

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 KEVIN JOHNSON and KIM SIECKMANN,
5 *Petitioners,*
6

7 vs.
8

9 CITY OF GLADSTONE,
10 *Respondent.*
11

12 LUBA No. 2011-086
13

14 FINAL OPINION
15 AND ORDER
16

17 Appeal from City of Gladstone.
18

19 Thomas H. Cutler, Lake Oswego, filed the petition for review and argued on behalf of
20 petitioners. With him on the brief was Harris Berne Christensen LLP.
21

22 David F. Doughman and Heather R. Martin, Portland, filed the response brief. David
23 F. Doughman argued on behalf of respondent. With them on the brief was Beery Elsner and
24 Hammond LLP.
25

26 HOLSTUN, Board Member; RYAN, Board Chair; BASSHAM, Board Member,
27 participated in the decision.
28

29 REMANDED 05/02/2012
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31 You are entitled to judicial review of this Order. Judicial review is governed by the
32 provisions of ORS 197.850.

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NATURE OF THE DECISION

Petitioners seek review of a city council decision that grants design review approval for a new city library.

REPLY BRIEF

Petitioner moves for permission to file a reply brief. The motion is allowed.

FACTS

The existing city library is located in the old central business district. The assistant city administrator submitted an application for approval of a new city library to replace the existing library. The new city library would be located on an approximately 12-acre parcel that is zoned Community Commercial (C-2). That 12-acre property is located near the eastern edge of the city, outside the old central business district.

The planning commission adopted findings addressing the Gladstone Municipal Code (GMC) requirements of the C-2 zoning district and design review. The GMC does not include design review approval criteria as such, and instead lists design review “Objectives.” One of those design review objectives is GMC 17.80.011(2), which is set out below:

“To encourage orderly development and to assure that structures, signs and other improvements are appropriately related to their site, and to surrounding sites and structures. Due regard shall be given to the aesthetic qualities of the terrain and landscaping, and proper attention given to exterior appearance of structures, signs, energy conservation and other improvements.”

On June 21, 2011, the planning commission denied the application, based on GMC 17.80.011, because the planning commission found the proposal could complicate or preclude use of the 11+ acre property for additional uses in the future. The planning commission explained:

“* * * Could the building be redesigned to have a smaller footprint? Could the building be relocated elsewhere on the site to preserve ability for additional future uses of the property? What about re-orienting the building, rotating it to a more north-south orientation? As proposed, the development

1 will not be particularly inviting to pedestrians, and there is little, if any ‘street
2 presence.’ As oriented as shown (east-west), the developer is not taking full
3 advantage of views to the east. Much discussion occurred between the
4 Planning Commission and the applicant. After three public hearings,
5 including several hours of public testimony, the Planning Commission as a
6 group could not arrive at consensus on this issue. Therefore, this criterion is
7 **NOT** satisfied.” Record 387 (emphasis in original).

8 As far as we can tell, GMC 17.80.011 was the sole basis for the planning commission’s
9 denial of the application.

10 On June 22, 2011, the assistant city administrator appealed the planning
11 commission’s June 21, 2011 decision to the city council. After a July 12, 2011 public
12 hearing before the city council, the city council approved the application, and this appeal
13 followed.

14 **FIRST ASSIGNMENT OF ERROR**

15 GMC 17.92.020 sets out the following procedure for appealing a planning
16 commission decision to the city council:

17 “(1) A decision of the Planning Commission made pursuant to this title
18 may be appealed to the City Council within fifteen (15) days after the
19 mailing of the Planning Commission’s written decision.

20 “(2) Written notice of the appeal, along with a filing fee, shall be filed with
21 the city.

22 “(3) The notice of appeal *should* state in detail the nature of the decision,
23 determination or requirements and the grounds upon which the
24 applicant deems herself/himself aggrieved.

25 “(4) If an appeal is not filed within the fifteen (15) day period, the decision
26 of the Planning Commission shall be final.

27 “(5) If a timely appeal is filed, the City Council shall receive a copy of the
28 Planning Commission’s written decision and shall hold a public
29 hearing on the appeal.

30 “(6) The City Administrator or designee *shall summarily reject an untimely*
31 *filed appeal.*” (Emphases added.)

1 In her June 22, 2011 appeal, the assistant city administrator entered the following in
2 the spaces in the appeal form where the appellant is to “Identify the reasons for the appeal:”

3 “Disagree with the Planning Commission’s decision.” Record 379.

4 Petitioners argue GMC 17.92.020(3) requires that the “grounds upon which the
5 applicant deems herself/himself aggrieved” must be “state[d] in detail.” Petitioners contend
6 the incomplete sentence “Disagree with the Planning Commission’s decision” is not
7 sufficient to state the grounds for appeal in detail, and the city council exceeded its authority
8 in accepting the appeal.

9 As the city correctly notes, GMC 17.92.020(3) states that the notice of local appeal
10 “*should* state in detail the nature of the decision * * *,” GMC 17.92.020(3) does not state that
11 a notice of local appeal “shall” or “must” do so.¹ In addition, it is less than clear whether the
12 command to “state in detail” is limited to the “nature of the decision” or extends also to the
13 “grounds upon which the applicant deems herself/himself aggrieved.” Finally, the command
14 in GMC 17.92.020(6) that the city administrator “shall summarily reject an untimely filed
15 appeal,” suggests the city knows how to state a jurisdictional or mandatory requirement
16 clearly when it means to. *Breivogel v. Washington County*, 114 Or App 55, 57, 834 P2d 473
17 (1992). The city’s failure to more clearly state that a detailed statement of the grounds for
18 local appeal is a jurisdictional or mandatory requirement calls into question whether the city
19 *could* interpret GMC 17.92.020(3) to impose a jurisdictional or mandatory requirement,
20 much less whether the city council *must* do so. *Golden v. City of Silverton*, 58 Or LUBA
21 399, 406 (2009).

¹ Contrast GMC 17.92.020(6), which commands that the city administrator shall summarily reject an untimely filed appeal.

1 In any event, even if GMC 17.92.020(3) imposes a mandatory requirement that the
2 grounds for appeal must be stated in detail, the city council found that the notice of local
3 appeal in this case satisfies that requirement:

4 “* * * The Council finds that the appeal contained the level of detail that
5 [GCM 17.92.020(3)] requires. It identified the file number of the decision and
6 the date the Planning Commission made the decision. As required by the
7 appeal form, it accurately described the decision being appealed and identified
8 the reason the applicant believes it was aggrieved: namely, because the
9 Planning Commission denied its application and the applicant disagreed with
10 that denial. Where an applicant is appealing a denial of its application to the
11 Council, the Council finds that an applicant’s mere disagreement with the
12 Planning Commission decision is a sufficiently detailed basis to appeal the
13 decision to the Council under GMC 17.92.020.” Record 2.

14 The truncated statement “disagree with the planning commission decision” would almost
15 certainly be inadequate to state in detail the grounds for appeal of a planning commission
16 decision *granting* design review approval. That is because a decision to grant design review
17 approval must be supported by findings that all approval criteria are satisfied and an
18 appellant wishing to challenge such a decision would need to identify which of the many
19 approval criteria he or she is relying on to challenge the design review approval. But in the
20 case of decision to deny design review approval, the potential issues in the local appeal are
21 likely to be much more limited, since decisions to deny applications for land use permit
22 approval are typically based on only one or a small number of approval criteria. As we have
23 already noted, the planning commission denied the application because it could not reach a
24 majority decision that the proposal complies with a single criterion, the GMC 17.80.011
25 orderly development objective. The city council found that the local appellant’s statement
26 that it disagreed with the planning commission’s decision concerning GMC 17.80.011 was
27 sufficient under GMC 17.92.020. The city council’s interpretation and application of GMC
28 17.92.020(3) is not reversible under ORS 197.829(1).² The city council’s interpretation and

² ORS 197.829(1) provides:

1 application of GMC 17.92.020(3) is not inconsistent with the text of GMC 19.92.020(3) and
2 is not inconsistent with its purpose or underlying policy, which presumably is to facilitate
3 local appeals by identifying the issues to be resolved in a local appeal. The notice of local
4 appeal was adequate to identify the decision and the single criterion that was to be the subject
5 of the local appeal. Because the city council’s interpretation and application of GMC
6 19.92.020(3) is “plausible,” we defer to the city council. *Siporen v. City of Medford*, 349 Or
7 247, 259, 243 P3d 776 (2010).

8 The first assignment of error is denied.

9 **SECOND ASSIGNMENT OF ERROR**

10 In an appeal of a planning commission decision, GMC 17.92.040 limits city council
11 review to the same design that was the subject of the planning commission’s review:

12 “(1) If an applicant appeals a decision of the City Administrator or
13 Planning Commission, he/she shall submit the same application to the
14 hearing body, other than changes necessary to effectuate any
15 conditions of approval.

16 “(2) No other view or revision designs or plans will be accepted.”

17 Citing transcript excerpts from July 12, 2011 and August 9, 2011 city council meetings,
18 petitioner contends the city council reviewed and approved plans that are different from the

“The Land Use Board of Appeals shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
- “(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

1 plans that were reviewed and denied by the planning commission. Petitioner contends that
2 the city council’s review of different plans violates GMC 17.92.040(1) and (2), and that since
3 the planning commission denied the application there were no conditions of approval that
4 might have authorized the changes under GMC 17.92.040(1). Petitioner also renews his
5 previously filed record objection in which he asks that LUBA order the city to include the
6 amended plans that the city council approved in the record of this appeal.

7 **A. Record Objection**

8 We turn first to petitioners’ record objection. As we note below, it is exceedingly
9 unclear what documents petitioners believe should be included in the record. Petitioners
10 previously filed record objections on November 14, 2011. In their second record objection,
11 petitioners argued:

12 “2. At Respondent’s Table of Contents for the Record at page 3, reference
13 is made to the 13 pages of oversized documents entitled ‘THA
14 Architecture Planning Submittal’ retained and to be submitted at oral
15 argument. It is unclear whether these documents relate to the
16 applicant’s original submissions to the Planning Commission, or to the
17 application materials and plans presented to the City Council.
18 Petitioners insist that complete application materials, including fully
19 legible plans as presented to each body be included in the record for
20 purposes of preparation of briefs and arguments, in addition to being
21 provided at oral argument.

22 “* * * * *

23 “8. At page 44 of the record, Respondent’s/applicant’s architect makes
24 reference to ‘calculations’ already accepted by staff. However, if such
25 calculations were accepted into the record, Petitioners request that
26 such calculations, and any related written submissions by the applicant
27 placed before the City Council be included in the record.” Petitioners’
28 Objection to the Record 1-3.

29 In response to petitioners’ record objections, the city submitted a supplemental record
30 and a response to each of petitioners’ record objections. The city’s response to objections 2
31 and 8 are set out below:

1 “2. The Supplemental Record contains the 13 pages of oversized
2 documents entitled ‘THA Architecture Planning Submittal,’ relating to
3 the applicant’s original submissions to the Planning Commission.

4 “* * * * *

5 “8. The Supplemental Record contains the calculations identified by
6 petitioner.”

7 In a December 14, 2011 Order, we concluded:

8 “The Supplemental Record appears to be sufficient to respond to record
9 objections 2-8. Those objections are resolved.” (Footnote omitted.)

10 In the omitted footnote we stated “[i]f we are wrong and the Supplemental Record is
11 insufficient to respond to objections 2-8, petitioners shall have the time provided by OAR
12 661-010-0026(2) to renew those objections.” Petitioners did not renew their objection until
13 the above noted objection in their petition for review, which was well after the deadline
14 provided by OAR 661-010-0026(2) expired.

15 Petitioners’ renewed record objection in the petition for review comes too late, and
16 for that reason the objection is denied. *Cape v. City of Beaverton*, 41 Or LUBA 515, 519
17 (2002); *Bates v. Josephine County*, 28 Or LUBA 21, 24 (1994).

18 **B. Changed Design**

19 The cited transcripts are exceedingly unclear about what, if any, amendments were
20 submitted to the city council that were not also submitted to the planning commission.
21 According to the city, petitioner Sieckmann raised a point of order regarding the possible
22 submission of design amendments to the city council. The city contends that the applicant’s
23 architect Keltner responded that the changes were made before the planning commission, not
24 the city council. In support of its position, the city cites the following minutes of the city
25 council’s July 12, 2011 meeting:

26 “Kim Sieckmann raised a point of order: The applicant is required to submit
27 the same application. The Planning Commission denied their applications;
28 there would be no conditions of approval according to Gladstone Statute
29 17.92.040 regarding changes.

1 “Mr. Keltner stated the slides were presented at the last Planning Commission
2 meeting; these changes were made prior to that Commission meeting in
3 response to questions from staff.

4 “• Clarity of number of bike parking spaces and locations (3 required; 10
5 provided, 4 of which covered.

6 “• Will be meeting with Gladstone Disposal and will provide a letter
7 indicating approval of a plan for trash storage, recycling and collection
8 as requested in the staff report.

9 “• Calculations will be submitted for window area.

10 “• Demonstrated the lighting complies with standards and they will
11 submit a plan that confirms those criteria have been met.

12 “• A temporary irrigation system will be provided for an 18-month
13 period. The proposed vegetation will not need irrigation after that 18-
14 month period; species have been selected that after they are established
15 they don’t need to be irrigated.

16 “Ideas that came up in Planning Commission meetings they would like to
17 incorporate include lighting along the path to the west of the library
18 connecting down to Oatfield Road and provide a crosswalk at the intersection
19 of Cason and Webster.” Record 164-65.

20 Although we cannot be sure, it appears that there were a number of possible changes
21 to the original proposal that were discussed and made before the planning commission and
22 that those potential changes continued to be a topic of discussion before the city council. The
23 city council’s decision includes a number of conditions.³ It seem unlikely to us that those

³ Those city council conditions of approval include the following:

“5. On-site lighting shall comply with Subsections 17.44.020(4) and (5) of the GMC including compliance with IES standards. The existing trail leading from Oatfield Rd. to the new library shall be fully illuminated in its entirety. All outdoor lighting must be property hooded to ensure that light emissions do not pollute night skies (i.e. lighting must be designed consistent with ‘dark-sky’ features.

“* * * * *

“7. The applicant shall submit a letter to the city from the franchise hauler indicating approval of a plan for trash/recycling storage and collection. Alternatively the applicant may submit calculations demonstrating compliance with the minimum standards method described in GMC * * * 17.44.020(7).

1 conditions of approval would have been included if the applicant had in fact submitted a
2 revised design showing the changes required by those conditions to the city council. GMC
3 17.92.040 precludes submission of a new design unless required by conditions of approval,
4 GMC 17.92.040 does not preclude a decision by the city council that the original design
5 should be changed or city council imposition of conditions of approval to require changes
6 that the city council wishes to see in the design. Petitioners have not established that the city
7 council allowed the applicant to submit a new design for review in violation of GMC
8 17.92.040.

9 The second assignment of error is denied.

10 **THIRD ASSIGNMENT OF ERROR**

11 To understand petitioners' third assignment of error, a picture of the location of the
12 city's existing library and the location of the proposed new library is helpful, but the parties
13 have not supplied that picture and the record does not include a helpful map. Petitioners
14 attached a copy of the city zoning map to the petition for review. But a black and white copy
15 of that map does not show the Gladstone city limits and does not indicate the existing and

“8. The applicant shall submit calculations demonstrating compliance with the window to wall provisions of Subsection 17.44.024.

“9. The landscaped area shall be provided with an automatic irrigation system.

“* * * * *

“20. Bicycle parking to be 50% covered. Final plans must show location and number of bicycle parking spaces.

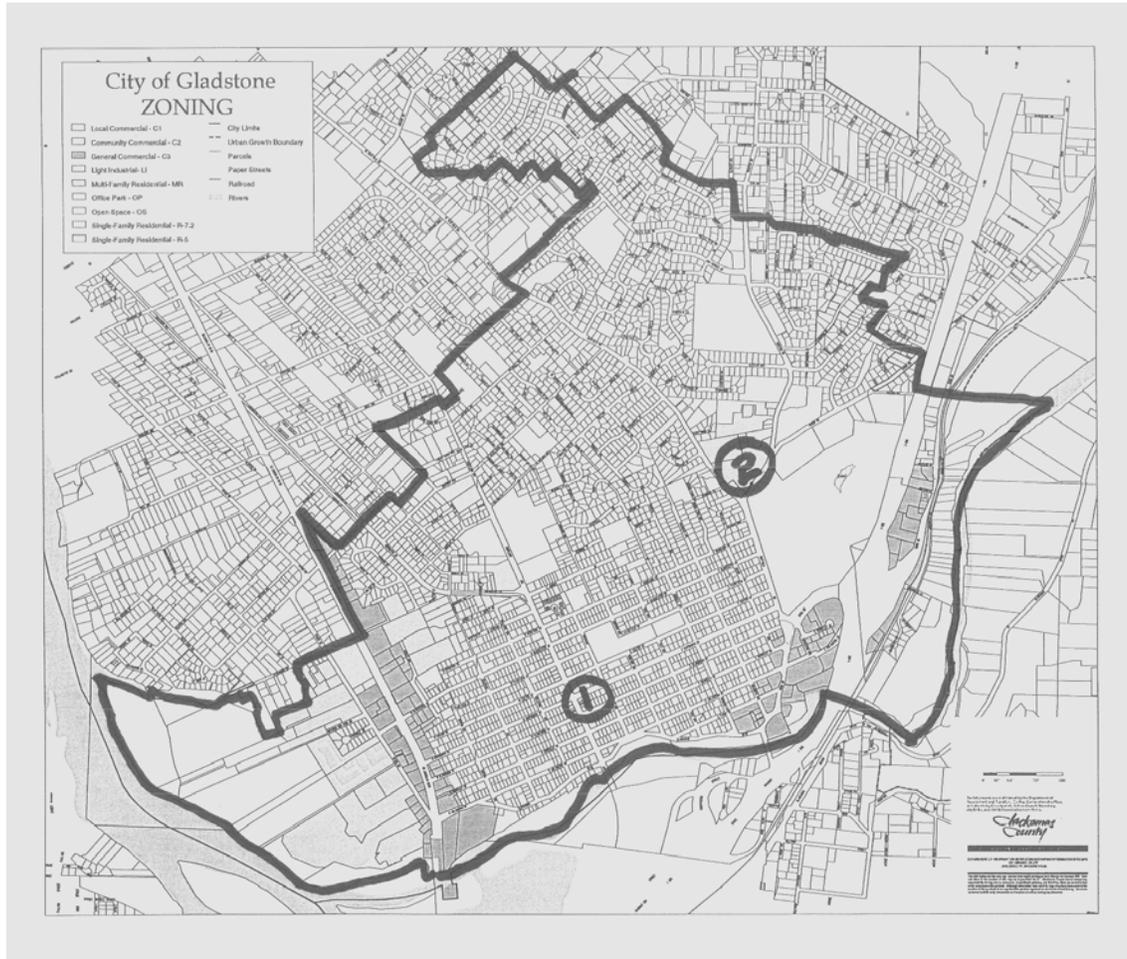
“* * * * *

“23. The new sidewalk on the site serving the library shall be revised to run continuously from the inside northerly parking spaces.

“24. A crosswalk shall be installed on Webster Rd. Its location will be determined following a discussion with the Gladstone Transportation/Traffic Committee, as reviewed and approved by a licensed traffic engineer. A flashing signal light at the crosswalk shall be considered and approved (if necessary) in the same manner.”
Record 15-17.

1 proposed library sites. We have reproduced that map on the next page of this opinion and
2 added a dark border to show the approximate city limits and circles to show the approximate
3 location of the existing library (number 1) and the proposed new library (number 2).

4



5

6 Gladstone Comprehensive Plan Facilities and Services Policy 10 (Policy 10) is set out below:

7 “Continue to espouse a policy of concentrating library facilities and services
8 in the existing central location.” (Emphasis added.)⁴

⁴ S.E. McLoughlin is the major north/south thoroughfare through the western part of the city, and the darker shaded properties on the above map along S.E. McLoughlin are zoned commercial. As the map shows, the existing library is not really located in the center of the City of Gladstone. Rather it is located near the center of a strip of commercially zoned land that extends from the Clackamas River, which runs along the southern border of the city, north approximately 10 blocks along Portland Avenue. Portland Avenue lies approximately four blocks east of S.E. McLoughlin Avenue. The ten block long commercially zoned area

1 Petitioners argued below that GMC 17.02.010 and 17.02.020 incorporate the entire
2 Gladstone Comprehensive Plan, including Policy 10, into the Gladstone Zoning and
3 Development Ordinance as approval criteria for land use decision making.⁵ Petitioners
4 contend “the existing central location” referenced in Policy 10 is the location of the existing
5 library in the approximate center of the city’s old central business district. The challenged
6 decision will result in the closing of that central library and the opening of a new central
7 library northeast of the old central business district, well outside the “existing central
8 location” of the existing central library building.

9 Petitioners’ second assignment of error presents two overlapping but distinct legal
10 issues, one that is well briefed by the parties and one that is not as well briefed. The first
11 legal issue assumes that Policy 10, as a comprehensive plan policy, is potentially applicable
12 to limited land use decisions. The first legal issue is whether Policy 10 is worded in a way
13 that makes it an applicable design review approval standard. The first legal issue would be
14 resolved by analyzing the text and, if necessary, the context of Policy 10 to determine
15 whether it is written as an approval standard and, if so, whether it is relevant to a city
16 decision to grant design review for a new library building. *Bennett v. City of Dallas*, 96 Or

along Portland Avenue, which is not shaded in a way that shows up on the map, is located near the center of the older part of the city that has a regular grid street pattern. The newer part of the city, with a less regular street pattern and more culs de sac, extends to the north and east.

⁵ GMC 17.02.010 appears to incorporate the Gladstone Comprehensive Plan into the city’s zoning and development ordinance:

- “(1) The comprehensive plan composed of goals, objectives, policies, implementation strategies, and the comprehensive plan land use map are adopted as the comprehensive plan as required by Oregon Revised Statutes 197.010 and 197.175. *The text and map of the comprehensive plan are attached as Exhibit A and incorporated in [Title 17 Zoning and Development] by reference.*
- “(2) The text is composed of a document entitled ‘Gladstone Comprehensive Plan: Goals, Objectives, Policies, and Implementation Strategies’ * * *.” (Emphasis added.)

GMC 17.02.020 provides that the comprehensive plan “shall serve as the land use policy for the city, and shall govern the exercise of the planning and zoning responsibilities of the city.

1 App 645, 647-49, 773 P2d 1340 (1989); *Angel v. City of Portland*, 21 Or LUBA 1, 13,
2 (1991).

3 The second legal issue concerns ORS 197.195(1) and has nothing to do with the text
4 of Policy 10. Under ORS 197.195, unless a local government complies with the statute’s
5 requirements, which are discussed below, comprehensive plan policies may not be applied
6 directly as decision making standards to limited land use decisions. Where the requirements
7 for direct application of comprehensive plan policies to limited land use decisions have not
8 been met, comprehensive plan policies may not be applied directly to limited land use
9 decisions, even if the text and context of those comprehensive plan policies is such that the
10 comprehensive plan policies would otherwise operate as applicable approval standards.

11 Because the second legal issue regarding ORS 197.195(1) is dispositive, we turn
12 directly to that issue. There is no dispute that the challenged decision is a limited land use
13 decision, as defined by ORS 197.015(12).⁶ The text of ORS 197.195(1), which is set out
14 below, both requires that limited land use decisions must be consistent with comprehensive
15 plans and restricts local governments’ authority to apply their comprehensive plans directly
16 as decision making standards for limited land use decisions.

17 “A limited land use decision shall be consistent with applicable provisions of
18 city or county comprehensive plans and land use regulations. Such a decision
19 may include conditions authorized by law. *Within two years of September 29,*
20 *1991, cities and counties shall incorporate all comprehensive plan standards*

⁶ ORS 197.015(12) provides in part:

“‘Limited land use decision’:

“(a) Means a final decision or determination made by a local government pertaining to a site within an urban growth boundary that concerns:

“* * * * *

“(B) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review.”

1 *applicable to limited land use decisions into their land use regulations. A*
2 *decision to incorporate all, some, or none of the applicable comprehensive*
3 *plan standards into land use regulations shall be undertaken as a post-*
4 *acknowledgment amendment under ORS 197.610 to 197.625. If a city or*
5 *county does not incorporate its comprehensive plan provisions into its land*
6 *use regulations, the comprehensive plan provisions may not be used as a basis*
7 *for a decision by the city or county or on appeal from that decision.”*

8 The underlined text of ORS 197.195(1) requires that limited land use decisions be
9 consistent with “applicable provisions of * * * comprehensive plans.” That part of ORS
10 197.195(1) supports petitioners’ argument under the third assignment of error that the city
11 council erroneously interpreted Policy 10 to be “inapplicable.”

12 The italicized part of ORS 197.195(1) restricts the city’s authority to apply
13 comprehensive plan policies directly to limited land use decisions, even if the text and
14 context of the comprehensive plan policy would otherwise render the policy an applicable
15 comprehensive plan decision making standard. The city argues in its brief that the city has
16 not incorporated Policy 10 as a comprehensive plan standard applicable to limited land use
17 decisions and, therefore, under the ORS 197.195(1) text italicized above Policy 10 cannot be
18 applied to deny the requested design review approval for the new library.

19 In their arguments below to the city council and in their argument in their petition for
20 review at LUBA petitioners never mention ORS 197.195, although they do argue that GMC
21 17.02.010 and 17.02.020 have the legal effect of incorporating the entire Gladstone
22 Comprehensive Plan (including Policy 10) as part of the Gladstone Zoning and Development
23 Ordinance. That incorporation might be adequate to make Policy 10 a “comprehensive plan
24 standard[] applicable to limited land use decisions,” and we understand petitioners to argue
25 that GMC 17.02.010 and 17.02.020 are adequate to make all comprehensive plan policies
26 potentially applicable to limited land use decisions under ORS 197.195(1) and that they were
27 adequate to make Policy 10 specifically applicable to the limited land use decision that is
28 before us in this appeal, although petitioners never cite ORS 197.195(1).

1 The city’s argument that the city has not incorporated Policy 10 into the city’s land
2 use regulations as required by ORS 197.195 is consistent with the city council’s decision,
3 although the city council’s decision, like petitioners, never cites ORS 197.195. However, the
4 city council’s findings do acknowledge petitioners’ GMC 17.02.010 and 17.02.020
5 “incorporation” argument and specifically reject petitioners’ position that GMC 17.02.010
6 and 17.02.020 make Policy 10 or other comprehensive plan policies directly applicable as
7 decision making standards for the challenged limited land use decision:

8 “A participant argued that under GMC 17.02.010 and .020 the entire Plan is a
9 relevant approval criterion. Those sections state that the Plan is incorporated
10 into GMC Title 17 and that the plan serves as ‘the land use policy for the city,
11 and shall govern the exercise of the planning and zoning responsibilities of the
12 city thereafter. The zoning ordinance (Title 17 of the Gladstone Municipal
13 Code) implements the comprehensive plan.’

14 “The language of sections 17.02.010 and .020 do not lead to the conclusion
15 that the participant advanced. In fact, they support the Council’s position and
16 interpretation that the Plan contains broad-based policies that the Code
17 implements. Consistent with case law from the Land Use Board of Appeals
18 and the Oregon Court of Appeals, the Council believes that in order for a Plan
19 policy to directly apply to a development application, the Code must refer to a
20 specific Plan provision and explicitly identify the provision as a criterion
21 applicable to land use applications.” Record 5.

22 While the above interpretation is not restricted to limited land use decisions and does
23 not cite ORS 197.195(1) specifically, neither is it inconsistent with the text of GMC
24 17.02.010 and 17.02.020. GMC 17.02.010 and 17.02.020 incorporate the comprehensive
25 plan but they do not expressly provide that all comprehensive plan policies are to operate as
26 decision making criteria for limited land use decisions or permits and other land use
27 decisions. The city council’s interpretation that a more specific reference is required in the
28 GMC to make individual comprehensive plan policies directly applicable as decision making
29 criteria for applications for design review approval and other applications for development
30 approval is plausible and we are required to defer to that interpretation under ORS
31 197.829(1) and *Siporen*.

1 The third assignment of error is denied.

2 **FOURTH ASSIGNMENT OF ERROR**

3 GMC 17.44.020 sets out general siting and design standards. GMC 17.44.020(3)
4 requires that an applicant for design review approval “[a]rrange structures and use areas to be
5 compatible with adjacent developments and surrounding land uses,” considering a number of
6 design and siting techniques.⁷ As far as we can tell, petitioners contend that the city erred in
7 applying GMC 17.44.020(3) by finding that the compatibility analysis required by GMC
8 17.44.020(3) need not be extended to require consideration of “potential surrounding [land]
9 uses” in addition to existing surrounding land uses. Petition for Review 14. Although less
10 clear, petitioners may be arguing that GMC 17.44.020(3) obligates the city to consider uses
11 that might potentially be constructed on the subject 12 acre parcel as well.

⁷ The text of GMC 17.44.020(3) is set out below:

“Compatibility. Arrange structures and use areas to be compatible with adjacent developments and surrounding land uses, considering the following design and siting techniques:

- “(a) Locate and design structures to protect scenic views or vistas from adjacent properties and public thoroughfares. Setbacks, building height and bulk should be considered;
- “(b) Design structures to provide visual order and avoid monotony in layout and design;
- “(c) Orient major service activity areas (e.g., loading and delivery areas) of the proposed project away from existing residences;
- “(d) Provide opaque enclosures and gates for all refuse storage areas;
- “(e) Screen mechanical equipment, except solar collection apparatus, from view or place such equipment in locations where it will not be viewed by the public. Screening shall be accomplished by the use of a sight- obscuring fence or hedge, a landscaped earth berm, building placement or other design techniques;
- “(f) Buffering and/or screening shall be used to mitigate adverse visual impacts, dust, noise and pollution, and to provide for compatibility between dissimilar adjoining uses. Special consideration will be given to the buffering, screening and siting of commercial and industrial uses to ensure that noise and odors are not detectable to normal sensory perception on adjacent residential properties. All development shall comply with GMC Chapter 8.12 (noise control).”

1 GMC 17.44.020(3) refers to “adjacent developments and surrounding land uses,”
2 without specifying whether that reference is to existing uses or uses that might be constructed
3 in the future under existing zoning. The city council’s choice to interpret GMC 17.44.020(3)
4 to be concerned only with existing uses is well within the city council’s interpretive
5 discretion under ORS 197.829(1) and *Siporen*, since GMC 17.44.020(3) does not expressly
6 state whether it is limited to existing uses or extends to potential uses as well. The
7 comprehensive plan language that petitioners cite in their petition for review as lending
8 contextual support to their preferred interpretation lends absolutely no support to their
9 preferred interpretation.

10 The fourth assignment of error is denied.

11 **FIFTH ASSIGNMENT OF ERROR**

12 In their fifth assignment of error petitioners appear to argue the city erred by effecting
13 a *de facto* comprehensive plan and zoning map change to open space, without going through
14 the required post-acknowledgment amendment process to formally adopt such map changes.

15 As previously noted, GMC 17.44.020(3) requires that an applicant for design review
16 approval “[a]rrange structures and use areas to be compatible with adjacent developments
17 and surrounding land uses.” After rejecting petitioners’ contention that GMC 17.44.020(3)
18 requires that the city consider uses that might potentially be constructed in the future, the city
19 council went on to explain why it did not believe the library as proposed violates GMC
20 17.44.020(3):

21 “* * * Regardless, the Council finds that nothing in this subsection or any
22 other relevant criteria would prohibit the siting of the new library in a manner
23 that would preclude or inhibit the use of the site for other structures or uses.
24 As the record demonstrates, one of the benefits of the library’s proposed
25 location on the site is that it will preserve the natural state and beauty of the
26 site, including a rare stand of oak trees, to the maximum extent possible. In
27 addition, the Council received testimony indicating that locating the library in
28 a substantially different portion of the site would lead to significantly higher
29 costs based upon required earthwork and grading issues that are substantially
30 less present in the area of the site where the library is to be located. Moreover,

1 the Council received testimony that suggested another structure could be
2 placed on the site (e.g. a water tower).” Record 7-8.

3 If we understand petitioners correctly, they contend that developing this
4 commercially zoned site in a manner that does not maximize its development potential for
5 commercial development, and instead preserving a large part of the 12-acre site as open,
6 undeveloped space effects a *de facto* change in the zoning and comprehensive plan maps
7 without going through the procedures that are required for such zoning and comprehensive
8 plan map changes.

9 Among the fatal flaws in petitioners’ reasoning is the lack of any cited requirement
10 that commercially zoned property be developed as intensively as possible. Petitioners’
11 contention that development of commercially zoned property must be as efficient and
12 intensive as possible and their *de facto* rezoning arguments are, as far as we can tell,
13 supported by no language in the GMC.

14 The fifth assignment of error is denied.

15 **SIXTH AND SEVENTH ASSIGNMENTS OF ERROR**

16 In establishing that a request for land use approval complies with applicable approval
17 standards, a local government may find that the approval standard is met or find that any
18 needed technical solutions that may be required to comply with the standard are “possible,
19 likely and reasonably certain to succeed.” *Gould v. Deschutes County*, 216 Or App 150, 161,
20 171 P3d 1017 (2007) (citing *Meyer v. City of Portland*, 67 Or App 274, 281-82, 678 P2d 741,
21 *rev den*, 297 Or 82, 679 P2d 1367 (1984)). But a local government may not simply defer
22 required findings of compliance with applicable approval standards or impose a condition of
23 approval that the required finding be made in the future without providing a right of public
24 participation. *Miller v. City of Joseph*, 31 Or LUBA 472, 480 (1996); *Thomas v. Wasco*
25 *County*, 30 Or LUBA 302, 315 (1996). Under these assignments of error, petitioners contend
26 the city improperly deferred its findings that the proposal complies with a number of relevant
27 approval criteria.

1 **A. Waiver**

2 Unless one of the petitioners or another party raised an issue below concerning the
3 criteria that are the subject of petitioners’ sixth and seventh assignments of error, under ORS
4 197.835(3) petitioners’ challenge to the adequacy of the city’s findings concerning those
5 criteria are waived.⁸ *Citizens Against Annexation v. City of Florence*, 55 Or LUBA 407, 417
6 (2007). Respondent contends that no issues were raised concerning any of the cited criteria.

7 Petitioners’ reply brief cites pages in the record where issues regarding some, but not
8 all, of the cited criteria were raised. At Record 489, petitioners’ attorney raised issues
9 concerning GMC 17.44.020(6) and (7), 17.44.024, 17.46.020(3) and 17.46.020(8). At
10 Record 134, petitioner Sieckmann raised issues concerning 17.50.020(2) and (6).⁹
11 Petitioners’ reply brief does not demonstrate that issues were raised below concerning the
12 remaining criteria identified in the sixth and seventh assignments of error, and petitioners’
13 challenge to the adequacy of the city’s findings concerning those criteria are waived.¹⁰

14 **B. Findings Challenges**

15 **1. GMC 17.44.020(6) and (7)**

16 GMC 17.44.020(6) requires visual screening of onsite equipment and requires that
17 utilities be placed underground. GMC 17.44.020(7) regulates trash removal and recycling.
18 For these standards the city found that the applicant’s experts testified that utilities would be
19 placed underground and onsite equipment would be screened and that adequate space for

⁸ As already noted, the challenged decision is a limited land use decision subject to ORS 197.195. ORS 197.835(3) imposes the following limitation on LUBA’s scope of review:

“Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.”

⁹ At Record 489 petitioners’ attorney cited GMC 17.50.00 et seq. That general reference was not sufficient to raise issues concerning the many subsections of GMC 17.50. *Burness v. Douglas County*, 62 Or LUBA 182, 196 (2010)

¹⁰ Those criteria include GMC 17.44.020(5), 17.56, 17.58, 17.44.020(1) and 17.60.

1 onsite storage and removal of trash and recycling would be provided. The city’s findings
2 note that no one questioned below the applicant’s representations regarding onsite
3 equipment, utilities, trash and recycling. The city contends that the fact that the city also
4 imposed a condition of approval to ensure continued compliance with these criteria does not
5 mean the city improperly deferred required findings of compliance with GMC 17.44.020(6)
6 and (7). We agree with the city.

7 Petitioners’ challenge regarding GMC 17.44.020(6) and (7) is denied.

8 **2. GMC 17.44.024**

9 GMC 17.44.024 imposes nonresidential design standards. The city council found that
10 based on materials submitted by the applicant the GMC 17.44.024 design standards would be
11 met. The city argues that although the city council also imposed a condition that requires the
12 applicant to submit additional calculations, that does not mean the city council improperly
13 deferred the required findings of compliance with GMC 17.44.024. Absent a more
14 developed argument from petitioners, we agree with the city.

15 Petitioners’ challenge regarding GMC 17.44.024 is denied.

16 **C. GMC 17.46.020(3) and (8)**

17 The city council’s findings concerning GMC 17.46.020(3) and (8) are set out below:

18 “5. Subsection 17.46.020(3) requires that provisions for irrigating planting
19 areas be made where needed. The applicant explained that it will
20 install an irrigation system to provide adequate irrigation for the
21 planted areas for 18 months (a LEED standard). Because all of the
22 plantings on the site will be native or drought tolerant, irrigation
23 should not be required after 18 months. No participants questioned or
24 objected to the applicant’s response as to how it would satisfy this
25 subsection. A condition of approval will require that applicant to
26 install an irrigation system to ensure the planting areas survive and
27 thrive. With the condition this subsection is met.” Record 10.

1 “10. Subsection 17.46.020(8) states that the City may require street
2 trees.[¹¹] It further states that if street trees are planted they must be of
3 a species compatible with the width of the planting strip and nearby
4 street tree species. A condition of approval will ensure that this
5 standard is satisfied. With the condition of approval, this standard will
6 be met.”¹² Record 11.

7 The city’s findings concerning GMC 17.46.020(3) seem adequate and appear to be
8 supported by uncontested evidence. We reject petitioners’ challenge to the adequacy of the
9 city’s findings concerning GMC 17.46.020(3).

10 The city’s findings concerning GMC 17.46.020(8) present a closer question, since the
11 city has deferred to a time after the city’s design review approval a decision on whether street
12 trees will be planted and, if so, what species will be planted. Petitioners appear to be correct
13 that the city has entirely deferred determinations regarding (1) whether any street trees will
14 be required under GMC 17.46.020(8) and (2) a decision about whether the species of any
15 such street trees will be “compatible with the width of the planting strip, and nearby street
16 tree species.” Such a complete deferral of a city decision concerning whether the proposal
17 complies with GMC 17.46.020(8) is not permissible. *Vizina v. Douglas County*, 16 Or
18 LUBA 936, 942 (1988).

19 Petitioners’ challenge regarding GMC 17.46.020(3) is denied; petitioners’ challenge
20 regarding GMC 17.46.020(8) is sustained.

¹¹ The text of GMC 17.46.020(8) is set out below:

“Street Trees. Street tree planting may be required of any development and, if planted, shall be according to city requirements and of a species compatible with the width of the planting strip, and nearby street tree species.”

¹² The challenged decision imposes the following condition of approval:

“21. The applicant will plant street trees as the site’s topography and other physical factors unique to the site permit. Proposed street tress will be approved by the City Planner and consistent with the GMC.” Record 17.

1 **D. GMC 17.50.020(2) and (6)**

2 GMC 17.50.020(2) requires traffic separation and GMC 17.50.020(6) imposes
3 pedestrian circulation standards. The city council adopted the following findings addressing
4 GMC 17.50.020(2) and (6):

5 “2. Subsection 17.50.020(2) requires provisions to be made, when
6 feasible, for a separation of motor vehicular, bicycle and pedestrian
7 traffic. The site plan demonstrates how the applicant proposes to
8 distinctly separate pedestrian and vehicular traffic. Sidewalks and
9 pathways will be well marked and lighted. A condition of approval
10 will require the applicant to light the existing pathway that begins at
11 Oatfield Rd. and will terminate in front of the library. While there are
12 not bike lanes on the site per se, vehicle traffic speeds and volumes (as
13 described in the traffic study) are expected to be light to modest and
14 therefore bicycles and motor vehicles will be able to share traffic lanes
15 with few, if any, anticipated problems or conflicts. Based on the
16 evidence in the record and a condition of approval, this standard is
17 met.” Record 13.

18 “4. Subsection 17.50.020(5) requires provisions to be made for the special
19 needs of the handicapped. The applicant clarified that the proposed
20 ADA parking spaces will be designed to include the appropriate
21 loading areas for accessibility. The pathway from Webster Rd. to the
22 library will be accessible to the handicapped and disabled. A
23 condition of approval will ensure that the application complies with
24 this subsection. With the condition, this subsection is satisfied.”
25 Record 14.

26 Petitioners appear to believe that simply because the city council imposed a condition
27 of approval that will require action by the applicant after the challenged design review
28 approval decision becomes final, the city council has improperly deferred its required
29 findings of compliance with GMC 17.50.020(2) and (6). We do not agree, and absent some
30 more specific challenge to the above-quoted findings, we conclude they are adequate to
31 demonstrate compliance with GMC 17.50.020(2) and (6).

32 Petitioners’ challenge regarding GMC 17.50.020(2) and (6) is denied.

33 The sixth and seventh assignments of error are sustained in part.

34 The city council’s decision is remanded.