BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MAJUDDIN JAFFER, PAT JAFFER,
JEAN ASTRINSKY, MIKE BILLMAN,
JASON BROWN, ANGELA BUCKHOLZ,
BOB RICE, JANINE RICE and JACK SLOAN,
Petitioners,

and

GARTH ELIASSEN, LENORE ELIASSEN
and DENNIS EBERLY,
Intervenor-Petitioners,

vs.

CITY OF MONMOUTH,
Respondent,

and

BENSON SAINSBURY,
Intervenor-Respondent.

LUBA No. 2005-123

FINAL OPINION
AND ORDER

Appeal from City of Monmouth.

Majuddin Jaffer, Pat Jaffer, Jean Astrinsky, Mike Billman, Angela Buckholz, Bob Rice, Janine Rice and Jack Sloan, Monmouth, and Jason Brown, Dallas, filed a joint petition for review. Bob Rice and Jason Brown argued on their own behalf.

Dennis D. Eberly, Monmouth, filed a petition for review.

Garth Eliassen, Monmouth, filed a petition for review.

Lenore Eliassen, Monmouth, represented herself.

Mark Irick, Dallas, filed a response brief and argued on behalf of respondent. With him on the brief was Shetterly, Irick and Ozias.

Roger A. Alfred, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief were Michael C. Robinson and Perkins Coie, LLP.

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

REMANDED 04/24/2006

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

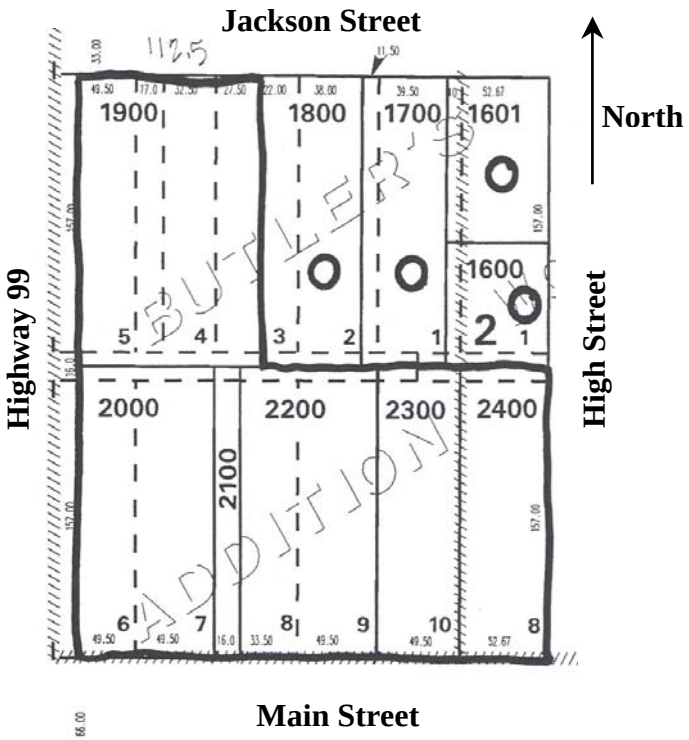
Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a city decision that approves comprehensive plan map and zoning map amendments for two tax lots.

FACTS

Intervenor-respondent (intervenor) wishes to construct a Walgreens pharmacy and a Dutch Bros. coffee shop on an "L" shaped portion of a city block. That city block is bounded by Jackson Street on the north, Highway 99 (also referred to as Pacific Street) on the west, Main Street on the south and High Street on the east. A map showing the property appears below.



Tax lots 1900, 2000, 2100 and 2200, which make up most of the "L" shaped parcel, are already designated "Commercial" on the city's comprehensive plan map and are zoned Commercial Highway (CH). Tax lots 1600, 1601, 1700, 1800, 2300 and 2400 are designated "Residential" on the city's comprehensive plan map. The northernmost four of those six tax

lots, tax lots 1600, 1601, 1700 and 1800, are zoned Residential Low Density (RL). Two of those six tax lots, tax lots 2300 and 2400, are zoned Residential Medium Density (RM). The challenged decision changes the comprehensive plan map designation for tax lots 2300 and 2400 to "Commerical" and rezones those tax lots to CH. The proposed Walgreens pharmacy would occupy most of tax lots 2200, 2300 and 2400. A parking lot would occupy tax lots 2000, 2100 and a part of tax lot 2200. The coffee shop, some shops and additional parking would be located on tax lot 1900.

Properties to the north and south along Highway 99, and to the west across Highway 99, are planned and zoned for commercial use. Two gasoline stations and a fast food outlet occupy three of the four corners of the intersection of Highway 99 and Main Street. The subject property occupies the remaining northeast corner of the intersection. A portion of the subject property was formerly the site of a gasoline station. That gasoline station was removed approximately 25 years ago, and the site of the former gas station has since been vacant. That former gasoline station site was recently the subject of environmental remediation. A residence is located on one of the two tax lots that are the subject of this appeal. That dwelling was rented in the past, but has been vacant for approximately two years.

MOTION TO STRIKE THE PETITION FOR REVIEW

Intervenor moves to strike the petition for review. Intervenor contends the petition for review was "written by a very experienced land use attorney," and speculates that the petition for review was not written by the nine *pro se* petitioners who signed as authors of the brief. At oral argument petitioner Bob Rice thanked intervenor for the backhanded compliment. However, he stated that the *pro se* petitioners were indeed the authors of the petition for review. Intervenor appeared to withdraw the motion at oral argument. However, even if the motion was not withdrawn, intervenor offers no basis for questioning petitioner

Rice's contention that the *pro se* petitioners who signed the petition for review are its authors.

Intervenor's motion to strike the petition for review is denied.

MOTION TO STRIKE EXTRA-RECORD DOCUMENT

Petitioners attach a copy of Resolution 1348 to their petition for review. Resolution 1348 is a 1998 city resolution that denied a request to rezone four tax lots from RL and RM to CH. Two of those four tax lots are the same two tax lots that the city rezoned to CH in the decision that is before us in this appeal.

We take official notice of Resolution 1348. Oregon Evidence Code (OEC) 202. However, we agree with the city and intervenor (respondents) that to the extent petitioners ask us to accept as true any findings of fact that are included in Resolution 1348, we may not do so. *Home Builders Assoc. v. City of Wilsonville*, 29 Or LUBA 604, 606 (1995). Similarly, we agree with respondents that any conclusions of law in that resolution are of limited relevance in this case because (1) Resolution 1348 is over seven years old and concerned a different proposal, and (2) while the rezoning requested in Resolution 1348 included tax lots 2300 and 2400, it also included other properties. Any findings of fact or conclusions of law in Resolution 1348 certainly were not binding on the current city council when it rendered the decision that is before us in this appeal.[1]

FIRST ASSIGNMENT OF ERROR

The criteria that must be satisfied to change a property's zoning map designation are set out at City of Monmouth Zoning and Development Ordinance (ZDO) 12.025:

> "No zone change shall be approved by the Planning Commission or enacted by the City Council unless it conforms to the Comprehensive Plan and at least one (1) of the following standards is met:

[1] We are informed that none of the members of the city council that adopted Resolution 1348 are members of the city council today.

"A. The zoning on the land for which the zone change is initiated is erroneous and the zone change would correct the error;

"B. Conditions in the neighborhood surrounding the land for which the zone change is initiated have changed to such a degree that the zoning is no longer appropriate, and the zone change would conform to the new conditions of the neighborhood;

"C. There is a public need for land use of the kind for which the zone change is initiated and that public need can best be met by the zone change."[2]

The criteria set out at ZDO 12.025(A) (zoning mistake), 12.025(B) (changed neighborhood conditions) and 12.025(C) (public need) are alternative criteria. Only one of the three criteria must be satisfied to approve a zoning map amendment. The city found that all three of those criteria are satisfied. Petitioners assign error to all three findings. We turn first to the city's findings concerning ZDO 12.025(B).

"The neighborhood and the City's needs have changed since the site was zoned initially. This area, and the City generally, have changed since this area was zoned initially. The property presently zoned RM has not been used for that purpose for years. The lack of use shows that the viability of these lots for residential use decreased. The house on that property is presently vacant. In the past, it has been used for rental [housing]. The traffic and noise generated by Highway 99 increased, making the areas closer to Highway 99 less attractive as residential property without the type of noise buffer that Walgreens can provide. There will be a greater economic benefit to the City by changing the zoning from RM to CH, because the property is and will not be used to its full extent under the current designation." Record 11.

At the April 6, 2005 planning commission hearing, one of the planning commissioners stated that she did not feel as though the neighborhood had changed and expressed concern that the proposal represented "commercial 'creeping' into this residential area." Record 328. Another planning commissioner expressed a contrary view:

[2] ZDO 12.030 sets out substantively identical criteria for comprehensive plan map amendments. Because the parties do not assign any significance to the minor wording differences in ZDO 12.025 and 12.030 and do not otherwise distinguish between the zoning map amendment and the comprehensive plan map amendment, we do not consider ZDO 12.030 further.

> "[The planning commissioner] stated that he feels the 'situation has changed' in that the City has grown from approximately 5,000 in the [19]70's to close to 8,000 in population now. He stated that he lives 3 or 4 blocks from Hwy 99 and the noise from the Hwy is very apparent from where he lives. He stated that he feels Walgreens would act as a buffer to the existing neighborhood from the traffic noise on Hwy 99. [He also] stated that this is 'prime commercial property' and stated that he feels that the needs of the City have changed with its growth. He noted that Hwy 51 and Hwy 99 are the two busiest streets in Monmouth. * * *" *Id.*[3]

Intervenor argues, and we agree, that the ZDO 12.025(B) "changed neighborhood conditions" criterion is subjective. ZDO 12.025(B) does not expressly limit the geographic scope of the surrounding neighborhood that the city may consider and it does not expressly limit the kinds of conditions that the city may rely on in concluding that changed neighborhood conditions warrant rezoning. Among other things, the city's findings cite increases in traffic on Highway 99, with resulting noise impacts on the subject property and other residentially zoned property, and increased commercial development in the area. Given the subjective nature of the ZDO 12.025(B) "changed neighborhood conditions" criterion, we cannot say the city's finding that commercial zoning is more appropriate than residential zoning is either wrong or inadequately explained.

Based on the record before use, we believe reasonable persons could disagree about whether the proximity of the rezoned properties to Highway 99 renders its residential zoning

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[3] Intervenor also cites the following from the April 26, 2005 planning department staff report to the city council:

> "* * * This area of the City along Pacific Street (99W) has been slowly growing with the addition of the 34,350 square foot Bi-Mart Store in 1994, Heron Pointe retirement Center in 1998, Oregon State Federal Credit Union and KFC/A&W in 2002.
>
> "The development of this site will complete the four corners at this hub of town, the major intersection anchoring the 'gateway of the downtown core' to Pacific Street. This concept was reviewed as a goal by the citizens of Monmouth in the 'Downtown Development Master Plan', presented in 2000." Record 306.

less suitable than the approved commercial zoning.[4] Similarly, reasonable persons could disagree about whether the proposed Walgreens will act as a buffer to lessen impacts on nearby residentially zoned property or simply exacerbate the traffic conflicts between the commercial areas along Highway 99 and those residentially zoned and developed properties. Petitioners offer no basis for LUBA to second-guess the city on its judgments concerning those issues.

Petitioners cite Resolution 1348, where the city previously found that conditions had not changed to a degree that warranted changing the residential zoning to commercial. However, as the city and intervenor point out, the decision in Resolution 1348 included additional property and is now over seven years old. The contrary conclusion regarding ZDO 12.025(B) in Resolution 1348 is not binding on the city in this proceeding, and we do not see that it detracts in any material way from the city's conclusion in this matter.

Petitioners also fault the city for looking city-wide and for not focusing more closely on the adjacent residential properties that they believe will be adversely affected by the proposal. We do not agree that the "surrounding" "neighborhood" that the city considered was city-wide or too large. The city considered the conditions on both the nearby residentially zoned and developed properties and the nearby commercially zoned and developed properties. That petitioners would have weighed those conditions differently than the city and reached a different conclusion under ZDO 12.025(B) does not mean that the city's contrary decision is erroneous.[5]

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[4] It is not entirely clear why the rental house on the rezoned property came to be vacant. Intervenor suggests it may have been because of its unsuitability for residential use, while petitioners suggest the tenants were removed from the property to pave the way for the disputed rezoning.

[5] Intervenor-petitioner Garth Eliassen submitted a petition for review in which he asserts a single assignment of error regarding the ZDO 12.025 criteria. We have considered his arguments in resolving this assignment of error, and we deny his assignment of error for the same reasons we deny petitioner's first assignment of error.

The first assignment of error is denied.[6]

SECOND ASSIGNMENT OF ERROR

Petitioners' second assignment of error is somewhat difficult to follow. The assignment of error itself only mentions Goal 2 (Land Use Planning). While the arguments under the assignment of error appear to be directed at Goal 2's requirement for an adequate factual base, intervenor reads it to be more directed at the Goal 2 requirement for consistency between plans and implementing land use regulations.[7] However, the argument that follows the assignment of error makes out three cognizable subassignments of error. Below, we first summarize petitioners' subassignments of error. Next, we address intervenor's argument that petitioners waived the issues presented in these sub-assignments of error by failing to raise them below. We agree with intervenor that two subassignments of error were waived, but we deny intervenor's waiver argument concerning a third subassignment of error. Finally, we consider the subassignment of error that was preserved, on the merits.

A. Petitioners' Subassignments of Error

1. Public Need

Goal 2 is "[t]o establish a land use planning process and policy framework as a basis for all decision and actions and to assure an adequate factual base for such decisions and action." Goal 2, Guideline E(2) concerns minor changes to comprehensive plans and land use regulations and provides as follows:

"**Minor Changes**

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[6] The parties present lengthy arguments on the other two rezoning criteria. Because only one of the ZDO 12.025 criteria must be met to grant the requested rezoning, and because we conclude that the city has adequately demonstrated that ZDO 12.025(B) is satisfied, we need not and do not consider those arguments in support of and in opposition to petitioners' remaining subassignments of error under the first assignment of error.

[7] Goal 2 is "[t]o establish a land use planning process and policy framework as a basis for all decision and actions related to use of land and to assure an *adequate factual base* for such decisions and actions." (Emphasis added.) Goal 2 also directs that implementing land use regulations "shall be consistent with and adequate to carry out [comprehensive] plans."

> "Minor changes, *i.e.*, those which do not have significant effect beyond the immediate area of the change, should be based on special studies or other information which will serve as the factual basis to support the change. The public need and justification for the particular change should be established. * * *"

Petitioners argue that the ZDO 12.025(C) "public need" criterion was adopted to implement Goal 2, Guideline E(2) and the challenged application does not comply with Goal 2, Guideline E(2) for the same reason it does not comply with ZDO 12.025(C).

2. Goal 9 (Economic Development)

As we explained in *Jaqua v. City of Springfield*, 46 Or LUBA 134, 165 (2004), *rev'd on other grounds*, 193 Or App 573, 91 P3d 817 (2004):

> "Among other things, Goal 9 requires that the city '[p]rovide for at least an adequate supply of sites of suitable sizes, types, locations, and service levels for a variety of industrial and commercial uses consistent with plan policies[.]' OAR 660 Division 9 is LCDC's Goal 9 administrative rule. Among other things, the rule requires that cities and counties complete an 'Economic Opportunities Analysis.' OAR 660-009-0015. Based on the Economic Opportunities Analysis, cities and counties are to prepare Industrial and Commercial Development Policies. OAR 660-009-0020. Finally, OAR 660-009-0025 requires that cities and counties designate industrial and commercial lands sufficient to meet short term and long term needs."

Although petitioners' subassignment of error is not clear, we understand petitioners to argue that under OAR 660-009-0015 the city was required to conduct an economic opportunities analysis concerning the proposal and erred by failing to do so.

3. Goal 10 (Housing)

Goal 10 is "[t]o provide for the housing needs of citizens of the state." Petitioners' Goal 10 subassignment of error is a little more straightforward than their Goal 2 and Goal 9 subassignments of error. As required by Goal 10, the city has adopted a buildable lands inventory (BLI) to identify the residentially planned and zoned lands that are available to meet the city's projected need for such lands under Goal 10. Petitioners contend the BLI establishes that additional RM zoned land will be needed before the end of the year 2020

planning period, and the city's findings are inadequate to explain why rezoning .39 acres of RM zoned land for commercial use is consistent with the city's obligations under Goal 10.

B. Waiver

1. Introduction

Under ORS 197.763(1), if petitioners did not raise issues during the city's local proceedings in this matter, those issues are waived and such issues may not be raised for the first time in a LUBA appeal.[8] Intervenor contends that the issues presented by petitioners' three subassignments of error were not raised below and, for that reason, are waived.[9]

The application in this matter was received by the city on February 2, 2005. At the conclusion of an April 6, 2005 public hearing, the city's planning commission voted to recommend approval of the requested comprehensive plan and zoning map amendments.[10] The city council held a public hearing on the proposal on May 3, 2005. That public hearing was continued until June 7, 2005. In a memorandum dated June 7, 2005, petitioners Jaffer and Eberly requested that the public hearing be continued again. In that June 7, 2005 memorandum, petitioners alleged that the proposal was flawed in numerous ways. Record 263-75. The alleged flaws included failures to address the comprehensive plan BLI or

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[8] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

[9] Intervenor has a slightly different understanding of the substance of petitioners' three subassignments of error, which we have just summarized above. As we have already noted, petitioners' subassignments of error are not clear. However, we believe our summary is a reasonable interpretation of petitioners' subassignments of error. Our resolution of petitioners' subassignments of error is based on our interpretation of those subassignments of error, and we do not further address the differences between our understanding of those subassignments of error and intervenor's understanding of those subassignments of error.

[10] The planning commission also separately approved site plans for the proposed Walgreen's pharmacy and Dutch Bros. coffee shop. Those site plan approvals were not appealed and are not before us in this appeal.

comprehensive plan housing goals and policies and several comprehensive plan economic policies.[11] While petitioners' June 7, 2005 memorandum does not mention the statewide planning goals, at the June 7, 2005 continued hearing, petitioners orally argued "that the statewide planning goals had not been addressed * * *." Record 252. Although the public hearing was closed on June 7, 2005, the record was held open until June 14, 2005 for all parties to submit additional evidence. Intervenor submitted a memorandum, dated June 14, 2005, that for the first time included findings addressing the statewide planning goals. Record 139-45. All parties were allowed until June 21, 2005 to submit rebuttal. On June 22, 2005, petitioners Jaffer and Eberly filed a motion to reopen the record to allow them to rebut certain documents that were submitted during the open record period between June 14, 2005 and June 21, 2005. Record 86-88. Petitioners alleged those documents improperly included new evidence. That motion was ultimately denied by the city. On June 28, 2005, intervenor submitted his final written legal argument. Record 75-79. The city adopted its final decision on August 2, 2005.

2. Goal 2

Relevant statutes require that amendments to the city's comprehensive plan must be consistent with the statewide planning goals. ORS 197.175(2)(a); 197.835(6). Similarly, amendments to the city's zoning ordinance may be subject to direct application of the statewide planning goals if specific provisions in an acknowledged comprehensive plan do not govern the amendment. ORS 197.835(7)(b). *Marine Street LLC v. City of Astoria,* 37 Or LUBA 587, 617 (2000). There can be no doubt that the disputed comprehensive plan map amendment, and possibly the zoning map amendment as well, must comply with the statewide planning goals. However, the very general allegation that the application should be denied because no effort apparently had been made prior to June 7, 2005 to establish that

[11] The memorandum cites plan economic goals to protect "existing businesses," to attract "a variety of new businesses," to "encourage small businesses," and others. Record 268.

the proposal was consistent with the statewide planning goals is not sufficient to raise the very specific Goal 2 issue that petitioners present in their first assignment of error. Accordingly, that issue is waived.[12]

3. Goal 9

We reach a similar conclusion regarding petitioners' Goal 9 argument. The issue petitioners now raise at LUBA is whether the Goal 9 rule requirement at OAR 660-009-0015 mandates that the city either prepare an economic opportunities analysis or demonstrate that the proposal is consistent with any economic opportunities analysis that the city may have already prepared. Without commenting on the merits of that issue, it was not raised during the city's proceedings in this matter. The general allegation concerning the statewide planning goals at Record 252 is not sufficiently specific. The allegations concerning the comprehensive plan economic policies are sufficient to raise issues concerning whether the proposal is consistent with those comprehensive plan policies. But petitioners do not allege error with regard to the comprehensive plan economic policies. This subassignment of error relies on Goal 9, specifically OAR 660-009-0015 of the Goal 9 administrative rule, not the comprehensive plan economic policies.

In a June 15, 2005 letter, petitioner Brown argued that the city should require an "Economic Impact Study." Record 137. However, that June 15, 2005 letter does not cite Goal 9, OAR 660-009-0015 or any other statutory, goal, administrative rule or local standard as the legal authority for requiring an economic impact study. The first paragraph of the letter states the applicant has failed to establish a public need for the proposal, which

[12] Even if the Goal 2 issue was not waived, petitioners argue the alternative criterion at ZDO 12.025(C) was adopted to implement the Goal 2 Guideline. If that argument is correct, because the acknowledged ZDO makes ZDO 12.025(C) one of three alternative criteria and one of the other three criteria is satisfied, there would be no Goal 2 violation. We also question whether the possible inconsistency of the proposed comprehensive plan and zoning map amendment with a statewide planning goal "guideline" could possibly provide a basis for reversal or remand. *See Downtown Comm. Assoc. v. City of Portland*, 80 Or App 336, 340, 722 P2d 1258 (1986) (the term "guideline" is a term of art; and, as defined by statute, guidelines are advisory).

suggests that petitioner Brown's argument was based on the ZDO 12.025(C) public need criterion, which does not expressly require either an economic impact study or an economic opportunities analysis.

Petitioners' argument that Goal 9 and OAR 660-009-0015 mandate that the city require the applicant to prepare an economic opportunities analysis was waived.

4. Goal 10 and the Buildable Lands Inventory

For similar reasons, we conclude petitioners' general argument regarding the need to address the statewide planning goals was not sufficient to raise a cognizable Goal 10 issue. Neither does the memorandum at Record 263-75 specifically mention Goal 10. But that memorandum does allege that the proposal does not address the comprehensive plan BLI, which was adopted in part to comply with Goal 10, and does not adequately address housing goals and policies in the comprehensive plan that were adopted to implement Goal 10. Those allegations are sufficient to raise the issues that petitioners raise under their final subassignment of error. We reject intervenor's contention that the issues raised in that subassignment of error were waived.

C. Petitioners' Third Subassignment of Error

There does not appear to be any dispute that the challenged zoning and comprehensive plan map amendment must be consistent with the city's BLI and related comprehensive plan housing policies and goals that were prepared to ensure that the city meets its Goal 10 obligation to plan and zone lands to meet the needs of its citizens for all needed housing types. Whether the legal requirement to do so is found in Goal 10, a combination of Goal 10 and Goal 2 or the city comprehensive plan itself does not matter.

The city, petitioners and intervenor all take somewhat different approaches in addressing the BLI and the projected year 2020 need for additional residentially planned and zoned lands. Those different approaches utilize different data summaries and produce apples and oranges that are difficult to compare. However, the key relevant facts do not appear to

be in dispute. Even if there is no current shortage of RM-zoned land, if the city's rezoning decision in this case will mean that the city may not have sufficient land to meet its year 2020 needs for developable RM-zoned lands, the challenged decision is likely inconsistent with the city's obligations under Goal 10 or comprehensive plan policies that implement Goal 10. Although we are not sure, this appears to be petitioners' central argument. Of course, even if there is enough land within the UGB generally planned for residential use, and available to be annexed and placed in one of the city's residential zones, if the BLI identifies a current shortage of RM-zoned land, such that the city's decision to rezone .39 acres of RM-zoned land exacerbates that current shortage of RM-zoned land, the city's decision would almost certainly constitute a violation of Goal 10 and the city's plan policies that implement Goal 10. *See Swyter v. Clackamas County*, 40 Or LUBA 166, 181 (2001) (while the small size of a property and its prior commercial use may support a conclusion that its zoning can be changed from residential to commercial without violating Goal 10, Goal 10 is a relevant consideration). We turn to this latter possibility first.

1. Currently Available RM-Zoned Acres

The city's BLI was adopted in 2001. Table 1 from that BLI is reproduced below.

Table 1
Buildable Residential Land
Monmouth, 2000

Zone/Plan designation	**Vacant (acres)**	**Partially Vacant**	**Redevelopable**	**Total**
Within the City Limits				
Low-Density Residential Zone (RS)	112.41	20.54	3.24	136.19
Medium-Density Residential Zone (RM)	6.51	4.70	5.07	16.28
High-Density Residential Zone (RH)	1.35	3.36	1.58	6.29
Net Buildable Acres Within the City Limits	120.27	28.60	9.89	158.76
Between the City Limits & UGB				
Residential (R)	228.32	63.20	11.43	302.95
Net Buildable Acres Between the City Limits & UGB	228.32	63.20	11.43	302.95

Net Buildable Acres Within the Urban Area	348.65	91.80	21.32	461.71

Table 1 shows that in 2000, the city had 6.51 acres of vacant RM zoned land, 4.70 acres of partially vacant RM-zoned land and 5.07 acres of redevelopable RM-zoned land, for a total of 16.28 acres of potentially developable RM-zoned land. Intervenor-Respondent's Brief, App 8. We do not know how many of those 16.28 acres remain available in 2006. However, petitioners do not argue that the .39 acres of RM-zoned land that the challenged decision rezones for commercial use leaves the city with a shortage of vacant, partially vacant, or redevelopable RM-zoned lands to meet immediate needs for such lands. Absent an argument to that effect, we assume that some of those 16.28 acres of potentially developable RM-zoned acres remain available today, and that the remaining acres are sufficient to meet the city's immediate needs for RM-zoned lands.

2. RM Zoned Acres Needed in the Future

The BLI identifies the city's housing need by housing type, not by individual residential zoning districts. The BLI projects that a total of 276.43 acres of land will be needed for residential development of all types before the end of the year 2020 planning period. Respondent's Brief, App 19. The BLI projects that (1) single-family dwellings will be constructed on 188.52 of those acres, (2) multi-family dwellings will be constructed on 64.44 of those acres, and (3) manufactured home parks will be constructed on 23.47 of those acres. *Id.*

Returning to Table 1, which was set out earlier in this opinion, the BLI indicates that there are currently 461.71 acres of land within the city's urban growth boundary (UGB) designated for residential development.[13] Of those 461.71 acres, Table 1 indicates that there

[13] For some reason the challenged decision (Record 14) and page 17 of the BLI (Intervenor-Respondent's Brief, App 17) state that there are 493 acres of land available for residential use within the UGB. Table 1 shows that there are 461.71 acres of land available for residential use. In this opinion, we assume the lower figure in Table 1 is correct, but we would reach the same conclusion if 493 acres is the correct figure.

are 158.76 buildable acres already within city limits and available to meet that year 2020 need for 276.43 acres. While the 158.76 acres of residentially planned and zoned lands already within city limits are not sufficient to meet the city's needs throughout the year 2020 planning period, there are 302.95 acres within the UGB, but outside the current city limits, which are available to meet that need. In other words, there is a surplus of 185.28 acres (461.71 acres minus 276.43 acres = 185.28 acres) available within the city's UGB to be placed into one or more of the city's three residential zoning districts to meet the city's housing needs between now and the year 2020.

It is true that some of the land that will be needed for residential purposes by the year 2020 apparently will need to be annexed and rezoned to allow such development. However, that does not alter the fact that there is a surplus of 185.28 acres already included within the city's UGB and available for such annexation and rezoning. Given that fact, we do not see how the city's decision to rezone .39 acres from RM to CH could possibly violate the city's obligations under Goal 10 and its comprehensive plan provisions that implement Goal 10. *Jaqua*, 46 Or LUBA at 171 (no Goal 10 violation where inventory of residentially designated lands shows a surplus both before and after some residentially zoned land is rezoned to permit commercial development).

Petitioners appear to be suggesting that the city cannot rezone the .39 acres for commercial use unless the city already has a sufficient supply of RM-zoned land within its city limits to meet its year 2020 need for RM-zoned land. However, petitioners cite no source for such a requirement, and we are aware of none. As intervenor points out, the buildable lands that must be identified under Goal 10 are buildable lands within the city's UGB, which separates urban and urbanizable land from "rural" land.[14] Given that the city

[14] Goal 14 (Urbanization) explains that UGB's are adopted to separate existing urban areas and surrounding "urbanizable land from rural land." As defined by Goal 10, buildable lands "refers to lands in urban and urbanizable areas that are suitable, available and necessary for residential use."

has a significant surplus of land within its UGB that is already planned for residential use, we do not agree that the city's decision to rezone .39 acres of RM-zoned land for commercial use violates the city's obligations under Goal 10 or its comprehensive plan housing goals and policies.

Petitioners' Goal 10 subasssignment of error is denied.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

As we have already noted, the application in this matter was submitted on February 2, 2005, and the planning commission held its public hearing on April 6, 2005. The city council held its public hearing on May 3, 2005 and continued that public hearing until June 7, 2005. On June 7, 2005, the public hearing closed. The record was held open thereafter for another week to allow all parties to submit additional evidence, a second week to allow rebuttal evidence, and for a third week to allow the applicant to submit final legal arguments.

The record includes a Traffic Impact Analysis (TIA), dated January 21, 2005, which was apparently prepared by Kittelson & Associates and sent to the Oregon Department of Transportation sometime around that date. Supplemental Record 425-527. For reasons that are not apparent to us, that TIA was not submitted to the city for inclusion in the record in this matter until June 7, 2005, the day the city council's continued public hearing closed. For that matter, when the city prepared the record of the local proceedings and transmitted that record to LUBA on September 26, 2005, the TIA was not included. The city subsequently included the TIA in a Supplemental Record that was received by LUBA on October 13, 2005. Petitioners objected to that Supplemental Record, arguing that some city councilors did not believe the TIA had been submitted for inclusion in the city's record on June 7, 2005 and that petitioner Jason Brown asked the city for all the applicant's traffic evidence in this matter on June 9, 2005 and was not given a copy of the TIA. We ultimately determined in a

January 9, 2006 order that intervenor submitted the TIA for inclusion in the record on June 7, 2005.

> "It is not entirely clear that the TIA was submitted on June 7, 2005 or that it was submitted in a way that made it clear to all persons present at that hearing that the TIA was being submitted for the record. The minutes [of the June 7, 2005 hearing] suggest that it was, but we cannot be sure the discussion noted in the minutes is directed at the TIA rather than [an earlier] May 17, 2005 memorandum. Petitioner's former attorney's affidavit suggests it was the May 17, 2005 memorandum. Even if we could consider petitioners' representation of what the city councilors allegedly told them, the personal recollections of three of the city councilors that they do not remember the TIA being submitted is not particularly strong evidence regarding whether the TIA in fact was submitted. We are not sure what to make of Petitioner Jason Brown's allegations. Assuming his description of his request of the city is accurate, the TIA was either not included in the record at that time or the city failed to provide him a copy for some reason. Either explanation is plausible.
>
> "We resolve the question of whether the TIA was submitted on June 7, 2005 in the city's and intervenor-respondent's favor primarily based on the June 14, 2005 document that appears at record 158-59. In that document, petitioners Bob Rice and Janine Rice offer a number of criticisms that are expressly directed at the TIA and the subsequent two-page May 17, 2005 memorandum which itself refers to the TIA. No one offers any explanation for why those petitioners would have submitted a critique of the TIA if it had not been submitted for inclusion in the record." *Jaffer v. City of Monmouth*, ___ Or LUBA ___ (LUBA No. 2005-123, Order, January 9, 2006), slip op 7 (footnote omitted).[15]

Although petitioners recognize that LUBA has already resolved the question of whether the TIA was included in the city's record in this matter, under this assignment of error, petitioners argue for the first time that they never received copies of affidavits that were attached to intervenor's Response that supported his arguments that the TIA was included in the record. As intervenor points out, the certificate of service attached to his October 26, 2005 Response states that copies of that Response were served on lead

[15] In the omitted footnote we noted two other documents in the record that refer to the TIA. Record 117-18, 208-09.

petitioners Jaffer.[16] Intervenor argues "[i]n the unlikely event that the affidavits were somehow inadvertently not included with petitioners' copy, the two affidavits are expressly referenced in the text of the Response, and, having read the Response, petitioners certainly could have contacted counsel and requested copies." Intervenor-Respondent's Brief 27. We agree with intervenor.

Petitioners next argue:

> "Even if the TIA is appropriately part of the record, it was not provided to [petitioner Jason] Brown who has submitted an affidavit stating that he specifically requested all traffic information from the City on June 9, 2005, so that it could be professionally reviewed.[17] By not providing Brown a copy of the TIA, the petitioners were substantially harmed because the City Council was not afforded the opportunity to weigh the professional transportation planning advice of Thomas Bauer, PE and President of PTV America, Inc. concerning the TIA. * * *" Petition for Review 22.

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[16] OAR 661-010-0075(2)(b)(A) provides in relevant part:

> "Any document filed with the Board * * * must also be served on all parties contemporaneously. Service on two or more petitioners unrepresented by an attorney is accomplished by serving the lead petitioner designated under OAR 661-010-0015(3)(f)(A). * * *"

OAR 661-010-0075(7)(a) provides:

> "A lead petitioner is responsible for notifying the other petitioners of documents received from the Board and other parties, but each petitioner remains responsible for his or her own representation."

[17] Petitioner Brown's affidavit includes the following allegations:

> "1. That on June 9th, 2005 I specifically requested all of the traffic information in the public record, so that I could have the traffic information reviewed and commented on by a professional traffic-engineering firm * * *.
>
> "2. The only traffic information in the record from Kittelson & Associates, Inc. was the Traffic Memorandum dated May 17, 2005.
>
> "3. I specifically asked if there were additional materials from Kittelson & Associates, Inc. or other traffic information in the record, which I had not been given. I was given the entire record to review at the counter and the Kittelson & Associates, Inc. Report dated January 21, 2005, 'Traffic Impact Analysis for the Proposed Zone Change and Walgreens Development in Monmouth, Oregon' was not in the record." Reply to Response to Objection to the Record and Petitioners' Motion to Take Evidence not in the Record, November 18, 2005 Affidavit of Jason P. Brown.

Petitioners go on to point out that while Mr. Bauer reviewed the May 17, 2005 Kittelson memorandum, he did not address the lengthy TIA because the city failed to provide that TIA to petitioner Brown.

Intervenor responds that if Mr. Bauer reviewed the May 17, 2005 memorandum he would have discovered that it refers to the full TIA and should have known that there was "additional data generated regarding the project that should also be reviewed and commented upon." Intervenor-Respondent's Brief 27. Intervenor goes on to argue:

> "Assuming the opponents were not provided a copy of the TIA as requested, it is well-established that individuals rely on information provided by city staff at their peril, and obtaining erroneous information from staff is not [a] basis for remand. *See e.g.*, *North Park Annex v. City of Independence*, 35 Or LUBA 512, 514 (1999)." *Id.*

Turning to intervenor's first point, the deadline for submitting additional evidence and legal argument was June 14, 2005. Had the city provided the requested TIA to petitioner Brown when he asked for it on June 9, 2005, only five days remained for Mr. Bauer to review the 102-page document and prepare his critique. Given the severe time constraints that petitioner Brown and Bauer were operating under, we do not fault them for failing to notice that the May 17, 2005 letter refers to the earlier January 21, 2005 TIA that had not been provided to petitioner Brown, notwithstanding his express request on June 9, 2005 that the city provide him with copies of all of Kittelson's materials.[18] Neither do we fault them for failing to make a second more specific request that the city provide them with a copy of the TIA.

Intevenor's second point is also without merit. In *North Park Annex*, the petitioner's appeal was dismissed because the petitioner filed its petition for review more than 21 days

[18] Neither the city nor intervenor disputes any of the allegations in petitioner Brown's November 18, 2005 affidavit. *See* n 16.

after the record was settled.[19] Petitioner attempted to excuse its failure to file its petition for review before the 21-day deadline expired on erroneous information it received from LUBA staff. In response to petitioner's telephone inquiry, LUBA staff erroneously advised petitioner that the record was settled on a date several days after the date that was specified in LUBA's order settling the record. *North Park Annex* stands for the unexceptional proposition that a petitioner who elects to rely on someone else to determine the date that the 21-day deadline for filing the petition for review commences (in that case LUBA staff), rather than discovering that date itself from the LUBA order that established that date, does so at its own peril.[20] However, that proposition and the reasoning that underlies that proposition has little or no applicability here. Unlike the petitioner in *North Park Annex*, who had a copy of LUBA's order and could have computed the deadline for filing the petition for review itself, the petitioner here is not the custodian of the city's evidentiary record in this matter. Intervenor did not provide a copy of the TIA to petitioner Brown when it was submitted to the city on June 7, 2005. Petitioner Brown had a right to expect that the city would give him a copy of that TIA when he asked the custodian of the record for a copy of all of Kittelson's materials on June 9, 2005. The timing of that request makes the city's failure even more significant, since the public hearing had closed and only five days remained for parties to submit the evidence regarding traffic impacts. Because the city failed to provide petitioner a copy of the TIA, his expert Bauer was unable to review and respond to

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[19] As relevant, OAR 661-010-0030(1) provides:

> "Filing and Service of Petition: The petition for review together with four copies shall be filed with the Board within 21 days after the date the record is received or settled by the Board. * * * Failure to file a petition for review within the time required by this section, and any extensions of that time under OAR 661-010-0045(9) or OAR 661-010-0067(2), shall result in dismissal of the appeal and forfeiture of the filing fee and deposit for costs to the governing body."

[20] As our decision in *North Park Annex* made clear, LUBA's records indicated that the order settling the record had been mailed to petitioner and petitioner did not argue that he did not receive that order. *Id.* at 513. Therefore, instead of placing a telephone call to LUBA staff to discover the date the record had been settled, petitioner could have consulted the order that settled the record.

the TIA before the June 14, 2005 deadline expired. We agree with petitioners that that error on the city's part prejudiced petitioner Brown's substantial rights. Remand is required so that petitioner Brown can be given an opportunity to respond to the TIA.

We do not mean to suggest that petitioners other than petitioner Jason Brown may assert the city's failure to provide the TIA to petitioner Jason Brown as a basis for remand. *Cape v. City of Beaverton*, 41 Or LUBA 515, 523 (2002); *Bauer v. City of Portland*, 38 Or LUBA 432, 439 (2000). Indeed petitioners Rice apparently were provided copies of the TIA and offered written testimony critiquing the TIA. Record 158-59. However, petitioner Jason Brown is one of the petitioners who signed the petition for review and he may assert the city's failure to provide the requested copy of the TIA as a basis for remand.

Because the city will be required on remand to provide petitioner Brown a copy of the TIA and reopen the evidentiary record to allow him an opportunity to rebut the TIA, we do not reach petitioners' remaining arguments that the TIA and the other Kittelson materials were inadequate to address their Goal 12 (Transportation) concerns.

The third assignment of error is sustained in part.

FOURTH ASSIGNMENT OF ERROR

Petitioners' fourth assignment of error is as follows:

> "The City misconstrued or violated applicable law, made inadequate findings, and made findings not supported by substantial evidence in the record in determining that the plan map amendment and zone change comply with Goal 1." Petition for Review 25.

The city adopted the following findings concerning Goal 1 (Citizen Participation):

> "Goal 1 requires local government to develop a citizen involvement program to ensure the opportunity for citizens to be involved in all phases of the planning process. Because Goal 1 establishes a requirement for local government to develop a program, it is not directly applicable to this decision. However, the City's citizen involvement plan has been adopted by the City and acknowledged by the Department of Land Conservation and Development. The hearings and City evaluation process for this case has been governed by that acknowledged program. For this particular request, public hearings have been held by the Commission and the Council. The record has

> been held open for additional testimony on traffic and transportation issues and then held open again for general written testimony. The Council finds that Goal 1 has been met generally by the City and specifically in this instance." Record 12.

Because the challenged decision does not amend the city's acknowledged citizen involvement program, it is difficult to see how the city's decision or its actions in this matter could possibly constitute a violation of Goal 1.[21] Of course the city may have failed to follow its acknowledged comprehensive plan and land use regulation provisions that are part of its acknowledged Goal 1 citizen involvement program. Any such failures likely would constitute substantive or procedural errors to correctly follow or apply its acknowledged comprehensive plan and land use regulations. However, without more, such failures generally would not constitute a violation of the city's obligation under Goal 1 to *develop* a citizen involvement program. With this analytical problem in petitioners' fourth assignment of error noted, we turn to petitioners' arguments under the fourth assignments of error.

Petitioners appear to argue that the city was so unresponsive to their requests to the city for information that the city's actions amount to a violation of Goal 1. We have sustained the part of petitioners' third assignment of error where they argue that the city's failure to provide the requested TIA resulted in a procedural error and prejudice to petitioner Brown's substantial rights. However, we do not see that the city's failure should also be viewed as a violation of Goal 1.

Petitioners also generally argue that "residents" were misinformed, that the city was slow in providing requested information and that certain documents favorable to the application should not have been included in the record. If petitioners are arguing that these city actions collectively or individually constitute procedural or substantive error that violates some comprehensive plan or land use regulation requirement, that argument is

[21] Goal 1 is "[t]o develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process."

neither stated sufficiently nor adequately developed for review. As with petitioners' citation to the city's failure to provide the TIA to petitioner Brown, we do not see how these city actions constitute a violation of Goal 1.

The fourth assignment of error is denied.

The city's decision is remanded, based on our resolution of the third assignment of error.