BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NANCY STAUS, GERALD HEILMAN
and JOHN FOSTER,
Petitioners,

and

JOAN ROSE,
Intervenor-Petitioner,

vs.

CITY OF CORVALLIS,
Respondent,

and

GROUP MACKENZIE,
Intervenor-Respondent.

LUBA No. 2004-091

JOAN ROSE,
Petitioner,

vs.

CITY OF CORVALLIS,
Respondent,

and

GROUP MACKENZIE,
Intervenor-Respondent.

LUBA No. 2004-093

FINAL OPINION
AND ORDER

Appeal from City of Corvallis.

Nancy Staus and John Foster, Corvallis, filed a petition for review. Nancy Staus argued on her own behalf.

Bill Kloos, Eugene, filed a petition for review and argued on behalf of petitioner/intervenor-petitioner, Joan Rose.

James K. Brewer, Corvallis, filed a response brief and argued on behalf of respondent. With him on the brief was Fewel and Brewer.

Michael J. Lilly, Portland, filed a response brief and argued on behalf of intervenor-respondent.

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

REMANDED 11/16/2004

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners challenge the city's approval of a zoning district change from PD (RTC) (Research Technology Center with a Planned Development overlay) to PD (GI) (General Industrial with a Planned Development overlay), a major planned development modification and detailed development plan, a tentative subdivision plat, and a sign variance.

MOTIONS TO INTERVENE

This case involves two appeals, one filed by petitioners Nancy Staus, Gerald Heilman and John Foster (LUBA No. 2004-091) and the other filed by Joan Rose (LUBA No. 2004-093). Those appeals have been consolidated. Joan Rose moves to intervene on the side of petitioners in LUBA No. 2004-091, and Group Mackenzie moves to intervene on the side of respondent in both appeals. There are no objections to either motion, and they are allowed.

MOTIONS TO FILE REPLY BRIEFS

Petitioners John Foster and Joan Rose each move to file reply briefs. There is no objection to either of these motions, and they are allowed.

MOTION TO TAKE OFFICIAL NOTICE

Following oral argument, petitioner Rose filed a motion requesting that LUBA take official notice of the Corvallis Buildable Lands Inventory.[1] There is no opposition to the motion, and it is allowed.

---

[1] At oral argument, there was a discussion regarding taking official notice of past versions of the comprehensive plan, including the comprehensive plan map. Petitioner Rose objected, arguing that we may not take official notice of past enactments, only current ones. No written request to take official notice has been filed. The superceded comprehensive plan maps are not listed anywhere in the table of contents to the record, either as a listed item or as an oversized exhibit. Accordingly, we may consider them only if we may take official notice of them under Oregon Evidence Code 202(7) (allowing for taking judicial notice of a city ordinance, comprehensive plan or enactment). Petitioner Rose has provided no support for her position that we cannot take official notice of superceded comprehensive plan maps, and we know of none. We will take official notice of the 1980 comprehensive plan map, which is the only superceded map provided to us.

FACTS

The subject property is a 32.34-acre, irregularly shaped, level tract consisting of seven parcels that are part of a planned development called Corvallis Business Park. The southern 17.5 acres of the Corvallis Business Park site is referred to as the Corvallis Station site. The proposed zoning district map change, detailed development plan and subdivision affect only the Corvallis Station site. The major planned development modification and sign variance affect the entire Corvallis Business Park site.

On December 3, 2003, the planning commission held a hearing on the proposed actions. The planning commission denied the application on December 17, 2003. The applicant, intervenor-respondent (intervenor) in this appeal, appealed that denial to the city council. On May 17, 2004, the city council adopted a final order and findings sustaining the appeal, reversing the planning commission and approving the proposed changes. This appeal followed.[2]

FIRST AND SECOND ASSIGNMENTS OF ERROR (ROSE)
SECOND ASSIGNMENT OF ERROR, SUBASSIGNMENT B (STAUS)[3]

A. First Assignment of Error (Rose)

The city council adopted certain findings in support of the challenged decision, found at Record 10-26. In addition, it incorporated other findings by reference, described as follows:

> "The City Council accepts and adopts the findings included in the Staff Report to the Planning Commission dated November 26, 2003; the staff report to the City Council dated December 29, 2003; the City Council minutes from the 2004 meetings of January 20, April 5, April 19, May 3, and May 17; and including written testimony submitted at the hearings that support approval of the District Change, Major Planned Development Modification and Detailed Development Plan, Tentative Subdivision Plat, and Sign Variance. The findings below supplement and elaborate on the findings contained in the materials noted above, all of which are attached hereto and incorporated [herein/by reference]. When there is a

[2] The tentative subdivision plat and sign variance are not at issue in this appeal.

[3] Petitioners Nancy Staus and John Foster filed a petition for review and petitioner Joan Rose filed a petition for review. Where the assignments of error in the two briefs are the same or similar, we refer to the parties collectively as "petitioners." Where there is a need to identify them separately, we will do so.

conflict between these findings and the above-referenced findings incorporated by reference, these findings shall prevail." Record 10 (brackets in original).

In her first assignment of error, petitioner Rose points out that the city's incorporated findings make up approximately 887 pages of a 1360-page record. Rose Petition for Review 8. She challenges the incorporated findings, arguing generally that the findings are not adequate, under ORS 227.173(3) and relevant cases, because they fail to identify the applicable standards, the facts relied on or explain why those facts support a conclusion that the standards are met.[4] *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 20-21, 569 P2d 1063 (1977).

Petitioner Rose argues that the findings requirement described in *Sunnyside* is not satisfied by providing that a specified findings document will prevail where findings in the specified findings document conflict with the incorporated findings. *See DLCD v. Douglas County*, 17 Or LUBA 466, 471 n 6 (1989) (finding that purports to incorporate only those portions of documents that are "consistent" with the decision is inadequate). She also argues that the incorporation that the city attempted in this case is the functional equivalent of adopting the entire record as findings. *See Jackson-Josephine Forest Farm Assn. v. Josephine County*, 12 Or LUBA 40, 42 (1984) (declining to consider the "record, minutes and documents in the file to be findings of fact or conclusions of law").

Intervenor responds that petitioner Rose has not specified what parts of the decision are inadequately explained or identified any conflicting findings. Intervenor attempts to distinguish *DLCD v. Douglas County* and *Jackson-Josephine Forest Farm Assn*., arguing that, in those cases, the local government failed to adopt any findings. In this case, the city did adopt specific findings, although it incorporated other documents as findings as well.

---

[4] ORS 227.173(3) provides:

"Approval or denial of a permit application or expedited land division shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

As the intervenor correctly points out, the city council's decision, which appears at Record 4-58, clearly does include findings. Those findings may or may not be adequate, but there is no doubt that findings appear at Record 6-27 and there is no doubt that the city council adopted those findings. We cannot say, in the abstract, that the city's decision to go further and incorporate a large number of additional documents as findings necessarily renders those findings inadequate as a matter of law.

The city council's decision clearly identifies the two staff reports it adopts as findings. It is not uncommon for local decision makers to rely on staff reports for findings, and staff reports frequently include findings of fact and proposed conclusions of law. The other documents that the city purported to adopt as findings may be inadequately identified. If so, the attempted incorporation fails and the city may not rely on any "findings" that may be included in those documents. *Gonzalez v. Lane County*, 24 Or LUBA 251, 258-59 (1992).[5] However, we do not see that an ineffective attempt to adopt additional findings by incorporation is necessarily a basis for reversal or remand, at least where the findings that the city clearly did adopt are adequate. It may be that the documents that the city adequately identifies and therefore incorporates into its decision as findings may constitute testimony rather than findings of fact or findings that explain how the relevant criteria are satisfied. But, even such an ineffective attempt to adopt *testimony* as *findings* may be harmless error if the findings that the city did adopt are otherwise adequate. The city council's decision to adopt the minutes from five of its meetings as findings comes close to constituting error as a matter of law, because those minutes almost certainly reflect testimony that both supports and testimony that is contrary to the city's ultimate decision. However, we do not believe the city's decision to adopt those minutes as findings, in and of itself, constitutes a basis for remand. The adopted minutes may not constitute findings. Even if the minutes do include findings,

[5] We conclude below that the city's purported incorporation of unspecified written testimony "that support[s] approval of" its decision is inadequate to identify the testimony that the city intended to incorporate as findings.

petitioners must demonstrate that any such incorporated findings are inconsistent with other findings that the city relies on to support its decision or are otherwise contrary to the city's ultimate decision.

We turn to petitioners' specific challenges to the adequacy of the city's findings in this matter.

B. Second Assignment of Error (Rose)
Second Assignment of Error, Subassignment B (Staus)

Petitioners assign error to the city's failure to adopt findings demonstrating that the proposed zoning district change complies with Statewide Planning Goal 12 (Transportation) and the Transportation Planning Rule (TPR).[6] OAR 660-012-0060(1) of the TPR requires local

[6] OAR 660-012-0060(1) and (2), the pertinent provisions of the TPR, provide:

> "(1) Amendments to functional plans, acknowledged comprehensive plans, and land use regulations which significantly affect a transportation facility shall assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility. This shall be accomplished by either:
>
> > "(a) Limiting allowed land uses to be consistent with the planned function, capacity, and performance standards of the transportation facility;
> >
> > "(b) Amending the TSP to provide transportation facilities adequate to support the proposed land uses consistent with the requirements of this division;
> >
> > "(c) Altering land use designations, densities, or design requirements to reduce demand for automobile travel and meet travel needs through other modes; or
> >
> > "(d) Amending the TSP to modify the planned function, capacity and performance standards, as needed, to accept greater motor vehicle congestion to promote mixed use, pedestrian friendly development where multimodal travel choices are provided.
>
> "(2) A plan or land use regulation amendment significantly affects a transportation facility if it:
>
> > "(a) Changes the functional classification of an existing or planned transportation facility;
> >
> > "(b) Changes standards implementing a functional classification system;
> >
> > "(c) Allows types or levels of land uses which would result in levels of travel or access which are inconsistent with the functional classification of a transportation facility; or

governments to evaluate the traffic impacts of amendments to functional plans, acknowledged comprehensive plans, and land use regulations that significantly affect a transportation facility. The city and intervenor offer numerous responses to petitioners' assignments of error related to the TPR.

1. Zoning District Change is a Land Use Regulation Amendment

First, the city argues that the TPR does not apply to this zoning district change because the zoning district change is not an amendment to a functional plan, acknowledged comprehensive plan, or land use regulation.[7] *See* OAR 660-012-0060(1); n 6. The city cites *Adams v. City of Medford*, 39 Or LUBA 464 (2001), arguing that the challenged zoning district change is a quasi-judicial zoning district change and was adopted by resolution, and that the TPR only applies to legislative zoning district changes, which the city adopts by ordinance.

Petitioner Rose argues that in *Adams*, we held that a zoning map amendment is a land use regulation amendment where a zoning map is part of the zoning code. Petitioner asserts that the zoning map in Corvallis is part of the zoning code. The city does not contest that assertion. We agree with Petitioner Rose that, under our holding in *Adams*, the zoning district change in this case is a land use regulation amendment that triggers the TPR.

2. Deferral of TPR Findings

The city argues that, even assuming the zoning district change is an "amendment" triggering application of OAR 660-012-0060, the city can assure compliance with the TPR by considering traffic impacts as part of the required conceptual plan modification and detailed development plan reviews that were approved in the challenged decision. The city cites to *Citizens for Protection of Neighborhoods, LLC v. City of Salem*, ___ Or LUBA ___ (LUBA No. 2003-201, June 9, 2004), for the proposition that a local government need not demonstrate that a plan or land use

---

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

[7] Petitioner Rose asserts in her reply brief that the city waived this legal argument. Because we conclude below that the TPR does apply here, we need not determine whether the city's position that it does not apply is a legal argument that is not waived or a legal issue that was not raised below and is thus affirmatively waived.

regulation amendment complies with the TPR, as long as it demonstrates compliance with the TPR prior to actual development of the property that is the subject of the amendment.

According to the city, neither the PD (RTC) district nor the PD (GI) district in this case allows any development to occur without subsequent review and approval of conceptual and detailed development plans. The city argues that the standards governing conceptual and detailed development plan approvals require a traffic analysis, and that in fact such a traffic analysis was conducted in the present case. Because the conceptual plan modification and detailed development plan were reviewed concurrently with the zoning district change, including the required traffic analysis, the city argues that it need not adopt findings addressing the TPR.

Petitioner Rose responds that none of the approvals challenged in this appeal addresses, much less demonstrates, compliance with the TPR. Petitioner Rose also contends that no future approvals prior to actual development will require compliance with the TPR. We agree with petitioner Rose. As far as the city has established, the standards governing conceptual plan modification and detailed development plan do not implement or even resemble the standards at OAR 660-012-0060, and nothing about those approvals assures compliance with the TPR.[8] Nor has the city established that standards sufficient to assure TPR compliance will govern future decisions allowing development of the subject property.

3. Adequacy of Findings

Finally, both intervenor and the city contend that the challenged decision in fact includes findings of compliance with the TPR. There is no dispute that neither the findings adopted by the city at Record 10-26, nor the incorporated staff reports that are specifically identified at Record 10 include findings addressing the TPR. However, in their briefs the city and intervenor cite to written

[8] The city asserts that the requirements of Corvallis Comprehensive Plan (CCP) 11.3.9 are similar to the requirements of OAR 660-012-0060, and we understand the city to argue that CCP 11.3.9 is applicable to conceptual and detailed development plan approval. That argument does not assist the city, for two reasons. First, as far as we are informed the city's findings do not appear to address CCP 11.3.9. Second, the CCP 11.3.9 requirements are not similar to the TPR requirements, unlike the code standards in *Citizens for Protection of Neighborhoods, LLC*.

testimony from the city's engineering staff and the applicant's traffic engineer, and argue that this testimony was incorporated into the decision as "findings" that demonstrate TPR compliance.

The city's and intervenor's responses in this respect illustrate several of the difficulties posed by incorporation of record documents as findings, difficulties more generally discussed under petitioner Rose's first assignment of error. In *Gonzalez*, we explained:

> "Both the appellate courts and this Board have recognized that local government decision makers may rely on findings initially prepared by others. The preferred method of accomplishing this is to physically set out the findings initially prepared by others as an integrated part of the local government's own written decision. However, if findings initially prepared by others and set out in a separate document are to be incorporated by reference into a local government's decision, it does not seem particularly burdensome to require that the local government clearly indicate in its decision an intent to incorporate all or specified portions of identified document(s) into its findings.
>
> "Nevertheless, this seemingly simple requirement has caused considerable difficulty over the years. In some instances, it is difficult to decide whether particular language indicates an intent to incorporate another document into the findings, or is just a reference to that document. In other instances, local government decisions have stated an intent to incorporate entire records, all written and oral testimony, or documents of uncertain identity. Finally, in some instances, it is unclear which portions of identified documents a local government wishes to incorporate, because the local government decision includes language qualifying the incorporation.
>
> "After all, the local government decision maker is in a unique position to know what it believes to be the facts and reasons supporting its decision. Therefore, we hold that if a local government decision maker chooses to incorporate all or portions of another document by reference into its findings, it must clearly (1) indicate its intent to do so, and (2) identify the document or portions of the document so incorporated. A local government decision will satisfy these requirements if a reasonable person reading the decision would realize that another document is incorporated into the findings and, based on the decision itself, would be able both to identify and to request the opportunity to review the specific document thus incorporated." 24 Or LUBA at 258-59 (citations and footnotes omitted).

In the present case, the city incorporated by reference hundreds of pages of minutes, written testimony and other documents and adopted them as "findings."[9] However, the city identified only a few of those pages in a manner that would allow a reasonable person to locate them with any certainty. For the bulk of the documents incorporated as "findings," the city simply identifies them as "written testimony submitted at the hearings that support approval" of the application. Further, the city qualifies that incorporation in a manner that requires LUBA and the parties to perform the uncertain task of determining which parts of the written testimony supports the approval and are therefore intended to be incorporated. *DLCD v. Douglas County*, 17 Or LUBA at 471 n 6. The city's attempt to incorporate the documents cited by respondents as "findings" addressing TPR compliance fails. The city did not adequately identify those documents and the city qualified the incorporation in a manner that makes it difficult or impossible to understand the facts the city relied upon and the justification for the decision. The city's approach effectively allows the city to wait until it files the response brief to attempt to identify the findings that demonstrate compliance with applicable approval criteria, from hundreds of pages of testimony in the record.

Because the city's attempted incorporation of the documents respondents rely upon was ineffective, those documents do not constitute findings supporting the city's decision. Respondents cite us to no other findings demonstrating TPR compliance, and therefore we agree with petitioners that the decision must be remanded to adopt adequate findings addressing the TPR and the issues petitioners raised regarding the TPR.

Petitioner Rose's first assignment of error is denied. Petitioner Rose's second assignments of error and subassignment B of petitioner Staus' second assignment of error are sustained.

THIRD ASSIGNMENT OF ERROR (ROSE)
FIRST ASSIGNMENT OF ERROR (STAUS)

---

[9] Minutes generally are nothing more than a summary of what is said at a public meeting or hearing. Although petitioner Rose does not specifically challenge the city's incorporation of minutes, we note that we have declined in the past to consider minutes as findings of fact. *Johnson v. Tillamook County*, 16 Or LUBA 855, 868-69 n 10 (1988); *Jackson-Josephine Forest Farm Assn. v. Josephine County*, 12 Or LUBA 40, 42 (1984).

The city uses comprehensive plan base map designations and applies comprehensive plan map *overlay* designations to those comprehensive plan *base* map designations.[10] The city also employs zoning base districts and applies zoning *overlay* districts to those zoning base districts.[11] To make things even more complicated, the same terminology is sometimes used for both *plan* map designations and *zoning* map districts. We set forth the comprehensive plan map designations that are at issue in these assignments of error in the margin, along with their acronyms, to provide a common point of reference and in an attempt to avoid confusion in our discussion of those designations below.[12]

The existing comprehensive plan map base and overlay designations for the Corvallis Station are at issue in this case.[13] The challenged decision includes a lengthy interpretation of certain ambiguities in the plan. That interpretation concludes that the existing comprehensive plan base designation is General Industrial (GI) with a Research Technology (RT) comprehensive plan overlay designation. It is petitioners' position that the subject property has a comprehensive plan *base* designation of Research Technology (RT).[14] Petitioners argue that because RT is the existing plan

---

[10] Overlay map designations work in conjunction with base map designations to modify uses and activities that would otherwise be permissible under the base map designation alone.

[11] The challenged decision and the parties use the terms "district" and "designation" somewhat interchangeably. In an attempt to clearly distinguish between the comprehensive plan map and zoning map we refer to comprehensive plan map *designations* and to zoning map *districts* in this decision.

[12] Those comprehensive plan map designations are as follows:

Plan Base Designations	**Plan Overlay Designations**
General Industrial (GI)	Research Technology (RT)
Light Industrial (LI)	Planned Development (PD)
	Regional Shopping Center (RSC)

[13] Petitioner Rose does not cross-reference her first assignment of error in this assignment of error, and we do not see that the city's error in incorporating documents as findings, discussed above, has any relevance to the remaining assignments of error.

[14] We list the RT plan map designation as an overlay designation in n 12, because we ultimately agree with the city's interpretation of its comprehensive plan.

base designation, rather than the GI plan base designation as the city found in its decision, a plan amendment is necessary to change the RT comprehensive plan base designation to GI, before the city can rezone the property to a General Industrial base zoning district with a Planned Development zoning overlay district. Petitioners contend that although the city purported to interpret its comprehensive plan to find the subject property's comprehensive plan base designation is GI, in reality the city's action constitutes a *de facto* amendment of the plan. If the city is correct that the plan base designation is GI, then the city is correct that no plan base amendment is required for the proposed rezoning. If petitioners are correct that the plan base designation is RT, then a prior or contemporaneous plan base designation amendment would be necessary to approve the proposed rezoning.

We will set out the pertinent land use history of the subject property before turning to the city's interpretation.

A. Relevant History

The city adopted a comprehensive plan in 1980. The 1980 plan included a Light Industrial (LI) plan base designation, which was shown by applying a distinctive pattern or swatch to the map to show the properties designated LI. Other distinctive swatches were applied to show properties with other plan base designations, but there was no distinctive swatch for the RT plan designation. As we explain later, the city relies in part on this feature of the 1980 plan to support its conclusion that the RT plan designation is an overlay rather than a base designation.

The 1980 comprehensive plan included an RT plan designation and corresponding comprehensive plan text defining that designation. In addition to the RT designation, the 1980 plan included a Regional Shopping Center (RSC) plan designation. There is no dispute that the RSC plan designation was an overlay designation. Both the RSC plan overlay designation and the RT plan designation were shown on the plan map by applying bold letters "RSC" and "RT" to the individual properties so designated. The city contends that for those properties with the RSC and RT plan map overlay designations, the 1980 plan showed the underlying plan map base designations

by the map pattern or swatch that was applied to those properties. In the 1980 comprehensive plan map, it is undisputed that the subject property carried a LI plan base designation and a RSC plan overlay designation.

At some point between 1980 and 1991, the city began using the GI plan base designation in place of the LI plan base designation. However, the comprehensive plan map did not reflect that change, and LI plan base designations remained on the plan map. In 1993, the city council approved a comprehensive plan map amendment replacing the RSC plan overlay with the RT plan designation for 27.5 acres, including the Corvallis Station site. Record 620, 755, 760. The 1998 Comprehensive Plan converted the RT letter designation to a color on the new comprehensive plan map and no longer included any separate swatch or other means of identifying the plan map base designation. Much of the ambiguity in the current comprehensive plan can be attributed to this failure in the 1998 comprehensive plan amendment.

B. City's Interpretation

The city adopted the following interpretation, in concluding that the subject property carries a GI plan base designation with a RT plan overlay designation:

> "Background – The City Council notes that the Corvallis Station portion of the subject property is the area proposed for the District Change and is designated in the Corvallis Comprehensive Plan as General Industrial with a Research Technology overlay. The Council notes that the subject site was zoned light industrial as far back as 1966. In 1980, with the adoption of the City's first Comprehensive Plan, the site received a Comprehensive Plan Designation of General Industrial with an 'RT' overlay. The Council notes that prior to 1998, when the new Comprehensive Plan and Plan Map were adopted, the Comprehensive Plan Map had an overlay designation called 'RT' to signify that a Research Technology Center [Zoning] District could be applied to a property which had the overlay. This overlay designation was noted on specific parcels merely by use of the letters 'RT' which were placed upon a number of properties with a Comprehensive Plan [base] designation of General Industrial. However, the Council finds that the base Comprehensive Plan designation for the properties was General Industrial.
>
> "The Council notes that the 1998 Comprehensive Plan directs, via Policy 8.9.7, that the City *'designate Research Technology Center (RTC) as a distinct industrial district that helps continue the practice of providing adequate green open*

space to maintain community livability.' The Council notes that this Policy, and Policy 8.9.13, go on to note required provisions of that RTC District. The City has had an RTC District that is consistent with all the elements of Policies 8.9.7 and 8.9.13 for quite some time (since approx. 1993). The 1998 Comprehensive Plan text reiterated the need for an RTC District (zone). The decision-makers also removed the RT overlay from all but three sites. The Council notes that one of the factors which likely contributed to this decision was the establishment of a new Comprehensive Plan Policy, 8.9.17, which directed that the City develop a new Limited Industrial-Office District to be applied Citywide. The Council finds that this District was envisioned to allow development similar to the RTC District. The Council notes that the 1998 Comprehensive Plan text did not direct any changes to actual Comprehensive Plan designations relative to the Research Technology (RT) overlay that already existed. The Comprehensive Plan Map is supposed to illustrate the Comprehensive Plan Text. The Council notes that the 1998 Comprehensive Plan Map has an error in that its legend shows an actual designation called Research Technology (RT) and the map uses a color to define it. This color was placed on properties in the City which had an RT Comprehensive Plan overlay and an approved RTC District (zone). This color replaced the old Map's way of indicating an RT overlay, but is misleading because it doesn't show the base General Industrial Comprehensive Plan designation that properties with the RT overlay have. As there is no authority in the Comprehensive Plan for a stand-alone RT designation, the Council finds that the legend and map are incorrect. Therefore, the Council finds it appropriate for the map to be corrected, the base General Industrial Comprehensive Plan designation to be shown, and the Comprehensive Plan RT overlay to be shown as an overlay.

"Given the above, the Council finds that the Comprehensive Plan designation for the RTC District portions of Corvallis Business Park have been and continue to be General Industrial with a Research Technology (RT) overlay." Record 10-12 (emphasis in original).

C. Legislation is Ambiguous

Petitioner Rose offers a straightforward explanation of the comprehensive plan map designation for the subject property. According to petitioner Rose, the current comprehensive plan map shows RT as a designation; the map's legend lists "Research Technology" with a blue oval next to it, and the subject property is colored blue on the map. The map's legend also appears to show GI designations as purple, and other properties, not including the subject property, are colored purple on the map. The current comprehensive plan map clearly shows the subject property colored blue.

Petitioner Rose argues that the clear and unambiguous existence of RT as a plan base designation is reinforced by Corvallis Land Development Code (LDC) 2.2.20, which includes a table entitled "COMPREHENSIVE PLAN & CORRESPONDING DISTRICT MAP DESIGNATIONS" that lists "Research Technology Center" as a plan designation and "Research Technology Center (RTC)" as the implementing zone. Respondent's Brief App-19. A footnote to that table states, "Does not include district overlays." *Id*. According to petitioners, because the RT plan designation is listed in the table and "overlay districts" are not listed, the RT plan designation must be a base designation.[15] The city's discussion in its findings of the confusing history of the subject property and other parts of the comprehensive plan, petitioner Rose argues, is merely an attempt to introduce ambiguity where there is none. *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 218, 843 P2d 992 (1992). According to petitioner Rose, any interpretation is improper because the legislation is not ambiguous; the plan map clearly shows that the Research Technology plan base designation exists.[16]

Intervenor concedes that the RT designation is referenced on the comprehensive plan map, but also notes that there is no text in the comprehensive plan that establishes such a plan base designation. The plan text includes a list of plan base designations and a description of each designation listed. The RT designation is not found anywhere on that list. CCP 224-26. This situation, intervenor argues, creates an inherent ambiguity. Intervenor's Brief 13. Finally, intervenor also points out that the 1998 comprehensive plan map legend includes items that are not plan base

---

[15] We note that the cited table lists the plan map designation as "Research Technology Center." We do not understand any party to contend that the reference is to anything other than the RT comprehensive plan map designation that we have been discussing to this point. Their dispute remains whether the RT comprehensive plan map designation is a base or overlay designation. We will continue to use the RT shorthand reference to the plan map designation.

[16] Petitioner Rose also argues that reference to legislative history is not appropriate where the text and context is sufficient to resolve the ambiguity. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611-12, 859 P2d 1143 (1993). What exactly is legislative history and what constitutes historical facts is somewhat convoluted in this case. Without analyzing the distinction in depth, we believe that a clear understanding of the planning history of the subject property is necessary in this case.

designations; *i.e.*, overlay designations and drainageways. Therefore, the map itself, even without reference to the plan text, is ambiguous. We agree with the city and intervenor that, unlike in *Goose Hollow*, the conflict in this case is found within the legislation itself, and is not created by the interpretation. The comprehensive plan is exceedingly ambiguous, and the city did not err by attempting to address and resolve that ambiguity through its interpretive findings.

D. Review of City's Interpretation

We next determine whether the city's interpretation is affirmable under the somewhat deferential standard in ORS 197.829(1). *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003). We are to affirm a local government's interpretation of its own ordinance unless it is inconsistent with the express language, purpose or underlying policy of the legislation or is contrary to a statute, land use goal or rule that the local legislation implements.

Petitioners argue that the text and context of the plan map does not support the city's interpretation. According to petitioner Rose, a more logical interpretation of the absence of any plan text describing the RT plan designation as a base designation, as discussed above, is that the textual description was inadvertently omitted, not, as the city interprets, that the RT base plan designation does not exist. Rose Petition for Review 25. However, the question is not which interpretation is "more logical" or which we believe is more correct. The proper inquiry is whether the city's interpretation is affirmable under the somewhat deferential standard expressed by the Court of Appeals in *Church*.

Petitioners Staus points out that plan policy 8.9.7, cited in the city's interpretation, requiring the city to "designate Research-Technology Center (RTC) as a distinct industrial district," calls for a Research-Technology plan map designation, not just the RTC zoning overlay district. According to petitioner Staus, plan policy 8.9.7 supports their interpretation that RT is a plan base designation.[17]

[17] Plan policy 8.9.7 provides, in part:

However, as the city explains in its interpretation, and argues in its brief, policy 8.9.7 is a direction to create a RTC *district*, or a zone, and has nothing to do with the RT *plan designation*. The city did create that "distinct industrial district." *See* LDC Chapter 3.26 – RTC (Research Technology Center) District. The language in LDC Chapter 3.26 supports the city's contention that policy 8.9.7 is a direction to create a zoning district, not a plan map designation, and its interpretation that the RT designation is plan overlay designation, not a plan base designation.[18] We agree with the city's explanation of that plan policy:

> "The City shall designate Research-Technology Center (RTC) as a distinct industrial district that helps continue the practice of providing adequate green open space to maintain community livability."

[18] LDC 3.26.10 provides:

"Purpose

> "This district implements the Industrial Use designation of the Comprehensive Plan. It is intended to provide locations for research and technology uses that desire a campus-like setting, with supporting commercial uses not to exceed 20 percent of the gross floor area, and to establish standards that address compatibility of the center with surrounding uses."

LDC 3.26.20.01provides:

"Establishment of the RTC District

> "This district may be requested by a property owner of lands identified on the Comprehensive Plan Map as potential RTC areas. Establishment of this district requires a public hearing by the Planning Commission in conjunction with a Conceptual Development Plan (Section 2.5.40). At the time this district is designated, the Planning Commission shall also designate the underlying district in conformance with the Comprehensive Plan.
>
> "The applicant has 3 years from date of approval for the district change and Conceptual Development Plan to complete a Plan Compatibility Review and be issued a building permit for a primary use. If no building permit has been issued prior to the expiration date, the district change and Conceptual Development Plan shall expire and the Director shall amend the Official Development District Map to remove the RTC district except as provided in 3.26.20.02 below."

LDC 3.26.20.02 provides:

> **"Time Extension**
>
> "a. An owner of property with an RTC designation may apply to have that designation extended beyond the 3-year limit, provided that an application is properly filed before the expiration of the designation on forms provided by the Director.

> "The absence of CCP textual support for establishing a stand-alone base designation for Research Technology Center is understandable given that its purpose is simply to identify potential areas of land which may allow for the application of a RTC district; i.e., [a zoning] overlay. * * * That the CCP requires a distinct industrial district and not a comprehensive plan use designation is understandable, given that this unique district only becomes operative upon request 'by an owner of property of lands identified on the Comprehensive Plan Map as *potential RTC areas*." LDC 3.26.20.01, App-1 (emphasis added). It would serve little purpose to establish RTC as a distinct comprehensive plan use designation if the only implementing development district was optional and not mandatory. Further, a scheme of that nature would leave the property owner not knowing how s/he could develop the land if s/he chooses not to develop the land under the optional RTC district, since there would remain no district implementing the purported designation." Respondent's Brief 7-8.

Finally, petitioner Rose asserts that finding 8.9.a of the comprehensive plan recognizes the existence of Research Technology as a plan base designation.[19] She argues that the finding only makes sense if the RT plan base designation exists. The city and intervenor explain that the reference to comprehensive plan map amendments in that finding is a reference to amendments that added land with a Limited Industrial designation to the city's inventory to address the need for that type of land, not to amendments that might have added lands designated RT. Record 630.

> "b. The Director shall process the request and mail notice to owners and occupants of all properties within 500 ft of the subject property in accordance with Chapter 2.16. The Director shall grant a 1-year extension of the expiration date upon finding that:
>
> "1. Unforeseen circumstances or conditions have caused the delay;
>
> "2. The applicant has demonstrated reasonable diligence in attempting to meet the time limits imposed; and
>
> "3. Facts upon which the approval was based have not changed to an extent sufficient to warrant refilling.
>
> "Applications for additional 1-year extensions may be filed in accordance with the above procedures."

[19] Plan finding 8.9.a states:

> "To implement economic policies, it is necessary to maintain an adequate supply of industrial lands. The Buildable Land Inventory and Land Need Analysis for Corvallis (1998) indicates that there was a shortage of Research-Technology Center and Limited Industrial land; however, Comprehensive Plan Map Amendments made in 1998 have adequately addressed this shortage."

In considering all of the elements of the comprehensive plan map, plan text and implementing code provisions, we affirm the city's conclusion that the RT plan designation is an overlay designation and that the plan map is simply incomplete in that it does not clearly show the underlying plan map base designations.

E. Appropriate Base Designation

Finally, petitioners argue that even if the RT plan designation is properly viewed as an overlay designation, as the city and intervenor assert, the appropriate plan base designation for the subject property is LI, not GI.[20] Petitioners base this position on the 1993 plan map amendment that replaced the RSC plan overlay designation with the RT plan overlay designation. The "Notice of Disposition" of that action describes the request that formed the basis of that action as follows:

> "On a 27.5 acre site the applicant is requesting approval of the following:
>
> "A Comprehensive Plan Map Amendment replacing the Regional Shopping Center (RSC) Overlay with the Research-Technology Center (RT) Overlay *within the Limited Industrial (LI) Designation*." Record 755 (emphasis added).

The city explains this apparent reference to Limited Industrial base designation as a scrivener's error. It explains that the original 1980 comprehensive plan map included plan base designations for Light Industrial, Limited Industrial and Intensive Industrial. At some time between 1980 and 1991, the city changed the Light Industrial designation to a General Industrial designation in order to avoid confusion because both Light Industrial and Limited Industrial designations were abbreviated as LI. The comprehensive plan map, however, was never changed and continued to depict properties designated Light Industrial. The subject property was designated Light Industrial; and, the city asserts, the reference in the 1993 "Notice of Disposition" is attributable to confusion caused by the LI reference on the map. That reference, the city argues, was a holdover of the Light

[20] Intervenor argues that this issue is waived because it was not raised below. The proper designation of the property was the primary subject of the city's interpretation, although it appears that this particular argument was not specifically addressed below. Based on our disposition of this argument on the merits, we decline to rule on the waiver issue.

Industrial map designations, and does not mean the property actually carried a plan base designation of Limited Industrial.

However we would resolve the parties' arguments if the 1993 comprehensive plan amendment actually amended the underlying plan map base designation, we do not agree that the 1993 comprehensive plan amendment had that effect. The language that petitioners rely on in arguing that the plan map base designation was changed in 1993 is found in the city's "Notice of Disposition." The ordinance that actually adopted the 1993 amendment did not include that language. Ordinance 93 – 23 provides:

> "THE CITY OF CORVALLIS ORDAINS AS FOLLOWS:
>
> "Section 1. The findings of fact prepared and presented by staff in the Report to Planning Commission dated August 25, 1993, are hereby adopted by the City Council. The City Council finds that the proponents have borne their burden of proof; and therefore, the Comprehensive Plan overlay classification for the subject property (see Exhibit A) generally located on the south side of Circle Boulevard between Highway 99W and the Southern Pacific Railroad line, Toledo Branch, is changed from Regional Shopping Center (RSC) to Research – Technology Center (RT)." Record 756.

The 1993 action taken by the city to amend the plan map overlay designation did nothing to change the then existing plan map base designation. The language in the notice did not effectuate the amendment that petitioners claim it did. The 1980 comprehensive plan designated the subject property Light Industrial, that designation was later renamed General Industrial, and, as far as we are made aware, no action by the city has since amended that designation.

These assignments of error are denied.

SECOND ASSIGNMENT OF ERROR, SUBASSIGNMENT A (STAUS)

Before the disputed decision was adopted, the city's Research Technology Center (RTC) base zoning district and Planned Development (PD) overlay zoning district applied to the property. The challenged decision changes that zoning to the General Industrial (GI) base zoning district with a PD overlay zoning district.

In their second assignment of error, subassignment A, petitioners Staus challenge the city's findings in support of the zoning map district change.[21] They argue generally that the city's findings, while addressing the appropriateness of removing the RTC base zoning district, do not address whether the new GI zoning district is appropriate and justified. Staus Petition for Review 15. The city council adopted extensive findings supporting this base zoning district change explaining both why the existing RTC zoning district is no longer appropriate and why the GI base zoning district is appropriate.[22] Petitioners do not explain how these findings are inadequate, and we do not see that they are.[23]

The relevant code provisions governing zoning map district changes are LDC 2.2.10, LDC 2.2.40.05 and LDC 2.2.20.[24] Both LDC 2.2.40.05 and LDC 2.2.20(c) require that zoning district

---

[21] Intervenor argues that petitioners Staus waived this issue because they did not raise it below. Staus responds, we believe correctly, that the issue of the proper underlying zone was central to the discussions below and cannot be said to have been waived.

[22] The city council found:

> "The Council finds the GI District Change is appropriate because the GI District implements the applicable Comprehensive Plan designation of General Industrial. The Council notes that the RTC designation is no longer appropriate because the size of the subject property does not meet the LDC requirements for a RTC site. The subject site is a remnant from a former RTC area that has been converted to a mix of RTC, Commercial Shopping, and Mixed-Use Employment zone districts over time. The Council notes that Land Development Code Section 3.26.40.01 states, 'Minimum parcel area for a [RTC] development site shall be 50 acres. Individual lot sizes shall be adequate to fulfill applicable Code requirements and minimum standards of this district.' The 17.43-acre Corvallis Station site is part of a 22-acre area that is currently 56 percent below the threshold for a RTC site. Given that it is much reduced in size from the 50 acres sought to achieve the campus-style development outlined in the RTC Zoning District, the Council finds that an alternative industrial designation, such as the General Industrial (GI) District, is more appropriate." Record 13-14.

[23] We have already concluded that the subject property has a comprehensive plan base designation of GI. As the findings state, the zoning district change is consistent with that designation.

[24] LDC 2.2.10 provides, in relevant part:

> "Frequent and piecemeal amendments to the Development District Map can threaten the integrity of the Comprehensive Plan and the likelihood of its successful implementation. Nevertheless, it may be necessary to amend the Development District Map from time to time to correct errors or to respond to changing conditions or unforeseen circumstances."

changes be consistent with the policies of the comprehensive plan.[25] Petitioners Staus cite three comprehensive plan policies, and argue that the comprehensive plan goals and policies are

---

Petitioners cite the language of LDC 2.2.10, but do not make an argument explaining how that provision applies. The city explains that the challenged zoning district change was, in fact, an amendment to correct errors and respond to changing conditions, as provided in that code provision. Record 13-14; Respondent's Brief 18-19.

[25] LDC 2.2.40.05 provides:

> "Quasi-judicial district changes shall be reviewed to determine the effects on City facilities and services and to assure consistency with the purposes of this chapter, policies of the Comprehensive Plan, and any other applicable policies and standards adopted by the City Council. In addition, the following compatibility factors shall be considered:
>
> "a. Visual elements (scale, structural design and form, materials, and so forth);
>
> "b. Noise attenuation;
>
> "c. Noxious odors;
>
> "d. Lighting;
>
> "e. Signage;
>
> "f. Landscaping for buffering and screening;
>
> "g. Traffic;
>
> "h. Effects on off-street parking;
>
> "i. Effects on air and water quality."

LDC 2.2.20 provides:

> "**Purposes**
>
> "This chapter sets forth review criteria and procedural requirements for quasi-judicial and legislative district map amendments to accomplish the following:
>
> "a. Maintain sound, stable, and desirable development within the City;
>
> "b. Permit changes in development district boundaries where appropriate;
>
> "c. Ensure district changes are consistent with the community's land use policies and goals; and
>
> "d Lessen the influence of private economic interests in the land use decision-making process."

applicable to this zoning district change. Staus Petition for Review 14.[26] The city concedes that it did not adopt findings that specifically address policies 8.10.1 and 8.10.4. Intervenor argues, however, that policy 8.10.1 is a generalized statement and does not establish a standard that is relevant to the approval of the zoning district change at issue here. We agree.[27]

With regard to policy 8.10.4, the city argues that it adopted an unchallenged interpretation with respect to plan policies 8.10.5, 8.10.7 and 8.12.1. According to the city, those policies apply to commercial uses on land designated or zoned for *commercial* uses, and do not apply to commercial activity on land designated or zoned for *industrial uses*.[28] The city asserts, in its brief,

---

[26] The plan policies cited by petitioners are as follows:

> "The location, type, and amount of commercial activity within the Urban Growth Boundary shall be based on community needs." CCP Policy 8.10.1
>
> "New commercial development shall be concentrated in designated mixed use districts, which are located to maximize access by transit and pedestrians." CCP Policy 8.10.4.
>
> "The RTC district shall be used to help assure the availability and adequacy of sites for 'high-tech,' 'biotech,' and renewable resource-based businesses and industries, and to foster the transfer of academic and private research results into practical applications." CCP Policy 8.9.7(D).

Petitioners also cite to Plan policy 13.13.3, which provides:

> "Apply the General Industrial-Office (GI-O) designation for properties east of Highway 99W with existing industrial designations."

The city points out that this policy applies only to the area governed by the North Corvallis Area Plan, and the subject property does not fall within the boundaries of that planning area. Petitioners do not respond to that argument, and we assume the city's position is correct.

[27] In any event, the city did address community needs in its findings: "* * * the Council finds that there are ample opportunities for research technology-type development in the community, other than the subject 17.58-acre site." Record 18.

[28] The city found:

> "The Council notes that the Planning Commission based its denial of the District Change, in part, on a determination that Comprehensive Plan Policy 8.10.5 and 8.12.1 are relevant to this application. The Policies state that expansion of commercial activity should not be permitted beyond the area designated in the Comprehensive Plan Map, dated December 1998. The Council notes that the Commission interpreted this policy broadly as applying to all commercial land uses, as opposed to commercial land use designations. The Commission found that because the proposed District Change to General Industrial would result in additional commercial uses being allowed on the subject site, that the District Change was inconsistent with Policy 8.10.5 and 8.10.7. The Council

that that interpretation applies equally as well to policy 8.10.4, and that the city council implicitly determined that policy 8.10.4 is also inapplicable. The city cites to *Alliance for Responsible Land Use v. Deschutes Cty.*, 149 Or App 259, 265-66, 942 P2d 836 (1997), *rev dismissed* 327 Or 555 (1998), *Bradbury v. City of Bandon* , 33 Or LUBA 664, 667 (1997), *Weeks v. City of Tillamook*, 117 Or App 449, 452-53 n 3, 844 P2d 914 (1992), for the proposition that a local government may adopt an implied interpretation that, if adequate for review, is entitled to deference.

The findings quoted at n 28 make no mention of policy 8.10.4, and nothing in those findings suggest that the city council believed that policy 8.10.4, like policies 8.10.5, 8.10.7, and 8.12.1, does not apply to commercial uses allowed in industrial zones. We perceive no implied or express interpretation with respect to policy 8.10.4 that we can review, much less defer to.[29] However, where a local government fails to provide a necessary interpretation of a local provision, the Board may interpret the provision in the first instance. ORS 197.829(2). We tend to agree with the city that the city's unchallenged interpretation of policies 8.10.5 and 8.10.7 applies equally well to policy 8.10.4. As the city points out in its brief, policies 8.10.4, 8.10.5 and 8.10.7 are within a section of the comprehensive plan devoted to "Commercial and Office Land Development and Land Use." The preceding section, CCP 8.9, is devoted to "Industrial Land Development and Land Use." Several findings and policies within CCP 8.9 discuss commercial uses within industrial zones, while as far as we can tell the findings and policies in CCP 8.10 do not discuss commercial uses in industrial zones at all. That context suggests that CCP 8.9 is intended to address commercial uses within industrial zones, while CCP 8.10 is intended to address commercial and office uses within commercial zones. Petitioners Staus offer no reason to interpret policy 8.10.5 any differently in this

---

> disagrees with this Policy interpretation, and finds that * * * these Comprehensive Plan polices are not intended to restrict the industrial land use designations or prohibit commercial uses within industrial districts. Therefore, the Council also finds that Policies 8.10.5, 8.10.7, and 8.12.1 are not applicable." Record 18-19.

[29] It is worth noting that the city council interpreted policy 8.10.4 in *Heilman v. City of Corvallis*, ___ Or LUBA ___ (LUBA No. 2004-069, August 10, 2004), as one of several plan provisions that potentially apply when property is redesignated or rezoned, to help determine the appropriate plan designation or zone. Slip at 11-12. We affirmed that interpretation.

respect than policies 8.10.4 and 8.10.7. We agree with the city that policy 8.10.5, like policies 8.10.4 and 8.10.7, is inapplicable, and therefore the city's failure to address policy 8.10.4 in its findings is not a basis for reversal or remand.

Finally, petitioners assert that the city adopted no findings addressing the "mandate" of policy 8.9.7(D) to use the RTC district "to help assure the availability and adequacy of sites for 'high-tech,' 'biotech,' and renewable resource-based businesses and industries[.]" *See* n 26. Neither the city nor intervenor addresses this issue directly. However, the challenged findings, while not citing the policy by number, clearly address that policy. The findings address the low demand for RTC development and conclude, "there are ample opportunities for research technology-type development in the community, other than the subject 17.58-acre site." Record 18.

Petitioners' second assignment of error, subassignment A is denied.

THIRD ASSIGNMENT OF ERROR (STAUS)

The city approved intervenor's request for a planned development modification, to modify the previously approved conceptual development plan, as provided by LDC 2.5.40.10.[30] That section lists LDC 2.5.40.04 as the applicable review criteria.[31] LDC 2.5.40.04, in turn, requires

---

[30] LDC 2.5.40.10 provides in pertinent part;

> "a. An applicant may petition for review of previously approved plans for purposes of modifying such plans, stating the reasons.
>
> "b. The Planning Commission, upon finding that the petition is reasonable and valid, may consider redesign in whole or in part of the original Conceptual Development Plan.
>
> "c. In reviewing a modification request, the Commission shall follow the procedures required for a Conceptual Development Plan submittal. The Commission's decision must be consistent with the review criteria in 2.5.40.04 above."

[31] LDC 2.5.40.04 provides:

> "Requests for approval of a Conceptual Development Plan shall be reviewed to assure consistency with the purposes of this chapter, policies and density requirements of the Comprehensive Plan, and any other applicable policies and standards adopted by the City Council. In addition, the following compatibility factors shall be considered:
>
> ✍✍ Basic site design (the organization of uses on a site);

consistency with the purposes of "this chapter," presumably meaning LDC chapter 2.5, the purposes of which are set out at LDC 2.5.20. In addition, the purposes of a planned development modification are spelled out in 2.5.60.01.[32] LDC 2.5.60.01(b) states that one purpose of a planned development modification is to provide elements that compensate for requested variations from approved plans, "such that the intent of the original approvals is still met." LDC 2.5.60.02 sets out thresholds that distinguish a *major* planned development modification from a *minor* planned development modification.[33] There is no dispute that the proposed modifications constitute a major planned development modification, and thus are subject to the procedures at LDC 2.5.60.03.

✍✍ Visual elements (scale, structural design and form, materials, and so forth);

✍✍ Noise attenuation;

✍✍ Noxious odors;

✍✍ Lighting;

✍✍ Signage;

✍✍ Landscaping for buffering and screening;

✍✍ Traffic;

✍✍ Effects on off-site parking;

✍✍ Effects on air and water quality."

[32] LDC 2.5.60.01 provides:

"**Purposes of a Planned Development Modification**

"(a) Provide a limited amount of flexibility with regard to site planning and architectural design for approved Conceptual or Detailed Development Plans; and

"(b) Provide elements within the development site that compensate for requested variations from approved Conceptual or Detailed Development Plans such that the intent of the original approvals is still met."

[33] LDC 2.5.60.02 provides:

"**Thresholds that Separate a Minor Planned Development Modification from a Major Planned Development Modification**

The original planned development approval included a condition limiting commercial uses in the southern portion of the site to 5% of the development of that portion of the site. Record 22. The planning commission, when considering the present proposal, found that the intent of the original approved conceptual development plan was to continue to limit commercial uses to 5% of the total area in the southern part of the site. *Id*. The planning commission concluded that the proposal was inconsistent with the purposes for a planned development modification set out LDC 2.5.60.01 because the proposed use was inconsistent with the original planned development in this respect.

The city council disagreed with the planning commission that the purpose statement at LDC 2.5.60.01 requires that a major planned development modification be consistent with the conditions imposed under the original conceptual development plan. Unlike minor modifications, the city council noted, there is no limit under LDC 2.5.60.02 and LDC 2.5.40.04 governing how much a major modification can vary from the original proposal. Read in this context, the city council determined, the "controlling factors" governing approval of a major planned development

---

> "a. The factors identified here describe the thresholds that separate a Minor Planned Development Modification from a Major Planned Development Modification:
>
> > "1. Change in use type, with the exception that for a valid (still active) Planned Development that existed or was approved before December 31, 2000, a modification request shall be considered as follows:
> >
> > > "(a) A request to add uses permitted by the underlying zone to up to 25 percent of the total acreage within the Planned Development site shall be considered a Minor Planned Development Modification; and
> > >
> > > "(b) A request to add uses permitted by the underlying zone to greater than 25 percent of the total acreage within the Planned Development site shall be considered a Major Planned Development Modification;
>
> "* * * * *
>
> "b. A modification that equals or exceeds the thresholds identified in section 2.5.60.02.a shall be processed as major modification.
>
> "c. A modification that falls below the thresholds identified in section 2.5.60.02.a or that decreases the amount of variation from a standard that was previously approved shall be processed as a minor modification."

modification are whether the modified use is allowed in the underlying zone and the impacts of that modified use. Record 25.

Petitioners Staus challenge the city's interpretation on several grounds. As an initial matter, the city and intervenor respond that this Board affirmed the city council interpretation of LDC 2.5.60.01 to the same effect in *Heilman v. City of Corvallis*, ___ Or LUBA ___ (LUBA No. 2004-069, August 10, 2004). Therefore, the city contends, the city council's interpretation should again be affirmed.

We agree with the city and intervenor that *Heilman* controls some of the issues raised by petitioners in this assignment of error. The interpretation we upheld in *Heilman* found that, when read in context with the rest of the Planned Development chapter of the code, LDC 2.5.60.01 provides no upper limits for what constitutes a major modification and that "changes to a Conceptual Development Plan may be substantial, as long as the review criteria in LDC 2.5.40.04 are met and the procedures identified in LDC 2.5.60.03 are followed." *Heilman*, ___ Or LUBA ___ slip op 21-22 n 17. In *Heilman*, we explained:

> "[T]he city's interpretation of LDC 2.5.60.02 is consistent with its text and context, and not reversible under ORS 197.829(1). As the city's decision notes, * * * nothing in the LDC [2.5.60.02] expressly defines an upper threshold or limit for a major modification. * * * The express authority to consider 'redesign in whole or in part' as a major modification, coupled with the absence of any criteria applicable to a major modification that suggest a limit to the type or degree of modifications proposed, supports the city council's interpretation that the purpose statement at LDC 2.5.60.01 does not function to limit the type or degree of modifications that may be approved as a major modification. While petitioners' contrary interpretation is also plausible, we cannot say the city council's interpretation is inconsistent with the express text and context of LDC 2.5.60.01." *Heilman*, ___ Or LUBA ___ slip op 22-23.

The argument presented by petitioners that the city cannot interpret LDC 2.5.60.02 to allow unlimited flexibility, although worded differently, is essentially the same argument that was presented in *Heilman*. We affirm our holding in *Heilman* and reject petitioners' argument in this regard.

However, some of the issues petitioners raise under this assignment of error were not decided by our opinion in *Heilman*. We will consider each issue in turn.

Petitioners first argue that the city's interpretation of LDC 2.6.60.01 conflicts with (1) TSP 3.60.40.c, which requires development proposals to be reviewed for conformance with level of service standards, (2) LDC 2.5.40.04, which requires consideration of off-site compatibility factors, including traffic, off-site parking and air and water quality, and (3) plan policies 8.10.1, 8.10.4, 11.2.1, 11.2.2, 11.3.4, and 11.3.9.[34] However, petitioners do not offer any explanation why the city's interpretation conflicts with these policies. Their argument is insufficiently developed to allow a response, and we do not address it further.

Petitioners next argue that LDC 2.5.80 provides for nullification of a planned development designation.[35] According to petitioners, the city's interpretation of LDC 2.5.60.01 would render

---

[34] Plan policy 8.10.1 requires that commercial activity be based on community needs; 8.10.4 provides that new commercial development be concentrated in mixed use areas; the remainder of the cited policies require that the transportation system be planned, developed and maintained to provide adequate capacity.

[35] LDC 2.5.80 provides in pertinent part:

"**PLANNED DEVELOPMENT NULLIFICATION**

"a. Property owner(s) or their authorized agents may apply to nullify an established Planned Development designation by filing an application form provided by the Director.

"The Planning Commission shall conduct a public hearing and provide notice of the hearing and decision shall be in accordance with Chapter 2.0 – Public Hearings.

"b. The burden of proof is placed on the applicant to justify nullification of the Planned Development designation, giving substantial evidence that:

"1. Developing the property under conventional district standards and regulations will not create nonconforming development.

"2. Special circumstances such as building relationships, drainageways, public improvements, topography, and so forth that were to be responded to specifically through the Planned Development process can be dealt with as effectively with conventional standards.

"3. Conditions attached to the approved Planned Development by the hearing authority can be met or are no longer necessary.

"4. No prior commitments involving the property were made that would adversely affect the subject property, other related properties, or the City, as in the case of density transfer, public improvements and activities, building relationships, recreational facilities, open space, or phasing of development.

LDC 2.5.80 superfluous. Petitioners assert that a property owner can request nullification to remove a planned development designation, and could then propose a new and different planned development proposal. Petitioners appear to argue that, under their interpretation that a major modification must meet the intent of the original proposal, a property owner could use the nullification provision to wipe the slate clean and then propose a new planned development proposal where the proposal fails to meet the intent of the original planned development.

To the extent we understand petitioners' argument here, it appears to prove too much. We agree that the nullification provision can be used to nullify an existing planned development designation. We also agree that a property owner could then propose a new planned development. However, under the city's interpretation, that property owner could also choose to merely modify the original plan, whether or not the proposed plan met the intent of the original plan. Such an interpretation does not render the nullification provision superfluous. A property owner may still use the nullification provision for its intended purpose, *i.e.*, to nullify a planned development designation and proceed with developing the property under conventional standards.

Finally, petitioners argue that the city did not find, as required by LDC 2.5.40.10(b), that the modification request is "reasonable and valid." The city responds that petitioners waived this issue by not raising it below. On the merits, the city concedes that it made no explicit findings that the modification request is "reasonable and valid," but it argues that by processing the application, adopting interpretations of the applicable code provisions and approving the modification, the city council implicitly found that the petition is reasonable and valid.

Petitioners reply to the city's waiver challenge by arguing that it adequately raised the issue below that LDC 2.5.40.10(b) requires a finding that the petition is reasonable and valid. Further, petitioners argue that the notice of hearing failed to identify LDC 2.5.40.10(b) as an approval criterion, as required by ORS 197.763(5)(a), and therefore petitioners may raise new issues

---

"c. If the Planned Development is nullified, the PD overlay designation shall be removed from the Official Development District Map after the appeal period has expired."

regarding that criterion before LUBA, notwithstanding failure to raise those issues below. ORS 197.835(4).

We have examined the record cites petitioners provide, and we see nothing on the cited pages that mentions, much less raises an issue under, LDC 2.5.40.10(b). With respect to ORS 197.835(4), petitioners do not provide a citation to the notice they believe to be defective. The two notices we find in the record list a number of comprehensive plan policies and LDC chapters as approval criteria, including LDC chapter 2.5. Record 1292, 1330. Petitioners do not explain why those notices are defective and, without focused argument to that effect, we decline to conclude that they are. This issue is waived.

The third assignment of error (Staus) is denied.

CROSS ASSIGNMENT OF ERROR (INTERVENOR)

Intervenor argues that the RTC base zoning district that was applied to the subject property in 1993 has expired, and therefore petitioner Rose's second and third assignments of error are moot.

Petitioner Rose argues that intervenor waived this issue because it was not raised in its local notice of appeal. *Miles v. City of Florence,* 190 Or App 500, 79 P3d 382 (2003). Rose Reply Brief 3-4. The local notice of appeal provides: "The Planning Commission erroneously interpreted Comprehensive Plan Policy 8.9.7 and other portions of the Plan and Code to require the preservation of the RTC overlay on the subject property." Record 612. That statement in intervenor's local notice of appeal is sufficient to raise the issue under ORS 197.763(1), ORS 197.835(3) and *Miles*.

LDC 3.26.20.01 dictates that an RTC district shall expire if no building permit has been issued within three years of the zoning district change. Intervenor argues that the same individual has owned the property since 1993, and that no building permit has been issued. Accordingly, under LDC 3.26.20.01, the RTC zoning district has expired, the zoning on the subject property long ago reverted to the GI zone, and no zoning district change was necessary.

The city found as follows:

> "The Council notes that the reason that a District Change is required to remove the RTC District designation on the subject 17.58-acre site (as opposed to considering it already expired), is that the site is part of a larger Conceptual Development Plan for Corvallis Business Park, which was enacted with the improvements that have occurred thus far in Phase I. The Council finds that the City does not have the authority to nullify (or let 'expire') the Conceptual Development Plan 'pieces' that are zoned RTC in order to develop in accordance with the underlying General Industrial District. Rather, the Council finds that a District Change and Major Planned Development Modification process is the appropriate process for removal of the RTC designation on this site." Record 16.

Petitioners argue that we should uphold the city's interpretation under ORS 197.829(1) and *Church*. We find the city's interpretation supportable under those deferential standards and affirm it.

Intervenor's cross-assignment of error is denied.

The county's decision is remanded.