

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

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JAMES BEAMER,)
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 Petitioner,)
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 vs.)
)
 THE CITY OF ROSEBURG,)
 OREGON,)
)
 Respondent.)

LUBA No. 87-014
FINAL OPINION
AND ORDER

Appeal from the City of Roseburg.

Darryl E. Johnson, Roseburg, filed the petition for review and argued the cause on behalf of Petitioner.

Timothy J. Sercombe, Eugene, filed a response brief and argued the cause on behalf of Respondent. With him on the brief were Harrang, Long, Watkinson and Arnold, P.C.

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

AFFIRMED 06/24/87

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioner appeals a City of Roseburg decision denying its
4 application for a comprehensive plan and zone change. The
5 change would facilitate placement of a shopping center.

6 FACTS

7 Petitioner filed a request for a plan and zone change on
8 August 6, 1986. The requested plan change was from High
9 Density Residential to Commercial, and the zone change was from
10 Multi-Family Residential to Community Commercial. The city's
11 planning department recommended denial of the application on
12 the ground the applicant did not show a public need for an
13 additional 8.72 acres of commercial property. The Roseburg
14 Planning Commission accepted the recommendation and denied the
15 request.

16 The planning commission decision was reviewed by the city
17 council on December 8, 1986. The city council adopted the
18 findings of the planning commission and the staff report with
19 modifications. It denied the appeal.

20 FIRST ASSIGNMENT OF ERROR

21 "The Roseburg City Council arbitrarily and
22 unconstitutionally required petitioner herein to show
23 public need of additional commercial property for the
24 community as a whole rather than the neighborhood.
25 The City of Roseburg consistently required no other
26 zone change amendments to show public need at all.
Other zone changes requested to commercial were only
required to show public need for the neighborhood.
Placing the greater burden of proof on petitioner
denies him equal protection of the law under the
constitution and due process of law."

1 Petitioner characterizes the proposed development as a
2 community shopping center. Petitioner recites the city council
3 required him to show a public need existed for the development
4 as measured against the whole community. Petitioner argues
5 there is no requirement in the city's land use regulations that
6 public need must be shown based on the whole community. The
7 correct standard, according to petitioner, is to measure need
8 for a shopping center in the immediate neighborhood. To
9 bolster petitioner's argument, petitioner mentions two prior
10 decisions where the issue of need involved only a review of
11 neighborhood need. Petitioner concludes the city violated
12 petitioner's right to equal protection of the law.¹

13 Petitioner's claim of unconstitutional discrimination
14 rests, at least in part, on the different treatment afforded to
15 two other applications. However, petitioner made no showing
16 that the two other applications were identical in size and
17 intensity to the controversy before us today. In addition, in
18 order to be constitutionally improper, select enforcement of an
19 ordinance provision must be deliberately based on unjustifiable
20 standards such as race, religion, or some other arbitrary
21 classification. Dyler v. Boles, 368 US 448, 82 S.Ct. 501, 7
22 L.Ed 2d 446 (1962); State of Oregon v. Clark, 630 P2d 810, 291
23 Or 231 (1981); see also, City of Eugene v. Crooks, 55 Or App
24 351, 637 P2d 1350 (1981). Petitioner has not shown use of an
25 arbitrary classification.

26 Further, even if the city council were to have treated

1 other applications differently, our first inquiry would be to
2 discover whether the city's interpretation and application of
3 its plan and ordinances were correct. Arguably, the prior
4 cases are examples of error in interpretation and application
5 of the code, and the present case may be an example of a
6 correct interpretation. See, Medford Assembly of God v.
7 Medford, 12 Or LUBA 167, (1984). We conclude petitioner has
8 not made the required showing of unconstitutionality.

9 The first assignment of error is denied.

10 SECOND ASSIGNMENT OF ERROR

11 "Staff member Chuck Rhodaback, the Community Planning
12 Director, erroneously advised the City Council that it
13 had to find public need for the community as a whole
and not for the neighborhood in which the requested
zone change was located."

14 In this assignment of error, petitioner complains the
15 advice given by the planning director was erroneous.
16 Petitioner complains there is no definition of public need in
17 the city's Land Use Development Ordinance (LUDO) or the
18 comprehensive plan. The planning director's requirement the
19 applicant show public need for the entire city placed an
20 excessive burden on the petitioner, according to this argument.

21 We are reviewing the city council's decision to deny the
22 application for the plan and zone change. The planning
23 director's interpretation is not a separate final land use
24 decision on appeal to us. ORS 197.015(10). His advice is not,
25 under these circumstances, relevant to this review proceeding.
26 The issue of whether the city was correct in holding petitioner

1 to a community wide public need standard is relevant to this
2 proceeding. We discuss this issue under the fifth assignment
3 of error.

4 This assignment of error is denied.

5 THIRD ASSIGNMENT OF ERROR

6 "The Roseburg City Council, although requiring
7 petitioner to show public need, failed to define
8 public need in its Comprehensive Plan, Zoning
9 Ordinance or elsewhere. The City Council does not
provide any standard by which petitioner can measure
his standard of proof to meet that standard."

10 Petitioner complains that the city's comprehensive plan and
11 the LUDO do not include standards and criteria about public
12 need. Petitioner asserts that governing bodies are required to
13 provide clear standards to guide the applicant. See, Lee v.
14 City of Portland, 57 Or App 798, 646 P2d 662 (1982).

15 Petitioner complains he was neither informed of the standards
16 under which his application would be tested nor told how he
17 could satisfy the public need requirement.

18 Petitioner echos the argument made in the first assignment
19 of error that the city erroneously held him to a community wide
20 public need standard rather than a neighborhood public need
21 standard. Also, petitioner says the city

22 "failed to identify whether the public need was to be
23 determined independently of a given application or
24 whether the impact of a specific development proposal
25 must be taken into consideration. Thus, petitioner is
left in the impossible position of trying to second
guess respondent as to what evidence he must present
to demonstrate that a claimed public need criterion
has been met." Petition for Review at 12.

26 Respondent argues the standards in the city's comprehensive

1 plan and zoning ordinance need not afford precise
2 predictability, but may allow for the exercise of judgment.
3 According to respondent, "public need" is not an impermissibly
4 vague standard. See, Stewart v. City of Eugene, 57 OR App 627,
5 646 P2d 74, rev den, 294 Or 492 (1983). Respondent argues the
6 city appropriately tested the desire to build a shopping center
7 to serve "the greater Roseburg area," (Record 43), against a
8 community wide standard.²

9 We believe the city fulfilled its responsibility to
10 identify the applicable public need criterion. The matter of
11 public need was clearly an issue from the beginning of the
12 proceeding. The applicant requested a shopping center to serve
13 "the greater Roseburg area," and the issue of whether a
14 neighborhood versus community wide need standard was discussed
15 at the city council hearing of December 8, 1986. The city
16 committed no error under these circumstances.

17 The third assignment of error is denied.

18 FOURTH ASSIGNMENT OF ERROR

19 "The Roseburg City Council erroneously allowed persons
20 other than the applicant and parties to the proceeding
21 to argue at the date and time set for its hearing.
22 Specifically, Daniel Robertson, of the Planning
Commission, Chuck Rhodaback, Community Planning
Director, and Bob Barbee, City Manager, were permitted
to argue the merits of the review by the council."

23 This assignment of error challenges the testimony given by
24 city staff members. Petitioner claims the ordinance does not
25 allow statements and explanations by planning commission
26 members and staff persons. Petitioner argues that allowing

1 unauthorized persons to argue in favor of the planning
2 commission decision

3 "substantially affects the minds of the City Council
4 and places an additional burden on the petitioner to
5 overcome the Planning Commission decision." Petition
6 for Review at 14.

7 We are cited to no authority prohibiting participation in
8 city council appeal proceedings by members of city planning
9 bodies or city staff, and we are not inclined to engraft such
10 prohibition given the facts in this case.

11 In fact, LUDO Sec. 2.300(3)(c) permits the "approving
12 authority"³ to request the planning director to present a
13 report and explain "graphic or pictorial displays" or "provide
14 other such information as may be requested by the approving
15 authority." This use of staff, provided in the ordinance,
16 suggests the ordinance expressly allows staff participation in
17 whatever manner the city council wishes.

18 We note the city council review of the planning commission
19 decision is, under the city's ordinance, confined to the
20 record. LUDO Sec. 2.700. Petitioner makes no claim that the
21 discussion by staff persons at the city council meeting
22 included facts not in the record of the planning commission
23 decision. In short, we find no facts supporting petitioner's
24 claim of prejudice in the city's procedure.

25 The fourth assignment of error is denied.

26 FIFTH ASSIGNMENT OF ERROR

"The Roseburg City Council's findings do not support
the Council's conclusion and are not supported by

1 substantial evidence in the record."

2 Petitioner includes a long list of findings he believes are
3 not supported by substantial evidence in the record. In
4 reviewing the list, we note at the outset that petitioner will
5 not be entitled to a remand or a reversal of the city's
6 decision unless petitioner is able to show that none of the
7 findings critical to the decision is supported by substantial
8 evidence. The burden petitioner faces is a difficult one. As
9 the court noted in Jurgenson v. Union County Court, 42 Or App
10 505, 600 P2d 1241 (1979)

11 "[w]hen a local government has denied a requested
12 land-use change, the concept of reviewing for
13 substantial evidence to sustain the denial presents
14 difficulties. In a local land-use proceeding the
15 proponent of change has the burden of proof. Could
16 not a local government deny a land-use change on the
17 sole basis that the proponent did not sustain his
18 burden of proof because his evidence was not
19 credible? If so, in what sense would we be expected
20 to say that the denial was supported by substantial
21 evidence?"

17 * * *

18 "We perceive no reason why a local decision denying a
19 requested land-use change should be treated
20 differently. In other words, a denial is supported by
21 substantial evidence within the meaning of ORS
22 34.040(3) unless the reviewing court can say that the
23 proponent of change sustained his burden of proof as a
24 matter of law." Jurgenson, 42 Or App at 510.
25 (citations omitted).⁴

22 The city's order of denial was based in part on its finding
23 that a development would pose traffic hazards and that
24 petitioner made an insufficient showing of need for a
25 development of the kind proposed. The findings supporting the
26

1 conclusions about traffic congestion and safety problems are
2 thin, but petitioner does not argue the city's traffic figures
3 are wrong. Petitioner does not explain how the city's evidence
4 is false or not substantial evidence to support the city's
5 finding of a traffic hazard. Rather, petitioner suggests his
6 own method of calculating traffic volumes and comes up with a
7 new set of figures. We understand petitioner's argument to ask
8 us to make new findings of fact and conclusions of law about
9 traffic based on petitioner's methods. This function is not
10 within our authority. We conclude the city's evidence about
11 traffic, while minimal, is sufficient to support the decision.

12 Homebuilders v. Metro, 54 Or App 60, 633 P2d 1320 (1981).

13 Younger, et al v. City of Portland, ___ Or App ___, ___ P2d ___
14 (Slip opinion of June 24,, 1987).

15 Petitioner argues the city's characterization of its
16 proposal as a community commercial center is not supported by
17 evidence in the record. Petitioner wishes us to view the
18 shopping center as a neighborhood shopping center and supports
19 this argument with a citation to a definition of community and
20 neighborhood shopping centers in a publication of the Institute
21 of Transportation Engineers. See, Petition for Review at 27.

22 While use of this definition may be perfectly appropriate
23 in some circumstances, the city's failure to use this standard
24 is not error. See, e.g., Hillsboro Neighborhood Development
25 Committee v. Hillsboro, ___ Or LUBA ___ (LUBA No. 86-094, June
26 3, 1987). Petitioner cites no requirement in the city's plan

1 or ordinance which requires the city to use any particular
2 definition of community or neighborhood shopping center. The
3 city found the proposed shopping center would serve a much
4 larger market area than the immediate West Roseburg
5 neighborhood. This determination is a reasonable
6 interpretation of its ordinance. Alluis v. Marion County, 64
7 Or App 478, 668 P2d 1242 (1983). In addition, the size of the
8 development and statements of the applicant about the services
9 to be provided are substantial evidence for the city's
10 conclusion.

11 The city found the applicant did not make the required
12 showing of a need in the community for less residential land
13 and more commercial land. Particularly, the city found the
14 applicant failed to present evidence about residential land
15 quantities and needs for the entire metropolitan area. The
16 city believed "this type of evidence is needed to justify a
17 public need for a reallocation of the residential land needs
18 set out in the plan." Record 6. We find no fault with this
19 interpretation. Alluis v. Marion County, supra.

20 The city added it was not clear from the record what
21 existing businesses serve the immediate area and why the
22 existing businesses were insufficient to meet present and
23 future needs. The city found

24 "justification for an additional five or more acres of
25 additional commercial land in West Roseburg is
26 lacking. The Applicant asserts that Dee's Market will
require approximately three acres. It is not clear
how large of an area is needed for the Abbey's Pizza

1 restaurant or why the restaurant facility could not be
2 located on already available commercial land in the
3 area (e.g., southeast corner of Harvard Avenue and
4 Looking Glass Road, southwest corner of Harvard Avenue
5 and Harrison Street). Likewise, the small commercial
6 uses could be sited on already available commercial
7 land in this area (see, e.g., listings set forth in
8 the Developmental Impact Study attached to the
9 application.) Whatever the public need justification
10 for a site for the grocery store, it does not satisfy
11 the justification required for the associated
12 commercial development land. And it is the size of
13 the entire commercial facility that is the problem
14 here with respect to traffic generation." Emphasis in
15 original. Record 7.

9 Petitioner provided the city with no evidence about the
10 impact of removing 8.72 acres of residential land in West
11 Roseburg nor any evidence about the need for additional
12 commercial property. Such a showing is the applicant's
13 responsibility, and the fact petitioner has not shown the
14 city's conclusions are mistaken is sufficient to sustain this
15 issue as a basis for the city's denial of the entire
16 application. Chemeketa Industries Corp. v. City of Salem, 14
17 Or LUBA 159 (1985).

18 In short, petitioner has not explained how the city's
19 findings are not responsive to the criteria and how, given the
20 evidence, petitioner is entitled to the change as a matter of
21 law.

22 The fifth assignment of error is denied.

23 The city's decision is affirmed.

FOOTNOTES

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Petitioner fails to note the provision of the Oregon and U.S. Constitutions which he believes provides him with the protection claimed. The omission is grounds to reject the claim. See, Chemeketa Industries v. City of Salem, 14 Or LUBA 159 (1985); Mobile Crushing v. Lane County, 11 Or LUBA 173 (1984).

2
Petitioner's application stated the project "will encourage shopping from the local neighborhood and the greater Roseburg area." Record 43.

3
The "approving authority" can be the planning commission or the city council.

4
Respondent characterizes the analysis as follows:

1. "Did Petitioner sustain his burden of proof with respect to all of the plan amendment criteria?
2. "If so, did other evidence undercut petitioner's showings so to make them less than compelling? and
3. "Did Respondent articulate a 'reasonable basis' to support the conclusion that Petitioner's evidence was not convincing?" Brief of Respondent City of Roseburg at 29.

In this case, we find that petitioner did not sustain his burden of proof.