BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WAL-MART STORES, INC.,
Petitioner,

vs.

CITY OF HILLSBORO,
Respondent,

and

VINCENT DIMONE, DEBRA DIMONE,
and THEODORE F. SUMNER,
Intervenors-Respondent.

LUBA No. 2003-141

FINAL OPINION
AND ORDER

Appeal from City of Hillsboro.

E. Michael Connors, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief were Gregory S. Hathaway and Davis Wright Tremaine, LLP.

Daniel Kearns, Portland, filed a response brief and argued on behalf of the respondent. With him on the brief was Reeves Kearns, PC.

Michael J. Lilly, Portland, filed a response brief and argued on behalf of intervenors-respondent Vincent Dimone and Debra Dimone.

Theodore F. Sumner, Portland, represented himself.

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

AFFIRMED 04/07/2004

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a city decision that denies its request for conceptual development plan approval and detailed development plan approval for a Wal-Mart store.

MOTION TO INTERVENE

Vincent Dimone, Debra Dimone and Theodore F. Sumner move to intervene on the side of respondent. There is no objection to the motions, and they are allowed.

FACTS

Petitioner desires to construct a 210,000 square foot Wal-Mart superstore in two phases. The first phase would consist of a 143,000 square foot retail building and related parking and landscaping. The second phase would consist of a 67,000 square foot grocery store, with additional parking and landscaping. Petitioner sought conceptual development plan approval for both phases and detailed development plan approval for the first phase. The proposed shopping center would be located on an approximately 26-acre site located at the intersection of SW Baseline Road and SW Cornelius Pass Road in the City of Hillsboro.

Existing residential areas adjoin the site to the east and north of the site. Baseline Road, which adjoins the south side of the site, and Cornelius Pass Road, which adjoins the west side of the site, are both arterials. Baseline Road and Cornelius Pass Road intersect at the southwest corner of the property. The 26-acre site is approximately square. The first phase retail store and related outdoor and seasonal sales areas and service areas would occupy approximately the southwest quarter of the site. The second phase grocery store and a parking area would occupy approximately the southeast quarter of the site. The remaining northern portion of the site, would be developed with a parking lot and a stormwater management facility. High voltage electric transmission lines cross the eastern part of the property over a 250-foot wide easement that crosses the property north to south. Those lines

cross over the eastern part of the proposed parking area and the stormwater management facility.

A berm and landscaping are proposed to buffer the residential areas to the east and north from impacts of the proposed commercial development. An existing dwelling and grove of mature Sequoia trees in the southwestern part of the site would be removed to construct phase one. A second grove of mature Sequoia trees is located mostly in the northern part of the site. That narrow, linear grove of trees extends from the northern boundary south through the middle of the site for approximately two-thirds of the north/south length of the property.

Primary access to the site will be from Cornelius Pass Road, via a traffic-signal controlled intersection located approximately 600 feet north of the intersection of Cornelius Pass Road and Baseline Road. A second, smaller, right in and right out access from Cornelius Pass Road would be located approximately 500 feet north of the primary access. A third smaller, right in and right out access would be provided from Baseline Road on the south, approximately 900 feet east of the intersection of Cornelius Pass Road and Baseline Road.

INTRODUCTION

The city has designated Station Community Planning Areas (SCPAs) "to promote transit-supportive and pedestrian sensitive mixed use developments in areas near light rail transit stations." Hillsboro Zoning Ordinance (HZO) §136(I)(A). The site of the proposed development is located in a SCPA. HZO §136(II) sets out a total of 14 different SCPA land use or zoning districts.[1] Those districts include a number of commercial, residential and industrial zoning districts. The subject property is zoned Station Community Commercial-Multi-Modal (SCC-MM). The history of how the site came to be designated SCC-MM is set

[1] Although we use the terms "zone" and "zoning district" in this opinion, the HZO uses the term "land use district."

out in our opinion in *Dimone v. City of Hillsboro*, 44 Or LUBA 698, *aff'd* 189 Or App 491, 76 P3d 690 (2003) and will not be repeated here. HZO §§136 through 142 apply to SCPAs. In this appeal, petitioner contends the city misapplied a number of provisions that appear in HZO §§136, 137 and 138 in denying the application.

UNCHALLENGED BASES FOR DENIAL

The city denied petitioner's request for CDP approval on three separate bases. One of the bases for denial was the city's finding that petitioner failed to demonstrate compliance with HZO §136(VII)(B)(1), which describes the purpose of CDP review and is made an approval criterion for CDP applications by HZO §136(VII)(B)(6)(b). HZO §136(VII)(B)(6)(b)(1) requires that an application for CDP approval must be "consistent with the purposes identified in [HZO §136]." The petition for review does not assign error to this basis for denial. Respondent argues that the city's decision regarding the CDP therefore must be affirmed, because petitioner did not challenge all of the city's bases for denial of that application. However, as petitioner points out, the city's findings regarding HZO §136(VII)(B)(1) rely entirely on its findings under HZO §137(XIII)(B)(3) and (4) where the city finds that petitioner failed to establish that it is necessary to remove both of the two mature groves of Sequoia trees on the site. Petitioner assigns error to that finding in the fourth assignment of error below. Given that petitioner challenges the findings the city relied on to conclude that petitioner failed to demonstrate compliance with HZO §§136(VII)(B)(6)(b) and 136(VII)(B)(1), petitioner contends that the city's decision should not be summarily affirmed simply because petitioner did not separately assign error to the part of the city's decision regarding HZO §136(VII)(B)(1). We agree with petitioner.

The city also argues that petitioner's application for DDP approval was denied in part because it failed to comply with the HZO §138(X) prohibition against exterior storage areas. The city council's final decision expressed some doubt about whether petitioner withdrew its original request for approval for outdoor storage. Record 15. Based on that uncertainty, the

city cited petitioner's failure to comply with HZO §138(X) as a basis for denying the DDP application. Petitioner does not assign error to that finding. At oral argument, petitioner suggested that it no longer seeks approval for outdoor storage and the city should have simply conditioned the application on elimination of outdoor storage. While either of those arguments might provide a basis for assigning error to the finding, neither is a substitute for the assignment of error. The city's unchallenged finding that petitioner's proposed outdoor storage violates HZO §138(X) requires that we sustain the city's denial of the DDP.[2]

THIRD ASSIGNMENT OF ERROR

Under HZO § 137(XVI)(C)(1), an applicant for DDP approval for a project that will occupy more than an acre or generate more than 100 average daily automobile trips must prepare a traffic impact report (TIR) and submit the TIR to the city engineer. HZO §137(XVI)(C)(1) requires that the TIR analyze the area within one-mile of the proposal or within a larger impact area if the amount of traffic that will be generated makes consideration of a larger impact area necessary. HZO §137(XVI)(C)(1) also sets out the required methodology for a TIR. HZO §137(XVI)(C)(2) and (3) authorize and direct that the city engineer impose certain requirements and authorize the city engineer to require additional analyses and improvements. Under HZO §137(XVI)(C)(4), the city engineer is authorized to require off-site improvements that may be necessary for safety reasons or to avoid congestion. HZO §137(XVI)(C)(6) provides:

> If identified off-site improvements within the impact area are not completed or guaranteed to be completed by the applicant, or by the City and/or the County as provided above, or if there remains a traffic safety hazard, or if the LOS is equal to or greater than shown in the 'Not to Equal or Exceed' column of the Table 137.4 on any street or roadway segment or intersection within the impact area as a direct result of the project or phase of a project, the Planning Director or the Planning Commission shall [deny the application or approve only such part of the application that will not cause congestion or a safety hazard]."

[2] The city's denial of the DDP is sustained on other bases below.

Under this assignment of error, petitioner first argues the planning commission and city council erred by not deferring to the judgment of the county engineer with regard to the adequacy of petitioner's TIR and proposed roadway improvements. Petitioner also argues that even if it was not error for the planning commission and the city council to independently assess the adequacy of petitioner's TIR and proposed roadway improvements, the planning commission and city council erred by refusing to utilize the applicable 1997 Institute of Transportation Engineers (ITE) Trip Generation Manual Standard, as HZO §137(XVI)(C)(1) requires.

A. Refusal to Accept the County Engineer's Determination Regarding HZO §137(XVI)(C)

As noted above, HZO §137(XVI)(C)(1)-(4) assign to the city engineer the responsibility of reviewing a TIR and ensuring that any needed transportation improvements to achieve the safety and congestion standards set out in HZO §137(XVI)(C) are constructed or guaranteed. Because both Baseline Road and Cornelius Pass Road are county roads, the city engineer asked the county traffic engineer to perform this analysis. The county engineer sent a letter to the city, which states "[t]he methodologies and assumptions used in [the TIR] generally follow Washington County's normal standard practice, procedures, and requirements." Record 228. The Washington County Department of Land Use and Transportation later sent additional letters in which it identified a number of improvements that it believes would mitigate traffic impacts. We understand petitioner to contend that it accepts the county engineer's recommendations and that the planning commission and city council lack authority to substitute their own review under HZO §137(XVI)(C)(1)-(4) of the TIR and lack authority to substitute their judgment for that of the county traffic engineer.

Based on our reading of HZO §137(XVI)(C)(1)-(4) and (6), those sections of the HZO do not expressly authorize the planning commission and city council to independently review the TIR in the manner the planning commission and city council did in this case. However, neither do they expressly prohibit the planning commission, or the city council in a

local appeal, from independently considering whether the county traffic engineer correctly applied HZO §137(XVI)(C)(1)-(4) for the city engineer. It is *possible* to interpret HZO §137(XVI)(C)(1)-(4) and (6) to assign to the planning commission and city council the much more limited role in assessing the adequacy of a TIR and the improvements the city engineer finds are required under those provisions. However, we do not agree that such an interpretation is *mandated* by the language of HZO §137(XVI)(C)(1)-(4) and (6), and it is clear that the city council does not interpret HZO §137(XVI)(C)(1)-(4) and (6) to assign it such a limited role. We do not agree with petitioner that it was error for the planning commission and city council to perform its own review of the adequacy of petitioner's TIR to comply with HZO §137(XVI)(C)(1)-(4).

This subassignment of error is denied.

B. Refusal to Use the 1997 ITE Trip Generation Manual Standards

HZO §137(XVI)(C)(1)(c) requires that, in preparing a TIR to assess whether a proposal will result in traffic congestion that violates applicable levels of service for transportation facilities in the impact area, the TIR "shall utilize the method described prescribed in the latest edition of the Highway Capacity Manual published by the Transportation Research Board." All parties agree that HZO §137(XVI)(C)(1)(c) requires that the city utilize the ITE Trip Generation Handbook. The parties' dispute under this subassignment of error is whether the city did so.

The ITE Trip Generation Handbook includes an estimate for average vehicle trip generation per 1,000 square feet of gross floor area for free-standing discount superstores. The estimated average trip generation rate for such stores is 3.82 trips per 1000 square feet of gross floor area. That 3.82 average is derived from the average vehicle trip ends generated by

eight existing Wal-Mart stores. The graph from the ITE Trip Generation Handbook that displays the computation of that 3.82 average is included as an appendix to this opinion.[3]

Applying the 3.82 average to the disputed store's 210,000 square feet of gross floor area produces an estimated trip generation of approximately 802 trips. We understand that that petitioner and the county engineer utilized this number of estimated trips in determining the impact area, assessing the traffic impact on transportation facilities within that impact area and identifying the appropriate measures to mitigate those impacts. Both the city planning commission and the city council rejected petitioner's reliance on the ITE Trip Generation Handbook 3.82 average standard. Petitioner contends that both the planning commission and city council erred in rejecting the 3.82 standard.

1. HZO §137(XVI)(C)(1)(c) Mandates Use of the 3.82 Average Trip Standard

Petitioner first reasons that HZO §137(XVI)(C)(1)(c) mandates use of the 3.82 average trip standard from the undisputed facts that (1) HZO §137(XVI)(C)(1)(c) requires that the city use the "latest edition of the Highway Capacity Manual published by the Transportation Research Board"; (2) the ITE Trip General Handbook is the required manual; (3) the disputed store is a "freestanding discount superstore;" (4) the ITE Trip Generation Handbook establishes a 3.82 trip generation standard for such discount superstores.

If petitioner's proposed store included 203,000 gross square feet or less, petitioner would be correct. However, petitioner's store includes 210,000 square feet. As intervenor's expert explained below:

> "We recommend that trip generation data should be collected by WalMart at existing facilities that are as large as the proposed store and incorporate those trip rates into the analysis. [WalMart] used the ITE Trip Generation Manual code 813 'Free Standing Discount Superstore' average trip rate for the

[3] As that graph shows, there is a fair amount of deviation in the traffic generated by those stores (from a low of 2.48 trips to a high of 5.21 trips per 1000 square feet of gross floor area). That deviation suggests that factors other than store size also influence the amount of traffic that these discount superstores generate.

> proposed wholesale building. This is the correct category to use, however, the 210,155 square foot WalMart building size is not within the range of stores studied under the ITE code 813. All of the stores studied for ITE code 813 were smaller than the store proposed by WalMart for this site. The largest store studied in the ITE Trip Generation Manual is 203,000 square feet, and the majority of the stores ranged from 120,000 to 180,000 square feet. The ITE trip generation manual guiding principle 3.[3] states, 'the value of the independent variable (in this case the store size) for the study site must fall within the range of data included to use either the rate or equation. The closest data point had an average rate of 4.19 trips per thousand square feet of floor area, which is higher than the 3.82 average rate for all data points." Record 1921 (underscoring in original; footnotes omitted).

Both the planning commission and the city council agreed with intervenor's expert on this point. Petitioner argues that both intervenor's expert and the city incorrectly assumed that the noted guiding principle cautions that the 3.82 standard should not be applied to the proposed 210,000 square foot discount superstore:

> "What [intervenor's expert] failed to explain, and the City Council failed to understand, is that the underlined portion of the quotation above was added by [intervenor's expert], and is not contained in the language in the Trip Generation Handbook. There is no basis for [intervenor's expert's] suggestion that the 'value of the independent variable' referenced in [Guiding Principle] 3.3 is referring to the store size. Nor does it make sense that it refers to store size because the ITE provides a trip rate per 1,000 gross square feet of building area – therefore the additional trips generated due to the larger size of the store will be accounted for in the total trip generation. This is particularly true in this case given that the ITE study was based on a traffic study of [eight] other Wal-Mart superstores located in the U.S., and therefore the only difference between the proposed store and the stores in the ITE study is the size – which is accounted for in the total trip generation calculations." Petition for Review 40-41 (footnotes and internal citations omitted).

Store size is the *independent* variable and average vehicle trip ends is the *dependent* variable displayed on the graph for Free-Standing Discount Superstores that is attached as an appendix to this opinion. Store size in 1000 square foot increments (the manipulated or independent variable) is multiplied by 3.82 (the average rate or standard) to compute estimated vehicle trip ends (the derived or dependent variable). If petitioner is arguing to the contrary, we reject the argument. Similarly we reject petitioner's contention that it is

appropriate to extrapolate the line on that graph so that the 3.82 standard can be applied to petitioner's 210,000 square foot store. As intervenor correctly points out, that is precisely what Guiding Principle 3.3 cautions against:

> "The value of the independent variable for the study site must fall within the range of data included to use either the rate or equation. Otherwise local data are needed." Petition for Review, Appendix 2.

In this case the range of data for the independent variable (store size) is a low of approximately 125,000 square feet to a high of approximately 203,000 square feet. Petitioner's proposed store falls outside that range, and the city did not err in concluding that additional local data are needed to provide a reliable estimate of the vehicle trips the proposed store would likely generate. The city's finding that additional local data were needed does not, as petitioner argues, reject the ITE Trip Generation Handbook that HZO §137(XVI)(C)(1)(c) requires the city to use. Rather the city (1) declined to use the standard 3.82 rate in a circumstance where the ITE Trip Generation Handbook says that rate should not be used and (2) required additional local data to estimate the number of vehicle trips the proposed store will generate, as the ITE Trip Generation Handbook expressly directs.

This subassignment of error is denied.

2. Petitioner's Comparables

On January 8, 2003, and February 12, 2003, opponents criticized petitioner's reliance on the 3.82 standard and argued that the large superstore proposed in this case would generate more traffic than was predicted by petitioner's expert using the 3.82 standard. Record 1916-31; 1752-68. To respond to concerns that the 3.82 standard should not be applied to petitioner's 210,000 square foot store to estimate the number of trips that would be generated, petitioner submitted a comparables analysis on April 8, 2003 that was based on five Wal-Mart superstores that petitioner argues are similar to the proposed store. Record 465-70. Opponents provided a detailed critique of that comparables analysis on April 16, 2003 and

argued that petitioner's April 8, 2003 comparables analysis was not sufficient to verify the accuracy of the 3.82 standard. Record 560-94.

The city council ultimately found that petitioner inadequately justified its assumption that the 3.82 standard is sufficiently accurate and reliable to utilize in this case to predict the expected trip generation of the proposed 210,000 square foot store so that an appropriate impact area can be identified and appropriate measures can be imposed to ensure that the required level of service for affected transportation facilities is maintained. The parties' arguments reduce to a dispute over whether that finding is supported by substantial evidence. There is expert testimony, which appears to qualify as the "local data" that Guiding Principle 3.3 calls for, that would support a city finding that use of a 3.82 standard is appropriate. However, there is also expert testimony that calls use of a 3.82 standard into question. Given that conflicting expert evidence, we cannot say that the city council's choice of which evidence to believe is unreasonable. *Mollala River Reserve, Inc. v. Clackamas County*, 42 Or LUBA 251, 268 (2002).

Petitioner's remaining arguments under this assignment of error fault the city for requiring a "comparables analysis," which petitioners contend is a standardless or improperly ambiguous and uncodified standard, to reject their use of the ITE Trip Generation Manual 3.82 standard. Petition for Review 42. Petitioner contends that the city's *ad hoc* creation of this standard violates ORS 227.173(1).[4]

Petitioner misreads the statute. In particular, petitioner confuses permit approval "standards," which ORS 227.173(1) requires the city to include in its land use regulations,

[4] ORS 227.173(1) provides:

> "Approval or denial of a discretionary permit application shall be based on standards and criteria, which shall be set forth in the development ordinance and which shall relate approval or denial of a discretionary permit application to the development ordinance and to the comprehensive plan for the area in which the development would occur and to the development ordinance and comprehensive plan for the city as a whole."

with the city's analysis of the adequacy of an applicant's evidentiary presentation to establish that it complies with those standards. The city is not obligated to adopt standards to guide a permit applicant's evidentiary presentation. As explained above, the city is not obligated to establish particular standards or factors that applicants must apply to store size to generate an estimate of the amount of traffic a proposed store is expected to generate. The ITE Trip Generation Manual provides such a numerical standard or factor for estimating traffic generation for discount superstores that fall within the range of store sizes that were used to derive the 3.82 standard. However, ORS 227.173(1) does not *require* that the city provide a numerical standard for how that information must be generated. *See Eugene Sand and Gravel, Inc. v. Lane County*, 44 Or LUBA 50, 68, *remanded on other grounds*, 189 Or App 21, 74 P3d 1085 (2003) (requirement that a denial decision identify standards that apply does not mean that local government must identify the type or quantum of evidence that would satisfy the standard).

In this case the ITE Trip Generation Manual requires that the estimate for trip generation for a superstore of the size proposed must be based on "local data." Admittedly, that does not tell an applicant much about how it should go about documenting its estimate of the amount of traffic that a proposed development will generate. But that is not unusual. In almost all land use permit proceedings, there are a number of ways an applicant may go about producing evidence that particular standards, such as transportation level of service standards, will be met.

The city's ultimate decision regarding the adequacy of an applicant's evidentiary presentation must be reasonable, based on a review of all the evidence in the record. *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 587, 842 P2d 441 (1992). We have already concluded that the city's decision satisfies that standard. However, contrary to petitioner's argument under this subassignment of error, the city is not obligated to adopt a particular standard, as part of its

land use regulations, to prescribe how applicants must go about producing the evidence that is needed to estimate the amount of traffic a particular proposal will generate.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

HZO § 137(XIII) requires preservation of mature trees in SCPAs. As noted earlier in this opinion, there are two physically separated groves of mature Sequoia trees. One is located in the southwest quarter of the property where the superstore is proposed. The other extends southward through the middle of the property and roughly divides the northern two thirds of the property in half.

HZO §137(XIII)(B)(3) requires that "destruction or damage" of the existing groves of mature Sequoia trees be avoided "to the maximum practicable extent." Petitioner proposes to remove the grove in the southwestern part of the property to construct phase one of the superstore. Petitioner to proposes to remove the grove in the middle of the property to construct parking and develop phase two of the superstore. HZO §137(XIII)(B)(4) provides:

> "Except where otherwise prohibited by law, an exception to the prohibition of cutting trees or to altering existing natural resource areas identified and protected by the provisions of paragraph 3, above, shall be allowed if:
>
> "a. A Certified Arborist determines that:
>
> "(1) Removal of a tree is necessary due to a safety hazard to persons or property; or
>
> "(2) A tree is irreparably diseased or dying, or is irreparably weakened by age, storm, injury or fire; or
>
> "b. A Registered Engineer certifies that:
>
> "(1) The area is needed for access to a building site for construction equipment and there is no practicable alternative route; or
>
> "(2) The area is needed to accommodate essential grade changes needed to implement storm water management requirements and/or engineering standards required for the integrity of the

proposed building, and for which there is no practicable storm water management or grading alternative; or

"(3) The location is needed for proposed buildings, streets, driveways, or other permanent improvements and there is no *practicable alternative* site, location or *design option* which would achieve the purpose and size of the proposed development within the lot, parcel or tract."[5] (Emphases added).

Petitioner's consulting arborist (Gilmore) submitted a report dated January 6, 2003, in which Gilmore considered whether some of the large Sequoias at the northern and southern end of the linear grove in the middle of the property could be saved if the other trees were removed. He concluded that they could not.[6] Record 2021-24. On March 7, 2003, petitioner submitted a second round of reports to consider whether the two groves of Sequoias could be saved. Arborist Gilmore and a second arborist (Owen) and professional engineer (Franklin) collectively concluded that the proposed superstore, parking and circulation, along with necessary site preparation and construction and installation of supporting utilities would necessarily impact both groves of Sequoia trees in ways that would make their preservation impractical. Record 1272-82. We agree with petitioner that those reports, collectively, make a compelling and apparently uncontradicted case that the proposed 210,000 square foot superstore and related parking cannot practicably be constructed on the site and at the same time avoid destroying or damaging all of the existing Sequoia trees. However, that compelling case appears to assume that the proposed superstore will be constructed: (1) at the location proposed; (2) with the footprint proposed; and (3) with the amount of surface parking proposed.

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[5] In addition, condition 6(b) of the city decision that rezoned the subject property to SCC-MM provided that the Sequoia groves must be preserved "to the greatest extent practicable." Supplemental Record 2369.

[6] According to petitioner's consulting arborist, the Sequoia trees in each grove have intertwined root systems, which makes it impossible to remove individual trees in the grove without damaging the root system of at least some of the remaining trees. Also, the shallow root systems of those trees make them highly susceptible to being blown down or even falling down in windless conditions when they are isolated and left exposed.

As the city and intervenors point out, it is not at all clear that the arborists and professional engineer gave any consideration to reducing the size of the proposed superstore footprint by reducing floor area or adding a second story, reducing the amount of proposed parking, or concentrating some of the parking into a multi-level structure to avoid impacts to the trees. HZO §137(XIII)(4)(b)(3) requires that the applicant consider "practicable alternative" "design option[s]." Although we express no view on whether any of those considerations or other potential "design option[s]" are practicable, if they are, they might allow one or both of the existing groves to be saved and incorporated into the development. We recognize that even if alternative design options might allow construction of a store and parking in locations that would not directly impact one or both of the groves of trees, managing stormwater and providing sewer, water and other utilities might nevertheless result in unavoidable impacts to the trees such that those trees would need to be removed in any event. There is language in the engineer's report that can be read to suggest that this might be the case. However, the engineer appears to be taking the proposed 210,000 square foot single story store, surface parking and stormwater management design as a given. It is not clear that the engineer considered whether a modified store and parking design might be accommodated on the site without removing both groves of trees.

For the reasons explained above, we do not agree with petitioner that the city erred in finding that petitioner failed to demonstrate compliance with the tree preservation and removal requirements of HZO §137(XIII)(3) and (4) and condition 6(b) of the city's prior rezoning decision.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

HZO §138(VI) imposes ground floor window and building façade requirements in SCPAs. Petitioner disputes the city's interpretation and application of the standards that

appear at HZO §138(VI)(C), which we set out in the margin.[7] Petitioner assigns two subassignments of error. First, petitioner contends the city erroneously interpreted HZO §138(VI)(C)(1) to impose a separate requirement that an unspecified area of the building façade along Baseline Road must be windows. Second, petitioner challenges the city's finding that the building frontages along Baseline Road and Cornelius Pass Road violate HZO §138(VI)(C)(3).

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[7] HZO §138(VI)(C) provides:

> "1. All development shall provide ground floor windows on the building facade facing and adjacent to a public street, major pedestrian route, direct pedestrian way leading from a light rail station site, or facing onto a park, plaza or other public outdoor space. Required windows shall allow views into lobbies or similar areas of activity, pedestrian entrances, or display windows. Required windows shall provide a lower sill no more than three feet (3') above grade; except where interior floor levels prohibit such placement, the sill may be located not less than two feet (2') above the finished floor level to a maximum sill height of five feet (5') above exterior grade.
>
> "* * * * *
>
> "3. In all districts, building frontages greater than 200 feet in length along streets or major pedestrian routes shall break any flat, monolithic facade by including architectural elements such as bay windows, recessed entrances or other articulation so as to provide pedestrian scale to the first floor."
>
> "4. In the SCC-CBD District, exterior walls facing a public street, public open space, pedestrian walkway and/or transit station shall have windows, display areas or doorways for at least seventy-five percent (75%)of the length and fifty percent (50%) of the area of the ground level wall area, which is defined as the area up to the finished ceiling height of the fronting space or fifteen feet (15') above finished grade, whichever is less.
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> "5. In the SCC-SC and SCC-HOD Districts, exterior walls facing a public street, public open space, pedestrian walkway and/or transit station shall have windows, display areas or doorways for at least fifty percent (50%) of the length and twenty-five percent (25%) of the area of the ground level wall area, which is defined as the area up to the finished ceiling height of the fronting space or fifteen feet (15') above finished grade, whichever is less.
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> "6. In all other districts, any exterior wall which is within twenty feet (20') of and facing onto a route or space described in paragraph 1., above, and which has an unobstructed view of the route or space, shall contain at least twenty percent (20%) of the ground floor wall area facing the street in display area, windows or doorway."

A. Lack of Windows on the Baseline Road Facade

Simply stated, petitioner reads HZO §138(VI)(C)(1) to impose a generally stated obligation that, as relevant in this appeal, is fully implemented by HZO §138(VI)(C)(4)-(6). HZO §138(VI)(C)(4)-(5) apply in the specified zoning districts, and do not apply in the SSC-MM zone. HZO §138(VI)(C)(6) applies in all other zones and therefore potentially applies to the disputed superstore. However, there is no dispute that the proposed store is located more than 20 feet from Baseline Road, and therefore HZO §138(VI)(C)(6) does not apply. The city adopted the following findings that explain its reasoning for concluding that HZO §138(VI)(C)(1) applies to require at least some windows on that façade, notwithstanding that none of the minimum window requirements in HZO §138(VI)(C)(4)-(6) apply:

> "* * * The Council interprets HZO §138(VI)(C)(1) to require ground floor windows for the building façade facing the public street for '*[a]ll* development.' Minimum coverage of the windows is set out in subsections (4), (5) and (6) of the section for some circumstances. But HZO §138(C)(1) requires some degree of windows for the store wall facing SW Baseline Road.
>
> "This requirement is not excused because HZO §138(C)(6) does not [apply]. That subsection requires 20% of the ground floor wall area to be display area, windows or doorways if the wall is within 20 feet of the street. The south wall of the proposed Wal-Mart superstore is not that close to SW Baseline Road.
>
> "However, it is the requirement that the wall be 'facing and adjacent' to the street that springs the requirement for windows in HZO §138(C)(1). 'Adjacent' is defined at HZO §136(C) as situated abutting the street and not separated from the street by 'an existing or planned intervening building as shown on an approved master plan.' Here, the south and west walls of the store are 'facing and adjacent' to SW Baseline Road and SW Cornelius Pass Road respectively. Thus HZO §138(C)(1) requires ground floor windows along these walls.
>
> "HZO §138(C)(1) could be read to excuse the requirements of windows for walls [where HZO §138(C)(6) does not apply]. That is the view taken by [petitioner]. The better and literal reading, however, is that some windows are required for walls under [HZO §138(C)(1)], even if [the] minimum requirements [of HZO §138(C)(6) do not apply]. This interpretation of the section implements the first purpose for station community planning stated in HZO §136(I)(B)(1), to further 'a balanced pedestrian orientation featuring

> buildings, streets and public spaces oriented towards the pedestrian while not excluding the automobile.' * * *" Record 22-23 (emphasis in original).

As relevant here, under ORS 197.829(1), *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1993), and *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003), LUBA must sustain the city's interpretation of HZO §138(VI)(C) unless that interpretation is inconsistent with the express language of the HZO, is inconsistent with the purpose of the HZO, or is inconsistent with the underlying policy for HZO §138 (VI)(C).[8]

The intended meaning of HZO §138(VI)(C)(1) and (4)-(6), when those sections are read together, is ambiguous. Petitioner's interpretation reads in a limitation that is arguably inconsistent the text of HZO §138(VI)(C)(1) and has only limited contextual support when HZO §136(VI)(C)(1) is read together with HZO §138(VI)(C)(4)-(6). The city's literal interpretation of HZO §138(VI)(C)(1) is consistent with the text of that section, but it creates a freestanding subjective criterion with no specified minimum window area, which seems somewhat inconsistent when viewed in context with the minimum window areas imposed by HZO §138(VI)(C)(4)-(6). Neither interpretation is inconsistent with the apparent purpose or policy of HZO §138(VI)(C), but neither interpretation appears to be essential to give effect to that purpose or policy. In short, neither petitioner's nor the city's interpretation is particularly compelling. We conclude that the city's choice here between two admittedly less than

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[8] ORS 197.829(1) provides, in relevant part:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
>
> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

compelling interpretations does not violate the standard of review that we are required to apply under ORS 197.829(1) and *Church.*

The city's interpretation of HZO §138 (VI)(C)(1) to require some windows be provided along the Baseline Road façade is not erroneous. This subassignment of error is denied.

B. Failure to Comply with HZO §138(VI)(C)(3)

HZO §138(VI)(C)(3) is set out above at n 7, and repeated below:

> "In all districts, building frontages greater than 200 feet in length along streets or major pedestrian routes shall break any flat, monolithic facade by including architectural elements such as bay windows, recessed entrances or other articulation so as to provide pedestrian scale to the first floor."

The city found that petitioner failed to comply with this criterion because the "walls are too large and monolithic, not sufficiently diverse in architectural detail and without windows on SW Baseline Road or sufficient windows on Cornelius Pass Road." Record 23. Petitioner contends "[t]he City's conclusion is not supported by substantial evidence." Petition for Review 57.

In challenging the city's finding that petitioner failed to establish that its proposal complies with HZO §138(VI)(C)(3), on evidentiary grounds, petitioner must demonstrate that the evidence establishes that it complies with that criterion as a matter of law. *Jurgenson v. Union County Court*, 42 Or App 505, 510, 600 P2d 1241 (1979); *Horizon Construction, Inc. v. City of Newberg*, 28 Or LUBA 632, 641-42 (1995). That burden is rendered even more difficult because the criterion is so subjective. *Larmer Warehouse Co. v. City of Salem*, 43 Or LUBA 53, 61 (2002). The evidence cited by petitioner does not demonstrate that its proposed superstore complies with HZO §138(VI)(C)(3) as a matter of law.

This subassignment of error is denied.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Under HZO §138(VIII)(C)(1), a "maneuvering area, service dock or loading area" must be located more than 50 feet from any "major pedestrian route" unless it is "not practicable" to do so. Petitioner proposes a "truck drive, loading and maneuvering area" along the south façade of the building that is less than 50 feet from Baseline Road. One of the city's bases for denying the DDP request, was its finding that this loading and maneuvering area violates HZO §138(VIII)(C)(1). Record 15.

Petitioner argues that other HZO requirements effectively compel location of the proposed superstore in the southwest part of the site. Petitioner contends the city's interpretation and application of HZO §138(VIII)(C)(1) means petitioner must show that building a smaller store or a store with a smaller footprint is impracticable. Petitioner contends that interpretation is erroneous because it would be easier to seek a variance under HZO §136(X)(B) than to comply with the practicability standard in HZO §138(VIII)(C)(1).

We are not sure that we agree with petitioner that a variance would provide an easier route to approval of the desired loading and maneuvering location.[9] Even if it would, it does not necessarily follow that the city's interpretation of the "practicability" standard in HZO §138(VIII)(C)(1) is wrong. That interpretation admittedly makes the "practicability" standard a difficult hurdle to clear in this case. However, we do not agree that the city's interpretation is inconsistent with the text of HZO §138(VIII)(C)(1). Beyond its point regarding the HZO variance provisions at HZO §136(X), petitioner cites no context that supports a different

[9] For example HZO §136(X)(3), one of the city's variance standards, requires that the city find:

> "a. The adjustment will equally or better meet the purposes of the Station Community Planning Area and of the regulation to be modified;
>
> "b. The Variance or cumulative Variance adjustments results in a project which is still consistent with the overall purpose and intent of the district; and
>
> "c. The Variance will not result in significant detrimental impacts to the environment or the natural, historic, cultural or scenic resources of the City.

interpretation or any underlying policy or purpose that is frustrated by the city's interpretation.

The sixth assignment of error is denied.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Many of the parties' arguments are directed at the city's findings concerning the SCPA purpose statement, HZO §136(I), and the SCC-MM purpose statement, HZO §136(II)(D). As we noted earlier in this opinion, HZO §136(VII)(B)(6)(b) requires that an application for CDP approval must be "consistent with the purposes identified in [HZO §136]." Those purpose statements express a number of somewhat overlapping or conflicting policies. The city found that petitioner's proposal is not consistent with those purpose statements. Petitioner argues that its proposal complies with all of the city's development standards and therefore it is not possible for its store to be inconsistent with those general purpose statements.

We deny petitioner's third through sixth assignments of error above. Because we deny those assignments of error, several of the city's bases for denying the requested CDP and DDP approvals must be sustained. Therefore, even if the city erred in some respects in applying the purpose statements as additional bases for denying the requests, the city's decision would nevertheless have to be affirmed. We therefore do not consider petitioner's first and second assignments of error.

The city's decision is affirmed.

APPENDIX

Free-Standing Discount Superstore
(813)

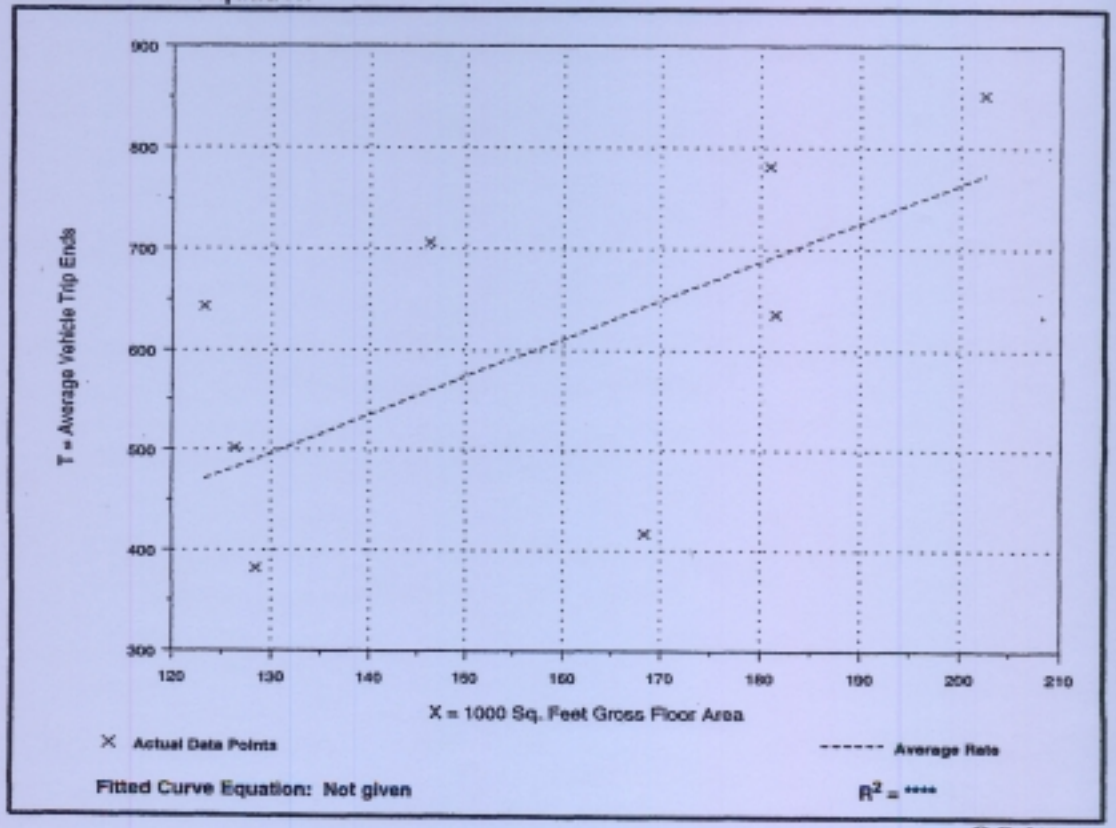
Average Vehicle Trip Ends vs: 1000 Sq. Feet Gross Floor Area
On a: Weekday,
Peak Hour of Adjacent Street Traffic,
One Hour Between 4 and 6 p.m.

Number of Studies: 9
Average 1000 Sq. Feet GFA: 154
Directional Distribution: 49% entering, 51% exiting

Trip Generation per 1000 Sq. Feet Gross Floor Area

Average Rate	Range of Rates	Standard Deviation
3.82	2.48 - 5.21	2.12

Data Plot and Equation



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