

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CARL BOTHMAN, CHRIS BOTHMAN
5 and CARLEE INVESTMENTS, LLC,

6 *Petitioners,*

7
8 vs.

9
10 CITY OF EUGENE,

11 *Respondent,*

12
13 and

14
15 KNUTSON FAMILY, LLC,

16 *Intervenor-Respondent.*

17
18 LUBA No. 2006-119

19
20 FINAL OPINION

21 AND ORDER

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23 Appeal from City of Eugene.

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25 William H. Sherlock, Eugene, filed the petition for review and argued on behalf of
26 petitioners. With him on the brief was Hutchinson, Cox, Coons, Du Priest, Orr & Sherlock,
27 PC.

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29 No appearance by City of Eugene.

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31 Daniel A. Terrell, Eugene, filed the response brief and argued on behalf of
32 intervenor-respondent. With him on the brief was the Law Office of Bill Kloos, PC.

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

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36 AFFIRMED

10/11/2006

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

NATURE OF THE DECISION

Petitioners appeal a city planning commission decision on remand from LUBA that rezones five parcels from Neighborhood Commercial (C-1) and General Office (GO) to Community Commercial with a Site Review Overlay (C-2/SR).

MOTION TO INTERVENE

Knutson Family, LLC (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The history of the present dispute is set out more fully in *Bothman v. City of Eugene*, 51 Or LUBA 426 (2006), and *Knutson Family LLC v. City of Eugene*, 48 Or LUBA 399, *aff'd* 200 Or App 292, 114 P3d 1150 (2005). In *Bothman*, LUBA remanded a city planning commission decision that approved the requested rezoning to C-2/SR. Specifically, we remanded the planning commission decision to consider two policies in the Willakenzie Area Plan (WAP), a comprehensive plan refinement plan. The two WAP policies specifically apply to the Sheldon Sub-area, an area that includes the subject property. On remand, the planning commission adopted findings addressing the two WAP policies. This appeal followed.

ASSIGNMENT OF ERROR

Eugene Code (EC) 9.8865(2) requires that rezoning proposals be consistent with applicable refinement plans. In *Bothman*, we noted that the WAP provides that WAP policies

“are adopted by the City Council as guidance for decision-making within the plan area. City programs, actions, and decisions will be evaluated on the basis of their ability to implement adopted policies in this plan as well as other adopted City goals and policies.” WAP 4.

1 We addressed several WAP policies that petitioners argued the city must consider in
2 rezoning the subject property, and agreed with petitioners that two of the cited policies,
3 Sheldon Sub-area Policies 4 and 5, must be considered. Accordingly, we remanded the
4 decision to consider Policies 4 and 5. On remand, the planning commission adopted findings
5 considering those policies and concluding that the rezoning request was consistent with
6 them, to the extent they apply. We now address petitioners' challenges to those findings.

7 **A. WAP Sheldon Subarea Policy 4**

8 Policy 4 requires the city to “[r]ecognize the existing general office and commercial
9 uses located along the west side of Coburg Road, north of Willakenzie Road, and discourage
10 future rezonings of these properties.” The subject property is located along the west side of
11 Coburg Road, north of Willakenzie Road, and is improved with existing office and
12 commercial uses.

13 With respect to Policy 4, we held:

14 “* * * Policy 4 expresses a clear policy preference that the subject property
15 remain in its existing C-1 and GO zoning. While that preference is not
16 absolute, and can be overcome by sufficient reasons and/or competing policy
17 considerations, read in context the policy clearly requires the city to at least
18 consider whether the applicant has established a basis to overcome that policy
19 preference. The hearings officer found that the applicant had not, and the
20 planning commission did not address that issue, under its view that policy 4 is
21 not a ‘mandatory’ approval criterion because it does not ‘prohibit certain
22 types of rezoning proposals.’ We believe that view of policy 4 to be incorrect.
23 As stated, policy 4 expresses a policy preference that the subject property
24 remain in its existing zoning, and read in context the policy clearly mandates
25 that the city be guided by--at a minimum, consider--that preference in the
26 context of an application to rezone the subject property under EC [Eugene
27 Code] 9.8865(1) and (2). The planning commission erred in failing to apply
28 and consider policy 4.” 51 Or LUBA at 440.

29 In the findings adopted on remand, the planning commission initially took issue with
30 language in LUBA's *Bothman* opinion that characterizes policy 4 as expressing a clear

1 policy preference to retain the existing C-1 and GO zoning on the subject property.¹
2 According to the planning commission, policy 4 instead is properly viewed as expressing a
3 policy preference to preserve *commercial* zoning, and to discourage future rezonings to allow
4 *non-commercial* uses. Under that view, policy 4 is simply not applicable to a proposal to
5 rezone the subject property from one commercial zone to another.

6 In the alternative, the planning commission adopted findings concluding that if policy
7 4 expresses an applicable policy preference, that preference is overcome by consideration of
8 competing policy preferences in other comprehensive plan, WAP plan, and EC provisions.²

¹ The planning commission findings state, in relevant part:

“As noted above, LUBA’s decision states that Policy 4 expresses a clear policy preference to retain the existing C-1 and GO zoning. The Planning Commission respectfully disagrees that Policy 4 expresses a clear policy preference to retain the existing zoning over the proposed zoning. WAP Sheldon Sub-area Policy 4 is written to address the broad category of commercial uses, without attempting to distinguish or prioritize specific commercial uses and zoning districts. Thus, the policy is properly interpreted to discourage future rezonings to non-commercial uses. It is silent, however, as to rezoning to a different commercial zone category. The existing general office and commercial uses permitted under the existing C-1 and GO zone, and the potential general office uses, would also be permitted in the proposed C-2 zone. Thus, the Planning Commission finds that the proposed zone change adheres to Policy 4.” Record 13

² The planning commission findings continue:

“* * * To the extent that Policy 4 can be interpreted as establishing a clear preference to retain the existing zoning, the Planning Commission finds the record provides sufficient reasons, including competing policy considerations, to overcome such preference.

“As an initial consideration, the Planning Commission has already found that the proposal to rezone all five tax lots to C-2/SR is consistent with every mandatory approval criterion. Further, rezoning all five tax lots to C-2/SR serves the overall intent of the other nonmandatory WAP policies. The five lots are under common ownership. A unified zone for the five lots enables a consolidated development that may not be possible under the mixed zoning that now exists. This consolidation promotes the intent of other nonmandatory criteria such as WAP General Commercial and Industrial Policy 3 and WAP Sheldon Sub-area Policy 1, which provide respectively:

“Encourage the consolidation of parking lots, development of joint access, and use of access controls on commercial and industrial developments.

“Encourage development that consolidates parcels into cohesive development sites and limits the number of access points onto Coburg Road.

1 Petitioners challenge both sets of findings. We need not address petitioners’
2 challenge to the planning commission’s interpretation of Policy 4 on remand, because we
3 agree with intervenor that the commission’s alternative findings adequately demonstrate that,
4 giving due consideration to policy 4, the proposed rezoning complies with EC 9.8865(2).

5 As noted, we stated in *Bothman* that the policy preference or guideline embodied by
6 policy 4 “is not absolute, and can be overcome by sufficient reasons and/or competing policy
7 considerations.” The planning commission concluded that the proposed rezoning would
8 facilitate comprehensive development of the subject tract, which among other things would
9 minimize the number of access points onto nearby streets, consistent with WAP General
10 Commercial and Industrial Policy 3 and WAP Sheldon Sub-area Policy 1. The planning
11 commission also cited the fact that the proposed rezoning complies with all mandatory
12 rezoning criteria. Weighing these considerations against the policy preference expressed in

“Knutson indicates that one of the primary purposes of this proposal is to provide the flexibility to develop the subject parcels in a more comprehensive manner than is possible with the current C-1 base zoning. It argues that comprehensive site development will, among other things, facilitate minimizing the number of access points onto Coburg Road and will also permit egress from the site onto Willakenzie Road. The applicant/appellant further argues that the C-2 base zone designation will allow the applicant to attract a wider range of potential uses to the site, thus making actual development of the site more likely. Although the Planning Commission does not find that WAP General Commercial and Industrial Policy 3 or WAP Sheldon Sub-area Policy 1 must be favorably addressed as a prerequisite to approval of the zone change, the applicant has shown that its proposed rezoning furthers the general direction of these two policies.

“In considering the proposal in the context of these three nonmandatory criteria, the Planning Commission finds that the policy preference of WAP Sheldon Sub-area Policy 4 is overcome by the competing policy considerations of WAP General Commercial and Industrial Policy 3 and WAP Sheldon Sub-area Policy 1.

“More significantly, the applicant has shown that its proposal is consistent with each mandatory rezoning criteria. Considering this fact, Policy 4 does not weigh heavily against this specific rezoning request and it is overcome by the policy preferences expressed in other policies and mandatory approval criteria.

“Based on the findings above, WAP Sheldon Sub-area Policy 4, alone, is not a sufficient basis for denial of the proposal.” Record 14 (Record citations omitted).

1 policy 4, the planning commission concluded that policy 4 “is overcome by the policy
2 preferences expressed in other policies and mandatory approval criteria.” Record 14.

3 Given that policy 4 is merely “guidance for decision-making” that must be
4 considered, along with other applicable policies and provisions that also function as guiding
5 considerations, as long as the city decision maker actually considers applicable policies and,
6 where different policies compete or point to different results, explains the basis for its choice
7 to give one policy greater weight than another, it is doubtful that that choice will be disturbed
8 on review. Here, the planning commission considered all applicable policies and explained
9 its choice to give greater weight to some policies over the preference expressed in policy 4.
10 We cannot say that a reasonable decision maker could not reach the same conclusion that the
11 planning commission did here.

12 **B. WAP Sheldon Sub-Area Policy 5**

13 Policy 5 states that “[t]he City shall encourage the location of general office uses as a
14 transition between commercial and residential uses.” As we noted in *Bothman*, the hearings
15 officer had found that tax lot, 4900, one of the parcels in the subject tract, is developed for
16 general office use, and that that parcel separates the existing residential areas west of the
17 subject property from the commercially zoned and developed uses along Coburg Road.

18 With respect to Policy 5, we held:

19 “While policy 5 is less site-specific than policy 4, and not specifically directed
20 at rezoning decisions, it expresses a clear policy preference to buffer
21 residential and commercial uses with general office uses in the Sheldon Sub-
22 Area. For the reasons expressed above, we agree with petitioners that the
23 planning commission erred in dismissing policy 5 from consideration for
24 purposes of EC 9.8865(1) and (2). As the hearings officer noted, the applicant
25 asserted that the existing general office uses on lot 4900 will remain, which
26 makes it unclear why the applicant is seeking to rezone that lot from GO to C-
27 2. Nothing cited to us in the record indicates why the property is being
28 rezoned to a commercial zone, or provides a basis to disregard policy 5.
29 Under our view of the WAP and EC 9.8865(1) and (2), the city must at least
30 consider the policy preference expressed in policy 5 as guidance in deciding
31 whether to approve the requested rezone of tax lot 4900 from GO to C-2. The
32 planning commission erred in failing to do so.” 51 Or LUBA at 441-42.

1 On remand, the planning commission adopted findings concluding that the buffer
2 value of retaining tax lot 4900 in GO zoning is minimal, and that application of the site
3 design review standards under the proposed SR overlay zone will ensure that whatever buffer
4 value is present will be retained.³

5 Petitioners disagree with those findings, arguing that the findings fail to establish that
6 the policy preference in Policy 5 is overcome. Petitioners contend that the C-2 zone
7 potentially allows more intensive uses on tax lot 4900, and that the existing GO-zoned use on

³ The planning commission findings regarding Policy 5 state, in relevant part:

“The existing office use now located on Tax lot 4900 is typical of, and is consistent with, the proposed C-2 zone. Tax lot 4900 is not situated to provide a significant transition between surrounding commercial development and residential development. As discussed above, Tax lot 4900 separates commercial uses at the corner of Willakenzie and Coburg Road [from] the southeast portion of a multi-family residential development. This residential development abuts low-density residential uses to the north, Sheldon High School to the west, GO and Commercial uses to the east along Coburg Road, and commercial uses to the south across Willakenzie Road. The potential transition offered by Tax Lot 4900 affects a small portion of the residential development. Given the relatively small size of Tax Lot 4900 in comparison to the adjacent residential use and the relatively high intensity of other uses in the immediate vicinity, the transitional value Tax Lot 4900 offers is minimal.

“Moreover, in this case the character and design of the abutting residential use minimizes the potential benefit of a transitional buffer. This residential use consists of several multi-family buildings within the R-2 zone. The site is designed with a street access that provides separation between the residential dwellings and Tax Lot 4900. Given the character and design of adjacent residential development, the transitional value Tax Lot 4900 offers is minimal.

“With regard to the intent of Policy 5, and considering the above, retention of GO zoning on Tax Lot 4900 offers limited, if any, transitional benefit above that provided under C-2 zoning in this instance. The new zone proposed by the applicant is the C-2 zone with the /SR overlay. The Planning Commission recognizes that the /SR site review standards, which will apply to development of all of the parcels included in the application, require consideration of whether a proposed design is reasonably compatible with surrounding properties. Consequently, the transition effect sought by Policy 5 can be achieved through the application of site review, to the extent feasible.

“Based on the findings above, the Planning Commission finds that the record includes sufficient grounds for overcoming the preference established in WAP Sheldon Sub-area Policy 5 that Tax Lot 4900 remain in the GO use.

“When compared with the benefits discussed under Policy 4, above, the minimal buffering/transition to be gained by maintaining the GO zoning on tax lot 4900 does not warrant denying the requested rezone for tax lot 4900 due to Policy 5.” Record 15-16.

1 tax lot 4900 currently buffers the multi-family dwellings to the west from the numerous
2 commercial uses around the intersection of Willakenzie and Coburg Roads. Petitioners also
3 fault the planning commission for making an implicit value judgment that multi-family
4 dwellings west of tax lot 4900 are somehow less entitled to buffering from high-intensity C-2
5 uses than single family dwellings. Finally, petitioners argue that the planning commission
6 erred in failing to require intervenors to specify whether and to what use tax lot 4900 would
7 be redeveloped under the C-2/SR zone.

8 Intervenor responds, and we agree, that the planning commission findings are
9 sufficient to explain why the policy preference in Policy 5 is overcome in the present case.
10 That a road intervenes between tax lot 4900 and residential uses to the west, and the fact that
11 C-2/SR zone will require site design review intended to minimize adverse impacts to those
12 residential uses supports the city's finding that the buffer or transitional value of GO-zoning
13 on tax lot 4900 is minimal. It is not clear to us that the planning commission made an
14 implicit value judgment regarding multi-family dwellings, as petitioners contend, but we see
15 no error in taking into account whether the neighboring residential uses are higher-intensity
16 multiple family dwellings or lower intensity single family dwellings, for purposes of
17 determining the buffer value of GO zoning on tax lot 4900. Finally, petitioners do not
18 explain why the planning commission was obligated to require intervenors to specify if and
19 how tax lot 4900 would be redeveloped under C-2/SR zoning.

20 In sum, petitioners have not demonstrated that the city's findings on remand are
21 inadequate or otherwise provide a basis for reversal or remand.

22 The assignment of error is denied.

23 The city's decision is affirmed.