

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

4 NEIGHBORS FOR LIVABILITY, a non profit
5 Oregon corporation, ROBERT BEARD, MAURA
6 MALONE, MARY PETERSON, PATRICIA A.
7 MAKLIN, MARK JOHN HOLADY, MONICA
8 HOLADY, MARVIN DOTY and JACK FRANKLIN,
9 *Petitioners,*

10
11 vs.

12
13 CITY OF BEAVERTON,
14 *Respondent,*

15
16 and

17
18 SORRENTO CONSTRUCTION/BRIAR
19 DEVELOPMENT COMPANY, JAMES M.
20 ANDERSON, FLOYD A. HARRINGTON,
21 JANET FERGUSON, BRYCE E. ADKINS,
22 STEVEN SANDERS, ALLISON D. BURGETT,
23 JANE ATHANASAKOS, SHARON DUNHAM,
24 MARK KALETTA, KEVIN W. TELLER, MARSHA
25 ANDERSON, VALERIE ADAMS, MARGARET
26 BARRETT, WAYNE L. BRIDGES, CAROL H.
27 BRIDGES, JANET RONACHER, RONALD
28 RONACHER, ALLEN R. SCHROEDER, JOELLA W.
29 SCHROEDER, DALE A. CHRISTENSEN, ANN L.
30 BUSH, ARDELL L. BUSH, JOSE SANDOVAL,
31 ALLEN T. SHELBY, CATHERINE M. ANDERSON,
32 PETER W. BARRETT, JOHN P. JACOBS, ROBERT
33 ALVARADO, SUSAN FRANICH, PAUL FRANICH,
34 KATHERINE L. ALVARADO, TOM GILROY, JOAN
35 GILROY, GORDON DAMRON, LISA SANDERS,
36 DEBORAH K. DAMRON, DEAN DERRAH, KATHY
37 DERRAH, SEOG H. LEE, JOANNE COONROD,
38 PATRICIA E. HALL, DUANE W. HALL, SHELLEY
39 BOYER, REBECCA WELLING, DAVID K. HIU,
40 DARIN D. HONN, LINDA M. PHILLIPS-HONN,
41 M. KATHLEEN LORENTZ, WANDA SPEERSTRA,
42 GARY SPEERSTRA, ROBERT D. JOHNSON,
43 HIDEKO KOJIMA, PEGGY HESS, TOD HESS,
44 KAREN SUGIYAMA, JAMES A. BURGETT,
45 VICTOR GALLEGOS, CORINE GALLEGOS,

1 LARRY C. KNISS, GLEN G. INSELMAN,
2 STEPHEN J. FRYBARGER, MARILYN J. ADKINS,
3 RICHARD L. KRIKAVA, HEATHER E. FRITH,
4 SUSAN FLOETER, HOLLY A. MOON, BILL FRITH,
5 STEVE MOON, DAVID TOYER, MARIE
6 BARZEN, EILEEN JOY KRAVETZ, ANNE
7 FAHLBUSCH, GEORGIA RANDLE, NICK
8 ATHANASAKOS, LISA MICHAELS and
9 ROBERT D. BOCK,
10 *Intervenors-Respondent.*

11
12 LUBA No. 99-036

13
14
15 Appeal from City of Beaverton.

16
17 Jeffrey L. Kleinman, Portland, filed the petition for review and argued on behalf of
18 petitioners.

19
20 William J. Scheiderich, Beaverton, argued on behalf of respondent.

21
22 Jack L. Orchard, Portland, filed a response brief and argued on behalf of intervenor-
23 respondent Sorrento Construction/Briar Development Company. With him on the brief was
24 Ball Janik LLP.

25
26 James M. Anderson, Beaverton, filed a response brief on his own behalf.

27
28 HOLSTUN, Board Chair; BASSHAM, Board Member; BRIGGS, Board Member,
29 participated in the decision.

30
31 AFFIRMED

12/23/99

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

35

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city ordinance that changes the comprehensive plan map
4 designations for several tax lots.

5 **MOTION TO INTERVENE**

6 Sorrento Construction/Briar Development Company (hereafter intervenor Sorrento),
7 the applicant below, moves to intervene on the side of respondent in this appeal. There is no
8 opposition to the motion, and it is allowed.

9 A large number of individuals also move to intervene on the side of respondent.¹
10 There is no opposition to the motion, and it is allowed.²

11 **FACTS**

12 This appeal concerns two properties that are located approximately one-half mile
13 apart on the north side of Beard Road in the City of Beaverton. One property is located at
14 the intersection of Beard Road and Murray Boulevard (Beard/Murray site). The other
15 property is located approximately one-half mile west at the intersection of Beard Road and
16 155th Avenue (Beard/155th site). Prior to adoption of the challenged decision, the Beaverton

¹Those individuals include: James M. Anderson, Floyd A. Harrington, Janet Ferguson, Bryce E. Adkins, Steven Sanders, Allison D. Burgett, Jane Athanasakos, Sharon Dunham, Mark Kaletta, Kevin W. Teller, Marsha Anderson, Valerie Adams, Margaret Barrett, Wayne L. Bridges, Carol H. Bridges, Janet Ronacher, Ronald Ronacher, Allen R. Schroeder, Joella W. Schroeder, Dale A. Christensen, Ann L. Bush, Ardell L. Bush, Jose Sandoval, Allen T. Shelby, Catherine M. Anderson, Peter W. Barrett, John P. Jacobs, Robert Alvarado, Susan Franich, Paul Franich, Katherine L. Alvarado, Tom Gilroy, Joan Gilroy, Gordon Damron, Lisa Sanders, Deborah K. Damron, Dean Derrah, Kathy Derrah, Seog H. Lee, Joanne Coonrod, Patricia E. Hall, Duane W. Hall, Shelley Boyer, Rebecca Welling, David K. Hiu, Darin D. Honn, Linda M. Phillips-Honn, M. Kathleen Lorentz, Wanda Speerstra, Gary Speerstra, Robert D. Johnson, Hideko Kojima, Peggy Hess, Tod Hess, Karen Sugiyama, James A. Burgett, Victor Gallegos, Corine Gallegos, Larry C. Kniess, Glen G. Inselman, Stephen J. Frybarger, Marilyn J. Adkins, Richard L. Krikava, Heather E. Frith, Susan Floeter, Holly A. Moon, Bill Frith, Steve Moon, David Toyer, Marie Barzen, Eileen Joy Kravetz, Anne Fahlbusch, Georgia Randle, Nick Athanasakos, Lisa Michaels and Robert D. Bock.

²Intervenor-respondent James M. Anderson filed a response brief on his own behalf and on behalf of the other individual intervenors-respondent. Because intervenor-respondent Anderson is not an attorney, he may file a brief on his own behalf, but he may not file a brief on behalf of the other individual intervenors-respondent. OAR 661-010-0075(6).

1 Comprehensive Plan (hereafter BCP or plan) designated the 17.5-acre Beard/Murray site as
2 Urban Standard Density Residential (SDR) and designated the approximately 10.3-acre
3 Beard/155th site as Commercial.

4 The challenged decision changes the plan map designation for the Beard/155th site
5 from Commercial to SDR. The decision changes the plan map designations for the northern
6 10 acres of the Beard/Murray site from SDR to Commercial and for the southern 7.5 acres of
7 the Beard/Murray site from SDR to Urban Medium Density Residential (MDR). According
8 to petitioners, the overall purpose of the application that is disputed in this appeal is to allow
9 development of a particular supermarket on the Beard/Murray site. We summarize below
10 four important features of the challenged decision, before turning to petitioners' assignments
11 of error.

12 **A. Relocation of Commercial and SDR Designations**

13 The challenged decision explains that the map changes for the 10.3-acre Beard/155th
14 site and the northern 10 acres of the Beard/Murray site are intended to “relocate” the existing
15 plan map designations. Record 2.³

16 **B. Commercial Development of the Northern 10 Acres of the Beard/Murray**
17 **Site**

18 The challenged decision explains its intent regarding development of the northern 10
19 acres of the Beard/Murray site as follows:

20 “The Council intends that the [northern 10 acres of the Beard/Murray site] be
21 developed in a manner which is consistent with representations made by the
22 applicants’ representatives and more fully described in the record of this
23 proceeding. Those features include without limitation that the property be
24 used as a retail grocery store site, [and] that design features minimize visual

³The decision explains:

“The Council * * * intends that the previous Commercial designation of [the Beard/155th site] be relocated to the [northern 10 acres of the Beard/Murray site], and that the previous Residential designation of [the northern 10 acres of the Beard/Murray site] be relocated to the previously commercial properties [at the Beard/155th site].” Record 2.

1 and noise impacts on surrounding residential properties, particularly to the
2 west. Nothing contained herein should be construed as placing a limitation on
3 conditions, which may be imposed as part of any future permit application.”
4 Record 2.

5 **C. Plan Map Changes Revert if Substantial Progress is not Achieved Within**
6 **Two Years**

7 The decision specifically provides that if substantial progress is not achieved in
8 pursuing development of the sites within two years, then the plan map designation changes
9 that are approved by the challenged decision “shall, without further action by the City,
10 automatically revert to their previous * * * Plan Map designations.” Record 2.

11 **D. Substantial Progress Defined**

12 The challenged decision does not approve zoning map changes to correspond with the
13 new plan map designations. Neither are specific development proposals approved for either
14 the Beard/Murray site or the Beard/155th site. The challenged decision requires that the
15 applicant seek appropriate zoning for the Beard/155th site and seek appropriate zoning and
16 development permits for the Beard/Murray site.

17 “[T]he applicant shall demonstrate substantial progress * * * within two years
18 from and after the conclusion of any appeal of this Council decision to
19 [LUBA]. For purposes of this section ‘substantial progress’ shall mean:

20 “1. For the [SDR designated Beard/155th site] filing a complete zone
21 change application.

22 “2. For the [MDR designated southern 7.5 acres of the Beard/Murray site]
23 filing applications for a zone change and design review approval, or a
24 zone change and conditional use permit; and

25 “3. For the [Commercial designated northern 10 acres of the
26 Beard/Murray site] filing applications for a zone change and design
27 review approval, or a zone change and conditional use permit.”
28 Record 2-3.

29 **FIRST ASSIGNMENT OF ERROR**

30 Petitioners make several arguments under their first assignment of error. Each of
31 those arguments attack the challenged decision because it was adopted without, at the same

1 time, adopting implementing zoning that is consistent with the plan map amendments.

2 **A. Implementing Zoning Map Amendment Must be Adopted at the Time the**
3 **Plan Map is Amended**

4 Petitioners argue that Goal 2 (Land Use Planning) and ORS 197.175 require that the
5 city adopt appropriate zoning map designations for the properties that are at issue in the
6 challenged decision.⁴ Petitioners contend the city erred by failing to adopt those
7 implementing zoning map designations at the time the plan map designations were amended.

8 The city adopted the following findings to explain its position that the zoning and
9 permit decisions that will be necessary to implement the challenged plan map amendments
10 can be adopted at a later date:

11 “* * * The Council does not accept the opponents’ arguments that an
12 acceptable implementing zone must be found at this time.

13 “* * * The Council finds that a range of Commercial zones and/or regulatory
14 tools are potentially available to implement the Commercial Plan designation.
15 In any case, the Council was advised by the City Attorney that it is not
16 necessary to consider as part of this [comprehensive plan amendment]
17 application what specific zoning designation could (or should) be applied to
18 implement a Commercial designation for 10 acres of the Murray/Beard site.
19 A further decision on the appropriate zoning designation for each site will be
20 the subject of a separate land use process.

⁴As relevant, ORS 197.175(2) provides:

“Pursuant to ORS chapters 195, 196 and 197, each city and county in this state shall:

“(a) Prepare, adopt, amend and revise comprehensive plans in compliance with goals approved by the commission;

“(b) Enact land use regulations to implement their comprehensive plans[.]”

Similarly, Goal 2 provides in relevant part:

“City * * * plans and actions related to land use shall be consistent with the comprehensive plans of cities * * *.”

“* * * * *

“[Comprehensive] plans shall be the basis for specific implementation measures. These measures shall be consistent with and adequate to carry out the plans. * * *”

1 “* * * The applicant will be unable to develop the Murray/Beard site until a
2 specific zoning designation is applied. Therefore, there is no possibility that
3 Commercial development could occur on the property that does not conform
4 to the Comprehensive Plan.” Record 40.

5 The Goal 2 and statutory language cited by petitioners makes it clear that the city is
6 obligated to ensure that its “land use regulations,” including its zoning map, are consistent
7 with the plan map.⁵ However, neither Goal 2 nor ORS 197.175 expressly dictate that plan
8 map/zoning map consistency must be achieved at the same time that the comprehensive plan
9 map is amended.

10 A potential problem that is created by the approach that is taken in the challenged
11 decision is that the plan map and zoning map are thereby rendered inconsistent. The city
12 recognized that problem here. The city explained that the consequence of the approach taken
13 in its decision is that the applicant will be unable to develop the subject sites until new
14 zoning designations are applied to implement the new plan map designations.⁶ The dispute
15 between petitioners and the city under this subassignment of error concerns the *timing* of the
16 conforming zoning map amendments rather than *whether* those zoning map amendments are
17 required by Goal 2 and ORS 197.175.

18 In *Baker v. City of Milwaukie*, 271 Or 500, 533 P2d 772 (1975), the city adopted a
19 comprehensive plan that was in some respects inconsistent with its previously adopted
20 zoning ordinance. The Oregon Supreme Court held that in such a circumstance the city
21 assumed an obligation to conform its zoning ordinance to the comprehensive plan. The court

⁵As defined by ORS 197.015(11), “land use regulations” specifically include zoning ordinances. The Beaverton Development Code (BDC) is the city’s zoning ordinance, and the city’s zoning map is part of the BDC.

⁶The findings quoted in the text specifically refer to the 10 acres of the Beard/Murray site that are proposed for commercial development, because that is the site that was the primary focus of debate below. However, we do not understand the city to adopt a different position with regard to the MDR-designated portion of the Beard/Murray site or the SDR-designated Beard/155th site. We understand the city to have concluded in the challenged decision that new, consistent zoning must be applied to both the Beard/155th and Beard/Murray sites *before* they can be developed.

1 also held that the comprehensive plan controlled permissible uses of land until the
2 conforming zoning ordinance amendment is adopted.

3 “Upon passage of a comprehensive plan a city assumes a responsibility to
4 effectuate that plan and conform prior conflicting zoning ordinances to it. We
5 further hold that the zoning decisions of a city must be in accord with that
6 plan and a zoning ordinance which allows a more intensive use than that
7 prescribed in the plan must fail.” *Baker*, 271 Or at 514.

8 With particular relevance to the issue presented in this subassignment of error, the court in
9 *Baker* specifically left open the question of “the precise time that the [conforming zoning]
10 ordinance should be enacted.” *Baker*, 271 Or at 514 n 14.

11 The Oregon Supreme Court’s decision in *Baker* relied on its decision in *Fasano v.*
12 *Washington Co. Comm.*, 264 Or 574, 582, 507 P2d 23 (1973) and ORS 197.175(2) in
13 reaching the above conclusions and does not specifically refer to the language of Goal 2 that
14 is cited by petitioners. However, the cited language in Goal 2 imposes essentially the same
15 obligation that is imposed by ORS 197.175(2). *See* n 4. The Oregon Supreme Court’s
16 decision in *Baker* is contrary to petitioners’ argument that zoning ordinance amendments that
17 are necessary to implement a comprehensive plan amendment must be adopted at the same
18 time as the plan amendment.⁷

19 The challenged decision has the effect of leaving the subject sites undevelopable for
20 up to two years, until new zoning map designations are requested to implement the
21 challenged plan map designations. If those zoning map designations are not requested within

⁷In *Washington Co. Farm Bureau v. Washington Co.*, 17 Or LUBA 861, 883 (1989), we rejected an argument similar to the one advanced by petitioners here:

“Although we agree with petitioners that the EFU and AF-20 zones currently applied by the county to the disputed roadways do not allow the planned for improvements, we do not believe such a plan/zone inconsistency automatically requires remand as petitioners assume. Plan designations frequently envision more intensive uses than those currently authorized by the current implementing land use regulations. *See, e.g., Clinkscates v. City of Lake Oswego*, 47 Or App 1117, 1121, 615 P2d 1164, *rev den* 289 Or 74 (1980); *Greb v. Klamath County Comm’rs*, 32 Or App 39, 44, 573 P2d 733 (1981); *Marracci v. City of Scappoose*, 26 Or App 131, 133, 552 P2d 552 (1976).”

1 two years, the property reverts to its prior plan map designations. Petitioners’ argument
2 under this subassignment of error is categorical, *i.e.*, that contemporaneous zoning map
3 amendments are legally required by the goal and statute. Petitioners do not argue that
4 leaving the subject sites undevelopable for up to two years violates Goal 2, ORS 197.175(2)
5 or other statewide planning goal or statutory requirements. We therefore do not consider that
6 question.

7 Subassignment of error 1(A) is denied.

8 **B. The City Has no Appropriate Implementing Zoning Designations**

9 Petitioners’ second subassignment of error is a variation of their first subassignment
10 of error. Petitioners argue that the city has no zoning district that could be applied to
11 implement the challenged plan map amendments. The challenged decision takes the position
12 that the Community Service (CS) and Neighborhood Service (NS) zoning districts are
13 potentially available to implement the plan map amendments that are adopted by the
14 challenged decision.⁸ Petitioners contend that while the city’s CS and NS zoning districts
15 are potentially available as implementing zoning districts, neither district can be applied here

⁸The plan describes the CS district, in part, as follows:

“The [CS] District is intended to recognize existing commercial activity found principally along Beaverton Hillsdale Highway, Canyon Road, Tualatin Valley [Highway], Cedar Hills Boulevard and Highway 217. * * *

“[T]his type of development pattern should be limited to existing areas and not allowed to occur along other arterials.” BCP II-C-3.

The plan includes the following description of the NS district:

“This district is intended to provide for the frequent needs of nearby residents. They should contain uses such as a grocery store, drug store; small offices, and other uses that will provide convenient shopping services to area residents. This will be accomplished by regulating size, spacing, location and scale of these districts.” BCP II-C-2.

The plan includes the following NS District policy:

“2. Centers should be spaced approximately one mile apart to allow most residents one-half mile distance. This spacing is also to prevent single purpose commercial uses to develop into strips over time.” BCP II-C-8.

1 in view of the specific commercial development that is required by the decision for the
2 northern 10 acres of the Beard/Murray site.⁹ Petitioners contend that the lack of a currently
3 available implementing zoning designation violates Goal 2 and ORS 197.175(2).

4 The challenged decision envisions a particular kind of commercial development on
5 the northern 10 acres of the Beard/Murray site. For the reasons presented in their brief,
6 petitioners may be correct that neither the CS nor the NS zone allow the kind of commercial
7 development that is envisioned by the challenged decision. However, the challenged plan
8 amendment does not adopt a final decision that either the CS or NS zone can be or will be
9 applied to the Beard/Murray site. While some of the city's findings express a belief that one
10 of those zones could be applied in the future, the challenged decision expressly defers
11 rezoning to a later date. Any decision to rezone the subject sites will have to be justified
12 when and if such a decision is made in the future. Nothing in the challenged decision
13 purports to be a final decision that the NS zone or the CS zone may appropriately be applied
14 to implement the development that is envisioned by the challenged decision for the northern
15 10 acres of the Beard/Murray site. The expressions of confidence in the findings that those
16 zoning districts can be applied in the future are legally irrelevant in view of the city's
17 decision to defer rezoning the subject sites.¹⁰

⁹Petitioners argue the CS district is intended to recognize *existing commercial activity* located principally along the specified arterials and cannot be applied to the subject, *undeveloped* northern portion of the Beard/Murray site. Petitioners argue the NS zoning district cannot be applied because there are two existing NS districts within one mile of the Beard/Murray site.

The decision includes findings that suggest the CS district might be applied if the development is appropriately conditioned. The findings also suggest that the NS district could be applied with a variance to the one-mile spacing requirement. Petitioners argue that the nature of the commercial use that is approved by the challenged decision precludes application of the CS district and argue that no variance to the one-mile spacing requirement is possible under the city's land use regulations.

¹⁰We also note that the city may well be required to interpret its comprehensive plan and land use regulations in deciding whether those zoning districts can be applied. In that event, in any appeal LUBA would be required to apply a highly deferential standard of review. ORS 197.829(1); *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). Because at this point we have no way of knowing how the city might interpret its comprehensive plan and zoning ordinance, it would be particularly inappropriate for LUBA to consider now whether or how the CS or NS zoning districts may be applied to the Beard/Murray site.

1 Moreover, even if petitioners are correct that neither the NS nor the CS zoning
2 districts or other *existing* zoning districts can be applied to implement the challenged plan
3 map amendments, that would not require that the challenged decision be reversed or
4 remanded. If petitioners’ view of the NS and CS zoning districts proves to be correct in the
5 future, the city simply would be required to (1) adopt a new implementing zoning district or
6 amend an existing zoning district so that it could be applied, or (2) adopt any further plan
7 map amendments that may be required to allow an implementing zoning map designation to
8 be applied. We fail to see why a lack of an available implementing zone now, even if true,
9 necessarily provides a basis for reversal or remand.

10 Subassignment of error 1(B) is denied.

11 **C. Condition of Approval**

12 In presenting the above subassignments of error, petitioners appear to present a third
13 subassignment of error concerning the city’s expression of intent that the northern 10 acres of
14 the Beard/Murray site “be developed in a manner which is consistent with representations
15 made by the applicants’ representatives * * *.”¹¹ Record 2.

16 Petitioners first argue that an expression of intent is not the same as a condition of
17 approval. Petitioners contend the city failed to impose a condition that the Beard/Murray site
18 be developed in accordance with the expression of intent. It is not clear to us why petitioners
19 believe the city was required to condition the challenged plan map amendments in
20 accordance with the expression of intent. In any event, notwithstanding its failure to label
21 the expression of intent as a condition of approval, the challenged decision clearly requires
22 that the zoning map designations and permit applications that will be required to implement
23 the challenged decision must comply with the cited expression of intent. We fail to see any
24 error in the city’s failure to label the requirement a “condition of approval.”

¹¹The complete expression of intent is set out in section “B” of our discussion of the facts above.

1 Petitioners next argue the expression of intent included in the challenged decision “is
2 so vague and uncertain as to be both unascertainable and unenforceable.” Petition for
3 Review 19. Petitioners are correct that the expression of intent is “vague and uncertain.” We
4 agree with petitioners that such a vague and uncertain requirement may lead to future
5 disputes about what specifically is required to comply with the expression of intent.
6 However, the possibility of such disputes in the future does not mean that the requirement is
7 “unascertainable or unenforceable.” Planning standards are frequently imprecise. *See*
8 *Oswego Properties, Inc. v. City of Lake Oswego*, 108 Or App 113, 119, 814 P2d 539 (1991)
9 (the land use standards that are required by ORS 227.173(1) need only be “clear enough for
10 an applicant to know what he must show during the application process”)(quoting *Lee v. City*
11 *of Portland*, 57 Or App 798, 802, 646 P2d 662 (1982)).

12 In *DLCD v. City of St. Helens*, 29 Or LUBA 485, 497-98 (1995) and *Penland v.*
13 *Josephine County*, 29 Or LUBA 213, 222 (1995) we remanded a zoning map change and a
14 conditional use permit, where the decision makers relied on a particular development
15 proposal to ensure that an applicable approval criterion was met, but failed to condition the
16 approval to ensure development of the relied-upon development proposal. We see no reason
17 why that principle would not also apply to a plan map amendment, in similar circumstances.
18 In that event, it might also be error to impose a vague and uncertain condition, if such a
19 condition would be ineffective to achieve its purpose of limiting the development that would
20 otherwise be possible under the plan map designation. However, petitioners in this appeal do
21 not argue that the particular development that the city envisions in its expression of intent
22 (whatever the exact nature of that development might be) is required to meet an identified
23 approval criterion. To the extent petitioners address this question at all, they appear to argue
24 to the contrary that the nature of the development that the city requires *precludes* application
25 of available zoning designations. Because petitioners identify no legal standard that is

1 violated by the city’s admittedly unclear expression of intent, their argument under this
2 subassignment of error provides no basis for reversal or remand.

3 Subassignment of error 1(C) is denied.

4 The first assignment of error is denied.

5 **SECOND ASSIGNMENT OF ERROR**

6 The evidentiary hearing before the planning commission was limited to consideration
7 of the proposed plan map amendments. The parties were instructed not to direct their
8 arguments at the specific commercial development that is anticipated for the northern 10
9 acres of the Beard/Murray site, because no specific development or zoning proposal was
10 being considered by the planning commission. The city council limited its review to the
11 evidentiary record compiled by the planning commission. As previously discussed, the city
12 council decision granting the requested comprehensive plan amendment limits commercial
13 development at the Beard/Murray site to the development that was proposed by the applicant
14 and imposes a two-year timetable and automatic revocation if the two-year deadline is not
15 met. Petitioners argue the city council “altered both the playing field and the goal posts” and
16 in doing so committed a procedural error and prejudiced petitioners' substantial rights.
17 Petition for Review 31.

18 Intervenor Sorrento responds that the conditions that petitioners now complain about
19 were imposed to address concerns that were raised during the local proceedings about
20 commercial development at the Beard/Murray site. Whatever the reasons for the conditions,
21 we do not agree there was an alteration of the playing field or a change in the goal posts.
22 The possibility that the requested plan map amendments would be conditioned to ensure
23 compliance with the relevant plan map amendment criteria was present throughout the city’s
24 deliberations. The conditions imposed by the city council admittedly have the effect of
25 limiting the kinds of development that may ultimately be approved when applications for
26 zoning and development approval are submitted. However, those conditions simply *limit* the

1 kind of commercial development that may be authorized through the zoning and permitting
2 process; they do not *authorize* a specific commercial development.

3 Petitioners recognize that there is nothing wrong with considering plan map and
4 zoning map changes and development permits that may be necessary for a particular
5 development proposal in separate proceedings, or making separate decisions concerning such
6 map changes and development permits. *Headley v. Jackson County*, 19 Or LUBA 109, 112-
7 13 n 6 (1990) (*quoting Kirpal Light Satsang v. Douglas County*, 17 Or LUBA 387, 395 n 15,
8 *remanded on other grounds* 96 Or App 207, *modified on reconsideration* 97 Or App 614, *rev*
9 *den* 308 Or 382 (1989)). The planning commission’s requirement that arguments be directed
10 at the requested plan map amendment criteria rather than a specific proposal simply reflected
11 the fact that approval for a specific proposal was not being considered with the plan map
12 amendments. That fact did not change during the city council’s deliberations in this matter.
13 Petitioners provide no reason for us to believe that petitioners will not be given an
14 opportunity to comment on the specific proposal for commercial development of the
15 Beard/Murray site when zoning map changes and development permits are requested.
16 Petitioners do not explain why the city council’s decision to limit testimony concerning the
17 plan map amendments it granted prevented petitioners from addressing the relevant plan map
18 amendment criteria.

19 The second assignment of error is denied.

20 **THIRD ASSIGNMENT OF ERROR**

21 As noted in our discussion of the facts earlier in this opinion, the approved plan map
22 changes for the Beard/Murray and Beard/155th sites will revert to their prior designations if
23 the applicant does not achieve substantial progress in implementing the development within
24 two years. Substantial progress is specifically defined as:

- 25 “1. For the [SDR designated Beard/155th site] filing a complete zone
26 change application.

- 1 “2. For the [MDR designated southern 7.5 acres of the Beard/Murray site]
2 filing applications for a zone change and design review approval, or a
3 zone change and conditional use permit; and
- 4 “3. For the [Commercial designated northern 10 acres of the
5 Beard/Murray site] filing applications for a zone change and design
6 review approval, or a zone change and conditional use permit.”
7 Record 2-3.

8 Petitioners argue that including a condition that may have the effect of revoking the
9 adopted plan map amendments, and causing a reversion to the previously existing plan map
10 designations, violates Goal 2. Petitioners do not cite the specific language of Goal 2 that
11 they rely upon. However, petitioners explain that the uncertainty that is caused by the
12 condition violates the Goal. Petitioners also argue that, because the possible reversion in two
13 years does not envision providing the notice required by ORS 197.610 or the right to appeal
14 provided by ORS 197.620, it violates those statutes as well.¹² Finally, petitioners argue the
15 uncertainty caused by the condition will cause some practical problems in applying the plan
16 and violates language in the introduction to the plan that requires that the plan be “the
17 official long-range land use policy document for the City of Beaverton.” BCP I-1.

18 We see nothing in the BCP or Goal 2 that expressly prohibits what the city has done
19 here. So long as the challenged comprehensive plan amendment is viewed as a single
20 amendment that simply has two possible eventual outcomes, rather than as two separate plan
21 amendments, the challenged decision does not violate ORS 197.610 or 197.620. We believe
22 the challenged amendment is appropriately characterized as a single amendment with two
23 potential outcomes.

24 Neither party addresses the provisions of ORS chapter 227 that govern the city’s
25 planning and zoning authority, but we are aware of nothing there that would preclude the

¹²Among other things, ORS 197.610 requires that a local government forward a copy of a proposed post-acknowledgment plan amendment to the Director of the Department of Land Conservation and Development at least 45 days before the final local hearing on adoption. ORS 197.620 provides that persons who participate in local proceedings leading to adoption of a comprehensive plan amendment may appeal the decision to LUBA.

1 challenged condition. Neither are we aware of anything in ORS chapter 197 or the other
2 statewide planning goals that would prohibit a condition that the plan map designations
3 revert to the acknowledged plan map designations that existed prior to the challenged
4 decision, if the applicant fails to achieve substantial progress in two years.

5 While we conclude that nothing in Goal 2 expressly forbids all conditions such as the
6 one challenged in this subassignment of error, that does not mean the concerns expressed by
7 petitioners are wholly without merit. If the reversionary period were longer, petitioners'
8 Goal 2 argument might have merit, notwithstanding the lack of language in Goal 2
9 specifically prohibiting such conditions. One of the fundamental requirements of Goal 2 is
10 that there be an "adequate factual base" for land use decisions. *1000 Friends of Oregon v.*
11 *City of North Plains*, 27 Or LUBA 372, 377 (1994). As the length of time in which a plan
12 map designations reversion could occur gets longer, the chances increase that the relevant
13 facts may change in unanticipated ways. At some point a *current* decision that plan map
14 designations could automatically change several years in the future would cease to be
15 supported by an adequate factual base, simply because the decision maker's ability to make
16 valid assumptions about future facts is limited. However, in this case, we do not believe that
17 the two-year period established by the disputed condition is long enough to raise questions
18 about whether the challenged decision is supported by an adequate factual base.

19 The third assignment of error is denied.

20 **FOURTH ASSIGNMENT OF ERROR**

21 At the time the challenged application was submitted, comprehensive plan
22 amendments were subject to criteria that are included in Section 8 of City of Beaverton
23 Ordinance 1800. One of those criteria requires the city to "consider and make findings
24 regarding" "[d]emonstrated public need to be satisfied by the amendment as compared with
25 other available properties." Record 11.

26 The city adopted the following findings addressing the Beard/155th site:

1 “There will be demand for residential uses in this area, as demonstrated by the
2 Leland study. The Metro Functional Plan targets an additional 6,745 single-
3 family units and 9,445 multi-family units needed in Beaverton by 2017. The
4 southern portion of the [Beard/Murray] site accommodates a portion of the
5 need that has been established for either multi-family or single-family
6 residential units. By designating ten acres of [SDR] at [the Beard/155th site]
7 no net loss of residential acreage will result.” Record 13.

8 The city also adopted the following findings concerning the Commercial designation that
9 was adopted for the northern 10 acres of the Beard/Murray site:

10 “The Council finds that [compliance with the public need criterion] is
11 adequately demonstrated solely by the prior designation of eleven acres of
12 commercial at [the Beard/155th site] ten of which are proposed to be relocated
13 to the [Beard/Murray] site. The fact that this action is simply a relocation of
14 an existing commercial area means the need for this amount of commercial
15 designated area has already been established.” Record 12.

16 As petitioners correctly note, the city did not adopt findings addressing the part of the
17 criterion that requires the city to “compare” the amendments at the Beard/Murray and
18 Beard/155th sites “with other available properties.” The challenged decision does take the
19 position that the Beard/155th site is suitable for residential development and the northern
20 portion of the Beard/Murray site is suitable for commercial development. However, we are
21 directed to no effort on the city’s part to “compare” the proposed amendments with “other
22 available properties.”¹³ Petitioners argue that this failure on the city’s part requires that the
23 challenged decision be remanded so that the required comparative analysis can be
24 performed.¹⁴

25 Although the interpretation could be stated more clearly in the decision, we
26 understand the city to have interpreted the “public need” criterion to apply differently where
27 a plan amendment is simply swapping existing plan designations on two approximately

¹³Neither does the decision take the position that there are no “other available properties” which could be designated Commercial or SDR.

¹⁴Intervenor Sorrento contends the city explains in various parts of its decision that the Beard/155th property is more appropriate for residential development than it is for commercial development. We do not understand petitioners to dispute this point.

1 10-acre properties located one-half mile apart.¹⁵ The challenged decision can be read to
2 interpret the “public need” criterion as being met without further consideration in that
3 circumstance, because the existing acreage of Commercial and SDR-designated land is
4 unaffected and it therefore can be assumed that the need that justified the existing plan
5 designations continues to apply.

6 Petitioners do not specifically challenge the above interpretation, except to argue that
7 the “public need” criterion must be applied according to its terms and requires that the city
8 conduct the required comparison with “other available properties.” If it were not for the
9 deferential standard of review we must apply to the city’s interpretation under ORS
10 197.829(1) and *Clark v. Jackson County*, we might agree with petitioners. As the court of
11 appeals has explained on numerous occasions, we are to remand under that standard of
12 review only where the interpretation is “clearly wrong.” *Huntzicker v. Washington County*,
13 141 Or App 257, 261, 917 P2d 1051, *rev den* 324 Or 322, (1996); *Zippel v. Josephine*
14 *County*, 128 Or App 458, 461, 876 P2d 854, *rev den* 320 Or 272 (1994); *Goose Hollow*
15 *Foothills League v. City of Portland*, 117 Or App 211, 843 P2d 992 (1992). While the city’s
16 interpretation fails to give effect to some of the language of the “public need” criterion, the
17 city’s explanation for doing so is based on the unique factual circumstance posed by a swap
18 of existing plan designations. We cannot say the city’s interpretation is clearly wrong.¹⁶

19 The fourth assignment of error is denied.

20 **FIFTH ASSIGNMENT OF ERROR**

21 Petitioners argue under the fifth assignment of error that the challenged decision

¹⁵Petitioners’ argument under this subassignment of error is limited to the Beard/155th site and does not include a challenge to the new plan map designations for the Beard/Murray site.

¹⁶We note that we can envision circumstances where the city’s interpretive approach in applying the “public need” criterion might present problems. For example if the plan designations of properties located some distance from each other were being swapped, it might not be possible to assume the need that justified the Commercial and SDR designations in the first place would continue to be met at the new locations. However, petitioners do not argue that there are such circumstances here.

1 violates Goal 10 (Housing), the Metropolitan Housing Rule, and Title One of the Urban
2 Growth Management Functional Plan.¹⁷ Petitioners argue that the city’s findings
3 misconstrue these requirements, are inadequate and are not supported by substantial
4 evidence.

5 Petitioners take the position that under the previously existing SDR designation of the
6 17.5-acre Beard/Murray site, approximately 111 dwellings could have been constructed on
7 the Beard/Murray site.¹⁸ According to petitioners, after the challenged decision, there is the
8 *potential* for between 88 and 164 dwelling units on the SDR-designated Beard/155th site and
9 MDR-designated southern portion of the Beard/Murray site.¹⁹ The actual potential number
10 of dwelling units will vary depending on which of the available zoning districts is ultimately
11 applied to the Beard/155th site and Beard/Murray site.²⁰ Petitioners argue the city erred by
12 failing to specifically condition the challenged plan map amendments on application of the
13 higher density zoning districts that would allow development of the higher number of
14 dwelling units.

15 We have already concluded that the city may delay application of new zoning to the
16 Beard/Murray and Beard/155th sites to a future date. The plan amendment that is challenged
17 in this appeal was approved based in part on a finding that the new plan map designations

¹⁷The goal, rule and functional plan all encourage and establish goals for development of housing.

¹⁸Apparently the Commercial designation that was previously applied to the Beard/155th site and is now applied to the 10-acre northern portion of the Beard/Murray site does not allow residential development.

¹⁹The parties and the city offered different estimates concerning the exact number of dwellings that could potentially be developed on the two sites under the prior and adopted plan map designations. However, intervenor Sorrento argues there was no contention that the proposed plan map designations would result in a potential for *fewer* residential units, as compared to the existing plan map designations, so long as the properties were ultimately zoned to allow maximum density residential development. We do not understand petitioners to dispute that point.

²⁰According to petitioners, the development potential on the Beard/155th site will be 70 units if it is zoned R-5 but will only be 35 units if it is zoned R-10. Petitioners contend that the development potential on the MDR designated northern 7.5 acres of the Beard/Murray site will be 94 units under R-2 zoning but only 53 units under R-3.5 zoning.

1 would result in an increased residential density over the prior plan map designations. There
2 is no real dispute that the adopted plan map designations at least authorize application of
3 zoning districts that would achieve that result. If the city were to adopt the more restrictive
4 residential zoning districts that petitioners fear *could* be adopted, we see no reason why such
5 a zoning decision could not be challenged on the basis that it is inconsistent with the plan,
6 Goal 10, Metropolitan Housing Rule, or the Urban Growth Management Functional Plan.
7 ORS 197.175(2)(d) (land use decisions must be consistent with acknowledged
8 comprehensive plans); ORS 197.835(7) (amended land use regulations must comply with
9 acknowledged plan or statewide planning goals); ORS 268.390(4) (city comprehensive plans
10 and actions taken under such plans must conform to Metro functional plans). We agree with
11 intervenor Sorrento that it would not be appropriate for LUBA to assume that the city will
12 apply inappropriate zoning districts in the future to comply with the challenged plan map
13 amendments. To the contrary, it is appropriate to assume the city will apply the appropriate
14 zoning districts and that any failure to do so can be corrected through an appeal of any city
15 decision that applies a zoning district that does not comply with the statutes, goals or BCP.

16 Finally, petitioners point to findings that address Goal 5 (Open Spaces, Scenic and
17 Historic Areas, and Natural Resources) and a city environmental criterion. Those findings
18 note that there is a significant grove of trees on the Beard/155th site and that tree preservation
19 will need to be considered when the site is developed. Petitioners argue that saving the trees
20 could result in a reduction of the number of dwellings that are ultimately developed on the
21 Beard/155th site.

22 Petitioners' concern is speculative. Nevertheless, had this concern been specifically
23 raised below, the city might well have been obligated to adopt findings to establish that the
24 significant grove of trees will not have the impact on potential residential development that
25 petitioners suggest. Where there is focused testimony raising legitimate concerns about
26 compliance with a relevant approval criterion, the city's findings must address such

1 concerns. *Norvell v. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979); *White*
2 *v. City of Oregon City*, 20 Or LUBA 470, 477 (1991). However, petitioners do not contend
3 that their concern regarding the potential impact of the trees on residential development of
4 the Beard/155th site was raised below, and we therefore conclude that no specific finding
5 addressing that concern was required. A variety of assumptions appear to have been made
6 concerning potential development of the subject sites. The city relied on those assumptions
7 to conclude that the challenged decision will result in an *increase* in the potential number of
8 dwellings. Absent some reason to suspect that the particular development constraint that
9 petitioners suggest is posed by the trees renders those assumptions invalid, we conclude a
10 reasonable person would rely on those assumptions to conclude as the city did. The
11 assumptions therefore constitute substantial evidence to support the city’s conclusion. *Dodd*
12 *v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*,
13 305 Or 346, 351-52, 752 P2d 262 (1988).

14 The fifth assignment of error is denied.

15 **SIXTH ASSIGNMENT OF ERROR**

16 In their final assignment of error, petitioners argue the city erred by failing to address
17 the transportation planning rule (TPR) requirements set out at OAR 660-012-0045(3) which
18 petitioners argue are directly applicable to city land use decisions.²¹ Petitioners concede that
19 they did not raise any issue before the city concerning compliance with OAR 660-012-
20 0045(3), but argue that they could not have anticipated the city would limit the requested
21 plan map amendments to require implementation of intervenor Sorrento’s proposal.

22 Intervenor Sorrento responds that the possibility of conditions such as the ones that

²¹ OAR 660-012-0045 includes requirements that local governments adopt land use regulations that ensure that development provides bicycle parking facilities, provides safe pedestrian and bicycle access, and supports transit. OAR 660-012-0055(4)(b) requires that local governments that have not yet adopted acknowledged land use regulations that comply with OAR 660-012-0045(3) and other specified TPR provisions must apply those provisions directly to their land use decisions.

1 were ultimately imposed were discussed during the local proceedings and that petitioners
2 cannot rely on the imposition of those conditions as an excuse for not raising the TPR issues
3 they attempt to raise now for the first time in the petition for review. Intervenor Sorrento
4 also notes that while the challenged decision *limits* development of the Beard/Murray site to
5 the proposal that was presented below, it does not *approve* that development. Therefore,
6 according to intervenor Sorrento, the requirements expressed in OAR 660-012-0045 are
7 appropriately addressed at the time the zoning and permit applications are submitted with the
8 more detailed proposal that will presumably accompany those applications. We agree with
9 both of intervenor Sorrento's responses.

10 The sixth assignment of error is denied.

11 The city's decision is affirmed.