

BEFORE THE LAND USE BOARD OF APPEALS JAN 30 3 14 PM '87  
OF THE STATE OF OREGON

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3  
4 RALPH AND CAROLYN YOUNGER, )  
5 ROBERT AND DEBBIE RUSSELL, LOU )  
6 AND KATHY JAFFE, RAYMOND AND )  
7 CATHERINE A. HONERLAH, ROBERT )  
8 HARDIN, JR. AND KRISTY HARDIN, )  
9 MARILYN SCHULTZ, DR. ROBERT J. )  
10 AND SUSAN NELSON, ANTHONY AND )  
11 REGGIE BARSOTTI, RON AND JANE )  
12 HARDY CEASE, JOE B. AND JO )  
13 HANSEN, AND TIMOTHY AND MARLA )  
14 NATHAN, AND THE NEIGHBORHOOD )  
15 PROTECTION COALITION, )  
16 )  
17 Petitioners, )  
18 )  
19 vs. )  
20 )  
21 CITY OF PORTLAND, )  
22 )  
23 Respondent. )

LUBA No. 86-046  
FINAL OPINION  
AND ORDER

14 Appeal from City of Portland.

15 Edward J. Sullivan, Portland, filed a petition for review  
16 and argued on behalf of Petitioners Younger, et al. With him  
17 on the brief were Mitchell, Lang & Smith.

18 William A. Gaylord, Portland, filed a petition for review  
19 and argued on behalf of Participant Gaylord. With him on the  
20 brief were Gaylord, Thomas & Eyerman, P.C.

21 Stewart A. Martin, Portland, filed a petition for review  
22 and argued on behalf of Participant Martin. With him on the  
23 brief were Danner, Scott & Martin.

24 Kathryn Beaumont Imperati, Portland, filed a Response Brief  
25 and argued on behalf of Respondent City of Portland.

26 Susan M. Quick, Portland, filed a response brief and argued  
on behalf of Respondents Fred Meyer Real Estate Properties,  
Ltd. and the Hyster Company.

Edward J. Sullivan, Portland, filed a Reply Brief on behalf  
of Petitioners Younger, et al and Participants Gaylord and  
Martin.

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

3 KRESSEL, Referee, did not participate in the decision.

4 AFFIRMED 01/30/87

5 You are entitled to judicial review of this Order.  
6 Judicial review is governed by the provisions of ORS 197.850.  
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1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioners appeal Portland City Ordinance No. 158573. The  
4 ordinance makes comprehensive plan and zoning ordinance map  
5 amendments for certain property located near Broadway and  
6 Northeast 30th Streets in Portland, Oregon. Petitioners ask  
7 that we reverse the ordinance or remand it to the city for  
8 further proceedings.

9 PROCEDURAL HISTORY AND FACTS

10 In July, 1985, Fred Meyer Real Estate Properties, the  
11 Hyster Co. and others, applied for comprehensive plan and zone  
12 changes to facilitate development of the Hyster Company  
13 property as a Fred Meyer shopping center. Hearings were held  
14 before the Portland Hearings Officer in September. On  
15 November 4, 1985, the hearings officer denied the application.

16 The denial was appealed to the Portland City Council, which  
17 held hearings on the appeal on January 8, January 29, February  
18 19, and March 5. At the March 5, 1986 hearing, the council  
19 made a tentative decision to approve the plan amendment, but  
20 denied the zone change. The council held additional hearings  
21 on April 3, May 7, May 14, and June 4, 1986. At the last  
22 meeting, the council granted both the plan amendment and the  
23 zone change by a 3 to 2 vote. This appeal followed.

24 The project site is 17.4 acres and is bounded by Northeast  
25 Weidler Street to the north, Northeast 32nd Street to the east,  
26 the Banfield Freeway to the south and Northeast 28th Street to

1 the west. The neighborhoods immediately adjacent to the  
2 project include both commercial and residential uses. The site  
3 is presently designated for Heavy Manufacturing and General  
4 Manufacturing. The ordinance changes the comprehensive plan  
5 designation to Light Manufacturing and down-zones current  
6 zoning from Heavy Manufacturing and General Manufacturing to  
7 Light Manufacturing. Within the Light Manufacturing zone,  
8 shopping centers, such as the one planned, are permitted uses.

9 The proposed shopping center includes about 28,000 square  
10 feet of office space, and 153,000 square feet devoted to a Fred  
11 Meyer retail store.

#### 12 ASSIGNMENTS OF ERROR

13 Each of three petitioners in this review proceeding make  
14 separate claims for remand and reversal of the city's  
15 decision.

16 All of Petitioner Gaylord's assignments of error address  
17 issues of traffic and transportation associated with the Fred  
18 Meyer project. We will take up Petitioner Gaylord's  
19 assignments of error first.

20 Petitioner Martin makes four assignments of error, each  
21 addressing the impact of the Fred Meyer development on the  
22 surrounding neighborhood and certain economic interests  
23 addressed in the city comprehensive plan.

24 Last, we will consider Petitioner Younger's assignments of  
25 error about procedures, including claims of ex parte contacts  
26 by the mayor and others. Three of Petitioner Younger's

1 assignments of error address the standard to be used in  
2 evaluating the adequacy of the city's findings and their  
3 factual base.<sup>1</sup> The standard of review urged by Younger will  
4 be discussed in our discussion of the substantive assignments  
5 of error.

6 TRAFFIC ISSUES

7 FIRST ASSIGNMENT OF ERROR (Gaylord)

8 "The order is unlawful in substance because the  
9 decision violates portions of Portland's acknowledged  
10 comprehensive plan. The order violates Comprehensive  
11 Plan Goals 2, 3, 6 and 10, and plan policies 2.9,  
12 2.11, 2.12, 2.17, 3.2, 5.11, 6.2, 6.3, 6.10 and 10.4."

11 SECOND ASSIGNMENT OF ERROR (Gaylord)

12 "The order is inconsistent with and contrary to the  
13 aims and purposes of Portland's Comprehensive Plan  
14 goals and policies, taken together, as they relate to  
15 northeast Portland and the neighborhoods surrounding  
16 the subject property."

15 THIRD ASSIGNMENT OF ERROR (Gaylord)

16 "The findings are not supported by substantial  
17 evidence in the whole record."

18 FOURTH ASSIGNMENT OF ERROR (Gaylord)

19 "The city erred by relying on studies, reports,  
20 documents and testimony prepared by the applicant that  
21 are fatally flawed, internally inconsistent and  
22 contradictory, and grossly manipulated to achieve the  
23 desired result."

22 Petitioner Gaylord combines these changes into one argument  
23 which is summarized as follows:

24 "New traffic generated by the decision will  
25 destabilize traffic patterns in the district, derogate  
26 the area's residential character, derogate levels of  
service at crucial intersections and undermine the  
public investment in improvements at Hollywood and  
Lloyd Center, in contravention of Plan Goals and

1 policies and ASCP. The traffic evidence presented by  
2 applicants and relied on by the City was unreliable,  
3 not believable, and does not constitute substantial  
evidence." Petition of Gaylord at 4.2

4 a. Traffic Estimates

5 The city's comprehensive plan "TRANSPORTATION" goal  
6 provides, in part, that the city is to

7 "Promote an efficient and balanced urban  
8 transportation system, consistent with the Arterial  
9 Streets Classification Policy (ASCP), to encourage  
10 energy conservation, reduce air pollution, lessen the  
impact of vehicular traffic in residential  
neighborhoods, and improve access to major employment  
and commercial centers."

11 Petitioner alleges the city's decision does not "lessen the  
12 impact" of traffic on streets, does not improve access to  
13 Lloyd's Center in the Hollywood commercial center and therefore  
14 violates the Goal. Petitioner asserts "all evidence in the  
15 record points to increased traffic on residential streets."  
16 Petition of Gaylord at 38. The increased traffic, according to  
17 petitioner, leads to a violation of the city's Arterial Streets  
18 Classification Policy (ASCP). Petitioner argues that the  
19 street capacity limits in the ASCP are exceeded or are likely  
20 to be exceeded by this development. Petitioner dismisses the  
21 city's finding of compliance with Goal 6 and the ASCP, stating  
22 that the findings are not supported by substantial evidence in  
23 the record.

24 In particular, petitioner argues the city should not have  
25 used the Institute of Traffic Engineers (ITE) trip generation  
26 rate as a basis for predicting the traffic consequences of this

1 development.

2 The table prepared by ITE shows shopping centers generating  
3 a minimum rate of 32 trip ends per 1,000 gross square feet of  
4 useable area, and a maximum rate of 116.1.<sup>3</sup> The applicant  
5 chose an average trip-end rate of 66.7. Petitioner challenges  
6 this choice. Petitioner explains that the ITE manual itself  
7 urges caution in utilizing the trip end standard. The manual  
8 states:

9 "The calculated vehicle trip-end rates based on 1,000  
10 gross square feet exhibited a wide range in results  
for similar sized centers.

11 \* \* \*

12 "The independent variable 1,000 gross square feet of  
13 leasable building area, has not shown a good  
14 correlation for estimating trips, but no other  
variable has been found to better describe a center  
and calculate trip generation rates." Record 1791,  
15 2316-17.

16 The manual goes on to list six factors to consider which  
17 may account for a wide range in trip generation rates,  
18 including newness of the center in a "relatively undeveloped  
19 market area," size of the center, types of tenants and other  
20 factors. Petitioner makes much of the city Hearings Officer's  
21 finding that many of these factors point to a higher than  
22 average rate for the new Fred Meyer center. See Record 2317.

23 Petitioner introduced evidence showing that the previous  
24 estimated Fred Meyer traffic volumes have been low.<sup>4</sup>

25 Petitioner adds that the average found in the ITE manual is  
26 simply an average--that half the time the average will be

1 exceeded.<sup>5</sup>

2 Respondent first argues that petitioner is, in essence,  
3 asking LUBA to weigh their evidence against that of the  
4 respondent, a function we are not entitled to perform as a  
5 reviewer of the record for substantial evidence. See  
6 Homebuilders v. Metropolitan Service District, 54 Or App 60,  
7 633 P2d 1320 (1981). Respondent argues that where both sides  
8 utilize experts who give credible evidence, reliance on either  
9 expert is sustainable. Columbia River Television v. Multnomah  
10 County, 14 Or LUBA 179 (1986); aff'd 78 Or App 699, \_\_\_ P2d \_\_\_  
11 (1986). We agree with this characterization of our standard of  
12 review.

13 The comparison utilized by the applicant's experts is  
14 substantial evidence to support the city's findings. One  
15 expert furnished traffic projections for the Beaverton Fred  
16 Meyer store, the Mill Plain Fred Meyer store, and the Stadium  
17 Fred Meyer store, and the Oregon City Fred Meyer store. The  
18 evidence suggests the applicant's testimony about traffic  
19 volumes generated by the project is reasonable. It is also  
20 apparent from the city's findings that it considered both the  
21 applicant's and the opponents' testimony on this issue, weighed  
22 it, and concluded that the applicant's testimony was more  
23 correct. The city's findings addressed each of petitioner's  
24 concerns.<sup>6</sup> Record 168-178.

25 We do not find the evidence presented by the petitioner to  
26 be necessarily more "believable" than that furnished by the



1 applicant. Further, it is not our function to decide which  
2 evidence is the more correct. Our review of the evidence  
3 suggests that evidence on both sides would support a decision.  
4 That is, either the evidence of the petitioner or that of the  
5 applicant is sufficient to form the basis for a decision. It  
6 is not our place to decide for the city which evidence it  
7 should believe. The city has done what it is required to do.  
8 It considered the evidence on both sides, weighed it (and in so  
9 doing considered its credibility) and made findings. *Braidwood*  
10 *v. City of Portland*, 24 Or App 477, 546 P2d 277 (1976). Under  
11 these circumstances, we can not say that the evidence  
12 supporting the city's decision is not substantial evidence.

13 Home Builders Association of Metropolitan Portland v.  
14 Metropolitan Service District, 54 Or App 60, 633 P2d 1320  
15 (1981).

16 b. Traffic on Particular Streets

17 Petitioner complains that the applicant's intersection  
18 analysis of evening peak traffic at intersections is flawed.  
19 This flaw results in underestimates of traffic on various  
20 streets and at intersections. Petitioner asserts:

21 "It is difficult to believe that during the Christmas  
22 shopping season or at other peak periods, the level of  
23 service would not drop below LOS D." Petition for  
24 Review of Gaylord at 29.

25 LOS D, or Level of Service D is a short-hand description of  
26 90 percent of street capacity. LOS D is considered by most  
traffic experts as a maximum acceptable traffic load for urban

1 areas. The next level, LOS E is 90 to 100 percent of capacity  
2 and typically results in an unstable traffic flow with back-ups  
3 to approaches and intersections. See Record 2131 and Gaylord  
4 Petition at 16.

5 The applicant introduced evidence showing that while  
6 traffic on particular streets may indeed increase as a result  
7 of this project, traffic generally in the area will decrease.  
8 See our discussion under (c), infra. As discussed earlier, the  
9 applicant's evidence regarding traffic loads is just as  
10 believable as that offered by the petitioner. We therefore do  
11 not accept petitioner's premise that the applicant's analysis  
12 of peak traffic levels is wrong.

13 Further, the plan requires an "efficient and balanced urban  
14 transportation system, protecting residential neighborhood  
15 livability while improving access and mobility within  
16 commercial/industrial areas." If we accept petitioner's  
17 traffic estimates as true, the fact that particular service  
18 level may be exceeded at Christmas time does not mean this  
19 comprehensive plan provision is violated. The excess traffic  
20 is temporary, and temporary violation of desirable traffic  
21 levels does not form a basis for reversal or remand.

22 We reject this challenge.

23 c. Traffic and Livability

24 Petitioner argues that residential livability in the area  
25 can not be maintained because of increased traffic occasioned  
26 by the new development. Residential livability is protected by

1 the policies implementing the city's transportation goal. See  
2 p. 7, supra. Petitioner relies on a Hearings Officer's  
3 statement that traffic patterns in the area will change,  
4 thereby causing an additional impact on neighborhood streets.  
5 See Record 2319-2321. Petitioner maintains exposure to  
6 increased traffic will degrade the neighborhood in violation of  
7 Comprehensive Plan Goals 2, 3, and 6, and Comprehensive Plan  
8 Policies 2.9, and 6.2.<sup>7</sup> Petitioner buttresses their argument  
9 by citing to their own expert's testimony. See Gaylord  
10 Petition at 37-38 and Record 1802 and 2134, 2170.

11 Petitioner further complain that a series of mitigation  
12 measures designed to keep traffic out of adjacent residential  
13 neighborhoods (traffic diverters at Northeast 28th, 30th and  
14 32nd) will impede accessibility to persons living in the  
15 neighborhood. This impediment will "harm the neighborhoods."  
16 Petition for Review of Gaylord at 39.<sup>8</sup>

17 Respondents argue that the findings clearly state, and the  
18 evidence shows, that none of the streets in the area will  
19 exceed either engineering or "environmental" capacities. The  
20 "environmental capacity" referred to by applicant's experts is  
21 not a standard in the Portland Comprehensive Plan. The city  
22 uses this term to describe the number of vehicles a street may  
23 accommodate before causing degradation to the nearby area. See  
24 Record 2173-80, 2183.

25 The city relied on studies using a standard of 800-4,000  
26 vehicles per day (V.P.D.) as the measure of the environmental

1 capacity of the roadway. Any traffic in excess of 4,000 V.P.D.  
2 is considered annoying and detrimental to the quality of life  
3 on the street. The city chose the mid-point of 2,000 V.P.D. as  
4 a "reasonable environmental capacity" figure for most streets.  
5 Record 2173, 2183. Based on this range, only one street,  
6 Northeast 24th, will experience traffic over 2000 V.P.D. The  
7 city estimates place the traffic on Northeast 24th at under  
8 4000 V.P.D., the upper limit of "livability." However, the  
9 city noted the width of the street and the fact it now carries  
10 a large volume of traffic. The increase from the Fred Meyer  
11 project will amount to 800 V.P.D. The city states Northeast  
12 24th is better able to handle increased traffic than other  
13 streets in the area. Record 86, 1840, 2401, 2173-80, 2183.

14 The city argues its plan goals and policies are not  
15 violated by a proposal which, while it alters traffic patterns,  
16 does not increase traffic over road classification limits. The  
17 city concludes it is entitled to balance the benefits of the  
18 development against the potential negative traffic impacts in  
19 the neighborhood. Corbett/Terwilliger/Lair Hill Legal Fund, et  
20 al v. City of Portland, et al, 9 Or LUBA 245, 256-260 (1983).

21 We find the city's analysis to be reasonable, and we do not  
22 find the city's use of "environmental capacity" to be error.  
23 Further, a change in traffic patterns does not necessarily mean  
24 a degradation of a neighborhood. See Corbett/Terwilliger, 9 Or  
25 LUBA at 260-262, supra. It is correct that traffic on 24th  
26 Street will increase, but the increase to a point barely within

1 acceptable standards does not mean a violation of city  
2 standards. We do not find the city policies guarantee a  
3 particular existing traffic pattern within neighborhoods.

4 We conclude there is no violation of Goal 6 or Plan  
5 Policies 6.1 and 6.2.

6 d. Mass Transit

7 Petitioner claims this proposal violates city plan policies  
8 encouraging investments in businesses supported by mass  
9 transit. Petitioner notes there is considerable city money  
10 invested in light rail for the Lloyd Center and the Hollywood  
11 Business District. Petitioner says the city found development  
12 of the Hyster site would enhance this investment, but  
13 petitioner argues the evidence is to the contrary. The Fred  
14 Meyer project, when completed, will be served by automobile  
15 traffic. Automobile use discourages transit use, according to  
16 petitioner. Also, petitioner believes the Hollywood District  
17 will suffer loss of business, as customers will be drawn to the  
18 new store. The shift in customers "cannot help but impair the  
19 city's investment in light rail at Hollywood." Petitioner  
20 Gaylord's Brief at 44.

21 We understand petitioner to argue that the proposal  
22 violates Transit Policy 2.12, encouraging transit; Policy 2.11,  
23 calling for expansion of districts adjacent to transit; Policy  
24 2.17, calling for increased transit opportunities; Policy 5.11,  
25 calling for the city to promote transit access; and Policy  
26 6.10, calling for the city to implement the Light Rail

1 Program. However, as respondent correctly notes, the policies  
2 do not suggest that commercial projects not located at a light  
3 rail station must be denied.

4 The city's order discusses each of the plan policies  
5 addressing transit, lists the transit sites near the  
6 development which may be used by patrons and employees of the  
7 development, and assesses the likely impact on transit. See  
8 Record 47-49, 54, 108-111, and 120.

9 The city found the use will be "auto dependent." That is,  
10 transit will not be the primary mode of transportation to and  
11 from the project.

12 However, the city also found the proposal is within  
13 reasonable walking distance to Tri-met bus stops, and is within  
14 a half a mile of the light rail station. The city concludes it  
15 is accessible to public transportation and therefore meets the  
16 mandate in Policy 6.4 to "encourage a safe and efficient  
17 metropolitan public transportation system...." The council  
18 concluded that the proposal complies with transit policies, "to  
19 the maximum extent possible." Record at 49.<sup>9</sup>

20 We do not find error as alleged. The policies petitioner  
21 claims are violated are stated in precatory language. That is,  
22 they "encourage" a series of actions designed to enhance and  
23 protect public transportation. The fact that the city's  
24 decision may not enhance the city's public transportation  
25 system as much as development closer to the transit system does  
26 not mean that the city may not make a finding that its

1 transportation policies are satisfied.

2 e. The Arterial Streets Classification Policy.

3 Petitioner complains that the proposal violates the  
4 Portland Arterial Streets Classification Policy (ASCP). Goal 6  
5 of the city's comprehensive plan requires efficient  
6 transportation systems which are consistent with this policy.  
7 Also, Comprehensive Plan Policy 5.11, Objective A, requires  
8 that the city "promote efficient traffic patterns and effective  
9 levels of transit service, consistent with the Arterial Streets  
10 Classification Policy...."

11 The ASCP directs what kinds of traffic and transit should  
12 be emphasized on each particular street and how future  
13 development should relate to such uses. For the Northeast  
14 Transportation District, which includes the Hyster site, the  
15 ASCP established the following objective:

16 "Because there are few streets which can appropriately  
17 be classified as Major City Traffic Streets within  
18 Northeast Portland, a basic objective shall be to  
19 stabilize traffic volumes by emphasizing ride-sharing,  
20 flexible working hours, and transit service  
improvements in the Downtown, Lloyd Center, the  
Hollywood Business District and within Northeast  
neighborhoods."

21 Specific Policies call for:

- 22 "1. The stabilization of traffic volumes on NE 33rd  
to maintain its residential character.
- 23 "2. A reduction or stabilization of volumes on NE  
24 21st and 24th so that they may regain their  
character as residential or local service streets.
- 25 "3. No shifting of traffic to adjacent neighborhood  
26 collectors or local service streets resulting in  
increases above 1982 traffic levels."

1  
2 Petitioner claims the level of service in the area will  
3 increase beyond acceptable limits. Petitioner complains that  
4 the city found the proposal to be only generally in compliance  
5 with the ASCP and that the city further considered the ASCP  
6 only to be a guide. Petitioner says this finding does not  
7 conform to Goal 6. The goal states transportation decisions  
8 must be "consistent with" the ASCP. Petitioner acknowledges,  
9 however, that Policy 6.3 speaks of the ASCP as a "guide."

10 The introduction to the ASCP states:

11 "As it is a policy, rather than a plan, the ASCP does  
12 not mandate any specific projects or any changes in  
13 traffic improvement or transit service. Instead, the  
14 ASCP indicates what kinds of improvements are  
15 appropriate on various kinds of streets and in  
16 different areas of the city."

17 Similar language is used in the implementation section of  
18 the ASCP as follows:

19 "Street classifications, policies and district  
20 policies are not intended to be a plan, instead, they  
21 serve as a guide to transportation project planning  
22 and management and the land use decision...."

23 We conclude the ASCP may not be used to deny development on  
24 the grounds that the development may conflict with particular  
25 policy in the ASCP. The city's interpretation of the ASCP as a  
26 directory and not a mandatory document is reasonable and must  
27 therefore be upheld. Alluis v. Marion County, 64 Or App 478,  
28 668 P2d 1242 (1983). The ASCP, by its terms, is a guide.  
29 Downtown Community Association v. City of Portland, 80 Or App  
30 336, 722 P2d 1258 (1986). The language in the ASCP stating



1 that it serves "to guide transportation improvements within the  
2 city" supports the city's position as does the language in the  
3 city's Goal 6 calling for a consistency in transportation  
4 systems with the Arterial Streets Classification Policy. Even  
5 if there are violations of the ASCP as alleged, the violations  
6 are not grounds for reversal or remand.<sup>10</sup>

7 PETITIONER MARTIN

8 Petitioner makes four assignments of error as follows:

9 "FIRST ASSIGNMENT OF ERROR

10 "The order is unlawful in substance because the  
11 decision violates portions of Portland's acknowledged  
12 comprehensive plan. The order violates Comprehensive  
13 Plan Goals 2, 3, 5, 6, and 10, and Plan Policies 2.9,  
14 2.11, 2.12, 2.17, 2.18, 3.2, 5.8, 5.9, 5.10, 5.11,  
15 5.12, 6.2, 6.3, 6.10 and 10.4.

16 "SECOND ASSIGNMENT OF ERROR

17 "The order is inconsistent with and contrary to the  
18 aims and purposes of Portland's Comprehensive Plan  
19 Goals and policies, taken together, as they relate to  
20 Northeast Portland and the neighborhoods surrounding  
21 the subject property.

22 "THIRD ASSIGNMENT OF ERROR

23 "The findings are not supported by substantial  
24 evidence in the whole record.

25 "FOURTH ASSIGNMENT OF ERROR

26 "The city erred by relying on studies, reports,  
documents and testimony prepared by the applicant that  
are fatally flawed, internally inconsistent and  
contradictory, and grossly manipulated to achieve the  
desired result."

Petitioner claims that particular plan goals and policies  
are violated. The claims are somewhat vague. We will only  
discuss claims of particular goal or policy violation when the

1 claim is fully explained.

2 Petitioner argues City Comprehensive Plan Goals 2, 3 and 5  
3 and related implementing policies are violated by this  
4 decision. Goal 2 provides:

5  
6 "Maintain Portland's role as the major regional  
7 employment, population and cultural center through  
8 public policies that encourage expanded opportunity  
9 for housing and jobs, while retaining the character of  
established residential neighborhoods and business  
centers.

10 Goal 3 provides:

11 "Preserve and reinforce stability and diversity of the  
12 city's neighborhoods while allowing for increased  
13 density in order to attract and retain long-term  
residents and businesses and insure the city's  
residential quality and economic vitality."

14 Goal 5 provides:

15 "Improve the level, distributions stability of jobs  
16 and income for resident industry, business and people  
in accordance with the economic development policy  
adopted by the city council."

17 The thrust of petitioner's argument is that the decision  
18 will significantly undermine the existing commercial business  
19 centers at the Lloyd Center and in the Hollywood District, and  
20 thereby jeopardize the livability of residential neighborhoods  
21 in the vicinity.

22 The city's order asserts compliance with these goals and  
23 implementing plan policies by finding the Fred Meyer project  
24 will create jobs, capital investment and promote business  
25 expansion in the area. The city concludes the store will not  
26 decrease economic opportunities elsewhere, but will make

1 positive economic impact on existing commercial centers and  
2 expand employment opportunities. In support of these findings,  
3 the city relies on several reports. These include a "public  
4 need evaluation impact analysis" revised in December, 1985,  
5 referred to as the Hobson Report. The report discusses market  
6 areas for grocery, home improvement, general merchandise  
7 stores, and analyzes impacts on existing businesses. Record  
8 2302-2105. It was updated in 1986.

9 The city also relies on a Fred Meyer Project Business  
10 Impact Analysis by Edward Grubb and Marilyn Stubbs dated  
11 September 10, 1985, (Record 2424-2488) which includes surveys  
12 of neighborhood businesses near other Fred Meyer stores,  
13 particularly Beaverton, Gresham, and Hollywood Fred Meyer  
14 stores. In addition, the city relies on a study of consumer  
15 demand by Thomas Kilpatrick dated September 9, 1985, (Record  
16 2489-2523). Finally, Fred Meyer cites to rebuttal material  
17 prepared by Hobson. Record 1407, et seq.

18 Generally, this evidence shows that a market demand exists  
19 for the new Fred Meyer store, the store will create jobs in the  
20 area, the store will not divert significant business in the  
21 Hollywood District, on balance will help business in the  
22 Hollywood District, and the project will strengthen the city's  
23 investment in that area.

24 Petitioner claims some evidence in the Hobson and  
25 Grubb/Stubbs analysis reveals that the new Fred Meyer store  
26 will adversely affect the Hollywood District and particularly

1 stores in direct competition with it. The stores in direct  
2 competition include the Hollywood Fred Meyer store.

3 Petitioner argues that the harm done to business at the the  
4 Hollywood Fred Meyer store will render that store unprofitable  
5 and eliminate it as an anchor for other businesses in the  
6 area. See Martin Petition at 26. This closure will devastate  
7 the Hollywood Business District as the local Fred Meyer store  
8 serves to draw customers to the Hollywood District.

9 Petitioner introduces the testimony of Dr. Ed Whitelaw, an  
10 economist at the University of Oregon. Dr. Whitelaw opined  
11 that the applicant's data shows residences in the market area  
12 are within a mile of an average of six grocery stores. Dr.  
13 Whitelaw concludes that the Fred Meyer store will take business  
14 away from those stores. While Dr. Whitelaw agreed that a new  
15 store will attract shoppers, and would be profitable, and some  
16 businesses will benefit from spillover, most will not. Record  
17 1873. Stores near Fred Meyer will probably benefit, those  
18 further away will be harmed. Record at 1847. Dr. Whitelaw  
19 testified that a new center will not generate more purchasing  
20 power, but will simply redistribute expenditures in that  
21 particular urban area. Record 1713.

22 In short, Dr. Whitelaw states that one does not create new  
23 jobs simply by opening up a store where no new market demand  
24 exists. The new store will come at the expense of stores  
25 elsewhere.

26 Goal 5 of the city's plan and its policies require the city

1 to promote and enhance Portland's commercial districts. Under  
2 Goal 5, the city should promote a business environment which  
3 allows for retention and expansion of businesses, and the city  
4 must encourage and strengthen vitality by ensuring adequate  
5 supply of commercially-zoned land to allow for business  
6 expansion. See City of Portland Plan Policy 5.9, 5.12 and  
7 5.10. In addition, the city must encourage long-term  
8 employment opportunities, Policy 5.12 and encourage city  
9 businesses to remain and expand, Policy 5.3.

10 It is apparent the experts do not agree about the effects  
11 of the new Fred Meyer store on the Lloyd Center and on the  
12 Hollywood Business District. For example, the parties are in  
13 opposite corners about whether the existing Fred Meyer store in  
14 the Hollywood District will suffer such a severe loss of  
15 business that it will close. Respondents deny the Hollywood  
16 store will close, claiming petitioner's evidence consists  
17 largely of economic forecasts by Dr. Whitelaw.

18 We are not empowered to decide whether Dr. Whitelaw is more  
19 correct than the Hobson report and other supporting evidence  
20 relied upon by the city. We note that closure of the Hollywood  
21 Fred Meyer store is, at this point, rather speculative. We  
22 conclude, therefore, that while there exists believable  
23 evidence on both sides of this question, we are unable to find  
24 as a matter of law, that the city's evidence is not  
25 substantial. That is, we conclude the city's evidence is such  
26 that a reasonable person would believe it to be sufficient to

1 support a decision. Christian Retreat Center v. Board of  
2 Commissioners of Washington County, 28 Or App 673, 560 P2d 100;  
3 rev den (1977).

4 Finally, we note the city's plan policies do not prohibit  
5 damage or harm to existing businesses or enterprises. In this  
6 case, the city's goals and policies do not rule out changes in  
7 the economic climate, nor do they prohibit approval of  
8 businesses which may be in direct competition with existing  
9 businesses.

10 We therefore deny Petitioner Martin's assignments of error.

11 YOUNGER PETITION

12 Petitioner Younger's first three assignments of error all  
13 address the sufficiency of the findings and evidentiary support  
14 for findings that address the following policies: Policy 2.11  
15 (Commercial Centers); Policy 5.9 (Area Character and Identity);  
16 Policy 5.10 (Land Use); Goal 6 (Transportation); Policy 6.2  
17 (Regional and City Traffic Patterns); Policy 6.3 (Land  
18 Use/Street Relationship); and Policy 10.4 (Comprehensive Plan  
19 Map Amendments).

20  
21 The policies claimed to be violated are discussed under  
22 other assignments of error in this opinion. We will therefore  
23 discuss only Petitioner Younger's charges which are not raised  
24 by other petitioners.

25 FOURTH ASSIGNMENT OF ERROR (Younger)

26 "The findings are legally inadequate because they

1 address compliance with applicable Comprehensive Plan  
2 Goals and policies based not on the uses authorized by  
3 the Light Manufacturing designation and M3 zone, but  
4 on a specific use, a Fred Meyer store."

5 The new zoning designation allows uses permitted in the C-2  
6 Zone. The C-2 Zone allows retail stores, but also race tracks,  
7 drive-in businesses, theaters, adult businesses and other  
8 enterprises. The city only considered applicable comprehensive  
9 plan goals and policies in connection with one particular use,  
10 the Fred Meyer store. Petitioners argue the city was obliged  
11 to review the plan amendment and zone change proposals against  
12 all the uses permitted in the zone and failed to do so.

13 Petitioners assert other uses allowable under the new  
14 designation will have significantly different impacts on  
15 traffic, the Hollywood Business District, Lloyd Center and  
16 neighborhood livability.

17 The city argues the comprehensive plan does not require the  
18 broad consideration asserted by petitioners. The applicable  
19 comprehensive plan policies, according to respondent, are  
20 Policies 10.4 (Comprehensive Plan Amendments) and 10.8 (Zoning  
21 upon Plan Adoption). Policy 10.4 provides, in relevant part,  
22 that

23 "the applicant must show that the requested changes:

24 "(1) consistent with and supportive of the appropriate  
25 comprehensive plan goals and policies,

26 "(2) compatible with the land use pattern established  
by the comprehensive plan,

"(3) in the public interest to grant the petition; the  
greater the departure from the comprehensive plan map

1 designation, the greater the burden of the applicant,  
2 and

3 "(4) that the public interest is best served by  
4 granting the petition at this time and at the  
5 requested locations."

6 Policy 10.8 provides that the city council must make two  
7 findings to approve a zone change. The findings required are,  
8 in part,

9 "1. The proposed rezoning must be to the maximum  
10 comprehensive plan map designation \* \* \*

11 "2. It must be found that services adequate to  
12 support the proposed industrial or commercial use  
13 or the maximum residential density allowed by the  
14 proposed rezoning are presently available or can  
15 be reasonably made available (consistent with the  
16 comprehensive plan public facilities policies) by  
17 the time the proposed use qualifies for a  
18 certificate of occupancy or completion from the  
19 Bureau of Buildings."

20 The city argues these policies do not require consideration  
21 of all possible uses in a given zone, only the particular  
22 proposal.

23 In addition, notes the city, the decision does not permit  
24 Fred Meyer or its successor to conduct any use permitted in the  
25 M3 zone. The council's approval of the zone change is subject  
26 to a number of conditions which are tailored to the Fred Meyer  
store, including:

"1. Construct and pay for extensive traffic  
improvements.

"2. Obtain an indirect source permit.

"3. Implement an employee ride share program.

"4. Attempt to recruit and hire employees from the  
surrounding area.



- 1 "5. Limit operating hours and truck delivery routes  
2 and hours.
- 3 "6. Apply for and obtain design review and superbblock  
4 review approvals.
- 5 "7. Provide a public park and plaza at the site.
- 6 "8. Seek and obtain street vacations as may be  
7 necessary."

8 These conditions may only be amended by ordinance and after  
9 public hearing. At that time, petitioners and others will have  
10 an opportunity to voice objection or support for a new use.

11 In DLCD v. Clatsop County, 14 Or LUBA 358 (1986), we said  
12 that a rezoning required the governing body to consider the  
13 impact of the uses in the proposed new zoning designation, not  
14 simply the impact of a particular development proposal. See  
15 also Confederated Tribes v. Wallowa County, 14 Or LUBA 92, 103  
16 (1985). Policy 10.4 cited by Respondent City does not limit  
17 inquiry under a comprehensive plan amendment to the impact of a  
18 particular proposal. Policy 10.4 requires the applicant to  
19 show that the "changes" are consistent with the comprehensive  
20 plan, compatible with the land use pattern, in the public  
21 interest and serves the public interest at this time and at  
22 this location. Nothing in the policy suggests "changes" refers  
23 to a project, but rather to the change in use designation.  
24 Therefore, we do not agree with the city that it may simply  
25 focus on the impact of the Fred Meyer proposal and not the  
26 potential impact caused by the rezoning should Fred Meyer not

1 complete its project and other uses move on to the property.

2 In addition, we do not find Policy 10.8 particularly  
3 helpful to the city's position. Policy 10.8, regarding zone  
4 changes, addresses the "services adequate to support the  
5 proposed...use...." That is, the policy requires that the city  
6 find that necessary services will serve the particular use  
7 proposed. This requirement addresses services, it does not  
8 change or modify the comprehensive plan requirement that the  
9 "changes" meet comprehensive plan criteria.

10 However, we note that of the uses permitted under the Light  
11 Manufacturing plan designation and M3 and M3S zones, the Fred  
12 Meyer proposal with its very large shopping center, parking lot  
13 and related facilities appears to be a highly intensive use.  
14 Indeed, the Fred Meyer proposal is consistent with the most  
15 intensive uses allowed in the zone.<sup>11</sup>

16 In addition, there are several conditions applicable to the  
17 Fred Meyer store which appear to limit the intensity of use to  
18 one compatible with this particular project. Supra, page 25.  
19 Further, these conditions, applicable to the new designation,  
20 may not be removed except through a public hearing. That is, a  
21 new developer may not escape the imposition of these conditions  
22 without seeking to have them changed in a formal city  
23 proceeding.

24 Therefore, while we agree with petitioners that the city  
25 must consider the most intensive uses allowed in the new zone  
26 designation, the consideration of the Fred Meyer proposal only

1 does not warrant reversal or remand. The public is adequately  
2 protected by the imposition of conditions effectively limiting  
3 intensity of use to the maximum level allowed in the new zone.

4 FIFTH ASSIGNMENT OF ERROR (Younger)

5 "Respondent City erred by failing to provide for  
6 Planning Commission Review of the challenged  
7 amendment, as required by Portland Comprehensive Plan  
8 Policy 10.3, for failing to undertake such an  
9 amendment through the major plan review process of  
10 Policy 10.1, and not responding to Petitioners'  
11 requests to do so. Respondent thus exceeded its  
12 jurisdiction, failed to follow procedures applicable  
13 to the matter before it in a manner which prejudiced  
14 the substantial rights of Petitioners, and improperly  
15 construed applicable law."

16 Comprehensive Plan Policy 10.3 states:

17 "Interim Plan Review and Amendment. Proposed  
18 amendments to the Goals, Policies and Map of the  
19 Comprehensive Plan will be reviewed by the Planning  
20 Commission prior to action by the City Council,  
21 consistent with citizen involvement procedures and  
22 state law. The Planning Commission will also review  
23 the Comprehensive Plan for amendments that consider  
24 compliance with goals, objectives and plans adopted by  
25 the Metropolitan Service District, and make  
26 recommendations to the City Council."

Petitioners argue this policy has not yet been fulfilled.

The comprehensive plan map is changed by this decision, but the  
planning commission did not review the map change. Petitioners  
also insist this particular change is so inconsistent with the  
plan goals and policies, that the amendment amounts to a major  
change in the comprehensive plan text without following  
requirements for comprehensive plan review and revision.

Petitioners also charge failure to treat the Fred Meyer  
proposal as a major plan change results in prejudice to

1 petitioners' substantial rights. See ORS 198.835(8) (a) (B).  
2 Petitioners say they are entitled to security in the plan  
3 amendment process against major plan changes outside the  
4 five-year major plan amendment cycle mandated by the plan  
5 itself. In petitioners' view, the right to citizen  
6 participation in plan amendment proceedings are denied by the  
7 city's present action.

8 The council found Policy 10.3 not applicable. It found  
9 that

10 "Because the application is not a legislative  
11 amendment to the plan; the application does not  
12 pertain to the City's Annual Report; and the amendment  
does not pertain to a goal or text amendment of the  
comprehensive plan." Record 127.

13 Respondent argues rather that Policy 10.4 controls this  
14 request. Policy 10.4 states, in part, that

15 "Requests for modification of the comprehensive plan  
16 map designations will proceed under the regulations,  
17 notification requirements and hearing procedures used  
for zone change requests."

18 The city says this application is clearly a quasi-judicial  
19 plan amendment, not a major plan revision.

20 The city's interpretation of its policies is reasonable.  
21 This is a request for a particular change in the plan map, not  
22 a change in policy. The policies cited by petitioners address  
23 legislative changes, not single (albeit big) land development  
24 application. We will therefore sustain the city on this  
25 issue. Allius v. Marion County, supra; Fisher v. City of  
26 Gresham, 69 Or App 411, 416, 685 P2d 486 (1984).

1 SIXTH ASSIGNMENT OF ERROR

2 "Respondent City Council decision-makers engaged in ex  
3 parte contacts in violation of ORS 227.180(3) and  
4 Portland City Code section 33.215.150. This matter is  
5 subject to reversal or remand under ORS 197.835(12).  
6 In addition, the City Council exceeded its  
7 jurisdiction, failed to follow the procedures  
8 applicable to the matter before it, made a decision  
9 not supported by substantial evidence in the whole  
10 record, improperly construed the applicable law, and  
11 made an unconstitutional decision."

12 Petitioners complain about several contacts between members  
13 of the city council and certain individuals. Petitioners'  
14 chief complaint is that while many of the contacts were known  
15 to petitioners during the course of the proceedings, the  
16 substances of the contacts were not disclosed. Because  
17 petitioners were not aware of the contents of the ex parte  
18 contacts, they were provided no basis upon which to submit  
19 rebuttal testimony as provided for in ORS 227.180(3) and  
20 Portland City Code Section 33.215.150.<sup>12</sup> With no opportunity  
21 for rebuttal, petitioners were denied their substantial  
22 rights. ORS 183.135(8)(a)(B).

23 In addition, petitioners argue the following:

24 "Further under the Fourteenth Amendment to the Federal  
25 Constitution, Petitioners' property interests cannot  
26 be deprived without reasonable notice and an  
opportunity for hearing. Board of Regents v. Roth,  
408 U.S. 564 (1972). The right to an impartial  
decision-maker, free of prehearing or ex parte  
contacts, is guaranteed by the statutory and ordinance  
provisions set forth above, plus Oregon caselaw.  
Fasano, supra. These rights are property rights and  
have constitutional status under 1000 Friends of  
Oregon v. Waso County Court, 80 Or App 525,  
P2d \_\_\_\_ (August 6, 1986). Petitioners' constitutional  
rights have been violated in this case." Younger  
Petition at 33-34.

1  
2 ORS 197.835(12) provides that we may reverse or remand a  
3 land use decision because of ex parte contacts only where a  
4 member of the governing body did not comply with the disclosure  
5 requirements in ORS 215.422(3) (for counties) and ORS 227.183  
6 (for cities). ORS 227.180(3) provides:

7 "(3) No decision or action of a planning commission  
8 or city governing body shall be invalid due to ex  
9 parte contact or bias resulting from ex parte contact  
with a member of the decision-making body, if the  
member of the decision-making body receiving the  
contact:

10 "(a) Places on the record the substance of any  
11 written or oral ex parte communications concerning the  
decision or action; and

12 "(b) Has a public announcement of the content of the  
13 communication and of the parties' right to rebut the  
14 substance of the communication made at the first  
15 hearing following the communication where action will  
be considered or taken on the subject to which the  
communication related. ORS 227.180(3).

16 We recently issued an order denying petitioners' request  
17 for depositions sought to discover the substance of the  
18 contacts mentioned in this assignment of error. We found,  
19 among other things, that petitioners had failed to assert  
20 rights to challenge the decisionmakers for their failure to  
21 disclose the content of the ex parte contacts. We also found  
22 some of the contacts were exempted from the disclosure under  
23 ORS 227.180(4). We will not repeat the substance of our order  
24 here.<sup>13</sup> The record does not support petitioners' claim that  
25 ex parte contacts occurred. Accordingly, we deny this  
26 assignment of error.

1 SEVENTH ASSIGNMENT OF ERROR (Younger)

2 "Respondents Hearings Officer and City Council failed  
3 to allow Petitioners or their representatives to cross  
4 examine or otherwise determine the factual basis of  
5 the applicant's case or matters relating to the bias  
6 or interest of its witnesses, thus exceeding its  
7 jurisdiction, failing to follow the procedures  
8 applicable to the matter before it to the prejudice of  
9 the substantial rights of Petitioners, making a  
10 decision not supported by substantial evidence in the  
11 whole record, improperly construing the applicable  
12 law, making an unconstitutional decision and violating  
13 section 33.215.190(E) of the Portland City Code, ORS  
14 197.175(2), 197.250, and ORS 227.160 to 227.185.  
15 Respondent also erred in failing to state the weight  
16 to be given to that part of applicant's evidence which  
17 Petitioner could not cross-examine or rebut, as to  
18 whether the same was believable."

19 Petitioners claim a right to cross-examine the applicant's  
20 witnesses and state the city denied them this right. They  
21 argue that Fasano v. Washington County, 264 Or App 574, 507 P2d  
22 23 (1973) establishes a right to "present and rebut evidence."  
23 This right is not fulfilled, according to this argument, unless  
24 petitioners can cross-examine the applicant's witnesses.  
25 Petitioners assert their substantial rights are prejudiced  
26 without knowledge of the applicant's position or the means to  
27 know the applicant's case.

28 According to petitioners, the right to submit rebuttal  
29 evidence is not adequate because it does not reveal the bias of  
30 witnesses or data they rely upon if the data is not placed in  
31 the record. Rebuttal is "inefficient," according to  
32 petitioners.

33 In refusing cross-examination, the city:

34 "Exceeded its jurisdiction and improperly construed

1 the applicable law (i.e., the due process clause of  
2 the Fourteenth Amendment to the Federal Constitution,  
3 Portland City Code section 33.215.190(E), ORS  
4 197.175(2) ORS 197.250, ORS 227.160 to 227.185)."  
5 Brief of Petitioner Younger at 45.

6 As respondent city points out, this Board utilizes three  
7 steps in analyzing a claim that petitioners were improperly  
8 denied an opportunity to cross-examine. The issues involve  
9 three questions:

- 10 1. Did the petitioners assert a right of cross-  
11 examination?
- 12 2. Did the local governing body deny petitioners the  
13 right to cross-examine?
- 14 3. Were petitioners prejudiced by the denial of any  
15 right to cross-examination? See Sills v.  
16 Josephine County, 9 Or LUBA 122, 127-128 (1983)  
17 and Kale v. Deschutes County, 5 Or LUBA 156, 168  
18 (1982).

19 Nothing in ORS ch 227 or in the city's code requires the city  
20 provide a right of cross examination. Petitioners did request  
21 cross-examination. The city did not permit oral  
22 cross-examination, but did permit petitioners to submit written  
23 questions to witnesses. Fred Meyer consented to answer written  
24 questions. Petitioners also were given the opportunity to  
25 submit cross-examination questions to the council. They  
26 declined to do so.

27 Petitioners were permitted to address all evidence  
28 introduced by the applicants and were given the opportunity to  
29 test applicant's evidence by written requests. This procedure  
30 adequately protected petitioners' substantial rights. Without  
31 a local ordinance or a judicial decision granting the right of



1 cross-examination in land use proceedings, we will not engraft  
2 such a procedure on local land use hearings.

3 This assignment of error is denied.

4 EIGHTH ASSIGNMENT OF ERROR (Younger)

5 "The decision violates Plan policy 10.4 for amendments  
6 to the comprehensive plan map. The decision is not  
7 consistent and supportive of applicable Plan goals and  
8 policies. The decision is not compatible with the  
9 land use pattern established by the Plan map. The  
10 decision is not in the public interest. The public  
11 interest is not best served by approval of a Fred  
12 Meyer store at Hyster at this time. Findings of  
13 compliance with Policy 10.4 are not supported by  
14 material evidence in the whole record."

15 Policy 10.4 provides:

16 "Requests for modification of the Comprehensive Plan  
17 Map designations will proceed under the regulations,  
18 notification requirements and hearing procedures used  
19 for zone change requests. The burden of proof for  
20 such a change is placed on the petitioner seeking such  
21 an action. The applicant must show that the requested  
22 change is:

23 "(1) Consistent and supportive of the appropriate  
24 Comprehensive Plan Goals and Policies.

25 "(2) Compatible with the land use pattern established  
26 by the Comprehensive Map.

"(3) In the public interest to grant the petition; the  
greater the departure from the Comprehensive Plan  
Map designation the greater the burden of the  
applicant.

"(4) That the interest is best served by granting the  
petition at this time and at the requested  
locations. Rezoning may be considered  
concurrently with the request for modification of  
the Comprehensive Plan Map designation."

27 Petitioners' attack is quite broad, alleging the city  
28 failed to meet this policy without citing specific faults in  
29 the city's order.

1 The findings meet the first criterion. The findings  
2 discuss what the council perceived to be applicable goals and  
3 policies, acknowledged the existence of competing interests and  
4 explained why it decided as it did. Nothing more is required.  
5 See Green v. Hayward, 275 Or 693, 552 P2d 815 (1976);  
6 Corbett/Terwilliger/Lair Hill Legal Fund v. City of Portland,  
7 Supra.

8 The second criteria in Policy 10.4 is satisfied by  
9 examining the comprehensive plan map and analyzing the land use  
10 pattern established by that map. Evidence was considered that  
11 this site is no longer suitable for industrial use. The city  
12 examined the land use history of the site and changing land use  
13 patterns in the area. It concluded the industrial use was no  
14 longer suitable but the site is suitable for retail uses. The  
15 findings explaining this changing pattern are sufficient to  
16 satisfy this criterion.

17 The third criterion requires a finding that the amendment  
18 is in the public interest. In Corbett/Terwilliger/Lair Hill,  
19 we stated:

20 "The city's findings demonstrate plan policies have  
21 been considered and met, and there exist valid reasons  
22 to make the change. The city found it is better to  
23 have the property put to a useful purpose than to have  
24 it vacant. The Board believes this is a sufficient  
25 analysis to meet the 'public interest' test. The city  
26 is simply saying that it is better to use property  
than not to use it, and it has explained that the  
proposal will make use of the property and will  
violate no policies. The Board believes this  
definition through application of the findings is  
sufficient. 9 Or LUBA at 266.

1           The council made a similar finding in this case. It found  
2 that the project will provide economic benefits to the area,  
3 that there is a market demand for the facility, that there will  
4 be a positive impact on other businesses and commercial centers  
5 and that many jobs would be created. See Record 140-141. We  
6 do not believe this criterion requires more.

7           The last criterion requires a finding that the "public  
8 interest is best served by granting the petition at this time  
9 at the requested location." In Corbett/Terwilliger/Lair Hill,  
10 we held that if a proposal is in the public interest, no more  
11 is required to meet this policy than to have a developer ready  
12 to proceed. In this case, the council found the site is no  
13 longer suitable for heavy manufacturing (Record 50-55, 137-149,  
14 1495, 1569, 1643, 1721, 1726) and that Fred Meyer is ready and  
15 willing to develop the site. Record at 1898-1923, 1330-39.  
16 Evidence presented by Fred Meyer supports these conclusions.  
17 Record 1330-39, 1384-1485, 1820-1855, 1978-2119.

18           We do not believe more is required. These assignments of  
19 error are denied.

20           The decision of the city is affirmed.

FOOTNOTES

1

FIRST ASSIGNMENT OF ERROR (Younger)

"Certain of the findings and reasons supporting the order are legally inadequate. Certain findings incorrectly address applicable legal standards contained in Portland's Comprehensive Plan. Certain findings are conclusory or merely recite evidence. Similarly, certain reasons do not properly explain how applicable standards in the comprehensive plan apply to the decision, or demonstrate adequately compliance with those standards."

SECOND ASSIGNMENT OF ERROR (Younger)

"The order is unlawful in substance because the findings fail to address focused, unrebutted testimony on matters relevant to compliance with applicable criteria."

THIRD ASSIGNMENT OF ERROR (Younger)

"The order violates Statewide Goal 2 because it lacks adequate factual base."

2

Petitioner Gaylord's complaints are not immediately clear because petitioner spends most of the argument disputing evidence relied upon by the city. Further, petitioner fails to discuss how the allegedly unsubstantial evidence leads to a violation of one or more city comprehensive plan policies or land development ordinance provisions. Only at the end of petitioner's argument does one learn that petitioner challenges violation of Portland Comprehensive Goals 2, 3 and 6 and policies 2.9, 3.2, 5.9, 6.2, 6.3, and 6.10. How the city's decision specifically violates these provisions is merely outlined in the petition.

Petitioner Younger provides a more detailed explanation of how the city violated transportation policies. Our discussion utilizes arguments from both petitioners, therefore.

3

A trip end is one automobile trip to a particular end destination.

1  
4

2 Petitioners compare the Fred Meyer store at Mill Plain Road  
3 in the City of Vancouver, where the trip generation rate was  
determined to be 85.3.

4  
5

6 Petitioners say the Stadium Fred Meyer store in Northwest  
Portland, while having a much lower 50.1 trip-end rate, is in  
an area where 48 percent of the households own no automobile.  
7 See Gaylord Petition at 17.

8  
6

9 Petitioners complain that a considerable amount of  
"evidence" is included in the findings. This evidence appears  
10 in the form of rebuttal testimony, with conclusions of fact  
adopted by the city and included in its order of approval. We  
do not find fault with the city in this regard. To the extent  
11 that the findings may recite evidence, such recitation does not  
constitute proper findings. Graham v. Oregon Liquor Control  
12 Commission, 20 Or App 97, 530 P2d 858 (1975); See also Still v.  
Marion County, 5 Or LUBA 206 (1982). However, the evidence  
13 invariably leads to a conclusion of fact which is then  
available, in our view, to support the city's ultimate  
14 conclusion that a particular criterion has been satisfied. It  
is not necessary to separately bind findings and supporting  
15 evidence providing mere evidence is not substituted for  
required findings. See South of Sunnyside Neighborhood League  
16 v. Clackamas Co. Comm., 280 Or 3, 569 P2d 1063 (1977).

17  
7

18 Petitioners list other plan goals and policies they find  
violated but offer little explanation of how these plan goals  
19 and policies are violated. We will consider only those  
allegations which are tied to specific policies and for which  
20 petitioners offer a claim of error.

21  
8

22 City Plan Policy 6.2 states as follows:

23 "Regional and City Traffic Patterns create and maintain  
regional and city traffic patterns that protect that  
24 livability of Portland's established residential  
neighborhoods while improving access and mobility within  
25 commercial and industrial areas."

1  
2 9

3 See footnote 8, supra.

4 10

5 The city made extensive findings on compliance with the  
6 ASCP. See Record 86-87, 115-119 and 322-323. The city also  
7 found that the policies of the ASCP are to be balanced against  
8 the important goal of improving opportunities for economic  
9 development and access to major commercial and industrial  
10 centers. Record 97-98. We conclude the city's findings, on  
11 balance, show compliance with the ASCP notwithstanding the fact  
12 that specific streets may suffer an increase in traffic load  
13 because of the new development. See Record 91, 96, 101,  
14 310-311.

10 11

11 The zone and plan designation allows a multiplicity of  
12 retail uses, as well as some light industrial uses. In terms  
13 of traffic generation and numbers of persons visiting a site,  
14 it is difficult to conceive of a more intensive use than a  
15 shopping center.

14 12

15 ORS 227.180(3) states:

16 "(3) No decision or action of a planning commission  
17 or city governing body shall be invalid due to ex  
18 parte contact or bias resulting from ex parte contact  
19 with a member of the decision-making body, if the  
20 member of the decision-making body receiving the  
21 contact:

19 "(a) Places on the record the substance of any  
20 written or oral ex parte communications concerning the  
21 decision or action; and

21 "(b) Has a public announcement of the content of the  
22 communication and of the parties' right to rebut the  
23 substance of the communication made at the first  
24 hearing following the communication where action will  
25 be considered or taken on the subject to which the  
26 communication related.

25 Portland City Code Section 33.215.150 states:

26 "A. Private contacts. Prior to rendering a decision,  
no member of a review body shall communicate directly

1 or indirectly, with any person interested in the  
2 outcome or representative in connection with any issue  
3 involved in an application except upon notice and  
4 opportunity for all parties to participate. Should  
such communication occur, the member of the review  
body shall:

5 "1. Enter into the record the substance of any such  
written or oral communication; and

6 "2. Publicly announce the content of the  
7 communication and provide an opportunity to rebut  
the substance of the contact."  
8

9 13

10 We note the Oregon Supreme Court has declined to find that  
a local tribunal must, in all cases, be free of ex parte  
11 contact. Neuberger v. City of Portland, 288 Or 585, 607 P2d  
722 (1980); Eastgate Theater, Inc. v. Board of County  
Commissioners of Washington County, 37 Or App 745, 588 P2d 640  
(1978).  
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