

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 HOME DEPOT, U.S.A., INC.,
4 *Petitioner,*

5
6
7 vs.

8
9 CITY OF PORTLAND,
10 *Respondent,*

11 and

12
13 TMT DEVELOPMENT COMPANY, INC.,
14 *Intervenor-Respondent.*

15
16 LUBA No. 99-078

17
18 FINAL OPINION
19 AND ORDER

20
21
22 Appeal from City of Portland.

23
24 Frank M. Parisi, Portland, Corinne C. Sherton, Salem, and Todd S. Sadlo, Portland,
25 filed the petition for review. With them on the brief were Parisi and Parisi, LLP and Johnson
26 and Sherton, PC. Frank M. Parisi and Corinne C. Sherton argued on behalf of petitioner.

27
28 Kathryn S. Beaumont, Senior Deputy City Attorney, Portland, filed the response brief
29 and argued on behalf of respondent.

30
31 Steven L. Pfeiffer, Portland, represented intervenor-respondent.

32
33 BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,
34 participated in the decision.

35
36 AFFIRMED

04/07/2000

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

NATURE OF THE DECISION

Petitioner challenges amendments to the city’s zoning ordinance that limit certain retail uses in industrial and employment zones.

MOTION TO INTERVENE

TMT Development Company, Inc., moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

FACTS

Title 4 of the Metro Urban Growth Management Functional Plan (UGMFP) was adopted in 1998. Title 4 directs cities and counties within Metro’s jurisdiction to adopt rules to limit the siting of retail uses within employment and industrial zones. Title 4 was adopted because of a perceived conflict between large retail establishments and other businesses allowed in the industrial and employment zones. UGMFP 3.07.410 provides:

“It is the intent of the Metro 2040 Growth Concept that Employment and Industrial Areas contain supportive retail development. Employment and Industrial areas would be expected to include some limited retail commercial uses primarily to serve the needs of people working or living in the immediate Employment or Industrial Areas; not larger market areas outside the Employment or Industrial Areas.”

For industrial areas, Title 4 requires cities and counties to amend their comprehensive plans and land use regulations to prohibit retail uses larger than 60,000 square feet of gross leasable area per building or business in industrial areas. For employment areas, Title 4 requires a process resulting in a land use decision for any retail uses larger than 60,000 square feet of gross leasable area per building or business in employment areas.¹ Title 4 further requires that as part of such land use decisions in employment zones, the applicant for a large format retail use must demonstrate that transportation facilities adequate to serve the

¹Title 4 includes a map of designated industrial and employment areas.

1 retail use will be in place at the time the retail use begins operation.² The applicant must also
2 demonstrate “that transportation facilities adequate to meet the transportation need for the
3 other planned uses in the Employment Areas are included in the applicable comprehensive
4 plan provisions.” UGMFP 3.07.420.B.

5 In 1999, the City of Portland adopted legislation to comply with Title 4 (1999
6 amendments).³ The 1999 amendments affect five zoning districts: two General Industrial
7 districts (IG1 and IG2), the Heavy Industrial district (IH), and two General Employment
8 districts (EG1 and EG2). The city’s commercial zoning districts are not affected by the 1999
9 amendments.

10 As a result of these amendments, retail uses greater than 25,000 square feet of floor
11 area, exclusive of exterior sales or display areas, are prohibited in the industrial zones, and
12 are subject to a conditional use permit process in the employment zones. Petitioner, a retail
13 business that operates exclusively through large format retail stores, appeals the city’s
14 amendments.

15 **INTRODUCTION**

16 The city’s 1999 amendments limit retail sales and service uses in the affected zones
17 in several ways.⁴ The relevant changes are summarized below.

18 **A. Prior to 1999 Amendments**

19 Prior to the 1999 amendments, the IG1 industrial district allowed one retail use of

²The city refers to retail uses encompassing more than 60,000 square feet as “big box stores.” Petitioner refers to them as “large format retail uses.” For the purpose of consistency, we use petitioner’s terminology throughout this opinion.

³The amendments also rezone a particular site from EG2 to General Commercial (CG). However, those amendments have not been challenged in this appeal.

⁴Because petitioner’s appeal is directed primarily at the effect of the 1999 amendments on large format retail uses, we refer to the uses generally as “retail uses.” However, we note that the uses the city allows in its Retail Sales and Services category are broader than typical retail uses. The category includes, among other uses, hotels, motels, and restaurants. *See* Portland City Code (PCC) 33.920.250.C.3.

1 less than 3,000 square feet per site, subject to Floor Area Ratio (FAR) limitations. A
2 conditional use permit was required to site more than one retail use, or to site a retail use
3 containing more than 3,000 square feet. However, an adjustment to the FAR limitation was
4 allowed in certain circumstances.

5 In the IG2 and IH industrial districts, up to four retail uses of 3,000 square feet or less
6 per use, were allowed. A conditional use permit was required for more than four retail uses,
7 or for retail uses containing more than 3,000 square feet.

8 In the EG1 and EG2 employment districts, retail sales and service uses were allowed
9 without limitation on square footage, but were subject to a 1:1 FAR limitation. In historic
10 landmarks, the FAR limitation was 2:1.

11 **B. After the 1999 Amendments**

12 In the IG1 industrial district, one retail use per site is permitted, provided the use does
13 not exceed 3,000 square feet.⁵ Conditional use review is required for retail uses between
14 3,000 and 25,000 square feet. Retail uses over 25,000 square feet are prohibited, except
15 within historic landmarks. Retail uses with more than 3,000 square feet, but not more than
16 60,000 square feet, are allowed in historic landmarks, subject to conditional use review. FAR
17 limitations remain unchanged; however, no adjustments to the FAR limitations are allowed.

18 In the IG2 industrial district, up to four retail uses per site can be established,
19 provided that none of the uses exceeds 3,000 square feet. Conditional use review is required
20 for retail uses between 3,000 and 25,000 square feet. Retail uses over 25,000 square feet are
21 prohibited, except in historic landmarks. In historic landmarks, retail uses with more than
22 3,000 square feet, but not more than 60,000 square feet, are subject to conditional use review.
23 Retail uses greater than 60,000 square feet are prohibited. Like the IG1 industrial district,
24 FAR limitations are unchanged, but no adjustments to FAR limitations are allowed.

⁵The city's square foot calculations include floor area plus exterior storage and display areas.

1 In the IH industrial district, retail uses with more than 3,000 square feet, but not more
2 than 12,000 square feet, are subject to conditional use review. Retail uses may not exceed
3 12,000 square feet, except for those located in historic landmarks. In historic landmarks,
4 retail uses with more than 3,000 square feet, but not more than 25,000 square feet, may be
5 allowed through conditional use review. Within historic landmarks, retail uses of more than
6 25,000 square feet are prohibited.

7 In EG1 and EG2 employment districts, retail uses under 60,000 square feet of floor
8 area continue to be allowed outright, subject to FAR limitations. Retail uses over 60,000
9 square feet of floor area are subject to a conditional use process.⁶

10 **PRELIMINARY MATTERS**

11 Throughout the petition for review, petitioner asserts that the city’s findings are
12 insufficiently detailed to support its decision. Petitioner further argues that previous LUBA
13 decisions have established that the city must adopt findings to address plan objectives, as
14 well as goals and policies, when it adopts decisions that require compliance with the
15 comprehensive plan. These assertions require some preliminary discussion.

⁶PCC 33.815.128 establishes the conditional use criteria for the EG1 and EG2 zones. It provides:

“These approval criteria apply to Retail Sales And Service uses in order to allow commercial development that serves the immediate employment area while ensuring that the development will not have a detrimental impact on the character of the employment zone. The approval criteria are:

- “A. The recommended use will not have significant adverse effects on neighboring employment uses;
- “B. The transportation system is capable of supporting the recommended use in addition to the existing uses in the area. Evaluation factors include street capacity and level of service, access to arterials, transit availability, on-street parking impacts, access requirements, neighborhood impacts, and pedestrian safety;
- “C. The proposed use will not significantly alter the overall desired character of the area, based on the existing mixture of uses and the effects of incremental change; and
- “D. City-designated scenic resources are preserved.”

1 **A. Findings Requirement**

2 There is no statutory requirement that legislative land use decisions be supported by
3 findings demonstrating compliance with applicable legal criteria. *Churchill v. Tillamook*
4 *County*, 29 Or LUBA 68, 77 (1995). If the local government does not adopt findings
5 demonstrating that the challenged legislative decision is consistent with any applicable legal
6 requirements, the decision may still be upheld if the local government can demonstrate
7 through argument in its brief and citations to the record that the decision is consistent with
8 applicable legal criteria. *Id.* If, however, a local code specifically requires findings in order to
9 approve legislative decisions, then the failure to adopt those findings may result in reversal
10 or remand. *Foster v. Coos County*, 28 Or LUBA 609, 612 (1995).

11 Petitioner argues that PCC 33.835.040.A requires that the city’s legislative land use
12 decisions be supported by findings.⁷ Specifically, petitioner contends that PCC 33.835.040.A
13 requires that the proposed amendments be “found” to be consistent with the comprehensive
14 plan and statewide land use goals. Petitioner argues that the word “found,” coupled with the
15 findings of the city’s decision which identify certain plan goals and policies and conclude
16 that the goals and policies are met or are not relevant to the decision, establishes an implied
17 interpretation by the city that written findings are *required* in order to adopt legislative
18 amendments to the city’s code. As a result, petitioner argues that the city’s failure to adopt
19 adequate findings to support its decision requires remand. *Barnard Perkins Corp. v. City of*
20 *Rivergrove*, 34 Or LUBA 660, 675 (1998).

21 In *Barnard Perkins Corp.*, the relevant portion of the city’s code contained the
22 following language:

⁷PCC 33.835.040.A provides, in relevant part:

“Amendments to the Zoning Code: Text amendments to the zoning code must be *found* to be consistent with the Comprehensive Plan and the Statewide Planning Goals. * * *” (Emphasis added.)

1 “[In making a recommendation regarding ‘legislative actions,’ the planning
2 commission shall] ‘identify the provisions of the plan that are relevant to the
3 decision and prepare adequate findings on how the proposal does or does not
4 comply with each provision.’” 34 Or LUBA at 673.

5 Because the ordinance in *Barnard Perkins Corp.* explicitly required the identification of
6 applicable plan provisions and required that the planning commission adopt “adequate”
7 findings to show compliance or noncompliance, LUBA concluded that the city’s failure to
8 adopt “adequate” findings was error.

9 Unlike the City of Rivergrove’s code in *Barnard Perkins Corp.*, the PCC does not
10 require that the city prepare “adequate findings” demonstrating compliance with each
11 applicable provision. PCC 33.835.040.A merely requires that the city find that text
12 amendments are consistent with the plan and goals. The city did so. Petitioner has not
13 demonstrated that PCC 33.835.040.A requires more in the way of findings. Accordingly, in
14 addition to the findings the city did adopt, the city may rely on argument in its brief and
15 citations to plan provisions, code provisions and evidence in the record in order to
16 demonstrate consistency with applicable plan provisions and goals. *Redland/Viola/Fischer’s*
17 *Mill CPO v. Clackamas County*, 27 Or LUBA 560, 564 (1994).

18 **B. LUBA Precedent**

19 In petitioner’s second through fourth assignments of error, it contends that the 1999
20 amendments fail to comply with certain plan objectives. Petitioner argues that prior LUBA
21 decisions establish that plan objectives are properly viewed as legal standards for decisions
22 such as the decision challenged in this appeal. *Welch v. City of Portland*, 28 Or LUBA 439
23 (1994); *Hess v. City of Portland*, 23 Or LUBA 343 (1992).

24 In *Hess*, the petitioners challenged a decision that denied a quasi-judicial application
25 to rezone certain property from residential to general commercial. The city determined that
26 the neighborhood plan for the area contained objectives requiring that the applicant
27 demonstrate that the proposal (1) preserve and improve the livability of the established

1 neighborhoods; (2) encourage infill of residential development; and (3) discourage the
2 expansion of strip development. The petitioners argued that the plan objectives should not
3 have been applied because the city failed to mention at the pre-application conference that
4 those objectives were applicable criteria. LUBA concluded that the city correctly determined
5 that quasi-judicial zoning applications must comply with relevant provisions of the
6 applicable community plan and, therefore, the city's denial of the application based on its
7 failure to comply with relevant plan objectives was appropriate. 23 Or LUBA at 348.

8 In *Welch*, the city determined that a plan objective limiting maximum residential
9 density constituted a nonmandatory guideline rather than an applicable decisional criterion.
10 In addressing an assignment of error that challenged the city's determination that the
11 objective was not an approval criterion, LUBA noted its recent decision in *Hess* and held
12 that, in the absence of some explanation why objectives were decisional criteria in one
13 instance, and not in another, the city could not decide on a case-by-case basis that plan
14 objectives applied as decisional criteria in one circumstance and not in another. 28 Or LUBA
15 at 448.

16 In this case, the city argues that it adopted an implicit interpretation that the
17 comprehensive plan objectives cited by petitioner do not apply because the city did not adopt
18 findings addressing those objectives. According to the city, if the council believed the plan
19 objectives were decisional criteria, then findings would have been adopted to address them.

20 An implied interpretation may be adopted by a local government and affirmed by
21 LUBA, provided the interpretation is adequate for review. *Alliance for Responsible Land Use*
22 *v. Deschutes Cty.*, 149 Or App 259, 265-266, 942 P2d 836 (1997), *rev dismissed* 327 Or 555
23 (1998); *Bradbury v. City of Bandon*, 33 Or LUBA 664, 667 (1997). An interpretation is
24 adequate for review if the decision maker's understanding of the meaning of the local
25 provision is discernible in the decision. *Brown v. City of Portland*, 33 Or LUBA 700, 708
26 (1997).

1 Here, the city’s failure to adopt findings addressing plan objectives may mean, as
2 respondent suggests, that the city council interpreted the relevant plan provisions to require
3 only consideration of goals and policies. However, it is equally plausible that the city council
4 did not consider the question of whether the plan objectives are applicable decisional criteria
5 for the decision challenged in this appeal. In the absence of a reviewable interpretation that
6 the plan objectives do not apply, we will review each of petitioner’s assignments of error
7 with regard to identified plan objectives to determine whether there is evidence in the record
8 to support a conclusion that the objectives are either not applicable, or are satisfied.

9 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

10 Petitioner argues that the 1999 amendments violate Goal 9 (Economic Development)
11 and Comprehensive Plan Policy 5.1, Objective A.⁸ Both require that the comprehensive plan
12 and its implementing regulations provide an adequate supply of commercial and industrial

⁸Goal 9 provides, in relevant part:

“To provide adequate opportunities throughout the state for a variety of economic activities vital to the health, welfare, and prosperity of Oregon’s citizens.

“* * * * *

“Comprehensive plans for urban areas shall:

“* * * * *

“3. Provide for at least an adequate supply of sites of suitable sizes, types, locations, and service levels for a variety of industrial and commercial uses consistent with plan policies[.]”

Plan Policy 5.1 provides, in relevant part:

“Urban Development and Revitalization

“Encourage investment in the development, redevelopment, rehabilitation and adaptive reuse of urban land and buildings for employment and housing opportunities.

“Objectives:

“A. Ensure that there are sufficient inventories of commercially and industrially-zoned, buildable land supplied with adequate levels of public and transportation services.”

1 land. According to petitioner, the city's current inventory of commercially-zoned land does
2 not include a sufficient amount of undeveloped land to satisfy the need for large format retail
3 uses. In adopting a conditional use process for large format retail uses in the employment
4 zones, petitioner argues, the city effectively eliminates those zones from the pool of available
5 property for those uses, because it is unlikely that large format retail uses will be able to
6 satisfy the city's conditional use criteria.⁹ Petitioner argues that our opinion in *Opus*
7 *Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995), supports the principle that
8 whenever a comprehensive plan amendment reduces development opportunity on
9 commercial and industrial lands, the local government must (1) identify the impact the
10 amendments may have on the local government's Goal 9 inventory, and (2) determine
11 whether, after the plan amendment, the inventory continues to comply with Goal 9. Petitioner
12 further argues that the city's findings are deficient because they fail to consider the effect the
13 1999 amendments would have on large format retail uses, and do not address Policy 5.1,
14 Objective A.

15 The city responds that Goal 9 does not require that the city identify land to
16 accommodate every type of industrial and commercial use. The city contends that it is
17 enough for the city to establish that its inventory of commercially-zoned land includes
18 developable land to accommodate a range of retail uses. The city also argues that it is not
19 obliged to adopt findings that relate specifically to large format retail uses; the city need only
20 demonstrate that, by adopting the amendments, the city continues to maintain an adequate
21 supply of sites for a variety of commercial, employment and industrial-related activities. The
22 city contends that its amendments do not prevent petitioner from modifying its retail
23 approach to better fit into the city's use categories. The city also argues that even if the city is

⁹The parties do not address whether the property rezoned to CG as part of the 1999 amendments provides an adequate alternative to the limitations on large format retail uses in the employment and industrial districts.

1 obliged to consider plan objectives in its decision, the city’s findings and evidence
2 demonstrate that the city’s decision is consistent with Policy 5.1, Objective A.

3 *Opus Development Corp.* is of limited usefulness in this case. There, the city rezoned
4 an industrial and commercial area. As a result of the rezoning, the city placed an emphasis on
5 compatibility with neighboring residential uses by requiring that commercial and industrial
6 uses located adjacent to, or across the street from, residential uses undergo a site design
7 review process to ensure that adverse impacts of the commercial and industrial uses were
8 minimized. We held that the rezoning and the imposition of the site design review
9 requirements, which affected 105 properties, required findings by the city that the remaining
10 industrially designated land was adequate to satisfy the requirements of Goal 9. 28 Or LUBA
11 at 691.

12 Here, the city’s text amendments affect whether and how retail uses larger than a
13 specified square footage can be sited in industrial and employment zones. Neither Goal 9 nor
14 the city’s plan objective obligates the city to adopt a decision that ensures that large format
15 retail uses will be approved. Rather, the city’s decision must demonstrate that it considered
16 the impact of its decision on broad categories of uses. *Benjfran Development, Inc. v. Metro*
17 *Service Dist.*, 95 Or App 22, 26, 767 P2d 467 (1989) (Goal 9 and its implementing statutes
18 do not require that local governments approve every proposal that has potential economic
19 benefits.); *Western PCS, Inc. v. City of Lake Oswego*, 33 Or LUBA 369, 382 (1997) (Goal 9
20 does not require a demonstration that there is an adequate supply of sites for one particular
21 commercial use.) To the extent the amendments adversely affect the ability to obtain
22 approval for large format retail uses, it is sufficient for the city to demonstrate that it
23 considered the impact on such retail use along with competing policy objectives.

24 The city’s decision adopts the following findings with regard to Goal 9:

25 “Goal 9, Economic Development, requires provision of adequate
26 opportunities for a variety of economic activities vital to public health,
27 welfare and prosperity. The amendments are consistent with this goal because

1 they protect Portland’s industrial sanctuaries, areas that generate a high
2 percentage of family-wage jobs, from large-scale retail and office uses and
3 their negative impacts on traffic and land value.

4 “In addition, the amendments provide an opportunity for emerging types of
5 businesses that have both industrial and office characteristics to locate in
6 specific areas within the Central City Plan District through a conditional use
7 process. This provision supports creative reuse of existing, older industrial
8 buildings that may no longer be appropriate for traditional industrial uses. It
9 also provides opportunities near the City center for ‘industries of the future’
10 such as software development, internet sales and distribution, and others to
11 locate.

12 “Portland *Comprehensive Plan* findings on Goal 5, Economic Development,
13 and its related policies and objectives also support this goal.” Record 20-21.

14 In its response brief, the city cites to evidence in the record about the negative
15 impacts that retail uses may have on industrial and employment uses, including the loss of
16 industrial land for industrial uses, the increase in land costs attributable to competition for
17 large sites and the traffic conflicts resulting from the influx of customers to large retail
18 establishments within industrial and employment zones. The city argues that it adopted a
19 decision that responds to the policy for promoting an adequate supply of land for a variety of
20 commercial and industrial uses, by focusing on industrial development in industrial zones
21 and expanding employment opportunities in employment zones. We believe the findings and
22 evidence are sufficient to demonstrate compliance with Goal 9 and, assuming it is applicable,
23 Comprehensive Plan Policy 5.1, Objective A.

24 The first and second assignments of error are denied.

25 **FOURTH ASSIGNMENT OF ERROR**

26 Petitioner argues that the city’s decision should be reversed or remanded because it
27 fails to demonstrate compliance with Comprehensive Plan Policy 5.8, Objective E, and
28 Policy and Objective 10.4(19). Specifically, petitioner argues that the city’s findings fail to
29 show why large format retail uses pose a conflict with industrial and employment uses that
30 warrant limitations or, in some cases, outright prohibition. Petitioner further argues that the

1 findings fail to demonstrate, in light of the limitation on the development of large format
2 retail uses, that a sufficient inventory of buildable land remains after the 1999 amendments.
3 In addition, petitioner contends that PCC 33.815.128’s introductory purpose statement and
4 PCC 33.815.128.C have no connection to the city’s policies regarding industrial and
5 employment uses, and instead seem to be specifically aimed at eliminating large format retail
6 uses from industrial and employment zones altogether.¹⁰

7 Comprehensive Plan Policy 5.8 provides, in relevant part:

8 “Promote a variety of efficient, safe and attractive industrial sanctuary and
9 mixed employment areas in Portland.

10 “Objectives

11 “* * * * *

12 “E. Create mixed employment areas which encourage a broad range of
13 employment opportunities by permitting a mix of industrial and
14 commercial activities. Prevent land use conflicts within the mixed
15 employment areas through the use of development standards and by
16 limiting conflicting types of development.”

17 Comprehensive Plan Policy and Objective 10.4 provides, in relevant part:

18 “The Comprehensive Plan Map is the official long-range planning guide for
19 uses and development in the city. The Comprehensive Plan Map uses the
20 designations listed below. The designations state the type of area each is
21 intended for, general uses and development types desired, and the
22 corresponding zone or zones which implement the designation. * * *

23 “* * * * *

24 “(19) Mixed Employment

25 “This designation is intended for areas where a wide variety of
26 employment opportunities are encouraged in an industrial-type setting.
27 Industrial uses are allowed with few limitations. Commercial uses are

¹⁰While petitioner recognizes that an argument may be made that PCC 33.815.128’s introductory purpose statement is not directly applicable to an application for a conditional use permit, petitioner argues that the city could interpret the relevant conditional use criteria in light of the purpose statement, and thus indirectly impose additional review criteria. *See* n 6.

1 allowed, but are limited in intensity so as to not overburden public
2 services and to maintain adequate industrial development
3 opportunities. * * * The corresponding zones are [EG1] and [EG2].”

4 Petitioner contends that Policy 5.8, Objective E and Policy and Objective 10.4(19)
5 provide only three reasons why limitations on commercial uses within employment zones
6 might be justified: (1) where restrictions are necessary to “prevent land use conflicts”; (2)
7 where restrictions are necessary to avoid “overburden[ing] public services”; and (3) where
8 restrictions are necessary to “maintain adequate industrial development opportunities.”
9 According to petitioner, the city’s findings do nothing to explain which impacts attributable
10 to large format retail uses warrant their *de facto* prohibition in employment zones.

11 The city responds that it identified the traffic impacts and competition for scarce
12 employment and industrial land caused by large format retail stores as the impetus for both
13 the UGMFP Title 4 regulations and the city’s amendments to its industrial and employment
14 zones. According to the city, the record includes evidence of the impact that large format
15 retail uses have on areas designated for industrial and employment uses, and the city council
16 determined that petitioner’s contrary evidence was not persuasive. The city cites to (1) a
17 traffic study that demonstrates that large format retail uses have a disproportionate impact on
18 transportation systems; (2) a market analysis that concludes that large format retail uses
19 compete with industrial uses for scarce industrial land and drive up the cost of that industrial
20 land; and (3) testimony from industrial and employment business owners indicating that
21 large format retail uses introduce a clientele to the employment areas that is adverse to noise,
22 heavy truck traffic and other attributes of employment and industrial uses.

23 The city contends that the findings with regard to Policy 5.8 demonstrate that the city
24 adopted the 1999 amendments to expand opportunities for other office/manufacturing uses.
25 The city argues that the development standards it adopted to limit conflicting commercial
26 uses are sufficiently targeted to the identified problems associated with commercial uses in
27 employment zones. In addition, the city argues that PCC 33.815.128’s introductory purpose

1 statement is not itself an approval standard. The city argues that to the extent the introductory
2 purpose statement does anything, it explains the context for the conditional use criteria that
3 follow it.

4 The city points out that smaller-scale commercial uses still may be sited in the two
5 employment zones subject to FAR requirements and limitation on size and number of
6 establishments within a given area. The city contends that the amendments are consistent
7 with Policy 5.8, Objective E, and therefore, the city’s regulations should be upheld.

8 With regard to Policy and Objective 10.4(19), the city contends that all it does is
9 identify a particular plan map designation describing the “type of area each is intended for,
10 general uses and development types desired, and the corresponding zone or zones which
11 implement the designation.” The city argues that Policy and Objective 10.4(19) does not
12 impose any decisional standards and, therefore, it is not necessary for the city to adopt
13 findings to address it.

14 We agree with the city that there is substantial evidence in the record to support the
15 city’s decision that the 1999 amendments are needed to limit conflicts associated with large
16 format retail uses. We also agree that the conditional use criteria address potential conflicts
17 between employment uses and large format retail uses with the apparent goal of ensuring
18 compatible development. Finally, we agree that Policy and Objective 10.4(19) does not
19 impose any decisional standards, nor does it require findings that the proposed amendments
20 be consistent with its terms.

21 The fourth assignment of error is denied.

22 **THIRD ASSIGNMENT OF ERROR**

23 Comprehensive Plan Policy 10.10 provides, in relevant part:

24 “Amendments to the zoning and subdivision regulations should be clear,
25 concise, and applicable to the broad range of development situations faced by
26 a growing, urban city.

27 “Objectives

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“* * * * *

“B. Assure good administration of land use regulations by:

“* * * * *

- Using clear and objective standards where ever possible[.]”

Petitioner contends that the city’s decision should be reversed or remanded because the city’s conditional use criteria are not clear and objective, and the city failed to adopt findings explaining why clear and objective standards could not be adopted. Petitioner contends that PCC 33.835.040.A requires that the city adopt amendments to its zoning ordinance consistent with the comprehensive plan, and therefore the city is obligated to adopt findings explaining why it was not “possible” to adopt clear and objective standards in light of the directive of Policy 10.10, Objective B.

The city responds that most of the 1999 amendments *are* clear and objective, and that the city’s findings demonstrate that Policy 10.10 is satisfied.¹¹ The city cites to FAR requirements, numerical limitations on the number of businesses, and the specific size requirement that identifies which commercial businesses would be subject to conditional use review, as clear and objective standards. The city concedes that the conditional use standards are subjective, but argues that the conditional use process is responsive to Metro’s requirement that large format retail uses be subject to a process that results in a land use decision. The city also argues that the conditional use process is consistent with the stated purpose of conditional use review: to assess the impacts of a proposed development on

¹¹The city’s finding addressing Policy 10.10 states:

“Policy 10.10, Amendments to the Zoning and Subdivision Regulations, requires amendments to the zoning and subdivision regulations to be clear, concise, and applicable to the broad range of development situations faced by a growing, urban city. The amendments support this policy because they place restrictions on retail and office uses that are expressed in numerical terms. In addition, the amendments support this policy by recommending new conditional use criteria for retail uses over 60,000 square feet in the employment zones that are applicable to a broad range of retail activities.” Record 28.

1 surrounding uses, and tailor mitigation measures to reduce those impacts. The city contends
2 that the conditional use standards need to be flexible to address the particular impacts caused
3 by a development and that, because the flexibility is essential in this circumstance, the
4 conditional use criteria the city adopted are as clear and objective “as possible.”

5 Policy 10.10 merely requires that land use regulations “*should* be clear [and]
6 concise.” We have explained many times that land use planning standards that are expressed
7 as “shoulds” are properly viewed as being nonmandatory. *Neuharth v. City of Salem*, 25 Or
8 LUBA 267, 277-78 (1993); *Bennett v. City of Dallas*, 17 Or LUBA 450, 456-57, *aff’d* 96 Or
9 App 645, 773 P2d 1340 (1989); *McCoy v. Tillamook County*, 14 Or LUBA 108, 118 (1985).
10 Although under *Clark v. Jackson County*, 313 Or 508, 515, 836 P2d 710 (1992), the city
11 council might be able to interpret land use standards that are worded as “shoulds” as being
12 mandatory, the city in this case has not interpreted Policy 10.10 as dictating that *all* land use
13 regulation standards must be clear and concise.

14 Assuming Objective B of Policy 10.10 applies as an approval criterion in this matter,
15 it presents a closer question. However, we believe the explanation provided in the city’s brief
16 is sufficient to explain why Policy 10.10, Objective B is not violated by the challenged
17 decision. As noted above, the city explains that in large part the standards adopted by the city
18 in the challenged decision are numerical and, therefore, are clear and objective. The city
19 argues the subjective conditional use standards are needed to allow the city flexibility to
20 fashion mitigation measures in particular cases. In other words, the city contends that a mix
21 of “clear and objective” and “subjective” standards is needed to ensure that employment and
22 industrial uses are not adversely impacted by particular large format retail uses. The city
23 contends that the ability to fashion mitigation measures in the circumstances provided in the
24 ordinance would not be possible with clear and objective standards. Finally, the city points
25 out that the UGMFP specifically requires that the city adopt a “process resulting in a land use
26 decision,” for certain large format retail uses in employment zones. That requirement of the

1 UGMFP for a “land use decision” effectively dictates a process that will involve some
2 discretion, which suggests that at least some of the standards may not be “clear and
3 objective.”¹² We find the city explanation, on whole, sufficient to explain why Policy 10.10,
4 Objective B is not violated by the challenged decision.

5 The third assignment of error is denied.

6 The city’s decision is affirmed.

¹²The statutory definition of “land use decision” does not include decisions made under standards that do not require interpretation or the exercise of policy or legal judgment or the approval or denial of building permits under clear and objective standards. ORS 197.015(10)(b)(A) and (B).