LAND USE
BOARD OF APPEALS
SEP 2 3 36 PM '80

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3	Henry S. Dobaj, Petitioner,	LUBA No. 80-002
4-5	vs.	
6-10	City of Beaverton, Oregon, a municipal corporation; Jack Nelson, Mayor and member of the City Council of the City of Beaverton; Lester Knudson, Ann Schmidt, Homer Speer and Larry Cole, Council members of the City of Beaverton; Neal and Laura Berlin, Sandra Baderman, Dale D. Conn, Ralph Fear and Mike Porter, Respondents.	FINAL OPINION AND ORDER

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13 Appeal from City of Beaverton.

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15 Diane W. Spies, Portland, filed the petition and argued the cause for Petitioner Dobaj.

16 Eleanor S. Baxendale, Assistant City Attorney for Beaverton, filed the brief and argued the cause for City of

17 Beaverton.

18 Neal and Laura Berlin, Sandra Baderman, Dale D. Conn, Ralph Fear and Mike Porter filed the brief. Neal Berlin and Dale D.

19 Conn argued the cause on their own behalf.

20 REYNOLDS, Chief Referee; COX, Referee; BAGG, Referee; participated in the opinion.

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22 REVERSED and REMANDED 9/02/80

23 You are entitled to Judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

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REYNOLDS, Referee

STATEMENT OF FACTS

Petitioner appeals the city's denial of his request to amend the Beaverton Area General Plan (BAGP) map to change the present designation of his three acre parcel from urban standard residential to neighborhood commercial (CN). The BAGP, although adopted prior to the adoption of the SW goals and although apparently amended from time to time since then, has not been acknowledged by LCDC as in compliance with the goals.

Ordinance No. 1800 which officially adopted the BAGP specifies when amendents may be made and the procedures which are to be followed for amendments. Section 6 provides:

> "The council from time to time may amend the plan on the basis of further studies or changed circumstances or conditions. Proposed amendments may be initiated by the Planning Commission or by the Council. In the case of an amendment to the map portion of the Plan, the Commission may recommend and the council may attach conditions to the approval of such amendment.***"

Section 7 specifies the procedures to be followed for amendment:

> "Section 7. Amendment Procedure. Before the council may adopt any amendment to the plan, the planning commission shall conduct at least one public hearing on the proposed amendment and shall submit a recommedation to the council. Upon receipt of the recommendation, the council shall conduct at least one public hearing on the proposed amendment. After the close of the public hearing, the council may adopt, reject, or adopt with modifications the recommendation of the planning commission. At least 10 days' advance public notice of said hearings shall be published in at least one newspaper of general circulation within

the city. A copy of the proposed amendment shall be kept on file with the city recorder for public inspection for at least 10 days prior to the public hearing and may be sent to other public agencies for comment. The notice provisions of this section shall not restrict the giving of notice by other means, including posting, mailing, radio or television.

"Section 7A. Amendment Application Fees. In order to defray expenses incurred in connection with the processing of applications, the council shall establish, by resolution, a fee to be paid to the city upon the filing of an application for a plan amendment. [Section 7A added by Ordinance No. 3033, passed February 7, 1977.]"

The planning commission conducted a public hearing on petitioner's requested plan amendment. The planning commission considered the planning staff report (recommending approval of the request) and testimony from the applicant and residents of the area who opposed the request, and voted to recommend denial of the request to the council. No written findings were prepared by the planning commission stating the basis for the denial. The minutes, however, reflect that the denial was for the reason that:

"1) the applicant's request lacked the proof needed to support the change; 2) there are alternative commercial neighborhood sites that have not been developed; and 3) additional traffic would be generated by the proposed request."

Petitioner "appealed" the planning commission's recommendation of denial to the city council.[1] Petitioner contended in its appeal brief that its burden of proof was to:

"demonstrate the compliance with all applicable mandatory Land Conservation and Development Commission (*LCDC goals), all applicable goals and policies expressed in the advisory Beaverton Area General Plan

(BAGP), and all other applicable statutory and judicial land use planning guidelines in the state of Oregon and the City of Beaverton."

Petitioner argued, among other things, that it had met this burden of proof, that there was no substantial evidence to the contrary, and that the planning commission had, therefore, erred in recommending denial of the plan change. Petitioner requested that the city council approve the proposal.

The city council conducted a hearing on petitioner's request, announcing that the hearing would be "on the record." Prior to beginning his presentation, petitioner, through his attorney, requested a clarification of what "on the record" meant with respect to who could testify. After some discussion of the matter the mayor ruled that "on the record" meant that only those persons who had previously testified and whose testimony had become a part of the record would be allowed to make comments before the council.

Petitioner then summarized his position as to why the request should be approved.[2] Following this presentation, numerous residents of the area who would be impacted by the proposed amendment and who testified before the planning commission commented in opposition to the request. Petitioner at no time objected to the procedure that was followed by the city council. The only "objection" which was made was that one person who testified before the council had not previously testified. However, subsequent discussion revealed that the person had testified although his name did not appear in the

minutes as having done so.

The council, following lengthy discussion and deliberation, voted to deny the requested plan amendment. The city attorney was directed to prepare written findings of fact, conclusions of law and a final order. These were prepared, submitted to the council, and considered at a subsequent hearing. Petitioner submitted written exceptions to the findings, which exceptions were also considered by the council. The council voted to adopt with a few minor changes the findings as drafted by the city attorney.

FIRST ASSIGNMENT OF ERROR

Petitioner contends that it was error for the city council not to review a tape recording or written transcription of the testimony before the planning commission. Petitioner asserts that the only time a city council may consider minutes in lieu of a full transcription or in lieu of a second de novo hearing is where adequate findings are made by the planning commission. As an additional ground for error, petitioner claims the minutes of the planning commission were "insufficient to insure due process."

While we do not, at first blush at least, believe West v. City of Astoria, 18 Or App 212, 524 P2d 1216 (1974) and Bienz v. City of Dayton, 29 Or App 761, 566 P2d 904 (1977) support petitioner's contention with respect to the need for a full transcript in lieu of adequate findings, we need not reach this issue or the issue of the adequacy of the minutes in this

case. Where a party before the governing body has the opportunity to raise procedural matters which are capable of being cured by the governing body but fails to raise such issues, this Board will not permit such issues to be raised on appeal. See Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 569 P2d 1063 (1977).

In this case the transcript of the hearing before the city council indicates that petitioner had a copy of the planning commission minutes and knew that the city council had before it only these minutes as representative of the testimony before the planning commission. Under such circumstances, when an objection could have enabled the city council to cure the alleged defect, we will not allow objections to first be made on appeal.

SECOND AND THIRD ASSIGNMENTS OF ERROR

Petitioner contends under these assignments of error that the city's findings are not supported by substantial evidence in the record, and that even if sufficient, the city misconstrued the applicable law. Petitioner contends that he proved his entitlement to the plan map amendment as a matter of law because he proved that it conformed with the plan's policies and goals and with specific provisions of applicable statewide goals.

Beaverton's order denying the requested plan map amendment is based upon non-compliance of the proposed amendment with the policies and goals of the BAGP. The order states, essentially,

four reasons why the plan map amendment does not conform to the policies and goals of the BAGP. We will address each of these reasons in turn.

(1) No change in circumstances

In conclusion No. 1 of its order, the city stated no change in circumstances had occurred since 1977 when the city denied this same request and that no change in circumstances had occurred since the plan map was adopted. The only basis stated for this conclusion is that the surrounding property has developed as planned for in the BAGP and as residents in the area expected.

Ordinance No. 1800, sec 6, provides, in pertinent part, as follows:

> "The council from time to time may amend the plan on the basis of further studies or changed circumstances or conditions. Proposed amendments may be initiated by the Planning Commission or by the Council. In the case of an amendment to the map portion of the Plan, the Commission may recommend and the council may attach conditions to the approval of such amendment.***"

Ordinance No. 1800 enables the city to amend its plan on the basis of either a change in circumstances or conditions or "further studies." Thus, the fact that no change in circumstances or conditions may have occurred is not sufficient to enable the city to state that it is powerless to amend the plan if further studies have been conducted.

What is a "further study" is not explained or defined in the BAGP or Ordinance No. 1800. In our view, a "further study"

1 could be an analysis of an element or area of the BAGP
2 conducted by city staff, or it could also include a request for
3 a plan amendment with supporting facts and evidence submitted
4 by a private individual. In the absence of a contrary
5 definition or interpretation by the city, the petitioner's
6 request for a plan map amendment, with a supporting Plan
7 Amendment Study dated as recently as March of 1979 qualifies as
8 a "further study" within the requirement of Ordinance No. 1800.
9 Moreover, there has been a change in circumstance since the
10 BAGP was adopted in 1972 - that being the realignment of
11 Brockman Road which created what petitioner believes to be his
12 irregularly shaped 3.03 acre parcel. While this realignment
13 does not give rise to a duty on the part of the city to amend
14 its plan, it certainly is a sufficient change in circumstance
15 to enable the city to amend its plan provided the amendment
16 would satisfy other aspects of the BAGP and not violate
17 applicable provisions of the statewide planning goals, at least
18 in the absence of an explanation to the contrary in the
19 findings.
20 Accordingly, the city erred in concluding that no change in
21 circumstances had occurred. The city is further in error in
22 asserting that a finding that no change in circumstances had
23 occurred was sufficient for the city to deny the proposed plan
24 amendment when the record clearly shows a "further study" had
25 been conducted.
26 (2) No need

Concerning need, the BAGP states as follows:

> "***They [Neighborhood Commercial Centers] should be spaced from 1 to 1 1/2 miles apart and new locations should be based on realistic economic projections which demonstrate a need for the facilities."

The city's findings of fact show that no site presently designated for CN is less than one mile from the petitioner's property. The findings also concede that the petitioner demonstrated a need empirically via a market study. However, the city concluded that petitioner failed to prove "need" as required by the comprehensive plan because numerous persons testified that they did not want a neighborhood commercial center in their neighborhood and because "[s]ites designated Neighborhood Commercial and Community Commercial exist in the immediate vicinity,...are available for development should a need for such a facility be manifested...[and] appear to be well enough located to be convenient without encouraging many unplanned item trips."

The city's finding that no need was demonstrated by petitioner is based upon need standards not contained in or in conflict with those set forth in the BAGP as quoted above. Need, according to the BAGP, is to be determined on the basis of economic data and distance between sites. Citizen testimony did not refute petitioner's market study which showed that even if all presently designated CN sites were developed there would still be a deficit of 46,000 square feet of neighborhood

1 commercial floor area in the south Beaverton area. Citizen
2 testimony was essentially to the effect that a neighborhood
3 center was not wanted. The specific desires of neighbors in
4 the area is not a criteria or standard enunciated in the
5 comprehensive plan for determining need.

6 The remainder of the city's finding concerning need is in
7 conflict with the 1 to 1 1/2 mile standard contained in the
8 BAGP. Whether other sites are in the "immediate vicinity," are
9 "available for development" and are "convenient" enough to
10 residents in the area are considerations beyond the scope of
11 the BAGP. Presumably these matters were all taken into account
12 when the city adopted the 1 to 1 1/2 mile policy in the BAGP.
13 In any event, the city cannot say, consistent with the BAGP,
14 that there is no need for a site because it is too close to
15 other sites when the site meets the distance requirements set
16 forth in the BAGP.

17 Because the city based its finding of no need upon
18 standards either not contained in or in conflict with the
19 standards set forth in the BAGP, the city erred in concluding
20 that petitioner failed to demonstrate need as required by the
21 BAGP.

22 (3) No buffers

23 Concerning lack of buffers, the city concluded:

24 "The lack of proper buffers between the subject property and the Urban Standard Residential areas is
25 contrary to the policy evidenced on the General Plan Map, defeats the expectations of the home owners and
26 will lower property values."

"Buffering" in the above quoted finding refers to urban medium or urban high density development separating urban standard residential areas from commercial areas. See Finding of Fact No. 10.

The presence or absence of "buffers" consisting of medium or high density residential development is not a prerequisite in the BAGP to designation of a neighborhood commercial center in a single family residential area. The BAGP recognizes that commercial centers may be located within residential destricts:

> "Convenience commercial, neighborhood commercial, and community commercial shopping areas <u>may</u> be located within residential districts and should <u>have</u> development standards which recognize the residential area." BAGP, Vol III, P. 56 (emphasis added).

In addition, the BAGP states the following:

> "Of necessity, non-residential uses will have to abut residential areas in different parts of the community and in these instances, any non-residential use should be subject to special development standards in terms of set backs, landscaping, sign regulations, building height and design." <u>Ibid</u>. See also P. 63.

Finally, the BAGP speaks to the matter of locating neighborhood commercial centers in the following:

> "***These facilities and services should be carefully located and their siting and design subject to thorough review to insure compatibility with their surroundings. Neighborhood commercial centers can include more extensive commercial services but would not enjoy the same freedom of location as the small convenience centers.***" <u>Id</u>., at 34.

Nothing in any of the foregoing standards remotely suggests that "buffers" of medium high density residential development <u>must</u> separate a neighborhood commercial center from a single

family residential area. Rather, the "buffers" referred to are in the form of landscaping, special set back requirements, and so forth. The only discussion in the BAGP text concerning multi-family housing being located next to commercial centers appears in the residential section of the BAGP:

> "Medium and high density residential developments should be located where they have good access to arterial streets and are near commercial services or public open space." BAGP, Vol. III at 55.

This requirement or guideline, however, does not appear to be for the purpose of protecting single family residences from commercial centers, but for the purpose of assuring the provision of convenient services to residents in multi-family areas.

The city contends that while not expressly stated in the BAGP text, it is clear from looking at the BAGP map that there exists a policy of requiring multi-family buffering between neighborhood commercial centers and single family residential areas. Even if this were so, however, this is not sufficient to bring this policy to the attention of one applying for a plan map change. We agree with petitioner that one should not have to go on a fishing expedition through the plan map to discern policies not expressed or implied in the plan text itself.

In order for the city to have properly relied upon a requirement that there be buffering of multi-family residential between commercial and single family residential areas, at a

1 minimum it had to announce its intent to rely upon such a
2 requirement sufficiently in advance of its final decision so as
3 to grant the applicant a meaningful opportunity to address the
4 standard. See Marbett v. Portland General Electric, 277 Or
5 447, 463, 561 P2d 154, (1977), Commonwealth Properties, Inc. v.
6 Washington County, 35 Or App 387, 382 P2d 387 (1978). In the
7 present case it appears the applicant first became aware that
8 the city would require a buffer of multi-family housing when he
9 read the city's draft findings prepared after the close of the
10 public hearing before the city council. However, no
11 opportunity appears to have been afforded petitioner to address
12 the buffering requirement between the time the city council
13 first considered the draft findings on December 3, 1979, and
14 the time of their adoption on December 10, 1979. At the
15 December 10, 1979 meeting, petitioner did submit a request for
16 reconsideration based in part upon the city's error in relying
17 upon the previously unannounced buffer standard. In our view,
18 however, a motion for reconsideration does not give an
19 applicant sufficient opportunity to address the question of
20 whether it can or whether it should even have to meet a
21 standard not known or reasonably susceptible of being known to
22 the applicant at the time of the public hearing. Under the
23 circumstnces presented here, the city erred in basing its
24 denial in part upon its finding that a requirement that
25 multi-family housing separate the applicant's property from
26 adjacent single family residential areas had not been met.

1 (4) Undesirable location

2 Of the four bases for denial, the city's finding that the
3 applicant's property was undesirable for a CN site came closest
4 to meeting a standard expressed in the BAGP. The pertinent
5 finding, set forth in the order as conclusion No. 5, states as
6 follows:

7 "Locating a Neighborhood Commercial center by an elementary school is undesirable because it attracts
8 school children into a center which may contain a food store."
9

10 This finding, argues the city, relates to the BAGP policy
11 quoted in the previous section of this opinion which requires
12 the location, siting and design of neighborhood commercial
13 centers to be compatible with their surroundings. However,
14 there is no evidence in the record which supports the concern
15 of the city that were the applicant's property developed as
16 Neighborhood Commercial Center it would attract school
17 children. Nor is there any evidence or explanation in the
18 record as to why even if children would be attracted this would
19 be so undesirable as to cause the center to be incompatible
20 with the surrounding land uses. The council probably inferred
21 that because a grocery store is a permissible use within a
22 Neighborhood Commercial Center that children would be attacted
23 to the center. The council may also have felt that children
24 would cross Davies Road, which separates the school from the
25 applicant's property, more frequently, thus increasing the
26 danger to school children and creating an altogether

1 undesirable situation. But the findings are silent as to the
2 basis for the city's conclusion that school children would be
3 attracted and the reason why this would be undesirable.
4 There was, however, conflicting evidence in the record as
5 to whether the safety of school children travelling to and from
6 the elementary school would be unreasonably impaired were the
7 applicant's property to be developed as a neighborhood
8 commercial center. The city's findings do not address this
9 evidence. We are unwilling to conclude in the face of this
10 conflicting evidence that the applicant proved as a matter of
11 law that his proposed plan amendment conformed to the BAGP
12 policies and goals relative to compatibility of the proposed
13 use with surrounding land uses.
14 CONCLUSION
15 The city's findings that the applicant's proposed plan
16 amendment does not conform to the BAGP policies and goals are
17 inadequate to justify denial of the proposed amendment on that
18 basis. Because, however, there is conflicting evidence in the
19 record as to whether one of the BAGP policies has been met,
20 this board cannot say the applicant proved conformance with the
21 BAGP policies and goals as a matter of law.[3] This board
22 must, therefore, reverse and remand this decision to the city
23 for further proceedings consistent with this opinion.
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FOOTNOTES

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[1] Ordinance 1800 provides that the planning commission "shall submit" its recommedation to the city council. Petitioner's "appeal" of the recommendation was unnecessary to place the matter of the recommendation before the city council.

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[2] As part of its presentation, the applicant submitted proposed findings of fact and conclusions of law approving the plan amendment request. The conclusions of law were in summary as follows:

1) The request complies with all applicable LCDC Goals;
2) The request complies with the goals and policies of the BAGP;
3) There is a public need for the request, and the need is best fulfilled by changing the classification on petitioner's property as compared with other available properties.

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[3] The Board mailed to the parties a proposed opinion in which were discussed standard which an applicant for a comprehensive plan map amendment may have to meet in order to be entitled as of right to the proposed amendment. We received supplemental briefs from the parties in response to the proposed opinion. While the Board is desirous of assisting the parties to an appeal in knowing what standards must be met upon remand, the Board is not prepared to set forth in this opinion in an advisory fashion the standards which might be required in order for a proponent of a plan map amendment to be entitled to that amendment as a matter of right.