

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

4 OSKAR HESS, HOWARD DIETZ, and)
5 DOROTHY DIETZ,)
6)
7 Petitioners,) LUBA No. 92-051
8)
9 vs.) FINAL OPINION
10)
11 CITY OF PORTLAND,)
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 Respondent.

16 Appeal from City of Portland.

18 J. Milford Ford, Portland, filed the petition for
19 review and argued on behalf of petitioners. With him on the
20 brief was Allen, Fellows, Livingston & Greif.

22 Kathryn Beaumont Imperati, Portland, filed the response
23 brief and argued on behalf of respondent.

25 SHERTON, Referee; HOLSTUN, Chief Referee; KELLINGTON,
26 Referee, participated in the decision.

28 AFFIRMED 06/17/92

30 You are entitled to judicial review of this Order.
31 Judicial review is governed by the provisions of ORS
32 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city council order denying their
4 application for a comprehensive plan and zoning map
5 amendment.

6 **FACTS**

7 The challenged decision describes the site of the
8 proposed plan and zone map amendment as follows:

9 "This site encompasses approximately 1,200 feet of
10 frontage along the north side of S.E. Division
11 Street, from 87th on the west to halfway between
12 90th and 92nd on the east. It includes 16 lots in
13 14 different ownerships. Along its entire length,
14 Division is a highly diverse mix of uses,
15 including both single [family] and multifamily
16 residential, commercial and some industrial uses.
17 In many areas, including this one, the uses are
18 immediately adjacent to each other * * *."
19 Record 68.

20 The entire site is designated and zoned Townhouse
21 Multi-Dwelling (R3). Property abutting the site to the
22 north is also designated and zoned R3 and is in residential
23 use. Property adjoining the site to the east and west is
24 designated and zoned General Commercial (CG) and is in
25 commercial use. Property to the south of the site, across
26 S.E. Division Street, is in diverse commercial and
27 residential uses. Portions of the property to the south are
28 designated and zoned R3, CG and Neighborhood Commercial
29 (CN2). Record 69.

30 Petitioners and other property owners applied for a
31 comprehensive plan and zoning map amendment for the site

1 from R3 to CG. No changes in existing development are
2 proposed as part of the application. The city denied the
3 application.

4 **FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR**

5 In these assignments of error, petitioners contend the
6 city's decision to deny their application for comprehensive
7 plan and zone map amendments is not supported by adequate
8 findings or substantial evidence in the whole record.

9 It is the applicant's burden to establish compliance
10 with the applicable approval standards. Sunnyside
11 Neighborhood v. Clackamas Co. Comm., 280 Or 3, 18, 569 P2d
12 1063 (1977). The city cannot approve a comprehensive plan
13 or zone map amendment unless each applicable approval
14 standard is satisfied. Accordingly, this Board must sustain
15 the city's decision denying the proposed amendments if the
16 decision demonstrates that one or more applicable standards
17 are not met. Seeger v. City of Portland, ___ Or LUBA ___
18 (LUBA No. 92-056, June 10, 1992), slip op 7; Garre v.
19 Clackamas County, 18 Or LUBA 877, 881, aff'd 102 Or App 123
20 (1990).

21 In addition, to overturn a city determination that
22 applicable approval standards are not met, on evidentiary
23 grounds, it is not sufficient for petitioners to show that
24 there is substantial evidence in the record to support their
25 position. Rather, the evidence must be such that a
26 reasonable trier of fact could only say petitioners'

1 evidence should be believed. Adams v. Jackson County, 20
2 Or LUBA 398, 403 (1991); Morley v. Marion County, 16 Or LUBA
3 385, 193 (1988); Weyerhauser v. Lane County, 7 Or LUBA 42,
4 46 (1982). In other words, petitioners must demonstrate
5 that they sustained their burden to establish compliance
6 with applicable approval standards as a matter of law.
7 Jurgenson v. Union County Court, 42 Or App 505, 510, 600 P2d
8 1241 (1979); Adams v. Jackson County, supra; Van Mere v.
9 City of Tualatin, 16 Or LUBA 671, 683 (1988).

10 **A. Comprehensive Plan Map Amendment**

11 The city's comprehensive plan and land use regulations
12 have been acknowledged by the Land Conservation and
13 Development Commission pursuant to ORS 197.251. ORS
14 197.175(2)(d) provides that a local government must make
15 land use decisions "in compliance with [its] acknowledged
16 plan and land use regulations." The city's plan includes
17 Policy 10.6 (Amendments to the Comprehensive Plan Map),
18 which provides as relevant:

19 " * * For quasi-judicial amendments, the burden
20 of proof for the amendment is on the applicant.
21 The applicant must show that the requested change
22 is: (1) Consistent and supportive of the
23 appropriate Comprehensive Plan Goals and Policies,
24 (2) Compatible with the land use pattern
25 established by the Comprehensive Plan Map,
26 (3) Consistent with the Statewide Land Use
27 Planning Goals, and (4) Consistent with any
28 adopted applicable area plans adopted as part of
29 the Comprehensive Plan.

30 " * * * * "

1 The challenged decision finds that the proposed plan
2 map amendment fails to satisfy each of the four above quoted
3 approval standards established by Policy 10.6. Record
4 74-75. We address standard (4) first.

5 The city's decision concludes the proposed plan
6 amendment conflicts with the Hazelwood Community Plan (HCP).
7 There is no dispute that the HCP is an "area plan" which has
8 been adopted as part of the comprehensive plan. However,
9 petitioners argue the HCP should not be applied because city
10 planning staff failed to mention it at a pre-application
11 conference with the applicants. Petitioners also argue the
12 HCP should not be applied to properties west of Interstate
13 Highway 205, because such properties are not really part of
14 the Hazelwood neighborhood.

15 The HCP includes a map which establishes its
16 boundaries. HCP Map 2. That map indicates the subject site
17 is within the boundaries of the HCP. Petitioners' arguments
18 that areas west of I-205 should not be considered part of
19 the Hazelwood neighborhood might provide a reason for
20 amending the HCP boundary in the future, but do not alter
21 the area to which the HCP is presently applicable. In
22 addition, petitioners cite no legal authority to support
23 their contention that failure to mention the HCP at the pre-
24 application conference should result in the HCP not being
25 applicable to the subject application, and we are aware of
26 none. We conclude the proposed plan amendment must be

1 consistent with the HCP.

2 The city's decision finds the proposed plan amendment
3 is inconsistent with the following HCP objectives and
4 policies:

5 " * * * Objective A is to 'preserve and improve the
6 liveability of established neighborhoods.'
7 Testimony at the hearing indicates that operation
8 of [an illegal business] is already having an
9 adverse impact on the neighborhood. Designation
10 of the entire site for a broad range of commercial
11 uses would cause further commercial encroachment
12 into the established residential neighborhood.

13 "Objective C would 'encourage infill residential
14 development compatible with the surrounding area.'
15 This is what [petitioner] Hess is doing by
16 building the duplex on one of the lots included in
17 this site. * * *

18 "Objective F reads 'discourage the expansion of
19 strip commercial development and encourage
20 cohesive and functional shopping areas.' This
21 proposal would foster strip development by
22 creating an unbroken stretch of commercial zoning
23 on the north side of Division from 82nd to 92nd.

24 " * * * * *

25 "Policy 2, Arrangement of Land Uses, specifies
26 appropriate locations for commercial nodes. This
27 area is not one of the specified areas.

28 "Policy 3, Housing Location, does indicate this
29 location as appropriate for medium density
30 multi-dwelling [R3] zoning, based on the
31 locational requirements listed in the policy.
32 * * *"¹ Record 75-76.

¹The decision also includes the following finding that HCP Objective G is not implicated by the proposed plan amendment:

1 With regard to Objective A, petitioners contend there
2 is no evidentiary support for the city's finding of
3 inconsistency. Petitioners argue the "overwhelming
4 testimony" below was that the existing commercial uses
5 within the subject site have had an overall beneficial
6 effect on the surrounding neighborhood. Petition for
7 Review 44.

8 Petitioners do not explain why the city's findings on
9 the other HCP objectives and policies are inadequate or
10 unsupported, but rather incorporate into their petition for
11 review arguments submitted below concerning these HCP
12 provisions. Record 92-94. With regard to Objective C,
13 petitioners simply contend that infill residential
14 development of the site would not be compatible with the
15 commercial nature of the surrounding area. Record 92-93.
16 With regard to Objective F, petitioners concede the proposal
17 would expand strip commercial development along the north

"Objective G [is 'to allow] businesses and offices to continue to exist along arterials without becoming nonconforming uses.['] This proposal would remove the nonconforming use status of the existing business[es] by allowing commercial zoning. However, the legally established businesses are already nonconforming; retaining the existing zoning does not make any additional businesses become nonconforming." Record 76.

We understand petitioners to contend that the proposed plan amendment is actually supportive of Objective G because it would remove nonconforming status from existing businesses and would allow development of commercial businesses on the remaining lots within the site. However, we agree with the city that Objective G has no applicability to a proposed plan map amendment where businesses are already nonconforming uses under the existing plan designation and zone.

1 side of Division, but argue that the property along this
2 arterial is best utilized for strip commercial development
3 and, therefore, should be given an exception to Objective F.
4 With regard to Policy 2, petitioners argue that the policy
5 only "encourages" commercial businesses to be located at the
6 specified commercial nodes, but does not prohibit their
7 being located elsewhere. Petitioners do not address
8 Policy 3.

9 Taken together, the HCP objectives and policies
10 discussed above establish that (1) commercial uses are
11 discouraged at the subject location; (2) strip commercial
12 development is generally discouraged; (3) the subject site
13 satisfies locational requirements for the existing R3 plan
14 designation and zoning; (4) infill residential development
15 is encouraged; and (5) the livability of established
16 neighborhoods must be preserved and improved. With regard
17 to (5) (Objective A), we have reviewed the evidence in the
18 record cited by the parties and find there is conflicting
19 evidence with regard to whether the proposed amendment would
20 adversely affect the livability of the established
21 residential neighborhood to the north. Therefore, we cannot
22 say petitioners have established compliance with Objective A
23 as a matter of law. Additionally, petitioners' arguments
24 concerning the other HCP objectives and policies provide no
25 basis for concluding the proposed R3 to CG plan map
26 amendment for the subject site is consistent with the HCP as

1 a matter of law.

2 This subassignment of error is denied.

3 **B. Zone Change**

4 The proposed zone change to CG is dependent on approval
5 of a plan map amendment to CG for the subject site. In the
6 preceding subassignment, we sustain the city's denial of the
7 plan map amendment. This requires that we sustain denial of
8 the zone change as well.

9 This subassignment of error is denied.

10 The first through third assignments of error are
11 denied.

12 **FOURTH ASSIGNMENT OF ERROR**

13 Petitioners contend procedural errors by the city
14 prevented them from having an adequate opportunity to
15 address the city's "no net housing loss" approval criterion
16 for plan map amendments from a residential designation to a
17 commercial designation.² However, under the first through
18 third assignments of error above we sustain the city's
19 decision to deny the proposed plan map amendment on an
20 independent basis. Therefore, no purpose would be served by
21 considering this assignment of error.

22 The fourth assignment of error is denied.

²The "no net housing loss" requirement is an approval standard for certain plan map amendments established by plan policy 10.6, other provisions of which are discussed in the text, supra.

1 **FIFTH ASSIGNMENT OF ERROR**

2 Petitioners contend comments made by three city council
3 members during city council deliberation on petitioners'
4 application indicates the city council's denial of the
5 proposed plan and zone map amendments is based, at least in
6 part, on improper bases. According to petitioners, the
7 council members' comments indicate they believed they should
8 defer taking any action to amend the plan and zone maps for
9 the subject site until a broader based review of the entire
10 area is conducted during the next year.

11 This Board has held on numerous occasions that the land
12 use decision reviewed in an appeal before LUBA is the final
13 written decision, not what individual parties, staff or
14 members of the decision making body may have stated during
15 the course of the proceedings below. Gray v. Clatsop
16 County, ___ Or LUBA ___ (LUBA Nos. 90-167 and 90-168,
17 November 4, 1991), slip op 31; Gruber v. Lincoln County, 16
18 Or LUBA 456, 460 (1988); Bruck v. Clackamas County, 15
19 Or LUBA 540, 542 (1987); Oatfield Ridge Residents Rights v.
20 Clackamas Co., 14 Or LUBA 766, 768-69 (1986); Citadel
21 Corporation v. Tillamook County, 9 Or LUBA 61, 67 (1983).

22 Here, the allegedly improper basis for denying the
23 proposed plan and zone map amendments is not included in the
24 final, written decision appealed to this Board.
25 Petitioners' argument, therefore, provides no basis for
26 reversal or remand of the city's decision.

1 The fifth assignment of error is denied.

2 The city's decision is affirmed.