

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

3
4 JAMES J. NICITA,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF OREGON CITY,
10 *Respondent,*

11 and

12
13
14 PROVIDENCE WILLAMETTE FALLS
15 MEDICAL CENTER,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2016-047

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from City of Oregon City.

24
25 James J. Nicita, Oregon City, filed the petition for review and argued on
26 his own behalf.

27
28 Carrie A. Richter, Portland, filed a response brief and argued on behalf
29 of respondent. With her on the brief were William K. Kabeiseman and Garvey
30 Schubert Barer.

31
32 Michael C. Robinson, Portland, filed a response brief and argued on
33 behalf of intervenor-respondent. With him on the brief were Seth J. King and
34 Perkins Coie LLP.

35
36 HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board
37 Member, participated in the decision.

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AFFIRMED

08/15/2016

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 an ordinance that approves comprehensive plan and zoning map amendments and a revised Master Plan to allow construction of, among other things, a medical office building and related parking.

MOTION TO INTERVENE

Providence Willamette Falls Medical Center (intervenor), the applicant below, moves to intervene on the side of respondent. No party opposes the motion and it is granted.

FACTS

Division Street is a north/south street that runs generally along the west side of intervenor’s medical center in Oregon City. Most of the medical center is located east of Division Street. Intervenor received Master Plan approval in 2012 to expand the medical center. Part of the approved 2012 Master Plan extends west of Division Street into a predominantly residential neighborhood. Record 218. The 2012 Master Plan approval authorized construction of two medical office buildings (MOBs). One of those MOBs (the east MOB) was to be located one block east of Division Street. The block between the east MOB and Division Street was to be developed as parking lot. The other MOB (the west MOB) was to be located west of Division Street.

Intervenor subsequently determined it only wished to construct one MOB. The 2015 Master Plan challenged in this appeal eliminates the east

1 MOB and authorizes a 35,000-square-foot west MOB, along with a larger
2 Master Plan area west of Division Street for parking.¹ Petitioner contends this
3 expanded parking area will require the destruction of six existing houses that
4 would not have been destroyed under the 2012 Master Plan. Simply stated,
5 petitioner contends the city's approval of a 35,000-square-foot west MOB with
6 associated parking, instead of requiring that intervenor eliminate the west MOB
7 and enlarge the east MOB violates city comprehensive plan goals and policies
8 to protect housing.

9 Intervenor contends the challenged decision expands the Mixed Use
10 Employment (MUE) comprehensive plan and zoning designations that
11 currently exist on the west side of Division street to include two houses that are
12 currently on land zoned Residential (R-6) and planned low density. Those two
13 houses along with three houses that are on property that is already planned and
14 zoned MUE, a total of five houses, will be removed to provide parking for the
15 west MOB, not six houses as petitioner contends. Record 43.

16 **FIRST ASSIGNMENT OF ERROR**

17 In his first assignment of error, petitioner argues the appealed ordinance
18 is inconsistent with a number of Oregon City Comprehensive Plan (OCCP)
19 Goals and Policies.

¹ The two MOBs approved in the 2012 Master Plan would have totaled 50,000 square feet.

1 **A. OCCP Goal 2.4**

2 OCCP Goal 2.4 provides:

3 “Provide a sense of place and identity for residents and visitors *by*
4 *protecting and maintaining neighborhoods* as the basic unit of
5 community life in Oregon City while implementing the goals and
6 policies of the other sections of the Comprehensive Plan.”
7 (Emphasis added.)

8 Petitioner argues “[t]he replacement of six houses with surface parking
9 lots would not protect and maintain the existing neighborhood west of Division
10 St., but rather damage it significantly.” Petition for Review 10. Petitioner
11 contends that the city’s “bunched findings * * * do not address this criterion.”
12 *Id.*

13 Petitioner refers to some of the findings the city adopted to support its
14 findings as “bunched,” by which petitioner means in some cases the city
15 adopted a single set of findings to address more than one similar
16 comprehensive plan goal or policy. Petitioner contends the city cannot
17 “bunch” its findings but cites no authority for that argument. We reject the
18 argument. *See Sattler v. City of Beaverton*, 41 Or LUBA 295, 301 (2002) (it
19 does not matter that findings are more responsive to one standard than another
20 so long as the findings are adequate to demonstrate the proposal complies with
21 both standards).

22 The findings the city adopted in support of its decision to approve the
23 proposal point out that the approved expansion of the Master Plan only affects
24 the .53-acre already zoned MUE and .5-acre zoned R-6 and planned Low

1 Density Residential, a total of approximately one acre. The findings go on to
2 explain:

3 “As shown on the zoning map below, a significant amount of land
4 on the west side of Division Street is within the MUE district.
5 Single-family homes are not a permitted use within the MUE
6 district and the three homes within the MUE zone are presently
7 legally nonconforming. The transition from a single-family
8 dwelling to the proposed use would allow the site to comply with
9 the permitted uses identified in MUE. The proposal provides
10 certainty that the three properties currently within MUE will be
11 developed with a parking lot and not a large medical office facility
12 which is 60 feet in height. The applicant proposed to limit the
13 medical office building to 2 stories in height and the Site Plan and
14 Design Review requirements of the Oregon City Municipal Code
15 assure that the proposed structure will be located near Division
16 Street, likely providing a buffer between the medical office
17 building and adjacent residential properties.

18 “* * * * *

19 “The application includes the consolidation of two medical office
20 buildings totaling 50,000 square feet into a single structure which
21 is approximately 35,000 square feet. The applicant indicated that
22 the intent of this modification is to improve patient access to the
23 West MOB while reducing parking impacts on McLoughlin
24 neighborhood streets by locating parking in proximity to the West
25 MOB. Moreover, the proposal will result in fewer traffic impacts
26 and less parking demand overall from buildout of the master plan
27 due to a net reduction of 15,000 sf of building space on campus
28 * * *. In addition, the increase in available parking near the
29 medical office building would likely decrease the amount of on-
30 street parking throughout the neighborhood, especially as the
31 facility grows with their master plan and existing on-site parking
32 is replaced with structures.

33 “The neighborhood is characterized by a mix of residential and
34 nonresidential uses. The proposal would replace 2 homes within
35 the R-6 single-family Dwelling District and 3 homes currently

1 within the Mixed Use Employment District. The mixture of homes
2 directly adjacent to nonresidential uses is common throughout the
3 neighborhood. The new facility would provide better access to
4 medical services and high wage jobs which would also benefit the
5 neighborhood and be consistent with the nearby character. This
6 goal is met.” Record 13-14.

7 The above findings give a number of reasons why the city believes the
8 proposal is consistent with the goal of “protecting and maintaining
9 neighborhoods[.]” Petitioner appears to argue that replacing the five existing
10 houses necessarily violates OCCP Goal 2.4 but offers no reason why the goal
11 must be interpreted in that way. It is apparent that the city commission does not
12 interpret OCCP Goal 2.4 in that manner, and instead interprets OCCP Goal 2.4
13 to be met, notwithstanding the loss of five existing houses, so long as the
14 proposal will otherwise protect and maintain the nearby neighborhood. That
15 implicit interpretation is adequate for review. *Alliance for Responsible Land*
16 *Use v. Deschutes Cty*, 149 Or App 259, 267-68, 942 P2d 836 (1997), *rev*
17 *dismissed* 327 Or 555, 971 P2d 411 (1998). On the merits, the city
18 commission’s interpretation is well within the deference it must be given under
19 ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776
20 (2010).

21 This subassignment of error is denied.

22 **B. OCCP Policy 7.1.12**

23 OCCP Policy 7.1.12 provides:

24 “Ensure that key public services, such as water and sewer; and key
25 public facilities such as police, fire, and *hospital structures have*

1 *the capability to back-up electricity during emergencies.”*
2 (Emphasis added.)

3 Petitioner contends the MOB qualifies as a hospital structure and the city
4 failed to list OCCP Policy 7.1.12 as an applicable standard and failed to adopt
5 any findings that establish that the MOB has the required back-up electricity.

6 The parties apparently read OCCP Policy 7.1.12 to require that hospitals
7 have a back-up source or supply of electricity. That is likely what the drafters
8 of OCCP Policy 7.1.12 intended, although the policy does not really say that.
9 For purposes of this opinion, we will assume the parties correctly understand
10 OCCP Policy 7.1.12.

11 The parties disagree over whether petitioner waived his right to raise an
12 issue in this appeal concerning OCCP Policy 7.1.12 by failing to raise that
13 issue below. Under ORS 197.763(1) and 197.835(3), LUBA review of quasi-
14 judicial land use decision generally is limited to issues that were raised below.
15 The waiver question depends on whether OCCP Policy 7.1.12 is an “applicable
16 criteri[on]. ORS 197.835(4)(a).² We therefore turn directly to that question.

17 Petitioner’s entire argument that a MOB qualifies as a hospital is:
18 “[g]iven the intent stated in [the] proposal and * * * findings that the intent of
19 the modification is purportedly to ‘improve patient access to the west MOD,’ it

² ORS 197.835(4)(a) provides a petitioner at LUBA may raise new issues that were not raised below if “[t]he local government failed to list the applicable criteria for a decision under ORS * * * 197.763(3)(b) * * *.”

1 seems quite apparent that the proposed West MOB is a “hospital structure.”
2 Petition for Review 11.

3 As far as we can tell, neither the OCCP nor the Oregon City Municipal
4 Code (OCMC) define “hospital” or “hospital structure.” Intervenor argues that
5 the “MUE zoning district separately lists “Hospitals” and “Medical and dental
6 clinics, outpatient; infirmary services” as permitted uses. Intervenor contends
7 there would not be any need for those separate listings if hospitals include
8 MOB. Absent a more developed argument from petitioner, we agree with
9 intervenor.

10 This subassignment of error is denied.

11 **C. OCCP Goal 10.1 and Policy 10.1.1**

12 OCCP Goal 10.1 and Policy 10.1.1 are set out below:

13 **“Goal 10.1 Diverse Housing Opportunities**

14 “Provide for the planning, development and
15 preservation of a variety of housing types and lot
16 sizes.

17 *“Policy 10.1.1*

18 “Maintain the existing residential housing stock in
19 established older neighborhoods by maintaining
20 existing Comprehensive Plan and zoning designations
21 where appropriate.” (Underscoring added; italics in
22 original.)

23 Petitioner contends the destruction of existing older housing that will be
24 necessary to develop additional parking for the MOB violates the above goal
25 and policy because it will not preserve or maintain those existing houses.

1 Petitioner also faults the city for not expressly considering whether the
2 neighborhood association’s suggestion that developing the MOB east of
3 Division Street is more consistent with the goal and policy.

4 With regard to OCCP Goal 10.1, intervenor summarizes the city
5 commission’s findings explaining the steps the city has taken to implement that
6 goal as follows:

7 “■ Adding 953 units through zone changes that increased
8 housing density

9 “■ Amending its zoning code to allow construction of one
10 accessory dwelling unit in every place where a single-family
11 dwelling is allowed

12 “■ Adopting cottage housing with density bonuses

13 “■ Granting building permits since October 1, 2002 for 2,438
14 dwelling units (2,136 single-family dwelling units, 253
15 townhouses, 23 accessory dwelling units, and 26 multi-
16 family units)

17 “■ Approving concept plans for the South End, Beaver creek,
18 and Park Place areas recently added to the City’s Urban
19 Growth Boundary, which plan for a total of 3,324 dwelling
20 units

21 “■ Adopting new mixed-use zones that allow for the potential
22 of 8,000 new dwelling units[.]” Intervenor-Respondent’s
23 Brief 17.

24 The city found that when all of these actions in furtherance of OCCP Goal 10.1
25 are considered, the loss of five existing dwellings to make way for MOB
26 parking, three of which are already located in the MUE zone and thus are
27 nonconforming uses, does not violate OCCP Goal 10.1. The city’s findings are

1 adequate to explain why it concluded the proposal does not violate OCCP Goal
2 10.1.

3 With regard to the OCCP Policy 10.1.1 of “maintaining existing
4 Comprehensive Plan and zoning designations *where appropriate*[,]” the city
5 commission adopted the following findings:

6 “The proposal includes expanding the Master Plan boundary by 6
7 properties including four within the MUE district (which include 3
8 homes) and two within the R-6 Single-Family Dwelling District
9 (which include 2 homes). The three homes within the MUE district
10 are currently zoned for medical office, and are a nonconforming
11 use. The proposal will allow the properties to transition to a
12 conforming use. As demonstrated above, the City has, on balance,
13 added a significant amount of new homes to compensate for the
14 potential removal of the homes.

15 *“It is not appropriate* to retain the existing structures because, as
16 pointed out above, a significant amount of land west of Division is
17 already designated MUE. The neighborhood is characterized by a
18 mix of residential and nonresidential uses. The proposal would
19 replace 2 homes within the R-6 single-family Dwelling District
20 and 3 homes currently within the Mixed Use Employment District.
21 The mixture of homes directly adjacent to nonresidential uses is
22 common throughout the neighborhood. In addition, none of the
23 homes are within a historic district or individually designed
24 historic structures and thus it is not necessary to retain the existing
25 structures. Lastly, a majority of the land on the west side of
26 Division is currently within the MUE district and thus there is no
27 context of which to retain the existing homes. The proposal will
28 result in fewer traffic impacts and less parking demand overall
29 from buildout of the master plan due to a net reduction of 15,000
30 sf of building space on campus * * *. In addition, the increase in
31 available parking near the medical office building would likely
32 decrease the amount of on-street parking throughout the
33 neighborhood, especially as the facility grows with their master

1 plan and existing on-site parking is replaced with structures. * * *”
2 Record 17-18. (Emphasis added.)

3 The above findings adopted to address both OCCP Goal 10.1 and Policy
4 10.1.1 give a number of reasons why the city commission concluded that
5 retaining the existing comprehensive plan and zoning designations was not
6 “appropriate,” within the meaning of OCCP Policy 10.1.1. Aside from
7 expressing reasons why he believes retaining those designation is appropriate,
8 petitioner does not directly challenge the city commission’s reasoning.

9 Finally, to the extent petitioner is arguing it was error for the city
10 commission to fail to address whether the neighborhood association’s proposal
11 to develop the MOB east of Division Street with ground floor parking is more
12 consistent with OCCP Goal 10.1 and Policy 10.1.1, intervenor argues, and we
13 agree, that nothing cited to us requires that the city commission select an
14 alternative that might be more consistent with OCCP Goal 10.1 and Policy
15 10.1.1 or explain why it determined not to select that alternative.

16 This subassignment of error is denied.

17 **D. OCCP Goal 10.2 and Policy 10.2.1**

18 OCCP Goal 10.2 and Policy 10.2.1 are set out below:

19 **“Goal 10.2 Supply of Affordable Housing**

20 “Provide and maintain an adequate supply of
21 affordable housing.”

22 *“Policy 10.2.1*

23 “Retain affordable housing potential by evaluating
24 and restricting the loss of land reserved or committed

1 to residential use. When considering amendments to
2 the Comprehensive Plan Land-Use Map, ensure that
3 potential loss of affordable housing is replaced.”
4 (Underscoring added; italics in original.)

5 Petitioner argues:

6 “If the number of lower-cost housing units in Oregon City is
7 inadequate to meet both current and projected needs of Oregon
8 City’s lower-income residents, then razing of six * * * older
9 homes for surface parking lots would be unlawful under this
10 provision because it would, rather, reduce the amount of
11 affordable housing. There is some evidence that at least one of the
12 six homes at issue is in fact affordable housing. * * *” Petition for
13 Review 14-15.

14 The city commission’s findings addressing OCCP Goal 10.2 and Policy
15 10.2.1 include the following:

16 “The development proposal entails expanding the Master Plan
17 boundary by approximately 1 acre for hospital associated uses
18 where there are currently five homes (two in the R-6 zone, and
19 three in the existing MUE zone). As demonstrated in the analysis
20 in Goal 10.1, the City has provided opportunities to allow an
21 increase in the number of dwelling units within Oregon City as
22 well as adopted standards which allow for smaller dwelling units
23 which will likely be lower in cost and is likely to make up for any
24 loss in affordable housing, to the extent that these housing units
25 contribute to the City’s existing affordable housing stock.” Record
26 18.

27 The above findings explain that to the extent the five dwellings to be
28 removed qualify as affordable housing, the city’s efforts to encourage
29 affordable housing will be adequate to make up for the small loss in affordable
30 housing that could result from the approved medical center expansion. The
31 findings go on to explain this conclusion is further supported by evidence that

1 housing costs in Oregon City are far less than in nearby jurisdictions.
2 Intervenor contends those findings are adequate to explain why the proposal is
3 consistent with OCCP Goal 10.2 and Policy 10.2.1 and that those findings are
4 supported by substantial evidence. We agree with intervenor.

5 This subassignment of error is denied.

6 The first assignment of error is denied.

7 **SECOND ASSIGNMENT OF ERROR**

8 Statewide Planning Goal 6 (Air, Water and Land Resources Quality)
9 provides in part: “All waste and process discharges from future development,
10 when combined with such discharges from existing developments shall not
11 threaten to violate, or violate applicable state or federal environmental quality
12 statutes, rules and standards.” Petitioner contends the MOB and related
13 parking that is made possible by the challenged comprehensive plan, zoning
14 ordinance and Master Plan amendments “will include a storm water drainage
15 system.” Petition for Review 17. The development will require Oregon
16 Department of Environmental Quality approval and petitioner appears to
17 suggest there is no evidence in the record that such approval will be
18 forthcoming or that the proposal can comply with Goal 6’s requirement that the
19 proposal not violate applicable state and federal environmental standards.

20 Intervenor argues, among other things, that petitioner’s concerns that the
21 proposed development will not comply with applicable state and federal

1 environmental standards is speculative and premature. The city adopted the
2 following findings addressing Goal 6:

3 “* * * The proposed zone change and comprehensive plan
4 amendment do not alter existing city protections provided by
5 overlays for natural resources, stormwater rules, or other
6 environmental protections which have been previously deemed
7 consistent with Statewide Planning Goal 6.” Record 24.

8 Intervenor points out that the challenged decision provides that the proposal
9 remains subject to the conditions of approval imposed in the 2012 Master Plan.
10 Record 11. The 2012 Master Plan requires that the proposal comply with the
11 city’s stormwater requirements. Record 322-24 (Conditions 10, 11, 12 and 26).
12 Intervenor contends that petitioner has not demonstrated that more is required
13 under Goal 6 at this post-acknowledgment plan and land use regulation
14 amendment stage. We agree with intervenor. *See Friends of the Applegate*
15 *Watershed v. Josephine County*, 44 Or LUBA 786, 802 (2003) (at post
16 acknowledgment stage local government only need show “it is reasonable to
17 expect that applicable state and federal environmental quality standards can be
18 met[,]” quoting *Salem Golf Club v. City of Salem*, 28 Or LUBA 561, 583
19 (1995).

20 The second assignment of error is denied.

21 **THIRD ASSIGNMENT OF ERROR**

22 In this assignment of error, petitioner contends the mayor made
23 statements at the February 17, 2016 hearing that establish that he is biased in
24 this matter against petitioner, thus depriving petitioner of the “impartial

1 tribunal” to which all parties to a quasi-judicial land use proceeding are entitled
2 under *Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d 23 (1973).
3 The specific statement that petitioner objects to arose following opponents’
4 request for a continuance at the February 17, 2016 city commission hearing.
5 The mayor apparently believed the requested continuance to be unwarranted
6 and frivolous and made the following statement before the vote to grant the
7 requested continuance:

8 “So, the only thing I have to say about this is that it is the same
9 thing, it just comes from a different source, which is all kind of
10 tied together. I think that this one came from Mr. Buss via the
11 McLoughlin Historic... or the McLoughlin Neighborhood
12 Association, which again, its ... and there’s a reason the banana is
13 on the table up here. Because I got sent something from an old
14 friend of mine who’s been in Oregon City raised eleven kids and
15 more than fifty-some grandkids. And it’s a term called ‘banana.’
16 Which means build absolutely nothing anywhere near anything.
17 And if we are going to make something happen in Oregon City,
18 we’ve got to get out of that mode of saying we’re going throw,
19 we’re going to stop any kind of progress that’s going to happen
20 here. I believe we got elected to get things done. And these kinds
21 of posturing and maneuvering doesn’t accomplish anything. So, I
22 would entertain the same motion on this.” Petition for Review 19.

23 The city argues that the above was merely an expression of frustration at what
24 the mayor viewed as an unnecessary procedural delay in adopting a final
25 decision and that it comes nowhere near establishing the “actual bias” that is
26 required under the Court of Appeals’ most recent analysis of the *Fasano*
27 “impartial tribunal” requirement, which the Court of Appeals has described as
28 “more hortatory than literal.” *Columbia Riverkeeper v. Clatsop County*, 267 Or

1 App 578, 598, 341 P3d 790 (2014), *quoting Eastgate Theatre Inc. v. Bd. of*
2 *County Comm’rs of Washington County*, 37 Or App 745, 753, 588 P2d 670
3 (1978).

4 It is not entirely clear to us that the mayor’s statement was directed
5 solely at the opponents’ request for a continuance. But in any event, we do not
6 agree the statement demonstrates that the city commissioner’s position on the
7 proposal was a product of bias instead of application of the applicable approval
8 criteria.

9 The third assignment of error is denied.

10 **FOURTH ASSIGNMENT OF ERROR**

11 Metro Urban Growth Management Functional Plan (UGM Functional
12 Plan) 3.07.820(a) requires that “[a] city or county proposing an amendment to a
13 comprehensive plan or land use regulation shall submit the proposed
14 amendment to the [Chief Operating Officer] at least 35 days prior to the first
15 evidentiary hearing on the amendment.” Petitioner contends the city failed to
16 give the notice to Metro that is required by UGM Functional Plan 3.07.820(a).

17 Intervenor contends petitioner failed to raise this issue below and
18 therefore has waived his right to challenge the adequacy of the city’s notice to
19 UGM Functional Plan 3.07.820(a). Intervenor contends this is so because
20 UGM Functional Plan 3.07.820(a) is not an “applicable criteri[on]” and the
21 issue could have been raised below. ORS 197.835(4)(a). We agree with
22 intervenor. The issue was not preserved for review.

1 Even if the issue had been preserved for review, apparently 35-day prior
2 notice was not initially given prior to the beginning of the planning
3 commission's initial November 9, 2015 public hearing on the proposal. But due
4 to concerns about the city's failure to give notice of the proposal to the
5 Department of Land Conservation and Development (DLCDD), that public
6 hearing was continued to November 30, 2015. On November 18, 2015, the
7 same date notice was given to DLCDD, the city gave notice to Metro of the
8 proposal and provided access to a copy of the proposal. Record 2868. The
9 continued public hearing on the proposal was continued a second time and
10 ultimately held 54 days after the November 18, 2015 notice to Metro, on
11 January 11, 2016. The planning commission recommended approval and a
12 hearing before the city commission was scheduled for February 17, 2016. As
13 we have already noted, at opponents' request, the February 17, 2016 city
14 commission hearing was continued to March 2, 2016 at which the city
15 commission voted to tentatively approve the application. The city commission
16 adopted its findings and final decision on April 6, 2015.

17 While the city's November 18, 2015 notice came after commencement of
18 the initial November 9, 2015 planning commission hearing in this matter, that
19 hearing was continued to a date 54 days after the November 18, 2015 notice to
20 Metro. We conclude that November 18, 2015 notice was adequate either to
21 comply with UGM Functional Plan 3.07.820(a), or to make any technical

1 noncompliance with UGM Functional Plan 3.07.820(a) a procedural error that
2 resulted in no prejudice to petitioner's substantial rights.

3 The fourth assignment of error is denied.

4 The city's decision is affirmed.