

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

3
4 DEBORAH FAY,
5 *Petitioner,*

6
7 and

8
9 ERIK A. PALMER,
10 FRIENDS OF CATHEDRAL PARK
11 NEIGHBORHOOD ASSOCIATION,
12 JULIE BURNS and BRITTNEY HALL,
13 *Intervenors-Petitioner,*

14
15 vs.

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17 CITY OF PORTLAND,
18 *Respondent,*

19
20 and

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22 ROWEN RYSTADT and
23 TERRY CARNEY,
24 *Intervenors-Respondent.*

25
26 LUBA No. 2003-063

27
28 FINAL OPINION
29 AND ORDER

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31 Appeal from City of Portland.

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33 Deborah Fay, Portland, filed a petition for review and argued on her own behalf.

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35 Erik Palmer, Portland, filed a petition for review and argued on his own behalf.

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37 Brittney Hall, Portland, filed a petition for review and argued on her own behalf.

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39 Kathryn E. Holland, Vancouver, WA, appeared on behalf of intervenor-petitioner
40 Friends of Cathedral Park.

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42 Julie Burns, Portland, appeared on her own behalf.

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44 Frank Hudson, Deputy City Attorney, Portland, filed the response brief and argued on
45 behalf of respondent.

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Rowen Rystadt, North Plains, and Terry Carney, Portland, appeared on their own behalf.

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

REMANDED 12/16/2003

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

NATURE OF THE DECISION

Petitioner challenges a city decision that rezones a 10,000-square foot lot from Single Family Residential (R5) to High Density Residential (RH).

FACTS

This matter is before us for the second time. In *Fay v. City of Portland*, 43 Or LUBA 390 (2002), we remanded the city’s decision because the city’s findings were inadequate to demonstrate that the proposed rezoning is consistent with two applicable approval criteria. On remand, the city conducted additional evidentiary proceedings with respect to those two criteria. At the conclusion of those evidentiary proceedings, the city council adopted a decision that again approves the proposed RH designation. This appeal followed.

TRANSPORTATION POLICY 6.15¹

A. Transportation Policy 6.15 as an Approval Criterion

Intervenor-petitioner Palmer (Palmer) argues that the county erred in failing to treat Transportation Policy 6.15 (Policy 6.15) as a mandatory approval standard. According to Palmer, the city transportation planner referred to the policy as a nonmandatory consideration, and treated the policy as such in her testimony before the city council.

The city responds, and we agree, that notwithstanding the city planner’s statement, the decision itself applies Policy 6.15 as an approval standard that must be met in order to

¹ Policy 6.15 provides:

“On-Street Parking Management:

“[The city shall manage the supply, operations and demand for parking and loading in the public right-of-way to encourage economic vitality, traffic safety, and livability of residential neighborhoods. Parking in the right-of-way, in general, should serve land uses in the immediate area. Maintain existing on-street parking in older neighborhoods where off-street parking is inadequate. Parking for individuals, or at specific locations, is not guaranteed by this policy. However, the City should act to protect parking, first for residents and second for customers and visitors.” (Bold in original.)

1 approve the proposed zone change, and adopts findings that conclude that the proposed RH
2 zoning designation is consistent with Policy 6.15.

3 Palmer's first assignment of error is denied.

4 **B. Findings Challenge**

5 The city concluded that the proposed rezoning is consistent with Policy 6.15, stating:

6 "It is undisputed [that] the proposed development will be limited to a total of
7 35 residential units. The additional demand for parking generated by the
8 proposed development will be offset, in part, by the provision of at least one
9 onsite parking space for every 2 residential units. Moreover, the
10 development's proximity to four Tri-Met bus routes will further offset the
11 demand for on-street parking by reducing the need for residents to own
12 vehicles to get around the city. In light of the availability of onsite parking
13 and the proximity of public transportation, the city concludes the actual
14 increase in vehicular traffic and the amount of additional demand for parking
15 generated by the proposed development will be negligible. Accordingly, the
16 city finds that approval of the proposed development is consistent with * * *
17 Policy 6.15." Record 46.

18 Petitioner and intervenors-petitioner Palmer and Hall (petitioners) argue that the
19 city's finding that the proposed RH zoning is consistent with Policy 6.15 is inadequate.
20 According to petitioners, the finding does not explain what the standard requires, nor does it
21 address evidence that petitioners submitted that on-site parking and the existence of four
22 nearby bus routes are insufficient to ensure compliance with Policy 6.15. Petitioners also
23 argue that there is evidence that the proposed rezoning would adversely affect economic
24 development, in that trucks from nearby light industrial and commercial businesses will have
25 more difficulty traveling on North Baltimore Avenue, a narrow local service street, because
26 the increase in the number of parked cars will result in a narrow driving lane that larger
27 commercial vehicles will find difficult to navigate. Petitioners contend that the findings also
28 do not address evidence and arguments petitioners made below that development at RH
29 densities will result in traffic safety hazards because of the limited site distance at the North
30 Baltimore Avenue and North Edison Street intersection.

1 Petitioners contend that there is evidence in the record that, on average, residents of
2 the neighborhood own two vehicles *per residence*. Petitioners contend that if, as evidence
3 indicates, residents of the proposed development will own two vehicles per unit, 70
4 additional vehicles owned by residents of the subject property will need parking spaces
5 within the vicinity of North Baltimore Avenue and North Edison Street and only 17
6 additional parking spaces will be available on-site. Petitioners contend that a net increase of
7 53 vehicles using on-street parking is not a “negligible” increase.

8 Petitioners also argue that the city’s reliance on bus transportation to limit the need
9 for automobiles in the St. Johns neighborhood is misplaced. According to petitioners, the
10 commute via bus from St. Johns to downtown Portland is almost an hour long, compared to a
11 15-minute commute for automobiles. Petitioners also cite evidence that the intervals between
12 buses make public transportation from St. Johns to other areas of the city exceedingly time-
13 consuming. Petitioners argue that even if residents of the development that will be sited on
14 the subject property wish to avail themselves of public transportation, the sidewalks from the
15 subject property to the nearest bus stop are uneven and drop off from the curb to the street,
16 making walking difficult. Petitioners also point out that there is an unsignalized intersection
17 that carries heavy volumes of truck traffic between the subject property and the bus stops.
18 Petitioners argue that all of those factors mean that it is unrealistic for the city to expect that
19 more than a few residents will rely on public transportation as their sole means of transport.

20 We cited *Wakelin v. City of Portland*, 40 Or LUBA 401 (2001) in addressing
21 petitioner’s contention in *Fay I* that the city’s finding with respect to Policy 6.15 was
22 inadequate. *Fay I*, 43 Or LUBA at 399 n 6. In *Wakelin*, the city approved an application to
23 rezone property to allow for the development of a 45-unit apartment complex located within
24 250 feet of an intersection of two major transit streets. In that decision, the city adopted
25 findings addressing Policy 6.15, concluding that the policy was met because, based on the
26 applicant’s transportation impact study, only a negligible number of vehicles would be

1 parked on adjacent residential streets, and residents of the complex would likely use
2 alternative modes of transportation. The petitioners in *Wakelin* challenged those findings,
3 arguing that the city’s approval criteria, including Policy 6.15, required a parking supply and
4 demand study that showed that the residents of the proposed apartments would actually use
5 buses and bicycles rather than automobiles. We concluded that the city was not obligated to
6 require a specific parking demand and supply study in order to show that the proposed
7 rezoning is consistent with the city’s approval criteria. We also concluded that the city’s
8 findings were adequate to demonstrate that the proposed rezoning was consistent with Policy
9 6.15, in light of the evidence that showed that the additional parking demand from the
10 proposed development would be “negligible.” 40 Or LUBA at 410.

11 On remand, the city apparently considered our *Wakelin* decision when addressing
12 Policy 6.15, finding that Policy 6.15 is satisfied if a “negligible” number of additional
13 vehicles from the development that the requested rezoning will allow will require parking
14 spaces on the surrounding residential streets. However, the city’s decision here does not
15 explain what it thinks “negligible” means, in terms of estimated absolute numbers,
16 percentage increase in parking demand, impact on supply of available parking spaces or in
17 any other terms that might provide some basis for evaluating the legal sufficiency of the
18 city’s finding regarding Policy 6.15. Petitioners dispute that the impact will be negligible,
19 and it is reasonably clear that petitioners and the city have somewhat different ideas about
20 the meaning of the word “negligible.” Just as importantly, petitioners contend that (1) the
21 additional parking will have adverse economic development impacts on nearby industry and
22 (2) nearby businesses which depend on North Baltimore Avenue will be adversely affected
23 by difficulty navigating the more narrow driving lane the increased on-street parking will
24 produce. Those concerns presumably are based on the “economic vitality” and “traffic
25 safety” components of the first sentence of Policy 6.15. The city’s finding does not respond

1 to either of those concerns. Consequently, the city’s conclusion that the increased parking
2 demand will be “negligible” is inadequate.

3 On remand, the city might want to begin with a brief explanation what the terms of
4 Policy 6.15 require in the context of a rezoning application before proceeding to consider
5 whether the requested zoning can be approved consistent with the city’s obligation under
6 Policy 6.15 to “[m]anage the supply, operations, and demand for parking and loading in the
7 public right-of-way to encourage economic vitality, traffic safety, and livability of residential
8 neighborhoods.” The city’s conclusion that additional demand for on-street parking will be
9 “negligible” is not sufficient to explain why the requested rezoning can be approved
10 consistent with the three management obligations and three overriding public policies that
11 those three management obligations are meant to encourage.

12 With that said, we disagree with petitioners’ contentions that Policy 6.15 must be
13 read to require that the city manage parking to ensure that parking for *existing* residents is
14 maintained. The last sentence of Policy 6.15 assigns first priority to residents; it does not
15 differentiate between parking for existing residents and new residents. Similarly, we disagree
16 with petitioners that Policy 6.15 requires preservation of every existing on-street parking
17 space in neighborhoods where off-street parking is inadequate.² Further, Policy 6.15 clearly
18 does not require, as intervenor-petitioner Hall’s first assignment of error suggests, that
19 individual parking spaces directly in front of each resident’s dwelling must be retained for
20 the use of that resident.

21 Petitioner’s first assignment of error, Palmer’s third assignment of error and
22 intervenor-petitioner Hall’s first and second assignments of error are sustained in part. Given
23 that we conclude that the city’s findings are inadequate we do not consider and express no

² To a certain extent, we addressed this argument in *Fay I*, 43 Or LUBA at 399, where we agreed with the city that Policy 6.15 does not impose such an extreme standard.

1 opinion on petitioners’ contentions that the record does not include substantial evidence that
2 would support such findings. *DLCD v. Columbia County*, 15 Or LUBA 302, 305 (1987).

3 **REMAINING ASSIGNMENTS OF ERROR**

4 **A. Procedural Assignments of Error**

5 Palmer argues that the city council’s decision is flawed because one city councilor
6 relied on the precedential impact of Measure 7 to conclude that the proposed rezoning should
7 be approved.³ According to Palmer, those references to Measure 7 indicate that the
8 commission was unduly influenced by factors unrelated to the applicable criteria and,
9 therefore, the city’s decision to approve the rezoning application was error.

10 The city responds that the off-hand comments from the councilor, when read in
11 context, clearly show that the councilor considered only the applicable approval criteria and
12 concluded, based on those criteria, that the application should be approved. The city contends
13 that, properly understood, the councilor’s comments indicate that if he did *not* base his
14 decision on the applicable criteria, Measure 7-type lawsuits might be brought. Record 99. We
15 agree.

16 Palmer’s fourth assignment of error is denied.

17 **B. New Evidentiary Challenges**

18 Petitioner argues that the city’s decision is based in part on findings that are not
19 supported by substantial evidence. Specifically, petitioner challenges findings that (1) are
20 based on an assumption that North Baltimore Avenue has a 20-percent slope to the west of
21 the subject property but flattens to a six-percent slope where the subject property fronts on
22 North Edison Street and (2) conclude that the entire street grid surrounding the subject
23 property has been developed.

³ Measure 7 (2000) was an initiative that was passed by the voters that required a local government to provide compensation to property owners if a decision by the local government resulted a reduction in the value of the owners’ real property. Measure 7 was ruled unconstitutional by the Oregon Supreme Court in *League of Oregon Cities v. State of Oregon*, 334 Or 645, 56 P3d 892 (2002).

1 The city responds that those findings were adopted during the city’s initial
2 proceedings, and petitioner did not challenge them in her initial appeal. Therefore, the city
3 argues, petitioner may not challenge them in this appeal.

4 Generally, issues that could have been raised during the initial appeal to LUBA, but
5 were not, cannot be raised for the first time during an appeal of the decision on remand from
6 LUBA. *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992). Here, petitioner’s
7 second, third and fourth assignments of error challenge facts that were assumed in the initial
8 decision and do not directly pertain to the new findings the city adopted on remand.
9 Petitioner was obliged to contest those facts in her initial appeal and may not challenge them
10 for the first time in this appeal. Petitioner’s second, third and fourth assignments of error are
11 therefore denied.

12 **C. Findings and Evidentiary Challenges Concerning Comprehensive Plan**
13 **Transportation Goal 6**

14 Comprehensive Plan Transportation Goal 6 (Goal 6) provides:

15 “Develop a balanced, equitable, and efficient transportation system that
16 provides a range of transportation choices; reinforces the livability of
17 neighborhoods; supports a strong and diverse economy; reduces air, noise,
18 and water pollution; and lessens reliance on the automobile while maintaining
19 accessibility.”

20 **1. Findings Challenge**

21 With respect to Goal 6, the city council found:

22 “[Portland Department of Transportation (PDOT)] provided a detailed
23 response to the requirements of Goal 6 * * *. [PDOT] comments * * * are
24 incorporated by this reference into this finding. [PDOT] requested frontage
25 improvements and related conditions of approval.

26 “As noted above, additional conditions of approval have been imposed by
27 Council to address the substantial transportation-related concerns voiced by
28 the neighbors. Council notes that Goal 6 requires that the proposal will
29 provide for safe and efficient movement. In addition, the
30 Pedestrian...Facilities section of the Transportation Planning Rule requires
31 that the proposal provide for safe and convenient pedestrian, bicycle and
32 vehicular circulation consistent with access management standards and the

1 function of affected streets. As noted previously, there is a limited sight
2 distance along N[orth] Baltimore Avenue. There is a street slope of
3 approximately 20 percent along the frontage of the property. This changes to
4 approximately 6 percent in the vicinity of the intersection of N[orth]
5 Baltimore and N[orth] Edison and continues to the northeast. This change in
6 slope creates a segment of roadway that has limited sight distance. The
7 applicant will be required to demonstrate that the proposed vehicular access to
8 the [site] has acceptable sight distance. Due to these concerns, access for the
9 site is preferred on N[orth] Edison Street. Also due to these concerns, Council
10 has imposed a requirement for either a Design Review or compliance with the
11 Community Design Standards prior to approval of any building permit for
12 new development on the site.” Record 45.

13 Petitioner argues that

14 “The findings assert that Goal 6 compliance can be [met] by the Design
15 Review or Community Design Standards. However, the finding is
16 unsupported by any restrictions or requirements of those conditions as they
17 pertain to meeting the approval criteria for * * * Goal 6 in this matter.”
18 Petition for Review 9.

19 Petitioner asserts that the finding must explain why the proposed conditions of approval will
20 satisfy Goal 6.

21 Fairly read, the finding concludes that conditions requiring (1) street and sidewalk
22 improvements; (2) limited access from the subject property to North Baltimore Avenue
23 unless the access can meet sight distance requirements; and (3) compliance with Community
24 Design Standards set out in PCC 33.218 or design review using Community Design
25 Guidelines are sufficient to ensure consistency with Goal 6. Without a more developed
26 argument from petitioner that explains why she believes that those conditions are not
27 adequate to ensure that the proposed rezoning is consistent with Goal 6, this assignment of
28 error provides no basis for reversal or remand.

29 Petitioner’s fifth assignment of error is denied.

30 **2. Evidentiary Challenge**

31 Petitioner argues that the city council found that the findings rely on evidence that the
32 subject property is in relatively close proximity to four bus routes to conclude that Goal 6 is
33 met. Petitioner argues that that reliance is misplaced, citing other evidence that demonstrates

1 that automobiles are the primary mode of transportation used by residents in the St. Johns
2 neighborhood. Petitioner argues that there is no evidence in the record that could lead to a
3 conclusion that the existence of those bus routes lessens the neighborhood's reliance on
4 automobiles as the primary mode of transportation, or why the bus routes will affect the
5 number of automobiles that residents of the subject property will park on public streets.

6 Contrary to petitioner's assertion, the city council's findings with respect to Goal 6
7 do not rely on the existence of the four bus routes to conclude that Goal 6 is met. Rather, the
8 city council concludes that the conditions of approval requiring particular site improvements
9 that are identified in the challenged decision and other improvements that may be imposed as
10 a result of compliance with the city's community design standards are adequate to
11 demonstrate that the proposed rezoning is consistent with Goal 6. Because the finding with
12 respect to Goal 6 does not rely on the evidence petitioner cites, petitioner's sixth assignment
13 of error is denied.

14 The city's decision is remanded.