BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BROWN & COLE, INC., a Washington corporation, HAROLD B. SHOEMAKER, HAROLD E. WEST, LARRY GUTHU, JR., GREGORY J. HYDE, A.J. MYRICK, and RONALD KIGGINS, Petitioners, vs. CITY OF ESTACADA, Respondent, and DAVID BAUER, PATRICIA BAUER, WILBUR BAUER, VIVIAN BAUER, DOLORES McNALLY, and ESTATE OF FRED McNALLY, Intervenors-Respondent.	LUBA No. 91-038 FINAL OPINION AND ORDER

Appeal from City of Estacada.

Divan Williams, Jr., Portland, filed the petition for review. With him on the brief was Ater, Wynne, Hewitt, Dodson & Skerritt. Robert C. Shoemaker and Divan Williams, Jr. argued on behalf of petitioners.

Thomas J. Rastetter, Oregon City, filed a response brief and argued on behalf of respondent.

James Stuart Smith, Portland, filed a response brief and argued on behalf of intervenors-respondent McNally. With him on the brief was Davis, Wright & Tremaine.

Steven R. Schell and Stark Ackerman, Portland, filed a response brief on behalf of intervenors-respondent Bauer. With them on the brief was Black, Helterline. Stark Ackerman argued on behalf of intervenors-respondent.

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

AFFIRMED 07/26/91

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners appeal a City of Estacada ordinance adopting a comprehensive plan map amendment from Light Industrial to Commercial, and a zone change from Light Industrial (M-1) to General Commercial (C-1), for an approximately two acre parcel.

MOTIONS TO INTERVENE

David Bauer, Patricia Bauer, Wilbur Bauer, Vivian Bauer, Dolores McNally and Estate of Fred McNally move to intervene in this proceeding on the side of respondent. There is no opposition to the motions, and they are allowed.

FACTS

The subject parcel is located within a triangular shaped area known as Estacada Industrial Park. This area is bounded by State Highway 211/224 on the east, a city park on the north and the Clackamas River on the west. Save for a metal fabrication plant, the city sewage treatment plant, and a vacant automobile dealership building on the subject parcel, the area is generally undeveloped. The subject parcel (tax lot 102) is located north of another undeveloped two acre parcel (tax lot 104) and south of the sewage treatment plant. The subject parcel has access to the east on Industrial Way, near its intersection with Highway 211/224.

Intervenors Bauer are the contract purchasers of, and

intervenors McNally the record owners of, the subject parcel. On September 5, 1990, intervenors and the owner of the adjacent parcel to the south filed an application to rezone the two parcels from M-1 to C-1. Intervenors Bauer proposed "to relocate their existing grocery store of approximately 12,600 sq. ft. and build a new all purpose grocery facility of approximately 30,000 sq. ft." on the subject parcel.[1] Record 747. No specific development was proposed for tax lot 104.

On January 30, 1991, after holding a public hearing, the city planning commission issued a decision recommending denial of the proposed comprehensive plan map amendment and zone change. Record 418. The city council conducted a de novo review of the application, holding public hearings on February 7 and February 28, 1991. It appears from documents in the record that at least by the time the city council held its first public hearing, intervenors Bauer were no longer proposing to use the subject parcel for a general purpose grocery store, but rather for a "Shop 'N Kart" facility.[2] See, e.g., Record 430-434, 535-539, 560-563. A "Shop 'N Kart" is a warehouse style, discount

[1]Intervenors Bauers' existing grocery store is located in downtown Estacada, on leased property. That property has been purchased by petitioner Brown & Cole, Inc., which plans to operate its own grocery store on the site.

[2]Whether the Shop 'N Kart proposal was considered by the planning commission is disputed by the parties.

grocery store. Record 536.

On March 21, 1991, the city council adopted an ordinance amending the comprehensive plan map designation for the subject parcel (tax lot 102) from Light Industrial to Commercial and rezoning it from M-1 to C-1.[3] The city council's decision imposes conditions on the plan amendment and zone change, including that "[c]onstruction of commercial structures shall be restricted to the proposed Shop 'N Kart facility and necessary parking and auxiliary facilities." Record 7.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The City erred by failing to disclose and provide petitioners an opportunity to rebut ex parte communications with members of the City Council."

The city council's public hearing began on February 7, 1991 and was continued to February 28, 1991 for presentation of the applicants' rebuttal. Record 329-330. At the beginning of the February 28, 1991 public hearing, the city attorney made the following statement regarding ex parte contacts:

> "[W]e did have one ex-parte communication at the last [City] Council meeting, very brief * * *, unintentional I'm sure. All of the councillors I believe were present except for Councilor Walls. I think all councillors would want to declare that ex-parte communication. It was very, very brief,

[3]The city council's decision also denies the application with regard to amending the plan and zone designations for tax lot 104.

maybe 15 seconds * * *.

"* * * * *

"I don't think much was said at all, but the substance of it essentially was someone from out of state telling us whether we need another grocery store, something of that nature. And I would doubt if any of the parties want to rebut that, but they are certainly welcome to have that opportunity." Record 71.

Following this statement, the city attorney advised the mayor and city council members that if they had any other ex parte communications since the February 7, 1991 hearing, they should be declared and their contents disclosed. Id. The mayor stated he had talked to one council member about the possibility of opening Lake Shore Drive,[4] and four of the six council members stated the subject of the proposed plan and zone change had been brought up in conversations, but the council members had refused to discuss it. Record 72. After these comments, the hearing proceeded with the presentation of the applicant's rebuttal.

Petitioners contend the city council failed to adequately disclose the substance of the above referenced ex parte contacts and to give petitioners an opportunity to rebut these ex parte communications, as required by due

[4]Lake Shore Drive is shown on maps in the record as running along the Clackamas River, on the western edge of the industrial park area. Record 564.

process and ORS 227.180(3).[5] Petitioners further contend the mayor denied their subsequent request for an opportunity to object to and rebut these ex parte contacts. Petitioners argue that because they were provided neither a basis upon which to submit, nor an opportunity for, rebuttal testimony, the city's errors prejudiced petitioners' substantial rights and, therefore, warrant reversal or remand of the city's decision. Fasano v. Washington Co. Comm., 264 Or 574, 507 P2d 23 (1973); Angel v. City of Portland, ___ Or LUBA ___ (LUBA No. 90-109), March 6, 1991), slip op 10-11; Lower Lake Subcommittee v. Klamath County, 3 Or LUBA 55 (1981).

Respondent and intervenors-respondent (respondents) argue the city complied with ORS 227.180(3). Respondents contend the statements by the city attorney, mayor and council members described above sufficiently placed the substance of any ex parte communications on the record. With regard to providing an opportunity for rebuttal, respondents argue that although there was no explicit

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[5]ORS 227.180(3) provides that no decision of a city council shall be invalid due to ex parte contact with a member of the council, if the member receiving the ex parte contact:

> "(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and
>
> "(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related."

invitation for rebuttal following the city council members' comments on ex parte contacts, it was clear from the city attorney's statements at the beginning of the February 7 and February 28, 1991 hearings that the city provided an opportunity to rebut any ex parte communications at the time those communications were disclosed.

Respondents also deny that later in the February 28, 1991 hearing, petitioners were refused an opportunity to rebut the content of the above described ex parte communications. Respondents contend that after the close of the applicant's rebuttal presentation, petitioners' attorney asked the mayor for "an opportunity * * * to surrebut and make some comments about what we believe are some errors that have occurred * * * during the submission of [the applicants'] latest two rounds of written materials." Record 98. According to respondents, petitioners' attorney also asked the mayor for an opportunity "to put on the record [that] errors have been made," "to sum up," and "to provide surrebuttal." Record 99. Respondents contend these requests do not indicate a desire to rebut ex parte communications, but rather to object to errors made in the applicants' rebuttal presentation and to provide surrebuttal.

We agree with respondents that the city complied with

ORS 227.180(3).[6] As far as we can tell from the portions of the transcript of the February 28, 1991 city council hearing transcript to which we are cited, the contents of the 15 second ex parte communication at a previous council meeting and of the conversation between the mayor and a city council member were disclosed for the record. We understand the statements of the other four city council members to mean that they did not receive any ex parte communication because, although the subject was broached with them, they refused to discuss it. We also find the statement made by the city attorney at the beginning of the February 28, 1991 hearing, to the effect that the parties were welcome to rebut ex parte communications, is sufficient to satisfy the requirement of ORS 227.180(3)(b) that "a public announcement * * * of the parties' right to rebut the substance of the [ex parte] communication [be] made at the first hearing following the communication * * *."

It appears from the record that petitioners had the opportunity to rebut the ex parte contacts when they were

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[6]Furthermore, even if the city failed to comply with ORS 227.180(3) in some respect, its error was procedural in nature. Where a party fails to object to a procedural error below, that error cannot provide a basis for this Board to reverse or remand the challenged decision. Torgeson v. City of Canby, ___ Or LUBA ___ (LUBA No. 89-087, Order on Motion for Evidentiary Hearing, March 29, 1990), slip op 11-12; Union Station Business Community Assoc. v. City of Portland, 14 Or LUBA 556, 558 (1986). For the reasons stated in the text, infra, we believe petitioners had an opportunity to raise objections to the city council's disclosure of ex parte contacts at the February 28, 1991 hearing at the time those disclosures were made, but failed to do so, and did not raise such objections at any other time prior to the adoption of the final decision.

disclosed, but did not do so. See Kittleson v. Lane County, ___ Or LUBA ___ (LUBA No. 90-112, November 20, 1990), slip op 13. Further, petitioners were not denied the opportunity to rebut the ex parte contacts later in the hearing. We agree with respondents that the requests made by petitioners after the applicants' rebuttal was completed indicated a desire to raise procedural objections to and surrebut the applicants' rebuttal, not to object or present rebuttal to the previously disclosed ex parte contacts.[7]

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "The City erred by permitting a privately initiated plan amendment independent of city plan review in violation of the comprehensive plan."

City of Estacada Comprehensive Plan (plan) Chapter 1 (Introduction) includes the following section:

> "* * * Plan Review and Amendments
>
> "The adopted comprehensive plan will be reviewed by the Planning Commission and City Council annually to determine its applicability in light of changes, expansions, and development in the community. The Planning Commission and City Council may amend the comprehensive plan or undertake additional studies and research to change and/or support the plan.
>
> "Consideration may also be given, on this annual

[7]This case is, therefore, distinguishable from Angel v. City of Portland, supra, where the challenged decision was remanded because it was uncontested that no opportunity to rebut ex parte contacts had been provided, and that petitioners had objected to such lack of opportunity before the city made its final decision.

> schedule, by the city to privately sponsored amendments to the comprehensive plan. * * *
>
> "Both city-initiated and privately sponsored proposals may suggest changes in either the policy areas texts or the comprehensive plan map, or both.
>
> "All proposed amendments to the plan shall be subject to public hearing by the Planning Commission and City Council. In the case of a proposed change to the map, all property owners within 300 feet of the requested change shall be directly notified of the hearing date."[8] (Emphasis added.) Plan I-5.

Petitioners argue the above quoted plan provisions limit the city's consideration of privately sponsored plan amendments to its scheduled "annual review" of the plan. According to petitioners, the subject privately sponsored plan amendment was not considered as part of an annual review of the city's plan. Petitioners argue the city is not empowered to approve such a plan amendment outside of its annual review and, therefore, the challenged decision should be reversed under ORS 197.835(6).[9]

Respondents argue the plan provisions quoted above do not limit the city's ability to consider privately sponsored

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[8]Although not mentioned by petitioners, plan Citizen Involvement Policies 1 through 5 contain language virtually identical to the provisions quoted in the text.

[9]ORS 197.835(6) provides:

> "The board shall reverse or remand a decision involving the application of a plan or land use regulation provision if the decision is not in compliance with applicable provisions of the comprehensive plan or land use regulations."

plan amendments outside of the annual review process, but rather simply give the city discretion to consider privately sponsored amendments as part of its annual review. Respondent contends the plan provisions in question are similar to city plan provisions requiring update and revision of the plan every five years, which this Board interpreted not to limit the city's ability to review and amend the plan more frequently. Allen v. City of Banks, 9 Or LUBA 218, 225 (1983).

Intervenors McNally also argue that even if petitioners' interpretation of the above quoted plan provisions is correct, the city's error was simply in the timing of its consideration of the proposed plan amendment and, therefore, is procedural in nature. Intervenors McNally argue that in order to obtain reversal or remand of the city's decision due to this alleged procedural error, petitioners must (1) make a timely objection to this procedural error below, and (2) demonstrate that the error caused prejudice to their substantial rights. Mason v. Linn County, 13 Or LUBA 1 (1984), aff'd in part rev'd in part on other grounds 73 Or App 334 (1985); Meyer v. City of Portland, 7 Or LUBA 184 (1983), aff'd 67 Or App 274, rev den 297 Or 82 (1984); ORS 197.835(7)(a)(B). According to intervenors McNally, petitioners did neither.

We agree with respondents that the plan provisions quoted above do not prohibit the city from considering

privately sponsored quasi-judicial comprehensive plan amendments outside of the city's legislative plan annual review process. Rather, they provide that the city may consider such privately sponsored plan amendments as part of the legislative annual review process.

Additionally, we agree with intervenors McNally that even if petitioners' interpretation of these plan provisions were correct, the city's error in considering the proposed plan amendment outside of the annual review process would be procedural in nature. Further, although we agree with petitioners that they did object to this alleged procedural error below,[10] we also agree with intervenors McNally that petitioners have not demonstrated their substantial rights were prejudiced by this error. Under ORS 197.835(7)(a)(B), the city's failure to follow applicable procedures is grounds for reversal or remand of the challenged decision only if the error "prejudiced the substantial rights of the petitioner." Therefore, even if petitioners' interpretation of the relevant plan provisions were correct, this assignment of error would provide no basis for reversal or remand of the city's decision.

The second assignment of error is denied.

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[10]A report by petitioners' planning consultant, dated February 10, 1991, states that the plan provides for annual review and amendment, and observes that "[t]here is no indication that this application is a part of an annual Plan review process." Record 905.

THIRD ASSIGNMENT OF ERROR

> "The City misconstrued the applicable law and made findings not supported by substantial evidence in the entire record by not considering all of the uses permitted in the commercial zone."

Petitioners argue the city erroneously failed to consider the impacts of the most intensive uses allowed under the approved plan and zone designations.

A. Waiver

Respondents argue petitioners failed to raise this issue before the city and, therefore, are precluded from raising it before LUBA. ORS 197.763(1); 197.835(2). Respondents contend petitioners were aware of the proposed condition limiting use of the subject property to the proposed Shop 'N Kart facility, and could have argued before the city that impacts of other allegedly more intensive uses must be considered. According to respondents, the purpose of ORS 197.763(1) would be frustrated if petitioners are allowed to raise before LUBA issues to which the other parties did not have an opportunity to respond in the local proceedings. See Boldt v. Clackamas County, ___ Or LUBA ___ (LUBA No. 90-147, March 12, 1991), slip op 8, aff'd 107 Or App 619 (1991).

Petitioners argue they did raise this issue below. Petitioners point to the February 10, 1991 report submitted by their planning consultant, which states that there is no basis in the city plan or code for the type of use

limitation proposed. The consultant's report further states that if the plan amendment and zone change are approved, "any use permitted in the commercial district must be permitted on the site." (Emphasis in original.) Record 909.

ORS 197.763(1) requires that issues raised before this Board be raised in the local proceedings "with sufficient specificity so as to afford the governing body * * * and the parties an adequate opportunity to respond to each issue." We have stated ORS 197.763(1) does not require that arguments identical to those in the petition for review have been presented during local proceedings, but rather that "argument presented in the local proceedings sufficiently raise the issue sought to be raised in the petition for review, so that the local government and other parties had a chance to respond to that issue." Hale v. City of Beaverton, ___ Or LUBA ___ (LUBA No. 90-159, June 5, 1991), slip op 8; Boldt v. Clackamas County, supra. The Court of Appeals has affirmed this interpretation of the ORS 197.763(1) "sufficient specificity" requirement, stating "* * * the statute requires no more than fair notice to adjudicators and opponents, rather than the particularity that inheres in judicial preservation concepts." Boldt v. Clackamas County, 107 Or App 619, 623 ___ P2d ___ (1991).

In this case, the cited provision in the consultant's report was adequate to inform the city and other parties to

the local proceedings that petitioners contended the city could not limit its approval of a plan and zone designation change to a specific use of the subject property, but rather must assume that any use allowed by the new plan and zone designations could occur on the site. Although petitioners did not explain below what they believed the legal consequences of this theory to be (i.e. that the city must consider the impacts of all potential uses in approving the plan amendment and zone change), petitioners did raise the issue adequately to provide the city and other parties an opportunity to respond to the issue of all uses allowable under the plan and zone designations being potentially allowed on the subject property.

B. Merits

Petitioners argue that absent a plan or code provision containing specific substantive approval criteria for plan or zoning map amendments, the city is required to consider the most intensive uses allowed under the new designations in determining whether an amendment complies with the statewide planning goals and the comprehensive plan. Younger v. City of Portland, 15 Or LUBA 210, 228 (1986); Shirley v. Washington County, ___ Or LUBA ___ (LUBA No. 90-081, October 17, 1990), slip op 19-22. Petitioners further argue the condition of approval imposed by the city, that construction of commercial structures be limited to the proposed Shop 'N Kart facility, does not entitle the city to

limit its consideration to the proposed Shop 'N Kart facility. According to petitioners, this condition merely limits the type of structures that can be built, but does not prevent a more intensive commercial use from taking place in such structures.

Respondents argue that in Younger v. City of Portland, 86 Or App 211, 214, 739 P2d 50 (1987), rev'd on other grounds 305 Or 346 (1988), the Court of Appeals concluded there is nothing in state law, or general principles of land use law that requires all possible permitted uses to be considered in adopting a plan amendment and zone change. According to respondents, in Younger, the Court of Appeals analyzed specific Portland comprehensive plan policies to determine whether the city was required to consider all possible permitted uses. Respondents contend the court concluded that even if a plan policy might require consideration of other possible uses in some instances, where there are compelling reasons to believe that the property will be put to the proposed use in the foreseeable future, and the conditions of approval effectively limit the intensity of use to one comparable to the proposed use, it would be an "empty exercise" to require the city to consider all alternative uses. Younger, supra, 86 Or App at 215-216.

Both the Court of Appeals and this Board have stated there is no rule of general applicability to local government plan/zone change proceedings which requires a

local government to consider the most intensive uses possible under the new plan/zone designation when approving a plan/zone change. Younger, supra, 86 Or App at 214; Shirley v. Washington County, supra, slip op at 21. Petitioners premise their argument under this assignment of error on there being such a rule of general applicability. Petitioners do not argue that any provisions of the city's comprehensive plan or code require the city to consider other possible uses more intense than that proposed. Therefore, petitioners do not establish any basis for finding such a requirement exists.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

> "The City misconstrued the applicable law and made findings not supported by substantial evidence in the entire record by determining that objectives 1 and 6 of chapter 8 of the plan are only criteria for consideration, not mandatory approval standards, thereby failing to provide the required notice of and statement at the hearing regarding the applicable criteria."

Petitioners argue the city failed to identify City of Estacada Comprehensive Plan (plan) Economic Objectives 1 and 6 as applicable criteria in the notice of the hearing below, erroneously concluded Economic Objectives 1 and 6 are not mandatory approval criteria, and failed to adopt adequate findings supported by substantial evidence demonstrating compliance with these objectives.

A. Waiver

Respondents contend petitioners may not raise these issues before this Board because they failed to raise these issues before the city, as required by ORS 197.763(1) and 197.835(2).

Petitioners respond these issues were raised below, citing a portion of their planning consultant's February 10, 1991 report which quotes plan Economic Objectives 1 and 6 and states the applicants failed to demonstrate the proposed plan amendment and zone change complies with these objectives. Record 905-906. Petitioners also argue that under ORS 197.835(2)(a), issues concerning compliance with these objectives can be raised before this Board in any case, because the city failed to comply with the requirement of ORS 197.763(3)(b) that these objectives be identified as applicable criteria in the notice of the city council's hearing.

We disagree with petitioners' contention the city failed to list Economic Objectives 1 and 6 as applicable criteria in the notice of the city council's hearing. The list of approval criteria attached to the notice includes, under the heading "Chapter 8: Economics Element," "Criterion: Diversify and approve the economy of Estacada [the plan Economics Goal]," followed by a listing of plan Economic Objectives 1 through 6. Record 899. However, petitioners did sufficiently raise in the proceedings below

the issues concerning compliance with plan Economic Objectives 1 and 6 which they seek to raise before this Board.

B. Compliance with Economic Objectives 1 and 6

Plan Economic Objectives 1 and 6 provide:

> "1. Protect those areas zoned for industrial development from encroachment of incompatible land uses.
>
> "* * * * *
>
> "6. Preserve the existing commercial area and encourage the location of new commercial and retail activities in it." Plan VIII-1.

Petitioners argue the city misconstrued Economic Objectives 1 and 6 not to be mandatory approval criteria for the challenged plan amendment and zone change. Petitioners argue the context of the plan objectives indicates they are approval standards if expressed in mandatory terms. Petitioners therefore contend the requirements of these objectives to "protect" industrially zoned areas from encroachment of incompatible uses and to "preserve" the existing commercial area are mandatory approval standards.[11]

Petitioners also argue the city failed to adopt adequate findings demonstrating compliance with these applicable mandatory approval standards. Petitioners

[11]We do not understand petitioners to contend the requirement of Economic Objective 6 to "encourage" the location of new commercial activities in the existing commercial area is a mandatory approval standard.

further argue the city's findings of compliance with these provisions are not supported by substantial evidence in the whole record.

Although it is not entirely clear, petitioners' contention that the city failed to construe the above described mandatory portions of Economic Objectives 1 and 6 as mandatory approval criteria appears to stem in large part from the language in the city findings emphasized below:

> "* * * We have reviewed the plan for approval standards relevant to the requested amendments, and make below the findings for the standards we find applicable. In identifying the applicable approval criteria, we only chose those that were relevant to the proposed amendments. We also only chose criteria that were mandatory (where compliance is required) and not plan provisions couched in such terms as "encourage" (which indicates desirable, but discretionary conditions). * * * <u>Certain discretionary plan provisions were included as "Objectives" rather than approval criteria. These "objectives" were included as factors to be considered as part of the evaluation of the mandatory criteria</u>." (Emphasis added.) Record 25.

However, following the above quoted portion of the city's findings, the city adopted detailed findings addressing Economic Objective 1 (Record 26-27) and the mandatory portion of Economic Objective 6 (Record 29-31). In both instances, the city concluded that "this objective has been met." Record 27, 31. We therefore disagree with petitioners' contention that the city did not interpret and apply plan Economic Objectives 1 and 6 as mandatory approval criteria.

Furthermore, petitioners provide no explanation of why the detailed findings adopted by the city addressing Economic Objectives 1 and 6 are not adequate to demonstrate compliance with these objectives. It is petitioners' responsibility to identify how the city's findings are inadequate. In the absence of such an explanation, we will not sustain this portion of petitioners' assignment of error. League of Women Voters v. Metro Service Dist., 17 Or LUBA 949, 979, aff'd 99 Or App 333 (1989), rev den 310 Or 70 (1990); Vizina v. Douglas County, 16 Or LUBA 936, 944 (1988).

Turning to petitioners' evidentiary challenge, the parties provide no citations in their briefs to evidence in the record which supports or detracts from the city's decision. However, the city's findings themselves cite both evidence relied on by the city in making its decision and detracting evidence which the city chose not to rely upon. We will therefore consider the evidence cited in the city's findings in determining whether there is substantial evidence to support the city's determinations of compliance with Economic Objectives 1 and 6.

With regard to Economic Objective 1, the findings state the city relied on the Altman Report (Record 619-620) in concluding the proposed Shop 'N Kart facility is not incompatible with uses in the adjacent industrial area. Record 27. The findings also state the Baldwin Report

(Record 904-911) disagrees with statements in the staff report that commercial and industrial uses are not inherently incompatible, but explains the city based its decision not upon inherent compatibility between the two use types, but rather on findings related to the specific uses of the industrial property in question. Record 27.

Substantial evidence is evidence a reasonable person would rely on in reaching a decision. City of Portland v. Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Braidwood v. City of Portland, 24 Or App 477, 480, 546 P2d 777 (1976). We conclude, based on a review of the evidence cited, that a reasonable person could have adopted the findings and reached the conclusion made by the city with regard to compliance with Economic Objective 1. See Douglas v. Multnomah County, ___ Or LUBA ___ (LUBA No. 89-086, January 12, 1990), slip op 14.

With regard to Economic Objective 6, the findings explain the city council heard testimony from Bert Hambleton (Record 287-303) and Robert Baldwin (Record 778-782) that the proposed development would weaken the downtown commercial area, including comparisons by Mr. Baldwin with the cities of Portland, Gresham and Phoenix, Arizona. Record 30. The findings also state the city council heard testimony by Marilyn Dell (Record 75-80, 218-224), Roger Veatch (Record 224-229) and Max Anderson (Record 80-83, 987-999) that in the cities of McMinnville, Newberg, Bend and

The Dalles, despite the relocation of a supermarket away from the downtown core area, or development of a new supermarket away from the downtown core area, the downtown core areas are "even more alive today." Record 30. The findings also explain the city council believes Ben Altman's February 21, 1991 rebuttal letter explains why the experiences of the cities of Portland, Gresham and Phoenix are not applicable to Estacada (Record 984-986), finds the situations of the cities of Newberg, McMinnville, Bend and The Dalles more comparable to Estacada and chooses to rely on the evidence regarding the experiences of those cities. Record 30. Finally, the findings state the city relies on evidence in the Altman Report (Record 621-623) and Durham Report (Record 738-739) that the demand for commercial space in the downtown core area exceeds the existing supply as a basis for its conclusion that the proposed development will not harm the downtown core. Record 30-31.

We conclude, based on a review of the evidence described and cited above, that a reasonable person could have adopted the findings and reached the conclusion made by the city with regard to compliance with Economic Objective 6.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

> "The City erred by permitting a small area to be singled out of a larger area and specially zoned for a use classification totally different from

> and inconsistent with the classification of the surrounding land."

Petitioners argue the city's "decision to single out a small parcel of land for a use classification totally different from that of the surrounding area must be considered a classic violation of the statewide goals and comprehensive plan." Petition for Review 18. Petitioners contend the city has failed to adopt specific approval criteria for quasi-judicial plan and zone map amendments, and the goals found in plan Chapters 8, 10 and 11, which the city applied in making the challenged decision, "are too general to ensure that [city] council members can make comprehensive plan and zone change decisions with any degree of consistency." Petition for Review 19. According to petitioners, this is evidenced by the fact the city approved the requested plan and zone map amendments for the subject tax lot, while denying the same request for the adjacent, almost identical tax lot 104. Petitioners conclude the challenged decision constitutes invalid "spot zoning * * * based only on the benefit derived by particular property owners." Petition for Review 19. Smith v. County of Washington, 241 Or 380, 406 P2d 545 (1965); Buckley v. Newberg, 2 Or LUBA 210 (1981).

Respondents argue that petitioners do not identify under this assignment of error any specific way in which the challenged decision violates the statewide planning goals or the city's comprehensive plan. According to respondents, if

plan and zone map amendments are adopted through a quasi-judicial process, in compliance with the statewide planning goals and the city's comprehensive plan, as was the case here, the decision is by definition not "spot zoning."

Respondents concede a series of Oregon appellate court cases culminating in Smith v. County of Washington, supra, found "spot zoning" to be void. However, according to respondents:

> "* * * These cases focused on the validity of small scale, legislative rezoning, and held that once a comprehensive plan was adopted, there was no presumption of legislative regularity for zone changes that were not consistent with the plan and based upon changes in the character of the rezoned area sufficient to justify an amendment to the existing plan." Intervenors-Respondent Bauers' Brief 23-24.

Respondents also point out these "spot zoning" cases predated Fasano v. Washington Co. Comm., 264 Or 574, 507 P2d 23 (1973), which held that small scale rezonings are quasi-judicial actions requiring certain procedural safeguards, and the 1973 adoption of new statewide land use legislation. Respondents contend these changes make the concept of "spot zoning" obsolete in Oregon. According to respondents, since Fasano, there have been no judicial or LUBA decisions declaring a rezoning invalid as "spot zoning."[12]

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[12]Respondents point out that Buckley v. Newberg, supra, did not involve a quasi-judicial zone change, but rather the legislative application of a

Respondents also argue the city's findings and the record establish that the commercial classification of the subject property is compatible with the surrounding uses. Respondents further argue the evidence and findings show the challenged decision was not made solely for the benefit of a particular property owner, but rather complies with a variety of approval criteria related to the broader public welfare.

"Spot zoning" describes an arbitrary land use decision made in derogation of established criteria or made without criteria. Lane County School Dist. 71 v. Lane County, 15 Or LUBA 150, 153 (1986); see Jehovah's Witnesses v. Mullen, 214 Or 281, 330 P2d 5 (1958). The basis for invalidating "spot zoning" has been described as follows:

> "Arbitrary, or 'spot,' zoning to accommodate the desires of a particular landowner is not only contrary to good zoning practice, but violates the rights of neighboring landowners and is contrary to the intent of the enabling legislation which contemplates planned zoning based upon the welfare of an entire neighborhood." 1 Anderson, American Law of Zoning § 5.13 (3d ed 1986), quoting Smith v. County of Washington, supra.

The challenged decision to change the plan and zone map designations for the subject parcel was made pursuant to provisions in the Statewide Planning Goals (goals) and the city's comprehensive plan, which has been acknowledged by the Land Conservation and Development Commission (LCDC) as

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moratorium to all similarly situated properties but one, with no findings establishing the public benefit of the single exclusion.

complying with the goals. The city's decision identifies the applicable criteria and adopts findings to demonstrate those criteria are satisfied. We agree with respondents that if the challenged plan and zone map amendment was adopted in compliance with the applicable criteria, it cannot be considered arbitrary and, therefore, is not invalid "spot zoning." See Wallowa Lake Forest Industries v. Wallowa County, 13 Or LUBA 172, 179 (1985). Because petitioners fail to show an applicable standard is violated by the city's decision, no basis for reversal or remand is established. Lane County School Dist. 71 v. Lane County, supra.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

> "The City Council's findings regarding compliance with Statewide Planning Goal 9, 11, and 12 are not based on substantial evidence in the entire record."

On April 29, 1989, the city adopted a "Proposed Periodic Review order, proposed amendments to the City Code and Comprehensive Plan, and the Economic Development Analysis and Public Facilities Plan, as backround [sic] reports to the Comprehensive Plan * * *." Record 658. These four documents are part of the local record in this appeal. Record 633-695. At several places in the findings addressing compliance with Statewide Planning Goals 9 (Economy of the State), 11 (Public Facilities and Services)

and 12 (Transportation), the city indicates it relied on information in the Proposed Periodic Review Order, Economic Development Analysis or Public Facilities Plan. See, e.g., Record 12, 13, 15, 18, 19, 24.

Petitioners contend the city council's findings of compliance with Goals 9, 11 and 12 are not supported by substantial evidence in the record solely on the ground that the findings are improperly based on information in the city's proposed periodic review order. According to petitioners, in Bridges v. City of Salem, 104 Or App 220, 223, 800 P2d 302 (1990), the Court of Appeals held that changed circumstances could not be used as a basis for findings that plan amendment criteria are satisfied:

> "It is axiomatic that changes in circumstances after the adoption of a comprehensive plan must be accommodated through plan amendments, rather than through noncompliance with the supposedly obsolete provisions. See West Hills & Island Neighbors v. Multnomah Co., 68 Or App 782, 683 P2d 1032, rev den 298 Or 150 (1984). * * *"

Petitioners argue that because the city relied on improper evidence, its findings of compliance with Goals 9, 11 and 12 are legally inadequate.

In Bridges v. City of Salem, the Court of Appeals determined that a local government could not rely upon evidence of changed circumstances since adoption of its comprehensive plan to justify noncompliance with a plan approval criterion for plan and zone map amendments. The court did not say that evidence of changed circumstances

could not be relied on as a basis for finding compliance with applicable plan and zone map amendment approval criteria.

The city's findings conclude the challenged plan and zone map amendment complies with the requirements of Goals 9, 11 and 12. Record 9-25. Petitioners do not demonstrate any instance where the city relied on facts in its proposed review order as a basis for not complying with provisions of Goals 9, 11 and 12. Neither do petitioners point to any instance where facts in the proposed review order which are relied on in the city's findings conflict or prevent compliance with provisions in the city's comprehensive plan. Petitioners' arguments, therefore, provide no basis for concluding the city's determinations of compliance with Goals 9, 11 and 12 are not supported by substantial evidence.

The sixth assignment of error is denied.

The city's decision is affirmed.