

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

APR 22 5 40 PM '86

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2
3 DOWNTOWN COMMUNITY ASSOCIATION)
LEAGUE OF WOMEN VOTERS, SUSAN)
4 STURGIS, DAVID FROSETH and)
BILL RUCKER,)

LUBA No. 85-095

5 Petitioners,)

FINAL OPINION
AND ORDER

6 vs.)

7 CITY OF PORTLAND,)

8 Respondent,)

9 and)

10 GENERAL AMERICAN THEATERS, INC.)

11 Participant.)
12

13 Appeal from City of Portland.

14 Corinne C. Sherton, Salem, filed the petition for review
and argued on behalf of Petitioners. With her on the brief
15 were Sullivan, Josselson, Roberts, Johnson & Kloos.

16 Kathryn Beaumont Imperati, Portland, filed the response
brief and argued on behalf of Respondent City of Portland.

17 Susan M. Quick, Portland, filed the response brief and
argued on behalf of Respondent General American Theaters, Inc.
18 with her on the brief were Ball, Janik and Novack.

19 KRESSEL, Chief Referee; BAGG, Referee; DuBAY, Referee;
20 participated in the decision.

21 REVERSED

4/22/86

22 You are entitled to judicial review of this Order.
Judicial review is governed by the provisions of ORS 197.850.
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1 NATURE OF DECISION

2 This appeal concerns two land use applications approved by
3 the City of Portland. DZ 45-84 involves the design of a 22
4 story building known as the Broadway Theater Project
5 (project). CU 43-84 involves a conditional use permit for
6 construction of an eight-level parking garage in the project.

7 FACTS

8 The project is to be built on southwest Broadway, between
9 Salmon and Main streets in Portland's Commercial/Downtown
10 Development Zone (C1/Z). The site is occupied by the Broadway
11 Movie Theater. It is near the center of Portland's entertain-
12 ment district. A short distance away is the Arlene Schnitzer
13 Concert Hall, the centerpiece of the Portland Center for the
14 Performing Arts (PCPA).

15 Respondent General American Theaters, Inc., (GAT) proposes
16 to build the 22 story structure in two phases. Phase I
17 consists of a four-theater cinema complex at basement level,
18 5,400 square feet of retail and lobby space, and an eight-level
19 parking garage. Phase II consists of over 232,000 square feet
20 of office (and some retail) space above the garage.

21 The application in DZ 45-84 requests approval of conceptual
22 design of the building and a variance to permit access from the
23 garage onto southwest Main Street, designated a "non-automobile
24 oriented street" by the city's parking policy. DZ 45-84 also
25 requests approval of an adjustment in the floor area ratio
26 (FAR)¹ for the building. The requested adjustment would

1 change the FAR from 12:1 to 20:1.

2 The city's design review commission approved the requests,
3 subject to conditions, after a hearing in December, 1984.

4 The city code requires a conditional use permit for
5 construction of the proposed parking garage. Section
6 33.44.140, 33.56.090 Portland City Code (code). The revised
7 application in CU 45-84 indicates the garage will include 392
8 parking spaces in Phase I. The parking spaces will be reduced
9 to 312 upon completion of Phase II.

10 The city's hearings officer denied the application in CU
11 45-84. His decision was based in part on the city's Downtown
12 Parking and Circulation Policy (1980) (DPCP). He construed the
13 policy to permit only 12 parking spaces until construction of
14 the second phase of the project. The hearings officer also
15 rejected the applicant's claim that the parking proposal would
16 satisfy certain permit criteria in the city's zoning code.²

17 Petitioner Sturgis appealed the Design Review Commission's
18 decision on DZ 45-84 to the city council. Respondent GAT
19 appealed the hearings officer's decision on CU 43-84. The
20 appeals were consolidated and reviewed at several council
21 hearings. At the conclusion of the hearings, the council
22 denied petitioner Sturgis' appeal in DZ 45-84 and upheld GAT's
23 appeal in CU 43-84.

24 The city's final decision approves the project subject to
25 numerous conditions. The most important can be paraphrased as
26 follows:

- 1 1. Phase I construction must include "the structured
2 support system" for Phase II.
- 3 2. Construction of Phase II must begin within two
4 years of the approval "...unless the applicant...
5 demonstrates that the Phase II portion of the
6 project is not feasible at that time."
- 7 3. The project must include 20 long-term parking
8 spaces for use by the First Congregational Church
9 to meet a committment made by the city in connec-
10 tion with construction of the PCPA.
- 11 4. The garage must be open for evening performances
12 at the PCPA.
- 13 5. Vehicles may not use the southwest Salmon Street
14 exit from the garage between 4:30 - 5:30 p.m.
15 without approval by the city traffic engineer.
- 16 6. Until completion of Phase II, the garage must be
17 used almost exclusively for short-term (less than
18 four-hours) parking.
- 19 7. Upon completion of Phase II, 50 percent of the
20 spaces must be available for short-term parking
21 during the day.
- 22 8. The garage may not be opened until 60 days before
23 the opening of the four proposed movie theaters.

24 The city's order adds that a committee is to be established
25 to assure compliance with the conditions of approval. However,
26 the final condition (No. 19) states:

27 "The city agrees that due to the two-phased
28 construction of this project, and the use of city
29 approved industrial revenue bonds, the city will not
30 attempt to order closure of the garage due to a
31 claimed non-compliance with these conditions, except
32 for failure to pay legally imposed fines after all
33 timely appeals have been exhausted. The city will use
34 other methods to enforce compliance with this decision
35 and the conditions of approval." Record at 8.

36 FIRST ASSIGNMENT OF ERROR

37 The city was required to evaluate the proposed garage for
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1 compliance with the acknowledged comprehensive plan. ORS
2 197.175(2)(d); 197.835(3). Petitioners first direct our
3 attention to the following provision of the city's Downtown
4 Plan, a component of the comprehensive plan:

5 "Transportation Specific Goal B.1

6 Reduce air and noise pollution and pedestrian-vehicle
7 conflicts to provide a healthier, more pleasant
8 atmosphere for walking. Reduce and where possible
9 eliminate private automobile traffic in the core.
10 Traffic volume should be scaled down commensurate with
11 the needs of the area and to a degree which reflect
12 the viability of the developing mass transit system
13 and the requirements of the federal air quality
14 standards.

15 "Air Quality Planning Guideline 1

16 Manage traffic circulation and parking in order to
17 reduce air pollution."

18 The city concluded that the project complied with the
19 goal. The principal finding about the effect of the parking
20 facility on air quality reads:

21 "The applicant's parking garage will not increase air
22 pollution within the downtown area and, in fact, is
23 likely to diminish air pollution by reducing the
24 number of cars circling the blocks near the PCPA and
25 looking for parking. The applicant's project is not
26 located in one of the identified air pollution "hot
spots" in the downtown area. Moreover, the applicant
will be required to obtain an indirect source permit
from the Department of Environmental Quality, to
insure compliance with state and federal air pollution
laws. The garage is designed to permit vehicles to
enter and exit rapidly and to avoid the creation of
congestion and pollution by PCPA patrons waiting to
enter and exit the structure." Record at 34.

27 Petitioners attack the city's finding in several respects.
28 They begin by arguing that, although the quoted policies are to
29 reduce air and noise pollution, much of the city's finding
30 concerns other questions, such as whether the project will

1 intensify existing pollution problems or satisfy state and
2 federal pollution standards. They also allege that the
3 portions of the finding that do correspond to the policy are
4 unsupported by substantial evidence in the record. If the
5 city's decision required satisfaction of the air pollution
6 policy, i.e., demonstration that the project would "reduce air
7 and noise pollution and pedestrian-vehicle conflicts...,"
8 petitioners' criticism of the findings would have considerable
9 force. Most of the city's discussion of the issue does not
10 correspond to the policy as worded, but seems to recast it in
11 less stringent terms. However, the city was not required to
12 read the transportation goal in isolation from other goals in
13 the comprehensive plan. Assuming the goal is intended to be a
14 decisionmaking standard in permit cases, it could be balanced
15 against other plan goals in the determination of whether the
16 project complied with the plan. Citizens To Save the
17 Willamette Riverfront v. Portland, 12 Or LUBA 244, 258 (1984);
18 Tichy v. Portland, 6 Or LUBA 13, 19-20 (1982). The balance
19 approach is reflected in portions of the city's findings not
20 challenged by petitioners. The findings state:

21 "4. The Transportation Goal must be balanced with
22 other Goals of the Downtown Plan, such as preservation
23 of the Broadway entertainment district and encouraging
24 high density retail and office development close to
25 the transit corridor. The City has made a commitment
26 to complete the PCPA and provide a variety of theatres
and other entertainment facilities for Portland's
citizens. Expert evidence presented by the applicant
indicates that the PCPA's success in attracting
patrons depends significantly on the availability of
close, secure, well lighted parking. The applicant's

1 project is intended to fulfill an existing need for
2 theater parking by providing parking for PCPA patrons
3 within one block of the PCPA. In providing such
4 parking, the Council finds that the applicant's pro-
5 ject strengthens the Broadway entertainment district
6 in a manner consistent with the downtown plan.
7 Moreover, in retaining cinema uses at this site and
8 providing parking for cinema patrons, the applicant's
9 project is similarly consistent with the concept of
10 maintaining and strengthening the Broadway entertain-
11 ment district. The council also finds that the
12 provision of retail shops and cinemas, the unique
13 architectural design of the project and the provision
14 of parking close to the PCPA and the cultural
15 institutions on the park blocks are public benefits
16 which justify less than literal compliance with the
17 Transportation Goal.

18 Since the city could (and did) weigh the benefit of the
19 project in terms of all the goals in the plan, petitioners
20 first challenge must be rejected.

21 We next turn to petitioners' challenges under the city's
22 Downtown Parking and Circulation Policy.

23 The DPCP is an element or component of the city's downtown
24 plan, itself a part of the Comprehensive Plan. See Resolution
25 32794, October 30, 1980; Downtown Plan, Transportation Goal,
26 Planning Guideline on Parking. Although this much is agreed by
27 the parties, there is considerable disagreement over the
28 function the DPCP plays in regulating the number of parking
29 spaces in the project and the timing of the construction of
30 those spaces. We take up these questions below.

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34 1. Number of Parking Spaces

35 Section 9 of the DPCP provides, in pertinent part:

36 "Maximum Parking Space Ratios

1 a. A new parking structure which is proposed as part
2 of a new development or redevelopment, may be
3 approved, subject to other applicable sections of this
4 policy...provided that the number of parking spaces in
the structure does not exceed the number indicated by
the following schedules of maximum parking-space
ratios for office and other types of development."

5 Given the projected allocations of floor space in the building,
6 the applicable DPCP schedules authorize construction of no more
7 than 197 parking spaces (12 in Phase I, 185 in Phase II).

8 Despite these limitations, however, the city's order approves
9 construction of 392 spaces in phase I and a reduction to 312
10 spaces upon completion of phase II.

11 The final order maintains that the ratios in the DPCP are
12 only the starting point for determining the allowable number of
13 parking spaces in the project. The order states that other
14 factors, particularly the need for short-term parking to serve
15 the nearby PCPA, can play a part in the final calculation.

16 Thus, the final order states:

17 "The Council finds that it is in the public interest
18 to provide public parking across the street from the
19 PCPA, a public investment which relies upon box office
20 receipts to retire its debt. It is further in the
21 public interest to maintain downtown cinemas, to
22 upgrade the Broadway entertainment district, to
23 provide parking for symphony artists and the First
24 Congregational Church...and to provide parking for
25 nearby cultural and institutional uses." Record at
26 68-69.

27 Petitioners take issue with the city's calculation of
28 allowable parking based on factors outside the DPCP. They
29 claim the ratios in Section 9, and only those ratios, determine
30 the maximum number of allowable parking spaces in the project.

1 Although respondents concede that the DPCP is an element of
2 the city's downtown plan, they characterize this element as
3 advisory in nature. They support this characterization by
4 citing parts of the the comprehensive plan, the downtown plan,
5 the zoning code and the DPCP itself. In these documents, the
6 DPCP is described as a "guide" or "guideline" for city
7 actions. For example, the comprehensive plan states:

8 "8.2 Downtown Air Quality. The revised downtown
9 parking and circulation plan will guide future city
10 efforts on attaining air quality standards in the
11 central business district and allow for expanded
employment and housing opportunities downtown."
General Plan, (emphasis added).

12 The resolution adopting the DPCP states that the council's
13 intent is to:

14 "Provide guidelines and incentives for development of
15 efficient, adequate and convenient parking, which
16 supports the goals and guidelines of the downtown
plan." Resolution 32794, October 30, 1980. (Emphasis
added)

17 Finally, the city's zoning code states that the ratios in
18 Section 9 of the DPCP are to be used "as a guideline only" in
19 the calculation of the allowable number of spaces in an
20 off-street parking facility. Section 33.56.090 Portland
21 Municipal Code.

22 Respondents offer these and similar official statements as
23 evidence that the ratios in the DPCP are not binding, but
24 instead are merely "suggested methods for calculating
25 off-street parking for development projects in downtown
26 Portland." Brief of City of Portland at 19.

1 The city's interpretation of the DPCP is entitled to
2 weight, but it is not controlling in this forum. Gordan v.
3 Clackamas County, 73 Or App 16 (1985); Mason v. Mountain River
4 Estates, 73 Or App 344 (1985).. We are not convinced that the
5 references to the parking policy as a "guide" or "guideline,"
6 mean the policy may be relegated to purely advisory status.

7 The words "guide" and "guideline" do not necessarily convey
8 the meaning advocated by respondents. The context in which the
9 city's plans use these words to refer to the DPCP, do not
10 demonstrate that the city intended the document to be
11 advisory. The city council may have intended to make the DPCP
12 purely advisory, but it has not clearly expressed that intent
13 in its planning laws ³

14 In our view, the critical points are that (1) the DPCP is a
15 component of the city's downtown plan and (2) Section 9 (the
16 parking ratios) is worded as a regulatory measure, in
17 unambiguous, mandatory terms. These points persuade us that
18 petitioners challenge must be sustained.

19 The comprehensive plan occupies the pre-eminent position in
20 the hierarchy of Oregon land planning regulations. This
21 principle was recognized a decade ago. Baker v. City of
22 Milwaukie, 271 OR 500, 533 P2d 772 (1975). The principle has
23 been echoed and reinforced by actions of all three branches of
24 state government since then. See ORS 197.175; Philipi v. City
25 of Sublimity, 294 Or 730, 752, 662 P2d 325 (1983); Statewide
26 Planning Goal 2 (Land Use Planning). The city's position

1 however, particularly its reliance on Section 33.56.090 of the
2 zoning code, is at odds with the plan-supremacy doctrine. The
3 zoning ordinance, which by law is inferior to the comprehensive
4 plan, cannot emasculate the plan by simply designating it a
5 "guideline only." Since the DPCP is a component of the city's
6 plan, it must be given controlling status.

7 Respondents defend the city's interpretation on grounds it
8 promotes planning flexibility. However, the plan-supremacy
9 doctrine does not necessarily stand in the way of flexibility.
10 A plan provision may set up structured or flexible controls,
11 depending on the values sought to be promoted. As in all cases
12 where there is debate over the meaning of a particular plan
13 provision, much depends on the actual terms used. Here, the
14 plan provision is clearly worded in mandatory language.
15 Section 9 of the DPCP is entitled "maximum parking space
16 ratios." The text allows approval of new parking in
17 conjunction with new development,

18 "...provided that the number of parking spaces in the
19 structure does not exceed the number indicated by the
following schedules of maximum parking space ratios..."

20 Another provision emphasizes that the ratios are maximums; city
21 administrators may approve plan proposals for fewer parking
22 spaces than are allowable under the ratios, but not for more
23 parking spaces. See Section 9b, DPCP.

24 The provision of the DPCP relied on by petitioners is not
25 purely advisory. It is mandatory.⁴ Accordingly, the city's
26 approval of more than the number of parking spaces authorized

1 under Section 9 constitutes legal error. Reversal of the
2 decision is therefore warranted.⁵

3 2. Timing of Construction

4 The next question is whether the DPCP allows the city to
5 approve construction of parking spaces in Phase I of the
6 project that are attributable, under Section 9 of the DPCP, to
7 the retail and office floor area projections for Phase II. As
8 noted, the hearings officer answered this question negatively.
9 He held that only 12 parking spaces could be built in Phase I.
10 The decision was based on the limited retail and office space
11 commitments in that phase. The city council, however, approved
12 392 spaces in Phase I, based on the projected construction of a
13 large amount of floor area for office and retail uses in Phase
14 II and on the needs of other uses in the vicinity (e.g., the
15 PCPA).

16 The city's downtown parking regulations neither expressly
17 allow nor expressly prohibit phased construction projects.
18 Nonetheless, petitioners claim that approval of 392 parking
19 spaces in advance of construction of Phase II conflicts with
20 the DPCP. They rely principally on Section 10, which provides,
21 in pertinent part:

22 "(c) All parking requests which are approved by the
23 city shall expire if construction is not started
24 within two years. The allotted parking will be
reassigned to the parking reserve.

25 "(d) It is the intent of this policy to meet all
26 reasonable requests for new parking from the
parking reserve, if the development complies with
other sections of this policy."

1 The "parking reserve" is not explained in the DPCP. As we
2 understand it, the reserve represents the difference between
3 the maximum number of allowable parking spaces in the downtown
4 area (referred to by the city as the "parking lid") and the
5 present inventory of downtown spaces. Under Section 10c, when
6 new parking spaces are approved, construction must begin within
7 two years. If construction does not begin, the new parking
8 spaces are reassigned automatically to the reserve. Based on
9 these provisions of the DPCP, the petition states:

10 "...if Phase II construction is not begun within
11 two years, the spaces allocated to Phase II will
12 not "expire" and be reassigned to the parking
13 reserve, as section 10 requires. They will have
14 already been constructed and put into use.
15 Furthermore, due to the proposed use of City
16 industrial revenue bonds for the project, the
17 City was forced to accept a condition that it
18 will not attempt to order closure of the garage
19 due to non-compliance with conditions of the
20 order, unless fines have not been paid after all
21 appeals have been exhausted. Thus, if construc-
22 tion on Phase II is not started within two years,
23 Participant (GAT) can either convince the PDC
24 construction is infeasible or pay a fine to the
25 City. In either case, the City would not be able
26 to require that the parking spaces allocated to
Phase II be returned to the reserve, as DPCP
Section 10 requires." Petition at 20.

20 The city offers two responses to this challenge. First,
21 the city reads the word "construction" in Section 10c of the
22 DPCP to refer only to the garage, not the office and retail
23 uses proposed in Phase II. That is, if construction of the
24 garage commences within the two-year period, the city says
25 Section 10c is satisfied. However, given our previous
26

1 conclusion that the garage and the other uses in the project
2 are interdependent, (Section 9 of the DPCP), we cannot read
3 Section 10 as the city suggests. Since the parking and other
4 uses making up this project are interdependent, construction of
5 the entire project must begin within the two year period. If
6 this does not happen, Section 10 requires reassignment of the
7 planned parking spaces to the parking reserve, for use by other
8 projects.

9 The city's alternative response to petitioner's challenge
10 accepts the foregoing construction of the DPCP. In this
11 argument, the city maintains it's decision satisfies Section
12 10c because construction of a significant portion of Phase II
13 will begin within the two year limit. The city's brief states:

14 "Alternatively, the council found that even if Section
15 10c was construed as a requirement rather than a
16 guideline, evidence in the record demonstrated the
17 project would comply with this requirement. A
18 representative of GAT testified that construction of
19 Phase I would include construction of several
20 hundred-thousand dollars worth of infrastructure for
21 the Phase II offices...

22 "More significantly, Section 10c only requires
23 construction to be 'started' within two years of
24 approval of a parking request. The council
25 interpreted GAT's construction of the Phase II
26 infrastructure in Phase I of the project to constitute
'starting' construction of Phase II within the meaning
of Section 10c." (R.249-50).

27 The city's argument is plausible at first blush, but it is
28 not sufficient to answer petitioners' challenge. Condition of
29 approval 1(b) requires the applicant to:

30 "begin construction of Phase II within two years of
31 this approval, unless the applicant provides the

1 Portland Development Commission with a project
2 feasibility analysis which demonstrates that the Phase
3 II portion of the project is not feasible at that
4 time." Record at 5, (emphasis added).

5 The quoted condition is inconsistent with the city's claim
6 that construction of both phases of the project will start
7 within two years of the approval. As petitioners point out, the
8 condition seems to authorize city officials to sanction an
9 indefinite postponement of Phase II if the project is not
10 "feasible." This provision makes it possible, as petitioners
11 point out, for GAT to build the Phase I parking garage and
12 later cancel construction of the Phase II office and retail
13 space that justifies the garage under Section 9 of the
14 DPCA.⁶

15 In light of these circumstances, we agree with petitioners
16 that the city's approval of the project conflicts with the
17 DPCP. We construe that document to make the parking and office
18 construction aspects of the project interdependent. The city's
19 decision, particularly condition 1(b), however purports to
20 sever the connection.

21 The first assignment of error is sustained.

22 SECOND ASSIGNMENT OF ERROR

23 The city approved a variance to allow access from the
24 parking garage onto southwest Main Street, a "non-automobile
25 oriented street" under the DPCP. Petitioners claim (1) the
26 DPCP prohibits access from the garage onto southwest Main
Street and does not authorize approval of a variance from the

1 prohibition and (2) even if a variance may be authorized to the
2 nonaccess requirement in some cases, the city's findings in
3 this case do not support variance approval. We reject these
4 claims.

5 1. Authority to Grant Variances

6 Section 15 of the DPCP establishes three classifications
7 for streets in downtown Portland; traffic access streets,
8 nonautomobile streets, and principle bicycle streets. Section
9 17 of the policy, entitled "nonautomobile oriented streets"
10 provides:

11 "1. It is the intent of this policy to protect
12 non-automobile oriented streets from further
13 development of automobile-oriented facilities
14 which require access to new parking.

15 "2. Non-automobile oriented streets are those streets
16 which may become public transit or pedestrian
17 ways, subject to ongoing planning and implementa-
18 tion. The actual design and future use of these
19 streets, and the degree to which automobile
20 traffic may be limited on them will be determined
21 by future planning and design studies.

22 "3. Streets classified as non-automobile oriented
23 streets are indicated on the accompanying map,
24 Exhibit III."

25 In addition, Section 20(a) of the DPCP reads:

26 "Access to new parking facilities will not be
27 permitted to or from any street classified as a
28 non-automobile oriented street in Section 17 of this
29 policy or to or from any street listed below and
30 indicated on the accompanying map, Exhibit VI."

31 Southwest Main Street is designated a non-automobile oriented
32 street on the maps referred to in Section 17(3) and Section
33 20(a).

1 We agree with petitioners that the foregoing provisions of
2 the DPCP prohibit access from the proposed garage onto
3 southwest Main Street. The next question is whether the city
4 may waive the prohibition by granting a variance. We find the
5 answer to this question in Section 20(a) of the DPCP. The map
6 referred to in that provision (i.e., Exhibit VI of the DPCP),
7 bears the caption:

8 "Streets where new access to parking will not be
9 approved* 'reduced traffic areas' where new parking
access may be allowed subject to conditions

10 *except when granted under variance procedures."

11 Thus, this exhibit designates southwest Main Street as a
12 "street where new access to parking will not be approved except
13 when granted under variance procedures.

14 Petitioners' contention that variance relief is unavailable
15 rests on the fact that southwest Main Street is shown on two
16 maps in the DPCP, only one of which authorizes a variance from
17 the nonaccess rule. We do not believe, however, that those
18 circumstances indicate the city's intention to make variance
19 relief unavailable. Assuming the DPCP is ambiguous, the city
20 could resolve the ambiguity in favor of the allowability of
21 relief. That interpretation is not clearly contrary to the
22 express language and intent of the DPCP. We therefore sustain
23 the city's interpretation. Cascade Broadcasting Corp. v.
24 Groener, 51 Or App 533, 537, 626 P2d 386 (1981) rev den 291 Or
25 117 (1981)⁷; Bienz v. City of Dayton, 29 Or App 761, 776-77,
26 566 P2d 904 (1977).

1 2. Satisfaction of Variance Criteria

2 Petitioners contend the access variance violates three
3 standards in the city code.⁸ They first direct attention to
4 Section 33.98.010(a)(2). Under that section, a variance

5 "shall not permit the establishment within a zone of
6 any use which is not a permitted use within that zone
7 or the establishment of any use for which a condi-
8 tional use is required within that zone..." (emphasis
9 added).

10 Petitioners claim the access variance "...has been granted for
11 the express purpose of enabling a conditional use (392 spaces
12 of off street parking) to be approved." Petition at 24. Thus,
13 they insist that the emphasized portion of Section
14 33.98.010(a)(2) is violated.

15 We reject this claim. We read Section 33.98.010(a)(2) to
16 prevent issuance of a variance in order to allow a use
17 otherwise prohibited by the zoning code. This is not such a
18 variance. In this case, the zoning ordinance lists off-street
19 parking as a conditional use in this zone. The city has
20 approved a conditional use permit to allow the parking
21 proposal. There is no suggestion here that the variance power
22 is being used to circumvent the permit requirement or to
23 "permit the establishment within a zone of any use which is not
24 permitted within that zone..."

25 Petitioners' next attack arises under Section
26 33.98.010(2)(B) of the zoning code. That section requires a
finding that:

1 "The variance is required in order to modify the
2 impact of exceptional or extraordinary circumstances
3 or conditions that apply to the subject property or
its development that do not apply generally to other
properties in the vicinity."

4 The claim is that the city misconstrued the "exceptional or
5 extraordinary circumstances or conditions" standard by ruling
6 that the parking needs of the nearby PCPA justified the access
7 variance. Petitioners insist the standard is satisfied only if
8 there are exceptional or extraordinary circumstances inherent
9 in the project site. They say that conditions or needs
10 associated with other property (e.g., the PCPA) provide no
11 justification for variance relief.

12 The city claims that the exceptional circumstance
13 justifying the variance is the project's proximity to the
14 PCPA. The final order states:

15 "The Council finds the rationale for the variance in
16 this case is that there is an exceptional circumstance
17 which requires the need for two access points to this
18 garage. That "exceptional circumstance" is the need
19 for parking to accomodate the PCPA. According to
20 expert testimony in the record, the amount of parking
which is necessary to meet the needs of the PCPA
requires a garage with more than one access point.
this is because of the exit and entrance congestion
which would occur during evening and matinee
performances with a garage of this size having only
one access." Record at 64.

21 The city's rationale is echoed in respondent GAT's brief.

22 The brief states:

23 "There are no other performing arts center (sic) in
24 the city. There are no other sites available for this
25 project directly across from the PCPA. These
26 constitute unusual circumstances or site conditions
found nowhere else in the city or in the C1/Z zone."
Brief of Respondent GAT at 30.

1 Petitioners' challenge to the variance finds some support
2 in Oregon case law. The idea that a variance may be allowed
3 only if conditions inherent in the land prevent or obstruct
4 compliance with zoning regulations is reflected in several
5 cases. See Lovell v. Independence Planning Commission, 37 Or
6 App 3, 6, 586 P2d 99 (1978); Moore v. Board of Clackamas County
7 Commissioners, 35 Or App 39, 45, 580 P2d 583 (1978).

8 The present case is distinguishable from Lovell and Moore
9 and justifies a different interpretation of the variance
10 standard. At issue in those cases were zoning requirements
11 (minimum lot size and minimum off street parking) that applied
12 uniformly throughout the zoning district. The governing
13 ordinances authorized relief in cases of "practical difficulty
14 or unnecessary hardship." The courts found that relief was not
15 warranted because the claimed hardship or difficulty in
16 complying with the regulations did not arise out of conditions
17 inherent in the land, but reflected the personal circumstances
18 or desires of the applicants.

19 This case is different. The subject of the variance is a
20 site specific prohibition on access to new parking facilities.
21 See DPCP Section 20(a). As previously noted the document that
22 imposes the prohibition also recognizes that relief may be
23 warranted for particular parking proposals.⁹ Importantly,
24 although the city code employs some language similar to the
25 codes interpreted in Lovell and Moore, it also states that
26

1 variances in the downtown development zone do not depend on
2 proof of "practical difficulties or unnecessary hardships."
3 Section 33.98.010 states:

4 "A variance as specified in Section 33.98.015 may be
5 granted if literal interpretation and enforcement of
6 the regulations of this title applicable to a property
7 would result in practical difficulties or unnecessary
8 hardships or in the case of property located within a
Z Zone if it is found that such a variance would be
supportive of the Planning Goals and Guidelines for
Downtown Portland as adopted by the Council."
(emphasis added)

9 We believe these factors justify the city's approach to the
10 "exceptional or extraordinary conditions" requirement. That
11 is, the city could interpret the requirement in light of the
12 emphasized language in Section 33.98.010. The purpose of the
13 access variance is not to relieve hardship created by zoning
14 restrictions, but to increase the ability of a specific project
15 to meet a public need.¹⁰

16 The final order contains extensive discussion of the manner
17 in which the garage will support the goals and guidelines of
18 the Downtown Plan. According to the city, the civic importance
19 of the PCPA, its need for adequate parking and the site's
20 relationship to the PCPA and other cultural and entertainment
21 institutions justify granting relief from the access
22 prohibition. The order explains why the ability of the garage
23 to meet the identified need depends on two access points, one
24 of which should be southwest Main Street:

25 "This is because of the exit and entrance congestion
26 which would occur during evening and matinee perform-
ances with a garage of this size having only one

1 access. The council finds there is no alternative to
2 the S.W. Main Street access because the site is a half
3 block bounded only by S.W. Main, S.W. Broadway and
4 S.W. Salmon. One access point is designated for S.W.
5 Salmon. It would be far more detrimental to place an
6 access onto such a busy street as S.W. Broadway and
7 would result in substantially more pedestrian/automobile
8 conflicts between PCPA patrons attempting to park
9 in the garage and PCPA patrons attempting to walk to
10 nearby intersections to cross Broadway and reach the
11 PCPA. The council finds the most logical access is
12 therefore on S.W. Main. Based on expert testimony in
13 the record, no congestion problem or problems interacting
14 with pedestrians are created as a result of the
15 S.W. Main access for the parking garage because of the
16 pedestrian crossings between the Performing Arts
17 complex." Brief of GAT, page 32.

18 We conclude that the city's interpretation of Section
19 33.98.010(2) should be sustained.

20 Petitioners' final challenge to the access variance is that
21 the city has failed to demonstrate why the need for two garage
22 access points requires variance relief. Their argument, which
23 rests on the approval standard in Section 33.98.010(2)(B), is
24 that garage access could be provided from two other streets
25 (Salmon and Broadway), neither of which is a "non-automobile
26 oriented street."

27 Petitioners' attack assumes that the city code bars
28 variance relief where the access can be provided in a manner
29 that avoids the need for a variance. We find no such
30 limitation in the text. The word "requires" in Section
31 33.98.010(2)(B) need not be given the meaning advocated by
32 petitioners. Our previous acceptance of the city's
33 justification for the variance (i.e., the need to provide
34 convenient parking for nearby uses such as the PCPA)

1 necessarily answers this challenge.

2 The second assignment of error is denied.

3 THIRD ASSIGNMENT OF ERROR

4 The city code establishes the maximum floor area ratio
5 (FAR) for buildings in the downtown development zone. See
6 Section 33.56.060. The applicable ratio in this case is 12:1.
7 Since the site covers 20,000 square feet, the ratio would allow
8 construction of a 240,000 square foot building.

9 GAT's proposal to erect a building of nearly 400,000 square
10 feet requires approval of an increase in FAR, from 12:1 to
11 20:1. In this assignment of error, petitioners claim the
12 city's approval of the increase, termed an "adjustment" by the
13 city code, fails to satisfy the governing approval standards in
14 several respects.

15 We begin with a review of the relevant code provisions.
16 Section 33.56.060(4) of the code authorizes "adjustments" to
17 maximum floor area ratios. Section 33.98.200 states that the
18 purpose of granting adjustments in the downtown development
19 zone is to:

20 "...increase flexibility in the zoning regulations so
21 as to allow development that is supportive of the
22 Planning Goals and Guidelines for Downtown Portland as
23 adopted by the Council...."

24 The code sets forth the following general approval criteria for
25 adjustments:

26 "(a) It will not permit the establishment of a use
which is not a permitted use within that zone, or the
establishment of a use for which a conditional use
approval is required but has not been obtained.

1 "(b) It will not cause a substantial adverse effect
2 upon environmental conditions or upon property values
3 in the immediate vicinity of the property of the
4 applicant.

5 "(c) It will apply only to the property that is owned
6 by the applicant and for the specific site approved.

7 "(d) The benefit of granting the adjustment in
8 support of a specific policy has been weighed against
9 other relevant Comprehensive Plan policies and public
10 concerns and has been found to be in the public
11 interest.

12 "(e) The adjustment granted is the minimum required
13 to achieve the proposed benefit."

14 In addition to the foregoing, an adjustment in the downtown
15 development zone may be granted only

16 "...if it is found that the adjustment will result in
17 a use or structure that is more supportive of the
18 Goals and Guidelines for Downtown Portland..., than
19 would be the case without the adjustment." Section
20 33.98.230.

21 The city found the adjustment was required to accommodate
22 the mixed use project. (The office building portion of the
23 complex by itself fulfills the FAR allowance of 12:1). The
24 alternative of building the parking garage below grade, thus
25 requiring no FAR adjustment, was considered but rejected.
26 Placement of the cinema complex above the garage was found to
27 create serious structural difficulties.¹¹

28 Petitioners' first challenge to the FAR adjustment arises
29 under Section 33.98.120(b) of the code. The section requires a
30 finding that the adjustment

31 "...will not cause a substantial adverse effect upon
32 environmental conditions or upon property values in
33 the immediate vicinity of the property of the

1 applicant."

2 Petitioners allege that the only portion of the city's order
3 that addresses the quoted standard reads as follows:

4 "The Council finds no conclusive evidence that there
5 will be "substantial" adverse effect by the proposed
6 development on the environmental conditions or upon
7 property values in the immediate vicinity of the pro-
8 posal. Access to light and air is minimally affected
9 due to the project's north/south orientation. The
adjustment will result in a minimal increase of shadow
on the surrounding public and private spaces since a
building of this height is permitted at this
location. Existing urban services are adequate to
support this project. Record at 59.

10 Petitioners claim these findings are deficient because (1) they
11 are conclusional, particularly with regard to property values,
12 (2) they do not address the effects of the adjustment on the
13 "visual environment" or air quality ("environmental conditions"
14 under Section 33.98.120(b)) and (3) the findings impermissibly
15 shift the burden of demonstrating compliance with Section
16 33.98.120(b) to the opponents of the project.

17 Respondent GAT correctly points out that the portion of the
18 final order cited by petitioners is not the only discussion
19 relevant to the FAR adjustment. Other portions of the order
20 state the project will enhance the value of surrounding
21 development by revitalizing the city's entertainment district.
22 The findings say that the proposed cinemas will "breathe life"
23 into a stagnating theater area and that the parking garage will
24 help support the PCPA and related institutions. These findings
25 do not discuss property value impacts in detail, but they are
26 adequate. Lee v. City of Portland, 57 Or App 798, 646 P2d 662

1 (1982). Petitioners do not explain why more detailed analysis
2 of the project's effect on property values is required.

3 We reach the same result in connection with the findings
4 addressing the project's visual and air quality impacts.
5 Petitioners' seem to say that detailed findings are needed on
6 these points because project opponents specifically objected to
7 the magnitude of the adjustment. However, the testimony cited
8 by petitioners is at least as general as the findings adopted
9 by the city.

10 In any event, the final order does discuss visual impact
11 and air quality issues. As to visual impacts the findings
12 state the project will not adversely affect views of Mount
13 Hood. In addition:

14 "The council finds based on slides, testimony and
15 models of the project, that it will not look out of
16 place in terms of building densities of other
17 buildings in the area. In fact, it complements the
18 PCPA by incorporating many of the design elements of
19 the center, including the lighting, the glass
20 elevators, the backlit glass facade, the bowed facade
21 on the upper levels, and the sheltered pedestrian
22 environment." Record at 38.

19 The discussion adequately addresses Section 33.98.120(b).

20 We reject petitioners' charge that the treatment of air
21 pollution in the final order is inadequate for the reasons
22 stated in the first assignment of error. The city's order
23 indicates that the project will have negligible impact on air
24 quality and that the negative impacts are outweighed by the
25 project's benefits. This is sufficient to respond to
26 petitioners' challenge.

1 Finally we reject petitioners' contention that the city's
2 findings shift the burden of demonstrating compliance with the
3 city code to the opponents of the project. Although such a
4 shift is implied in the portion of the order singled out by
5 petitioners, the order as a whole clearly indicates that the
6 burden was on the permit applicants.

7 Petitioners' next challenge to the FAR adjustment arises
8 under Section 33.98.230 of the code. That provision requires a
9 finding that

10 "The adjustment will result in a use or structure that
11 is more supportive of the Goals and Guidelines for
Downtown Portland...than would be the case without the
adjustment."

12 The city addressed the standard as follows:

13 "A Z Zone adjustment may be granted by Council if it
14 is found that the adjustment will result in a use that
15 is more supportive of the goals than would be the case
without the adjustment. The Council finds that such
16 is the case in this application. Provision of parking
for the PCPA and for nearby cultural and institutional
17 uses; creation of four new downtown cinemas; provision
for pedestrian level retail uses; and the terrace
18 garden and restaurant creating open space are all
public benefits supportive of many of the Downtown
19 Plan goals and guidelines, as set forth above. The
FAR adjustment does not create a building which is out
20 of scale with the surrounding buildings nor one which
would adversely affect light and air available to
21 adjacent structures or pedestrians in a way which
outweighs the benefits of the project. The Council
22 finds that the proposal will revitalize the Broadway
entertainment district identified in the Downtown Plan
23 and will maintain downtown cinemas along Broadway
consistent with the goals of the Downtown Plan.

24 "There is evidence in the record, which the Council
25 relies upon, that existing movie theaters in the
Broadway entertainment district are endangered due to
26 financial concerns. Approval of this project will
ensure that at least four downtown cinemas will be
retained. This is supportive of the Downtown Plan

1 goals pertaining to the plan concept, commerce and
2 office, culture and entertainment, and visual image.

3 "The Council finds that a reasonable relationship
4 between public benefits and approval of an adjustment
5 to the FAR has been established by the applicant in
6 the design of this project." Record at 65-66.

7 Implicit in this finding is the idea that Section 33.98.200
8 calls for comparison of (1) the benefits of the project as
9 approved, i.e., including the FAR adjustment for the eight-
10 level garage and (2) the benefits of the project without the
11 FAR adjustment. Petitioners claim this misconstrues the code.
12 They insist Section 33.98.200 requires:

13 "(1) identification of the type(s) of structures which
14 could be built on the site without an FAR adjustment;
15 and (2) a comparison of the Downtown Plan consistency
16 of the proposed project and of the type(s) of
17 structures that could be built on the site without an
18 FAR adjustment." Petition at 29

19 We reject petitioners' challenge. Section 33.98.200 calls
20 for comparison of (1) the use or structure that "will result"
21 if an adjustment is approved, with (2) the use or structure
22 that "will result" if no adjustment is granted. Although it is
23 possible, the framers of the code intended the comparison to be
24 made in the abstract, as petitioners suggest, the city was not
25 obligated to take that approach. The text leaves ample room
26 for a comparison focused on the project at hand (i.e., with and
27 without the FAR adjustment). See Fisher v. City of Gresham,
28 69 Or App 411, 416, 685 P2d 486 (1984).

29 Petitioners' final challenge to the FAR adjustment arises
30 under the following provision of the Downtown Plan:

1 Downtown Plan Building Density Goal:

2 "Establish height and bulk limitations in the context
3 of a building's immediate environment. Careful
4 consideration should be given to the cost of providing
5 utilities and services and the capacity of the
6 transportation system which serves it to accommodate a
7 given density.

8 Planning Guideline 4:

9 "Consider granting incentives - permitting maximum
10 densities or other economic benefits - in order to
11 implement planning objectives: such as more downtown
12 housing, preservation of historic buildings, provision
13 of arcades or covered walks, additions to the skyway
14 system and usable rooftop open space." Petition for
15 Review at 29-30.

16 Petitioners read these plan provisions to authorize the
17 adoption of fixed maximums on building height and bulk. The
18 quoted guideline, in their view, allows the city to permit
19 development up to, but not beyond the established maximums. By
20 contrast, the city's decision seems to assume the project can
21 be developed to the maximum FAR (12:1) and allows even greater
22 building size (the adjustment) because of perceived public
23 benefits.

24 If the plan provisions cited by petitioners clearly
25 established a more restrictive policy on building size than is
26 reflected in the zoning code, we would uphold this
27 challenge. However, the plan provisions do not articulate
28 such a restrictive policy. The density goal is worded in
29 open-ended terms. It seems to call for case-by-case
30 development of height and bulk limitations. The guideline
31 urges city officials to "consider" allowable buildings of

1 maximum density as an incentive rather than a right. The
2 guideline is not worded as a requirement.

3 The city's zoning code is not more permissive than the
4 plan. Although the code establishes height and FAR "maximums"
5 for various downtown areas, see Section 33.56.060(4), it also
6 authorizes FAR adjustments in particular cases "...to increase
7 flexibility...so as to allow development that is supportive of
8 the planning goals and guidelines for Downtown Portland..."
9 Section 33.98.200. We find no error in the city's utilization
10 of these code provisions to authorize the FAR adjustment.

11 The third assignment of error is denied.
12 Based on the first assignment of error, the city's decision is
13 reversed.

FOOTNOTES

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Under the city code, "floor area ratio" is the ratio of the floor area of a structure to the area of the site. Section 33.56.060(1). The project is to be built on a 20,000 square foot site. The code would allow construction of a 240,000 square foot building on this site. The applicant required an adjustment in the ratio in order to increase the floor area of the building to 399,730 square feet.

2

The code authorizes approval of the conditional use permit if "the use at the particular location is desirable to the public convenience and welfare and not detrimental or injurious to the public health, peace, or safety, or to the character and value of the surrounding properties." Section 33.106.010. The applicant argued that the parking facility met this standard because it would serve the PCPA and other nearby cultural institutions. The hearings officer rejected the claim, finding that the asserted need for additional parking in the area had not been proven.

3

Respondent GAT points out that the phrase "planning guidelines" is defined in the downtown plan as follows:

"In most cases, the guidelines are more specific than the goals. They are intended to identify ways to implement the general goals that were developed by the Downtown Plan Citizens' Advisory Committee."

We fail to see how this definition supports the city's characterization of the DPCP as purely advisory.

4

The city itself has given the DPCP legal status in the past. For example, the air quality portion of the DPCP was submitted to the Department of Environmental Quality as the city's Parks and Traffic Circulation Plan under OAR 340-20-120. The portion submitted to DEQ states, in part:

"Approval of new parking will be made based on the maximum floor space ratios established in Section 9 of the Parking and Circulation Policy. See Section IV-3, DPCP."

1 In addition, the city's hearings officer states that past
2 council actions have relied on the DPCP in evaluating parking
3 proposals. Record at 588.

4

5
6 It may be, as the city contends, that the ratios in Section
7 9 of the DPCP are unrealistically low. However, this would be
8 a reason to amend the DPCP, not to set it aside.
9

10

11 6
12 The city's treatment of the proposed parking garage as a
13 separate project from the proposed office building is also
14 reflected in condition 19 of the final order. In that
15 condition, the city agrees it

16 "...will not attempt to order closure of the garage
17 due to a claimed non-compliance with these conditions,
18 except for failure to pay legally imposed fines after
19 all timely appeals have been exhausted. The city will
20 use other methods to enforce compliance with this
21 decision and the conditions of approval." Record at 8
22

23 After this appeal was briefed and argued, respondent GAT
24 filed a supplemental memorandum arguing that the DPCP could not
25 be given legal affect because it was not adopted by ordinance.
26 Petitioners objected to the timing of the supplemental
memorandum.

The Board will not consider the memorandum because it was
not timely filed. The issue sought to be raised by GAT could
have been raised in the normal course of the appeal.

18

19 7
20 Respondent General American Theaters urges us to reject
21 petitioner's challenge on grounds the DPCP, on which
22 petitioners rely, is not a binding legal document, but is
23 purely advisory. Respondent adds that some provisions of the
24 city zoning code do authorize variance relief in this case. We
25 have previously rejected the characterization of the DPCP as
26 "advisory." We also reject the argument that the city's zoning
code controls over the DPCP.

24

25 8
26 We note that the DPCP provisions authorizing relief from the
nonaccess rule refer to variance procedures; standards for
approval are not identified. The parties seem to agree,

1 however, that the governing standards are set forth in the
2 zoning code, in the sections pertaining generally to variances.

3

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4 The city's zoning code has a similar provision. See
5 Section 33.56.110(1) and related map.

6

10

7 We have previously concluded that the project's
8 relationship to the PCPA cannot be considered in determining
9 the number of allowable parking spaces in the garage. Our
10 conclusion that the relationship can be considered in connec-
11 tion with the access variance is a separate matter. The former
12 conclusion stems from the limitations in the DPCP. The latter
13 stems from the zoning code and concerns a different issue.

14

11

15 The order states:

16 "...it would be impossible to locate the theaters
17 above grade due to structural difficulties for the
18 spans necessary for the theaters. ...The Council
19 finds that the theater complex is a significant public
20 benefit of the proposal to the Downtown, especially
21 the Broadway Entertainment District and should not be
22 eliminated for the sake of strict compliance with the
23 FAR of the site." Record at 40.

1 Constitution. While ORS 197.835(8)(a)(E) allows the Board to
2 reverse a land use decision determined to be unconstitutional,
3 no authority is granted to declare a state legislative act
4 unconstitutional.

5 This assignment of error is sustained.

6 Remanded.

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1 Bagg, Referee, Concurring.

2 I concur in the result in this case but I would require the
3 county to consider an additional matter on remand.

4 In the second assignment of error, petitioner challenges a
5 finding that it is not practicable to safely move farm
6 machinery on Evergreen Road. Evidence supporting this finding
7 includes testimony that the road is "heavily traveled." I do
8 not believe this conclusion is a sufficient basis, even when
9 combined with other testimony about practical difficulties in
10 moving farm equipment, to support the finding. "Heavy traffic"
11 is not defined. Is it heavy at rush hour? Is "heavy traffic"
12 10 cars per hour, 20, 50? How much traffic does it take to
13 disrupt farm equipment travel?

14 As this case is being remanded, I would require the county
15 to review this issue further.

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1 FOOTNOTES

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4 Mr. Allison's testimony qualified him as a party according to
5 county ordinances. However, his status as a party in the
6 county proceedings does not entitle him to notice and hearing
7 under the applicable code section, Section 204-4.2, quoted in
8 the text.

9

2
10 Petitioner contends the private right of access is a right
11 that runs with land the current operator is farming under a
12 lease. Petitioner argues the right is available to any one
13 leasing the other property. The findings neither reflect these
14 allegations nor provide another explanation about ownership of
15 the right of way or under what conditions it may be used.

16

3
17 The data for average size of farms in Washington County is
18 also supplied by Oregon State University Extension Service.

19

4
20 OAR 660-04-028 states:

21 "(8) The requirement for a map or aerial photograph in
22 section (7) of this rule only applies to the following
23 committed exceptions:

24 "(a) Those adopted or amended as required by a Continuance
25 Order dated after the effective date of OAR
26 660-04-028(7); and

27 "(b) Those adopted or amended after the effective date of
28 OAR 660-04-028(7) by a jurisdiction with an
29 acknowledged comprehensive plan and land use
30 regulations."

31

5
32 The court also held adoption of a comprehensive plan is a
33 legislative responsibility. The court interpreted the county
34 charter to authorize the county commissioners to exercise this
35 responsibility through procedures provided by ordinance or
36 resolution. Since procedures established by an ordinance were
37 followed, the court held the plan was lawfully adopted.

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The court noted that the county's ordinance adoption procedures do not require publication of notice of the hearing at least 10 days prior to the hearing as required by ORS 215.060.

7

ORS 215.402 provides in part:

"(1) 'Contested case' means a proceeding in which the legal rights, duties or procedures of specific parties under general rules or policies provided under ORS 215.010 to 215.213, 215.215 to 215.263, 215.283 to 215.337 and 215.402 to 215.438, or any ordinance, rule or regulation adopted pursuant thereto, are required to be determined only after a hearing at which specific parties are entitled to appear and be heard."