

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 SAVE DOWNTOWN CANBY,

5 *Petitioner,*

6
7 vs.

8
9 CITY OF CANBY,

10 *Respondent,*

11 and

12
13 GREAT BASIN ENGINEERING,

14 *Intervenor-Respondent.*

15
16 LUBA No. 2012-097

17
18 FINAL OPINION

19 AND ORDER

20
21
22 Appeal from City of Canby.

23
24 E. Michael Connors, Portland, filed the petition for review and argued on behalf of
25 petitioner. With him on the brief was Hathaway Koback Connors LLP.

26
27 Joseph Lindsay, City Attorney, Canby, filed a joint response brief on behalf of
28 respondent.

29
30 Steven W. Abel and Elaine R. Albrich, Portland, filed a joint response brief, and
31 Steven W. Abel argued on behalf of intervenor-respondent. With them on the brief was Stoel
32 Rives LLP.

33
34 BASSHAM, Board Member; HOLSTUN, Board Chair; RYAN, Board Member,
35 participated in the decision.

36
37 REMANDED

06/04/2013

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

NATURE OF THE DECISION

Petitioner appeals an ordinance approving a text and zoning map amendment from one commercial zone to another commercial zone with different site design standards, to facilitate approval of a fuel station.

FACTS

The subject property is a .75 acre tract located at the corner of Highway 99E and S Locust Street in the City of Canby. The property’s base zone is Highway Commercial (C-2). The property and most of the surrounding land are also subject to the Downtown Canby Overlay (DCO) zone, which has several sub-areas. Each of the DCO sub-areas allow the same uses, which are determined by the base C-2 zone, but each DCO sub-area has slightly different site design review standards.

The DCO sub-area that applies to the subject property is the Core Commercial (CC) sub-area. The CC sub-area is intended to foster pedestrian-oriented development, and its design criteria generally reflect that intent. The subject property is the north-easternmost property from the city center that is zoned CC. Properties farther to the northeast are also within the DCO, but subject to the Outer Highway Commercial (OHC) sub-area, which is generally intended to foster more automobile-oriented development.

On February 28, 2012, intervenor-respondent (intervenor) had a pre-application conference with city staff concerning a site design review application for a proposed Fred Meyer fuel station on the subject property. City staff advised intervenor that placing a fuel station within the CC sub-area would pose problems in demonstrating consistency with the intent of the CC sub-area. City staff suggested that intervenor first apply to rezone the property from CC to OHC, which would basically involve a minor text amendment to the geographic descriptions of the DCO sub-areas, and a map amendment to shift the boundary

1 between the CC and OHC sub-areas approximately 150 feet southwestward to include the
2 subject property in the OHC sub-area.

3 Intervenor applied to rezone the property from CC to OHC, and for site design review
4 approval of a six-unit fuel station under the OHC design review criteria. The city planning
5 commission held a hearing on the proposed text and map amendments, and recommended
6 denial. Because the site design review application followed a different procedure, and was
7 dependent on the text and zoning amendments, the planning commission deferred hearings
8 on the site design review application until the city council reviewed its recommendation on
9 the text and zoning amendments. The city council held a hearing on the text and map
10 amendments, and on December 5, 2012, adopted Ordinance No. 1365, which approved the
11 text and map amendments. This appeal followed.

12 **MOTION TO DISMISS**

13 Intervenor moves to dismiss this appeal, arguing that Ordinance No. 1365 is not a
14 “final” decision and therefore not subject to LUBA’s jurisdiction.

15 ORS 197.015(10)(a) defines a “land use decision” as a final decision that concerns
16 the adoption, amendment or application of comprehensive plan provisions or land use
17 regulations. As noted, the planning commission deferred consideration of the site design
18 review application. Intervenor contends that the three applications for a text amendment,
19 map amendment, and site design review approval were consolidated pursuant to ORS
20 227.175(2), which requires the city to establish a consolidated procedure by which an
21 applicant may, at its option, seek approval for all permits or zone changes needed for
22 development approval. Because the three applications were consolidated, intervenor argues,
23 the adoption of Ordinance No. 1365 approving the text and map amendments was not a final
24 decision, but rather an interlocutory decision issued in the middle of a consolidated
25 proceeding on the three applications that has yet to be completed.

1 Petitioner responds, and we agree, that Ordinance No. 1365 is unquestionably a final
2 decision. The consolidation procedure at ORS 227.175(2) is available at the option of the
3 applicant, and intervenor consented to the planning commission’s intent to process the text
4 and map amendment applications separately from the site design review application. In any
5 case, nothing in ORS 227.175(2) or elsewhere cited to our attention suggests that an
6 otherwise final decision is not final until all consolidated applications are finally decided.¹
7 The motion to dismiss is denied.

8 **FIRST ASSIGNMENT OF ERROR**

9 The Transportation Planning Rule (TPR) at OAR 660-012-0060(1) requires local
10 governments to determine if plan or land use regulation amendments would “significantly
11 affect” an existing or planned transportation facility. If so, the local government must adopt
12 one or more measures to prevent or offset impacts on the facility.² Canby Municipal Code

¹ We see no reason under state law why the city could not have issued an interlocutory decision on the text and map amendments and provided that the ordinance approving the text and map amendments would not become final until the city adopted a final decision on the application for site plan approval. But the city did not do so in this case.

² OAR 660-012-0060(1) provides, in relevant part:

“If an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation (including a zoning map) would significantly affect an existing or planned transportation facility, then the local government must put in place measures as provided in section (2) of this rule* * *. A plan or land use regulation amendment significantly affects a transportation facility if it would:

“* * * * *

“(c) Result in any of the effects listed in paragraphs (A) through (C) of this subsection based on projected conditions measured at the end of the planning period identified in the adopted TSP. As part of evaluating projected conditions, the amount of traffic projected to be generated within the area of the amendment may be reduced if the amendment includes an enforceable, ongoing requirement that would demonstrably limit traffic generation, including, but not limited to, transportation demand management. This reduction may diminish or completely eliminate the significant effect of the amendment.

“* * * * *

1 (CMC) 16.08.150(A) implements the TPR, and sets out a process and standards for
2 determining whether an amendment significantly affects a transportation facility.

3 In its findings, the city council concluded that CMC 16.08.150 has been satisfied and
4 the amendments will not significantly affect any transportation facility within the meaning of
5 the TPR. The city’s primary basis for that conclusion is that the “amendments do not change
6 the underlying base zone or the overlay zone, but rather simply adjust the boundaries
7 between two design subareas of the [DCO] overlay zone.” Record 21. According to the city,
8 the CC and OHC sub-areas of the DCO overlay zone “simply regulate[] the design of the
9 uses that are already allowed within the Property’s base zone designation.” *Id.* The city
10 concluded that the amendments “would not change the trip generation potential in the C-2
11 zone (the underlying base zone), so it would not cause any change in the performance of
12 existing or proposed facilities.” *Id.* The city’s reasoning on these points was based on a
13 September 4, 2012 letter from intervenor’s attorney, which the city council adopted by
14 incorporation as additional findings. Record 19, 265-83.

15 Petitioner argues that the findings and record are insufficient to conclude that the
16 change from CC to OHC sub-areas of the DCO does not “significantly affect” any
17 transportation facility.

18 Where an amendment is a zoning map amendment, one option a local government has
19 to determine whether the amendment significantly affects a transportation facility within the
20 meaning of OAR 660-012-0060(1)(c) is to first evaluate whether the new zone authorizes

“(B) Degrade the performance of an existing or planned transportation facility such that it would not meet the performance standards identified in the TSP or comprehensive plan; or

“(C) Degrade the performance of an existing or planned transportation facility that is otherwise projected to not meet the performance standards identified in the TSP or comprehensive plan.”

1 more traffic-intensive uses, compared to the old zone. *Barnes v. City of Hillsboro*, 61 Or
2 LUBA 375, 399, *aff'd* 239 Or App 73, 243 P3d 139 (2010); *Mason v. City of Corvallis*, 46
3 Or LUBA 199, 222 (2005). This initial, somewhat hypothetical, inquiry typically involves
4 comparing the most traffic-generative uses allowed in the two zones that could reasonably be
5 developed on the property in question. If those most traffic-generative uses allowed in the
6 two zones are the same, then the local government could easily conclude that new zone will
7 not generate any more traffic than the old zone and therefore no further inquiry is necessary
8 under the TPR. However, if the most traffic-generative uses are different, which is typically
9 the case, and the most traffic-generative use under the new zone would generate more traffic
10 than under the old zone, then further and more technical analysis is usually necessary to
11 determine if the amendment significantly affects a transportation facility and, if so, whether
12 and what measures may be required.

13 In the present case, we understand the city to have concluded that, based on the fact
14 that the uses allowed in the base C-2 zone are precisely the same both before and after the
15 change from the CC to OHC sub-area of the DCO overlay zone, the amendment does not
16 change the traffic-generative capacity of the uses allowed. Therefore, the city found, no
17 further analysis was necessary under the TPR, in order to conclude that the change did not
18 “significantly affect” any transportation facility. The only change, the city found, was to the
19 site design review standards, which differ slightly between the CC and OHC sub-areas, and
20 which do not affect traffic generative capacity of the uses allowed in the base C-2 zone under
21 any of the DCO sub-areas. Based on that finding, the city found that the TPR is satisfied,
22 without the need for further inquiry.

23 However, petitioner disputes that the different site design standards particular to the
24 OHC sub-area do not increase the traffic generative capacity of the uses allowed, compared
25 to the CC sub-area. Petitioner notes that under the design standards applicable in the CC
26 sub-area, the maximum building footprint size is 30,000 square feet, while the maximum

1 building footprint size in the OHC sub-area is 80,000 to 100,000 square feet. CMC
2 16.41.050(A)(2) (Table 3). According to petitioner, the footprint size of a commercial use
3 such as the retail uses allowed as permitted uses in the C-2 zone could easily increase its
4 traffic-generating capacity, compared to the same commercial use with a smaller footprint.

5 Further, petitioner argues, the differential maximum building footprint size in Table 3
6 is intended to affect the *types* of commercial uses allowed in each sub-area of the DCO.
7 CMC 16.41.010(C) states that one of the purposes of the different sub-areas in the DCO zone
8 is to:

9 “Ensure that building sizes reflect desired uses in the Core Commercial and
10 Transitional Commercial areas. Requirements limit the size of the building
11 footprint to 40,000 [sic] square feet in these areas. For the purpose of
12 understanding the scale of development, the proposed maximum allows for
13 the creation of a high end grocery store (e.g. New Seasons, Whole Foods or
14 Zupans). The proposed maximum differentiates development in this area
15 from those in the Outer Highway Commercial area. Maximum building
16 footprints are much larger in the [OHC] area.”

17 The differences in the site design standards between the CC sub-area and the OHC
18 sub-area almost entirely relate to the appearance of structures, which would seem to have no
19 apparent effect on traffic-generating capacity. Nonetheless, petitioner is correct that the two
20 sub-areas have different maximum building footprint sizes, with 30,000 square feet the
21 maximum in the CC sub-area, while the OHC sub-area allows a maximum building footprint
22 of between 80,000 to 100,000 square feet. The apparent intent of this difference is to foster
23 particular types of smaller scale commercial development in the CC sub-area, and allow
24 larger scale commercial uses in the OHC sub-area. The base C-2 zone allows various
25 commercial uses in all DCO sub-areas, such as a retail store, but the different maximum
26 building footprint standards means that in the OHC sub-area building footprints for a retail
27 store could be up to three times larger than an otherwise identical retail store located in the
28 CC sub-area.

1 That said, a building footprint size differential does not automatically translate into an
2 increase in traffic generating capacity. A maximum building footprint does not limit the total
3 square footage of the building, only its footprint. Multiple buildings, in the CC sub-area
4 could occupy the same footprint as a larger building in the OHC sub-area. But we note that
5 the CC sub-area has a maximum building height of 60 feet, while the OHC sub-area has a
6 maximum building height of 45 feet. The extra height allowed in the CC sub-area could
7 presumably increase the total square footage for a given footprint size. In addition, there are
8 different floor area ratio and setback standards between the two sub-areas, which would
9 presumably affect both the maximum footprint and total square footage practicable on the
10 subject property.

11 Most traffic engineers and local governments use the Institute of Transportation
12 Engineers (ITE) *Trip Generation* Manual to calculate the trip generation potential of various
13 types of uses. In the present case, the applicant's and city's engineers used the ITE Manual
14 to estimate the trip generation potential of the proposed fuel station. We note that, under the
15 ITE Manual, trip generation for most commercial use categories is calculated by multiplying
16 a certain trip rate per square footage. Thus, the total square footage of a building or use
17 seems to be a critical element in estimating trip generation for present purposes. In turn,
18 estimating total square footage would seem to require taking into account variables such as
19 maximum building footprints, maximum building height, floor area ratios, setbacks, etc. that
20 differ between the two zones being compared.

21 This suggests that one approach to determining whether the rezone from CC to OHC
22 could generate additional traffic and thus requires further analysis under the TPR would be
23 evaluate the square footage and hence the traffic generation capacity of the most traffic
24 intensive use allowed in the C-2 zone that could reasonably be constructed on the subject
25 property, given the different footprint, height, setback, and floor area ratios that would apply
26 in the two sub-areas. If that analysis showed that constructing the use under the OHC

1 standards would increase traffic generation compared to constructing the use under the CC
2 standards, then further analysis is necessary under the TPR. If not, then the city could
3 conclude that no further analysis is necessary, and the TPR is satisfied.

4 However, the record and the city’s findings do not address these questions. The
5 applicant submitted a traffic impact analysis, but it analyzed only the traffic impacts of the
6 proposed fuel station under the ITE Manual, and did not purport to compare the different
7 traffic generating potential between uses allowed under the different CC and OHC sub-area
8 design standards.³ The city’s conclusion that no further inquiry is necessary under the TPR
9 rests mainly on its finding that the uses allowed in the base C-2 zone have not changed.
10 However, that finding is not a sufficient basis for that conclusion, if in fact the different site
11 design standards that apply in the CC and OHC sub-areas affect the size or type of
12 development to an extent that would be significant under the ITE Manual. We conclude that
13 remand is warranted for the city to address this issue.

14 Petitioner also challenges under this assignment of error a finding that appears to
15 embody an alternative basis for concluding that the TPR is satisfied. The city noted that four
16 years ago the city adopted an ordinance that applied the DCO and its sub-areas to the
17 downtown area, and that ordinance was supported by a finding that “all required public
18 facilities and services either exist or will be provided concurrent with development.” Record
19 21. Based on that referenced finding, the city concludes that “there was no change in
20 transportation impact by implementing the DCO, meaning there would be no impact in
21 changing the Property from CC to OHC.” *Id.* Petitioner argues, and we agree, that this
22 finding is not sufficient to demonstrate that the TPR is satisfied. It does not necessarily
23 follow from the fact that the DCO as a whole complied with the TPR when it was adopted

³ The challenged ordinance does not limit or condition the zone change to allow only the proposed fuel station or otherwise limit the size or types of uses allowed on the subject property.

1 four years ago that rezoning property from one DCO sub-area to another will not increase
2 traffic generation, compared to the prior configuration of sub-areas, if in fact the different
3 sub-areas have different standards that result in higher traffic generation potential.

4 The only other argument presented in the first assignment of error that warrants
5 discussion is petitioner's argument that the city's findings regarding the TPR and a "public
6 need" standard are inconsistent. However, similar issues are raised under the second and
7 third assignments of error, and we address the inconsistency argument under those
8 assignments of error.

9 The first assignment of error is sustained.

10 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

11 Under these assignments of error, petitioner argues that the city's findings of
12 compliance with three CMC criteria are inconsistent, and not supported by substantial
13 evidence.

14 **A. Inconsistency**

15 Petitioner contends that the city's findings addressing several criteria characterize the
16 subject property as essentially undevelopable under the CC sub-area. According to
17 petitioner, those findings conflict with the city's TPR findings, which as discussed above
18 conclude that the rezone from CC to OHC will not increase the traffic generative capacity of
19 the property. Petitioner contends that the city cannot have it both ways: either (1) the subject
20 property is undevelopable under the CC sub-area, and must be rezoned to OHC in order to be
21 developed, in which case the rezone will result in a net increase traffic compared to the CC
22 zone and thus potentially "significantly affect" transportation facilities under the TPR, or (2)
23 the rezone does not change the development potential of the property at all, in which case the
24 city's finding that the subject property is undevelopable under the CC sub-area is not
25 supported by substantial evidence, which undercuts the basis for concluding that the rezone
26 complies with other criteria.

1 The flaw in petitioner’s argument is that the city did not find that the subject property
2 is “undevelopable” under the CC sub-area or any words to that effect. CMC 16.88.160(D)(2)
3 is a text amendment standard requiring a finding that there is a “public need for the change.”

4 Petitioner cites to the following finding addressing CMC 16.88.160(D)(2):

5 “The public need for the change is evidenced by the fact that development has
6 not occurred on the Property over many years. The Property is located away
7 from the core area of the City and is on the edge of the OHC. The
8 amendments will make development and private investment on the Property
9 more attractive, and through private investment and redevelopment of the
10 Property, the downtown core will be enhanced. Without the amendments, the
11 attractiveness for the Property is diminished and the parcels are more likely to
12 remain undeveloped within the DCO, which will diminish the ability of the
13 downtown core to prosper. Accordingly, there is a public need for the
14 change.” Record 22.

15 Similarly, CMC 16.88.160(D)(4) requires a finding that the text amendment will “preserve
16 and protect the health, safety and general welfare of the residents in the community.” The
17 city’s findings addressing CMC 16.88.160(D)(4) state in relevant part that the change will
18 “facilitate development of underutilized land.” Record 22. In addressing Statewide
19 Planning Goal 9 (Economic Development), the city found that the amendment will “spur
20 development and commercial use of the Property, which will contribute to economic
21 development” of the city. Record 24.

22 However, fairly read, the above findings conclude that the subject property will be
23 more likely to be developed under the OHC sub-area, not that it is undevelopable under the
24 CC sub-area. There is no necessary contradiction or inconsistency in finding that the rezone
25 complies with the TPR, because it does not authorize uses with more traffic generative
26 capacity compared to the old zone, yet finding that the new zone will make it easier to
27 actually develop the property.

28 As explained above, where a local government determines that a zone change
29 complies with the TPR based on a comparison of uses allowed in the two zones, that
30 comparison is largely a hypothetical one, having little to do with actual development of the

1 property or whether the property is or is not likely to be developed under the old zoning. We
2 held above that the city’s analysis was insufficient to establish that no further inquiry is
3 necessary under the TPR. However, we disagree with petitioner that the city is on the horns
4 of a dilemma, and that on remand if it again concludes that the rezone does not increase the
5 traffic-generative capacity of the subject property that the city will necessarily undercut the
6 evidentiary basis for concluding that the rezone complies with the “public need” standard at
7 CMC 16.88.160(D)(2), the “health, safety and general welfare” standard at CMC
8 16.88.160(D)(4), or Statewide Planning Goal 9.

9 **B. Substantial Evidence regarding Public Need**

10 Under the third assignment of error, petitioner asserts a substantial evidence challenge
11 to the city’s finding that the CMC 16.88.160(D)(2) “public need” criterion is met because
12 the property “will not develop” under the CC sub-area. Petition for Review 22. According
13 to petitioner, the DCO with its sub-areas was first applied only four years ago, at the start of a
14 serious real estate recession. While the rezoning to the OHC sub-area may be useful to
15 facilitate the proposed fuel station, petitioner argues that there is no evidence or explanation
16 for why the property cannot be developed with other commercial uses under the CC sub-area.
17 For these reasons, petitioner contends that remand is necessary for the city to require
18 substantial evidence that there is a “public need” for the amendment.

19 As explained above, the city did not find that the subject property “will not develop”
20 under the CC sub-area, only that rezoning the property to OHC would facilitate or make it
21 easier to develop the property. Those findings are supported by testimony in the record.
22 Petitioner’s arguments are based on a mischaracterization of the city’s findings, and
23 accordingly do not provide a basis for reversal or remand.

24 The second and third assignments of error are denied.

1 **FOURTH ASSIGNMENT OF ERROR**

2 The city’s Transportation System Plan (TSP) calls for a future pedestrian crossing of
3 OR 99E in the vicinity of the subject property. That future pedestrian crossing is included in
4 TSP Table 5-1, among a list of financially constrained solutions that “can be funded using
5 existing revenue streams through the year 2030.” At the time the city issued its decision, it
6 was developing but had not yet adopted a OR 99E Corridor and Gateway Design Plan
7 (Gateway Plan) that identified the specific location of that future pedestrian crossing at S
8 Locust Street, approximately 100 feet from the subject property. The city’s traffic engineer
9 testified that while the Gateway Plan has not yet been adopted, the location of the pedestrian
10 crossing identified therein is consistent with and clarifies the TSP. Further, the engineer
11 stated that when a pedestrian crossing is constructed in this area it would affect site access for
12 the fuel station and would “trigger the need to convert the proposed site access to right-
13 in/right-out.” Record 346.

14 Petitioner argued below that a future pedestrian crossing at S Locust Street would
15 conflict with the proposed fuel station. The city’s findings do not specifically address the
16 future pedestrian crossing listed in TSP Table 5-1 or identified in the Gateway Plan.
17 However, there is a finding under CMC 16.88.160(D)(1), which requires that the city “shall
18 consider” the comprehensive plan in adopting a text amendment, that the “99E Corridor and
19 Gateway Design Plan is not yet adopted and is therefore not a criterion for this application.”
20 Record 22.

21 Petitioner argues that even though the Gateway Plan was not adopted and need not be
22 considered under CMC 16.88.160(D)(1), nonetheless the TSP itself calls for a future
23 pedestrian crossing in the vicinity of the subject property, and therefore the city is obligated
24 to consider and explain “why a pedestrian crossing in this area does not undermine the
25 justification and purpose for seeking the Amendments in the first place.” Petition for Review
26 24.

1 Respondents contend that the CMC 16.88.160(D)(1) obligation to “consider” the
2 comprehensive plan does not convert a future pedestrian crossing listed in a TSP table into a
3 mandatory approval consideration or criterion that requires specific findings to explain why
4 the pedestrian crossing would not undermine the justification of the zone change to OHC. At
5 best, respondents argue, under CMC 16.88.160(D)(1) the city is required to consider relevant
6 comprehensive plan language and balance such language against other relevant
7 considerations.

8 The city’s findings do not appear to “consider” the conflicts, if any, between uses
9 allowed under the OHC sub-area and a future pedestrian crossing in the area, as
10 contemplated by the TSP, or explain why such conflicts need not be considered for purposes
11 of CMC 16.88.160(D)(1). Based on the city engineer’s testimony, the only consequence may
12 be that when the pedestrian crossing is eventually constructed that access to the station must
13 be converted sometime in the future to right-in/right-out. However, because the city did not
14 appear to consider the question at all, and the decision must be remanded in any event under
15 the first assignment of error, remand is also warranted under this assignment of error for the
16 city to adopt findings considering the future pedestrian crossing listed in the TSP to the
17 extent it is relevant to the amendment, and balancing that consideration against other relevant
18 considerations, or explaining why no such consideration is required under CMC
19 16.88.160(D)(1).

20 The fourth assignment of error is sustained.

21 The city’s decision is remanded.