

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

3
4 ZIAN LIMITED PARTNERSHIP,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF TUALATIN,
10 *Respondent,*

11 and

12
13 CENTERCAL PROPERTIES, LLC
14 and CABELA’S WHOLESALE, INC,
15 *Intervenors-Respondents.*

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18 LUBA No. 2013-088

19
20 FINAL OPINION
21 AND ORDER

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23 Appeal from City of Tualatin.

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25 Seth J. King, Portland, filed the petition for review and argued on behalf
26 of petitioner. With him on the brief were Steven L. Pfeiffer and Perkins Coie
27 LLP.

28
29 Christopher D. Crean, Portland, filed a joint response brief and argued
30 on behalf of respondent. With him on the brief was Beery Elsner & Hammond
31 LLP.

32
33 Steven P. Hultberg, Portland, filed a joint response brief and argued on
34 behalf of intervenor-respondent CenterCal Properties LLC. With him on the
35 brief were Christe C. White and Radler White Parks & Alexander LLP.

36
37 R. Gibson Masters, Portland, filed a joint response brief on behalf of
38 intervenor-respondent Cabela’s Wholesale, Inc. With him on the brief was K
39 & L Gates LLP.

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

AFFIRMED

03/04/2014

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

NATURE OF THE DECISION

Petitioner appeals a city council decision approving a master plan for redevelopment of a retail shopping center.

FACTS

The subject property consists of a 26-acre site currently developed with a number of buildings. The property is bounded by Interstate 5 on the east, SW Nyberg Street on the south, SW Martinazzi Avenue on the west, SW Boones Ferry Road to the northwest, and the Tualatin River on the north. The property is located within the city’s Central Urban Renewal Plan (CURP) sub-area and is subject to CURP goals and objectives.

Intervenor-respondent CenterCal Properties LLC (CenterCal) applied to the city for approval of a master plan to redevelop the subject 26 acres. The proposed redevelopment includes demolishing three existing buildings, retaining five existing buildings, and constructing six new buildings, along with access and public transportation improvements.

The city’s Transportation System Plan (TSP) provides for two future street improvements in or near the subject property: (1) a minor collector across the site, known as the “loop road,” that connects SW Nyberg Street, SW Martinazzi Avenue, and SW Boones Ferry Road; and (2) an extension of SW Seneca Street across SW Martinazzi onto the subject site. The proposed extension of SW Seneca Street crosses city owned property that is currently occupied by a city building, the former city council chambers, before reaching the portion of the site owned by CenterCal and subject to the master plan. The city building is served by an access driveway onto SW Martinazzi that also connects to the existing shopping center.

1 The city council conducted hearings on the application and, on August
2 26, 2013, adopted a resolution approving the master plan. The city’s decision
3 imposes a condition of approval that requires construction of the SW Seneca
4 Street extension, but states that the timing of construction will be determined in
5 a later public facilities review proceeding, which is not anticipated or required
6 to occur prior to removal of the former city council chambers building. With
7 respect to the loop road, the city’s decision approves an alignment and two-lane
8 section profile for the loop road. Petitioner, who owns property nearby,
9 appeals the city council’s decision to LUBA.

10 **MOTION FOR OFFICIAL NOTICE**

11 The city requests that LUBA take official notice of City of Tualatin
12 Resolution 5179-14, dated February 10, 2014, which approves with conditions
13 the public facilities to support the redevelopment authorized in the master plan
14 approval challenged in this appeal. The city states that it does not offer
15 Resolution 5179-14 for any evidentiary purpose, but solely to illustrate the
16 city’s arguments, discussed below, regarding the city’s multi-step development
17 review processes.

18 Petitioner does not object to the motion for official notice, and it is
19 granted for the limited purpose stated in the city’s motion.

20 **FIRST ASSIGNMENT OF ERROR**

21 The city council reviewed the proposed master plan for compliance with
22 the CURP goals and objectives. CURP Goal 5, objective (b) is to “[s]upport
23 the implementation of transportation improvements described in the
24 Transportation Element of the Tualatin Community Plan and [TSP].” As noted,
25 the city’s TSP provides for the future extension of SW Seneca Street across SW
26 Martinazzi through city owned property to connect with the subject site.

1 The city’s findings discuss whether the existing driveway into the city-
2 owned property would function adequately under full build-out of the master
3 plan, and ultimately conclude that:

4 “Based on a review of all of the traffic evidence in the record, the
5 City finds that the best operation and functional transportation
6 environment is achieved with a signalized extension of Seneca
7 Street and closure of the driveways south of City Hall and south of
8 the Council Building.

9 *“Based on the traffic information and testimony submitted, the*
10 *Council finds the Master Plan must include a condition that*
11 *Seneca Street extension be constructed to the standards of a*
12 *Minor Collector and a signal be placed at Seneca and SW*
13 *Martinazzi Avenue. The time of construction will be determined*
14 *through the public facilities decision process and is not anticipated*
15 *or required to occur prior to removal of the Council Chambers*
16 *building.” Record 643 (italics in original, underlining added).*

17 Accordingly, the city council imposed condition of approval F(a):

18 “The following transportation improvements are necessary for the
19 Master Plan (Goal 5):

20 “a. The Seneca Street extension to the Nyberg Rivers site with a
21 signal at SW Martinazzi Avenue constructed to the
22 standards of a Minor Collector Street. * * * The time of
23 construction will be determined through the public facilities
24 decision and is not anticipated or required to occur prior to
25 removal of the Council Chambers building.” Record 6.

26 Under the first assignment of error, petitioner challenges Condition F(a),
27 arguing that it is ineffective to ensure that the Seneca Street extension will ever
28 be constructed, and therefore ineffective at ensuring compliance with CURP
29 Goal 5, objective (b). According to petitioner, the city erred in failing to
30 require construction of Seneca Street prior to issuance of a building permit or
31 certificate of occupancy, or payment of a fee-in-lieu, or some other measure

1 that ensures that the extension is constructed and necessary facilities are in
2 place prior to full build out. Indeed, petitioner notes that under Condition F(a)
3 construction is not required to occur until the council chambers building is
4 removed. Petitioner argues that if the council chambers building is never
5 removed, the Seneca Street extension will never be constructed. Relatedly,
6 petitioner argues that the city’s findings are inconsistent, because the city
7 concludes that the Seneca Street extension is “necessary” to comply with
8 CURP Goal 5, objective b but does not impose conditions sufficient to ensure
9 that the extension will be built at the appropriate juncture, if at all.

10 The city and intervenors-respondents (together, respondents) argue that
11 petitioner misunderstands the role of a master plan approval. According to
12 respondents, a master plan is not a development permit, but rather a conceptual
13 plan that is the initial step in obtaining subsequent development approvals.

14 CURP F.4 provides that “[p]rior to approval of applications [within the
15 plan area], applicants will be required to submit and gain City approval of a
16 master plan governing development within the [area].” Thus, all subsequent
17 development reviews will be governed by the master plan. One of the
18 subsequent required development reviews, respondents argue, is public
19 facilities review. Tualatin Development Code (TDC) 74.110 provides in
20 relevant part that the “timing and extent” of public improvements are
21 determined by the City Engineer. TDC 74.140 provides that all public
22 improvements required by TDC chapter 74 “shall be completed and accepted
23 by the City prior to issuance of a Certificate of Occupancy.” TDC 74.430
24 authorizes the City Engineer to modify the scope, location or timing of public
25 improvements under certain circumstances. Respondents argue that, under the
26 city’s multi-step review process, the city did not err in finding that construction

1 of the Seneca Street extension is necessary to support improvements identified
2 in the TSP, but deferring the timing of construction to the public facilities
3 review conducted by the City Engineer. According to respondents, the public
4 facilities review process is sufficient to ensure that the timing and provision of
5 public improvements required by the master plan will comply with CURP Goal
6 5, objective (b).

7 We agree with respondents that petitioner has not demonstrated that
8 anything in the CURP or the TDC requires the city, in approving the master
9 plan, to determine the timing of the Seneca Street extension, or impose
10 additional conditions in order to ensure compliance with CURP Goal 5,
11 objective (b). Petitioner would have a much stronger argument if master plan
12 approval were the city's final development approval prior to seeking building
13 permits or an occupancy permit. But as we understand the city's development
14 processes, master plan approval is only the first of several required
15 development reviews. The TDC expressly requires that the timing of public
16 improvements be determined during the public facilities review process, not the
17 master plan process. The public facilities review process will require the
18 provision of the street improvements required by the master plan, under the
19 conditions and timing determined by the city engineer, as the TDC requires.
20 Under that scheme, the city did not err in failing to determine the timing of the
21 Seneca Street extension as part of master plan approval. For the same reasons,
22 the city's finding that the Seneca Street extension is necessary and its decision
23 to defer the timing of construction to public facilities review are not
24 inconsistent.

25 The first assignment of error is denied.

1 **SECOND ASSIGNMENT OF ERROR**

2 Petitioner argues that the city council misconstrued the applicable law in
3 concluding that the approved “loop road” is consistent with CURP
4 requirements, which call for a two-lane road with a center left turn lane.

5 As noted, the city’s TSP contemplates a loop road that connects SW
6 Nyberg Street and SW Martinazzi Street through the subject property. The
7 CURP describes the loop road in relevant part as follows:

8 “This street is identified as a minor collector and will have two
9 travel lanes and a center left turn lane. * * * This entire street will
10 be a special section, but will generally follow Street Section Cb
11 and be modified as specific areas warrant.” CURP 19.

12 CenterCal proposed, and the city council approved, a loop road with four
13 segments with somewhat different sections or profiles. The loop road begins as
14 a north/south driveway connecting the proposed shopping center to SW Nyberg
15 Street, makes a 90 degree turn to the west in front of the shopping center,
16 connects to the proposed SW Seneca Street extension, turns 90 degrees to the
17 north around the shopping center, and ultimately connects with Boones Ferry
18 Road. Each of four segments features two travel lanes, but none has a center
19 left turn lane.

20 The city council rejected petitioner’s argument that the proposed loop
21 road is inconsistent with the CURP, because it does not feature a center left
22 turn lane:

23 “Zian argued that the loop road is inconsistent with the [CURP]
24 because the Applicant has modified the entire loop road and the
25 loop road dos not include a center left turn lane. Zian argues that
26 these modifications are not limited to ‘specific areas.’ Second,
27 Zian argues that the Applicant has not provided any justification
28 for why these modifications are warranted. The City Council
29 rejects Zian’s arguments and adopts the following findings.

1 “First, the discussion at Page 19 of the [CURP] identifies the
2 ‘Loop Road’ in very general terms and was not based on any
3 specific master plan proposal. Based on the specific proposal
4 presented by the Applicant, the City Council concludes that the
5 changes to the Loop Road are warranted. * * * The City Council
6 finds that the phrase ‘as specific areas warrant’ does not prohibit
7 the City Council from making modifications to the entire road,
8 provided that there is a basis for those changes in each ‘specific
9 area’ where changes are proposed. For example, the connection at
10 A Street does not have a left turn lane. In this ‘specific area’ the
11 change is warranted because a left turn onto SW Boones Ferry is
12 not recommended by any of the transportation studies. Thus, there
13 is an adequate basis for not including a center left lane in this area.
14 The City Council finds that all of the changes to the Loop Road
15 proposed by the Applicant are warranted due to the specific
16 development proposal offered by the Applicant, existing or
17 planned development, and the Applicant’s traffic studies.” Record
18 661.

19 Petitioner contends that the city council’s interpretation is inconsistent
20 with the express language of the CURP description, and reversible under ORS
21 197.829(1)(a).¹ According to petitioner, the last sentence of the CURP
22 description, which authorizes the city to “modif[y] as specific areas warrant,” is
23 limited to modifications to Street Section Cb, and cannot plausibly be
24 interpreted to authorize the city to modify the mandatory center left turn lane
25 listed in the first sentence.

¹ ORS 197.829(1) provides in relevant part that LUBA

“shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless [LUBA] determines that the local government’s interpretation:

“(a) Is inconsistent with the express language of the comprehensive plan or land use regulation[.]”

1 Respondents argue, and we agree, that petitioner has not demonstrated
2 that the city council misconstrued the CURP loop road description. The
3 subject of the last sentence of that description is the “entire street.” The
4 authorization to “modif[y] as specific areas warrant” applies to the “entire
5 street,” and is not limited to Street Section Cb, as petitioner argues. The city
6 council’s interpretation that the last sentence authorizes the city to modify the
7 requirement for a center left turn lane in specific areas, if warranted, is entirely
8 plausible and must be affirmed under ORS 197.829(1)(a) and *Siporen v. City of*
9 *Medford*, 349 Or 247, 243 P3d 776 (2010). Under that interpretation, if all of
10 the segments or “specific areas” of the loop road warrant modifications, the city
11 council is authorized to modify the entire road. Petitioner does not dispute the
12 city’s conclusion that modifications are warranted for each of the four loop
13 road segments, and therefore for the entire road. Petitioner’s arguments do not
14 establish a basis for reversal or remand.

15 The second assignment of error is denied.

16 The city’s decision is affirmed.