

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

4 JEAN MELTON, F. ROBERT WILKE,)
5 and C. P. BROWN,)
6)
7 Petitioners,)
8)
9 vs.)
10)
11 CITY OF COTTAGE GROVE,)
12)
13 Respondent,)
14)
15 and)
16)
17 WAL-MART,)
18)
19 Intervenor-Respondent.)

LUBA No. 95-056

FINAL OPINION
AND ORDER

20
21
22 Appeal from City of Cottage Grove.

23
24 Douglas M. DuPriest, Eugene, file the petition for
25 review and argued on behalf of petitioners. With him on the
26 brief was Hutchinson, Anderson, Cox & Coons.

27
28 Gary R. Ackley, City Attorney, Cottage Grove, filed a
29 response brief and argued on behalf of respondent.

30
31 Allen L. Johnson, Eugene, filed a response brief and
32 argued on behalf of intervenor-respondent. With him on the
33 brief was Johnson & Kloos.

34
35 LIVINGSTON, Chief Referee; GUSTAFSON, Referee,
36 participated in the decision.

37
38 AFFIRMED 01/22/95

39
40 You are entitled to judicial review of this Order.
41 Judicial review is governed by the provisions of ORS
42 197.850.

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a legislative decision of the city
4 council following a remand from LUBA. The challenged
5 decision adopts supplemental findings in support of an
6 approval of a zoning ordinance amendment that adds, with
7 limitations, "interstate-oriented major retail facility" to
8 the list of uses permitted in the city's Commercial Tourist
9 (CT) zone.

10 **MOTION TO INTERVENE**

11 Wal-Mart Store, Inc. (intervenor) moves to intervene on
12 the side of respondent. There is no objection to the
13 motion, and it is allowed.

14 **FACTS**

15 The facts of this case prior to the appeal addressed in
16 Melton v. City of Cottage Grove, 28 Or LUBA 1, aff'd 131 Or
17 App 626 (1994) (Melton I), are set forth in our earlier
18 opinion. See Melton I, 28 Or LUBA at 4-5. In Melton I we
19 determined the Transportation Planning Rule (TPR), OAR
20 Chapter 660, Division 12, which implements Statewide
21 Planning Goal 12, must be applied to the challenged zoning
22 ordinance amendment. We remanded on that issue only.

23 As we stated in Melton I:

24 "That the record shows the Woodard site has direct
25 access onto Thornton Road is a sufficient basis
26 for requiring the city's determination under OAR
27 660-12-060(2)(c), that the amendment does not
28 allow types or levels of land uses resulting in

1 'levels of travel or access * * * inconsistent
2 with the functional classification of a
3 transportation facility,' to include consideration
4 of impacts on Thornton Road. * * *

5 "* * * No party cites any findings or evidence in
6 the record identifying the functional
7 classification of Thornton Road or the impacts of
8 the proposed amendment on the levels of travel or
9 access on Thornton Road. Therefore, the city must
10 determine on remand whether the proposed amendment
11 will allow uses that will result in 'levels of
12 travel or access which are inconsistent with the
13 functional classification of' Thornton Road.⁷

14

15 "⁷ If the city finds the proposed amendment will
16 not allow uses resulting in levels of travel or
17 access inconsistent with the functional
18 classification of Thornton Road, it will establish
19 the proposed amendment does not significantly
20 affect a transportation facility under OAR 660-12-
21 060(2) and, therefore, OAR 660-12-060(1) does not
22 apply.^[1] If the city finds the proposed amendment

¹OAR 660-12-060 provides, in relevant part:

"(1) Amendments to functional plans, acknowledged comprehensive plans, and land use regulations which significantly affect a transportation facility shall assure that allowed land uses are consistent with the identified function, capacity, and level of service of the facility. This shall be accomplished by either:

"(a) Limiting allowed land uses to be consistent with the planned function, capacity and level of service of the transportation facility;

"(b) Amending the TSP to provide transportation facilities adequate to support the proposed land uses consistent with the requirements of this division;

"(c) Altering land use designations, densities, or design requirements to reduce demand for automobile travel and meet travel needs through other modes.

1 will allow uses resulting in levels of travel or
2 access inconsistent with the functional
3 classification of Thornton Road, it must
4 demonstrate the amendment satisfies the
5 requirements of OAR 660-12-060(1)." Melton I at
6 10-11. (Emphases and first ellipsis in original.)

7 After notice and a hearing, the city council, on March
8 13, 1995, adopted both a letter from intervenor's attorney
9 (counsel's findings) and a staff report (staff's findings)
10 as its supplemental findings. This appeal followed.

11 **FIRST ASSIGNMENT OF ERROR**

12 Petitioners contend the challenged decision
13 misconstrues and misapplies OAR 660-12-060(1) and (2)(c) and
14 is not supported by adequate findings or substantial
15 evidence. The city and intervenor (together, respondents)

"(2) A plan or land use regulation amendment significantly affects a transportation facility if it:

"(a) Changes the functional classification of an existing or planned transportation facility;

"(b) Changes standards implementing a functional classification system; or

"(c) Allows types or levels of land uses which would result in levels of travel or access which are inconsistent with the functional classification of a transportation facility; or

"(d) Would reduce the level of service of the facility below the minimum acceptable level identified in the TSP.

"(3) Determinations under sections (1) and (2) of this rule shall be coordinated with affected transportation facility and service providers and other affected local governments.

"* * * * *"

1 reply that because Thornton Road has no functional
2 classification, as the term is used in OAR 660-12-060(2)(c),
3 OAR 660-12-060(2)(c) does not apply.

4 In its decision prior to Melton I, the city made the
5 following finding:

6 "It appears that a type or level of service
7 becomes inconsistent with a functional
8 classification only where (a) a functional
9 classification exists that applies to the facility
10 and (b) the type or level of use that would result
11 would be a type or level of service that is
12 inappropriate to that classification." Record
13 A29.²

14 This interpretation of OAR 660-12-060(2)(c) was unchallenged
15 on appeal and is now the law of this case.³ See Beck v.
16 City of Tillamook, 313 Or 148, 152-53, 831 P2d 678 (1992);
17 Tylka v. Clackamas County, 24 Or LUBA 296, 304 (1992).

18 The counsel's findings state (and, as noted above, the
19 statement is a finding of the city council): "In this case
20 Thornton Road is currently under the jurisdiction of the
21 city, and the city has not yet adopted a functional
22 classification for Thornton Road." Petitioners contend the
23 clarity of this finding is obscured by another in the
24 staff's findings.

²Citations to the record developed prior to Melton I are to "Record A___." Citations to the record developed between Melton I and this appeal are to "Record B___."

³We do not defer to the city's interpretation of OAR 660-12-060(2)(c). See Sensible Transportation v. Washington County, 28 Or LUBA 375, 376 (1994). We simply do not review it.

1 "It is therefore, the Council's finding that the
2 proposed amendment, to the list of uses permitted
3 in the Commercial Tourist (CT) CGZO 18.28.020(U)
4 [sic] will not allow types or levels of land uses
5 which could result in levels of travel or access
6 inconsistent with the functional classification
7 (minor collector) of Thornton Road under OAR 660-
8 12-060(2)c." (Emphasis added.) Record B61.

9 A similar statement is made in the background section of the
10 staff findings, together with a statement that

11 "[staff] have reviewed the issue as required and
12 concur that the siting of an interstate-oriented
13 major retail facility (Wal-Mart) with certain
14 limitations will not change the functional
15 classification of any of the streets within the
16 study boundary which includes Thornton Road.
17 Refer to Exhibit 'B' * * * ." Record B60.

18 The referenced "Exhibit B" states that Thornton Road is
19 listed as a "Minor Collector." However, Exhibit B states in
20 a footnote:

21 "'Final Report Cottage Grove Transportation Safety
22 Study,' CRS Group, Inc. June 1982., Figure 11,
23 page 41, proposed functional classifications.
24 This report was never adopted by the City of
25 Cottage Grove." Record B64. (Emphasis added.)

26 Intervenor urges us to treat the footnote as part of the
27 challenged decision, incorporated by reference. However,
28 the staff findings, although they refer to Exhibit B,
29 clearly do not themselves adopt the conclusion that Thornton
30 Road has no functional classification. The staff findings
31 state that Thornton Road is a minor collector and then
32 conclude that this functional classification will not change
33 if the proposed interstate-oriented major retail facility is
34 sited.

1 The counsel's findings and the staff findings thus seem
2 to conflict on whether Thornton Road has a functional
3 classification. However, the counsel's findings either
4 anticipate or recognize the conflict with the staff's
5 findings. They state, with reference to two earlier traffic
6 studies and a subsequent report:

7 "All three reports, and [a traffic consultant's]
8 conclusions are fully consistent in showing that
9 the text amendment itself does not result in types
10 or levels of service that are inconsistent with
11 any identified recommended or former
12 classification of Thornton Road." Record B15.
13 (Emphasis added.)

14 If the challenged decision had adopted only the
15 counsel's findings, the matter would end there.
16 Nevertheless, it would not affect our disposition of this
17 case if the city had adopted only the staff's findings and
18 found that Thornton Road is classified as a minor collector.
19 That is because the staff's findings include a finding that
20 the proposed interstate-oriented major retail facility will
21 not result in levels of travel or access which are
22 inconsistent with the minor collector functional
23 classification. See OAR 660-12-060(2)(c). If true, the
24 proposed development does not "significantly affect a
25 transportation facility" under OAR 660-12-060(2)(c), and
26 OAR 660-12-060(1) does not apply.

27 Petitioners state an evidentiary challenge to the
28 staff's finding that there will not be levels of travel or
29 access which are inconsistent with the minor collector

1 classification. Petitioners contend that one study (JRH
2 study) shows the proposed interstate-oriented major retail
3 facility would cause traffic levels on Thornton Road to rise
4 beyond the design capacity for a minor collector.

5 One of the exhibits to the counsel's findings is a
6 March 7, 1995 letter from a traffic consultant, responding
7 to traffic issues raised by petitioners' counsel. Record
8 B18-21. The traffic consultant's letter states, in relevant
9 part:

10 "[According to the] June 28, 1994 JRH study, which
11 looks at the facility as limited by the adopted
12 text amendment, there will only be one chance
13 [sic] in level of service for any part of Thornton
14 Road. Thornton Road is currently at level of
15 service 'A', which is the highest grade of
16 service, involving little or no delay. That
17 change will be a change from level of service 'A'
18 to level of service 'B', meaning delays of 5 to 10
19 seconds. The only movement affected by this
20 reduced level of service is northbound left turn
21 from Whitaker [sic] onto Thornton Lane. Level of
22 service 'B' is the second highest level of
23 service. Levels A-E are considered to acceptable
24 [sic] levels of service for non signalized
25 intersections within urban areas. A change from
26 level of service 'A' to level of service 'B' will
27 not impact the functional classification of
28 Thornton Road as a minor collector." Record B20.
29 (Emphasis added.)

30 The staff's findings are based in part on the traffic
31 consultant's letter, which reflects his expertise as well as
32 the evidence he reviewed. The traffic consultant's letter
33 is substantial evidence. Even assuming petitioners'
34 attorney bases his conclusions on conflicting evidence,

1 rather than drawing different conclusions from the same
2 evidence, we defer to the local government's decision, as
3 expressed in the staff's findings, to rely in part on the
4 traffic consultant's letter. See Younger v. City of
5 Portland, 305 Or 356, 360, 752 P2d 262 (1988); Angel v. City
6 of Portland, 22 Or LUBA 649, 659, aff'd 113 Or App 169
7 (1992).

8 Under the first assignment of error, petitioners raise
9 additional issues, including intersection spacing and the
10 impacts of a proposed pedestrian bicycle path which would
11 intersect with Thornton Road. These issues are beyond the
12 scope of LUBA's remand order in Melton I, as they do not
13 concern the functional classification of Thornton Road.

14 The first assignment of error is denied.

15 **SECOND ASSIGNMENT OF ERROR**

16 The staff findings state:

17 "For the same reasons given in the original
18 decision, approved by LUBA, the amendment does not
19 trigger the other three significant tests as
20 applied to Thornton Road, OAR 660-12-060(2) a, b,
21 and d. Record B61.

22 Petitioners contend this statement is an "express
23 finding" with respect to OAR 660-12-060(2)(a), (b) and (d),
24 and argue the city "on its own initiative and by its own
25 volition * * * broadened the scope of the hearing on
26 remand." Petitioners' Petition for Review 25. Petitioners
27 argue they may therefore raise additional arguments,
28 notwithstanding the general rule that when a record is

1 opened on remand, parties may not raise old, resolved issues
2 again. See Beck, supra, 303 Or at 153.

3 A statement in a staff report prepared prior to a
4 hearing on remand that certain criteria need not be
5 considered on remand does not itself broaden the scope of
6 the remand to include consideration of those criteria.

7 The second assignment of error is denied.

8 **THIRD ASSIGNMENT OF ERROR**

9 Petitioners contend the city did not comply with
10 OAR-660-12-060(3), which requires that determinations under
11 OAR-660-12-060(1) and (2) be "coordinated with affected
12 transportation facility and service providers and other
13 affected local governments." Specifically, petitioners
14 contend that there was no coordination with Lane County
15 between the Melton I remand order and the decision
16 challenged here.

17 We have on several occasions discussed the coordination
18 requirement of Goal 2, as implemented through
19 OAR-660-12-060(3). See, e.g., Melton I at 11. Prior to
20 Melton I, the city consulted with the county concerning the
21 traffic impacts of the proposed interstate-oriented major
22 retail facility. The county was free at that time to raise
23 any concerns it may have had concerning Thornton Road.
24 Petitioners have not shown the proposal changed after LUBA's
25 remand. Our remand order in Melton I did not, and
26 OAR-660-12-060(3) itself does not, require a second

1 consultation on the same issues.

2 The third assignment of error is denied.

3 The city's decision is affirmed.