

## BEFORE THE LAND USE BOARD OF APPEALS

## OF THE STATE OF OREGON

TROY VEST,  
*Petitioner,*

VS.

CITY OF MOLALLA,  
*Respondent.*

LUBA No. 2012-009

## FINAL OPINION AND ORDER

## Appeal from City of Molalla.

Gregory S. Hathaway, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief were E. Michael Connors and Hathaway Koback Connors LLP.

Christopher D. Crean, Portland, filed the response brief and argued on behalf of respondent. With him on the brief were Courtney Lords and Beery, Elsner & Hammond, LLP.

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

AFFIRMED 08/23/2012

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

## Opinion by Ryan.

## **NATURE OF THE DECISION**

Petitioner appeals a decision by the city denying his application for a comprehensive plan map amendment and zone map amendment, and conditional use, design review and partition approval.

## **REPLY BRIEF**

Petitioner moves for permission to file a reply brief to respond to new matters raised in the response brief. The motion is granted and the reply brief is allowed.

## FACTS

The subject property is a rectangular shaped approximately 8-acre parcel located south of W. Main Street (State Highway 211) between Hart Avenue and Shaver Street. Molalla Avenue is located approximately 500 feet east of the property. A truck repair business and storage units are located on a portion of the property and the remainder of the parcel is vacant. The properties to the east of the subject property along Shaver Street are currently zoned General Commercial, Central Commercial and Medium-High Density Residential and contain a mix of commercial and residential uses. The properties to the west of the subject property are zoned Light Industrial and Heavy Industrial. The property to the southwest of the subject property is developed with a fertilizer plant, storage and parking lot.

In May, 2010, petitioner applied to change the comprehensive plan map designation of the property from Light Industrial to Central Commercial, change the zoning map designation from Light Industrial to Central Business District (CBD/C-1) and for conditional use approval for a proposed 164-unit apartment building. The planning commission held two public hearings on the applications, and at its May 17, 2011 hearing, voted to recommend approval of the applications to the city council. The city council held five public hearings on the applications on July 27, August 24, October 26, and December 14, 2011 and January 25,

1 2012. At the conclusion of the December 14, 2011 hearing, the city council voted to deny  
2 the applications. This appeal followed.

3 **FIRST ASSIGNMENT OF ERROR**

4 Resolving petitioner's assignments of error requires a brief background and summary  
5 of an ordinance that the city adopted in March, 2010, Ordinance 2010-03, and a summary of  
6 the proceedings on petitioner's applications.<sup>1</sup>

7 **A. Ordinance 2010-03**

8 The city adopted Ordinance 2010-03 on March 10, 2010. Ordinance 2010-03  
9 repealed the city's existing comprehensive plan that was adopted in 1980 and replaced it with  
10 a new comprehensive plan that incorporated several documents into the newly adopted  
11 comprehensive plan. One of those documents was the "E. Downtown Molalla & OR 211  
12 Streetscape Plan (XX, 2008)" (Downtown Plan). Response Brief App. 2. According to  
13 petitioner, the subject property is within the Downtown Plan study area, and a section of the  
14 Downtown Plan recommended that the subject property be rezoned to the CBD/C-1 that he is  
15 seeking here and redeveloped.<sup>2</sup>

16 Ordinance 2010-03 also adopted an urban reserve area for the city. Response Brief  
17 App. 1-2. Because the statutes and rules governing the city's designation of an urban reserve  
18 area require the county in which the city is located to approve the urban reserve area  
19 designation, Ordinance 2010-03 contained a delayed effective date provision, as follows:

20 "Section 6. This Ordinance shall be effective on the same date Clackamas  
21 County approves an order amending its Comprehensive Plan to reflect the  
22 urban reserve designation included in the City of Molalla Comprehensive Plan  
23 adopted hereunder." Response Brief App. 3.

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<sup>1</sup> The city attaches a copy of a portion of Ordinance 2010-03 to its brief at Appendix 1-3 and moves for LUBA to take official notice of the ordinance. The motion is granted. Oregon Evidence Code (OEC) 202(7).

<sup>2</sup> The Downtown Plan is not included in the Record, but petitioner attaches nine pages from the plan to the petition for review. Petition for Review Appendix 11-20.

1 In March, 2011, the county planning commission voted to recommend to the county board of  
2 commissioners that the city's urban reserve designation be denied. Record 174. In  
3 December, 2011, the board of county commissioners adopted an order denying the city's  
4 urban reserve designation.<sup>3</sup>

5           **B. City Proceedings on the Application**

6           As noted, petitioner submitted its consolidated applications in May, 2010,  
7 approximately two months after the city adopted Ordinance 2010-03. The city's notice of  
8 public hearing for the first planning commission meeting on the applications that was held on  
9 March 14, 2011 did not list any provisions of the city's comprehensive plan or the  
10 Downtown Plan as applicable approval criteria. Record 597-612. However, the staff report  
11 issued by the city's planning staff for the April 28, 2011 continued planning commission  
12 hearing identified the Downtown Plan as an applicable approval criterion and concluded that  
13 the applications satisfied the Downtown Plan. Record 452, 557-58. As noted, the planning  
14 commission recommended approval of the applications to the city council.

15           The notice of the first city council hearing on the applications on July 27, 2011 did  
16 not list any applicable approval criteria. Record 391-92. The minutes of the second city  
17 council hearing on the applications held on August 24, 2011 reflect that the city's attorney  
18 explained that the applications were required to be reviewed for compliance with applicable  
19 provisions of the previous version of the city's comprehensive plan. Record 261. An  
20 October 24, 2011 letter from the attorney for an opponent of the applications took the  
21 position that Ordinance 2010-03 had not yet taken effect, and that the applications should be  
22 reviewed for compliance with the city's 1980 comprehensive plan. Record 129. At the  
23 conclusion of the December 14, 2011 city council hearing, the council voted to deny the

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<sup>3</sup> The city attaches the county's December 1, 2011 order denying the city's urban reserve designation to its brief and moves for LUBA to take official notice of the order. Response Brief App. 4-5. The motion is granted. OEC 202(7).

1 applications. The findings adopted in support of the city council's decision conclude that the  
2 applications failed to satisfy Statewide Planning Goal 9 (Economic Development), Statewide  
3 Planning Goal 12 (Transportation Planning), as well as various provisions of the Molalla  
4 Development Code (MDC) discussed below.

5 **C. Assignment of Error**

6 In his first assignment of error, petitioner argues that the city council's decision is not  
7 supported by adequate findings because the findings fail to explain why the Downtown Plan  
8 is not an applicable approval criterion and why the applications fail to satisfy the Downtown  
9 Plan. We understand petitioner to argue that the only evidence in the record supports the  
10 conclusion that the applications are consistent with the Downtown Plan and that the city was  
11 required to explain its decision why the Downtown Plan is not an applicable approval  
12 criterion.

13 The city responds by pointing to the delayed effective date clause of Ordinance 2010-  
14 03 and the county's December 1, 2011 order that denied the city's urban reserve designation  
15 that is attached to the response brief. The city argues that the city council is not required in  
16 its findings to either explain why the Downtown Plan is not an applicable approval criterion,  
17 or determine whether the applications are consistent with the Downtown Plan. Citing ORS  
18 197.175(2)(d), the city argues that it is impermissible for the city to consider the Downtown  
19 Plan as an applicable approval criterion where the Downtown Plan is not part of the city's  
20 comprehensive plan.<sup>4</sup>

21 In his reply brief, petitioner renews his argument that the city's findings must explain  
22 why the Downtown Plan is not an applicable approval criterion, and argues that it is  
23 impermissible for the city to supply in the response brief the justification for the decision that

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<sup>4</sup> ORS 197.175(2)(d) requires the city to make land use decisions in compliance with the city's acknowledged plan and land use regulations.

1 petitioner argues should be included in the findings in support of the decision. Finally,  
2 petitioner argues in his reply brief that the city's position set forth in its response brief is  
3 inconsistent with its processing of the applications in accordance with the 2010 version of the  
4 MDC, because the 2010 version of the MDC implements the version of the city's  
5 comprehensive plan that was adopted in Ordinance 2010-03.<sup>5</sup>

6 If the city had consistently taken the position throughout the proceedings to their  
7 culmination in the city council's decision that the Downtown Plan was an applicable  
8 approval criterion, but reversed that position for the first time in the city's response brief, and  
9 there was some uncertainty over whether the Downtown plan is effective, we would likely  
10 agree with petitioner that remand is necessary for the city to adopt findings addressing  
11 whether the Downtown Plan is effective and thus potentially a source of approval criteria.  
12 *Norvell v. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979) (findings must  
13 address and respond to specific issues relevant to compliance with applicable approval  
14 standards that were raised in the proceedings below). However, that is not what occurred.  
15 Although during the hearings before the planning commission the city's planning staff took  
16 the position that the Downtown Plan was an applicable approval criterion and that the  
17 applications were consistent with the Downtown Plan, during the proceedings before the city  
18 council the city confirmed that the Downtown Plan is not an applicable approval criterion.  
19 The city council proceedings spanned a six month time period, and by the second of five city  
20 council hearings on the applications the issue of the status of the Downtown Plan as an  
21 applicable approval criterion had been raised. Record 261; DVD Recording of August 24,  
22 2011 city council hearing at 55:00. Thus, petitioner was on notice well before the city filed

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<sup>5</sup> The city adopted Ordinance 2010-04, the 2010 version of the MDC, on the same date that it adopted Ordinance 2010-03. Ordinance 2010-04 does not contain a delayed effective date provision. Reply Brief Appendix 1-2.

1 its response brief that the city considered the Downtown Plan not to be an applicable  
2 approval criterion.

3 Petitioner filed a reply to the city's response brief, and in that reply brief petitioner  
4 does not take the position that the Downtown Plan is effective and provides no legal theory  
5 for why the Downtown Plan applies to his applications. Absent any argument that the  
6 Downtown Plan is effective, we do not think that remand is necessary for the city to adopt as  
7 findings the explanation regarding the status of Ordinance 2010-03 and its effect on the  
8 applicability of the Downtown Plan to the applications that was provided during the  
9 proceedings below and included in the response brief. The explanation that the city provides  
10 in its response brief is not a post hoc justification for the city's decision to deny the  
11 applications, but rather is an appropriate response to petitioner's first assignment of error that  
12 only assigns error to the adequacy of the city's findings but does not argue that the  
13 Downtown Plan is effective.

14 Further, we do not think that the city's processing of the applications in accordance  
15 with the 2010 MDC changes the outcome of our resolution of petitioner's first assignment of  
16 error. *See n 3.* There appears to be no dispute that the 2010 MDC took effect when adopted  
17 and we do not understand petitioner to argue that the city erred in processing his application  
18 in accordance with the 2010 MDC.

19 The first assignment of error is denied.

20 **FOURTH ASSIGNMENT OF ERROR**

21 One of the bases on which the city denied the applications is that the applications  
22 failed to satisfy MDC 19.28.030(B)(4), which provides:

23 "A recommendation or a decision to approve, approve with conditions or deny  
24 an application for a quasi-judicial amendment shall be based on the following  
25 criteria:

26 \*\*\* \* \*

1           “(4) The change is in the public interest with regard to neighborhood or  
2           community conditions \* \* \*[,]”

3       The owner of an industrial site adjacent to the subject property’s western boundary and the  
4       owner of a vacant industrial site located near the subject property provided testimony and  
5       evidence that industrial businesses use both Shaver Street and Hart Avenue for truck access  
6       and that Clackamas County has designated the use of Shaver Street an alternate truck route  
7       connection to N. Mollalla Avenue for truck traffic travelling north from S. Molalla Avenue.  
8       That testimony took the position that siting high-density residential uses adjacent to a truck  
9       route that has been used for more than 25 years is not in the public interest due to safety  
10      concerns. Record 124-25, 433-34, 440. The city found:

11           “The \* \* criterion is \* \* \* subjective. The Council did consider potential  
12          conflicts when locating residential use adjacent to industrial activities, existing  
13          or possible. Testimony was submitted by the County Weighmaster indicating  
14          both Shaver and Hart Streets, are, in fact used by large vehicles entering and  
15          exiting industrial lands adjacent to the subject [property]. Based solely on this  
16          finding, the Council can conclude the change is not in the public interest with  
17          regard to neighborhood or community conditions due to potential conflicts.”  
18          Record 87.

19       In his fourth assignment of error, petitioner challenges the city’s public interest  
20      findings. Petitioner argues that the evidence in the record demonstrates that the Downtown  
21      Plan identified the subject property for redevelopment and infill, and that the city in adopting  
22      the Downtown Plan has already concluded that redevelopment and infill on the property is in  
23      the public interest and may not now conclude otherwise. The problem with that argument is  
24      that, as we explain above, the Downtown Plan is not effective, and therefore neither  
25      petitioner nor the city may rely on the Downtown Plan to take the position that the question  
26      of whether the proposed change is in the public interest has been answered already. *See 1000*  
27      *Friends of Oregon v. City of Dundee*, 203 Or App 207, 216, 124 P3d 1249 (2005) (city erred  
28      in relying on a buildable lands inventory that was not incorporated into its comprehensive  
29      plan at the time it made its decision).

1       Also according to petitioner, there is no evidence in the record that there are existing  
2 conflicts between the nearby existing residential uses and the existing truck traffic, and the  
3 city's reliance on potential conflicts between the proposed multi-unit residential building and  
4 truck traffic generated by existing industrial uses is inconsistent with existing residential  
5 zoning and uses in the area. The city responds that the evidence in the record that trucks use  
6 the streets adjacent to the subject property for truck access and testimony from the owners of  
7 industrial property in the vicinity that expressed concern over potential safety issues due to  
8 conflicts between high-density residential development and truck access is evidence a  
9 reasonable decision maker could rely on to support the city's conclusion that the  
10 comprehensive plan map amendment is not in the "public interest with regard to  
11 neighborhood or community concerns." Petitioner does not point to any evidence in the  
12 record that responds to those concerns or otherwise addresses them in any way except to  
13 point out that petitioner verified with the city that the affected streets are not officially-  
14 designated truck routes.

15       We do not think the absence of evidence in the record of previous conflicts between  
16 residential uses of nearby property and truck traffic calls into question the testimonial  
17 evidence regarding the existing truck traffic and concerns about future high-density  
18 residential development of the subject property, where there is no evidence about the type or  
19 density of the existing residential development or existing traffic management measures that  
20 clarifies that existing residential development is similar to the higher-density development  
21 that petitioner proposes. Given the subjectivity of a criterion requiring that the proposed  
22 comprehensive plan map amendment be "in the public interest with regard to neighborhood  
23 or community concerns," we agree with the city that a reasonable person could rely on the  
24 testimony of industrial businesses that a proposed mixed-use apartment building located  
25 along a heavily used truck route could create conflicts between the residents and truck traffic  
26 to support the city's finding of that the proposed change is not in the public interest. *See*

1     *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003), *rev'd on other*  
2     *grounds* 192 Or App 567, 86 P3d 1140 (2004), *aff'd* 338 Or 453, 111 P3d 1123 (2005)  
3     (testimony of neighbors is adequate to support a city's finding of noncompliance with a  
4     criterion requiring that a building be compatible in scale and mass with adjoining structures,  
5     given the subjectivity of the criterion).

6                 The fourth assignment of error is denied.

7     **SECOND, THIRD AND FIFTH ASSIGNMENTS OF ERROR**

8                 The challenged decision is a denial, and the city need only adopt a single adequate  
9     basis for denying petitioner's request for a comprehensive plan and zoning map amendment.  
10     *Duck Delivery Produce v. Deschutes County*, 28 Or LUBA 614, 616 (1995). We conclude  
11     above that the city's denial of the applications on the basis that they fail to satisfy MDC  
12     19.28.030(B)(4) is adequate, and we need not address petitioner's challenges to the city's  
13     additional bases for denial of the applications.

14                 The city's decision is affirmed.