

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

4 LAWRENCE R. LOWERY, KELLY M. GILLARD,
5 ROBIN BEST, ERIN R. HOWELL,
6 ALISE L. MUNSON, ELMYR R. CULI,
7 ANAMARIA B. IOANIDE, PAUL VAN ORDEN,
8 DENA KAUFMAN, and KEVIN RETALIA,
9 *Petitioners,*

10
11 vs.

12
13 CITY OF PORTLAND,
14 *Respondent,*

15
16 and

17
18 BACK BRIDGE LOFTS LLC,
19 *Intervenor-Respondent.*

20
21 LUBA No. 2013-066

22
23 FINAL OPINION
24 AND ORDER

25
26 Appeal from City of Portland.

27
28 Lawrence R. Lowery, Kelly M. Gillard, Robin Best, Erin R. Howell, Alise L.
29 Munson, Elmyr R. Culi, Anamaria B. Ioanide, Paul Van Orden, Dena Kaufman and Kevin
30 Retalia, Portland, filed a joint petition for review. Paul Van Orden argued on his own behalf.

31
32 Kathryn S. Beaumont, Senior Deputy City Attorney, Portland, filed a joint response
33 brief on behalf of respondent. Linly Rees, Deputy City Attorney, Portland, argued on behalf
34 of respondent.

35
36 Andrew H. Stamp, Lake Oswego, filed a joint response brief and argued on behalf of
37 intervenor-respondent.

38
39 HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board Member;
40 participated in the decision.

41
42 AFFIRMED

11/20/2013

43
44 You are entitled to judicial review of this Order. Judicial review is governed by the
45 provisions of ORS 197.850.

1
2
3
4
5
6
7
8
9

NATURE OF THE DECISION

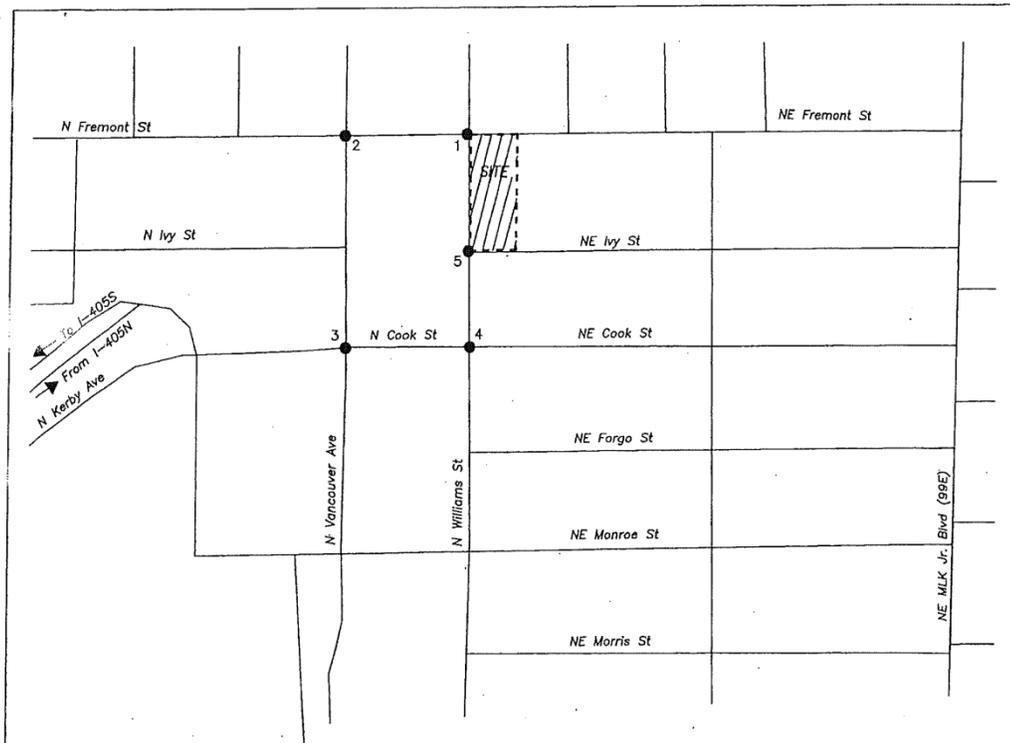
Petitioners appeal a city council decision that approves comprehensive plan and zoning map amendments to allow higher density residential mixed use development.

MOTION TO INTERVENE

Back Bridge Lofts, LLC, the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

A map from the record is included below.



10
11
12

Fremont is an east/west arterial; Williams is a north/south arterial.¹ The subject 34,000 square foot property is made up of six vacant lots that are located at the southeast

¹ N Williams and streets west of N Williams are North streets and streets east of N Williams are North East (NE) Streets. To simplify we have shorted the street names.

1 corner of the intersection of Fremont and Williams. In this location, Williams is a one-way
2 street north. Vancouver is a north/south arterial located one block west of Williams. In this
3 location, Vancouver is a one way street south, and provides access to Cook, an east/west
4 street located two blocks south of Fremont. Traveling west on Cook, Cook becomes Kirby,
5 which provides access to I-205 and Legacy Emmanuel Medical Center.

6 **FIRST ASSIGNMENT OF ERROR**

7 The Portland Zoning Code criteria for zoning map amendments are set out at Portland
8 City Code (PCC) 33.855.050. PCC 33.855.050(B) requires that there be adequate public
9 services for the development that would be allowed by the amendment. PCC
10 33.855.050(B)(2)(c) specifically addresses transportation system facilities, and requires that
11 the city find that there are adequate transportation system facilities to support the additional
12 uses that would be allowed by the new zoning district, or that those transportation facilities
13 will be adequate to support those uses when development is complete.² The last sentence of
14 PCC 33.855.050(B)(2)(c) recognizes that limits or mitigation may be needed to ensure
15 transportation facilities will be adequate.

16 To address PCC 33.855.050(B)(2)(c), the applicant submitted a traffic impact study
17 (TIS). Record 133-98. That study identified two intersections that, at certain times, either
18 currently fail to operate at acceptable levels of service, or are projected to fail to operate at
19 acceptable levels of service by the year 2035. Record 141-42. Those two intersections are
20 the Williams and Vancouver intersections with Cook, neither of which is currently

² PCC 33.855.050(B)(2)(c) provides:

“Public services for transportation system facilities are capable of supporting the uses allowed by the zone or will be capable by the time development is complete. Transportation capacity must be capable of supporting the uses allowed by the zone by the time development is complete, and in the planning period defined by the Oregon Transportation Rule, which is 20 years from the date the Transportation System Plan was adopted. Limitations on development level or mitigation measures may be necessary in order to assure transportation services are adequate.”

1 signalized. The city council found that (1) with traffic signals at those two failing
2 intersections, (2) a limit on the traffic that can be generated by the site until those
3 intersections are signalized and the signals are operational, and (3) a “minor signal timing
4 modification” at the Fremont/Vancouver intersection, PCC 33.855.050(B)(2)(c) is satisfied
5 and the challenged map amendments will have no significant effect on the transportation
6 system that might implicate further mitigation obligations under the Transportation Planning
7 Rule (TPR).³ The city council imposed conditions of approval to ensure that those steps are
8 taken.⁴

³ The city council’s findings include the following:

“As demonstrated in the TI[S], the net increase in trips generated by the potential development allowed as a result of the change in zoning of the subject property will not significantly impact the functionality of the existing transportation system, assuming the installation of traffic signals at the intersections of Vancouver/Cook, Williams/Cook and a minor signal timing modification at the intersection of Vancouver/Fremont. The analyzed intersections will function at the same level regardless of whether or not the development allowed with the zone change occurs. A condition of approval limiting site generated vehicle trips to the amount allowed under the current R1 zoning (32 multi-dwelling units) until funding for traffic signals at Vancouver/Cook Williams/Cook is approved ensures transportation facilities will be adequate to serve the site in addition to existing uses in the area. * * * Funding has been approved for the signal at Williams/Cook and the City is in the process of facilitating a source of funding for the Vancouver/Cook intersection.” Record 57-58.

⁴ The challenged decision imposes the following conditions of approval:

“3. Until traffic signals at the intersections of N. Williams Avenue/N. Cook Street and N. Vancouver Avenue/N. Cook Street have been funded, uses on the site under the RX zone are limited to a total of 25 new weekday p.m. peak hour trips. Square footage equivalencies are to be applied per Table 1 * * *. The applicant must submit a written verification at the time of building permit review that demonstrates per Table 1 * * * that all uses on the site, both existing and proposed, do not exceed a maximum net new weekday p.m. peak hour trip generation rate of 25 trips.

“4. Once the traffic signals required under Condition 3, above, are funded, the cap on maximum trip generation shall no longer apply to development on the site. However, neither a Temporary nor Final Certificate of Occupancy for development allowed under the RX zone will be issued until these traffic signals are installed and operational.” Record 62; Table 1 omitted.

Table 1 sets out assumed trip rates per square feet or per dwelling unit, for a number of land use categories, including Multi-Dwelling.

1 In their first assignment of error, petitioners claim the city council’s findings are
2 inadequate to demonstrate that the proposal complies with the PCC 33.855.050(B)(2)(c)
3 adequate transportation system standard and that the city council’s findings are not supported
4 by substantial evidence. However, in the arguments under the first assignment of error,
5 petitioners do not directly challenge the above quoted findings or the city’s reasoning in those
6 findings. Instead, for the most part, petitioners identify what they believe are a number of
7 inadequacies in the TIS. Respondent and intervenor-respondent (collectively respondents)
8 take the position that petitioners waived the right to raise issues regarding the alleged
9 inadequacies, because they failed to raise those alleged inadequacies before city.
10 Respondents also argue petitioners’ allegations are without merit and provide no basis for
11 remand even if they were not waived. We first address the parties’ waiver arguments, before
12 turning to their arguments on the merits.

13 **A. Waiver**

14 For quasi-judicial land use decisions, ORS 197.763(1) requires that any issues that are
15 raised in a LUBA appeal must have been raised before the city below.⁵ In appeals of such
16 decisions, ORS 197.835(3) specifically limits LUBA’s scope of review to issues that were
17 adequately preserved under ORS 197.763(1).⁶ ORS 197.835(4) sets out some circumstances
18 where a petitioner at LUBA may raise new issues for the first time at LUBA without having
19 first raised them below, but petitioners do not contend that ORS 197.835(4) applies here.

⁵ ORS 197.763(1) provides:

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

⁶ ORS 197.835 sets out LUBA’s scope of review. ORS 197.835(3) provides:

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

1 In their response brief, respondents contend petitioners did not sufficiently raise any
2 of the issues they raise in their first assignment of error. Response Brief 8. LUBA considers
3 waiver arguments to be a “new matter,” and routinely allows reply briefs under OAR 661-
4 010-0039 to allow petitioners to provide a written response to the waiver arguments. When a
5 reply brief is filed to respond to waiver arguments, the nature and scope of the issues that are
6 the subject of the waiver argument and petitioner’s position concerning where the issue was
7 raised in the record is typically clarified. That did not happen in this case, because petitioners
8 did not file a reply brief. Petitioners also did not respond to respondents’ waiver arguments
9 in their opening argument at oral argument in this case. Petitioners did not respond to the
10 waiver arguments until final rebuttal at oral argument. The Board therefore allowed
11 respondents an opportunity to respond in writing to the rebuttal portion of petitioners’ oral
12 argument and allowed petitioners an opportunity for final written rebuttal on the waiver
13 issues. Although LUBA prefers that petitioners respond to waiver arguments in a reply brief,
14 the procedure we have employed in this case also allows for clarification of the parties’
15 positions regarding waiver.

16 There was a good deal of confusion at oral argument concerning the pages of the
17 record that petitioners were relying on to respond to respondents’ waiver argument. It was
18 also not clear what issues petitioners believed were raised on the pages of the record they
19 cited. That was one reason we allowed additional briefing regarding waiver following oral
20 argument. Intervenor identified a number of pages in the record based on its review of the
21 recording of oral argument: Post Hearing Memorandum 1-2, n1. Petitioners do not identify
22 any additional record pages in their post-hearing memorandum, and we limit our
23 consideration to those pages of the record.

24 As we explained in *Graser-Lindsey v. City of Oregon City*, 56 Or LUBA 504, 510
25 (2008):

26 “ORS 197.763(1) and 197.835(3) require ‘fair notice to adjudicators and
27 opponents, rather than the particularity that inheres in judicial preservation

1 concepts.’ *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078
2 (1991). A petitioner adequately raises an issue under ORS 197.763(1) and
3 197.835(3) by citing the relevant legal standard, presenting argument that
4 includes the operative terms of the legal standard, or taking other actions to
5 raise the issue such that the city knows or should know that the issue is one
6 that needs to be addressed in its decision. *Reagan v. City of Oregon City*, 39
7 Or LUBA 672, 690 (2001).”

8 The pages in the record that petitioners cite, for the most part, raise general concerns and do
9 not refer specifically to applicable approval criteria and do not mention operative terms from
10 any approval criteria.⁷ Raising such generalized concerns below, without citing approval
11 criteria or employing the criteria’s operative terms, is not sufficient to preserve the right to
12 raise technical issues under the statewide planning goals, administrative rules or local land
13 use approval standards. *Cornelius First v. City of Cornelius*, 52 Or LUBA 486, 495 (2006)
14 (generalized arguments that commercial zoning is not justified are insufficient to preserve a right
15 to raise issues under Goal 9 (Economic Development) or the Goal 9 rule); *Spiering v. Yamhill*
16 *County*, 25 Or LUBA 695, 712 (1993) (no issue raised regarding the ORS 215.296 EFU zone
17 standards where the statute was not cited and none of the operative terms of the statute were
18 employed in petitioner’s arguments below); *ODOT v. Clackamas County*, 23 Or LUBA 370, 375
19 (1992) (general references to Goal 12 (Transportation) are insufficient to raise an issue under the
20 transportation planning rule).

21 With one exception—issue B(2) regarding the trip limit condition—the issues
22 petitioners raise under the first assignment of error were not raised sufficiently to give the city

⁷ Record 406-07 (taller buildings and lack of adequate off-street parking will make existing traffic conditions worse); 421 (design review will be inadequate to ensure development is compatible with the neighborhood); 545-46 and 553-54 (potential building mass will be out of character with existing neighborhood; signalization of two intersections will be inadequate to prevent traffic problem); 559-60 (taller permitted buildings will be out of character with neighborhood; existing traffic congestion will be made worse); 563 (opposed to higher density apartments with inadequate off-street parking); 661-62 (taller buildings out of scale with neighborhood and higher density will make traffic congestion worse); 626-27 (opposed to potential building height and mass; existing traffic congestion will be made worse); 660-61 (traffic signals will be inadequate; hearings officer’s condition limiting development until traffic signals are funded should be extended to require that signals be installed before the condition is lifted; additional building height and massing will negatively impact neighborhood); 663-65 (concerned about traffic, building height and density; light and privacy will be lost)

1 and other parties fair notice regarding the much more particular and specific issues they raise
2 under the first and second assignments of error. Those issues have been waived. However,
3 we address all of petitioners’ issues below on the merits to provide a more complete review
4 in the event of an appeal of our decision.

5 **B. Petitioners’ Arguments**

6 **1. Failure to Demonstrate Site Access Points Will Operate Within**
7 **Required Levels of Service**

8 The TIS examined five nearby intersections. The TIS did not identify where access
9 drives would be provided to provide access to the site from adjoining streets and did not
10 attempt to show that any such access drives would operate at particular levels of service
11 (LOS).⁸ Petitioners contend this failure was error.

⁸ The source of the city’s use of LOS to measure transportation facility performance is apparently the Metro Regional Transportation Plan (RTP). The RTP includes the following definition of LOS:

“Level of service (LOS)—A tool for evaluating system performance identifying deficiencies for roadways, transit and other motorized and non-motorized modes of travel. For example, roadway measures of level-of-service assign criteria based on volume-to-capacity ratios. A qualitative measure describing operational conditions within a traffic stream from a motorist’s point of view. A level of service definition describes conditions in terms of speed and travel time, freedom to maneuver, and traffic interruptions. LOS is rated on a scale of A through F:

“LOS Motor Vehicle Traffic Flow Characteristics

- “A Virtually free flow; completely unimpeded
- “B Stable flow with slight delays; reasonably unimpeded
- “C. Stable flow with delays; less freedom to maneuver
- “D High density but stable flow
- “E. Operating conditions at or near capacity; unstable flow
- “F Forced flow, breakdown conditions
- “>F Severe Congestion – demand exceeds roadway capacity, limiting volume that can be carried and forcing excess demand onto parallel routes and extending the peak period.

“Sources: 1985 Highway Capacity Manual (A through F descriptions)

1 Petitioners cite no legal authority for their position that a TIS must demonstrate that
2 access drives will operate at or above a specified LOS. Respondents contend that under
3 TRN-10.27—an administrative rule adopted by the Portland Bureau of Transportation—a
4 TIS must show that proposed development will not cause signalized intersections and stop-
5 controlled intersections to perform at below LOS D or E respectively.⁹ Respondents contend
6 that studying access drives in this case would be particularly problematic, since no specific
7 development was proposed as part of the application. In any event, respondents contend that

“Metro (>F Description)” RTP G-11 – G-12.

⁹ TRN 10-27 provides:

“For traffic impact studies required in the course of land use review or development, the following standards apply:

- “1. For signalized intersections, adequate level of service is LOS D, based on a weighted average of vehicle delay for the intersection.
- “2. For stop-controlled intersections, adequate level of service is LOS E. Level of service for two-way stop-controlled intersections is based on individual vehicle movement, and all-way stop controlled intersections is based on a weighted average of vehicle delay for the intersection.
- “3. An amendment or other land use application that requires analysis of traffic capacity and allows development that either (1) may cause a transportation facility to perform below the standards established in sections 1 and 2, or (2) adds vehicle trips to a facility that is already performing below the standards established in sections 1 and 2 may be approved if:
 - “a. Development resulting from the amendment or other land use application will mitigate the impacts of the amendment or other land use application in a manner that avoids further degradation to the performance of the facility by the time of development through one or more of the following:
 - “(i) the development is limited to result in no net increase in vehicle trips over what is allowed by the existing zoning; OR
 - “(ii) one or more combination of transportation improvements or measures are imposed to mitigate the transportation impacts of the amendment or other land use application in a manner that avoids further degradation to the performance of the facility by the time of any development.”

1 TRN-10.27 does not mention access drives, does not assign a minimum LOS for access
2 drives and does not require that a TIS consider access drives.

3 We agree with respondents. This subassignment of error is denied.

4 **2. Trip Limit Condition**

5 As already noted, the city imposed a condition of approval that limits new weekday
6 p.m. peak period trips to 25—the same number of trips that would result if the property were
7 developed under existing zoning. Under the hearings officer’s decision that condition was to
8 be lifted when the two signals were funded. Under the city council’s decision the condition
9 will be lifted when the two signals are installed. Petitioners contend the existence of this
10 condition is “an indication and recognition of the tenuous balance already existing in the
11 transportation systems.” Petition for Review 10. Petitioners go on to cite testimony by one
12 of the petitioners that he could not ever recall seeing a condition like this. Finally, petitioners
13 cited testimony by another of the petitioners that she has difficulty now backing out of her
14 driveway onto Fremont.

15 The issues concerning the trip limit condition were adequately raised below, and we
16 reject respondents’ contention that the issues were waived.

17 Even if the condition is accurately described as an indication of an already tenuous
18 traffic situation, it simply does not follow that there is anything improper about imposing the
19 trip limitation to address that concern. The fact that one of the petitioners has never seen a
20 condition like this does not mean the condition will not be effective to serve its intended
21 purpose, and neither does the petitioners’ differing view about whether the condition will be
22 effective to accomplish its intended purpose. And even if one of the petitioners currently has
23 difficulty backing onto Fremont, it does not follow from that fact that granting the requested
24 rezoning, as conditioned, violates PCC 33.855.050(B)(2)(c).

25 This subassignment of error is denied.

1 **3. Ivy Street Access**

2 Ivy Street adjoins the subject property on its southern boundary. Petitioners contend
3 access from the property to Ivy Street would be inconsistent with its functional classification,
4 leaving only Fremont and Williams as potential access streets for driveways to serve the
5 property.

6 Petitioners cite no legal authority for their position that access from the property onto
7 Ivy Street would be inconsistent with its local street functional classification. Respondents
8 contend that no access is proposed as part of this application onto any of the three streets.
9 Respondents argue that access to the subject property will be determined at the time of design
10 review or at the time a building permit is issued, and the decision concerning access will be
11 governed by PCC 17.28.110(D), which provides as follow:

12 “The Director of the Bureau of Transportation may refer any driveway permit
13 application to the City Traffic Engineer and/or the Oregon Department of
14 Transportation as appropriate, for a review of the location and width. The City
15 Traffic Engineer shall recommend such conditions and limitations regarding
16 the location and operation of driveways as are found necessary to insure the
17 safe and orderly flow of pedestrian, bicycles and vehicular traffic and preserve
18 on-street parking.”

19 Petitioners offer no response to respondents’ position that points of access will be
20 determined at the time of site review or development under PCC 17.28.110(D), which does
21 not preclude access onto local streets. And as far as we can tell, Ivy Street’s status as a local
22 street does not preclude access onto Ivy Street from the subject property.

23 This subassignment of error is denied.

24 **4. Dangerous Access onto Fremont and Williams**

25 Petitioners contend that traffic exiting the property onto Fremont will likely
26 experience long delays during the morning and evening peak hours, which will increase the

1 chance of “impatient drivers taking risky gaps to turn left from the site access” onto Fremont.
2 Petition for Review 9.¹⁰

3 Petitioners erroneously assume access driveways must operate at a predetermined
4 LOS and erroneously assume access to the property will be located on Fremont Street or
5 Williams Avenue, when no development is proposed as part of this application and no access
6 on either street is proposed.¹¹ Petitioners’ speculation about how turning movements might
7 be dangerous is not sufficient to demonstrate the decision violates the PCC
8 33.855.050(B)(2)(c) requirement that the transportation system be “capable of supporting the
9 uses allowed by the zone or will be capable by the time development is complete.”

10 **5. Timing Modification at the Fremont/Vancouver Signal**

11 The applicant’s TIS recommended that the Fremont and Vancouver intersections with
12 Cook be signalized and that “a minor signal timing modification at the intersection of
13 Vancouver/Fremont [be] required.” Record 145. The Portland Bureau of Transportation
14 (PBOT) reviewed the TIS and in a March 18, 2013 memorandum recommended that the
15 proposed rezoning be approved. Record 291-300. In support of the recommendation PBOT
16 found that the TIS was adequate to demonstrate that the proposed rezoning would not
17 significantly affect the existing transportation system, so long as the two intersections were
18 signalized and there was “a minor signal timing modification at the intersection of
19 Vancouver/Fremont.” Record 297. The city council adopted that finding as its own. Under
20 this subassignment of error, petitioners argue “[t]he City neglected to state whether traffic

¹⁰ Petitioners make no specific argument about Williams, aside from asserting the LOS standard likely will not be met.

¹¹ Intervenor points out that while some parking will likely be required under a recent amendment to the PCC, at the time this rezoning application was submitted, the Portland Zoning Code did not require any off-street parking and for that reason it should not be assumed that there will be any access from the property onto either Williams Avenue or Fremont Street.

1 signal timing can be altered at the N Vancouver Avenue/N Fremont Street intersection to
2 mitigate the traffic impacts from this Amendment.” Petition for Review 13.

3 If someone had raised a question about whether the signal can be modified, or for that
4 matter whether the two intersections can be signalized, PBOT and the city council likely
5 would have been required to address those questions. But that did not happen here. No one
6 raised any question before the city about whether the signal timing can be modified, and other
7 than to suggest it might not be possible, petitioners offer no reason in their petition for review
8 to suspect that the signal timing could not be modified. The city council was entitled to rely
9 on PBOT’s finding that the signal modification should be included in the required mitigation,
10 without adopting a specific finding that the signal in fact can be modified.

11 This subassignment of error is denied.

12 **6. TIS Mathematical Errors**

13 Petitioners contend the TIS does not constitute substantial evidence, because it
14 includes mathematical errors. We set out petitioners’ argument below:

15 “The TIS, trip assignment in Figures 4 and 5 * * * (R. 150-151) is less than
16 the trip generation for non-pass-by trips in Table 3 (R. 139). Figure 4 shows
17 131 ingress and 171 egress non-pass-by trips in the AM peak hour where
18 Table 3 shows 188 ingress and 190 egress non-pass-by trips. Figure 5 shows
19 123 ingress and 170 egress non-pass-by in the [PM] peak hour where Table 3
20 shows 171 ingress and 155 egress non-pass-by trips. Lancaster Engineering
21 used the trip assignments in Figures 4 and 5 * * * for the traffic analysis. The
22 missing motor vehicle trips affect the outcome of the traffic analysis.”
23 Petition for Review 12.

24 We display the figures petitioners allege in a format that makes it easier to compare them
25 below.

26

	Table 3	Figure 4	Figure 5
AM Ingress	188	131	
AM Egress	190	171	
PM Ingress	171		123
PM Egress	155		170

27

1 Table 3 in fact displays the trip numbers indicated above. Record 139. But Figures 4
2 and 5 do not display the trip numbers petitioners allege. Record 150-51. Rather they display
3 AM and PM distribution of site-generated trips through five intersections.¹² It is not clear to
4 us how petitioners arrived at the AM and PM trip numbers they allege are shown on Figures
5 4 and 5, because petitioners do not tell us how they arrived at those trip numbers. Stated
6 simply, petitioners have not established that in comparing the trip numbers on Table 3 and
7 the trip numbers they allege are shown on Figures 4 and 5 is comparing apples and apples.
8 Unless petitioners do that, the fact that the trip numbers are different could be explained for
9 any number of reasons.

10 It may be that petitioners are assuming all site-generated trips will pass through the
11 Fremont/Williams or Williams/Ivy intersections. Whatever petitioners' assumptions, and
12 even if petitioners are correct about the number of site-generated trips displayed on Figure 4
13 and 5, it may be that the Table 3 total ingress and egress trip numbers include some trips that
14 exit onto Fremont and travel east or arrive on Fremont from the east and enter the property
15 before reaching the Fremont/Williams intersection. If so, they would not pass through any of
16 the 5 intersections that were studied in the TIS and therefore would not be included in the
17 site-generated trips reflected on Figures 4 and 5. The same could be true for trips between
18 the site and eastern destinations via Ivy. That would potentially explain why the trip numbers
19 differ. There could be other explanations as well. Petitioners' argument regarding the
20 alleged TIS mathematical errors is simply not sufficiently developed to provide a basis for
21 reversal or remand of the decision.

22 This subassignment of error is denied.

¹² The map that was included earlier in this opinion displays the five intersections that were studied in the TIS.

1 **7. Reliance on Draft TIS That Lacked Two Appendices**

2 The TIS is a draft that was submitted with the application. It lacks the stamp of the
3 engineer who prepared it and the TIS lacks two appendices. One appendix was to include the
4 traffic warrants that show signals are needed at the Cook intersections with Williams and
5 Vancouver. The other appendix included technical support for the LOS figures included in
6 the TIS. Respondents point out the record establishes that the TIS was prepared by a licensed
7 traffic engineer and all parties in this appeal agree the Cook intersections with Williams and
8 Vancouver will require signals to allow the zoning change to be approved in compliance with
9 PCC 33.855.050(B)(2)(c). We agree with respondents that the lack of a stamp and the
10 missing warrants is not sufficient to render the TIS something other than substantial
11 evidence.

12 The missing technical support for the LOS figures is a different question. Had
13 petitioners raised the issue, we likely would feel differently about the missing technical
14 support for the LOS figures. The LOS figures are a critical part of the TIS and the missing
15 technical support might well have required remand, so that a final TIS with the missing
16 technical support could be included in the record. But the draft TIS with the missing
17 technical appendix was available throughout the local proceedings and an objection to the
18 missing technical appendix could have been raised at any time. Therefore, any issue
19 concerning the missing technical information is waived and cannot be raised for the first time
20 at LUBA.

21 This subassignment of error is denied.

22 The first assignment of error is denied.

23 **SECOND ASSIGNMENT OF ERROR**

24 Petitioners challenge the city’s findings regarding certain policies implementing Goal
25 2 of Portland’s comprehensive plan, which calls for the city to “expand[] opportunity for

1 housing and jobs, while retaining the character of established residential neighborhoods

2 * * *.”¹³ There are a number of policies under Goal 2, including the following:

3 **“2.1 Population Growth**

4 “Allow for population growth within the existing city boundary by providing
5 land use opportunities that will accommodate the projected increase in city
6 households by the year 2000.

7 **“2.2 Urban Diversity**

8 “Promote a range of living environments and employment opportunities for
9 Portland residents in order to attract and retain a stable and diversified
10 population.

11 **“2.9 Residential Neighborhoods**

12 “Allow for a range of housing types to accommodate increased population
13 growth while improving and protecting the city's residential neighborhoods.”¹⁴

14 **A. Waiver**

15 Respondents contend petitioners failed to raise any issue below with regard to these
16 plan policies. Response Brief 21-22. There was a great deal of testimony below about
17 whether the taller, more massive building that would be permitted under the approved map
18 designations would be incompatible with the adjoining neighborhood. Having raised those
19 issues, petitioners are entitled to challenge the city’s findings that address the compatibility of

¹³ The complete text of Goal 2 is set out below:

“Maintain Portland’s role as the major regional employment, population and cultural center through public policies that encourage expanded opportunity for housing and jobs, while retaining the character of established residential neighborhoods and business centers.”

¹⁴ Petitioners also cite Policy 1(B) of the Albina Community Plan. That policy is substantively similar to the Policies 2.1, 2.2 and 2.9 of the Comprehensive Plan and charges the city with ensuring “compatibility of new development with nearby housing” and fostering “complete neighborhoods that have service and retail businesses located within or conveniently near to them.” The city adopted similar findings addressing Comprehensive Plan Policies 2.1, 2.2 and 2.9 and addressing Albina Community Plan Policy 1(B). Record 23-24, 28-29. Petitioners do not differentiate in their arguments between Comprehensive Plan Policies 2.1, 2.2 and 2.9 and Albina Community Plan Policy 1(B). To avoid redundancy, we therefore limit our discussion to the city’s findings addressing Comprehensive Plan Policies 2.1, 2.2 and 2.9.

1 the building with the neighborhood. The issues raised under the third assignment of error
2 were adequately raised below. We reject respondents' waiver argument.

3 **B. The City's Balancing of Plan Policies**

4 In addressing Policy 2.1, the city found that whereas the existing Medium Density
5 Multi-Family plan designation for the property would allow 43 dwelling units per acre, the
6 Central Residential designation would allow 100 dwelling units and would "better address[]
7 the goal of accommodating the projected increase in households within the City's existing
8 boundaries." Record 23.¹⁵ In addressing Policy 2.2, the city found that the Central
9 Residential designation would encourage higher density, mixed use development, consistent
10 with that policy. *Id.*¹⁶ Finally, in addressing Policy 2.9, the city recognized that the 100 foot
11 height limit in the RX zone would permit much taller buildings than the adjoining R2 zone,
12 which has a 40 foot height limit. The city recognized that this large difference in maximum
13 height "has the potential to adversely impact the adjoining lower-density residential area."
14 To address this concern, the city imposed three conditions. First, the maximum 100 foot
15 building height that would otherwise be allowed under RX zoning was reduced. The

¹⁵ The city's Policy 2.1 findings are as follows:

"The proposed Central Residential designation will allow for an increase in the potential number of residential units that can be developed on this Site. As noted in the comments above, the existing Medium Density Multi-Family designation on the Site would allow maximum of 43 dwelling units per acre (up to 64 units per acre if the amenity bonus provisions are used, whereas the proposed Central Residential designation would allow over 100 dwelling units, assuming 900 square feet per unit, and 20 percent of the building's floor area being in commercial use). This increased residential density allowed under the proposed Central Residential designation better addresses the goal of accommodating the projected increase in households within the City's existing boundaries." Record 23.

¹⁶ The city's Policy 2.2 findings are as follows:

"The mixed residential and commercial development which is encouraged under the proposed Central Residential designation can help create an urban diversity along the nearby transportation corridors (N Williams Avenue, N Vancouver Avenue and NE Fremont Street) that are currently underdeveloped. The higher density and mixed use nature of development allowed under the proposed designation supports a more vibrant urban living environment that provides housing opportunities and commercial goods and services for those living in the area, all of which help activate the pedestrian environment." *Id.*

1 maximum building height would be stepped down from a maximum of 85 feet, at the
2 northwest corner of the site, to 65 feet in the center of the site, to 40 feet along the R2 zoned
3 area to the east. Record 23; 68. Second, the city required that development of the site be
4 subject to the more rigorous Type II Design Review, rather than the Community Design
5 Standards. And finally, while the RX zone does not have minimum building setbacks from
6 adjoining property, the city required that development of the subject property observe the RH
7 zone setbacks, which the city found to be “consistent with most other multi-dwelling zones.”
8 Record 24.¹⁷

¹⁷ The city’s Policy 2.9 findings are as follows:

“Arguments have been made that the increased height associated with the allowed density of the proposed Central Residential designation may not protect the city’s residential neighborhoods, and specifically the adjoining R2 zone located east of the Site. City Council agrees that the 100 foot height allowed in the corresponding RX zone of the Central Residential designation has the potential to adversely impact the adjoining lower-density residential area. To address this concern, City Council includes a condition of approval that caps the maximum allowed building heights below that permitted in the RX zone, with the allowed height stepping down towards the adjoining lower-density neighborhood to the east. These maximum heights will range from 85 feet in the northwest corner of the site; closest to the higher-density mixed-use Williams/Vancouver corridor, to 65 feet in the center of the Site, and tapering down to 40 feet closest to the adjoining R2 zone. The allowed heights are reflected in Exhibit I.30.

“To further protect the surrounding residential neighborhood, City Council has included an additional condition that requires future development on the site to be review through a discretionary Type II Design Review, rather than be allowed to use the Community Design Standards. Prior to applying for the Design Review, the Applicant will be required to complete a Design Advice Request. The requirements for both a Type II Design Review and a Design Advice Request promote early communication between the public and the Applicant, prior to any development occurring on the site, and subjects development on the site to a more rigorous design review process that cannot equally be achieved through use of the Community Design Standards.

“Additionally, City Council understands that the proposed RX zone does not require minimum building setbacks from adjacent properties. While the Design Review process provides the opportunity to require minimum building setbacks in order to meet the applicable design guidelines, this does not provide adequate certainty to adjacent property-owners. To provide the needed certainty, City Council will require the minimum side setbacks of the RH zone apply between development on the Site and the abutting R2 zoned properties. This condition will establish a minimum setback that is consistent with most other multi-dwelling zones.

“With these condition, City council finds that approval of the requested Central Residential designation will be equally or more supportive of this policy that the existing designation.” Record 23-24.

1 Petitioners focus exclusively on Comprehensive Plan Policy 2.9 and the portion of
2 Albina Community Plan Policy 1(B) that calls for new development to be compatible with
3 nearby housing, along with PCC 33.120.215, which sets out the purpose of height standards
4 in the city’s multi-dwelling Residential zones.¹⁸ Petitioners contend the maximum 85 foot
5 height at the corner of Fremont and Williams is even taller than the existing 75 foot tall
6 multi-dwelling building located one block north on Williams. Petitioners argue the much
7 taller, much more massive development that will be permitted under the new Central
8 Residential plan map designation and RX zoning negatively impact privacy in a historic
9 predominantly single family neighborhood. Petitioners contend that RX zoning is
10 incompatible and the rezoning fails to protect the housing in that neighborhood, in violation
11 of Policy 2.9 and Albina Community Plan Policy 1(B).

12 There are two problems with petitioners’ arguments under the second assignment of
13 error. First, a reasonable person could certainly take the position that the relatively significant
14 difference between the permitted maximum height limits in the adjoining R2 zone and the
15 proposed RX zone is such that the change in zoning will result in incompatibility with the
16 adjoining historic, primarily single family residential development to the east and fail to
17 “protect” that “residential neighborhood[,]” as Policy 2.2 and a portion of Albina Community
18 Plan Policy 1(B) require. While the drawings do not depict development exactly as it would
19 be permitted under the challenged decision, an idea of what that relationship might look like

¹⁸ PCC 33.120.215 provides:

- “A. **Purpose.** The height standards serve several purposes:
- “● They promote a reasonable building scale and relationship of one residence to another;
 - “● They promote options for privacy for neighboring properties; and
 - “● They reflect the general building scale of multi-dwelling development in the City’s neighborhoods.”

1 is shown in drawings at Record 415, 417 and 418. But in this context what it means to be
2 “compatible” and what it means to “protect” is somewhat subjective. The city council clearly
3 recognized that the difference in building height and mass could result in incompatibility and
4 leave the adjoining neighborhoods with inadequate protection. The city council’s reduced,
5 stepped-down height limits, enhanced design review and minimum setback conditions were
6 adopted to address that danger. Those measures are inadequate in petitioners’ view. But in
7 highly subjective matters like this, LUBA rarely is in a position to second guess a city
8 council’s judgment on such questions. We certainly cannot say the city council abused its
9 interpretive discretion in applying Policy 2.9. ORS 197.829(1).

10 Secondly, and perhaps more importantly, the city was not applying Policy 2.9 in a
11 vacuum. A large number of policies were evaluated, and the city’s findings addressing
12 Policy 2.9 were also adopted to address Policies 2.1 and 2.2, which call for a “range of living
13 environments and employment opportunities” and accommodating growth within existing
14 city boundaries. PCC 33.910.050 sets out the approval criteria for quasi-judicial
15 comprehensive plan map amendments. One of those criteria, PCC 33.810.050(A)(1)
16 provides:

17 “The requested designation for the site has been evaluated against relevant
18 Comprehensive Plan policies and on balance has been found to be equally or
19 more supportive of the Comprehensive Plan as a whole than the old
20 designation[.]”

21 Where comprehensive plan policies must be applied and are somewhat conflicting, as is the
22 case here, a balancing process of some sort is not only permissible, it may well be required.
23 *Waker Associates, Inc. v. Clackamas County*, 111 Or App 189, 194, 826 P2d 20. PCC
24 33.810.050(A)(1) simply requires that relevant policies be “considered and balanced.” *Welch*
25 *v. City of Portland*, 28 Or LUBA 439, 449 (1994). We have previously recognized that this
26 balancing process is “inherently subjective.” *McInnis v. City of Portland*, 25 Or LUBA 376,
27 384 (1993).

1 In the same contiguous block of findings that the city adopted to address Policy 2.9,
2 the city also addressed Policies 2.1 and 2.2, which the city found would be better
3 implemented by the higher density plan and zoning map designations it approved. Record
4 23-24. Petitioners neither acknowledge nor challenge these findings. We conclude the city's
5 findings demonstrate that it balanced Policies 2.1, 2.2 and 2.9 in reaching its ultimate
6 conclusion that the Central Residential and RX map designations are equally or better
7 supportive of these policies. We conclude the way the city council struck that balance was
8 well within its discretion.

9 The second assignment of error is denied.

10 **THIRD ASSIGNMENT OF ERROR**

11 In their final assignment of error, petitioners cite three comments by two city
12 councilors and the mayor and argue those comments show the decision was improperly based
13 on extra-record evidence and an improper basis. One city councilor stated higher density is a
14 partial answer to global warming. Another city councilor stated it was important to have the
15 affordable housing the proposal would generate. Petitioners contend there is no evidence in
16 the record to support either claim. Finally, the mayor expressed confidence that the
17 neighborhood and the applicant will be able to arrive at a "good outcome" through design
18 review. Petitioners contend the particular applicant and particular neighborhood have no
19 bearing on whether the approval criteria are satisfied.

20 As we have stated on many occasions, our review in an appeal of a land use decision
21 is limited to the written land use decision and we generally do not consider comments that
22 may have been made during the local proceedings unless those comments demonstrate error
23 in the written decision. *Allen v. Grant County*, 39 Or LUBA 232, 239 (2000); *Bruck v.*
24 *Clackamas County*, 15 Or LUBA 540, 542 (1987); *Citadel Corporation v. Tillamook County*,
25 9 Or LUBA 401, 404 (1983). There is nothing in the record, much less the city's written
26 decision, that even remotely suggests the two city councilors based their decisions on global

1 warming or a need for affordable housing, rather than the applicable approval criteria for the
2 disputed map amendments. In the case of the mayor's confidence regarding design review,
3 the city council imposed a condition calling for enhanced design review specifically to
4 address concerns under Policy 2.9 about possible neighborhood compatibility. The mayor's
5 expression of confidence that design review will be successful to achieve its intended
6 purpose is not error.

7 The third assignment of error is denied.

8 The city's decision is affirmed.