BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAKE MINTZ, PAUL SCHAEFER,
and LAWERENCE BATES,
Petitioners,

and

HENRY KANE,
Intervenor-Petitioner,

vs.

CITY OF BEAVERTON,
Respondent,

and

J. PETERKORT AND COMPANY
Intervenor-Respondent.

LUBA No. 2012-020

JAKE MINTZ, PAUL SCHAEFER,
and LAWERENCE BATES,
Petitioners,

vs.

CITY OF BEAVERTON,
Respondent,

and

J. PETERKORT AND COMPANY,
Intervenor-Respondent.

LUBA Nos. 2012-021,
2012-022 and 2012-023

FINAL OPINION
AND ORDER

Appeal from City of Beaverton.

Charles Swindells, Portland, filed the petition for review and argued on behalf of petitioners.

Henry Kane, Beaverton, represented himself.

William J. Scheiderich, Assistant City Attorney, Beaverton, filed a joint response brief and argued on behalf of respondent.

Damien R. Hall, Lake Oswego, filed a joint response brief and argued on behalf of intervenor-respondent. With him on the brief were Timothy V. Ramis and Jordan Ramis PC.

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

REMANDED (LUBA NO. 2012-021) 08/22/2012

AFFIRMED (LUBA NOS 2012-020, 2012-022, 2012-023)

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal four city ordinances that apply city comprehensive plan and zoning map designations to 13 recently annexed parcels that formerly carried Washington County land use district designations.

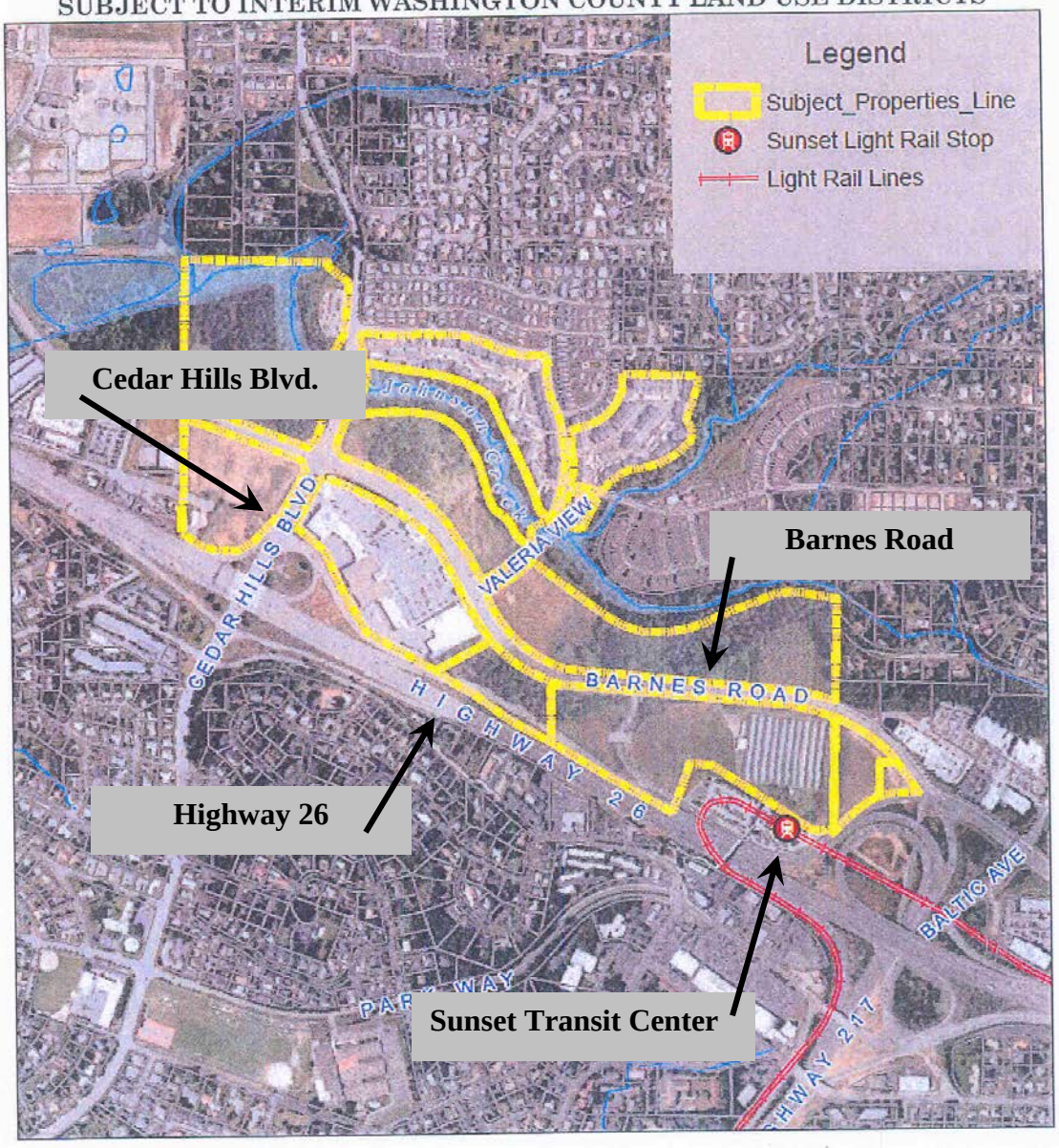
FACTS

The 13 undeveloped and developed parcels that are the subject of this appeal lie on the north and south sides of Barnes Road. A black and white reproduction of a color map from the record is included on the next page to assist in describing the parcels. Eleven of those parcels are located between the Sunset Transit Center (on the east) and the intersection of Barnes Road and Cedar Hills Blvd. (on the west), a distance of approximately three quarters of a mile. The other two parcels, which are undeveloped, are also located on the north and south sides of Barnes Road, but are immediately west of the Barnes Road/Cedar Hills Blvd. intersection.

One of the eleven parcels between the Sunset Transit Center and Barnes Road/Cedar Hills Blvd. intersection is occupied by the Peterkort Town Square Mall, an existing shopping center at the southeast corner of Barnes Road/Cedar Hills Blvd. intersection. The seven parcels located north of Barnes Road and east of Cedar Mills Blvd. include three undeveloped parcels that adjoin Barnes Road and four parcels that make up part of the existing Deveraux Glen development. With the exception of the Peterkort Town Square Mall parcel, the parcels along the south side of Barnes Road are all vacant and lie between Barnes Road and U.S. Highway 26, an east/west arterial highway that parallels Barnes Road to the south. The southeastern most parcels surround the existing Sunset Transit Center, which includes a MAX light rail transit station.

EXHIBIT E.1

AERIAL VICINITY MAP
PETERKORT PROPERTIES WITHIN THE CITY OF BEAVERTON
SUBJECT TO INTERIM WASHINGTON COUNTY LAND USE DISTRICTS



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Nine of the parcels were annexed in 2005; four of the parcels were annexed in 2011. Until the disputed decisions were adopted, the 13 parcels retained their Washington County land use district designations.[1]

INTRODUCTION

On October 25, 1988, the city and Washington County entered into an Urban Planning Area Agreement (UPAA). As relevant here, the UPAA provides as follows:

> "D. The CITY and the COUNTY agree that when annexation to the CITY takes place, the transition in land use designation from one jurisdiction to another should be orderly, logical and based upon a mutually agreed upon plan. *Upon annexation, the CITY agrees to convert COUNTY plan and zoning designations to CITY plan and zoning designations which most closely approximate the density, use provisions and standards of the COUNTY designations*. Such conversions shall be made according to the tables shown on Exhibit 'B' to this agreement." Record 228 (emphasis added).

The tables in Exhibit B of the UPAA show which city plan and zoning map designations apparently were determined to most closely approximate county land use designations in 1988. However, those tables have not been updated to reflect subsequent changes in city comprehensive plan and zoning map designations and in county land use district designations. The county land use district designations that currently apply to the 13 parcels did not exist in 1988. The city plan and zoning map designations that the city applied, as well as the city plan and zoning map designations that petitioners believe the city should have applied, also did not exist in 1988. All parties apparently agree that because Table B does not specify the most closely approximating city plan and zoning map designations the city was obligated under the UPAA to apply the current city plan and zoning designations that "most closely approximate the density, use provisions and standards" that applied under the county's land use district designations at the time of annexation. In this

[1] The City of Beaverton uses separate zoning map and comprehensive plan map designations. Washington County uses combined land use map designations.

opinion, we refer to this criterion as the "most closely approximate" criterion. The UPAA "most closely approximate" criterion has been adopted as part of the City of Beaverton's acknowledged comprehensive plan and land use regulations. Beaverton Comprehensive Plan, Volume I, 3.15; Beaverton Development Code (BDC) 40.97.15.4(C)(3); BDC 10.40.3(B).[2]

While the "most closely approximate" criterion may seem relatively straightforward in the abstract, as our discussion below shows, it would be a mistake to underestimate the potential complexity of applying that standard. It requires the city to compare the density, uses, and review standards that apply under the existing county land use district designations with the density, uses, and review standards that apply under city plan and zoning map designations to determine which city designations "most closely approximate" the county's existing designations in those three regards. Significantly, neither the UPAA nor the BDC gives any express guidance regarding whether a close approximation of *densities* is more or less important than a close approximation of *uses* or a close approximation of *standards* or whether all three considerations should be given approximately equal weight.

In their first six assignments of error, petitioners contend the city applied the wrong city zoning map and comprehensive plan map designations to the parcels. We understand

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[2] Beaverton Comprehensive Plan, Volume I, 3.15 incorporates and sets out the UPAA in its entirety.

BDC 10.40.3(B) provides:

> "For parcels where the UPAA does not identify a specific City zoning designation and discretion is required, a public hearing shall be held * * *. The most similar City zoning designation will be applied as required by the UPAA."

BDC 40.97.15.4(C)(3), one of the approval criteria for zoning map amendments following discretionary annexation decisions, provides as follows:

> "The proposed zoning designation most closely approximates the density, use provisions, and development standards of the Washington County designation which applied to the subject property prior to annexation."

petitioners to argue the city planning and zoning map designations will allow too much nonresidential development and will likely not result in the types and density of mixed residential and commercial/office development that was envisioned when the Washington County land use designations were applied. In their seventh assignment of error, petitioners challenge the city's reasoning in concluding that the challenged decisions will not significantly affect transportation facilities and therefore comply with the Land Conservation and Development Commission's Transportation Planning Rule (TPR).

FIRST ASSIGNMENT OF ERROR

The parcels east of the Barnes Road/Cedar Hills Blvd. intersection that adjoin Barnes Road on its north side and one parcel adjoining and south of Barnes Road and north of Highway 26 were designated by the county as Transit Oriented Residential District, 40-80 units per acre (TO:R40-80) or Transit Oriented Residential District, 80-120 units per acre (TO:R80-120).[3] Record 1197. One of the appealed ordinances changes those designations to the city's Station Community Sunset (SC-S) zone. Record 25, 1198. Instead of applying the SC-S zone, petitioners contend that under the UPAA "most closely approximate" criterion the city should have applied its Station Community High Density Residential (SC-HDR) zone.

As already noted, the UPAA "most closely approximate" criterion requires the county to consider density, use provisions and standards. At pages 9-20 of the petition for review petitioners address each of those three considerations and argue that the SC-S zone selected by the city does not most closely approximate the county's TO:R40-80 and TO:R80-120 designations that they replace, as compared with the SC-HDR zone. We address each of those three considerations in turn.

[3] On the map included earlier in this opinion, these parcels are displayed as the two large parcels adjoining the north side of Barnes road and the small trapezoid shaped parcel south of Barnes Road and north of Highway 26.

A. Density

1. Appendix A

One significant problem we have had in resolving this appeal is the complexity of the county's and city's land use regulatory schemes. To simplify our discussion of the first assignment of error, we have prepared appendices to make it easier to compare the city's SC-S and SC-HDR zones with the county's TO:R40-80 and TO:R80-120 designations. Appendix A is based on Table C of Washington County Community Development Code (CDC) 375 and BDC 20.20.15 and displays the relative density requirements required by Table C and BDC 20.20.15. As Appendix A shows, the TO:R40-80 district requires a *minimum* residential density of 40 dwelling units (du) per acre and a *maximum* residential density of 80 du per acre. The TO:R80-120 district requires a *minimum* residential density of 80 du per acre and a *maximum* residential density of 120 du per acre.

The SC-S zone that the city applied requires a *minimum* residential density of 30 or 24 du per acre, depending on proximity to light rail. As Appendix A shows, the SC-HDR imposes the very same 30/24 du per acre minimum residential densities. If we limit our analysis to Appendix A, the SC-S and SC-HDR zones both have the same somewhat lower minimum residential densities, as compared to the county's TO:R40-80 and TO:R80-120 designations. And both the SC-S and SC-HDR have no *maximum* residential densities, as compared to the county's TO:R40-80 and TO:R80-120 designations, which do have maximum residential densities. As far as the "most closely approximate" criterion is concerned, under CDC 375 Table C and BDC 20.20.15 as summarized in our Appendix A, densities in the SC-S and SC-HDR zones "approximate" the densities in the county's TO:R40-80 and TO:R80-120 designations equally "closely."

However, the city relied heavily on what it found to be a much closer correlation between the minimum densities required by the TO:R40-80 and TO:R80-120 designations and the minimum density that will effectively be required in the SC-S zone, based on a

separate requirement for a minimum number of residential units in the SC-S zone. BDC 20.20.40 requires a minimum of 1,899 residential units on the SC-S zoned parcels. The city and intervenor-respondent (together respondents) take the position that if that number of residential units is developed the resulting residential density will equal the minimum residential densities called for in the county's TO:R40-80 and TO:R80-120 designations. Respondents contend that higher residential density means the SC-S zone is clearly the most closely approximate zone as far as density is concerned, compared to the SC-HDR zone. Moreover, respondents contend that higher residential density will allow the city to avoid running afoul of minimum residential density requirements that were imposed on the county under Title I of Metro's Urban Growth Management Functional Plan (UGMFP).[4]

2. BDC 20.20.40

On March 5, 2012 the city adopted Ordinance 4578 to amend BDC 20.20.40, which sets out special requirements for the SC-S zone, to impose a minimum residential development requirement of 1,899 units in the city's SC-S zone. Ordinance 4578 was not appealed to LUBA.[5] With that minimum residential development requirement, respondents argue that the SC-S zone "exactly match[es] the county's [TO:R40-80 and TO:R80-120 district] minimum residential density." Respondents' Brief 8. Respondents do not explain

[4] Although petitioners apparently took the position below that the city is bound to ensure that the zoning the city applies to the subject properties is consistent with Metro Title I, it is exceedingly unclear precisely what the Title I minimum residential densities for the subject property are. But given that the "most closely approximate" criterion requires that the city apply the zone that most closely approximates the county designations with regard to *density*, uses and standards, all other things being equal, the city would be entitled to apply the zone that requires the higher minimum residential density even if Title I does not require that the city do so.

[5] In this consolidated appeal, petitioners challenge four other ordinances that were also adopted on March 5, 2012, including Ordinance 4580, which applies the amended SC-S zone to several parcels. Respondents have not argued that, because petitioners failed to appeal the Ordinance 4578 text amendments to the SC-S zone, petitioners are barred from raising any of the issues they raise in the first assignment of error. There are suggestions to that effect in places in respondents' brief, but the suggestions are undeveloped and we do not consider them further.

their claim that with the 1,899 dwelling units required by BDC 20.20.40.1 through .5 the SC-S zone exactly matches the minimum density that would be required under the TO:R40-80 and TO:R80-120 districts, but petitioners do not dispute that claim. Neither do petitioners assign error to the city's finding that with the required 1,899 dwelling units in the SC-S zone, there will be no loss in minimum density, compared to the county's TO:R40-80 and TO:R80-120 designations. Record 36. Petitioners' challenge, which we address below, is that BDC 20.20.40.1 through .5 will fail to operate as intended and will not produce the desired 1,899 dwelling units. Therefore, for purposes of this opinion, we assume the city is correct that the 1,899 dwelling units, if built, would result in the same minimum residential density that was required under the county's TO:R40-80 and TO:R80-120 district minimum densities and limit our consideration to petitioners' challenges that BDC 20.20.40 will not operate to actually produce 1,899 residential units.

As we have already noted, the BDC is complicated and the parties' arguments concerning BDC 20.20.40 are frequently unclear. We do our best below to describe the issues raised by the first assignment of error concerning BDC 20.20.40 and the parties' arguments concerning those issues. The BDC 20.20.40 SC-S minimum residential development requirement has five parts. First, planned unit development (PUD) approval is required for any application to develop or divide SC-S zoned property. BDC 20.20.40.1.[6] Second, a minimum of 1,899 residential units must be developed on the SC-S zoned properties, and a maximum of 10,960,500 square feet of non-residential development may be

[6] BDC 20.20.40.1 provides:

> "As to any and all property within the SC-S zoning district, approval of a Conditional Use Permit – PUD (Planned Unit Development), *pursuant to Section 40.15.15.4. of the Development Code*, shall be required prior to, or concurrent with, any land division or other land use approval(s) for the same property or any portion of the same property." (Emphasis added.)

approved on the SC-S zoned properties. BDC 20.20.40.2.[7] Third, to implement the minimum residential development requirement, each application for development of a SC-S zoned parcel must demonstrate that the desired 1,899 residential units have already been developed or can be developed in the future on the remaining undeveloped SC-S zoned parcels. BDC 20.20.40.3.[8] Fourth, the city imposed BDC 20.20.40.4 to avoid allowing non-residential development to exhaust existing unused transportation facility capacity that will be needed for the desired 1,899 units of residential development.[9] Finally, no more than 80 percent of the allowable 10,960,500 square feet of non-residential development to be approved through the planned unit development process may be constructed before the minimum 1,899 minimum residential units on SC-S zoned properties are constructed. BDC 20.20.40.5.[10]

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[7] BDC 20.20.40.2 provides:

> "On or before the full development or redevelopment of all property lying within the SC-S zoning district, the following development levels shall be met:
>
> "A. A minimum of 1,899 residential dwelling units, but no more than 5,115 residential dwelling units; and
>
> "B. No more than 10,960,500 square feet of non-residential development."

[8] BDC 20.20.40.3 provides:

> "An applicant for a land use approval, other than a Sign Application, for any and all property within the SC-S zoning district shall demonstrate, through the submittal of a land use analysis, that the minimum and maximum development levels identified in Section 20.20.40.2. have been or will continue to be met when all properties within the SC-S zoning district have been divided or developed or both."

[9] BDC 20.20.40.4 provides:

> "An applicant for a land use approval, other than a Sign Application, for any and all property within the SC-S zoning district shall demonstrate that the application complies with the Traffic Impact Analysis required by Section 60.55.20., associated with the effective Conditional Use Permit – PUD (Planned Unit Development) as to all property within the SC-S zoning district."

[10] BDC 20.20.40.5 provides:

Before turning to petitioners' arguments, BDC 20.20.40 is sufficiently complicated that it may be useful to highlight what we understand to be the critical features of BDC 20.20.40. The first critical feature is the BDC 20.20.40.1 requirement that any land division or development in the SC-S zone must proceed via an application for PUD approval. *See* n 6. As we understand it the city intends that any such PUD applications will be required to include two important determinations: (1) a demonstration that vacant land remains available to develop the 1,899 dwelling units required by BDC 20.20.40.2 and (2) a demonstration that there is available transportation capacity to serve the trips that are being generated or will be generated by those 1,899 residential units. *See* ns 7, 8 and 9. Finally, BDC 20.20.40.5 provides an incentive to actually develop the 1,899 residential units by only permitting 80 percent of the allowable 10,960,500 square feet of non-residential development to be approved before the 1,899 residential units are developed. *See* n 10. We understand respondents to take the position that the worst case scenario as far as residential development in the SC-S zone is concerned would be that as much as 80 percent of the allowable 10,960,500 square feet of non-residential development will be developed without any residential units. That worst case scenario assumes there is transportation capacity to develop up to 80 percent of the allowable 10,960,500 square feet of non-residential development, while reserving sufficient transportation capacity for the 1,899 residential units. In theory, at that point development of the SC-S zoned parcels could cease without any residential units having been developed, even though there would be sufficient remaining vacant land to complete the remaining 20 percent of allowable non-residential development

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> "No more than 80 percent of non-residential development approved through a Conditional Use Permit – PUD (Planned Unit Development) application may be constructed prior to construction of the minimum dwelling requirement for the properties located within the SC-S zoning district. Once the minimum dwelling unit requirement for the properties located within the SC-S zoning district is constructed and has received Certificate of Occupancy, construction of the remaining 20 percent non-residential development may resume."

and the 1,899 residential uses and transportation capacity for all of the 1,899 residential units. We understand respondents to suggest the much more likely scenario is that the 1,899 residential units will be developed and that as much of the 10,960,500 square feet of non-residential development will be developed as can be developed within transportation system capacity constraints.

Petitioners argue the desired 1,899 residential units will not be achieved under BDC 20.20.40, for a number of reasons.

a. The One-half Acre Exception

A critical linchpin of the city's assumption that the SC-S-zoned properties will be developed in a manner that matches the minimum residential density envisioned under the county designations is the requirement that all development in the SC-S zone will require an application for PUD approval that demonstrates the availability of vacant land for the desired minimum number of residential use and the availability of transportation capacity for the desired residential units. BDC 20.20.40.1 requires PUD approval for "any and all property within the SC-S zoning district," and requires such PUD approval "prior to, or concurrent with, any land division or other land use approvals(s) for the same property or any portion of the same property." *See* n 6. If the language of BDC 20.20.40.1 quoted in this paragraph is read in isolation, it seems clear that any application to divide or develop SC-S zoned property would require PUD approval that would be required to ensure the availability of land and transportation capacity for the desired 1,899 residential units.

But petitioners contend there is a loophole in BDC 40.15.15.4(A)(2) that would permit the existing parcels to be divided into parcels of less than one-half acre and then developed without PUD approval and without having to comply with any of the requirements in BDC 20.20.40, since the requirements of BDC 20.20.40 depend on PUD approval. The requirement in BDC 20.20.40.1 for PUD approval is expressly "pursuant to Section 40.15.15.4 of the Development Code[.]" *See* n 6. BDC 40.15.15.4 sets out the requirements

for PUDs, including the "Threshold[s]" for when PUD approval may be sought or is required, "Procedure Type[s] and "Approval Criteria." BDC 40.15.15.4(A)(2) sets out a specific threshold for requiring PUD approval in the SC-S zone and provides that PUD approval "[i]s required when development is proposed within the SC-S (Station Community-Sunset) zoning district on a land area greater than ½ acre in size."

Similar language exempting development on parcels of less than one-half acre was also included in BDC 20.20.40.1, which as noted requires PUD approval in the SC-S zone. *See* n 6. Ordinance 4578 deleted that exemption from BDC 20.20.40.1. Record 3. The city apparently intended to delete BDC 40.15.15.4(A)(2) as well. Record 62. But it did not do so, and BDC 40.15.15.4(A)(2) clearly imposes a one-half acre threshold for PUD approval in the SC-S zone. Moreover, one of the PUD "Approval Criteria" expressly requires a finding that "[t]he proposal satisfies the threshold requirements for a PUD application." BDC 40.15.15.4(C)(1). As already explained, BDC 40.15.15.4(A)(2) establishes a threshold requirement of one-half acre in the SC-S zone. The finding required by BDC 40.15.15.4(C)(1) could not be made for a development on less than one-half acre of SC-S zoned property.

Respondents suggest that BDC 40.15.15.4(A)(2) is merely an application requirement and that the city's failure to delete that text when it deleted similar text in BDC 20.20.40.1 before it adopted Ordinance 4578 can be overlooked to give effect to the city's intent to subject all development in the SC-S zone to PUD approval. Respondents' Brief 10-11. We reject the suggestion. As we have already explained, BDC 40.15.15.4(A)(2) is not a mere application requirement; it sets the threshold for PUD approval. It operates in concert with BDC 40.15.15.4(C)(1) to operate as an approval criterion. No matter how much the city may have intended to delete the BDC 40.15.15.4(A)(2) one-half acre threshold, its failure to do so when it adopted Ordinance 4578 cannot be overlooked to give effect to that intent. The best

evidence of the legislature's intent is the text and the context of the statute. *State v. Barrett*, 331 Or 27, 32, 10 P3d 901 (2000).

b. Land Use Analysis

BDC 20.20.40.3 requires that a PUD applicant include "a land use analysis" that establishes that "the minimum and maximum development levels" set out in BDC 20.20.40.2 either have already been met or will be met when the SC-S zoned properties are fully developed. *See* n 8. We set out petitioners' arguments concerning BDC 20.20.40.3 below:

> "The elements of the 'land use analysis' and PUD process that will be relied upon to ensure residential development are not defined or specified. Nothing in respondent's generic PUD ordinance suggests a mechanism to ensure residential development anywhere on the subject properties. It is unclear how an applicant for a PUD in one area of the SC-S district can 'demonstrate' through 'analysis' how other applicants will eventually develop other areas in the district." Petition for Review 15 (citations omitted).

We can readily agree with petitioners that BDC 20.20.40.3 includes essentially no direction regarding how a PUD applicant is to go about demonstrating how the minimum and maximum levels of development called for in BDC 20.20.40.2 will be achieved in the future. But we cannot agree with petitioners' suggestion that LUBA should conclude that without such explicit direction PUD applicants will be unable to do so. Because PUD applicants are unconstrained by BDC 20.20.40.3 in *how* they must go about making the required demonstration, they will be free to make and defend assumptions about how the remaining property could be developed. The city will then be required to determine if the demonstration rests on reasonable assumptions and is supported by adequate evidence. Petitioners have not established that the lack of prescriptive detail in BDC 20.20.40.3 is an error that justifies remand.

With regard to petitioners' point that there is no "mechanism to ensure residential development anywhere on the subject properties," petitioners cite no legal requirement for such an *ensuring* mechanism. Even the city's SC-HDR zone does not *ensure* residential

development; it merely allows residential development and requires that any non-residential development must be mixed use development that includes at least some residential development.[11] The city's SC-S zone admittedly takes a different approach and permits up to 80 percent of allowable nonresidential development to be completed *before* it prohibits any additional non-residential development until the desired 1,899 residential units are developed. Those are different approaches to achieving a mix of residential and non-residential development. It is petitioners' burden to show that there is something about the approach employed by the SC-S zone that warrants remand. The above argument does not do so.

c. The Transportation Impact Analysis

The text of BDC 20.20.40.4 was set out earlier at n 9 and is set out again below:

> "An applicant for a land use approval, other than a Sign Application, for any and all property within the SC-S zoning district shall demonstrate that the application complies with the Traffic Impact Analysis required by Section 60.55.20, associated with the effective Conditional Use Permit – PUD (Planned Unit Development) as to all property within the SC-S zoning district."

It is not easy to understand what BDC 20.20.40.4 requires, particularly for an applicant who wishes to develop only a portion of the SC-S zoned property. An explanation that is set out in a January 31, 2012 staff report is cited by both petitioner and respondents and is quoted below:

> "The proposed amendments would result in a requirement to include and plan for 1,899 dwelling units. The discussion now ties back to transportation planning where the capacity of the transportation system equates to a specific number of trips. Out of the specific number of available trips, the trips for the proposed residential dwelling units (minimum 1,899 dwelling units) will have to be accounted for in the development planning. The remaining trips can then be divided among non-residential uses. 10,960,500 square feet of floor

[11] We discuss the mixed use requirement for non-residential development in the SC-HDR and under the county's TO:R40-80 and TO:R80-120 designations later in this opinion.

> area can only be built if the remaining available trips allow that level of intensity. In any recent study for the Barnes-Peterkort area there is not enough transportation capacity to serve that level of intensity. * * * * " Record 426.

From the above, we understand the parties to share the view that BDC 20.20.40.4 was adopted to prevent non-residential development from being approved and constructed on the SC-S zoned properties to the point that the transportation capacity necessary for the desired 1,899 residential units would no longer be available to serve those residential units. It appears that, independent of the 80 percent limit imposed by BDC 20.20.40.5, there may well be insufficient transportation capacity to construct 10,960,500 square feet of non-residential development or even 80 percent of that figure. If so, the city is apparently relying on BDC 20.20.40.4 to ensure that no more non-residential development be approved when that non-residential development will require transportation capacity that is necessary for the minimum 1,899 residential units that have not yet been approved and developed. Petitioners' arguments between line 9 on page 15 and line 18 on page 16 of the petition for review are not easy to follow or understand.[12] But we understand petitioner to argue that it is not sufficiently clear how BDC 20.20.40.5 will require that the transportation capacity needed for the minimum 1,899 residential units will be accounted for and preserved while allowing non-residential development to proceed in advance of development of all of the specified 1,899 residential units.

Putting aside the problem of the one-half acre exception to the requirement for PUD approval, even where PUD approval will be required, such approval could be sought separately for a number of smaller parcels. For example if PUD approval were sought for a one-acre SC-S zoned parcel, it is certainly not clear to us that BDC 20.20.40.4 would require that the applicant must demonstrate that the traffic capacity needed for the proposed one-acre

[12] For example, the finding that petitioners say appears on page 21 of the record does not appear there. Neither does it appear on the only other page of the record they cite.

development would leave sufficient traffic capacity available to develop the balance of any residential development needed to achieve 1,899 minimum residential units. On remand, the city will need to revise BDC 20.20.40.4 to more clearly state that an applicant for PUD approval in the SC-S zone is required to account for and preserve the traffic capacity needed to serve any of the 1,899 minimum residential units that have not already been developed and are not proposed for development in the PUD application.

Petitioners make additional traffic-related arguments after line 18 on page 16 of the petition for review. Those arguments are not well developed and we do not understand them. We do not consider them further.

Because the SC-S and SC-HDR zones approximate the density of the county's designations equally as well, without regard to BDC 20.20.40, the problems we have identified in BDC 20.20.40 might not provide a basis for remand. But as we explain below, the city appears to be relying heavily on the higher minimum density that would result under BDC 20.20.40 in concluding the SC-S zone is the "most closely approximate" zone. That reliance is therefore critical to the city's decision and remand is therefore required.

To summarize, we conclude that the city could reasonably rely on the increased density that would be required under BDC 20.20.40 to conclude that the SC-S zone more closely approximates the county TO:R40-80 and TO:R80-120 designations with regard to density, so long as the BDC 40.15.15.4(A)(2) one-half acre exception is eliminated and BDC 20.20.40.4 is amended to make clear that the transportation capacity necessary to serve any undeveloped 1,899 residential units must be accounted for and preserved in any PUD applications for approval of non-residential development.

B. Use Provisions

Although the parties do not discuss the issue they appear to have a shared understanding that the "most closely approximate" criterion requires more than a rote comparison of the "uses" listed in the potential city zoning districts and the "uses" listed in

the county land use district designations. In both the city's and the county's regulations the listed uses are frequently modified by endnotes or footnotes that impose additional land use restrictions. We conclude that when the city is applying the "use provisions" prong of the "most closely approximate" criterion, the city is required to examine more than the unadorned list of uses. The city is required to consider the "use provisions," which include both the list of uses and the land use restrictions imposed by the endnotes and footnotes and otherwise. This broader consideration is far more complicated than a simple comparison of the listed uses. As will become clearer below, one of the more significant limitations imposed by the SC-HDR zone and the county designations is a requirement that any proposal for non-residential development be mixed use development that includes residential development.[13] That required mixed use feature is present in the county's land use designations but is missing from the SC-S zone that the city applied in this case.

BDC 20.20.20, which petitioners included as an appendix to the petition for review, sets out a table that identifies the uses allowed in the city's multiple use zoning districts, including the SC-S district that the city applied to several of the formerly TO:R40-80 and TO:R80-120 designated parcels and the SC-HDR district that petitioners contend the city should have applied to those parcels. The table identifies several general categories of uses, including "Residential," "Commercial," "Civic" and "Industrial." Within those four categories the table identifies a total of 29 "Specific Uses" that in many cases are broken down into more specific uses (which we will refer to as More Specific Uses). By our count the matrix breaks the 29 Specific Uses into 46 More Specific Uses in those four general

[13] According to the BDC:

> "Multiple Use zoning districts establish varied levels of residential and commercial uses, supporting transit and pedestrian oriented development with minimum density and intensity requirements. Multiple Use areas include: the Downtown Beaverton and Washington Square Regional Centers, Town Centers, and Station Communities." BDC 20.20.05.

categories. For 22 of those 46 More Specific Uses, the SC-HDR and SC-S zones use are identical. For another 11 of those More Specific Uses the SC-HDR and SC-S zones appear to have only minor differences. For those 11 More Specific Uses petitioners do not argue that the differences are significant and we therefore assume that they are not. That leaves 13 More Specific Uses. Petitioners argue that the SC-HDR zone's treatment of those More Specific Uses much more closely approximates the treatment of those uses under the TO:R40-80 and TO:80-120 districts than does the SC-S zone that the city applied.

To simplify this opinion, we have included Appendices B and C to compare the ways the county's TO:R40-80 and TO R80-120 regulate those 13 More Specific Uses and the way the city's SC-HDR and SC-S zoning districts treat those same uses. While some detail and precision has been lost in preparing Appendices B and C, they demonstrate very clearly that as far as regulation of those 13 More Specific Uses is concerned, the SC-HDR much more closely approximates the county's TO:R40-80 and TO:R80-120 land use districts than does the SC-S zone that the city applied.

In general, petitioners are correct that while commercial development is allowed in the SC-HDR zone, it is only allowed in mixed use buildings where residential uses meeting minimum residential densities are also provided as part of the mixed use. In contrast, the SC-S zone allows stand-alone commercial development in buildings that need not provide any residential units.

With regard to industrial uses, as compared with the county's TO:R districts, the similarity of the city's SC-HDR zone and the dissimilarity of the city's SC-S zone, is even more striking. The city's SC-S zone permits industrial uses, whereas the TO:R districts and the SC-HDR zone do not allow industrial uses.

As we have already explained, the city relied in large part on BDC 20.20.40, which requires a minimum of 1,899 residential dwelling units on the SC-S designated properties, to conclude these TO:R40-80 and TO:80-120 designated parcels should be zoned SC-S to more

closely match the existing county TO:R districts' minimum residential densities. We conclude above that the BDC will need to be amended or clarified in two particulars before that reliance is warranted with regard to density. But even if the BDC is amended so that the city may rely on the increased density that will result if the minimum 1,899 residential units are developed in the SC-S zone, that only means the SC-S zone most closely approximates the existing county TO:R40-80 and TO:80-120 designations with regard to *density*. But density is only one of three considerations under the "most closely approximate" criterion. As Appendices B and C clearly demonstrate and petitioners argue, the SC-HDR zone much more closely approximates the TO:R40-80 and TO:R80-120 districts' regulation of commercial and industrial uses than does the SC-S that the city applied.

For reasons we do not understand, neither petitioners nor respondents cite us to the city's most detailed findings addressing the "most closely approximate" criterion. Record 807-14.[14] In addition to the eight pages of text addressing the "most closely approximate" criterion, the findings refer to two exhibits which compare uses and densities in the county's TO:R40-80 and TO:R80-120 and the city's SC-S zones. It is reasonably clear from those findings just how difficult it is to apply the "most closely approximate" criterion to city zones and county land use district designations that are complicated to begin with, take somewhat different approaches in regulating land use, and are littered with endnotes, footnotes and other special qualifications that make a meaningful and understandable comparison a daunting task. It is also reasonably clear from those findings that in applying the "most closely approximate" criterion, the city did not assign as much importance to similarity of uses as it did to other considerations, particularly meeting minimum residential development targets that require higher density in the areas it zoned SC-S:

[14] The November 30, 2011 staff report that includes those findings was adopted by reference in Ordinance 4580, which adopts the SC-S zoning. Record 30.

> "* * * The SC-S zoning district is crafted to be more closely approximate to County regulations for the subject parcels with respect to level of development review, minimum dwelling unit requirements, land use analysis requirements and thresholds for construction of the minimum residential dwelling requirements. This is consistent with the provisions of the UPAA. While the county has decided to place specific locational requirements for development in their community plan, the City does not use the Comprehensive Plan or [BDC] to design the development of specific locations. Rather, the City uses the development review process for considering development locations and types of development. *Staff recommends that the critical issue of concern for the City to consider is to ensure the development capacity assumed by the County is maintained*. This is the reason for the City to propose amendments to the SC-S zoning district to specify minimum and maximum development expectations for the zoning district. Staff recommends that how the development takes place, in what locations, and in what order is best determined by the property owner subject to City land use review. * * *" Record 807-08 (emphasis added).

The city's findings do not specifically recognize the 13 More Specific Uses that the SC-HDR regulates very much like the county's TO:R40-80 and TO:R80-120 districts and the SC-S zone regulates much differently. The findings merely recognize that there are some differences in the way the SC-S zone and the TO:R40-80 and TO:R80-120 zones regulate uses:

> "Exhibit 12 to this staff report is a permitted and prohibited uses table that compares the existing County TO land use districts upon the subject parcels to the City's SC-S zoning district. While the permitted land uses of the SC-S zoning district do not translate exactly the uses as allowed under the current County regulations, the SC-S zoning district does allow for most of the uses allowed under the County districts. * * *" Record 812.

The differences in the way the SC-HDR and SC-S zones regulate the 13 More Specific Uses appear to be significant to us.

The city's findings do not seem to recognize the different way the county's TO:R40-80 and TO:R80-120 designations and the SC-HDR zone treat those 13 More Specific Uses, as compared to the SC-S zone. Exhibit 12, which is referenced in the above-quoted findings, compares the SC-S zone uses to the uses allowed in the county's TO:R40-80 and TO:R80-120 districts, but does not include a comparison of the uses allowed in the SC-HDR zone that

might have highlighted the different treatment of those 13 More Specific Uses under the SC-HDR and SC-S zones. It is not clear to us that the city was even aware that the SC-S and SC-HDR zone treat those 13 More Specific Uses quite differently and that the SC-HDR zone much more closely matches the way the county's TO:R40-80 and TO:R80-120 designations regulate those uses. On remand the city will need to adopt findings that address the 13 More Specific Uses for which the SC-HDR zone much more closely approximates the way the county's TO:R40-80 and TO:R80-120 designations regulate those uses and determine whether the SC-S zone nevertheless satisfies the "most closely approximate" criterion.

C. Standards

Petitioners' arguments concerning the development "standards" factor under the city's "most closely approximate" rezoning criterion appear at Petition for Review 19-20. The same "Design Review Design, Standards and Principles" set out at BDC 60.05 apply in both the SC-HDR zone and the SC-S zone. Petitioners' argument under the standards prong of the "most closely approximate" criterion appears to be entirely derivative of their argument under the uses prong. As we understand it, petitioners contend the SC-HDR zone more closely aligns with the TO:R40-80 and TO:R80-120 designations because BDC 60.05 imposes different design review standards depending on the use being regulated, and the uses permitted under the SC-HDR zone more closely align with the uses permitted under the TO:R40-80 and TO:R80-120 designations.

We think we understand the theory behind petitioners' argument under the standards prong. But missing from the petition for review is any attempt to identify the standards that would have applied to development under the county's TO:R40-80 and TO:R80-120 designations and the standards that will apply under BDC 60.05 beyond citing to Washington County Community Development Code (CDC) Chapter 431 (the county standards) and BDC 60.05 (the city standards). The Transit Oriented Design Principles and Standards at CDC Chapter 431 are 38 pages long. The city Design Review Design Principles, Standards and

Guidelines are 69 pages long. Petitioners' argument is simply not sufficiently developed to merit review. As presented we cannot tell if petitioners' argument under the standards prong adds anything of substance to their argument under the uses prong. We therefore do not consider petitioners' arguments concerning the standards prong of the "most closely approximate" criterion further.

D. Conclusion

The city relies heavily on BDC 20.20.40 to conclude that the SC-S zone more closely approximates the county TO:R40-80 and TO:R80-120 designations with regard to residential density and likely is relying in large part on that closer approximation in residential density to conclude that the SC-S zone satisfies the "most closely approximate" criterion despite the fact that the SC-HDR zone more closely approximates the way the TO:R40-80 and TO:R80-120 designations regulate a number of uses. Such reliance is improper unless the BDC 40.15.15.4(A)(2) one-half acre exception is eliminated and BDC 20.20.40.4 is amended to make clear that the transportation capacity necessary to serve any undeveloped 1,899 residential units must be accounted for and preserved in any PUD applications for approval of non-residential development. Additionally, the city's findings do not appear to recognize that for 13 More Specific Uses the SC-HDR zone much more closely approximates the TO:R40-80 and TO:R80-120 designations that the SC-S zone the city applied to the subject properties. On remand the city must explain why the SC-S zone nevertheless complies with the "most closely approximate" criterion, despite its differences with regard to those 13 More Specific Uses, if that is the city's position despite the differences concerning those 13 More Specific Uses.

Finally, because the city has adopted the "most closely approximate" criterion as part of its comprehensive plan and land use regulations, any city council interpretations of that criterion would be subject to deferential review under *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010). But the city has not adopted an express or implicit

interpretation of the most closely approximate criterion. *See Green v. Douglas County*, 245 Or App 430, 438-40, 263 P3d 355 (2011) (to be adequate for review, a local government's implicit interpretation of an ordinance "must carry with it only one possible meaning of the ordinance provision and an easily inferred explanation of that meaning"). The city may want to consider doing so on remand.

Petitioners' first assignment of error is sustained in part and denied in part.

SECOND ASSIGNMENT OF ERROR

Under the second assignment of error, petitioners challenge the city's application of the SC-S zone to an approximate 25 acre area nearest the Sunset Transit Center.[15] The county's land use designation for those 25 acres was Transit Oriented Business District (TO:BUS), which allows a variety of uses. As with the first assignment of error, petitioners rely on the UPAA "most closely approximate" criterion and argue the city's SC-HDR zone more closely approximates the county's TO:BUS zone. Petitioners make three points, which we address below.

A. Limits on Commercial Development

Petitioners' challenge under the second assignment of error is similar to the challenge in their first assignment of error, but whereas petitioners support the first assignment of error with 15 pages of argument, the second assignment of error is supported with less than two pages of argument. Petitioners begin by pointing out that the county's TO:BUS zone limits the gross floor area of commercial use on a development site to 40 percent of the total gross floor area and that the SC-HDR zone imposes similar limits. Petitioners contend the SC-S zone imposes no such limit, which makes the SC-HDR zone more closely approximate.

[15] On the map, these three parcels are the large and two smaller parcels that adjoin the Sunset Transit Center, which adjoin Barnes Road on its south side near the Highway 217 interchange with Highway 26 and Barnes Road.

B. Minimum FAR

Petitioners then concede that the minimum floor area ratio (FAR) imposed by the county's TO:BUS zone is .6 and more closely approximates the city's .5 to 1.0 minimum FAR in the city's SC-S zone than the .4 FAR in the city's SC-HDR zone.[16]

C. The Requirement for Housing

Petitioners then argue the requirements for housing in the SC-HDR zone more closely approximate the requirements for housing under the TO:BUS designation:

> "However, the overall nature of uses required by the existing TO:BUS designation * * * in conjunction with the requirement under ACS-11 for a minimum of 150 dwelling units within the 3.92-acre 'Sunset' District closest to the Station and a minimum of 200 dwelling units within the 3.86-acre 'Hillside' District, demonstrates that the SC-HDR [zone] more closely approximates the TO:BUS density and use provisions.
>
> "Respondent's findings concede that a primary effect of application of its SC-S zone is elimination of the county's requirement for housing at the Station. Testimony before respondent's City Council in support of this 'added flexibility' explained an economic rationale to justify it and also the allowance of 80% completion of the maximum allowed non-residential use prior to development of residential uses, and respondent's findings endorse that rationale. Respondent's findings do not explain the consequences, for purposes of UPAA compliance, of the ½-acre exemption from PUD review in the SC-S zone, since that exemption was purportedly removed. Thus, respondent's findings explain why the SC-S zone was chosen to replace the county's TO:BUS zone but do not substantiate a conclusion that the SC-S zone, rather than the SC-HDR zone, most closely approximates the density, use provisions and standards of the TO:BUS zone." Petition for Review 21-22 (record citations omitted).

D. Conclusion

With regard to petitioners' first two observations, those observations are simply not sufficiently developed. Petitioners must do more than cite one way in which the SC-HDR zone more closely approximates the county's TO:BUS zone and one way in which the SC-S

[16] A FAR is the ratio of developed floor area to the area of the parcel to be developed. A FAR of more than one requires multistory development.

zone more closely approximates the county's TO:BUS zone and leave it to LUBA to determine the significance of those differences and whether one difference is more important than the other.

We are not sure what to think about petitioners' challenge based on the housing requirements. Petitioners' observation that two county planning districts that overlap the 25 acres that have been designated SC-S had minimum dwelling unit targets would seem to favor the SC-S zone, which as already discussed under the first assignment of error also has a minimum dwelling unit target, whereas the SC-HDR zone does not.[17] As was the case with petitioners' objection to potentially allowing 80 percent of the allowable non-residential development to proceed, that difference in planning approach as compared to the approach taken in the TO:BUS and SC-HDR zone is not sufficient to establish that the SC-HDR zone most closely approximates the county's TO:BUS designation.

Finally, although the argument is not well developed, we understand petitioners to complain that the close approximation of the SC-S zone to the TO:BUS designation depends on all development being subject to PUD review. Petitioners appear to be correct about that. But we have already determined under the first assignment of error that the city must eliminate the one-half acre exception on remand if it is going to heavily rely on the requirement for PUD review for all development, including development of less than one-half acre. If the city does that it will correct any error petitioners have adequately assigned

[17] The parties dispute here and under the other assignments of error whether those minimum dwelling unit targets, which apply in what the parties refer to as Area of Special Concern No. 11 under the county's Cedar Mill –Cedar Hill Community Plan, are properly viewed as part of the county's district designations. In findings adopted in support of SC-S zone text amendments by Ordinance 4578 the city found that they are not. Petitioners did not appeal Ordinance 4578 and the findings adopted in support of the ordinances that have been appealed to LUBA do not address the Area of Special Concern No. 11 minimum dwelling unit targets. It is not even clear to us that the parties are aware that the Ordinance 4578 findings that respondents attempt to rely on in their brief were not adopted in support of the ordinances that are before us in this appeal. Of course it is potentially legally significant that petitioners neither appealed Ordinance 4578 nor assigned error to those findings. The parties' Area of Special Concern No. 11 arguments do not seem critical and we have elected to largely ignore them.

and developed under the second assignment of error. Petitioners' second assignment of error therefore presents no additional basis for remand.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

This assignment of error concerns the two parcels that are located at the southeast and southwest corners of the Barnes Road/ Cedar Hills Blvd intersection.[18] *See* map. The county applied its Transit Oriented Retail Commercial (TO:RC) designation to those parcels. Ordinance 4582 applies the city's Corridor Commercial (CC) zone to those parcels. Petitioners contend the city should have applied the city's Station Community – Multiple Use (SC-MU) zone.

In the first sentence of the paragraph that begins on page 23, line 12 of the petition for review, petitioners state "[t]he existing county [TO:RC designation], respondent's CC, and respondent's [SC-MU] districts are all predominantly commercial retail districts." Petitioners follow that observation regarding the similarity of the two city zones and the county designation with argument that carries over to the first three paragraphs on page 24 of the petition for review. The first two paragraphs describe some ways the TO:RC designation limits offices, service stations, hotels and residential uses. In the final two paragraphs, petitioners describe some ways the city's CC and SC-MU zones regulate similar uses differently. These arguments are simply too undeveloped to allow us to determine if the identified differences are significant. Based on petitioners' final argument under the third assignment of error, which we address next, it is not even clear to us whether petitioners believe the identified differences are significant. These arguments are not sufficient to call

[18] As noted earlier, the parcel at the southeast corner of that intersection is currently developed with the Peterkort Town Square Mall and the parcel at the southwest corner of that intersection is undeveloped.

into question the complex balancing that the city was required to engage in to apply the "most closely approximate" criterion to these two parcels.

In the final two paragraphs of the third assignment of error, petitioners identify what they contend is "[t]he most important reason why respondent's SC-MU zone more closely approximates the density, use provisions and standards of the county TO:RC [designation]." Petition for Review 24. The TO:RC designation has a minimum FAR that ranges from a high of .5 to a low of .25 depending on proximity to station platforms and Town Centers. Under the county's TO:RC designation, a FAR of .25 applies to these two parcels. The SC-MU zone that petitioners believe the city should have applied imposes a minimum FAR of .4.[19] The CC zone imposes no minimum FAR.

Petitioners argue that the city improperly applied the CC zone to avoid the potentially higher traffic generation that might result from the higher FAR in the SC-MU zone rather than applying the SC-MU zone that more closely approximates the county's TO:RC designation. But petitioners have simply identified a relatively minor difference in FAR (the SC-MU .4 FAR is slightly higher than the TO:RC .25 FAR and the CC zero FAR is slightly lower. The city adopted findings addressing the "most closely approximate" criterion at Record 51. Those findings explain that the city relied on exhibits that present a detailed comparison of the uses, dimensional and site development standards and residential density requirements in the TO:RC and CC zones, and with regard to all three considerations there is a close correlation. Record 1145, 1147 and 1150.[20] The difference in FAR that petitioners identify does not come close to providing a basis for LUBA to second guess the city's selection of the CC zone or to remand for additional findings.

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[19] Petitioners claim that the SC-MU zone imposes a FAR that ranges between .4 and 1. The table they cite to support the claimed range of FAR does not support the claim.

[20] The exhibit at Record 1147 actually is the exhibit at the unnumbered page of the record following Record 1147.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

In their fourth assignment of error, petitioners' challenge to the comprehensive plan designations the city applied to the same two parcels that were the subject of petitioners' zoning challenges under the third assignment of error is entirely derivative of the third assignment of error.[21] The fourth assignment of error is denied for the same reasons we deny the third assignment of error.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

In the fifth assignment of error, petitioners challenge Ordinance 4582, which applies the city's Urban High Density (R1) zone to one small and three larger parcels that lie east of Cedar Hills Blvd and north of the SC-S zoned parcels that adjoin the north side of Barnes Road. Those parcels access Barnes Road via Valeria View Avenue. Ordinance 4582 also applies the R1 zone to the parcel at the northwest intersection of Cedar Hills Blvd/Barnes Road. *See* map. Those parcels were formerly designated either TO:R12-18, TO:R24-40 or TO:R40-80 by the county. Petitioners contend the city's SC-HDR zone most closely approximates those county designations.

Petitioners identify three differences in the city R-1 zone that the city applied and the SC-HDR zone that petitioners believe the city should have applied, which they contend makes the SC-HDR zone more closely approximate the county's TO:R designations.

[21] Petitioners contend the city should have applied the city comprehensive plan map designation that would be consistent with the SC-MU zone that petitioners argue the city should have applied instead of the CC zone that the city applied to those two parcels.

A. Retail Development

First, the county's TO:R40-80 and TO:R24-40 designations allow limited retail uses, as does the city's SC-HDR zone. The R1 zone the city applied to those parcels does not allow any retail uses.

B. Detached and Accessory Dwellings

Second, the county's TO:R40-80 designation does not allow detached dwellings, and the TO:R12-18 and TO:R24-40 designations do not allow accessory dwellings. The SC-HDR limits detached dwelling to lots that face a green or common area and does not allow accessory dwellings. The R1 zone that the city applied allows detached dwellings and allows accessory dwellings.

C. Storage

Third, the county TO:R12-18 and TO:R24-40 designations prohibit storage facilities. The SC-HDR zone prohibits storage facilities in this area of the city. Unlike the TO:R12-18 and TO:R24-40 designations and the city's SC-HDR zone, the R1 zone allows storage facilities.

D. Conclusion

As was the case with petitioners' challenge under the third assignment of error to the city's selection of the CC zone for nearby parcels, petitioners' challenge to the city selection of the R1 zone for these parcels instead of the SC-HDR zone simply identifies three relatively minor differences in the way the SC-HDR and R1 zones regulate three uses. The city adopted findings addressing the "most closely approximate" criterion at Record 51. As previously noted, those findings explain that the city relied on exhibits that present a detailed comparison of the uses, dimensional and site development standards and residential density requirements in the two zones. Record 1144, 1147, 1149. The difference in the way those two zones regulate retail, residential and storage *uses* do not come close to providing a basis for LUBA to second guess the city's selection of the R1 zone as the most closely

approximate zone based on *uses, density and standards*, all three of which must be considered under the "most closely approximate" criterion.

SIXTH ASSIGNMENT OF ERROR

In their sixth assignment of error, petitioners' challenge of the comprehensive plan designations for the same five parcels that were the subject of the fifth assignment of error are entirely derivative of the fifth assignment of error.[22] The sixth assignment of error is denied for the same reasons we deny the fifth assignment of error.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

In their seventh assignment of error, petitioners challenge one of the assumptions that the city made in concluding that the SC-S zoning the city applied to a number of parcels will not significantly affect existing or planned transportation facilities and that the SC-S zoning complies with the Land Conservation and Development Commission's Transportation Planning Rule (TPR).

A. Introduction

Before turning to petitioners' argument, we note that it is an understatement to say that in its current state of evolution, the TPR is quite complicated. The analysis that the city relied on in applying the TPR is also quite complicated and includes a number of assumptions that can easily be described as questionable. Respondents apparently understood petitioners to raise three issues under the seventh assignment of error. Respondent's Brief 17. And respondents spend ten pages of their brief responding to those arguments. Respondents' Brief 16-26. In doing so, respondents address some issues that are not fairly raised in the petition for review. At oral argument, the parties arguments similarly

[22] Petitioners contend the city should have applied the city comprehensive plan map designation that would be consistent with the SC-HDR zone.

ranged beyond the only challenge that is both fairly presented in the seventh assignment of error and sufficiently developed for review. At the end of our discussion of the seventh assignment of error we set out and reject an issue that petitioners raise in the petition for review but do not develop. Otherwise, we limit our discussion under the seventh assignment of error to the only issue that petitioners raised and sufficiently developed in their petition for review and make no attempt to address other issues that respondents raise in their brief and that petitioners raised at oral argument concerning the city's TPR analysis.

B. The Ten Percent or 10,000 Square Foot Limit on Commercial Uses

The city relied on a report prepared by staff and intervenor's transportation expert to find that applying the SC-S zone to parcels along Barnes Road would not "significantly affect" any transportation facilities, within the meaning of the TPR.[23] Record 702-732. The report's finding of no significant affect is based on an analysis of the hypothetical worst case traffic scenario under the county's map designations for these properties and a worst case traffic scenario under the SC-S zoning that the city applied to those properties. The city found that the worst case traffic scenario under the county designations exceeds the worst case traffic scenario under the city's SC-S zoning. Based on that finding, the city concluded that the SC-S zoning would have no significant effect and therefore no TPR mitigation measures needed to be considered or implemented. Petitioners do not assign error to the worst case scenario approach that the city relied on in this case. But petitioners do challenge one of the key assumptions that the city relied on in computing the worst case scenario under the county's map designations. Although at places in the petition for review petitioners suggest their challenge under the seventh assignment of error is also an evidentiary

[23] Under the TPR, if a comprehensive plan or land use regulation amendment like the ones at issue in this appeal will "significantly affect" a transportation facility, one or more of the mitigation measures set out in the TPR must be implemented. OAR 660-012-0060. The TPR defines what it means to "significantly affect" a transportation facility.

challenge, petitioners' challenge is to the way the city interpreted and applied the county CDC, which is primarily if not entirely a question of law.

The county designations for some of the properties that the city zoned SC-S were TO:R40-80 and TO:R80-120. The parcels at issue under the seventh assignment of error are Parcel 7 (11.93 acres) and Parcels 12 and 17 (15.74 acres). Record 713. The report's worst case scenario under the county's designations for Parcel 7 was based on an assumption that under the county designations Parcel 7 could be developed with 212,000 square feet of development and Parcels 12 and 17 could be developed with 427,302 square feet of commercial development. Petitioners contend the report misconstrues applicable limits on commercial development imposed by CDC 375-7(3) and therefore significantly overstates the amount of traffic in the worst case scenario for Parcel 7 and Parcels 12 and 17. We understand petitioners to argue that if the city had correctly interpreted and applied CDC 375-7(3), which we discuss below, the worst case scenario under the county designations would be much lower and the traffic that will be generated by the SC-S zone that the city applied will exceed the lower county worst case scenario and "significantly affect" existing and planned transportation facilities, within the meaning of OAR 660-012-0060.

The bulk of petitioners arguments under the seventh assignment of error are directed at Parcel 7 and we largely limit our discussion below to Parcel 7. As we note on Appendix B, commercial uses are allowed in the TO:R40-80 and TO:R80-120 designations. However CDC 375-7(3) limits such commercial development to ten percent of the development, but not more than 10,000 square feet.[24] The report assumes that Parcel 7 could be divided into a number of smaller parcels and developed separately, with the CDC 375-7(3) ten

[24] CDC 375-7(3) begins by setting out four criteria that commercial development must meet in the county's Transit Oriented Residential designations and then provides: "When all these criteria are met, up to ten (10) percent of the total gross floor area of a *development*, not exceeding ten thousand (10,000) square feet, may be used for commercial uses." (Emphasis added.)

percent/10,000 square foot limitation on commercial *development* applying separately to each of the developments on those smaller parcels. Record 706. Petitioners do not assign error to the report's assumption that Parcel 7 could be divided into smaller parcels for purposes of development. But petitioners do challenge the report's assumption that the CDC 375-7(3) ten percent/10,000 square foot limitation on commercial development would apply separately to the development on each of the smaller parcels that could be created by dividing Parcel 7:

> "Even if it were reasonable to assume twenty-one land divisions of Parcel 7, the county's Master Planning requirement would treat Parcel 7 as portions of two separate Master Planning Area 'developments' for all purposes, including the 10,000-square-foot-or 10% commercial allowance. *See* Rec. 920, 956, CDC 403-2.1(E)." Petition for Review 31 (footnote omitted.)[25]

The Peterkort Property lies within an area that is subject to the county's Cedar Hills – Cedar Mill Community Plan and is divided into six "Master Plan Areas." The Cedar Hills – Cedar Mill Community Plan requires a master plan for each of the Peterkort Property "Master Plan Areas."[26] Petitioners argue that the CDC 375-7(3) ten percent/10,000 square

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[25] The omitted footnote sets out the text of CDC 403-2.1(E), which sets out one of the CDC requirements for a "Master Plan," and provides:

> "A development application (Master Plan or Site Analysis application) for a development shall be for the entirety of the site, including all phases of a phased development. The development application shall demonstrate compliance, or demonstrate that it is feasible, for all portions of the site to comply with the standards of the Articles III (e.g., density, setbacks, height), IV (e.g., parking landscaping, grading and drainage), V (e.g., access spacing), and VI. When a residential development will occur in phases, or the development site is divided into multiple residential lots or parcels, each phase or lot or parcel shall develop to the density stated in the development application unless the original development application is modified consistent with the applicable density requirements and other applicable standards of this Code." (Underscoring in original.)

[26] The Cedar Hills – Cedar Mill Community Plan explains:

> "6. The Peterkort property is the largest undeveloped property in the subarea. It is likely the property will be developed in stages over a number of years, responding to market demands. Parts of the Peterkort property should be viewed as units in planning their development to assure that individual *developments* in each unit are complementary and viewed in context of an overall development plan for that unit. *

foot limitation on commercial *development* applies to all "development" within each of the "Master Plan Areas" set out for the "Peterkort Property" in the county's Cedar Hills – Cedar Mill Community Plan. Petitioners contend the map at Record 956 shows that Parcel 7 lies in two of these Master Plan Areas. We understand petitioners to contend that because Parcel 7 lies in two Peterkor Master Plan areas, under CDC 375-7(3) development of Parcel 7 could include at most 20,000 square feet of commercial development.

The CDC 375-7(3) ten percent/10,000 square foot limitation on commercial development nominally applies to "development," not to "Master Plan Areas" *See* n 24. But petitioners' argument is nevertheless possible because the Cedar Hills – Cedar Mill Community Plan requires a master plan for each of Peterkort "Master Plan Areas,." In addition, CDC 403-2.1(E) requires that a master plan include "the entirety of the site, including all phases of a phased development." *See* ns 25 and 26. Of course that begs the question of whether a master plan for each of the five Peterkort Master Plan Areas must be viewed as proposing a single *development* within each Master Plan Area, as that word is used in CDC 375-7(3), notwithstanding that the master plan may be for a large number of parcels that will be developed separately at different times. On that question the CDC and Cedar Hills – Cedar Mill Community Plan are ambiguous.

The challenged decision does not expressly address the interpretive issue raised by petitioners. However in that circumstance, under ORS 197.829(2), LUBA may adopt its own interpretation. Respondents make a number of arguments in support of their position that the Peterkort Master Plan Areas can be divided into a large number of parcels to be developed separately, and each separate development would be considered a "development," for purposes of the CDC 375-7(3) ten percent/10,000 square foot limitation on commercial

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* * Therefore, this design element requires approval of a master plan for each area of the Peterkort property shown on the Peterkort Property Master Plan Areas map before development can proceed in that area." Record 920 (emphasis added).

development. We agree with respondents that CDC 375-7(3), CDC 403-2.1(E) and the Cedar Hills – Cedar Mill Community Plan need not be interpreted to apply in the way petitioners argue. As respondents' point out, there is contextual support for their interpretation. Most of the Peterkort Station Master Plan Area falls within the CDC and Cedar Hills – Cedar Mill Community Plan Area of Special Concern No. 11, which specifically calls for a 500 room hotel, a theater complex of as much as 70,000 square feet and 150,000 square feet of retail "in addition to the theater and hotel." Respondents' Brief 21. Under petitioners' interpretation of CDC 375-7(3), CDC 403-2.1(E) and the Cedar Hills – Cedar Mill Community Plan, nowhere near that amount of commercial development could be approved. Other contextual support for respondent's position can be found in the Cedar Hills – Cedar Mill Community Plan requirement for master plans for each of the Peterkort Master Plan Areas. See n 26. That requirement observes "[p]arts of the Peterkort property should be viewed as units in planning their development to assure that individual *developments* in each unit are complementary and viewed in context of an overall development plan for that unit." (Emphasis added.) It is reasonably clear that the word "units" here is referring to the Peterkort Master Plan Areas and the plural reference to developments is consistent with respondent's position that multiple developments may be proposed within a single Peterkort Master Plan Area.

Given the ambiguity of CDC 375-7(3) and CDC 403-2.1(E) and the Cedar Hills – Cedar Mill Community Plan on this question, and the above-described context, we conclude petitioners have not established that the city's calculation of the amount of commercial development possible on Parcel 7 is based on an erroneous interpretation of CDC 375-7(3), CDC 403-2.1(E) and the Cedar Hills – Cedar Mill Community Plan.

Petitioners arguments concerning Parcels 12 and 17 are rejected for the same reason we reject their arguments concerning Parcel 7.

C. Improper Deferral

Petitioner argues at the end of the seventh assignment of error:

> Finally, to the extent respondent finds that TPR compliance can be deferred to a later development approval stage, *see* Rec. 209, that finding is erroneous and warrants remand of the challenged decisions. *Willamette Oaks, LLC v. City of Eugene*, 232 Or App 29 (2009)." Petition for Review 32.

Respondents contend that the city has not deferred its finding that the challenged amendments do not significantly affect transportation facilities and for that reason do not implicate the TPR.

To the extent the above-quoted finding can be interpreted to be an argument that the city improperly deferred consideration of the TPR, it is inadequately developed and we deny it for that reason alone. In addition, we agree with respondents that the city did not defer its consideration of the TPR.

The seventh assignment of error is denied.

CONCLUSION

Ordinance 4580 is the ordinance that applied city SC-S zoning to six parcels. Ordinance 4580 is the subject of LUBA No. 2012-021. Our resolution of the first assignment of error requires that we remand Ordinance 4580. We deny petitioners' remaining assignments of error. We therefore affirm Ordinances 4579, 4581 and 4582, which are the subject of LUBA Nos. 2012-020, 2012-022 and 2012-023.

Appendix A

Comparison of District Densities

	County TO:R40-80; TO:80-120 Residential Districts	City SC-HDR Zone (the zone petitioners say should have been applied)	City SC-S Zone (the zone the city applied)
Minimum residential density/ac	40 du/ac (TO:R40-80 dist.) 80 du/ac (TO:R80-120 dist.) ---------- 150 du in Sunset Dist. 200 du in Hillside Dist. 400 du in Holly Dist.	30 du/ac w/i 400 ft of Light Rail Transit (LRT) 24 du/ac > 400 ft of LRT	30 du/ac w/i 400 ft of LRT 24 du/ac > 400 ft of LRT
Maximum residential density/ac	80 du/ac (TO:R40-80 dist.) 120 du/ac (TO:R80-120)	None	None

Appendix B

Comparison of District Uses

Commercial Uses

	County TO:R40-80; TO80-120 Residential Districts	City SC-HDR Zone (the zone petitioners say should have been applied)	City SC-S Zone (the zone the city applied)
(1) Offices	-Office must share parking with residences -In TO:R40-80 Dist. total gross floor area of office use may not exceed 50% of gross floor area of the development -In TO:R80-120 Dist. total gross floor area of office use may not exceed 50% of gross floor area of the development	-Office use limited to multi-use development. Office use cannot exceed 50% of residential floor area. Office use only allowed if min residential densities are met	Permitted
(2) Retail Trade; (3) Restaurants; (4) Commercial Amusement Uses	-Uses Limited to multiple use bldgs. -Uses must be less than (<) 10% of floor area. -Uses must be < 10,000 sq ft. -Uses must primarily serve adjacent residences and offices.	-Uses limited to multi-use development. -Uses must be < 10,000 sq ft. -Minimum residential densities must be met	-Permitted

Appendix B (Continued)

Comparison of District Uses

Commercial Uses

	County TO:R40-80; TO80-120 Residential Districts	City SC-HDR Zone (the zone petitioners say should have been applied)	City SC-S Zone (the zone the city applied)
(5) Medical Clinics	Not allowed	-Use limited to multi-use development. -Use must be < 50% of residential floor area. -Use only allowed if min residential densities are met.	Permitted
(6) Service and Professional Businesses; (7) Vehicle Rental Facilities	Not allowed	-If not multiple use, bldg must be <10,000 sq ft. -In multiple use development, these uses may not exceed 25% of total sq. ft. of the development	Permitted
(8) Rental Business	Not allowed	-Only in multi-use buildings. -Must be <5,000 sq ft -Only allowed if minimum residential. densities are met	Must be <5,000 sq ft
(9) Meeting facilities	Not allowed	Not allowed	Allowed
(10) Commercial w/ drive up windows	Not Allowed	Not Allowed	-Allowed > ½ mile from station platform -Conditionally allowed >1/4 mile < ½ mile from station platform -Prohibited <1/4 mile from station platform

Appendix C

Comparison of District Uses

Industrial Uses

	County TO:R40-80; TO:80-120 Residential Districts	City SC-HDR Zone (the zone petitioners say should have been applied)	City SC-S Zone (the zone the city applied)
(11) Manufacturing, Fabricating, Assembly, Processing and packing	Not Allowed	Not allowed	Permitted
(12) Printing, Publishing, Bookbinding	Not Allowed	Not Allowed	Permitted
(13) Warehousing	Not Allowed	Not Allowed	Permitted