

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

3
4 TED LAMM and ELIZABETH LAMM,)
5)
6 Petitioners,)
7)
8 vs.)
9) LUBA No. 94-129
10 CITY OF PORTLAND,)
11) FINAL OPINION
12 Respondent,) AND ORDER
13)
14 and)
15)
16 BABLER BROS., aka P.I.P.E., INC.,)
17)
18 Intervenor-Respondent.)

19
20
21 Appeal from City of Portland.

22
23 Jack Orchard, Portland, filed the petition for review
24 and argued on behalf of petitioners. With him on the brief
25 was Ball, Janik & Novack.

26
27 Peter Kasting, Deputy City Attorney, Portland, filed a
28 response brief and argued on behalf of respondent.

29
30 William C. Cox, Portland, filed a response brief and
31 argued on behalf of intervenor-respondent.

32
33 KELLINGTON, Referee; HOLSTUN, Chief Referee; SHERTON,
34 Referee, participated in the decision.

35
36 REMANDED 01/03/95

37
38 You are entitled to judicial review of this Order.
39 Judicial review is governed by the provisions of ORS
40 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal an order of the city council
4 eliminating a condition of approval, requiring the
5 construction of improvements to NE Grand Avenue, from 1989
6 and 1973 conditional use permits and 1975 and 1980 zone
7 changes affecting the subject property.

8 **MOTION TO INTERVENE**

9 Babler Bros., aka P.I.P.E., Inc., the applicant below,
10 moves to intervene on the side of respondent in this appeal
11 proceeding. There is no objection to the motion, and it is
12 allowed.

13 **FACTS**

14 The challenged decision states the following facts:

15 "Applicant requests the deletion of a condition of
16 approval in all four of the following decisions:
17 (1) a conditional use for a fill as Condition B.
18 of Case CU-17-89 in the Hearings Officer's
19 Decision of April 26, 1989; (2) another
20 conditional use for a fill as Condition 3 of
21 CU 63-73 in the City Council's decision of
22 September 4, 1973; (3) a zone change as
23 Condition B of Ordinance No. 139442 * * * of
24 February 5, 1975; and [(4)] another zone change as
25 Condition 1 of Ordinance No. 149396 * * * of
26 April 9, 1980. All four of these conditions
27 required improvements to portions of the NE Grand
28 Avenue right-of-way. At the time of these
29 decisions the unimproved portion of NE Grand
30 Avenue was the site's only access to NE Columbia
31 Boulevard. * * * The approval criteria for this
32 review are those for Base Zone Changes found in
33 [Portland City Code (PCC)] 33.855.050 * * *.

34 "The site is a 24-acre parcel on the north side of

1 NE Columbia Boulevard. The [west] side of the
2 site borders an unimproved section of NE Grand
3 Avenue. The north part of the site borders the
4 Columbia Slough. The portion near the slough is
5 quite steep. The back side of the slough is
6 actually a levee, but this is not evident because
7 landfill dumping has back-filled against the south
8 side of the levee. Most of the site is a vacant
9 capped demolition debris landfill that is used for
10 storage of pre-cast concrete products. The
11 concrete is cast in an existing facility on the
12 east end of the site." Record 4.

13 The hearings officer conducted a public hearing on the
14 proposal to eliminate the disputed conditions of approval
15 and, thereafter, approved the request. Petitioners appealed
16 the hearings officer's decision to the city council. After
17 a public hearing on the matter, the city council affirmed
18 the decision of the hearings officer, and this appealed
19 followed.

20 **PRELIMINARY ISSUES**

21 **A. Scope of Review**

22 Intervenor contends the challenged decision is a
23 limited land use decision, not a land use decision.
24 ORS 197.015(12) defines "limited land use decision," in
25 relevant part, as:

26 "[A] final decision or determination made by a
27 local government pertaining to a site within an
28 urban growth boundary which concerns:

29 * * * * *

30 "(b) The approval or denial of an application
31 based on discretionary standards designed to
32 regulate the physical characteristics of a
33 use permitted outright, including but not

1 limited to site review and design review."

2 As relevant, ORS 197.015(10)(a)(A) defines "land use
3 decision" as:

4 "A final decision or determination made by a local
5 government * * * that concerns the adoption,
6 amendment or application of:

7 "* * * * *

8 "(iii) A land use regulation[.]

9 "* * * * *"

10 ORS 197.015(10)(b) establishes exceptions to the
11 ORS 197.015(10)(a) definition of "land use decision." One
12 of those exceptions is a limited land use decision.
13 ORS 197.015(10)(b)(C).

14 The challenged decision eliminates conditions of
15 approval requiring certain improvements to NE Grand Avenue.
16 There is no dispute that elimination of the conditions of
17 approval requires city review under PCC standards regulating
18 zone changes. Thus, the challenged decision is not subject
19 only to standards simply regulating the physical
20 characteristics of a use permitted outright, as is required
21 for it to be a limited land use decision. Therefore, the
22 challenged decision is, by definition, not a limited land
23 use decision. See *Fechtig v. City of Albany*, 130 Or
24 App 433, ___ P2d ___ (1994).

25 The challenged decision applies the PCC zone change
26 standards. The PCC is a land use regulation. Therefore,
27 the challenged decision is a land use decision.

1 **B. Raise It or Waive It**

2 The city and intervenor argue petitioners waived their
3 right to raise certain issues before this Board, because
4 those issues were not raised during the local proceedings.

5 ORS 197.835(2) provides that LUBA's scope of review is
6 limited as follows:

7 "Issues shall be limited to those raised by any
8 participant before the local hearings body as
9 provided by ORS 197.763. * * *"

10 ORS 197.763(1) provides:

11 "An issue which may be the basis for an appeal to
12 [LUBA] shall be raised not later than the close of
13 the record at or following the final evidentiary
14 hearing on the proposal before the local
15 government. Such issues shall be raised with
16 sufficient specificity so as to afford the
17 governing body * * * and the parties an adequate
18 opportunity to respond to each issue."

19 We have held that under the "raise it or waive it"
20 provisions of ORS 197.763 and ORS 197.835(2), a local
21 government's failure to list a single applicable approval
22 criterion from its comprehensive plan or land use
23 regulations in its notice of the initial evidentiary hearing
24 means that issues may be raised at LUBA even if they were
25 not raised locally. Weuster v. Clackamas County, 25 Or LUBA
26 425 (1993). Petitioners contend the city's notice of
27 hearing does not list the specific comprehensive plan
28 transportation policies applicable to the proposal and,
29 therefore, petitioners may raise issues at LUBA regardless
30 of whether those issues were raised below.

1 The city notice of the first evidentiary hearing states
2 that "mandatory transportation" policies in the city's
3 comprehensive plan are applicable to the proposal, but does
4 not identify which policies fall within that category.
5 Petitioners were in no position to determine which plan
6 transportation policies the city would determine to be
7 mandatory, as the city is vested with significant discretion
8 in making such determinations. See Davis v. City of
9 Bandon, ____ Or LUBA ____ (LUBA No. 94-033, September 12,
10 1994); Salem-Keizer School Dist. 24-J v. City of Salem, 27
11 Or LUBA 351 (1994). Because the notice of hearing fails to
12 identify which plan transportation policies the city
13 believes are applicable to the proposal, we must consider
14 all issues raised in the petition for review.

15 **FIRST ASSIGNMENT OF ERROR**

16 "The City erred by adopting inadequate findings of
17 compliance with the Transportation Element of the
18 Comprehensive Plan, by failing to identify the
19 'mandatory policies' of the Transportation Element
20 that constituted approval standards, and by
21 failing to identify the Transportation Element, or
22 any policies contained therein, as approval
23 standards in the public hearing notice of the City
24 Council Hearing."

25 Petitioners argue the challenged decision fails to
26 include findings of compliance with various plan
27 transportation policies. Specifically, petitioners allege:

28 "* * * The City's findings describe the
29 'Transportation Element' [of the plan] as an
30 applicable approval criterion, but the findings do
31 not identify which policies the City considers

1 relevant to the Applicant's proposal or, in the
2 alternative, how the transportation service
3 findings address all 25 policies contained in the
4 Transportation Element. For example, the findings
5 do not purport to address concerns related to
6 Policy 6.10 (barrier free design), Policy 6.11
7 (pedestrian network), Policy 6.12 (bicycle
8 network), Policy 6.13 (transportation demand
9 management), Policy 6.18 (clean air and energy
10 efficiency). * * * The City's findings fail to
11 provide a basis for concluding either that these
12 policies are satisfied or that they are
13 inapplicable. * * *" (Record citations omitted.
14 Emphases in original.) Petition for Review 12.

15 We cannot determine whether and to what extent the
16 cited plan transportation policies apply to the proposal.
17 The city must identify which, if any, plan policies apply to
18 the proposal and explain in its decision how those policies
19 are satisfied. Beck v. City of Happy Valley, 27 Or LUBA 631
20 (1994); Barrick v. City of Salem, 27 Or LUBA 417 (1994);
21 Eskandarian v. City of Portland, 26 Or LUBA 98 (1993).

22 The first assignment of error is sustained.

23 **SECOND ASSIGNMENT OF ERROR**

24 "The City's findings with respect to adequacy of
25 transportation services are not supported by
26 substantial evidence in the record as a whole."

27 Petitioners contend the record lacks substantial
28 evidence to support the following findings addressing the
29 requirement of PCC 33.855.050.B for transportation services
30 adequate to support the uses allowed by the proposed zone:

31 " * * * Improvement of this intersection to the
32 standards required by past conditions of approval
33 would constitute a nuisance by adding to, rather
34 than relieving, a truck congestion problem. * * *"

1 Record 8.

2 " * * * A portion of the proposed improvements are
3 * * * * on a fill unsuitable for a roadbed."
4 Record 9.

5 " * * * Since the Applicant no longer needs [NE]
6 Grand Avenue for site access, the Bureau of
7 Transportation Engineering and Development has
8 determined that it would be inequitable to make
9 the applicant solely responsible for improvements
10 that would benefit several properties. * * *"
11 Record 9.

12 Petitioners rely on a letter from the Oregon Department
13 of Transportation and, with respect to the third finding
14 quoted above, intervenor's (or its predecessors in
15 interest's) failures to comply with the disputed conditions
16 of approval for many years. Petitioners claim that both
17 undermine the evidence in the record which might otherwise
18 support the above quoted findings.

19 The city and intervenor cite evidence in the record
20 supporting the above quoted findings. We have reviewed the
21 evidence cited by the parties and conclude a reasonable
22 decision maker could find as the city did, based on the
23 evidence cited by the parties. Therefore, the city's
24 determination of compliance with PCC 33.855.050.B is
25 supported by substantial evidence in the whole record.
26 Younger v. City of Portland, 305 Or 346, 752 P2d 262 (1988);
27 1000 Friends v. Marion County, 116 Or App 584, 842 P2d 441
28 (1992).

29 The second assignment of error is denied.

1 **THIRD ASSIGNMENT OF ERROR**

2 "There was an insufficient basis for deletion of
3 the [NE] Grand Ave. conditions and the City erred
4 in determining that a change in circumstances had
5 occurred justifying the release of the Applicant's
6 obligations to improve NE Grand Ave."

7 The challenged decision includes the following
8 findings:

9 "The most significant change in circumstances
10 since the imposition of the prior conditions of
11 approval is that Applicant has developed a new
12 access to [NE] Columbia Boulevard separate from
13 the proposed [NE] Grand Avenue Improvements. * *
14 *

15 " * * * * *

16 "Circumstances have changed. Because applicant
17 has developed a site access to NE Columbia
18 Boulevard, and because this new access is separate
19 from the unimproved portion of NE Grand Avenue,
20 applicant should not be solely responsible for
21 improvements to NE Grand Avenue." Record 9.

22 Petitioners contend the city's determination to eliminate
23 the disputed conditions on the basis of changed
24 circumstances, quoted above, is wrong.

25 No party cites any standard requiring findings
26 concerning significant changes in circumstances as a
27 prerequisite to eliminating conditions of approval for
28 conditional use permits or zone changes. Further, we do not
29 understand the city to have determined "change of
30 circumstances" is an independent basis for approving the
31 elimination of the disputed conditions of approval. The
32 challenged decision identifies the standards applicable to

1 the proposed elimination of the disputed conditions as being
2 the PCC zone change standards. Nothing in the challenged
3 decision identifies changed circumstances as an approval
4 standard under the PCC zone change regulations or elsewhere.
5 The findings quoted above, concerning a significant change
6 in circumstances, are simply a conclusion about the subject
7 property's access. Whether or not the changes to the
8 subject property's access amount to a "significant change in
9 circumstances" provides no basis for reversal or remand of
10 the challenged decision.

11 The third assignment of error is denied.

12 **FOURTH ASSIGNMENT OF ERROR**

13 "The City erred in making its decision to delete
14 past conditions of approval requiring improvements
15 to NE Grand Ave., purportedly removing all such
16 conditions from all prior land use approvals, even
17 though the Applicant limited its request to
18 removal of only Condition B [of the 1989
19 conditional use permit.]"

20 Petitioners argue the city's authority to take action
21 is limited to the specific request contained in the
22 development application. Petitioners allege intervenor's
23 application requested elimination only of Condition B of the
24 1989 conditional use permit approval decision. Citing
25 Goodman v. City of Portland, 19 Or LUBA 289 (1990),
26 petitioners argue the city lacks authority to remove
27 conditions of approval other than the one intervenor
28 specifically requested be eliminated in its development
29 application.

1 Limitations on a local government's authority over
2 development applications must be specifically expressed in
3 the local code. Simonson v. Marion County, 21 Or LUBA 313,
4 318 (1991). We are cited to nothing in the PCC which limits
5 the city's ability to approve a proposal to only the
6 specific requests included in a development application, and
7 we are not aware of any such limitation. Goodman is
8 inapposite. In Goodman, the applicant applied for a
9 conditional use permit for particular property. In the
10 process of approving that conditional use permit, the city
11 also imposed development limitations on other property owned
12 by the applicant that was not included in the applicant's
13 application. Based on its interpretation of the PCC, this
14 Board held the city lacked authority to impose development
15 restrictions on property not subject to the development
16 application.

17 Cases more analogous to the situation presented by the
18 instant appeal are Woodstock Neigh. Assoc. v. City of
19 Portland, _____ Or LUBA _____ (LUBA No. 94-093, October 11,
20 1994), and Colwell v. City of Portland, 1 Or LUBA 74 (1980).
21 In Woodstock Neigh Assoc., this Board determined the city
22 did not err by approving a subdivision proposal including
23 clustered housing, even though the development application
24 did not include clustered housing. In Colwell, LUBA
25 determined the city did not err by approving a development
26 permit, even though the development application was for zone

1 change approval only. Similarly, here, we do not believe
2 the city committed error by eliminating conditions of
3 approval requiring improvements to NE Grand Avenue in
4 addition to the one condition of approval relating to NE
5 Grand Avenue that the application requested be removed.

6 The fourth assignment of error is denied.

7 The city's decision is remanded.