decision.

19 The twenty-second and twenty-third assignments of error
20 are denied.

21 The city's decision is remanded.

22