

LAND USE
BOARD OF APPEALS

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

DEC 9 3 58 PM '87

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PORTLAND OIL SERVICE CO., INC.)
) LUBA No. 87-076
 Petitioner,)
)
 vs.) FINAL OPINION
) AND ORDER
CITY OF BEAVERTON,)
)
 Respondent.)

Appeal from City of Beaverton.

Steven W. Abel, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Schwabe, Williamson & Wyatt.

Pamela J. Beery, Beaverton, filed a response brief and argued on behalf of Respondent City.

SHERTON, Referee; BAGG, Chief Referee; HOLSTUN, Referee; participated in the decision.

REMANDED 12/09/87

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

1 Opinion by Sherton.

2 NATURE OF THE DECISION

3 Petitioner appeals Beaverton City Council Resolution
4 No. 2811. This resolution changes the boundaries of and
5 reduces the scope of improvements proposed for the previously
6 created Beaver Creek Boulevard Street and Drainage Improvement
7 District (Beaver Creek L.I.D.). The resolution also revises the
8 estimated cost of improvements, establishes a new assessment
9 method and renames the Beaver Creek L.I.D. as the Lombard North
10 L.I.D.

11 FACTS

12 On November 4, 1985, the city adopted Resolution No. 2656
13 creating the Beaver Creek L.I.D. for the purpose of constructing
14 streets, utilities and drainage improvements in a relatively
15 large, predominantly undeveloped area of the city. No specific
16 street alignments were approved at that time. However, the
17 resolution describes the proposed streets as "extending [east
18 to west] from S.W. 117th to S.W. Hall Blvd., and from this
19 street south to S.W. Canyon Road." The Beaverton General Plan
20 (the city's comprehensive plan) includes a map entitled
21 "Circulation Plan" which depicts streets meeting this
22 description and designates them as "Proposed Collectors."
23 Property owned by petitioner was included in the Beaver Creek
24 L.I.D.

25 No improvements were actually constructed in the
26 Beaver Creek L.I.D., but the projected costs of the proposed

1 improvements rose over time. The Tri-Metropolitan Transit
2 District (Tri-Met) purchased a landlocked parcel within the
3 L.I.D. and in 1985 was awarded state lottery funds to develop
4 the site as a replacement for its current regional transit
5 center. On June 22, 1987, the City Council held a public
6 hearing to consider modifications to the L.I.D. and decided to
7 reduce the area and scope of the L.I.D. to include only what
8 was necessary for Tri-Met to proceed with its transit center.

9 On August 10, 1987, after a public hearing at which
10 petitioner appeared, the City Council adopted Resolution
11 No. 2811 modifying the L.I.D. The revised North Lombard L.I.D.
12 involves construction of a street "extending northerly from
13 S.W. Canyon Road to a temporary cul-de-sac at the proposed
14 intersection of an unnamed street extending easterly from SW
15 Hall Blvd. and the extension of SW Beaverdam Road." The
16 temporary cul-de-sac would be located on the Tri-Met site.

17 The total area in the L.I.D. was reduced to a fraction of
18 that in the original L.I.D. A new method of assessment was
19 adopted, resulting in petitioner being required to pay
20 considerably more than it would have under the original
21 Beaver Creek L.I.D. This appeal followed.

22 JURISDICTION

23 Respondent City moves to dismiss this appeal on the ground
24 the Notice of Intent to Appeal was not filed within 21 days of
25 the decision as required by ORS 197.830(7) and OAR 661-10-015.
26 The city contends the decision to extend and improve the

1 subject street was made by Resolution No. 2656 on November 4,
2 1985, and the appealed resolution is simply a revision to that
3 earlier decision, allowing use of a "temporary cul-de-sac at
4 the location of a proposed future intersection," and modifying
5 the method of financing the improvements.

6 The city further argues that LUBA lacks jurisdiction to
7 review this case because the appealed decision is not a land
8 use decision under the "significant impact test." City of
9 Pendleton v. Kerns, 294 Or 126, 133-134, 653 P2d 996 (1982) (a
10 local government decision is a land use decision if it will
11 have a "significant impact on present or future land uses in
12 the area"). The city contends the appealed decision does not
13 in itself have significant impacts on present or future land
14 uses in the area. The city argues such impacts occurred either
15 when the city made its 1982 decision to designate the subject
16 street as a Proposed Collector on the Circulation Plan Map of
17 its General Plan, or when the city adopted its 1985 resolution
18 authorizing the construction of streets in the area.

19 The city claims that the authorization of street
20 improvements by Resolution No. 2811 is not a new authorization
21 of street improvements, but rather simply a decision to reduce
22 temporarily the scope of the improvements authorized by its
23 1985 resolution. The city also asserts that this situation is
24 distinguishable from that in City of Pendleton v. Kerns, supra,
25 because in this case the street improvements authorized are the
26 same as those contemplated by the city's Plan.

1 Petitioner replies that the appealed decision is a new land
2 use decision, different from that made by the city's 1985
3 resolution. Petitioner contends the cul-de-sac authorized by
4 the appealed decision will have different impacts on present
5 and future land uses in the area than the through streets
6 authorized by the 1985 resolution and shown on the Circulation
7 Plan Map in the General Plan. Petitioner argues that placing a
8 regional transit center on a cul-de-sac rather than a through
9 street will have significant impacts on traffic congestion and
10 use of surrounding properties.¹

11 Petitioner appealed the adoption of Resolution No. 2811,
12 which became final on August 13, 1987. Petitioner's notice of
13 intent to appeal Resolution No. 2811 was filed within the 21
14 days allowed by statute and LUBA rule, and therefore was
15 timely. The question which must be answered is whether
16 Resolution No. 2811 is a land use decision subject to LUBA's
17 jurisdiction.

18 Resolution No. 2811 changes the street development
19 authorized for the subject area, from an east/west through
20 street connecting S.W. Hall Blvd. and S.W. 117th and a
21 north/south street connecting that street with S.W. Canyon
22 Road, to a cul-de-sac extending north from S.W. Canyon Road.
23 Construction of the cul-de-sac will allow development of a
24 regional transit center on the Tri-Met site (and presumably
25 development of other currently undeveloped parcels adjacent to
26 the cul-de-sac) and will result in changes in the amount and

1 pattern of traffic, which will impact other property in the
2 vicinity.

3 Thus, authorization of construction of the cul-de-sac will
4 have a significant impact on the present and future land uses
5 of the surrounding property. Furthermore, we believe that
6 these impacts will be significantly different from those which
7 would be caused by the development of through streets
8 connecting S.W. Hall Blvd., S.W. 117th and S.W. Canyon Road, as
9 previously approved by the city's 1985 resolution and
10 contemplated by the city's Circulation Plan Map.² We
11 therefore find that Resolution No. 2811 is a land use decision
12 under the "significant impact test" as set out in Kerns, supra.

13 There is another, independent basis for determining that
14 the appealed resolution is a land use decision, one not argued
15 by either party in this case. That is, does the resolution
16 meet the statutory definition of a land use decision found in
17 ORS 197.015(10).³ A local government decision is a land use
18 decision if it meets either (1) the significant impacts test of
19 City of Pendleton v. Kerns, supra or (2) the statutory
20 definition of ORS 197.015(10). Billington v. Polk County, 299
21 Or 471, 479, 703 P2d 232 (1985).

22 In this case, Resolution No. 2811 is a land use decision
23 under ORS 197.015(10) if it involves application of a
24 comprehensive plan provision. In making such a determination
25 it is not sufficient that a decision may touch on some aspects
26 of the comprehensive plan, rather the comprehensive plan must

1 contain provisions intended as standards or criteria for making
2 the appealed decision. Billington v. Polk County, 299 Or at
3 475.

4 As the party seeking LUBA review, the burden is on
5 petitioner to establish LUBA's jurisdiction, i.e. that the
6 appealed decision is a land use decision. Billington v. Polk
7 County, 299 Or at 475; City of Pendleton v. Kerns, 294 Or at
8 134 n7. Petitioner specifically identifies one provision of
9 the Circulation section of the Plan as being applicable to the
10 appealed decision.⁴ We will therefore consider whether this
11 provision, Circulation Statement of Intent of the Plan 13
12 (CSIP 13), is an approval standard for the appealed decision.

13 CSIP 13 provides:

14 "In developing the road network for the area bounded
15 by Canyon, 117th, Center and Hall, the following
criteria shall be met:

16 "a. Access to the area from Canyon shall be provided
17 by a signalized commercial minor collector
18 located mid-distance between the 117th and Hall
signals to the extent possible.

19 "b. Primary access to the development proposed in the
20 southeast part of the area shall be from 117th or
off an internal collector street system, not from
Canyon.

21 "c. Public access from Center into the area is
22 necessary. However, there should be no direct
connection between Canyon and Center.

23 "d. A collector street system is necessary east and
24 west between Hall and 117th to relieve the use of
Canyon for this trip desire, provide alternative
25 access to properties along Canyon, to serve the
area and to connect the area to developments west
26 of Hall and Watson, e.g., Beaver Creek Center.

1 "e. Only one signalized crossing for auto traffic
2 shall be allowed on Hall. An additional crossing
of the arterial may be necessary for transit
vehicles.

3 "f. Private driveway access and local street access
4 to Canyon on 117th, Center and Hall shall be
eliminated to the extent possible.

5 "g. Any access within the area shall respect the
6 integrity of the Beaverton Creek parkway.

7 "h. All other access within the area can be served by
8 local streets or, as approved by the City,
private streets."

9 The city does not argue that the provisions of CSIP 13 are
10 not mandatory approval standards for street development
11 decisions in the subject area.⁵ Rather, the city argues that
12 the provisions of CSIP 13 are standards which the city is not
13 required to address until a later stage of its street
14 development process. The city argues that before actual
15 construction of the proposed cul-de-sac can occur, its land use
16 regulations will require review of the proposed project under
17 the Site Development provisions of the Beaverton Code and the
18 Site and Design Review provisions of the Development Code, at
19 which times compliance with the Plan will be an approval
20 criterion.

21 However, the provisions of the Beaverton Code, Development
22 Code and Plan to which the city has directed our attention do
23 not bear out the city's argument. Under Development Code
24 Sec. 134.2.A, the Site and Design Review process applies to a
25 non-structural development activity only if it is subject to
26 the Site Development permit provisions of Beaverton Code (BC)

1 Sec. 9.05.005 - 9.05.170 and occurs (1) in a Significant
2 Natural Resource Zone or (2) on a parcel identified as an
3 Important Natural Resource Area where the work will occur
4 within 100 feet of a Significant Natural Resource Zone.⁶

5 According to the Plan Natural Resources Map, the site of
6 the proposed street and cul-de-sac includes some area
7 designated as "Other Important Natural Resources," but is
8 clearly not within 100 feet of a designated "Significant
9 Natural Resource Zone." Thus, any future city decisions on the
10 proposed cul-de-sac improvement would not come within the
11 jurisdiction of the Site and Design Review process.

12 The Site Development process of BC Sec. 9.05.005 - 9.05.170
13 does appear to require that a permit be obtained from the City
14 Engineer before any street construction work is performed
15 within city rights of way BC Sec. 9.05.020.A. However, the
16 standards for approval of such permits found in BC
17 Sec. 9.05.055 and 9.05.060 are technical in nature and do not
18 include compliance with the Plan.

19 Thus, the city has not demonstrated there are future stages
20 in the development of the proposed street and cul-de-sac at
21 which relevant Plan provisions would have to be applied.
22 However, even if the city had done so, that would not
23 necessarily mean that there cannot be Plan provisions which are
24 approval standards for the decision appealed in this case.
25 What must be determined is whether CSIP 13 is an approval
26 standard for the appealed decision.

1 By the express terms of CSIP 13, its provisions are
2 mandatory criteria for "developing the road network for the
3 [subject] area." Resolution No. 2811 authorizes the
4 construction of the initial segment of street to serve the area
5 in question. It is a step in the process of developing the
6 road network which will serve the area.

7 We conclude that Plan CSIP 13 is an approval standard
8 applicable to the appealed decision; and, therefore, that
9 Resolution No. 2811 meets the statutory definition of a land
10 use decision. Because the appealed decision meets either the
11 statutory or significant impacts tests for a land use decision,
12 the city's motion to dismiss is denied.

13 FIRST ASSIGNMENT OF ERROR

14 "The Resolution fails to contain adequate findings of
15 fact and conclusions of law to support the enactment
of Resolution No. 2811."

16 Petitioner argues that the decision to authorize
17 improvement of the subject street and cul-de-sac is
18 quasi-judicial, comparable to the street extension decision
19 which we held to be quasi-judicial in Kerns v. City of
20 Pendleton, 2 Or LUBA 295, 299 (1981), and therefore must be
21 supported by findings and conclusions. As previously stated,
22 petitioner makes a general claim that there are provisions in
23 certain sections of the Beaverton General Plan (Plan) which
24 apply to the challenged decision, but specifically identifies
25 only CSIP 13.

26 The city argues that its decision to authorize construction

1 of the subject street and cul-de-sac is legislative because (1)
2 a substantial number of properties are affected, (2) the
3 decision does not apply preexisting criteria to concrete facts,
4 and (3) the process was not bound to result in a decision on
5 whether or not to develop the street; and, therefore, it is not
6 required to be supported by findings and conclusions. The city
7 also argues that under ORS 197.835(10)(b), the failure to adopt
8 adequate findings and conclusions is not necessarily a basis
9 for remand by LUBA.

10 In Strawberry Hill 4-Wheelers v. Benton County Bd. of
11 Comm., 287 Or 591, 602-603, 601 P2d 769 (1979), the Supreme
12 Court described three factors to be considered in determining
13 whether a land use decision is quasi-judicial:

14 "Generally, to characterize a process as an
15 adjudication presupposes that the process is bound to
16 result in a decision and that the decision is bound to
17 apply preexisting criteria to concrete facts. * * *
18 [A] further consideration has been whether the action,
19 even when the governing criteria leave much room for
20 policy discretion, is directed at a closely
21 circumscribed factual situation or a relatively small
22 number of persons. * * *"

19 In this case, the city's process of considering whether to
20 modify the previously created Beaver Creek L.I.D. was not bound
21 to result in a decision. The city could simply discontinue its
22 process, leaving the Beaver Creek L.I.D. unchanged, at any time
23 prior to adoption of its final decision. On the other hand,
24 the city's decision to authorize construction of the street and
25 cul-de-sac did involve the application of preexisting criteria
26 to concrete facts, as we have already held that CSIP 13 is an

1 approval standard for this decision. Also, the subject
2 decision is directed at a closely circumscribed factual
3 situation and relatively small number of persons. Only ten
4 parcels, in six ownerships totalling less than ten acres,
5 adjoin the proposed street improvements and are included in the
6 revised North Lombard L.I.D.

7 Thus, the appealed decision satisfies two of the indicia of
8 a quasi-judicial decision set out in Strawberry Hill 4-Wheelers
9 v. Benton Co. Bd. of Comm., supra, but does not satisfy the
10 "bound to result in a decision" factor. However, in Estate of
11 Gold v. City of Portland, 87 Or App 45, 51-52, 740 P2d 812
12 (1987) (amendment of city urban renewal plan), the Court of
13 Appeals held that a decision can be quasi-judicial without
14 meeting the "bound to result in a decision" test, at least if
15 the other attributes of a quasi-judicial decision are present.
16 In that case, the Court reasoned a city can decide to do
17 nothing, but having elected to make a decision, is required to
18 act quasi-judicially.

19 We believe that the decision in this case is comparable to
20 that made in Estate of Gold v. City of Portland, supra, as well
21 as to the street extension decision we held to be
22 quasi-judicial in Kerns v. City of Pendleton, supra. Therefore,
23 the decision is quasi-judicial. Because the decision is
24 quasi-judicial in nature, the city was required to adopt
25 findings, based on evidence in the record, demonstrating
26 compliance with applicable provisions in its comprehensive

1 plan. Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3,
2 569 P2d 1063 (1977).

3 Petitioner has argued, and we have agreed, that in this
4 case CSIP 13 is an applicable criterion. The city failed to
5 adopt findings addressing CSIP 13.⁷ This will result in
6 remand unless (1) pursuant to ORS 197.835(10)(b), the city
7 identifies "relevant evidence in the record which clearly
8 supports the decision," or (2) the city shows the individual
9 sub-parts of CSIP 13 are inapplicable to the decision. We will
10 review the city's decision against each of the eight sub-parts
11 of CSIP 13 on this basis.

12
13 a. Access to the area from Canyon shall be provided by a
14 signalized commercial minor collector located
mid-distance between the 117th and Hall signals to the
extent possible.

15 This provision requires the city to adopt findings
16 demonstrating that the approved street and cul-de-sac accessing
17 Canyon Road will be designed and function as a commercial minor
18 collector, will be signalized and is located as much as
19 possible midway between 117th and Hall Blvd. In particular,
20 the findings would need to demonstrate that a street ending in
21 a cul-de-sac complies with city requirements for a minor
22 collector.

23 The city argues the proposed street complies with this
24 provision of the Plan. The city states that its intent is to
25 build a through street, and the cul-de-sac is only temporary.
26 However, the city does not identify any evidence in the record

1 which would clearly support a determination that the cul-de-sac
2 as proposed would function as the commercial minor collector
3 envisaged by this Plan provision. Therefore, failure to adopt
4 findings addressing this applicable criterion is ground for
5 remand.

6 b. Primary access to the development proposed in the
7 southeast part of the area shall be from 117th or off
8 an internal collector street system, not from Canyon.

9 The city argues that this provision refers to the already
10 constructed Canyon Place Shopping Center, which has access from
11 117th, and therefore is not applicable to this decision.
12 However, the city does not indicate where in the record this
13 information can be found. Nevertheless, it is clear from the
14 map of the North Lombard L.I.D., which is part of Resolution
15 No. 2811, that the proposed cul-de-sac does not provide access
16 to the southeast part of the area bounded by Canyon, 117th,
17 Center and Hall. Therefore, this provision is not applicable.

18 c. Public access from Center into the area is necessary.
19 However, there should be no direct connection between
20 Canyon and Center.

21 The city argues its decision complies with this provision
22 because no direct connection between Canyon and Center is
23 proposed by the approved street improvement. The city does not
24 cite any evidence to support its statement. Nevertheless it is
25 clear from the adopted map of the North Lombard L.I.D. that the
26 approved cul-de-sac is not a direct connection between Canyon
and Center; and, therefore, we can conclude that this provision
has been met.

1
2 d. A collector street system is necessary east and west
3 between Hall and 117th to relieve the use of Canyon
4 for this trip desire, provide alternative access to
5 properties along Canyon, to serve the area and to
6 connect the area to developments west of Hall and
7 Watson, e.g., Beaver Creek Center.

8 Petitioner argues that this provision establishes "a goal
9 of attempting to provide alternative access to properties along
10 Canyon" to relieve Canyon Road traffic. According to
11 petitioner, the proposed cul-de-sac does not comply with this
12 provision because development of a regional transit center on
13 the proposed cul-de-sac will increase, rather than relieve,
14 Canyon Road traffic.

15 The city argues that this provision is not applicable
16 because the proposed temporary cul-de-sac runs north and south,
17 and the east-west connection between Hall and 117th
18 contemplated by the Plan will be addressed when further street
19 development in the area is approved.

20 We believe that this provision is applicable and requires
21 the city to make a determination that street development
22 approved in the subject area is consistent with the eventual
23 development of the described east-west collector between Hall
24 and 117th. The city does not identify evidence in the record
25 which clearly supports such a determination.

26 e. Only one signalized crossing for auto traffic shall be
27 allowed on Hall. An additional crossing of the
28 arterial may be necessary for transit vehicles.

29 The city states this provision is not applicable to the
30 appealed decision. We agree with the city, as it is clear from

1 the map of the North Lombard L.I.D. that the approved street
2 does not intersect Hall Blvd.

3 f. Private driveway access and local street access to
4 Canyon on 117th, Center and Hall shall be eliminated
5 to the extent possible.

6 Petitioner argues that the city's decision does not comply
7 with this standard because it approves access onto SW Canyon
8 Road by a driveway for the proposed regional transit center.
9 The city argues that this provision only calls for elimination
10 of driveway and local street access onto 117th, Center and Hall
11 (described by the city as arterials which in turn access
12 Canyon), not onto Canyon itself.

13 We will uphold a city's interpretation of its Plan, if that
14 interpretation is reasonable. Alluis v. Marion Co., 64 Or App
15 478, 481, 668 P2d 1242 (1983). However, the city's
16 interpretation of this provision as imposing no restriction on
17 driveway and local street access to SW Canyon Road runs counter
18 to its apparent purpose of reducing traffic congestion on major
19 streets.

20 The city's Circulation Plan Map shows that Center and 117th
21 are classified as collectors, Hall as an arterial, and Canyon
22 as a principal arterial. Furthermore, there is no access from
23 Center onto Canyon, as the two streets do not intersect. Also,
24 interpreting this provision as imposing no limitation on
25 driveway and local street access onto Canyon would be
26 inconsistent with the requirement of sub-part "a" above that
access to the area from Canyon be provided by a minor collector.

1 If this provision applies to driveway and local street
2 access onto Canyon, what the city is required to demonstrate in
3 its findings is either (1) the approved cul-de-sac will meet
4 city standards for a minor collector, and therefore will not be
5 a driveway or local street (see discussion of sub-part "a"
6 above); or (2) access from the cul-de-sac to Canyon is
7 consistent with eliminating access from private driveways and
8 local streets to Canyon to the extent possible. The city has
9 not identified evidence in the record which would clearly
10 support either determination.

11 g. Any access within the area shall respect the integrity
12 of the Beaverton Creek parkway.

13 The city argues that this provision is not applicable to
14 its decision, but cites no evidence to support its argument.
15 As it is not self-evident where the Beaverton Creek parkway is
16 located, we cannot conclude as a matter of law that this
17 provision is inapplicable to the proposed decision. The city
18 must adopt findings addressing the relationship between the
19 approved cul-de-sac and the Beaverton Creek parkway.

20 h. All other access within the area can be served by
21 local streets or, as approved by the City, private
streets.

22 The city argues that this provision is not applicable to
23 its decision. We agree, as it imposes no limitation on city
24 street approvals.

25 In conclusion, the city has failed to adopt findings
26 addressing CSIP 13 sub-parts a, d, f and g, and has not

1 identified evidence in the record which clearly supports its
2 decision with regard to these criteria. We therefore sustain
3 the first assignment of error.

4 SECOND ASSIGNMENT OF ERROR

5 "The City Council's decision-making process is
6 contrary to law since the Resolution adopted by the
7 Council, as contained in the record, materially
8 differs from the Resolution filed by the City
9 Recorder."

10 Petitioner argues that the city's decision-making process
11 was procedurally flawed in that the version of Resolution
12 No. 2811 signed by the Mayor and filed with the City Recorder
13 is materially different from the version adopted by the city
14 Council at its August 10, 1987 meeting, signed by the Mayor on
15 August 13 and initially filed by the city with the record for
16 our review.⁸

17 According to petitioner, the revision has the effect of
18 authorizing the city to relieve Tri-Met of obligation for
19 benefits to its property due to future street improvements
20 beyond what is authorized by Resolution No. 2811. Petitioner
21 argues it is prejudiced by the city's recording of a different
22 version of the resolution than what was adopted on August 10,
23 1987. Petitioner contends it was denied the right to present
24 and rebut evidence on the city's final decision which it argues
25 is guaranteed by Fasano v. Washington Co. Comm., 264 Or 574,
26 588, 507 P2d 26 (1973).

27 The city agrees that the version of Resolution No. 2811
28 initially filed as part of the record for review differs from

1 the certified, recorded version of the resolution. However,
2 the city maintains the former version of the resolution does
3 not contain the language which was actually adopted by the City
4 Council on August 10, and the recorded version of the
5 resolution does not differ materially from the language which
6 was adopted on August 10.

7 The city points out that the City Council's motion on
8 August 10 amended the proposed version of the resolution to
9 include revised language for Section 6 submitted by the City
10 Attorney in a memorandum. The city argues that because the
11 version of the resolution before the City Council at the
12 hearing attended by petitioner was substantially the same as
13 the recorded version,⁹ petitioner was not denied any rights
14 to present and rebut evidence.

15 The version of Section 6 actually adopted by the City
16 Council on August 10 was contained in the memorandum from the
17 City Attorney. It appears that in producing the final written
18 version of the resolution a scrivener's error was made, in the
19 form of one line from the memorandum being omitted, resulting
20 in the version initially signed by the Mayor and submitted to
21 us with the record. At some point that scrivener's mistake was
22 discovered, and a second order was signed by the Mayor.
23 However, for some reason the second order, the one officially
24 filed with the City Recorder, incorporated additional changes
25 in the language of Section 6 of the resolution. See footnote 9.

26 The differences between the language of the adopted and

1 recorded versions of Section 6 of Resolution No. 2811 concern
2 Tri-Met's obligations for benefits to its property due to
3 future road construction beyond what is authorized by this
4 decision. This issue was addressed in testimony and Council
5 discussion at the August 10 hearing in which petitioner took
6 part. Petitioner's argument is based on the incorrect premise
7 that a governing body cannot amend the language of a proposed
8 enactment after the close of public hearing. Petitioner had
9 the opportunity to address the issue of Tri-Met's future
10 obligations in its testimony, and therefore was not denied its
11 rights to present and rebut evidence.

12 In its argument on this assignment of error petitioner
13 terms the city's action "arbitrary." Petitioner may intend the
14 use of this term to be shorthand for an allegation that the
15 city's decision is unconstitutional in some respect and
16 therefore is subject to remand under ORS 197.835(8)(a)(E).
17 However, no such argument is developed in the petition. We
18 decline to consider claims of unconstitutionality where, as
19 here, they are unsupported by legal argument. Chemeketa
20 Industries Corp. v. City of Salem, 14 Or LUBA 159, 166 (1985);
21 Mobile Crushing Company v. Lane County, 11 Or LUBA 173 (1984).

22 The second assignment of error is denied.¹⁰

23 The decision is remanded.

24

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26

1 FOOTNOTES

2 _____
3 1

4 Petitioner also argues that the city's motion to dismiss
5 was not timely filed under the provisions of OAR 661-10-065(2)
6 limiting a party to ten days in which to challenge the failure
7 of an adverse party to comply with any requirement of statute
8 or LUBA rule. Petitioner states that more than ten days
9 elapsed between the service of the petition for review on the
10 city and the filing of the city's motion to dismiss. However,
11 a challenge to LUBA's authority to act may be brought at any
12 time and is not subject to the ten-day limitation of
13 OAR 661-10-065(2). Osborne v. Lane County, 4 Or LUBA 368, 369
14 (1981). In this case, the city's motion to dismiss challenges
15 the notice of intent to appeal on jurisdictional grounds, and
16 therefore was timely filed.

17 _____
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19 Resolution No. 2811 describes the authorized cul-de-sac as
20 "temporary." The fact that the network of through streets
21 previously authorized by the city's 1985 resolution and
22 depicted on the city's Circulation Plan Map may ultimately be
23 built at some time in the future does not alter the fact that
24 development of the cul-de-sac will have significant impacts on
25 present and future land uses in the surrounding area during the
26 time the cul-de-sac exists. We note that Resolution No. 2811
27 does not include any limitation on the duration of the
28 "temporary" cul-de-sac.

29 _____
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31 ORS 197.015(10) states in relevant part:

32 "(10) 'Land use decision':

33 "(a) Includes:

34 "(A) A final decision or determination made by
35 a local government or special district
36 that concerns the adoption, amendment or
37 application of:

38 "(i) The goals;

39 "(ii) A comprehensive plan provision;

40 "(iii) A land use regulation; or

41 "(iv) A new land use regulation * * * "

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2 In its petition for review, petitioner also makes a general
3 claim that there are provisions in the Bicycle and Pedestrian
4 Facilities, Transit Facilities and Services and Circulation
5 sections of the Beaverton General Plan (Plan) which apply to
6 the challenged decision. In the absence of specific
7 identification by petitioner of Plan provisions which it claims
8 are relevant, we will not search the Plan to locate applicable
9 provisions. See Gann v. City of Portland, 12 Or LUBA 1, 6,
10 aff'd 70 Or App 355, 688 P2d 854 (1984); City of Salem v.
11 Families for Responsible Government, 64 Or App 238, 242, 668
12 P2d 395 (1983).

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9 We note that the "Circulation - Statements of Intent of the
10 Plan" section of the Plan is preceded by the statement that
11 "[t]he statements which follow set forth guidelines for the
12 circulation system in the community." (Emphasis added.) The
13 effect of this statement on the applicability of CSIP 13 was
14 not raised by the parties to this case. In the absence of
15 argument by the city that the provisions of CSIP 13 are not
16 mandatory standards, we will not consider whether the
17 above-quoted language has the effect of making the Plan's
18 Circulation Statements of Intent of the Plan merely advisory.
19 cf., Downtown Community Association v. City of Portland, 80 Or
20 App 336, 722 P2d 1258, rev den 302 Or 86 (1986).

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17 The relevant portions of Development Code Sec. 134.2.A
18 provide:

18 "A. The provisions of Site and Design Review
19 shall pertain to the following activities * * *

20 "1. New building or major remodeling of an
21 existing building, except for single-family detached
22 dwellings or single duplexes not being developed as a
23 part of a larger development. * * *

24 "2. Site work subject to a permit under BC
25 9.05.005 - .170 (the 'Site Development Ordinance')
26 which occurs on a parcel identified as an Important
27 Natural Resource Area where the work will occur within
28 100 feet of a Significant Natural Resource Zone.

29 "3. Site work subject to a permit under BC
30 9.05.005 - .170 (the 'Site Development Ordinance') in
31 a Significant Natural Resource Zone."

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In fact, the city failed to adopt any findings addressing compliance with its comprehensive plan. As CSIP 13 is the only Plan provision specifically identified by petitioner as being applicable to the appealed decision, we do not decide whether there are other applicable provisions in the Plan which should have been addressed by the city in its findings.

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Section 6 of Resolution 2811, with brackets indicating text found in the version initially signed and deleted from the recorded version, and underlining indicating text not found in the version initially signed, but present in the recorded version, states:

"The Council recognizes that the assessment to be made against property within the district now owned by the Tri-Metropolitan Transit District (Tri-Met) exceeds the share of the project cost that otherwise would be born by Tri-Met given the benefits that will presently accrue to its property by the approximate amount of \$200,000 plus the value of right-of-way presently to be dedicated by Tri-Met to the City. The Council authorizes the Mayor to enter the City into contract with Tri-Met that will declare Tri-Met, [on] to have fulfilled its obligation for the benefits to its property that may accrue under any future local improvement district formed to construct a public roadway generally running east-west between SW 117th Street and SW Hall Boulevard and providing access to Tri-Met's present property (tax lot 1400) from the north."

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Section 6 of Resolution 2811, with brackets indicating text found in the version adopted by the City Council on August 10 and deleted from the recorded version, and underlining indicating text not found in the version adopted by the City Council on August 10, but present in the recorded version, states:

"The Council recognizes that the assessment to be made against property within the district now owned by the Tri-Metropolitan Transit District (Tri-Met) exceeds the share of the project cost that otherwise would be born by Tri-Met given the benefits that will presently accrue to its property by the approximate amount of \$200,000 plus the value of right-of-way presently to

1 be dedicated by Tri-Met to the City. The Council
2 authorizes the Mayor to enter the City into contract
3 with Tri-Met that will declare Tri-Met, [on certain
4 conditions already] to have fulfilled its [monetary]
5 obligation for the benefits to its property that may
6 accrue under any future local improvement district
7 formed to construct a public roadway generally running
8 east-west between SW 117th Street and SW Hall
9 Boulevard and providing access to Tri-Met's present
10 property (tax lot 1400) from the north."
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10 In denying this assignment we do not rule that the city's
11 decision-making process was legally proper. However, it is
12 petitioner's responsibility to identify the legal bases on which
13 it claims we may grant relief. In this instance, petitioner has
14 not identified any constitutional, statutory, ordinance or
15 charter provisions as being violated by the Mayor's signing and
16 recording a resolution different from that adopted by the City
17 Council. We will not supply petitioner with legal theories or
18 make petitioner's case for petitioner. Deschutes Development v.
19 Deschutes County, 5 Or LUBA 218, 220 (1982).
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