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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

DONALD B. COOK and)
DALE G. KIRKPATRICK,)
)
Petitioners,)
)
vs.)
)
CITY OF EUGENE,)
)
Respondent.)

LUBA No. 86-088

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Donald E. Cook, and Dale G. Kirkpatrick, Eugene, filed the petition for review and argued on their own behalf.

Timothy J. Sercombe, Eugene, filed a response brief and argued on behalf of Respondent City.

BAGG, Referee; DuBAY, Chief Referee; participated in the decision.

AFFIRMED

04/07/87

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioners appeal a planning commission order denying a
4 requested zone change for a 1.2 acre tract from Suburban
5 Residential (RA) to Neighborhood Commercial (C-1) and an
6 accompanying sign district boundary change. The city's order
7 upheld the findings and conclusions of the city planning
8 commission. Petitioners request we reverse the city's action.

9 FACTS

10 The property is at the northwest corner of Cal Young Road
11 and Gilham Road. The site is vacant and in a low density
12 residential area.

13 There is a community shopping center with a Safeway store
14 and other commercial establishments approximately three
15 quarters of a mile to the east at the intersection of Cal Young
16 and Coburg Road. A Dairy Mart is about seven-tenths of a mile
17 away and a large shopping center with three delicatessens, an
18 Albertsons, health spa and other stores exist one mile to the
19 south.

20 Petitioners' request would allow development of a 10,000
21 square foot building for a convenience grocery, delicatessen
22 and beauty salon.

23 INTRODUCTION TO ASSIGNMENTS OF ERROR

24 The Eugene Code provides the following standards for
25 rezonings:

26 "(2) The commission or hearings official shall review

1 the application and receive pertinent evidence
2 and testimony as to why or how the proposed
3 change is consistent with the following criteria
4 required for approval:

5 "(a) The uses and density that will be allowed in
6 the location of the proposed change (1) can
7 be served through the orderly and efficient
8 extension of key urban facilities and
9 services prescribed in the Metropolitan Area
10 General Plan, and (2) are consistent with
11 the principles of compact and sequential
12 growth.

13 "(b) The proposed change is consistent with the
14 Metropolitan Area General Plan (1)
15 applicable text, (2) specific elements
16 related to the uses listed in the proposed
17 zoning districts, and (3) applicable land
18 use designations. The written text of the
19 Plan takes precedence over the Plan diagram
20 where apparent conflicts or inconsistencies
21 exist.

22 "(c) The proposed zone change is consistent with
23 applicable adopted neighborhood refinement
24 plans, special area studies, and functional
25 plans. In the event of inconsistencies
26 between these plans or studies and the
Metropolitan Area General Plan, the latter
is the prevailing document." Eugene Code,
Section 9.678(2).

18 As provided in Section 9.678(2)(b), a rezoning proposal
19 must meet applicable comprehensive plan provisions. The
20 hearings officer found the following plan criteria for
21 governing commercial development in residential neighborhoods
22 to be applicable:

23 "(1) Within convenient walking or bicycling distance
24 of an adequate support population. For a
25 full-service neighborhood commercial center at
26 the high end of the size criteria, an adequate
support population would be about 4,000 persons
(existing or anticipated) within an area
conveniently accessible to the site. For smaller

1 sites or more limited services, a small support
2 population or service area may be sufficient.

3 "(2) Adequate area to accomodate [sic] offstreet
4 parking and loading needs and landscaping,
5 particularly between the center and adjacent
6 residential property, as well as along street
7 frontages next door to outdoor parking areas.

8 "(3) Sufficient frontage to ensure safe and efficient
9 automobile, pedestrian and bicycle access without
10 conflict with moving traffic at intersections and
11 along adjacent streets.

12 "(4) The site shall be no more than five acres,
13 including existing commercial development. The
14 exact size shall depend on the numbers of
15 establishments associated with the center and the
16 population to be served."

17 Policy 12, Objective 5, of the comprehensive plan, the
18 Residential Element, provides that the city will

19 "promote compatibility between residentially-zoned
20 land and adjacent areas. The plan text explains that
21 existing and proposed residential areas are to be
22 protected from non-residential land uses while
23 providing a 'compatible and functional mixed use
24 development.'" Objective 5, Plan p. III-A-3.

25 The plan also provides

26 "for limited mixing of office, commercial, and
27 industrial uses subject to clear, objective criteria
28 which: (a) do not materially reduce the suitability
29 of industrial, office, or commercial areas for their
30 primary use; (b) assure compatibility; and (c)
31 consider the potential for increased traffic
32 congestion." (Economic Element Objective 12, Plan p.
33 III-B-4.)

34 The hearings officer found Code Section 9.678(2)(b),
35 requiring consistency with the Metropolitan Area General Plan,
36 to be unsatisfied by the proposal. He found petitioners failed
37 to meet their burden of proof regarding compatibility with the
38

1 residential character of the neighborhood.

2 LEGAL STANDARD

3 Many of petitioners' assignments of error include the
4 suggestion that it is the city's responsibility to show that
5 petitioners have failed to meet ordinance standards.

6 Petitioners mistake the burden. Petitioners must show they
7 comply with ordinance standards in order to obtain approval.

8 Where the application is denied, we are bound to uphold the
9 denial unless we can find that the petitioners have sustained
10 their burden of proving compliance with all criteria as a
11 matter of law. Jurgenson v. Union County Court, 42 Or Ap 505,
12 600 P2d 1241 (1979); Chemeketa Industries Corporation v. City
13 of Salem, 14 Or LUBA 159 (1985). In reviewing these

14 assignments of error, then, it will not be our function to
15 review the city's decision for detailed analysis of how
16 petitioners have failed to meet their burden of proof.

17 Instead, we examine whether the city's findings address
18 relevant criteria, are supported by substantial evidence in the
19 record and whether, on petitioners' side, petitioners have
20 shown as a matter of law that they meet all ordinance
21 criteria.

22 Several of petitioners' assignments of error claim no
23 substantial evidence supports the city's decision. Substantial
24 evidence is evidence a reasonable mind could accept as adequate
25 to support a conclusion. Although we might disagree with a
26 conclusion based upon certain evidence, we are not at liberty

1 to overturn the decision if the supporting evidence meets this
2 standard. Bowman Park Neighborhood Association v. City of
3 Albany, 11 Or LUBA 197 (1984).

4 ASSIGNMENT OF ERROR NO. 1

5 "The Respondent's planning staff and hearings official
6 erred by determining that petitioners' application was
7 not consistent with the Metropolitan Area General Plan
8 (1) applicable text, (2) specific elements and (3)
9 applicable land use designations when no substantial
10 evidence in the record was presented."

11 Petitioners first assert that their proposal meets all
12 applicable criteria. They then argue the city's conclusion
13 that their proposal is not in conformance with the
14 comprehensive plan is based solely on a denial of an earlier
15 zoning request, the "McCabe" proposal. We disagree.

16 The discussion of the McCabe proposal in the hearings
17 officer's order does not appear to be grounds for denial of
18 petitioners' request, but is simply a notation of criteria used
19 in the decision. The hearings officer stated:

20 "There is mention in the staff report in the
21 applicants' rebuttal thereto of the role of the
22 previous actions of the Planning Commission and City
23 Council. Those previous actions on the site must
24 always be considered for what relevance they might
25 have to the decision at hand. Particularly, the
26 McCabe decision is pertinent. While it is recognized
that the criteria for zone change at that time
included 'public need,' a reading of the minutes does
not necessarily indicate the public need was the
decisive issue in the denial of the zone change at
that time. Obviously, the issue of traffic was then a
significant one, as was the issue of an adequate
support population for commercial use. The city
council is the governing body of the jurisdiction and
that body's interpretation of the Metro Plan, as it
relates to this application, must be considered, even
though it may not be decisive." Record 50.

1 We do not sustain petitioners' challenge. The hearings
2 officer's comments about the McCabe case are not findings
3 supporting denial, but simply references to a case where
4 similar criteria were at issue.
5

6 ASSIGNMENT OF ERROR NO. 2

7 "The Respondent's planning staff and hearings official
8 erred in that there is no substantial evidence in the
9 record to support their findings that the proposed
10 development would change traffic flow and impact
11 safety in the area."

12 Petitioners argue there is no expert testimony that
13 petitioners' proposal will change traffic flow or that it will
14 negatively impact safety in the area. Petitioners discount
15 evidence from neighbors concerned about traffic on Cal Young
16 and Gilham Roads arguing the neighbors' testimony really
17 addresses motorists who speed on those roadways.

18 The hearings officer found petitioners failed to submit
19 sufficient evidence showing the level of traffic which will be
20 generated by the development. He also found the traffic
21 generated by commercial use of the site would conflict with
22 existing single family residences.

23 "A great deal of testimony and evidence was presented
24 indicating the existing level of traffic (14,700
25 vehicles per day on Cal Young Road) and the dangerous
26 situation that presently exists at the intersection.
The fact is that there is an intersection of an
arterial and a collector in the midst of residential
uses with a grade school not far away. The arterial
has a number of driveways that take direct access in
the block between Gilham and Oakway Roads. While the
applicant can argue that this all indicates the site
will never be utilized for residential purposes, it is
also a significant factor pertaining to this particular

1 locational criterion for Neighborhood Commercial
2 Facilities.

3 "I cannot accept the situation will not be worsened
4 and traffic not increased by the rezoning. While it
5 is said that convenience markets rely on traffic that
6 is already there, that is not entirely true. Moreover
7 a number of uses in the C-1 district are obviously
8 destination uses that will bring additional traffic to
9 this area. People will specifically make a trip to
10 the site, presumably to go to such a use as a
11 boutique, salon and spa, as proposed here. Further,
12 people will use their automobiles to go to the
13 convenience store to obtain one or two items they did
14 not obtain from the larger grocery store. The result
15 will be additional traffic that does not presently
16 exist." Record 48-49.

17 Evidence supporting this discussion includes the testimony
18 of neighbors and business persons in the area and the statement
19 of an assistant traffic engineer. The engineer found:

20 "A slight increase in the left-turn demand would cause
21 the probability of congestion to increase an
22 unacceptable level. In fact, the increase in
23 westbound volumes would also cause an unacceptable
24 situation. In addition, there is also a safety
25 concern because the left turn must be made across two
26 travel lanes plus a bike lane." Record 181.

27 We find the testimony of the neighbors and that of the
28 assistant engineer is substantial evidence supporting the
29 city's finding.

30 This assignment of error is denied.

31 ASSIGNMENT OF ERROR NO. 3

32 "The Respondent City of Eugene has erred by not
33 adopting a Cal Young Neighborhood Refinement Plan or
34 special area study in accordance with Policy 27 in the
35 Economic Element section of the Metropolitan Area
36 General Plan, III-B-6."

37 ASSIGNMENT OF ERROR NO. 4

38 "The Respondent City of Eugene has erred by violating

1 Policy 18 of the Economic Element in the Metropolitan
2 Area General Plan. (III-B-6)."

3 Petitioners complain in the third assignment of error that
4 the city failed to initiate a neighborhood refinement plan for
5 commercial development. The refinement plan is required by
6 Economic Development Policy 27 of the Metro Plan. The policy
7 provides:

8 "The City of Eugene shall initiate refinement plans to
9 determine the type and location of commercial and
residential land uses and flooding nodes prior to the
update of the Metropolitan Plan...."

10 We do not find error as alleged. The directive to prepare
11 refinement plans does not mean that the city may not make
12 decisions in the absence of such plans. See McIntyre Cooper
13 Company v. Board of Commissioners, 55 Or App 78, 637 P2d 211
14 (1981), rev den 282 Or 589 (1982). This plan directive is not
15 a standard for adjudicating quasi-judicial zoning requests.

16 In Assignment of Error No. 4, petitioners argue that
17 Economic Element Policy 18, calling for review of ordinances to
18 promote greater flexibility "for promoting appropriate
19 commercial development in residential neighborhoods" is
20 violated. This directive to city planners, like the directive
21 considered above, does not mean that decisions made in the
22 absence of such plans are invalid.

23 These assignments of error are denied.

24 ASSIGNMENT OF ERROR NO. 5

25 "The Respondent City of Eugene has erred by violating
26 Policy 18 of the Growth Management and the Urban
Service Area." II-B-6.

1
2 Petitioners argue there is no substantial evidence to show
3 that the city's zoning process uses clear and objective
4 standards. Petitioners then go on to comment about statements
5 of planning commission members which suggest that the
6 commission members believe there were no "strict guidelines"
7 under which to make the decision.

8 Petitioners do not develop a legal theory for this
9 argument. Petitioners do not explain what standards they find
10 vague or why vague standards should result in reversal or
11 remand of the decision. See our discussion under Assignment of
12 Error No. 10, supra, and Deschutes Development v. Deschutes
13 County, 5 Or LUBA 218 (1982).

14 We therefore deny this assignment of error.

15 ASSIGNMENT OF ERROR NO. 6

16 "The Respondent's Planning Commission erred through
17 accepting the findings of the hearings officer
concerning Economic Objective 12 of the Metropolitan
Area General Plan. III-B-4."

18 The hearings officer quoted Economic Policy Objective 12
19 which discusses mixed commercial and industrial uses. He found
20 his decision to be "consistent" with the policy. See Record
21 50-51. Petitioners argue Economic Element Policy 19 is the
22 relevant policy. The policy provides:

23 "Provide for limited mixing of office, commercial, and
24 industrial uses under procedures which clearly define
25 the conditions under which such uses shall be
26 permitted and which: (a) preserve the suitability of
the affected areas for their primary uses, (b) assure
compatibility, and (c) consider the potential for
increased traffic congestion."

1 The city concedes the petitioners are correct and that the
2 discussion in the hearings officer's order about Economic
3 Objective 12 is not relevant. However, the city contends the
4 hearings officer's comments are not necessary to the decision
5 and claims the comments appeared in the hearings officer's
6 order only to highlight the matter of compatibility and traffic
7 congestion.

8 The order of denial is sufficient without the hearings
9 officer's discussion of a policy that is not applicable to the
10 decision. We conclude the discussion is surplusage and not
11 necessary to the decision, and its inclusion is not error
12 requiring reversal or remand. See Chemeketa Industries v. City
13 of Salem, 14 Or LUBA 159 (1985).

14 ASSIGNMENT OF ERROR NO. 7

15 "The Respondent's Planning Commission erred in that
16 there is no substantial evidence in the record to
17 support their finding that an adequate support
population does not exist for this petition [sic]."

18 Petitioners allege the hearings officer concluded that
19 there is not an adequate support population for this rezoning
20 request. Petitioners claim there is no evidence in the record
21 to support the conclusion. Further, petitioners "question the
22 validity and usefulness of the term 'within convenient walking
23 distance or bicycling distance of an adequate support
24 population.'" Petitioners claim what is meant by an adequate
25 support population is unclear, and what is meant by convenient
26 walking distance is unclear.

1 The hearings officer found that

2 "there is some question as to whether there is
3 adequate support population within convenient walking
4 or bicycling distance of this proposed
5 development.... The nature of this low density
6 residential area and the availability of commercial
7 services presently does, at least, raise the question
8 of the existence of the support population called for
9 under the Plan standards." Record 48.

10 The hearings officer's discussion is not a finding. South
11 of Sunnyside Neighborhood League v. Board of Commissioners, 280
12 Or 3, 569 P2d 1063 (1977). The comments do address relevant
13 criteria, but the hearings officer makes no finding addressing
14 the criteria. Given these comments do not support the
15 decision, we see no need to inquire as to whether or not the
16 hearings officer's comments about the support population are
17 supported by substantial evidence.

18 ASSIGNMENT OF ERROR NO. 8

19 "The Respondent's Planning Commission erred in that
20 there is no substantial evidence in the record to
21 support their finding that there is NOT sufficient
22 frontage to ensure safe and efficient automobile,
23 pedestrian, and bicycle access without conflict with
24 moving traffic at the Cal Young/Gilham Road
25 intersection."

26 In this assignment of error, petitioners complain that the
27 planning commission was in error in accepting this issue as a
28 basis for denial. As we understand the argument, petitioners
29 believe there is insufficient evidence to support the
30 conclusion that adequate frontage is not available.

31 The hearings officer found:

32 "I do not find there is sufficient frontage to insure
33 safe and efficient automobile, pedestrian bicycle

1 access without conflict with moving traffic at the Cal
2 Young/Gilham Road intersection. I view this
3 particular standard for location of a Neighborhood
4 Commercial Facility as important, particularly in the
5 context of the existing situation at this
6 intersection." Record 49.

7 Respondent does not cite to any particular evidence in
8 support of the hearings officer's finding about frontage. We
9 note, however, that there is testimony in the record that
10 serious traffic problems exist in the area and that left turn
11 lanes necessary to access development could cause additional
12 congestion and traffic hazard. Record 56-58.

13 Petitioners do not cite us to any evidence conflicting with
14 that cited above. Therefore, we find the hearings officer's
15 statement to be supported by substantial evidence. See Record
16 198-199.

17 ASSIGNMENT OF ERROR NO. 9

18 "The Respondent's Planning Commission erred in that
19 there is no substantial evidence in the record to
20 support their finding that this rezoning would
21 discourage the maintenance of the residential
22 development existing adjacent."

23 Petitioners quarrel with the hearings officer's finding
24 that if the rezoning request is approved, residential
25 properties might be rezoned to commercial or general office
26 use. See Record 15. Petitioners argue

"The written text of the Metro plan does not contain
any evidence to justify the denial based upon the
viewpoint that increased traffic or congestion would
discourage the maintenance of adjacent residential
development." Petition for Review at 26.

Evidence to support the view that the proposal will result

1 in future rezonings need not be found in the plan. Such
2 evidence, if found at all, must be found in the record of the
3 hearing before the hearings officer and the planning
4 commission.

5 The relevant plan policy is Policy 12 in the Metro plan.
6 This policy provides that the city should promote compatibility
7 of residential zoning and adjacent development. As such, the
8 hearings officer appropriately considered whether the rezoning
9 would promote such compatibility. He found it does not,
10 largely because of traffic. As discussed under Assignment of
11 Error 2, this finding is supported by evidence from persons
12 familiar with the area. Petitioners cite us to no contrary
13 evidence showing the plan standard is met, therefore, we reject
14 petitioners' challenge.

15 ASSIGNMENT OF ERROR NO. 10

16 "The Respondent's Planning Commission and hearings
17 official erred in that there is no substantial
18 evidence in the record to properly define the terms
(1) compatibility, (2) appropriate, (3) suitable, and
(4) adequate."

19 Petitioners complain that terms used in the plan are
20 vague. Petitioners argue that the city should define these
21 terms.

22 Petitioners do not provide a legal theory upon which we
23 might grant relief. Apparently, petitioners believe the city's
24 use of the term in the plan do not rise to the level of
25 "standards and criteria" as required in ORS 227.173. We
26 disagree.

1 While the terms "compatibility," "appropriate," "suitable"
2 and "adequate" may themselves be vague, in the context of the
3 plan and as interpreted in the hearings officer's order, the
4 terms adequately describe the relationship between the proposed
5 development, the traffic situation and the neighborhood.

6 Without a more specific charge by petitioners as to how the
7 terms are inadequate as applied in this case, we decline to
8 find in petitioners' favor. See Lee v. City of Portland, 57 Or
9 App 798, 646 P2d 662 (1982).

10 ASSIGNMENT OF ERROR 11

11 "The Respondent's Planning Commission erred in that
12 there is no substantial evidence in the record to
13 support their denial that there is a lack of a
 transition or buffer zone between the proposed
 development and the adjacent residential development."

14 ASSIGNMENT OF ERROR NO. 12

15 "The Respondent's Planning Commission erred in that
16 there is no substantial evidence in the record to
17 support their findings that the proposed development
 would have too much impact on housing decisions people
 made years ago when they relied on the Metro Plan."

18 In Assignments of Error 11 and 12, petitioners cite the
19 discussion of individual planning commission members and
20 complain that the discussions reveal erroneous understandings
21 of the facts and some misunderstandings as to applicable
22 issues.

23 We do not find error as alleged. The inconsistencies
24 between comments by members of a decisionmaking body and the
25 final order is resolved in favor of the order. McCullough v.
26 City of Baker, 14 Or LUBA 198 (1986); Citadel Corp. v.

1 Tillamook Co., 9 Or LUBA 61; affd 66 Or App 965, 675 P2d 1114
2 (1984). That is, the comments do not form the basis of the
3 city's decision; the order does. It is against the order that
4 petitioner must direct their challenge.

5 The comments of the decisionmakers do not, under these
6 circumstances, provide a basis for remand or reversal.

7 The City of Eugene's decision is affirmed.