

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

4 VINCENT DIMONE, DEBRA DIMONE,
5 and EDWARD DAVIS,
6 *Petitioners,*
7

8 vs.
9

10 CITY OF HILLSBORO,
11 *Respondent,*
12

13 and
14

15 ZOE ANNE ARRINGTON,
16 *Intervenor-Respondent.*
17

18 LUBA Nos. 2001-117 and 2001-118
19

20 FINAL OPINION
21 AND ORDER
22

23 Appeal from the City of Hillsboro.
24

25 Michael J. Lilly, Portland, filed a petition for review and argued on behalf of
26 petitioners Vincent and Debra Dimone.
27

28 Edward Davis, Hillsboro, filed a petition for review and argued on his own behalf.
29

30 Timothy J. Sercombe, Portland, filed a joint response brief and argued on behalf of
31 respondent. With him on the brief was Preston Gates & Ellis, LLP.
32

33 Jack L. Orchard, Portland and Kristin L. Udvari, Portland, filed a joint response brief.
34 With them on the brief was Ball Janik LLP. Jack L. Orchard argued on behalf of intervenor-
35 respondent.
36

37 HOLSTUN, Board Member; BRIGGS, Board Chair; BASSHAM, Board Member,
38 participated in the decision.
39

40 AFFIRMED

12/11/2001

41
42 You are entitled to judicial review of this Order. Judicial review is governed by the
43 provisions of ORS 197.850.
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NATURE OF THE DECISION

Petitioners appeal a city decision that amends the zoning map designation for property that was annexed by the city in November, 2000.

MOTION TO INTERVENE

Zoe Anne Arrington (intervenor), the owner of the subject property and the appellant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The material facts are not in dispute and we adopt the statement of facts from the joint response brief.

“In 1994, the City of Hillsboro (the ‘City’) and Washington County began to plan for development within an eight-mile study area surrounding the Hillsboro extension of the Westside Light Rail Transit System and the new light rail stations. To coordinate planning efforts for properties outside of City limits, the City and Washington County signed a Memorandum of Understanding (the ‘MOU’) giving the City primary responsibility for Station Area Planning for areas within the city and in the unincorporated areas of Washington County generally within one-half mile of the light rail stations. This MOU delegated Station Area Planning responsibility for the Quatama/185th Avenue Station Community Planning Area (‘SCPA’) to the City of Hillsboro. The Arrington Property is within the Quatama/185th SCPA, but was then outside the City limits. * * *

“* * * * *

“To implement the future SCPA plans, the City proposed (and subsequently adopted) a number of amendments to its Comprehensive Plan and Zoning Code. * * * In August, 1996, the City adopted Ordinance No. 4454, which identified the boundaries of the SCPAs and amended the Comprehensive Plan designations for all properties within the SCPAs to ‘Station Community Planning Area.’ As part of the process, [14] implementing SCPA zones were created, to be applied to properties in the SCPAs. The City subsequently adopted Ordinance No. 4545, approving recommended zoning designations for properties within the Quatama/185th SCPA, in April 1997. In Ordinance No. 4545, the City Council determined that the Arrington Property should be zoned SCC-MM (Station Community Commercial-Multi Modal). The SCC-

1 MM zone permits a variety of uses, including residential, commercial, office
2 and community service.

3 “Pursuant to the MOU with Washington County, the County was to amend its
4 planning and zoning designations for properties within the SCPA areas
5 consistent with the SCPA designations adopted by the City Council.
6 However, * * * the County did not adopt the City zoning designations. Thus,
7 the Arrington Property, which was outside the city limits when the City
8 approved the SCC-MM zone for the property, retained the County R-6
9 Residential zoning designations, but carried a ‘shadow zone’ of SCC-MM as
10 the City’s intended zoning for that property pursuant to Ordinance No. 4545.
11 The County’s R-6 zone is, itself, inconsistent with the SCPA zoning scheme.
12 The County has no SCPA zones. * * *

13 “As the City began to annex properties within the SCPAs, the City * * *
14 applied the respective SCPA shadow zones to the properties. However, a
15 dispute between the Tualatin Hills Park and Recreation District * * * and
16 several other governmental entities regarding park service boundaries delayed
17 annexation of the Arrington Property until November, 2000. Soon after
18 annexation of the Arrington Property became effective, the City Planning
19 Department requested that the Planning Commission consider approval of a
20 resolution to initiate a zone change from County R-6 to City SCC-MM. On
21 January 10, 2001, the Planning Commission [initiated] a zone change to
22 officially apply the SCC-MM zone to the Arrington Property. The
23 Commission referred the zone change request to the City Planning and Zoning
24 Hearings Board (‘PZHB’) for a public hearing.

25 “[T]he PZHB voted on April 26, 2001 to deny the proposed zone change.
26 Intervenor-Respondent appealed the PZHB’s decision to the City Council.
27 The Council held a partial *de novo* hearing and reversed the PZHB’s decision,
28 finding that the proposed zone change complied with the City’s zone change
29 criteria and the intended SCPA designation. * * *” Joint Response Brief 7-9
30 (record citations and footnotes omitted).

31 In summary, the *city* comprehensive plan map designation for the subject property is
32 SCPA. The *county* R-6 zoning map designation for the property is inconsistent with the
33 city’s SCPA comprehensive plan map designation and needs to be changed now that the
34 property has been annexed by the city. The challenged decision applies the city’s SCC-MM
35 zoning map designation to the property. The questions presented in this appeal are whether
36 the city (1) failed to demonstrate that its decision complies with applicable rezoning criteria
37 and (2) committed other errors in changing the zoning map designation.

1 **INTRODUCTION**

2 City of Hillsboro Zoning Ordinance (HZO) Volume I, Section 114(2) establishes the
3 following criteria for zoning map amendments:

4 “a. That the request must conform with the Hillsboro Comprehensive Plan
5 and this Ordinance;

6 “b. That, where more than one designation is available to implement the
7 Comprehensive Plan designation * * *, the applicant must justify the
8 particular zoning being sought and show that it is best suited for the
9 specific site, based upon specific policies of the Hillsboro
10 Comprehensive Plan.”

11 Of the 14 zoning districts that apply within the Hillsboro Comprehensive Plan (HCP)
12 SCPA area, the city identified three that were potentially applicable to the subject property:
13 (1) Station Community Residential—Low Density (SCR-LD); (2) Station Community
14 Residential—Medium Density (SCR-MD) and (3) Station Community Commercial—Multi-
15 Modal (SCC-MM). As we have already noted, the SCC-MM zone was applied to the subject
16 property. Although the SCR-LD and SCR-MD zones are nominally residential zones and the
17 SCC-MM zone is nominally a commercial zone, a number of different multiple family
18 housing types are also permitted uses in the SCC-MM zone. HZO Volume II, 24-25 (Tables
19 1 and 2). All three zones may be applied to property, such as the subject property, that is
20 located more than 2,600 feet from a light rail station site. HZO Volume II, 3-4.

21 A number of petitioners’ assignments of error are directed at the city’s findings
22 concerning provisions of the City of Hillsboro Comprehensive Plan (HCP), which must be
23 considered under HZO Volume I, Section 114(2)(a) and (b).¹ We address those arguments
24 first, before turning to the parties’ remaining arguments.

25 **FIRST ASSIGNMENT OF ERROR (DAVIS)**

26 HCP Urbanization Implementation Measure I provides, in relevant part:

¹It is not always clear whether petitioners allege the city’s consideration of those HCP provisions implicate the criteria at HZO Volume I, Section 114(2)(a) or (b) or both.

1 “* * * To meet the burden of proof for a proposed zone change, it is both
2 necessary and sufficient to show that the proposed zone is consistent with and
3 represents the highest use allowed by the Comprehensive Plan Land Use Map,
4 and *in the case of zone changes in residential areas, the proposed zone shall*
5 *allow development of housing at a density within the range designated by the*
6 *Land Use Map. * * **” (Emphasis added.)

7 Petitioner argues that the subject property is properly viewed as a residential area and
8 that, under HCP Urbanization Implementation Measure I, the property must be zoned to
9 allow *only* housing. We understand petitioner to argue that because the SCC-MM zone
10 allows both commercial and residential development, it may not be applied to the subject
11 property.²

12 The city and intervenor-respondent (respondents) dispute petitioner’s reading of HCP
13 Urbanization Implementation Measure I. The property is largely undeveloped. Respondents
14 argue that while the subject property is presently zoned R-6, its comprehensive plan
15 designation is SCPA, which is not a residential plan designation. Respondents dispute that
16 the subject property is properly viewed as a residential area. We agree with respondents.

17 Even if the subject property were properly viewed as a residential area, respondents
18 argue that HCP Urbanization Implementation Measure I only requires that “the proposed
19 zone shall *allow* development of housing at a density within the range designated by the
20 [SCPA map designation].” According to respondents, the SCPA plan designation does not
21 mandate housing density ranges and petitioner Davis does not identify any such mandate.
22 The SCC-MM zone permits several kinds of multi-family residential development.
23 According to respondents, the SCC-MM zone therefore *allows* development of housing
24 consistent with the SCPA comprehensive plan designation. Respondents contend that HCP
25 Urbanization Implementation Measure I only requires that the zone *allow* residential

²A recurring point of contention between the parties is that, although the SCC-MM zone allows both commercial and residential development, the present owner plans to develop the property commercially.

1 development, it does not require that the zone *mandate* residential development. We agree
2 with respondents on this point as well.

3 The first assignment of error (Davis) is denied.

4 **THIRD ASSIGNMENT OF ERROR (DAVIS) AND FIRST ASSIGNMENT OF**
5 **ERROR, PART C (DIMONE)**

6 Station Area Comprehensive Planning (SACP) Policy VI (Quatama/185th) provides:

7 “The City *should* work with Washington County to ensure that lands generally
8 west of 205th Avenue to 216th Avenue and south of the Quatama /205th Station
9 to Baseline Road are planned for transit-oriented residential development.”
10 Record 132 (emphasis added).

11 The PZHB found that SACP Policy VI required that the zoning applied to the subject
12 property must assure at least some residential development. Because SCC-MM would allow
13 the subject property to be developed commercially without including any residential
14 development, the PZHB found SCC-MM zoning would not be consistent with SACP Policy
15 VI. Record 132-33.

16 The city council rejected the PZHB’s interpretation of SACP Policy VI for two
17 reasons. The city council fundamentally disagreed that SACP Policy VI imposed a
18 mandatory requirement for planning for transit-oriented residential use. Rather, the policy is
19 expressed as a nonmandatory “should” and directs that the city engage in a planning exercise
20 to that end with Washington County, which the city council noted has been done.

21 The city council also rejected the PZHB’s conclusion that the policy requires that the
22 zoning applied to the property must assure at least some residential development. The city
23 council concluded that because SCC-MM zoning allowed residential development as a
24 permitted use, any obligation to plan the property for residential development under SACP
25 Policy VI was satisfied.

26 Respondents argue, and we agree, that both of the above interpretations of SACP
27 Policy VI are well within the city’s discretion under ORS 197.829(1) and *Clark v. Jackson*
28 *County*, 313 Or 508, 836 P2d 710 (1992). Even without *Clark* deference, we have frequently

1 sustained similar interpretations of regulatory provisions that are expressed as “shoulds” or
2 are written in similar nonmandatory language. *Neuharth v. City of Salem*, 25 Or LUBA 267,
3 277-78 (1993); *Moorefield v. City of Corvallis*, 18 Or LUBA 95, 118 (1989); *Bennett v. City*
4 *of Dallas*, 17 Or LUBA 450, 456-57, *aff’d* 96 Or App 645, 773 P2d 1340 (1989); *Standard*
5 *Insurance Co. v. Washington County*, 16 Or LUBA 30, 37-38 (1987). We also have some
6 difficulty seeing how a zoning district that permits residential development outright could
7 possibly violate SACP Policy VI. That policy simply is not as strongly worded as petitioners
8 argue it is. It does not mandate *exclusive* residential development or *any* residential
9 development. It simply calls for certain lands to be “planned for transit-oriented residential
10 development.”

11 We have some question whether SACP Policy VI applies at all to this decision to
12 *rezone* the subject property without changing the comprehensive plan map designation.
13 Even if we assume the “planned for” language in SACP Policy VI encompasses rezoning, we
14 agree with the city council’s conclusion that placing the property into a zone that allows
15 residential development outright is sufficient to plan the property for residential
16 development.³

17 The third assignment of error (Davis) and the first assignment of error, part c
18 (Dimone) are denied.

19 **SECOND ASSIGNMENT OF ERROR (DAVIS) AND SECOND ASSIGNMENT OF**
20 **ERROR (DIMONE)**

21 As relevant, HCP Urbanization Implementation Measure A(5) provides:

22 “The infill of vacant, bypassed lands, between areas of development, at an
23 urban level, shall be encouraged. Appropriate measures shall be taken to

³No petitioner argues that the residential development that is allowed under the SCC-MM zone does not qualify as transit-oriented residential development. Petitioners’ arguments focus exclusively on the failure of the SCC-MM zone to mandate that development of SCC-MM zoned property must include some residential development.

1 insure that new development in infill areas is compatible with existing
2 developed areas. * * *

3 The parties apparently agree that HZO Volume I, Section 114(2)(a) and (b) require that the
4 city apply HCP Urbanization Implementation Measure A(5) and take “[a]ppropriate
5 measures” to ensure that development of the subject property under SCC-MM zoning will be
6 compatible with existing developed areas.

7 The city’s findings addressing compatibility concerns include the following:

8 “* * * The Council * * * finds that there is sufficient acreage included within
9 the Arrington tract to allow appropriate buffering, mitigation and other design
10 and planning techniques to make SCC-MM uses compatible with the existing
11 developed areas. The Council finds that the PZHB was not correct in its
12 statement that ‘large, well-established residential neighborhoods * * *
13 virtually surround the [Arrington] site on three sides.’ [T]he Arrington
14 Property * * * is adjacent to an existing neighborhood * * * on the north,
15 only.

16 “* * * * *

17 “Several neighbors opposed the SCC-MM zoning because they argue that
18 SCC-MM uses will create noise, light, automobile activity, glare and other
19 intrusive activity affecting their residential use. The Council finds that the
20 City’s Development Review process has specific provisions to deal with such
21 matters through site planning, buffering, landscaping and other mitigation
22 measures. The Council further finds that similar concerns have been
23 expressed in the past about large-scale commercial uses such as the Hillsboro
24 Esplanade and the Hillsboro Promenade. In each instance, site planning
25 techniques were used during the Development Review process to mitigate the
26 impacts of more intensive, non-residential uses on adjoining residential areas.
27 The Council expects that similar treatment will occur here.

28 “Additionally, the Council premises its approval of the SCC-MM zone on the
29 Conditions included with the attached Order. These Conditions likewise
30 address the neighbors’ concerns. The Council takes specific note of
31 opportunities for the neighbors to comment upon the future development and
32 use of the property as part of the Development Review process. While the
33 Council concurs that certain off-site impacts can have a detrimental [e]ffect on
34 the neighbors’ property, any form of new development on the Arrington
35 Property will have some impacts in light of the Arrington Property’s current
36 undeveloped condition. The City’s subsequent review processes are designed
37 to deal specifically with these kinds of off-site impacts.” Record 17-18.

1 Petitioner Davis argues that the city may not rely on conditions of approval to ensure
2 compatibility under HCP Urbanization Implementation Measure A(5) because that provision
3 does not itself authorize conditions of approval. Respondents contend that HCP
4 Urbanization Implementation Measure A(5) expressly requires “[a]ppropriate measures” to
5 ensure compatibility, without specifying or limiting what those measures may be. Further,
6 respondents point out that HZO Volume I, Section 114(1) expressly authorizes the use of
7 conditions when rezoning.⁴ We agree the city did not err by relying in part on conditions of
8 approval to ensure compatibility.

9 Petitioners Dimone argue that the city’s findings mischaracterize the nature of the
10 adjoining property and fail to recognize residential development that (1) is located near the
11 subject property to the west and (2) adjoins the subject property on the east and south. We
12 agree with respondents that the city’s findings simply characterize the facts differently than
13 petitioners would characterize those same facts. The city findings point out that the subject
14 property is bounded on the west and south by arterial highways that are planned to include
15 five travel lanes. We understand the city’s findings to take the view that residential
16 development that lies on the opposite side of such arterials from the subject property does not
17 adjoin the subject property. Similarly, the city’s findings recognize that a Bonneville Power
18 Administration (BPA) power line right of way crosses the eastern part of the subject
19 property, limiting the development that may occur next to the existing residential
20 development to the east.⁵ We see no error in the way the city’s findings describe the
21 adjoining residential development.

⁴As relevant, HZO Volume I, Section 114(1) provides:

“Amendment of this Ordinance by amending the zoning map may be contingent upon compliance with conditions found necessary to accomplish its purposes of this Ordinance and implement the goals and policies of the Hillsboro Comprehensive Plan. * * *”

⁵Petitioners are concerned that the area of the property that is subject to the BPA right of way will become a parking lot.

1 Finally, petitioners Dimone fault the city for relying on its conditions of approval,
2 and the development review process that will be applied at the time the subject property is
3 developed, to ensure compatibility with adjoining properties.⁶ Petitioners Dimone contend
4 the city’s findings are insufficient to demonstrate that compatibility will be achieved at the
5 time of development.

6 We conclude the city’s findings are adequate. The compatibility requirement that is
7 imposed by HCP Urbanization Implementation Measure A(5) applies at the time of rezoning
8 when the precise nature of development may not be known, as is the case here. Given that
9 context, and the city’s findings that the large currently undeveloped property will allow
10 buffering and other mitigation techniques to be employed, we believe it is appropriate and
11 adequate for the city to rely on subsequent development review to develop the precise
12 measures that will be needed to ensure compatibility.

13 The second assignment of error (Davis) and second assignment of error (Dimone) are
14 denied.

⁶One of the conditions of approval that the city imposed is as follows:

- “6) Development of the site shall conform to plans reviewed and approved pursuant to Section 133 Development Review / Approval of Plans. Notice of receipt of any application for Development Review approval shall be sent to owners of surrounding properties as required under Zoning Ordinance Section 116(2), excluding publication in a local newspaper. To mitigate potential adverse impacts between higher intensity residential, commercial, or mixed use uses on this site and existing residential uses to the north and east, the Development Review application shall consider, but not be limited to, the following design requirements:
 - “a. preservation to the greatest extent practicable of the mature evergreen trees on the western border of Tax Lots 200, 10700, and 10800 * * *;
 - “b. visual, noise, and light buffering of all higher intensity residential, commercial, or mixed use activities, including parking and loading, from adjacent existing residential properties. Buffering may include, but not be limited to, increased setbacks; use of vegetated buffers, limitations on placement of service accesses, directional lighting, sound attenuation walls, and other recognized mitigation techniques. Documentation regarding the projected effectiveness of any proposed mitigation techniques shall be included with the Development Review application.” Record 4-5.

1 **FOURTH ASSIGNMENT OF ERROR (DAVIS) AND FIRST ASSIGNMENT OF**
2 **ERROR, PART A (DIMONE)**

3 The reasons the city gave for applying the SCC-MM zone to the subject property
4 include the following:

5 “* * * As part of the SCPA process, the City analyzed the needs for various
6 inventories of land both generally within the City and within the SCPAs. A
7 determination was made that there is a significant shortfall of commercial land
8 inventory in the Quatama/185th area and that because of the Arrington
9 Property’s size, configuration and location, it could serve as an additional
10 commercial inventory resource through the application of the SCC-MM zone.

11 “* * * * *

12 “As additional support for the SCC-MM zoning, the Council has reviewed
13 actions taken by the City in 1998-’99 concerning the adjacent Gabrilis
14 property.

15 “The findings in the Gabrilis Plan amendment and rezoning applications,
16 which are incorporated herein by this reference, document the need for more
17 property available for commercial use. * * * Another important factor in the
18 City’s decision to redesignate the Gabrilis property to SCC-MM was the need
19 to create a block of property, zoned identically, that could be managed
20 effectively for access and circulation purposes. As noted in the Gabrilis
21 decisions, the City did not want to create obvious traffic conflicts by leaving
22 the Gabrilis parcel in residential use with the Arrington Property designated
23 SCC-MM.” Record 12-14.

24 Petitioners argue there is not substantial evidence in the record to establish a current shortage
25 of commercial land. Petitioners contend that the study that supported the 1997 SCPA
26 conclusion that additional commercial land is needed is not in the record.

27 Petitioners do not explain why they believe the city’s finding concerning a need for
28 commercially zoned land is critical to the decision. Petitioners do not cite any legal
29 requirement that the city find a current unmet need for commercial land as a prerequisite to
30 changing the zoning of the subject property to SCC-MM. We agree with respondents that
31 the city’s findings are most accurately described as identifying a number of factors that

1 justify applying the SCC-MM zone, which allows commercial development.⁷ Those factors
2 include the 1997 SCPA planning process, which concluded that there was a need for
3 additional commercial land in 1997. Another factor was the 1999 rezoning of the Gabrilis
4 property, which both recognized a need for commercial land and the desirability of
5 developing the Gabrilis property and the subject property commercially so that they could be
6 developed in a way that would avoid conflicts.⁸ We agree with respondents that each of
7 these cited factors lends some support to the city’s ultimate decision to apply SCC-MM
8 zoning. We also agree with respondents that the city’s reliance on the 1997 SCPA planning
9 process conclusion concerning a shortage of commercial land is not rendered improper by the
10 city’s failure to include in the record the study that supported that conclusion in 1997.

11 We also note that although evidence was submitted to demonstrate a need for land
12 designated for residential development, respondents again point out that the SCC-MM zone
13 permits residential development outright at densities that exceed the densities permitted
14 under the current R-6 zoning. Therefore, respondents argue that even if there were also a
15 need for more land zoned to permit residential development, the SCC-MM zone permits such
16 residential development.⁹

⁷The city’s findings that a need for commercial land has been recognized in the past are not the only findings that explain why the city council believes the SCC-MM zone is the best of the three available options. The city council also adopted the following findings, which petitioners do not challenge:

“* * * The Arrington Property is at the outer perimeter of the Quatama/185th SCPA. One of the principle features of the SCC-MM District is its availability to serve both transit and auto use by placing automobile-intensive uses at locations where the street system will support such uses and which will not adversely impact nearby transit-supportive development. The Arrington Property is situated at the intersection of two arterial streets and is of a size and topography that it can support automobile-intensive uses. * * *” Record 12.

⁸This desire to coordinate commercial development on the subject property and the Gabrilis property would appear to apply without regard to the issue of whether there is a current unmet need for additional commercial land.

⁹The city council ultimately concluded the subject property is suited for the variety of uses that are allowed in the SCC-MM zone:

1 We agree with respondents that petitioners’ challenges to the city’s findings
2 concerning commercial land needs provide no basis for reversal or remand. The city’s
3 reliance on past determinations that commercial lands were needed may not establish that
4 there is a current need for commercially zoned land, but we agree with respondents that it
5 was not error to rely on those past determinations as factors that support SCC-MM zoning
6 for the property. Moreover, as we have already noted, the disputed prior determinations of
7 need for commercial land are not the only reasons the city council gave for applying the
8 SCC-MM zone. The city council’s findings concerning (1) a desire to avoid development
9 conflicts between the subject property and the Gabrilis property and (2) the property’s
10 location on the periphery of the SCPA and proximity to arterials and suitability for
11 development are other factors the city council relied on in selecting the SCC-MM zoning and
12 those findings are not challenged. *See* ns 7 and 8.

13 The fourth assignment of error (Davis) and first assignment of error, part a (Dimone)
14 are denied.

15 **FIRST ASSIGNMENT OF ERROR, PART B (DIMONE)**

16 The city council offered the following explanation for determining that the property
17 should not be zoned SCR-LD:

18 “As to the SCR-LD District, the zone description states that it is ‘specifically
19 intended to assure quality’ residential dwelling units. The Council finds that
20 with the proximity of the Arrington Property to NW Cornelius Pass Road and
21 Baseline Road and the existence of the BPA right-of-way and high-voltage
22 lines on the Arrington Property, very little of the Arrington Property would be
23 available for ‘quality’ dwelling units. [The SCR-LD D]istrict’s other function
24 is as an in-fill area predominantly surrounded by low-density residential
25 development where higher density development is inconsistent with the
26 neighborhood. The Arrington Property is surrounded on two sides by arterial
27 streets and adjoining commercial property (the Gabrilis property). Its east
28 boundary is adjacent to a single-family area. However, the BPA right-of-way

“[T]he Council also finds that the size and location of the Arrington Property is well-suited for the flexible and varied uses permitted within the SCC-MM District, including office, community service-institutional, retail and residential.” Record 12.

1 and transmission lines so significantly limit development that the usable
2 portion of the Arrington Property is west of the BPA right of way.” Record
3 13.

4 Petitioners argue the above findings are inadequate to explain why SCR-LD zoning is not the
5 best of the available zones and that the findings are not supported by the record.

6 The record establishes the existence and location of the features that the city cites in
7 concluding that they render development of quality housing unlikely. The city council also
8 relies on those features to conclude they render the subject property inappropriate to serve
9 the SCR-LD district’s other function “as an infill area.”¹⁰ The city council’s findings are
10 adequate and supported by the record.

11 The first assignment of error, part b (Dimone) is denied.

12 **THIRD ASSIGNMENT OF ERROR (DIMONE)**

13 In finding that the PZHB was incorrect in assuming that the property could not be
14 developed under SCC-MM zoning in a way that would be compatible with the surrounding
15 properties, the city council found “[t]here is no evidence that indicates this is the case.”
16 Record 16. Petitioners argue the quoted finding shows the city council improperly shifted
17 the burden of proof to petitioners on the issue of compatibility.

18 Isolated statements, such as the finding quoted above, are insufficient to demonstrate
19 an improper shifting of the burden of proof in a quasi-judicial land use proceeding. *Carlson*
20 *v. Benton County*, 37 Or LUBA 897, 917-18 (2000); *Washington Co. Farm Bureau v.*
21 *Washington Co.*, 21 Or LUBA 51, 63-64 (1991). Immediately following this finding are
22 additional city council findings in which the city concludes the property can be developed
23 under SCC-MM zoning in a way that will be compatible with adjoining properties. Viewed
24 in that context, it is clear that the city council did not improperly shift the burden of proof to
25 petitioners.

¹⁰Petitioners do not challenge this conclusion.

1 The third assignment of error (Dimone) is denied.

2 **FOURTH ASSIGNMENT OF ERROR (DIMONE) AND FIFTH ASSIGNMENT OF**
3 **ERROR (DAVIS)**

4 Petitioners argue the city erred by giving inappropriate deference to its prior planning
5 actions that led to a shadow SCC-MM zone in 1997 but did not result in a final decision to
6 rezone the subject property.¹¹

7 It is true that the city repeatedly cites to its prior decision to designate the property
8 SCPA and to place the shadow SCC-MM zone on the property. To the extent the city’s
9 findings emphasize that the property is currently planned SCPA, and that a number of
10 planning assumptions and decisions were made to apply that planning designation, such
11 emphasis is entirely appropriate. We also see nothing that is legally improper in the city
12 council’s suggestions that it would be unfair or unwise to apply a different zone now, so long
13 as the city council recognizes that (1) its prior decision did not result in a final decision to
14 rezone the property; and (2) the city council must demonstrate compliance with HZO
15 Volume I, Section 114(2) to do so now. We conclude that the city council recognized that its
16 rezoning decision must be based on the applicable approval criteria and could not rest
17 entirely on a prior planning process that did not result in a final rezoning decision.

18 The fourth assignment of error (Dimone) and fifth assignment of error (Davis) are
19 denied.

20 **SIXTH AND SEVENTH ASSIGNMENTS OF ERROR (DAVIS)**

21 The city council has adopted a resolution to establish procedures for conducting land
22 use hearings. As relevant, the resolution includes the following requirement:

23 “* * * In its decision findings, the Council shall explain its reasons for
24 allowing a *de novo* hearing on the merits or a partial *de novo* hearing.”

¹¹Petitioner Davis also argues that the city failed to provide required notice in 1997 before adopting the SCC-MM shadow zone for the subject property. As respondents correctly note in response, the city’s prior decision to apply the SCC-MM shadow zone is not the subject of this appeal.

1 Petitioner argues the city council conducted a partial *de novo* hearing in this matter and failed
2 to explain its reasons for doing so in its findings.

3 Although the city council’s findings do not explain its reasons for allowing a partial
4 *de novo* hearing in this matter, the minutes of the May 15, 2001 hearing set out the
5 applicant’s request for a partial *de novo* hearing and the city council’s decision to allow the
6 request. Record 112-13. The city’s failure to include the required explanation in the city
7 council’s findings is procedural error.

8 LUBA will not remand a decision based on procedural error, unless that error results
9 in prejudice to petitioner’s substantial rights. ORS 197.835(9)(a)(B); *Mason v. Linn County*,
10 13 Or LUBA 1, 4 (1984), *aff’d in part rev’d and rem’d on other grounds sub nom Mason v.*
11 *Mountain River Estates*, 73 Or App 334, 698 P2d 529 (1985). Petitioner does not allege or
12 establish that the city’s failure to include the requisite explanatory findings resulted in
13 prejudice to his substantial rights.

14 Petitioner also argues that ORS 197.763, which establishes procedures for conducting
15 quasi-judicial land use hearings, does not allow *de novo* hearings. However, as respondents
16 correctly note, the relevant statute concerning local appeals of decisions by subordinate
17 hearings bodies such as the PZHB is ORS 227.180(1)(a), which provides as follows:

18 “A party aggrieved by the action of a hearings officer may appeal the action to
19 the planning commission or council of the city, or both, however the council
20 prescribes. The appellate authority on its own motion may review the action.
21 The procedure for such an appeal or review shall be prescribed by the
22 council[.]”

23 We are aware of no statutory restriction on the city council’s authority to allow on-the-
24 record, *de novo* or partial *de novo* hearings in local appeals, as it sees fit.

25 The sixth and seventh assignments of error (Davis) are denied.

26 **EIGHTH ASSIGNMENT OF ERROR (DAVIS)**

27 Petitioner challenges the city council’s decision in this matter to allow the prevailing
28 property owner’s attorney to draft the findings that were adopted in support of the challenged

1 rezoning decision. Petitioner cites no authority that holds this common practice to be
2 reversible error. The Oregon Supreme Court's view on the issue is contrary to petitioner's
3 position.

4 "* * * In contested land-use proceedings involving significant changes and
5 the presentation of large amounts of conflicting evidence, the major
6 proponents and opponents of the change will frequently be represented by
7 counsel. In such cases it would be quite proper for the governing body to
8 request the parties to prepare and submit proposed findings which could be
9 reviewed and used, as appropriate, in preparing its own final order."
10 *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 21, 569 P2d
11 1063 (1977).

12 The eighth assignment of error (Davis) is denied.

13 The city's decision is affirmed.