LAND USE
BOARD OF APPEALS
Nov 14 6 00 PM '89

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LARRY N. SOKOL, MARK BLACKMAN, WARREN OLIVER and CAROLYN JONES, Petitioners, vs. CITY OF LAKE OSWEGO, Respondent, and SOCIETY OF THE SISTERS OF THE HOLY NAMES OF JESUS AND MARY, Intervenor-Respondent.	LUBA Nos. 89-050 and 89-051 FINAL OPINION AND ORDER

Appeal from City of Lake Oswego.

Larry N. Sokol and Mark J. Greenfield, Portland, filed the petition for review. With them on the brief was Mitchell, Lang and Smith. Larry N. Sokol argued on behalf of petitioners.

James M. Coleman, Lake Oswego, filed a response brief and argued on behalf of respondent.

Gregory S. Hathaway and Virginia L. Gustafson, Portland, filed a response brief. With them on the brief was Garvey, Schubert and Barer. Gregory S. Hathaway argued on behalf of intervenor-respondent.

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

REMANDED 11/14/89

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners challenge two orders of the Lake Oswego City Council in this consolidated proceeding. Petitioners challenge Order PA 5-88-652 which approves comprehensive plan text and map amendments for the Marylhurst area of the city. Petitioners also challenge Order ZC 7-88-653 which approves zoning map amendments for the same area.[1]

MOTION TO INTERVENE

The Society of the Sisters of the Holy Names of Jesus and Mary moves to intervene on the side of respondent in this proceeding. There is no opposition to the motion, and it is allowed.

FACTS

Intervenor-respondent (intervenor) submitted the applications that led to the orders challenged in this appeal proceeding on behalf of itself, Marylhurst College and Christie

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[1]Respondent adds the following clarification concerning the nature of the decision and relief sought in this appeal proceeding:

> "The parties agreed during argument on petitioners' Motion to Consolidate consideration of LUBA 89-050 and 89-051 that review of ZC 7-88-653 in LUBA 89-050 will be limited to the rezoning to R-3 of the property that is the subject of the Plan map amendment, and that the validity of that portion of ZC 7-88 will be determined solely on the basis of the disposition in LUBA 89-051 of the related R-3 portion of PA 5-88. That agreement * * * is clear in the Petition for Review at footnote 3, page 14 and in the argument on the Ninth Assignment of Error, pp. 48-49, that petitioners' challenge to ZC 7-88 is so limited and is dependent upon the Board's disposition of PA 5-88 in LUBA 89-051." Respondent's Brief 1.

School. Marylhurst College occupies approximately 42 acres, Christie School occupies 12 acres and the balance of the 182 acres owned by the three entities is undeveloped except for the intervenor's Provincial House.

Approximately 40 acres west of Highway 43 is proposed to be developed with single family dwellings, at existing R-10 and R-15 densities. On the east side of Highway 43, Marylhurst College and Christie School will remain. Proposed uses for the remaining undeveloped property east of Highway 43 include (1) a retirement community for the elderly on approximately 53 acres, (2) attached housing units on approximately 36 acres along the Willamette River east and north of the Provincial House and east of the Marylhurst campus, and (3) two small office buildings on approximately 5.5 acres west of the Marylhurst campus.

Petitioners' challenge in this appeal proceeding focuses on a portion of the area east of Highway 43 proposed for residential development. The plan and zone designations for this portion of the property east of Highway 43 were changed by the city's decisions from R-10 and CI to R-3.[2] A significant portion of the area east of Highway 43 remains planned and zoned CI.

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[2]The R-10 (Residential Low Density) plan and zone designations allow single family dwellings at a density of one dwelling per 10,000 square feet. The CI (Campus Institutional) designations allow a variety of institutional and commercial uses. The R-3 (Residential High Density) designations allow any type of dwelling unit and permit a density of one dwelling unit per 3,375 square feet.

The history of the local proceedings is set out in respondent's brief as follows:

> "On June 24, 1988, the applicants filed their original application for Plan and zone changes and [overall development plan and schedule] ODPS approval affecting the 182 acre site known as the Marylhurst Area. The Marylhurst Area Plan was adopted in 1979 as a Special Area Plan for the Lake Oswego Comprehensive Plan. The Comprehensive Plan has been acknowledged by the state. The Plan amendment is classified as a major Plan amendment, pursuant to LOC 56.130. The proposed change most relevant to this proceeding was a change for a portion of the site from a R-10/CI designation to R-5. * * *
>
> "There was a Planning Commission meeting on September 12, 1988, at which a public hearing was scheduled for a review of the request. A full hearing was not held because the Commission believed there were too many items yet to be resolved and additional information which should be provided for review.
>
> "The applicants submitted a revised proposal on October 19, 1988. This is the proposal at issue in these proceedings. The R-5 area was changed to R-3 in the proposal. The proposed number of units did not change.
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> "The application requested amendments to the City's Comprehensive Plan map and text, and zoning map. For the R-3 area, the applicant proposed Plan map changes from R-10 and CI to R-3. The applicant also proposed Plan text changes to amend and replace some of the specific policies for each general policy of the 1979 Marylhurst Area Plan. * * * The applicant's case was presented. Petitioner Sokol requested a delay in order to allow opponents time to prepare their case. The Commission granted a one month delay. * * *
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> "The public hearing before the Planning Commission [was held] on December 12, 1989 * * *.
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> "The zone and Plan change final orders were approved by the Planning Commission on January 10, 1989. [Petitioner] Sokol filed a Notice of Appeal of the decisions on January 25, 1989 with the City Recorder. * * *
>
> "* * * * *

"* * * The March 21 [, 1989 City] Council hearing was confined to the record made before the Planning Commission."

"* * * [A]t the conclusion of the City Council public hearing and Council deliberations on PA 5-88, Councilor Durham moved to adopt PA 5-88 as recommended by the Planning Commission. * * * The motion passed 4-2. After deliberation on ZC 7-88, Councilor Durham moved to deny the appeal of ZC 7-88. * * * The motion passed 4-2. * * *

"The final orders for PA 5-88 and ZC 7-88 were considered and approved by the Council at its meeting on April 18, 1989. * * *"[3] (References to the plan, code and record deleted.) Respondent's Brief 4-7.

FIRST ASSIGNMENT OF ERROR

"The city improperly construed and violated LOC 55.155(5)(c) [sic 56.155(5)(c)] and statewide goals 1, 2, 5, 7 and 10 by approving conceptually a plan map amendment that lacks specific boundaries and by allowing the applicant to determine, after the fact and following the close of public testimony, what lands will be redesignated and rezoned for multi-family residential development."

SECOND ASSIGNMENT OF ERROR

"The City exceeded its authority and violated Chapter II, Section 4, and Chapter III, Section 6, of its City Charter by unlawfully delegating to the applicant the final decision-making authority on the proposed plan map amendment to R-3."

Lake Oswego Code (LOC) 56.155(5) provides in part:

"For residential plan amendments to R-0, R-3 or R-5, the [Planning] Commission will determine that (1), (2), (3) and (4) are met and that:

"* * * * *

"(c) The area is within reasonable walking distance

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[3]The procedure followed by the city council in taking action on the final orders is a matter of some dispute and is discussed further under the eighth assignment of error.

> of a transit stop as determined by recent surveys conducted by a reputable source such as the Tri-County Metropolitan Transportation District. The Commission shall use a distance of approximately 750 feet unless recent studies show otherwise."

The city council's findings explaining how the approved plan amendment complies with LOC 56.155(5) are as follows:

> "LOC 56.155(5)(c) requires R-3 designated areas to be within walking distance of a transit stop (the transit stop should be within 750 feet of the R-3 site). The Planning Commission found that Subarea 4 (the R-3 site) is approximately 900 feet from Highway 43 where a bus stop is located. The Planning Commission found that Subarea 4 could be reconfigured to be within 750 feet of a bus stop which would provide compliance with the criteria. The City Council agrees with the Planning Commission that if Tri-Met agrees to locate a bus stop on the proposed collector street (within 750 feet of the R-3 site) the criteria would be met without the reconfiguration; however, in the absence of such a bus stop the R-3 area will need to be reconfigured. This reconfiguration, if necessary, must occur and be shown on the final ODPS map."[4]

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[4]LOC 49.150 provides that development projects to be developed in phases must receive overall development plan schedule (ODPS) approval. LOC 49.410 provides that the purpose of ODPS approval is to:

> "(1) Assure that the proposed development, considered as a whole, will conform to the Comprehensive Plan and Development Standards,
>
> "(2) Assure that individual phases will be properly coordinated with each other and can be designated to meet the Development Standards,
>
> "(3) Provide preliminary approval of the land uses, maximum potential intensities or densities, arrangement of uses, open space and resource conservation and provision of public services of the proposed development, and
>
> "(4) Provide the developer with a reliable assurance of the City's expectations for the overall project as a basis for detailed planning and investment."

In a separate appeal proceeding, Sokol v. City of Lake Oswego, LUBA No. 89-099, petitioners challenge the city's decision to grant ODPS approval.

Record 44.

Under the first two assignments of error, petitioners argue the city council improperly delegated to others the responsibility of determining the final boundaries of the area to be designated R-3.[5] Petitioners also contend the city improperly construed LOC 56.155(5)(c) and that the city's decision violates several statewide planning goals.

A. Improper Delegation

As noted supra at n 5, there is no assurance that Tri-Met will extend a transit stop into the R-3 area approved by the city. Therefore, the city relies on the reconfiguration requirement discussed in its finding quoted above for compliance with LOC 56.155(5)(c). Respondents do not dispute that the area designated R-3, as currently configured, is at no point closer than 900 feet from the existing transit stop on Highway 43 and, therefore, does not comply with LOC 56.155(5)(c). Respondents also do not dispute that the city council is required to approve the requested plan amendment, but rather argue the city council did approve a plan amendment for the reconfigured R-3 area.

We do not agree with respondents that the city council's decision approved a plan map amendment for the reconfigured R-3 area in advance of the reconfiguration. The only plan map amendment to R-3 approved by the city council's decision is for

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[5]There does not appear to be any dispute that provision of a Tri-Met transit stop in the R-3 area would satisfy the standard of LOC 56.155(2). However, the parties also agree there is no evidence in the record to show that Tri-Met intends or is willing to provide such a transit stop.

the R-3 area as currently configured. However, the city council did not determine that the approved R-3 area as currently configured complies with LOC 56.155(5)(c). Rather, the city council directed that the planning commission, in the ODPS process, determine and approve exactly where and how the R-3 area will be reconfigured to comply with LOC 56.155(5)(c).[6] Apparently, under the city's decision, the plan map would then be changed to conform to the reconfiguration approved by the planning commission without additional plan amendment proceedings or approval by the city council.

LOC ch 56 requires that major plan amendments, such as the one approved by the city council in this proceeding, be approved by the city council, not the planning commission. See also Lake Oswego Comprehensive Plan (plan) 177-178 and our discussion at n 7, infra. We agree with petitioners that the city council's action to approve application of the R-3 designation to an area, later to be reconfigured by the planning commission through the ODPS procedure, was error.

The city council cannot approve a plan map amendment to R-3

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[6]As intervenor points out, it is apparently the city's intent that the R-3 area simply be extended 150 feet, so that it will be within 750 feet of the existing transit stop on Highway 43. However, we do not know how wide the "extension" will be or, with any precision, what areas now designated something other than R-3 will later be redesignated R-3. For example, we cannot tell whether the reconfiguration would result in the R-3 designation being applied to a narrow strip only as wide as the roadway connecting the R-3 area to Highway 43 and the transit stop, or whether it would result in R-3 designation of an area that would be developed residentially in place of other parts of the currently approved R-3 area that are further from Highway 43.

unless it demonstrates the amendment complies with LOC 56.155(5)(c). Where the city council recognizes that a proposed R-3 area, as now configured, does not comply with LOC 56.155(5)(c), the city council may not delegate to the planning commission, staff and the applicant the task of determining, during the ODPS process, the area to be designated R-3 after the city council takes action on the plan amendment.[7]

This subassignment of error is sustained.[8]

B. Improper Construction of LOC 56.155(5)(c)

In the above subassignment of error we determined the

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[7]In addition to the LOC and plan provisions cited above, we note that in Colwell v. Washington County, 79 Or App 82, 718 P2d 747, rev den 301 Or 338 (1986), the Court of Appeals made it clear that there are statutory requirements that comprehensive plan amendments must be adopted by the local government governing body. Although Colwell concerned a plan amendment adopted by a county, the court's decision was based in part on statutory language in ORS chapter 197 that applies both to cities and counties. ORS 197.010(1) (comprehensive plan "[m]ust be adopted by the appropriate governing body at the local and state levels"); ORS 197.015(5) ("'Comprehensive plan' means a generalized, coordinated land use map and policy statement of the governing body of a local government * * *"). Although legislation adopted in 1987 amended ORS ch 215 explicitly to allow counties to permit their planning commissions and hearings officers to approve certain plan amendments, similar statutory authority for cities was not adopted. ORS 215.431. Although ORS 227.180(1)(b) allows decisions on permits and zone changes to be made by city hearings officers, we find no authority in ORS ch 227 for plan amendments to be adopted by anyone other than the city's governing body. We also note that Goal 2 provides in part that "all land use plans and implementing ordinances shall be adopted by the governing body * * *."

[8]As respondent correctly notes, we have on numerous occasions held that local governments may, in granting development permit approval, impose conditions to assure that applicable approval criteria are met and rely on technical staff to assure that development complies with the conditions. Meyer v. City of Portland, 7 Or LUBA 184, 196 (1983), aff'd 67 Or App 274 (1984); Lee v. City of Portland, 3 Or LUBA 31, 43 (1981), aff'd 57 Or App 798 (1982); see Margulis v. City of Portland, 4 Or LUBA 89, 98 (1981). However, we have never said a local government may, in approving a plan map amendment, defer to a permit approval proceeding the responsibility of determining the location of the land to receive a new plan map designation.

challenged amendment designating property R-3 violates LOC 56.155(5)(c) and no one claims the area designated R-3, as presently configured, complies with LOC 56.155(5)(c). However, the parties present extensive argument in their briefs taking very different positions concerning the proper interpretation of LOC 56.155(5)(c). We address the interpretation question to provide guidance to the city on remand.

Petitioner contends that LOC 56.155(5)(c) requires that the entire area proposed to be planned R-3 must be within 750 feet of a transit stop. Respondents take the position that if any part of an area proposed to be planned R-3, no matter how small, is within 750 feet of a transit stop, LOC 56.155(5)(c) is satisfied. The city's decision does not express a definitive interpretation of LOC 56.155(5)(c). However, we infer from the city council's findings that it interprets LOC 56.155(5)(c) in the same manner advanced by respondents in their briefs.

As the parties point out, there are problems with both interpretations, and the language of LOC 56.155(5)(c) does not clearly require either interpretation. Under respondents' interpretation, if only some part of the proposed R-3 area need be within 750 feet of a transit stop, the standard could easily be meaningless. Development within a large R-3 area could be much farther than 750 feet from a transit stop, and possibly not "within reasonable walking distance," as the standard requires. In this case, the majority of the proposed R-3 area appears to be more than 1500 feet from the existing transit stop on

Highway 43. Record 53. Under petitioners' interpretation, LOC 56.155(5)(c) would be a much stricter standard than its words require. LOC 56.155(5)(c) does not explicitly require that an entire R-3 area must be within 750 feet of a transit stop, as it easily could.[9]

LOC 56.155(5)(c) establishes both a subjective and an objective standard, as well as a procedure for modifying the objective standard. The subjective standard requires that an R-3 area be within reasonable walking distance of a transit stop. The objective standard establishes that reasonable walking distance at approximately 750 feet, unless modified by recent studies, but does not explicitly require that the entire area be within 750 feet of a transit stop. We believe this lack of clarity gives the city some interpretive discretion.

However, because this decision must be remanded for other reasons, we do not decide whether the interpretation of LOC 56.155(5)(c) suggested by the city in its decision in this case is erroneous. We do not believe it is appropriate for us to determine, as a matter of law, whether the city's implied interpretation of LOC 56.155(5)(c) is correct in our review of a decision where the city's interpretation was not essential to its decision.[10]

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[9]Respondents contend a number of R-3 areas in the city include property farther than 750 feet from a transit stop.

[10]Although questions of legal interpretation are our responsibility, subject to judicial review, it is our practice where possible to afford the

In a future decision applying the R-3 plan designation, the city must explain why application of the R-3 designation to an area is consistent with the overall policy of LOC 56.155(5)(c). At the very least, the city must explain why an R-3 area, viewed as a whole, is within reasonable walking distance of a transit stop.[11]

This subassignment of error is denied.

C. Violation of Statewide Planning Goals

Petitioners allege the city decision concerning compliance with LOC 56.155(5)(c) violates Statewide Planning Goals (Goals) 1, 2, 5, 7 and 10. The gist of petitioners' argument is that because it is not possible to tell what additional areas may be designated R-3, it not possible to tell whether standards imposed by Goals 5, 7, and 10 are complied with or whether the procedures required by Goals 1 and 2 are satisfied.

In view of our agreement with petitioners that this case must be remanded to identify the area to be designated R-3 we need not decide their objections concerning Goals 5, 7 and 10.[12]

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governing body the initial opportunity to explain its interpretation of ambiguous code language. We give some weight to that interpretation, as long as it is not inconsistent with the language and intent of the code. See e.g. Mental Health Division v. Lake County, ___ Or LUBA ___ (LUBA No. 89-004, July 16, 1989), slip op 14; Sevcik v. Jackson County, ___ Or LUBA ___ (LUBA No. 87-087, May 23, 1988), slip op 4.

[11]We have some doubt whether the city may, consistent LOC 56.155(5)(c), approve an R-3 area where only one small part of the R-3 area is within 750 feet of a transit stop and the majority of the R-3 area is more than twice that distance from a transit stop.

[12]We note that respondents point out that the areas designated R-3 are all currently planned and zoned in a way that permits development. Respondents contend that any goal issues raised by the R-3 plan designation

Petitioners' arguments that procedural requirements imposed by Goals 1 and 2 were violated by the appealed decisions are not sufficiently developed to provide an additional basis for reversal or remand under this subassignment of error.

This subassignment of error is denied.

The first and second assignments of error are sustained in part.[13]

THIRD ASSIGNMENT OF ERROR

> "The City misconstrued Potential Landslide General Policy IV and specific policies thereunder in determining that R-3 density is appropriate for Subareas 4 and 4A. The City's findings are not supported by substantial evidence in the whole record."

The plan includes a map showing areas with "Potential for Landslide Hazard." Plan 39. Many areas within the city have potential for landslide hazard, including portions of the R-3 area at issue in this appeal proceeding. Under this assignment of error, petitioners contend the city's findings misconstrue Potential Landslide Area General Policy IV and the evidence does not show the policy is satisfied. Petitioners also contend, under Specific Policy 1, "'methods' must be 'demonstrated' that the site is safe for construction at this scale." Petition for

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necessarily were present and resolved when the current plan designations were applied. See Urquhart v. Lane Council of Governments, 80 Or App 176, 180, 721 P2d 870 (1986).

[13]Petitioners also contend the city council erred by not specifically addressing under LOC 56.155(5)(c) an area identified as "Subarea 4A." For the reasons stated in respondent's brief and intervenor's brief, we disagree with petitioners, and reject this portion of their argument under the first and second assignments of error.

Review 23.

The plan includes a number of Potential Landslide Area Policies. General Policy IV provides as follows:

> "The City will regulate land use, density and intensity of activity in landslide hazard areas, in accord with the degree of hazard and the limitations imposed by such hazards."

The plan also includes Specific Policies for each General Policy. Specific Policy 1 for General Policy IV provides in part:

> "Prohibit development of slopes with an established known landslide hazard, unless a registered engineering geologist or soils engineer demonstrates during public hearings procedure, methods by which the site can be rendered safe for construction. * * *"

The city's findings concerning General Policy IV are as follows:

> "The applicants have illustrated * * * that areas of steepest slopes throughout the area have been protected through designation as Open Space (OS). * * * On the east side of Highway 43, the most dense/intense uses have been assigned to areas with the lowest risk of hazard. Additional review of potential landslide areas and steep hillsides and other hazards areas will occur during development review to insure that the density/intensity of land uses are compatible with the soils and geology of the area and further the policy to regulate the intensity and density of uses in hazard areas. Because the request will protect high risk areas and locate more intense densities in the low risk areas, the City finds this request conforms to this City policy." Record 16.

In addition, respondents point out the record includes a letter from Northwest Testing Laboratories concerning the proposal which concludes:

> "The area does contain sensitive soils, however, with

> a proper and specific site geotechnical engineering investigation, the area can be safely developed * * *. Office and residential structures can also be safely constructed, if properly founded in the specific location." Record 599.

Respondent contends:

> "The city has adopted the Weak Foundation Soils and Hillside Protection Development Standards as a primary means of implementing the Comprehensive Plan Policies. LOC 49.010, Development Standards 13 and 16. A 'walk through' slope review by the applicant's soils consultant revealed no apparent slide areas. The preliminary geotechnical engineering review of Northwest Testing Laboratories, * * * concludes that office and residential structures can be safely constructed. No more detailed analysis is necessary at the Plan amendment stage. * * *
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> "During the development review process for each phase of development, plans will be submitted and conformance with the development standards will be considered through a public hearing process showing specific building locations and appropriate engineering solutions if necessary.* * *" (Citations to the record omitted.) Respondent's Brief 16-17.

We agree with respondent that the findings are adequate to demonstrate compliance with General Policy IV. We also agree with respondent that under the city's plan and land use regulations, the requirement imposed by Special Policy 1 is properly addressed during development review, when more detailed plans are prepared and specific development sites are known.[14]

The third assignment of error is denied.

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[14]Respondent correctly notes that in a case reviewing a pre-acknowledgment zone change, we held that after a preliminary determination concerning suitability for development was made, the city's development review process could be relied upon to address landslide hazards on a site specific basis. Constant v. City of Lake Oswego, 5 Or LUBA 311, 322-323 (1982).

FOURTH ASSIGNMENT OF ERROR

> "The plan amendments violate LOC 56.155(2), ORS 197.175(2)(a) and 197.835(4). The zoning amendments for Subareas 4 and 4A violate LOC 48.815(2) and ORS 197.835(4). The City's findings fail to address goal compliance and are legally inadequate."

Petitioners argue LOC 56.155(2) as well as ORS 197.175(2)(a) require that amendments to the city's comprehensive plan must comply with the statewide planning goals. Petitioners contend the city failed to identify applicable goals and failed to adopt findings demonstrating the approved plan amendment complies with the goals. Instead the city council adopted the following findings which petitioners contend are inadequate to show compliance with the goals:

> "* * * The City Council has found in the above findings that the proposed amendments to the Marylhurst Area Plan conform to, or better implement, Plan policies for the particular uses involved. As a result, since the Comprehensive Plan has been acknowledged by the State of Oregon as being in compliance with the Statewide Planning Goals and Rules, the City Council finds that the requested amendments are consistent with the Statewide Planning Goals * * *. Therefore, the City finds that there are no Statewide Planning Goals * * * required to be specifically addressed." Record 37.

Petitioners contend that the plan amendment must be remanded so the city council can adopt adequate goal findings. Petitioners further contend because the zone map amendment relies on and must be consistent with the plan map amendment, the challenged zone map amendment must be remanded for the same reason.

There can be no doubt that comprehensive plan amendments must comply with the goals. 1000 Friends of Oregon v. Jackson

County, 79 Or App 93, 97, 718 P2d 753 (1986) ("In the event that our opinion in [Ludwick v. Yamhill County, 72 Or App 224, 696 P2d 536, rev den 299 Or 443 (1985)] left anything to the imagination, we now reiterate that all comprehensive plan amendments are reviewable under ORS 197.835(4) for compliance with the statewide goals.") Respondents in this proceeding do not dispute that the challenged plan amendment must comply with the statewide goals.[15]

However, respondents point out the city includes as part of its acknowledged plan a chart explaining in some detail the relationship between the plan elements and the statewide planning goals. Using the chart, intervenor identifies findings addressing various goals requirements. Intervenor points out that petitioners do not identify any particular goal requirement which is violated by the city's decision and contends that petitioners do not explain why these findings are inadequate.

In these circumstances, we do not believe it is sufficient for petitioners simply to allege, as a basis for remand, a lack of findings specifically addressing the goals. We understand

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[15]The above quoted finding suggests that the city believes that simply because its plan has been acknowledged, it may assume that the plan's policies include all relevant goal considerations and there is no legal requirement to independently address the goals when the plan is amended, as long as the plan amendment is consistent with policies in the acknowledged plan. This suggestion goes too far and is rejected. ORS 197.835(4)(a) provides that LUBA is to find an amendment to an acknowledged land use regulation complies with the goals if it "is consistent with specific related land use policies contained in the acknowledged comprehensive plan * * *." There is no similar provision in ORS 197.835 for amendments to acknowledged comprehensive plans.

the city's position to be that it effectively has adopted goal findings, it simply has not denominated the goal findings as such. We further understand the city to argue its failure to adopt goal findings, labeled as such, is harmless, since the city's findings can be identified as addressing various goal requirements by using the plan chart discussed above.

Although it is possible that one or more goal requirements may not be adequately addressed by the city's findings of compliance with policies in the plan, we believe it is petitioners' obligation, in these circumstances, at least to identify the goal requirements they believe are violated. Petitioners do not identify any such goal requirements.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

> "The City's plan amendment and zone change decisions are inconsistent with and violate LOC 56.155(2), 56.155(3), LCDC Goals 2, 11, 12 and 14, Overall Density General Policies I and II, Residential Density General Policies I and II, Transportation General Policy I and Objective, and Marylhurst General Policy III. The proposals will negatively impact traffic, in violation of the above-cited policies. The City's findings of compliance are legally inadequate and not supported by substantial evidence in the whole record."

Petitioners contend that a number of goal, code and plan standards concerning transportation system impacts are violated by the city's decision in this matter.[16] Petitioners argue

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[16]Petitioners cite the following plan, code and goal provisions:

"(5) Overall Density General Policies I and II (residential

under this assignment of error that the city council's findings

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> densities within capacities of public facilities);
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> "(6) Residential Density General Policies I and II (residential densities within the capacity of public facilities);
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> "(7) Transportation Policy I (balanced transportation system) and Objective;
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> "(8) Marylhurst Policy III (Preserve highway capacity).
>
> "* * * * *
>
> "Goal 11 requires a 'timely, orderly and efficient arrangement of public facilities and services * * * to serve as a framework for urban * * * development.' Similarly, Goal 14 provides that conversion of urbanizable land to urban [land] shall be based, inter alia, on considerations of '[o]rderly, economic provision for public facilities and services.'
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> "Goal 12 requires development of a safe and convenient transportation plan that conforms with local and regional transportation plans. Goal 2 requires that city plans and land use actions be consistent with the comprehensive plans of other cities and regional plans and that plans and implementation measures be coordinated with the plans of affected governmental units. LOC 56.155(3) requires the City to determine that public facilities have capacity and are available to serve the proposed change, or are programmed to be available, with particular attention to be given to the impacts on existing and projected traffic flows and access based on street capacity and sight distance.
>
> "* * * * *
>
> "LOC 56.155(3) states that '[a]mendments which will have a negative short term impact due to timing of capital improvements may be denied or may be required to provide short or long term improvements.' Similarly, Transportation General Policy I, Specific Policy 1(f) states that the City's transportation system will:
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> > "'Include procedures for approving increases in planned land use intensity only when a detailed traffic analysis shows that existing streets and intersections will accommodate the projected traffic increases or when improvements necessary to accommodate those increases can be constructed without exceeding the capacity of any element of the City's coordinated transportation system.'" Petition for Review 27-34.

are conclusory and rely in large part on a condition that is unenforceable. Petitioners further argue that the traffic study relied upon by the city fails to address likely traffic impacts of the proposed development on Highway 43 north and south of the property where Highway 43 is a two lane roadway currently operating at or above capacity.

The property at issue in this appeal proceeding presently is planned and zoned for development. As the city council noted, the plan and zone map changes approved by the city in the decisions challenged in this proceeding actually reduce the amount of traffic that could be expected to be generated by development of the property when compared with the existing plan and zone designations. The city council found:

> "* * * that the site is currently planned and zoned in a manner that allows for much more intense development than the proposed development which will generate significantly less traffic (on both a daily and peak hour basis) than would occur if the site were developed in accordance with current Plan and zone desigations." (Emphasis added.) Record 34.

Petitioners do not challenge the accuracy of the above quoted finding, but contend the finding is irrelevant. Petitioners contend that the transportation related standards they cite make no reference to existing uses allowed under the acknowledged plan and zoning ordinance, and argue the plan and zone map amendments approved by the city must be demonstrated to be in compliance with the cited goal, plan and code standards.

ORS 197.835(3) and LOC 56.155(1) require that the plan amendment be consistent with the acknowledged comprehensive

plan.[17] In addition, the general principle underlying the above quoted finding (i.e., that amendments to an acknowledged plan and zoning ordinance that lessen or improve the impacts that goal, plan and code standards were adopted to address are consistent with those goal, plan and code standards) is supported by decisions of this board and the appellate courts.[18] See Urquhart v. Lane Council of Governments, 80 Or App 176, 721 P2d 870 (1986)(plan amendment not affecting an acknowledged Goal 5 inventory need not rejustify the adequacy of the Goal 5 inventory to comply with the goals); Semler v. City of Portland, ___ Or LUBA ___ (LUBA No. 87-081, December 21, 1987)(no violation of city noise standard where no evidence that planned unit development would generate noise in excess of residential development permitted outright in zone without application of noise standard); cf. Younger v. City of Portland, 86 Or App 211, 215-216, 739 P2d 50, rev'd on other grounds 305 Or 346 (1987)(city not required to address impacts of more intense use potentially allowed by zone change where evidence shows property will only be put to the proposed use).

We agree with the city that its finding that the challenged

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[17]LOC 56.155(1) requires that a plan amendment must either conform to or better implement plan policies for the particular uses involved.

[18]We need not and do not decide whether this general principle necessarily would apply to all plan and zone changes. For example, plan and zone changes required during a periodic review might have lesser impacts that goal, plan or code standards are designed to address, and nevertheless be insufficient to comply with periodic review factors identified under ORS 197.640(3).

plan and zone map amendments will actually reduce traffic impacts currently allowable under existing plan and zone designations is adequate to demonstrate the challenged plan and zone changes comply with the transportation related standards cited by petitioners.[19]

The fifth assignment of error is denied.[20]

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[19]Although our disposition of this assignment of error makes it unnecessary to discuss in detail the findings and evidence supporting the city's decision concerning the transportation-related concerns identified by petitioners, we do note those concerns were addressed. The traffic study relied upon by the city does consider traffic impacts along the two-lane portion of Highway 43 north and south of the property. The study concludes "[a]ll major intersections within the study area are currently operating at acceptable service levels." Record 657. The study acknowledges that Highway 43 is congested and that it will be near capacity by 2005, but "concludes that the proposed mixed-use development can be constructed with minimal traffic impacts on the surrounding street system." Record 666.

The study recommends and the city's decision imposes requirements that Highway 43 be improved along the property to add a turning lane and acceleration/deceleration lanes. In addition, the study noted the capacity of the intersection of Highway 43 and McVey, north of the property, could be increased by modifying the signal timing. Record 661. The traffic engineer preparing the study testified that with the proposed on-site and off-site improvements the overall impact on the transportation system in the area would be neutral or an improvement over the existing traffic situation. Record 388.

Furthermore, as noted earlier in this opinion, the plan and zoning ordinance amendments challenged in this decision are not the final decision to be rendered by the city concerning the intervenor's development proposal. In a separate decision, the city granted ODPS approval for the specific development proposed. We express no opinion here whether the cited goal, plan or code requirements may also be applicable to or are adequately addressed by that decision.

[20]We also reject petitioners' contention that the city failed to coordinate with the City of West Linn. As respondent points out, the City of West Linn did submit comments and did not oppose the city's decision. In addition, we agree with respondents that petitioners misread the condition they challenge as imposing an unenforceable limit on actual trips generated by by future development of the site. Rather, as respondents point out, the condition simply imposes a limitation on the allowable trip generation potential of the development proposed for the site, utilizing certain assumptions. Viewed in this way, we do not understand why the

SIXTH ASSIGNMENT OF ERROR

> "The procedural rights of the residents opposed to the rezoning and Comprehensive Plan changes were repeatedly avoided and denied by the City. It was error to notify only the developers of the lost record and to allow them to re-present their case with additional new evidence; it was error for the City to make available charts of the plan and zone change criteria twice for the benefit of the developers but not once for the use of the Glenmorrie residents; and it was error to prevent several of the opponents of the development from having a chance to speak at the City Council hearing."

Under this assignment of error, petitioners allege the city committed a total of three procedural errors that resulted in prejudice to petitioners' substantial rights.[21]

A. The December 12, 1988 Planning Commission Meeting

Prior to the December 12, 1988 planning commission meeting, the city discovered the tapes of the November 14, 1988 planning commission meeting, at which the applicant presented evidence in support of the application, were missing. Prior to the December 12 planning commission meeting, the applicant, but not the petitioners, was advised that the tapes were lost and that the applicant would be permitted to present its evidence again at the December 12 meeting. Petitioners contend the city's failure to provide advance notice to petitioners, as well as to the

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condition would not be enforceable.

[21]Under ORS 197.835(8)(a)(B), we may reverse or remand the city's decision if it "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner * * *." Muller v. Polk County, ___ Or LUBA ___ (LUBA No. 88-018, June 29, 1988), slip op 5; Mason v. Linn County, 13 Or LUBA 1, 4 (1985).

applicant, constitutes error. Petitioners contend their substantial rights were violated because they found out for the first time the night of the meeting that the applicant would be allowed to present its evidence to the planning commission first.

There was nothing improper about allowing the applicant to re-present its evidence after the tapes of the November 14 planning commission meeting were lost.[22] We also agree with the respondents that it was proper to advise the applicant before the meeting that its witnesses would need to be prepared to re-present the evidence offered at the November 14 meeting. Finally, we agree with respondents that it was at most a lack of courtesy not to similarly provide advance notice to petitioners of the lost tapes and consequent need for the applicant to re-present its evidence.

Although it is understandable that petitioners were upset when they arrived at the December 12 meeting and were informed the applicant would be allowed to re-present its evidence before petitioners would be able to present their case, we find no error and no prejudice to petitioners' substantial rights.[23]

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[22]Respondents note the LOC requires that a transcript of the planning commission hearing be prepared for city council review and a transcript could not be prepared without tapes of the applicant's presentation.

[23]The record does not show petitioners were denied an adequate opportunity to present their evidence to the planning commission. Although petitioners contend the planning commission was less fresh when their opportunity to present evidence came, the record does not show the planning commission was unable to give petitioners' evidence fair consideration due to the delay.

This subassignment of error is denied.

B. The Missing Wall Charts

Petitioners contend that large wall charts displaying the applicable approval criteria were prepared and made available to the applicant during the November 14 planning commission meeting. Petitioners later were advised the wall charts were lost, and the charts were not available during the December 12 planning commission meeting.[24] Petitioners complain the wall charts were "found" prior to the applicant's rebuttal on December 14.

We find nothing in the above course of events that provides a basis for us to conclude the city committed procedural error or that petitioners' substantial rights were prejudiced.

This subassignment of error is denied.

C. Denial of Time for Oral Argument

Petitioners argue that under LOC 48.825 and 48.835 they were entitled to 60 minutes of oral argument at the hearing held by the city council to consider the plan and zone amendment requests, rather than the 30 minutes they were given by the city council.[25]

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[24]We assume the wall charts were unavailable to both petitioners and the applicant during the December 12 planning commission meeting.

[25]The city's determination that petitioners were entitled to 30 minutes for oral argument under the cited code sections was based on its assumption that all petitioners were represented by petitioner Sokol. Petitioners contend each should have been viewed as an unrepresented individual and, viewed in this way, they were entitled to a total of 60 minutes of oral argument under the cited code provisions.

In a memorandum dated February 6, 1989, the city manager discussed code provisions controlling time for oral argument for hearings before the city council concerning plan amendments and appeals of planning commission decisions on zone changes. The city manager recommended that the city council conduct a combined hearing in this matter with petitioner Sokol to be allocated 30 minutes for argument.[26] At its February 7, 1989 meeting, the city council decided it would proceed in these cases in the manner recommended by the city manager. The parties, including petitioner Sokol, were provided with copies of the city manager's recommendation and were advised in a February 9, 1989 letter of the time limits for oral argument.[27]

At the March 21, 1989 city council meeting, petitioners contended that petitioner Sokol did not represent the other petitioners and that as individual petitioners they were entitled to a total of 60 minutes for oral argument, not the total of 30 minutes the city had advised them would be made available to them as a group. The city council refused to grant the petitioners' request for additional time for oral argument.

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[26]The city council hearing was on the record developed before the planning commission. Under the city's procedures, the parties are limited to legal arguments before the city council.

[27]Petitioners dispute that petitioner Sokol, an attorney, represented the other petitioners at this point. Petitioners were advised in the February 9 letter informing them of the time limits that the city council's hearing would be limited to the evidentiary record compiled before the planning commission and that petitioners were encouraged to submit written argument which would be copied at city expense and provided to the city council. The petitioners did not submit written argument.

Petitioners Sokol and Oliver used the entire 30 minutes allotted to petitioners for oral argument.

Petitioners do not explain why 30 minutes of oral argument was insufficient time to present their arguments to the city council. Even if, under LOC 48.825 and 48.835, petitioners were entitled to a total of 60 minutes as four individual unrepresented petitioners, they do not explain how limiting them to 30 minutes prejudiced their substantial rights.

This subassignment of error is denied.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

> "It was error for the Council to refuse to consider the letter of Bruce Schafer of March 21, 1989, which corrected the December 14th false statements of the applicants."

Petitioners argue that during rebuttal testimony before the planning commission on December 14, 1988, intervenor's attorney represented that the neighborhood group's traffic engineer told the applicant's traffic engineer that he did not disagree with the latter's report. Petitioner contends there was no such conversation between the traffic engineers and the attorney's representation to the planning commission was false.[28]

Petitioner contends the alleged misrepresentation is important because the planning commission and city council

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[28]Intervenor contends in its brief that the conversation did occur and that the representation to the planning commission during rebuttal was accurate. Intervenor-Respondent's Brief 44, n 16.

relied heavily on the applicant's traffic engineer's report. Therefore, petitioners contend it was error for the city council on March 21, 1989, to refuse to consider a letter from the neighborhood group's traffic engineer concerning the alleged misrepresentation.[29]

Respondents contend that LOC 56.150(4) limits the city council deliberations to the record compiled before the planning commission and that it would have been error for the city council to accept the letter offered by petitioners on March 21, 1989. Respondents argue the petitioners could have objected to the alleged misrepresentation during the December 14 hearing, but failed to do so. Respondents further note the petitioners could have requested that the city council remand the matter to the planning commission on March 21, so that the letter could properly be added to the record, according to city procedures for accepting evidence after the evidentiary hearing has closed, but petitioners did not do so. Finally, respondents note there is no indication in the city council's decision that it in any way relied upon, or viewed as significant, intervenor's

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[29]The letter states that the traffic engineer did not discuss the results of his study with anyone other than petitioner Sokol during December 1988 and that the results of his study disagreed with the study performed by the applicant's traffic engineer.

The letter, although not accepted by the city council, appears in the record with the notation at the top of the letter, "Not Accepted." Record 171. See Sokol v. City of Lake Oswego (LUBA Nos. 89-050 and 89-051, Order on Record Objections, July 25, 1989). We note the letter is somewhat equivocal about whether the alleged conversation between the two engineers occurred.

attorney's representation concerning the alleged traffic engineers' conversation.

We agree with respondents that petitioners waived any right they may have had to submit surrebuttal testimony by failing to object to the alleged misrepresentation during the December 14 hearing, or failing to explain why it was not possible to do so. We also agree that at the March 21 city council meeting, petitioners apparently sought a remedy the city council could not grant. Rather than requesting that the matter be remanded to the planning commission, which the city council is empowered to allow in appropriate circumstances, petitioners asked to submit new evidence to the city council. LOC 56.150(4) limits city council deliberations to the record.

The seventh assignment of error is denied.

EIGHTH ASSIGNMENT OF ERROR

> "The City Council decision to approve the zone change and comprehensive plan amendments were [sic] reached in error due to the state of disorder which existed at the meeting and because it does not reflect the majority view of the Council as required by Section 15(b) of the Lake Oswego City Charter."

At its March 21, 1989 meeting, the city council voted 4-2 to approve PA 5-88 and deny the appeal of ZC 7-88.[30] Written

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[30]The motions and votes on the plan amendment and zone change, as reflected in the minutes of the city council meeting, were as follows:

> "Councilor Durham moved that Council adopt PA 5-88 as recommended by the Planning Commission. Councilor Holman seconded the motion. The motion passed with Councilors Anderson, Holman, Mayor Schlenker and Durham voting 'yes.' Councilors Fawcett and Churchill voted 'no.'

orders and findings reflecting the city council's decisions were not adopted on March 21, 1989. On April 18, 1989, the city council took action on PA 5-88-652 and ZC 7-88-653.[31] After a motion to approve PA 5-88-652 was seconded, in response to a question by councilor Fawcett, the councilors were advised that their vote on the motion was not to approve the plan amendment but rather to determine whether the findings accurately reflected the action taken on March 21. The vote on the motion was 5-1.

The dissenting council member was councilor Holman, who had voted with the majority in favor of the proposed plan amendment on March 21. Councilor Holman explained his vote in favor of the plan amendment on March 21 had been in error and he intended to vote against the plan amendment.

The city attorney explained that had the vote on the proposed plan amendment on March 21 been 3-3, the plan amendment would have been denied for failure to receive a majority vote in favor. The city attorney then explained the city council's

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> "* * * * *
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> "* * * Councilor Durham moved that the appeal of ZC 7-88-629 be denied. Councilor Holman seconded the motion. * * * The motion passed with Councilors Anderson, Holman, Mayor Schlenker and Durham voting in favor. Councilors Fawcett and Churchill voted in opposition.
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> "* * * * *" Record 145.

[31]PA 5-88-652 and ZC 7-88-653 are lengthy written orders with findings and conclusions. Record 5-97. PA 5-88-652 approves the plan amendment and ZC 7-88-653 denies petitioners' appeal of the zone change.

rules governing "repeal" of an action taken by the council. Rule 12 provides that an action may be subject to a motion to repeal if "the motion specifies adequate reasons." Record 121. Approval of a motion to repeal requires a 2/3 vote of the members present.

Councilor Holman explained his reason for moving to repeal PA-5-88 was that he believed the evidence concerning traffic was unconvincing and did not support a determination that traffic facilities have adequate capacity to serve the planned development. The vote on the motion to repeal was 3-3.[32] Because the motion failed to receive the 2/3 vote required by Rule 12, it failed.

Following this vote, motions to approve Orders PA 5-88-652 and ZC 7-88-653 both were approved by votes of 6-0.

Petitioners argue Lake Oswego City Charter Section 15(B) provides:

> "Except as this charter provides otherwise, the concurrence of a majority of the members present and eligible to vote is necessary to decide any question before the Council."

Petitioners contend the questions raised at the April 18 city council meeting showed the required majority of the council did not support a decision to approve PA 5-88-652. Petitioners contend the requirement for a 2/3 vote to repeal the March 21

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[32]Prior to the vote on the motion to repeal, the mayor ruled the action on PA 5-88-652 "was complete." Record 103. This was followed by a challenge to the mayor's ruling, and a 4-3 vote to overrule the Mayor's ruling. Id.

action was improper in these circumstances and had the effect of frustrating "the true wishes of three of the Council." Petition for Review 48.

Respondents contend the city council simply followed the applicable procedures for repeal of the action taken on March 21, and contend it would have been error for the city council not to do so.

At oral argument in this matter, petitioners for the first time cited Heilman v. City of Roseburg, 39 Or App 71, 591 P2d 390 (1979)(Heilman). The parties requested, and were granted, an opportunity to submit additional written argument concerning the bearing that case may have on petitioners' eighth assignment of error.

Heilman concerned an appeal of a circuit court decision affirming the city council's denial of an application for a zone change. The city council voted to deny the application and directed the city attorney to prepare findings. Findings were prepared and approved by the city council 14 days later. However, the findings were not incorporated into an order and did not purport to ratify the earlier decision to deny the requested rezoning.[33]

The petitioners in Heilman argued the original vote by the city council was improper because it was not supported by

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[33]Because the findings made no reference to the earlier decision, the only written evidence of the council's earlier decision to deny the rezoning was the minutes of the city council's meeting.

findings. Petitioners contended the findings improperly flowed from the decision rather than the decision flowing from the facts. Respondents in Heilman argued the earlier city council vote was "preliminary and tentative" and merely established the inclination of the city council so that findings and a final decision could be prepared for adoption.

The Court of Appeals concluded that it would have been entirely proper for the city council to take tentative action at the first meeting, with a formal written order and findings adopted at a subsequent meeting. The problem in Heilman was that the second action only adopted findings, without adopting an order or ratifying the earlier decision. Therefore, the earlier decision had to stand on its own, and the Court of Appeals held it was error to make a final decision without contemporaneous findings. The Court of Appeals reasoned:

> "This was a quasi-judicial proceeding in which petitioners are entitled to findings, Fasano v. Washington County, 264 Or 574, 507 P2d 23 (1973), and the very heart of adjudication is that the determination of facts must be preliminary. Only after the facts are known, the adjudicator draws those conclusions which are suggested by those facts and issues an appropriate order. Here there is no order made contemporaneously with or after the fact-finding and the findings themselves do not in any express or implied way suggest a deliberate ratification of an earlier tentative decision. * * *" (Footnotes omitted.)[34] Heilman, 39 Or App at 75.

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[34]In one of the omitted footnotes, the Court of Appeals analogized the city council's quasi-judicial decision with judicial proceedings where a judge enters a tentative decision and requests that findings be prepared. The Court of Appeals observed it is the final order adopted after preparation of findings that "is the final order, not the earlier oral

As respondents correctly note, our decision under this assignment of error is not controlled by the holding in Heilman. The most significant difference between the decision challenged in this proceeding and the decision at issue in Heilman is that here we have a final order with contemporaneous findings adopted by a 6-0 vote at the April 18, 1989 city council meeting. However, as explained below, we are persuaded by the Court of Appeals' reasoning in Heilman, and the Supreme Court's decision in Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 569 P2d 1063 (1977), that the city followed improper procedures and improperly construed applicable law in reaching its decision on April 18, 1989.

As Heilman makes clear, the common practice of adopting a tentative decision followed by approval of a written decision with supporting findings is entirely appropriate. However, as the court's reasoning in Heilman makes equally clear, the city council's decision must flow from the city council's findings of fact, not vice versa. The respondents' position that a final action to approve the requested plan and zone changes occurred on March 21, subject only to approval of supporting findings is untenable. Only after factfinding has occurred and the facts are known can the decision maker conclude that applicable approval criteria are met.

As the Supreme Court explained in Sunnyside Neighborhood v.

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order * * *." Heilman, 39 Or App at 75, n 5.

Clackamas Co. Comm., 280 Or at 21:

> "We wish to make it clear that by insisting on adequate findings of fact we are not simply imposing legalistic notions of proper form, or setting an empty exercise for local governments to follow. No particular form is required, and no magic words need be employed. What is needed for adequate judicial review is a clear statement of what, specifically, the decision making body believes, after hearing and considering all the evidence, to be the relevant and important facts upon which its decision is based. * * *"

Thus, while no magic words or special form are required, the decision is required to be based on "what, specifically, the decision making body believes * * * to be the relevant and important facts * * *." Id. The relevant and important facts had not been determined when the city council voted on March 21.[35] Therefore, the city council's decision on March 21 was only a tentative decision, subject to preparation of the findings of fact and reasoning needed to support the decision so that it could be adopted as a final order.[36]

If, as we conclude, the city's March 21, 1989 action is properly viewed as only a tentative action, it was improper to

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[35]Although the planning commission's findings, Record 239-260, were before the city council on March 21, the city council's findings and reasoning were not stated orally at the March 21 hearing or embodied in any writing until the two orders were prepared after the March 21 meeting and adopted by the city council on April 18.

[36]The situation might be different if proposed findings had already been prepared to resolve factual disputes and reach the conclusions necessary to support a decision and were before the city council at the March 21 meeting. The situation might also be different if such findings were before the city council and needed only to be specifically supplemented or amended, and the city council gave instructions regarding specific findings to be prepared in writing and brought back to the city council for adoption. Neither situation exists in this case.

require that a motion to repeal be passed in accordance with city council Rule 12 before the city council took its final action on PA 5-88-652. Because the city's March 21 decision to approve the plan amendment was not final, there was nothing that required repeal.

On March 21, without having adopted the required supporting findings, the city council was in no position to take an "action" subject to Rule 12. When the 4-2 vote that supported the tentative decision to approve the plan amendment became a 3-3 vote, the proposed plan amendment no longer commanded the support of the majority of the council required for approval. Had the city council correctly construed the applicable law and proceeded on April 18 to vote on the plan amendment, rather than imposing the requirements of Rule 12 for repeal of a council action as a precondition to a decision on the merits of the plan amendment, the plan amendment apparently would have been denied. In any event, imposition of Rule 12 to prevent a vote on the merits to determine whether the plan amendment, on April 18, 1989, commanded the majority of members required by City Charter Section 15(B) was error.

The eighth assignment of error is sustained.

NINTH ASSIGNMENT OF ERROR

> "The zone changes to R-3 for Subareas 4 and 4A violate LOC 48.815(2) and applicable comprehensive plan policies."

LOC 48.815(2) requires that a zone change must conform to the city's comprehensive plan. Because we remand the city's

decision approving the plan map amendment to R-3, we also must remand the city' decision to change the zoning map designation to R-3. See n 1, supra.

The ninth assignment of error is sustained.

TENTH ASSIGNMENT OF ERROR

> "It is a violation of LCDC Goal V to allow construction on wetlands, as these amendments will permit."

Petitioners' arguments under this assignment of error rely in part on their argument that petitioner Jones was improperly denied an opportunity to present argument to the city council on March 21. We concluded earlier in this opinion, under the sixth assignment of error, that the city council did not err by limiting oral argument to 30 minutes, and petitioners may not complain about their division of the allotted so that petitioner Jones did not present oral argument.

More importantly, petitioners simply cite a passage in a staff report suggesting the existence of wetlands on the property and claim Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources) is violated and that no analysis was performed under ORS 197.732 (concerning exceptions to statewide planning goals).

Petitioners' arguments under this assignment of error are insufficient to state a basis upon which we might grant relief. As respondents correctly note, the challenged action does not actually allow construction on wetlands. Rather, the decisions change existing plan and zone designations that allow

development to different plan and zone designations that also allow development. The city's findings concerning wetlands are as follows:

> "(i) General Policy I: Identify wetlands. * * * The City finds that through the creation of the City Hydrology Map, the City has complied with this policy. The City has also adopted the Wetlands Development Standard which will be applicable during development review of each development phase. That standard is process and performance oriented. Wetlands are identified on a case by case basis after a site survey and analysis of the physical features and vegetation identified.
>
> "Opponents alleged that wetlands exist on the site. Site surveys performed by the applicants and the City show no evidence to support that allegation. Opponents attempted to introduce new evidence concerning wetlands during the City Council hearing. This offer was rejected because it is contrary to the City Code requirement that this proceeding be conducted on the record made before the Planning Commission. The opponents will have an opportunity to present evidence and raise the issue of compliance with the Wetland Standard during the evidentiary hearings required during the development review of each phase." Record 20-21.

We understand the above findings to say the City Hydrology Map is the city's inventory of wetlands and it shows no wetlands on the property. We also understand the findings to state that during the development review process a site survey and analysis is performed and the city's wetland standard is applied to any identified wetlands as part of development review approval. Petitioners do not explain why the above findings are not adequate to show compliance with Goal 5.

The tenth assignment of error is denied.

The city's decision is remanded.

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 89-050 and 89-051, on November 14, 1989, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 14th day of November, 1989.

Jan Zwemke
Management Assistant