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

COMMON GROUND: THE URBAN LAND)
COUNCIL OF OREGON, special)
interest council of the)
Homebuilders Association of)
Metropolitan Portland, an)
Oregon nonprofit corporation,)
and ALBERTSON'S, INC., a)
Delaware corporation,)
Petitioners,)
vs.)
CITY OF GRESHAM,)
Respondent,)
and)
WILLAMETTE PEDESTRIAN COALITION,)
an Oregon nonprofit corporation,)
BICYCLE TRANSPORTATION ALLIANCE,)
an Oregon nonprofit corporation,)
SENSIBLE TRANSPORTATION OPTIONS)
FOR PEOPLE, an Oregon nonprofit)
corporation, and 1000 FRIENDS OF)
OREGON, an Oregon nonprofit)
corporation,)
Intervenors-Respondent.)

LUBA No. 94-248
FINAL OPINION
AND ORDER

Appeal from City of Gresham.

Mark D. Whitlow and Bruce H. Cahn, Portland, filed the petition for review. With them on the brief was Bogle & Gates. Mark D. Whitlow argued on behalf of petitioners.

Richard D. Faus and Thomas Sponsler, City Attorneys, Gresham, filed a response brief. Richard D. Faus argued on behalf of respondent.

1 Keith A. Bartholomew, Portland, filed a response brief
2 and argued on behalf of intervenors-respondent.

3
4 SHERTON, Chief Referee, participated in the decision.

5
6 REMANDED

04/10/95

7
8 You are entitled to judicial review of this Order.
9 Judicial review is governed by the provisions of ORS
10 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal an ordinance amending the Gresham
4 Community Development Plan (plan).

5 **MOTION TO INTERVENE**

6 Willamette Pedestrian Coalition, Bicycle Transportation
7 Alliance, Sensible Transportation Options for People, and
8 1000 Friends of Oregon move to intervene in this proceeding
9 on the side of respondent. There is no objection to the
10 motion, and it is allowed.

11 **INTRODUCTION**

12 In 1991, the Land Conservation and Development
13 Commission (LCDC) adopted OAR Chapter 660, Division 12, the
14 Transportation Planning Rule (TPR), to implement Statewide
15 Planning Goal 12. As relevant in this appeal,
16 OAR 660-12-005 (Purpose) provides that "[t]hrough measures
17 designed to reduce reliance on the automobile, the [TPR is]
18 intended to assure that the planned transportation system
19 supports a pattern of travel and land use in urban areas
20 which will avoid the air pollution, traffic and livability
21 problems faced by other areas of the country."

22 The TPR requires regional Transportation System Plans
23 (TSPs) for the state's major metropolitan areas to be
24 completed by May 1995. OAR 660-12-055(1). Local
25 governments in these metropolitan areas must adopt local
26 TSPs and implementing measures within one year after

1 adoption of the regional TSP. Id. However, under
2 OAR 660-12-055(3), by May 8, 1994, local governments in the
3 major metropolitan areas must "adopt land use and
4 subdivision ordinances or amendments required by
5 OAR 660-12-045(3), (4)(a)-(e) and (5)(d)," which concern
6 providing bicycle and pedestrian facilities, designing new
7 development to accommodate transit routes and transit
8 facilities, and reducing reliance on the automobile.

9 The challenged ordinance was adopted November 15, 1994
10 and amends plan Volumes I (Findings), III (Code) and IV
11 (Standards). The city's findings describe the ordinance's
12 purpose as follows:

13 "The purpose of these * * * plan text amendments
14 [is] to comply with the [TPR] and to further
15 address the Gresham Community Development Plan
16 goals and policies. [The TPR] requires local
17 governments to integrate land use and
18 transportation planning and to provide a balanced
19 multi-modal transportation system. The [plan]
20 text amendments also provide a key opportunity to
21 better implement existing plan policies linking
22 land use and transportation. These [plan] text
23 amendments will revise requirements for
24 pedestrian, bicycle, and transit facilities.
25 Development will be required to be constructed in
26 a manner that supports all modes of transportation
27 and reduces reliance on the single-occupant
28 automobile."¹ Record 149.

¹When the city council adopted the challenged ordinance, it also adopted an order adopting as findings in support of the ordinance the October 10, 1994 staff report (Record 147-204), the November 1, 1994 addendum to that staff report (Record 140-46), and supplemental findings dated November 15, 1994 (Record 133-39). Record 132.

1 **FIRST ASSIGNMENT OF ERROR**

2 OAR 660-12-045(4)(b) requires local governments to
3 adopt regulations requiring:

4 "New retail, office and institutional buildings at
5 or near existing or planned transit stops to
6 provide preferential access to transit through
7 [certain listed] measures[.]" (Emphasis by
8 petitioners.)

9 Petitioners contend the city improperly construed the above
10 emphasized provision of OAR 660-12-045(4)(b), because the
11 challenged ordinance amends plan Volume IV,
12 section 3.1140(B) to apply the measures required by
13 OAR 660-12-045(4)(b)(A)-(C) to "all sites which front on a
14 designated Transit Street * * *." (Emphasis added.)
15 Record 14. Petitioners also contend the city's
16 determination that all sites fronting on designated Transit
17 Streets are "at or near existing or planned transit stops"
18 is not supported by substantial evidence in the record.

19 Based on the portions of the plan and record cited by
20 the parties, we agree with the city that a reasonable person
21 could conclude that all sites fronting on designated Transit
22 Streets in the city are "at or near existing or planned
23 transit stops," as that phrase is used in
24 OAR 660-12-045(4)(b). In addition, we agree with the city
25 and intervenors (respondents) that OAR 660-12-045(4)(b)
26 establishes minimum standards for preferential access to
27 transit that local government regulations must meet, not
28 maximum limitations beyond which local government regulation

1 is prohibited. Therefore, even if the buildings subject to
2 the requirements of plan Volume IV, section 3.1140(B)
3 include buildings that are not "at or near existing or
4 planned transit stops," that would not constitute a
5 violation of the TPR.

6 The first assignment of error is denied.

7 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

8 OAR 660-12-045(4)(b) requires that the measures used to
9 encourage preferential access to transit include:

10 * * * * *

11 "(B) Clustering buildings around transit stops;
12 and

13 "(C) Locating buildings as close as possible to
14 transit stops."

15 Petitioners contend the challenged ordinance not only fails
16 to implement the above requirements, but also misconstrues
17 the above quoted provisions as requiring the city to
18 prohibit auto parking or maneuvering areas between buildings
19 and transit streets.

20 The challenged ordinance purportedly implements
21 OAR 660-12-045(4)(b)(B) and (C) by adding a new paragraph
22 (3) (Parking Area Location and Design Standards on Transit
23 Streets * * *) to plan Volume IV, section 3.1140(B).
24 Paragraph (3)(b) provides that auto parking and maneuvering
25 areas shall not be located between a building facade with a
26 primary entrance and the street. Record 17.
27 Paragraph (3)(b) also provides that auto parking and

1 maneuvering areas located to the side of a building cannot
2 occupy more than 50% of a site's frontage on a transit
3 street. Id. Paragraph (3)(c) provides that surface parking
4 lots exceeding minimum parking requirements "shall be
5 designed to allow for more intensive future site
6 development." Record 18.

7 The city's findings explain its interpretation of
8 OAR 660-12-045(4)(b)(C), and its adoption of
9 paragraph (3)(b):

10 "The City interprets 'as close as possible'
11 broadly. It has drafted language to promote
12 preferential, unobstructed, access to transit by
13 prohibiting auto parking or maneuvering areas
14 between the primary entrance of a retail, office
15 or institutional building and transit stops,
16 Transit Streets, or streets in a Transit District.
17 * * * [A]ccess to transit is substantially
18 obstructed when there are auto parking and
19 maneuvering areas between a primary entrance [and]
20 a transit stop, Transit Street, or streets in a
21 Transit District due to safety, visual and
22 distance problems when such auto oriented
23 facilities are present.

24 "[W]ith regards [sic] to the term 'as close as
25 possible,' * * * nothing in [the TPR] precludes
26 the term from being interpreted broadly to allow a
27 local government to prohibit auto parking and
28 maneuvering areas between the primary entrance to
29 a building and the street. * * *" Record 176-77.

30 Respondents contend the city's prohibition against auto
31 parking and maneuvering areas between buildings and transit
32 streets, combined with other section 3.1140(B) requirements
33 that such areas not occupy more than 50% of a site's
34 frontage on a transit street, that at least one primary

1 building entrance be oriented to a transit street, and that
2 such buildings must have a direct connection between the
3 transit street and the building interior, "mean that
4 buildings will be located as close as possible to the
5 transit streets." Respondent's Brief 45. Respondents note
6 the ordinance also adopts plan Volume IV, section 6.0424
7 (Transit Facility Standards), which requires that developers
8 install transit stop facilities if a site's frontage on a
9 transit street is more than 600 ft. from existing transit
10 facilities. Record 36. Respondents contend the city's
11 regulations, in combination, satisfy OAR 660-12-045, "not
12 just as to building location, but as to enhancing the
13 transit, pedestrian and bicycle environments." Respondent's
14 Brief 46.

15 Respondents essentially argue that because the city's
16 regulations require transit stops every 600 ft. along a
17 transit street, and provide for a pedestrian and bicycle
18 friendly environment along such transit streets, every point
19 along a transit street is sufficiently "close" to a transit
20 stop. Therefore, according to respondents, the requirements
21 of OAR 660-12-045(4)(b)(B) and (C) for "clustering"
22 buildings around transit stops and locating buildings "as
23 close as possible" to transit stops are satisfied by
24 requiring that buildings on transit streets abut sidewalks,
25 and that no more than 50% of the frontage on transit streets
26 be occupied by auto parking and maneuvering areas.

1 While this may well make good planning sense,
2 particularly in an urban area where transit stops will be no
3 more than 660 ft. apart, it is not what OAR 660-12-045(b)(B)
4 and (C) require. These rule provisions require building
5 proximity to transit stops, not just transit streets. For
6 example, if a parcel has 200 ft. of frontage on a transit
7 street, and one end of the parcel is 100 ft. from a transit
8 stop while the other end is 300 ft. from the stop, we are
9 cited to nothing in the city's regulations that would
10 require a new building to be placed at the end of the parcel
11 closer to the transit stop. See STOP v. Washington County,
12 Or LUBA (LUBA No. 94-106, December 7, 1994),
13 slip op 10-11 (OAR 661-12-045(4)(b)(C) explicitly requires
14 new buildings to be placed "as close as possible" to transit
15 stops). Also, we are cited to nothing in the city's
16 regulations requiring that multiple buildings on a single
17 site near a transit stop be clustered around the transit
18 stop, rather than laid out in some other arrangement.

19 One additional point merits comment. Although we
20 conclude the city's prohibitions against auto parking and
21 maneuvering areas between a building and a transit street,
22 and its limitation of such areas to no more than 50% of the
23 frontage along a transit street, are not adequate to
24 implement OAR 660-12-045(b)(B) and (C), petitioners do not
25 demonstrate these provisions are inconsistent with or
26 prohibited by OAR 660-12-045(4)(b) or any other TPR

1 provision.

2 The second and third assignments of error are
3 sustained, in part.

4 **FOURTH ASSIGNMENT OF ERROR**

5 The challenged ordinance amends the transit design
6 standards of plan Volume IV, section 3.1140(B) to add a new
7 paragraph (2) (Ground Floor Windows, Window Walls and Blank
8 Walls on Transit Streets * * *). Paragraph (2) establishes
9 requirements for ground floor windows, offset jogs (using
10 elements such as bay windows and recessed entrances) and
11 surface relief changes in the street facades of buildings
12 along transit streets. Paragraph (2) states its purpose is
13 "to provide street safety and a comfortable pedestrian
14 street environment." Record 16.

15 Petitioners contend the city's adoption of
16 "architectural element" standards in paragraph (2)
17 misconstrues OAR 660-12-045(3)(b), which requires the city
18 to adopt regulations requiring:

19 "Facilities providing safe and convenient
20 pedestrian and bicycle access within and from new
21 subdivisions, planned developments, shopping
22 centers, and industrial parks to nearby
23 residential areas, transit stops, and neighborhood
24 activity centers, such as schools, parks, and
25 shopping. This shall include:

26 "(A) Sidewalks along arterials and collectors in
27 urban areas;

28 "(B) Bikeways along arterials and major
29 collectors;

1 "(C) Where appropriate, separate bike or
2 pedestrian ways to minimize travel distances
3 within and between the areas and developments
4 listed above."

5 Petitioners argue the "facilities" referred to in
6 OAR 660-12-045(3)(b) are the "actual access ways consisting
7 of sidewalks, bicycle or pedestrian ways" referred to in
8 OAR 660-12-045(3)(b)(A)-(C), not the types of architectural
9 elements required by paragraph (2). Petition for Review 23.

10 OAR 660-12-045(3)(b) provides the facilities required
11 to provide safe and convenient pedestrian and bicycle access
12 include the items listed in paragraphs (A) through (C) of
13 that subsection. OAR 660-12-045(3)(b) does not explicitly
14 indicate the type of architectural features required by
15 paragraph (2) cannot contribute to satisfying the rule's
16 requirement to provide safe and convenient pedestrian and
17 bicycle access.

18 However, even if we were to agree with petitioners that
19 the "facilities" referred to in OAR 660-12-045(3)(b) do not
20 include the type of architectural elements required by
21 paragraph (2), petitioners' argument would provide no basis
22 for reversing or remanding the challenged ordinance. The
23 city findings in support of the architectural element
24 requirements of paragraph (2) do not indicate they were
25 adopted to satisfy OAR 660-12-045(3)(b). Record 182-84.
26 Further, as we explained with regard to the TPR provision at
27 issue under the first assignment of error, the requirements
28 of OAR 660-12-045(3)(b) are minimum requirements. We are

1 not aware of anything in OAR 660-12-045(3)(b) or any other
2 provision of the TPR prohibiting the city from adopting the
3 architectural element standards of paragraph (2), even if
4 they are not required by the TPR.

5 The fourth assignment of error is denied.

6 The city's decision is remanded.