

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CORNELIUS FIRST and TRACY IRWIN,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF CORNELIUS,
10 *Respondent,*

11
12 *and*

13
14 WAL-MART STORES, INC.,
15 *Intervenor-Respondent.*

16
17 LUBA Nos. 2006-042 and 2006-043

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from City of Cornelius.

23
24 Jannett Wilson, Eugene, filed the petition for review and argued on behalf of
25 petitioners.

26
27 David F. Doughman, Portland, filed a joint response brief and argued on behalf of
28 respondent. E. Michael Connors, Portland, filed a joint response brief and argued on behalf
29 of intervenor-respondent. With them on the brief were Gregory S. Hathaway, Davis Wright
30 Tremaine, LLP and Beery Elsner and Hammond, LLP.

31
32 HOLSTUN, Board Member; BASSHAM, Board Chair, participated in the decision.

33
34 AFFIRMED

09/11/2006

35
36 You are entitled to judicial review of this Order. Judicial review is governed by the
37 provisions of ORS 197.850.

NATURE OF THE DECISION

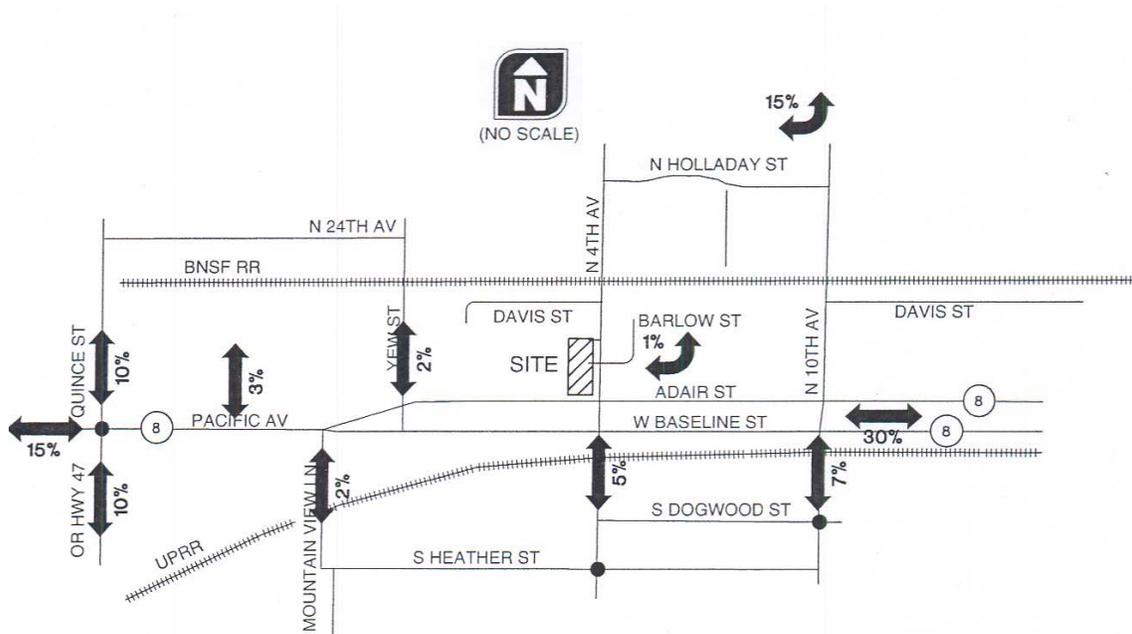
Petitioners appeal a city decision that amends the comprehensive plan and zoning map designations for a 2.67-acre property.

MOTION TO INTERVENE

Wal-Mart Stores, Inc. (intervenor) moves to intervene on the side of respondent in this appeal. There is no opposition to the motion, and it is allowed.

FACTS

Intervenor wishes to develop a store on 15.92 acres located at the intersection of N. 4th Avenue and Adair Street. A map from the record showing the location of the property and surrounding street intersections appears below.



Most of the 15.92-acre property was previously planned and zoned for commercial development. However, 2.67 acres were planned and zoned for residential development. The decisions that are before us in this appeal (1) change the comprehensive plan map

1 designation for the 2.67 acres from Medium Density Residential to Commercial and (2)
2 change the zoning map designation from Multi-Family Residential to Highway Commercial.
3 In related decisions, the city planning commission granted design review approval for the
4 proposed Wal-Mart store and approved a conditional use permit to allow outdoor sales and
5 storage at that store. Neither the design review nor the conditional use permit decision was
6 appealed locally, and neither of those decisions is before us in this appeal.

7 **A. The Comprehensive Plan Map Amendment Decision**

8 On January 17, 2006 and February 6, 2006 the city council held public hearings to
9 consider the planning commission's recommendation that the city council approve the
10 proposed comprehensive plan map amendment for the 2.67 acres with conditions. At the
11 conclusion of the January 17, 2006 public hearing, the record was held open until January 24,
12 2006 for additional written evidence. Record 133. The evidentiary record regarding the
13 comprehensive plan map amendment closed on January 24, 2006.

14 The applicant was allowed until January 27, 2006 to submit final written legal
15 arguments on the comprehensive plan map amendment. *Id.* At its February 6, 2006 public
16 hearing on the comprehensive plan amendment, the city council voted to approve the
17 amendment, with conditions. Record 85. Thereafter, on February 21, 2006, the city council
18 adopted Ordinance 865, which constitutes the city council's final written decision approving
19 the comprehensive plan map amendment. Record 71.

20 **B. The Zoning Map Amendment Decision**

21 On January 17, 2006 and February 6, 2006, the city council also held separate public
22 hearings on the proposed zoning map amendment for the 2.67 acres. At the January 17, 2006
23 public hearing, the city council opened the hearing and immediately continued the hearing
24 until February 6, 2006. At the February 6, 2006 public hearing, the city council received
25 evidence in support of and in opposition to the zoning map amendment. According to the
26 minutes of the February 6, 2006 public hearing, petitioner Irwin, "read a written statement

1 prepared by a land use attorney for ‘Cornelius First.’” Record 88. A copy of that written
2 statement was submitted on behalf of both petitioner Irwin and petitioner Cornelius First.
3 Record 93-102. The public hearing on the zoning map amendment was continued to
4 February 21, 2006. At the continued February 21, 2006 public hearing, city planning and
5 legal staff provided the city council with responses to questions raised by petitioners’
6 February 6, 2006 statement, along with supplemental findings to address those issues.
7 Record 70. After deliberating briefly, the city council passed a motion to approve the
8 requested zoning map amendment. Record 70. At the conclusion of the February 21, 2006
9 public hearing, immediately after it adopted Ordinance 865, the city council approved
10 Ordinance 866. Ordinance 866 constitutes the city council’s final written decision on the
11 zoning map amendment. This appeal followed.

12 **FIRST ASSIGNMENT OF ERROR**

13 Petitioners’ first assignment of error is directed at the comprehensive plan map
14 amendment. The City of Cornelius Development and Zoning Code (CDZC) requires that all
15 comprehensive plan amendments conform to the statewide planning goals. CDZC
16 11.30.80(D). CDZC duplicates the statutory requirement that amendments to acknowledged
17 comprehensive plans must be consistent with the statewide planning goals. *See* ORS
18 197.175(2)(a) (cities must amend comprehensive plans in compliance with the statewide
19 planning goals), ORS 197.835(6) (LUBA “shall reverse or remand an amendment to a
20 comprehensive plan if the amendment is not in compliance with the [statewide planning]
21 goals”). In their first assignment of error, petitioners allege the appealed comprehensive plan
22 amendment does not comply with Goal 9 (Economic Development). More precisely,
23 petitioners argue the city’s findings are inadequate to demonstrate that the comprehensive
24 plan map amendment complies with OAR 660-009-0010(4). The precise nature and extent
25 of petitioners’ OAR 660-009-0010(4) arguments under this assignment of error are not clear.

1 We first discuss OAR 660-009-0010(4) briefly, before returning to petitioners’ OAR 660-
2 009-0010(4) arguments.

3 **A. OAR 660-009-0010(4)**

4 OAR chapter 660, division 9 is the Land Conservation and Development
5 Commission’s (LCDC’s) administrative rule that implements the more generally worded
6 planning requirements of Statewide Planning Goal 9 (Economic Development) itself. That
7 rule was significantly amended in 2001. As we explained in *Jaqua v. City of Springfield*, 46
8 Or LUBA 134, 165 (2004):

9 Among other things, Goal 9 requires that the city ‘[p]rovide for at least an
10 adequate supply of sites of suitable sizes, types, locations, and service levels
11 for a variety of industrial and commercial uses consistent with plan
12 policies[.]’ OAR 660 Division 9 is LCDC’s Goal 9 administrative rule.
13 Among other things, the rule requires that cities and counties complete an
14 ‘Economic Opportunities Analysis.’ OAR 660-009-0015. Based on the
15 Economic Opportunities Analysis, cities and counties are to prepare Industrial
16 and Commercial Development Policies. OAR 660-009-0020. Finally, OAR
17 660-009-0025 requires that cities and counties designate industrial and
18 commercial lands sufficient to meet short term and long term needs.”
19 (footnote omitted.)¹

20 Generally, under OAR 660-009-0010(2), cities are not required to update their
21 comprehensive plan to include the more detailed industrial and commercial planning effort
22 that is required by OAR 660-009-0000 through 660-009-0025 until LCDC’s first periodic
23 review of their comprehensive plan following LCDC’s amendment of OAR chapter 660,

¹ In the omitted footnote, we explained:

“OAR 660-009-0015 requires that cities and counties provide four kinds of information. First, a review of national, state and local trends to identify the ‘major categories of industrial and commercial uses that could reasonably be expected to locate or expand’ in the city or county. OAR 660-009-0015(1). Second, the types of industrial and commercial sites that are likely to be needed. OAR 660-009-0015(2). Third, an inventory of vacant and underutilized industrial and commercial land within the city or county. OAR 660-009-0015(3). Fourth, an estimate of the types and amounts of economic development likely to occur in the city or county. OAR 660-009-0015(4).”

1 division 9 in 2001.² OAR 660-009-0010(4) provides an exception to that general rule where
2 a local government changes the *comprehensive plan* designation for more than two acres “to
3 or from commercial or industrial. In that circumstance, OAR 660-009-0010(4) requires that
4 the city do one of three things:

5 “(a) Demonstrate that the proposed amendment is consistent with the parts
6 of its acknowledged comprehensive plan which address the
7 requirements of [OAR chapter 660, division 9]; or

8 “(b) Amend its comprehensive plan to explain the proposed amendment,
9 pursuant to OAR 660-009-0015 through 660-009-0025; or

10 “(c) Adopt a combination of the above, consistent with the requirements of
11 [OAR chapter 660, division 9].”

12 **B. Petitioners’ Arguments**

13 Petitioners first argue that the city must select one of the three options set out in OAR
14 660-009-0010(4). Because petitioners’ remaining arguments under the first assignment of
15 error are not lengthy, we set them out below:

16 “[T]he city made findings on Goal 9. Rec 2939-42. However, the findings do
17 not seem to either reference or demonstrate compliance with any particular
18 portions of the city’s comprehensive plan.”

19 “The findings reference to a Market Study 2002, Rec 2940, but the findings
20 do not state whether this study was incorporated into the comprehensive plan
21 and do not identify how its provisions or conclusions respond to the Goal 9
22 economic opportunities analysis requirements. The list of appended
23 functional plans and studies in the comprehensive plan do not mention it at
24 all. * * *

25 “The findings also list data from an unidentified source (‘Exhibit E,’ which is
26 not appended to the decision) showing current availability of vacant or
27 underdeveloped commercial land. Rec 2940. Again, it is not clear if this data
28 has been incorporated into the comprehensive plan or not. Further, the data
29 itself shows a significant number * * * of the 68.65 acres of vacant
30 commercial sites are between one and five acres in size, which does not

² The statutory requirements for periodic review appear at ORS 197.628 through 197.636. LCDC’s more detailed requirements for periodic review appear at OAR chapter 660, division 25.

1 support the finding that there is a need for these additional sites to be
2 redesignated, let alone address the requirements of the Goal 9 rule.

3 “The city findings also assert a need to ‘rebalance’ the land base between
4 residential and commercial designations. Rec 2941. However, no citations to
5 any provisions of the comprehensive plan are provided to indicate that
6 ‘rebalancing’ is a goal or policy of the acknowledged comprehensive plan or
7 that ‘rebalancing’ is part of the economic opportunity analysis under Goal 9.”
8 Petition for Review 5-6.

9 The issue that petitioners raise under the first assignment of error is whether the city’s
10 comprehensive plan amendment complies with OAR 660-009-0010(4), in two or three
11 particulars. At a minimum, petitioners argue that the city (1) failed to identify the parts of its
12 comprehensive plan that it relied on in finding that the proposal complies with OAR 660-
13 009-0010(4) and (2) improperly relied on documents that have not been adopted as part of
14 the comprehensive plan. If petitioners’ arguments under the first assignment of error are
15 generously read, petitioners also make a third argument: that even where the city specifically
16 cites portions of the comprehensive plan, the city does not establish that the cited provisions
17 of the comprehensive plan were adopted to “address the requirements of [OAR chapter 660,
18 division 9],” as OAR 660-009-0010(4)(a) requires.³ In summary, under their first
19 assignment of error, petitioners raise very specific issues concerning the three options that
20 are available to the city under OAR 660-009-0010(4).

21 A petitioner must raise an issue with sufficient specificity to allow the decision maker
22 to respond to the issue. ORS 197.763(1).⁴ Moreover, to preserve a right to raise an issue at

³ The city and intervenor do not appear to recognize this third OAR 660-009-0010(4) argument.

⁴ ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.

1 LUBA, that issue must be raised before evidentiary record closes. *Id.* With certain
2 exceptions that do not appear to apply here, ORS 197.835(3) expressly limits LUBA’s scope
3 of review to issues that were properly raised below.⁵ In considering waiver arguments under
4 ORS 197.763(1) and 197.835(3), we must determine whether “fair notice” was given to the
5 parties and decision maker, such that a reasonable person would know that an issue must be
6 addressed. *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991).

7 Respondents argue that the first time petitioners raised any issue regarding the
8 requirements of OAR 660-009-0010(4) was in the February 6, 2006 statement that was first
9 submitted during the February 6, 2006 public hearing on the zoning map amendment.
10 Respondents argue that on February 6, 2006, the record in the comprehensive plan map
11 proceeding had already closed. Respondents further argue that because the record in the
12 comprehensive plan amendment proceeding had already closed, petitioners waived the OAR
13 660-009-0010(4) issues that were raised in that February 6, 2006 statement and they waived
14 the similar OAR 660-009-0010(4) issues that are raised in their petition for review.
15 Although petitioners orally responded to respondents’ waiver argument at oral argument,
16 petitioners did not submit a reply brief or otherwise respond to respondents’ waiver argument
17 in writing.

18 We do not understand petitioners to dispute that petitioners’ February 6, 2006
19 statement was submitted *after* the record in the comprehensive plan map proceeding had
20 closed. Therefore, that document was submitted too late to raise the OAR 660-009-0010(4)
21 issues that petitioners now raise in their petition for review. However, petitioners contend
22 their OAR 660-009-0010(4) issues were raised by persons other than petitioners and that so
23 long as the issues raised under the first assignment of error were raised by some party below,

⁵ ORS 197.835(3) provides the following limit on LUBA’ scope of review:

“Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.”

1 petitioners may raise them at LUBA. *Spiering v. Yamhill County*, 25 Or LUBA 695, 714-15
2 (1993). In support of that contention, petitioners cite the February 6, 2006 city council
3 minutes, where the city council asked planning staff about the city's commercial lands
4 inventory, and a written statement dated January 22, 2006, which was submitted on or about
5 that date by David Morelli (the Morelli Statement).

6 We are not sure what to make of petitioners' citation to the February 6, 2006 minutes,
7 since we do not understand petitioners to dispute that the record in the comprehensive plan
8 map amendment proceeding had already closed before that date. In any event, petitioners
9 make no attempt to explain what questions by the city council they believe raised the OAR
10 660-009-0010(4) issues that they raise under their first assignment of error. We do not see
11 that anything the city council asked planning staff about the city's commercial lands
12 inventory was sufficient to preserve the OAR 660-009-0010(4) issues that petitioners now
13 attempt to raise under the first assignment of error.

14 We have reviewed the Morelli Statement that appears at Record 3016-18. In that
15 statement, the author certainly raises issues regarding whether the applicant has adequately
16 demonstrated that the requested commercial designation for the 2.67 acres is are needed or
17 justified. However, that general issue regarding the alleged lack of need or justification for
18 the commercial designation is not sufficient to raise the much more specific rule-based
19 argument that petitioners advance under the first assignment of error. As respondents
20 correctly note, petitioners' first assignment of error for the most part faults the city for not
21 adopting findings that address the specific planning requirements set out in the Goal 9 rule.
22 Nowhere in the Morelli Statement does the author mention Goal 9 or OAR chapter 660,
23 division 9 or any subsection of that division. Petitioners' failure to cite OAR 660-009-
24 0010(4) specifically might not be fatal to their attempt to raise OAR 660-009-0010(4) issues
25 under the first assignment of error if they nevertheless raised issues regarding the substantive
26 legal requirements of OAR 660-009-0010(4). *See Hale v. City of Beaverton*, 21 Or LUBA

1 249, 254 (1991) (“ORS 197.763(1) does not require that arguments identical to those in the
2 petition for review have been presented during the local proceedings”). However, the
3 Morelli Statement does not do so. Petitioners provide no other specific citations to places in
4 the record where they contend the issues presented under the first assignment of error were
5 fairly raised, so as to give the city fair notice that petitioners believed the city had
6 inadequately addressed the requirements of OAR 660-009-0010(4), before the city’s record
7 in the comprehensive plan map amendment proceeding closed. Therefore, those issues were
8 waived.

9 The first assignment of error is denied.

10 **SECOND ASSIGNMENT OF ERROR**

11 **A. Introduction**

12 OAR chapter 660, division 12 is LCDC’s Transportation Planning Rule (TPR).
13 LCDC adopted the TPR to elaborate on the planning requirements under Statewide Planning
14 Goal 12 (Transportation). As relevant here, the TPR requires that one or more of the actions
15 set out in OAR 660-012-0060(2) must be taken in the event a comprehensive plan or land use
16 regulation amendment will “significantly affect an existing or planned transportation
17 facility.”⁶ OAR 660-012-0060(1).⁷ OAR 660-012-0060(1) specifically defines the term
18 “significantly affect.”⁸ The proposal to change the comprehensive plan map and zoning map

⁶ Those OAR 660-012-0060(2) actions are not at issue in this appeal and we do not discuss them further.

⁷ OAR 660-012-0060(1) provides in part:

“Where an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation would significantly affect an existing or planned transportation facility, the local government shall put in place measures as provided in [OAR 660-012-0060(2)] to assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility.”

⁸ As relevant, OAR 660-012-0060(1) provides:

“A plan or land use regulation amendment significantly affects a transportation facility if it would:

1 designations for the subject 2.67-acre property will “significantly affect” the intersections of
2 Quince Street and Pacific Avenue in the City of Forest Grove and the intersection of Yew
3 Street and Adair Street, within the meaning of OAR 660-012-0060(1)(c)(C), because those
4 intersections are expected to perform below the accepted performance standard at the end of
5 the planning period and the plan and zoning map amendments would worsen the
6 performance failure.⁹ See n 8. If it were not for OAR 660-012-0060(3), one or more of the
7 corrective actions required by OAR 660-012-0060(2) would be necessary in order to approve
8 the requested amendments. However, OAR 660-012-0060(3) adopts a non-degradation
9 standard that the city applied in this case to approve the disputed comprehensive plan map
10 and zoning map amendments.¹⁰ Under the OAR 660-012-0060(3) non-degradation standard,

“* * * * *

“(c) As measured at the end of the planning period identified in the adopted transportation system plan:

“* * * * *

“(C) Worsen the performance of an existing or planned transportation facility that is otherwise projected to perform below the minimum acceptable performance standard identified in the TSP or comprehensive plan.”

⁹ These intersections are located west of the subject property, in the City of Forest Grove. The map set out earlier in this opinion shows the locations of these intersections.

¹⁰ As relevant, OAR 660-012-0060(3) provides:

“Notwithstanding sections (1) and (2) of this rule, a local government may approve an amendment that would significantly affect an existing transportation facility without assuring that the allowed land uses are consistent with the function, capacity and performance standards of the facility where:

“(a) The facility is already performing below the minimum acceptable performance standard identified in the TSP or comprehensive plan on the date the amendment application is submitted;

“(b) In the absence of the amendment, planned transportation facilities, improvements and services as set forth in section (4) of this rule would not be adequate to achieve consistency with the identified function, capacity or performance standard for that facility by the end of the planning period identified in the adopted TSP; [and]

1 the disputed amendments can be approved, provided mitigation measures are implemented to
2 avoid any further degradation in the performance of the significantly affected facilities.
3 Stated differently, under OAR 660-012-0060(3), the disputed plan amendments can be
4 approved if those amendments, together with mitigation measures, will not make the
5 performance of those already failing intersections any worse than would be the case without
6 the disputed plan amendments.

7 To mitigate the impact of the proposed comprehensive plan and zoning map
8 amendments on the intersection of Yew Street and Adair Avenue, the city conditioned those
9 amendments on the applicant making a financial contribution toward construction of an
10 extension of Holladay Street west from 10th Avenue in the City of Cornelius to the
11 intersection of Yew and 24th Avenue in the City of Forest Grove. Record 28. The
12 applicant's expert explained that extending Holladay Street to 24th Avenue would provide an
13 alternative east-west collector route through the cities that would relieve traffic pressure on
14 the Yew Street/Adair Street intersection so that the OAR 660-009-0060(3) non-degradation
15 standard would be satisfied. Record 3240-41. The city found that the Holladay Street
16 extension would be sufficient to mitigate the impact of the plan and zoning map amendment
17 on the Yew/Adair intersection. Record 49.¹¹

“(c) Development resulting from the amendment will, at a minimum, mitigate the impacts of the amendment in a manner that avoids further degradation to the performance of the facility by the time of the development through one or a combination of transportation improvements or measures[.]”

¹¹ The city's findings include the following:

“In order to provide mitigation for the intersection of N. Adair & Yew a new traffic signal would be required. The applicant has indicated they would be willing to pay for a proportionate amount of the cost of a signal at this intersection. ODOT has stated that they will not permit a signal at this location. Staff has identified an alternative mitigation measure that would alleviate the impacts to this intersection. The City of Cornelius TSP and the City of Forest Grove TSP both identify the connection of N. Holladay Drive (Street) from N. 4th Avenue to Yew Street at 24th Avenue. DKS has identified this as a project that is reasonably likely to occur within the planning horizon used in their analysis. This road connection would provide an alternative northern route for customers, employees and vendors that is more likely to be constructed in the near future. Participation by the applicant in the

1 After explaining that OAR 660-012-0060(3) requires mitigation to avoid further
2 degradation of failing transportation facilities, the applicant's expert explained how expected
3 plan and zoning map amendment impacts on the Quince Street Pacific Avenue intersection
4 would be mitigated. Record 3004.¹² The city conditioned approval on the applicant making
5 a financial contribution to the City of Forest Grove when the property is developed.¹³

6 Petitioners make three arguments under the second assignment of error. In two of
7 those arguments, petitioners contend that the city's findings and the evidence in the record do
8 not establish that the selected mitigations will be effective to meet the non-degradation
9 standard at OAR 660-012-0060(3). In the third argument, petitioners contend that the city
10 failed to establish the existence of one of the key circumstances that must be present to
11 utilize the OAR 660-012-0060(3) non-degradation standard in the first place. We turn to that
12 third argument first.

construction of this street extension would help mitigate the impacts at N. Adair & Yew.
This shall be made a condition of approval." Record 49.

¹² Applicant's expert explained:

"An eastbound right-turn lane and signal modification were originally proposed in the August 31, 2005 Transportation Planning Rule (TPR) analysis to mitigate the impacts of the proposed zone change. A detailed cost analysis was prepared and submitted by us on January 3, 2006, estimating the cost of the improvements as approximately \$132,000. However, because of concerns raised by the City of Forest Grove regarding future plans at this intersection, the Applicant is willing to contribute the \$150,000 estimated for the original improvements in lieu of construction at the intersection. This contribution can be applied toward improvements deemed appropriate by the City of Forest Grove and ODOT to provide more long-term flexibility at the intersection." Record 3004.

¹³ That condition reads as follows:

"* * * When and if development occurs on the subject parcels, the Applicant shall pay \$150,000 to the City of Forest Grove to mitigate impacts at this location. This fee in lieu can be applied by the city in the future to either extend the eastbound right-turn lane to accommodate additional queues and vehicle stacking at the Pacific & Quince intersection, or complete other capacity improvements at the intersection deemed appropriate by the City of Forest Grove and ODOT." Record 28.

1 **B. Failure to Establish that the Non-Degradation Standard Applies**

2 The Holladay Street extension is a project that is already included in both cities’
3 Transportation System Plan (TSP), although the availability of funding to actually construct
4 that extension is a point of dispute among the parties.¹⁴ Citing OAR 660-012-0060(3)(b),
5 petitioners contend the city was obligated to establish that, even with the construction of the
6 Holladay Street extension that is anticipated in the TSP, the two significantly affected
7 intersections will not perform at an acceptable level of service. If the Holladay Street
8 extension would make those intersections operate at an acceptable level of service,
9 petitioners argue the city may not rely on the OAR 660-012-0060(3) non-degradation
10 standard to approve the disputed comprehensive plan and zoning ordinance amendments, if
11 those plan and zoning map amendments would authorize development that would cause
12 those intersections to again operate below the adopted performance standard.

13 Respondents contend that petitioners did not raise this issue below. We have
14 reviewed the Morelli Statement, where petitioners contend the issue was raised. We do not
15 see that this issue was raised in the Morelli Statement. This issue was therefore waived.

16 **C. The Holladay Street Extension Financial Contribution Mitigation**

17 Petitioners generally allege that the city’s findings concerning the Holladay Street
18 extension as mitigation to avoid further degradation of the Yew/Adair intersection are
19 inadequate and unsupported by substantial evidence. However, their only focused argument
20 is set out below:

21 “* * * It is [not] clear whether a partial funding (‘proportionate participation’)
22 will have any effect if the entire project is not built. In addition, as Forest
23 Grove pointed out, the analysis did not seem to consider whether extending
24 Holladay St. through to Hwy 47 would not result in even more traffic being

¹⁴ A TSP is “a plan for one or more transportation facilities that are planned, developed, operated and maintained in a coordinated manner to supply continuity of movement between modes, and within and between geographic and jurisdictional areas.” OAR 660-012-0005(38). OAR 660-012-0015 sets out the requirements for preparation and coordination of TSP; OAR 660-012-0020 sets out the elements of a TSP.

1 diverted to the intersections, rather than less. Rec 3235.” Petition for
2 Review 9.

3 If petitioners are arguing that OAR 660-012-0060(3)(c) requires an absolute
4 guarantee that the facility that will benefit from the proposed mitigation measure will
5 actually be built, they cite nothing in the language of OAR 660-012-0060(3)(c) that would
6 support that position. OAR 660-012-0060(3)(c) simply calls for mitigation “through one or a
7 combination of transportation improvements or measures.” As respondents point out, when
8 significantly affected transportation facilities are being addressed under OAR 660-012-
9 0060(2), funding arrangements to facilitate future transportation system improvements are
10 clearly allowable.¹⁵ We see no reason why similar latitude in dealing with the uncertainties
11 inherent in planning and paying for transportation facilities and actually constructing such
12 facilities is not permissible under OAR 660-012-0060(3)(c). The Holladay Street extension
13 is included in both cities’ TSP. The applicant’s traffic expert represented that the required
14 financial contribution would allow that improvement to be built sooner than would otherwise
15 be the case. Record 3240-41. Petitioners offer no reason why a reasonable person could not
16 believe that testimony. In its findings, the city explained that it found the applicant’s and the
17 city’s traffic experts opinions concerning the efficacy of the Holladay Street extension to
18 mitigate the impact of the comprehensive plan and zoning map amendment to be believable.
19 Record 31. Petitioners have not demonstrated that the city’s findings regarding the Holladay
20 Street extension mitigation are inadequate or are not supported by substantial evidence.

¹⁵ One of the options under OAR 660-012-0060(2) is as follows:

“Providing other measures as a condition of development or through a development agreement or *similar funding method*, including transportation system management measures, demand management or minor transportation improvements. Local governments shall as part of the amendment specify when measures or improvements provided pursuant to this subsection will be provided.” OAR 660-012-0060(2)(e) (emphasis added).

1 **D. The Quince/Pacific Intersection Financial Contribution Mitigation**

2 Petitioners generally allege that the city’s findings concerning the financial
3 contribution as mitigation to avoid further degradation of the Quince/Pacific intersection are
4 inadequate and unsupported by substantial evidence. However, their only focused argument
5 is set out below:

6 “[A]s the City of Forest Grove and [ODOT] pointed out, the planned
7 improvements and immediate needs for that intersection are dual westbound
8 left turn lanes, and the existing right of way may not allow for an extended
9 eastbound right turn lane and dual westbound left turn lanes both. Rec 3234.
10 There is no showing at all that \$150,000 will effectively mitigate the impacts
11 of the amendments if Forest Grove elects to use the money for something
12 other than an extended right turn lane or if additional right-of-way purchases
13 will be required in order to reconfigure the intersection to allow for both the
14 extended eastbound right turn lane and the dual westbound left turn lanes.
15 Rec 3234.” Petition for Review 8.

16 Respondents cite to expert testimony that an eastbound right turn lane would mitigate
17 the effect of the proposed plan and zoning map amendment on the Quince/Pacific
18 intersection. Record 3003, 5317-19. The statement by the City of Forest Grove at Record
19 3234 expresses concerns about the “real needs of the intersection.” We understand that
20 concern to be with pressures the intersection now faces and can be expected to face in the
21 future, without regard to the disputed plan and zoning map amendments. The City of Forest
22 Grove concedes the proposed eastbound right turn lane “may technically satisfy the TPR
23 requirements.” *Id.* The City of Forest Grove goes on to acknowledge and agree with
24 ODOT’s suggestion that as an alternative to the eastbound turn lane the applicant could
25 “provide a contribution to the City of Forest Grove to help pay for the dual-left
26 improvements.” *Id.*¹⁶

27 As we have already noted, the applicant’s original proposal to construct the
28 eastbound right turn lane was specifically modified to allow the applicant to pay the City of

¹⁶ After agreeing with ODOT’s suggestion, the City of Forest Grove goes on to question the amount of the proposed contribution and whether it would be adequate to achieve “meaningful mitigation.”

1 Forest Grove \$150,000 which would allow construction of the eastbound right turn lane *or*
2 “other capacity improvements at the intersection deemed appropriate by the City of Forest
3 Grove and ODOT.” *See* n 13. As the applicant’s expert explained, this was done
4 specifically to address the City of Forest Grove’s concern that while the eastbound right turn
5 lane might be sufficient to allow the plan and zoning map amendment to comply with the
6 TPR, it might be preferable to divert the funding that would be needed for that improvement
7 to hasten other improvements that are needed, without regard to the plan and zoning map
8 amendment, to enhance the performance of that intersection. We fail to see how giving the
9 City of Forest Grove that option necessarily offends OAR 660-012-0060(3)(c).

10 However, we agree with petitioners that if the City of Forest Grove is free under the
11 city’s decision to spend the \$150,000 for other improvements that would not provide the
12 mitigation that is required under OAR 660-012-0060(3)(c), that would almost certainly not
13 pass muster under OAR 660-012-0060(3)(c). That would be so, even if diverting those funds
14 to other improvements might be responsive to legitimate concerns that the expense of
15 building the eastbound right turn lane might be wasted if other intersection improvements
16 might later require the removal or redesign of that eastbound right turn lane. However, we
17 do not read the condition at Record 28 to be as open-ended as petitioners suggest. That
18 condition authorizes the City of Forest Grove to spend the \$150,000, with or without other
19 funds that may be available to the city, to make other capacity improvements in the
20 Quince/Pacific intersection. *See* n 13. While the condition does not expressly require that
21 those other capacity improvements, like the proposed eastbound right turn lane, be sufficient
22 to result in mitigation of the impact of the disputed plan and zoning map amendments as
23 required by OAR 660-012-0060(3), that limitation is implicit. With that implicit limitation,
24 we agree with respondents that the condition is sufficient to result in the mitigation required
25 by OAR 660-012-060(3) regarding impacts on the Quince/Pacific intersection.

26 The second assignment of error is denied.

1 **THIRD ASSIGNMENT OF ERROR**

2 CDZC 11.30.80(D)(3) provides that a comprehensive plan amendment must “address
3 the criteria identified in the Chapter 1 of the City Comprehensive Plan.” The relevant parts
4 of those criteria are set out below:

5 “Criteria

6 “The following criteria shall be used to establish whether or not a plan
7 amendment or change is justified. An amendment need not satisfy each and
8 every one of the criteria, but the city must conclude that at least some of the
9 criteria have been reasonably addressed.

10 “• The fact that an applicant owns the land for which the change is being
11 sought is not in itself sufficient justification for the change or
12 amendment.

13 “• *The proposed change or amendment must meet a public need. Such*
14 *need must be documented by appropriate facts and evidence and*
15 *should extend from the statewide planning goals, METRO 2040, or the*
16 *city own comprehensive plan.*

17 “• The amendment is necessary to conform with current state law or
18 regional policy, which requires local compliance.

19 “• *The amendment is necessary to implement the adopted vision for the*
20 *community, or to respond to unanticipated local circumstances.*

21 “• *The proposed change or amendment must be in conformance with the*
22 *unamended goals and policies of the Comprehensive Plan, as well as*
23 *being consistent with state and regional policies.*

24 • The amendment must meet the standards and requirements of the zone
25 in which it is located, or proposed to be located.” Cornelius
26 Comprehensive Plan 11 (emphases added.)

27 The city adopted findings addressing the three above-emphasized criteria. Petitioners
28 contend those findings are inadequate. Petitioners contend the findings concerning the
29 “public need” criterion and the “adopted vision” criterion express a “desire to have more
30 commercial development in the city, so as to balance out the proportionate tax burdens
31 between commercial and residential land uses.” Petition for Review 10. Petitioners fault
32 those findings because “no citations are provided to indicate that this ‘rebalancing’ is an

1 adopted goal or vision for the community.” *Id.* Petitioners acknowledge that the city’s
2 findings regarding the “unamended goals and policies” criterion “at least list the titles of the
3 comprehensive plan policy elements, but, again, no quotes or citations indicate which
4 unamended plan goals or policies are being analyzed.” Petition for Review 11.

5 This assignment of error is directed at the ordinance that approved the comprehensive
6 plan amendment. Respondents argue that the first time petitioners raised any issue
7 concerning these comprehensive plan criteria was in the February 6, 2006 statement that
8 appears at Record 93-102. As we have already concluded, that letter was submitted after the
9 local record in the comprehensive plan local proceedings closed. Respondents contend that
10 petitioners waived the issues raised under this assignment of error, because they were not
11 raised before the close of the evidentiary record in the city’s comprehensive plan amendment
12 proceeding. ORS 197.763; 197.835(3). *See* ns 4 and 5.

13 Petitioners may not rely on the February 6, 2006 letter to respond to respondents’
14 waiver argument. Petitioners argue the issues raised under this assignment of error were
15 raised in the documents that appear at Record 3016-18, 3085-86, 3288, and 3332.

16 We have reviewed those pages of the record. Record pages 3085-86, 3288, and 3332
17 do not raise the issues presented in this assignment of error. Record 3016-18 (the Morelli
18 Statement) certainly questions the existence of a public need for the proposed rezoning, but it
19 does not cite or rely on the above comprehensive plan criteria in making that argument.
20 More importantly, the Morelli Statement does not contend that the city failed to demonstrate
21 that the public need extends from the comprehensive plan, which is the issue that petitioners
22 raise in this assignment of error. We conclude that the Morelli Statement does not
23 sufficiently raise the issues presented under this assignment of error. Even if we were to
24 conclude that the Morelli Statement raised an issue concerning the comprehensive plan
25 public need criterion, it does not raise any issue regarding the other two criteria that the city

1 addressed in its findings, and those findings are sufficient to meet the city’s obligation to
2 address at least some of the comprehensive plan criteria.¹⁷

3 The third assignment of error is denied.

4 **FOURTH ASSIGNMENT OF ERROR**

5 CDZC 11.30.70(C) sets out approval criteria for zoning map amendments. CDZC
6 11.30.70(C)(2) requires that the applicant demonstrate that “[t]he permitted uses of the
7 proposed new zone will not materially and/or adversely affect the character of the
8 neighborhood.” In finding that the applicant carried its burden with regard to CDZC
9 11.30.70(C)(2), the city found:

10 “The subject properties zoned Multi-Family Residential, A-2 are not located
11 in a typical residential neighborhood. [T]he subject sites are sandwiched
12 between a large vacant property to the west zoned Highway Commercial, C-2
13 and a City Collector street on the east. A state highway (N. Adair St.) borders
14 on the south with Highway Commercial, C-2 zoned properties abutting it.
15 The character of this neighborhood is mixed with both commercial and
16 medium density residential uses. The neighborhood is also dominated by
17 vehicular uses both for existing commercial properties, residential properties
18 and by pass-through traffic. Much of the commercial zoned land in this
19 neighborhood is under developed or vacant. Most of the residential land is
20 also underdeveloped based on the Multi-Family Residential, A-2 district. Any
21 improvement or development to the property within the neighborhood will
22 create[] impacts, but only in a fashion as can be supported by the
23 infrastructure and master plans for the area. As the subject sites are improved
24 with commercial development requiring central access it will reduce the
25 existing conflicts on N. 4th Avenue created by vehicle backing motions onto
26 the street from the single-family residences. Other conflicts that exist when
27 residential development abuts commercial property include site and vehicle
28 lighting, noise, hours of operation (*i.e.* 24 hour[s]), and cut through traffic.
29 [T]he rezoning of the subject properties from Multi-Family Residential, A-2
30 to Highway Commercial, C-2 will improve the functionality of the

¹⁷ Even if we were to address petitioners’ arguments on the merits, we do not find them persuasive. We do not agree the public need and adopted vision criteria require the demonstrated nexus with the cited planning documents that petitioners believe is required. The public need only must “extend” from the “statewide planning goals, Metro 2040, or the City Comprehensive Plan.” Given the scope of those planning documents, it is hard to imagine a public need that would not in some way extend from some aspect of those documents. The “adopted vision” criterion does not mandate how that vision must be adopted. Finally, as petitioners concede, the city’s findings do cite the titles of the comprehensive plan. Petitioners argue that the citations must be more specific, but do not explain why that is so.

1 neighborhood by using the City Collector street (N. 4th Avenue) as the
2 division between the commercial and residential uses. The use of the site
3 design and other development requirements in the City Code provide the
4 analysis tools to properly plan for the health and safety of the subject
5 neighborhood. The change in zoning as proposed will not create material or
6 adverse affects on the character of this mixed commercial and residential
7 neighborhood.” Record 51.

8 Petitioners fault the city for focusing too narrowly on the nearby neighborhood when
9 traffic impacts would be felt far beyond the immediate neighborhood.¹⁸ Petitioners also cite
10 to concerns expressed by the City of Forest Grove that traffic associated with the plan and
11 zoning map amendments might have “adverse effects on pedestrian travel near the Adair and
12 Yew intersection” and “adverse impacts on the industrial neighborhood north of Adair * *
13 *.” Petition for Review 12.

14 CDZC 11.30.70(C)(2) does not dictate the relevant “neighborhood” or provide any
15 particular guidance in identifying the relevant neighborhood for purposes of the analysis
16 required by that section of the CDZC. While selection of too small an area no doubt could
17 frustrate the purpose of that section, petitioners have not shown that the area selected by the
18 city in this case is too small. The city also described the existing character of that
19 neighborhood and explained why the disputed comprehensive plan and zoning map
20 amendment would likely improve the functioning of that neighborhood. As respondents
21 correctly note, CDZC 11.30.70(C)(2) is not a “no adverse effects” or “no adverse impacts”
22 standard; it is a “not materially [or] adversely affect the *character of the neighborhood*”
23 standard. The city’s findings set out above are clearly adequate to explain why the city
24 believes that changing the comprehensive plan and zoning map designations for the 2.67
25 acres would not materially or adversely affect the character of a neighborhood that already
26 has a number of properties with commercial and residential zoning. The city’s findings also

¹⁸ Those traffic impacts are presumably the traffic impacts of the proposed Wal-Mart store, whereas the relevant impacts in this appeal are the impacts of the uses that are authorized by zoning map amendment for the 2.67 acres. Those impacts presumably are not coextensive.

1 explain why the city did not think resulting traffic impacts are inconsistent with CDZC
2 11.30.70(C)(2).

3 It seems likely that petitioners would have selected a larger neighborhood and would
4 have assigned more significance to impact traffic might have on that larger neighborhood.
5 However the city's more circumscribed interpretation and application of CDZC
6 11.30.70(C)(2) is clearly within its interpretive discretion under ORS 197.829(1). We reject
7 petitioners' contention that the city's findings are inadequate or unsupported by substantial
8 evidence.

9 The fourth assignment of error is denied.

10 The city's decision is affirmed.