

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 CITIZENS FOR RESPONSIBLE GROWTH,)
5 BARBARA STEPHENS, DAWN McCARTHY,)
6 SHIRLEY LOUTZENHISER, TERESA)
7 TAYLOR, KAY DUNCAN, AURORA JONES,)
8 PAUL JONES, KATHLEEN WYSONG,)
9 PETER TER HAR, JEFF TER HAR,)
10 DAVE LANGLO, MIRIAM HUNTSMAN,)
11 RALPH WINSOR, OLIVE BLUMENSHEIN,)
12 and LEXIE HALLAHAN,)

13)
14 Petitioners,)

LUBA No. 93-163

15)
16 vs.)
17)

FINAL OPINION
AND ORDER

18 CITY OF SEASIDE,)
19)

20 Respondent,)
21)

22 and)
23)

24 CENTERS WEST COMPANY,)
25)

26 Intervenor-Respondent.)
27

28
29 Appeal from City of Seaside.
30

31 Robert L. Liberty, Portland, filed the petition for
32 review and argued on behalf of petitioners.
33

34 Dan Van Thiel, Astoria, filed a response brief on
35 behalf of respondent.
36

37 Lawrence R. Derr, Portland, filed a response brief and
38 argued on behalf of intervenor-respondent. With him on the
39 brief was Josselson, Potter & Roberts.
40

41 KELLINGTON, Chief Referee; HOLSTUN, Referee; SHERTON,
42 Referee, participated in the decision.
43

44 AFFIRMED

01/31/94

45

1 You are entitled to judicial review of this Order.
2 Judicial review is governed by the provisions of ORS
3 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal an order approving a conditional use
4 permit for a factory outlet shopping center.

5 **MOTION TO INTERVENE**

6 Centers West Company moves to intervene on the side of
7 respondent in this appeal proceeding. There is no objection
8 to the motion, and it is allowed.

9 **FACTS**

10 This is the second time an appeal of a city decision
11 approving a conditional use permit for a factory outlet
12 shopping center on the subject property has been approved by
13 the city. In Citizens for Responsible Growth v. City of
14 Seaside, 23 Or LUBA 100, 102 (1992) (Citizens I), we stated:

15 "The subject property consists of several parcels
16 located 'between Highway 101 * * * on the west,
17 tidal Wehana Creek on the east, 14th [S]treet on
18 the north and 9th Street on the south * * *.' The
19 parcels comprise 9.75 acres.

20 "The proposal is for a factory outlet theme
21 shopping center including three buildings with a
22 gross area of 102,000 square feet and 538 parking
23 spaces to serve the shopping center, as well as
24 additional recreational vehicle parking spaces and
25 five parking spaces for busses.

26 "Most of the property within the project area is
27 zoned Industrial (M-1). In particular, the area
28 where the shopping center buildings are to be
29 located is zoned M-1. However, much of the land
30 upon which the parking lot is to be located is
31 zoned Commercial (C-3). The easternmost portion
32 of the property is 'within the Estuary Shoreland
33 (and wetland) boundary and [is] zoned A-2 Aquatic

1 [Conservation] Zone.'" (Citations omitted.)

2 As relevant here, in Citizens I this Board remanded the
3 challenged city decision on the basis that the city
4 improperly applied Seaside Zoning Ordinance (SZO) 4.021,
5 concerning traffic access, to the proposal. Petitioners
6 appealed our decision to the court of appeals. Initially,
7 the court of appeals affirmed our decision in Citizens I.
8 However, on reconsideration, the court sustained an
9 additional basis for remand, finding the city must interpret
10 Comprehensive Plan (plan) policies 5.1.2 and 5.1.6 and
11 explain their relevance to the proposal. Citizens for
12 Responsible Growth v. City of Seaside, 116 Or App 275, 840
13 P2d 1370 (1992), rev den 315 Or 643 (1993).

14 On remand, the city conducted additional proceedings
15 and again approved the proposed shopping center. This
16 appeal followed.

17 **THIRD ASSIGNMENT OF ERROR**

18 "The city violated ORS 197.763(6) by refusing to
19 keep the record open despite the request of a
20 party."

21 Petitioners argue the city refused to keep the record
22 open, as requested under ORS 197.763(6). Petitioners cite
23 testimony in which a participant requested that the record
24 be left open. Petition for Review 18.

25 ORS 197.763(6) provides that unless there is a
26 continuance under ORS 197.763(4)(b):

27 " * * * if a participant so requests before the

1 conclusion of the initial evidentiary hearing, the
2 record shall remain open for at least seven days
3 after the hearing. * * *"¹ (Emphasis supplied.)

4 To resolve this assignment of error, we must determine
5 whether ORS 197.763(6) applies to the city proceedings
6 conducted on remand. In Beck v. City of Tillamook, 313 Or
7 148, 151, 831 P2d 674 (1992), the court explained that
8 successive LUBA appeals are "two phases of the same case"
9 where a local government decision is appealed to LUBA, LUBA
10 remands the decision, the local government conducts
11 proceedings in response to LUBA's remand and adopts a new
12 decision, and the new decision is appealed to LUBA. The
13 court stated that when a local government reopens its record
14 to admit new evidence or testimony, after remand of its
15 decision by LUBA, it does so pursuant to ORS 197.763(7).²
16 Further, the court's discussion states that under ORS
17 197.763(7), the issues to be considered in a local remand
18 proceeding include new, unresolved issues relating to the
19 new evidence or testimony, but not issues that LUBA resolved
20 in its decision remanding the first local government
21 decision or any issue that could have been, but was not,

¹No continuance was requested during the proceedings on remand below.
Petition for Review 20.

²ORS 197.763(7) provides:

"When a local [decision maker] reopens a record to admit new evidence or testimony, any person may raise new issues which relate to the new evidence, testimony, or criteria for decision-making which apply to the matter at issue."

1 raised in the first LUBA appeal. In its discussion in Beck,
2 it is clear the court views local remand proceedings as part
3 of a single, continuous process.

4 Viewed in this light, the provision in ORS 197.763(6)
5 limiting its applicability to the "initial evidentiary
6 hearing" is significant. We determine that the "initial
7 evidentiary hearing" to which ORS 197.763(6) refers is the
8 first evidentiary hearing conducted during the original
9 local proceedings.³ It does not refer to an evidentiary
10 hearing conducted by the local government after LUBA remands
11 the local government's first decision. This means the city
12 did not violate ORS 197.763(6) by failing to grant a request
13 made during the local remand proceedings that the local
14 record be left open.⁴

15 As far as we can tell, new evidence concerning traffic
16 issues was submitted during the local remand proceedings.
17 Under Fasano v. Washington Co. Comm., 264 Or 574, 588, 507
18 P2d 23 (1973), a party has a right to rebut evidence
19 submitted during local quasi-judicial land use proceedings.
20 That new evidence was submitted raises the possibility of
21 prejudice to petitioners' right to rebut evidence, if such

³There is no dispute that an evidentiary hearing was conducted by the city during the local proceedings which lead to the first city decision appealed in Citizens I.

⁴We are not presented here with a situation in which, as a result of the remand by LUBA, a new application is submitted to the local government. Therefore, we do not consider whether the result would be the same in that circumstance.

1 an opportunity was requested and denied. See Caine v.
2 Tillamook County, 25 Or LUBA 209, 213-14 (1993). However,
3 during the local remand proceedings, there was no request
4 for an opportunity to rebut the new evidence. Rather, the
5 only request in this regard was for the record to remain
6 open to enable an opportunity for the requestor to "complete
7 her report." Petition for Review 20. We do not interpret
8 this request as one for an opportunity to rebut new
9 evidence. Rather, it is a request from a participant for
10 additional time to submit new evidence of her own.
11 Therefore, this assignment of error provides no basis for
12 reversal or remand of the challenged decision.

13 The third assignment of error is denied.

14 **SECOND ASSIGNMENT OF ERROR**

15 "The city erred by allowing the applicant to
16 submit additional information in support of its
17 application less than 20 days before the last
18 evidentiary hearing, while denying the opponents
19 an opportunity to rebut that additional
20 information."

21 ORS 197.763(4)(a) states:

22 "All * * * evidence relied upon by the applicant
23 shall be submitted to the local government and be
24 made available to the public at the time the
25 notice [required by ORS 197.763(3)] is provided."

26 Petitioners argue the applicant failed to make evidence
27 it relied upon available to the public within the requisite
28 period of time. For reasons similar to those explained
29 under the third assignment of error above, it is unclear
30 whether ORS 197.763(4)(a) applies to local proceedings on

1 remand. However, we need not decide in this appeal the
2 extent to which ORS 197.764(4) applies to such local
3 proceedings on remand. Assuming ORS 197.763(4)(a) applies
4 in the circumstances presented here, if additional evidence
5 in support of the application is submitted after the
6 ORS 197.763(4)(a) deadline, under ORS 197.763(4)(b) the
7 appropriate local government response is to allow a
8 continuance of the evidentiary hearing to provide
9 participants sufficient time to respond. 1000 Friends of
10 Oregon v. Lane County, 102 Or App 68, 73, 793 P2d 885
11 (1990). If a party fails to request a continuance, the
12 local government has no obligation to continue the hearing.
13 Reed v. Clatsop County, 22 Or LUBA 548, 554 (1992). As we
14 explain above, no person requested that the city continue
15 its local proceedings on remand. This assignment of error
16 provides no basis for reversal or remand of the challenged
17 decision.

18 The second assignment of error is denied.

19 **FIRST ASSIGNMENT OF ERROR**

20 "The city's findings of compliance with [SZO]
21 4.021 are not supported by substantial evidence in
22 the whole record."

23 **A. Waiver**

24 Intervenor contends that under ORS 197.835(2) and

1 197.763,⁵ petitioners waived the right to raise the
2 arguments stated under the first assignment of error.
3 Intervenor alleges those issues were not adequately raised
4 during the local proceedings below. The arguments under the
5 first assignment of error relate to the proposal's
6 compliance with SZO 4.021.

7 The purpose of ORS 197.763 is to afford the decision
8 maker and the parties an adequate opportunity to respond to
9 issues and to prevent unfair surprise at LUBA. Boldt v.
10 Clackamas County, 107 Or App 619, 813 P2d 1078 (1991).
11 However, ORS 197.763(1) does not require the presentation of
12 arguments during local proceedings that are identical to
13 those presented at LUBA. So long as the disputed issues
14 were sufficiently raised to give the local government and
15 other parties a chance to respond, those issues may be
16 raised at LUBA. Hale v. City of Beaverton, 21 Or LUBA 249,
17 254 (1991). We believe issues regarding the proposal's

⁵ORS 197.835(2) provides that LUBA's scope of review is limited as follows:

"Issues shall be limited to those raised by any participant
before the local hearings body as provided by ORS 197.763.
* * *"

ORS 197.763(1) provides:

"An issue which may be the basis for an appeal to [LUBA] shall
be raised not later than the close of the record at or
following the final evidentiary hearing on the proposal before
the local government. Such issues shall be raised with
sufficient specificity so as to afford the governing body * * *
and the parties an adequate opportunity to respond to each
issue."

1 compliance with SZO 4.021 were sufficiently raised during
2 the local proceedings below, such that no party should be
3 surprised by the arguments advanced in the first assignment
4 of error.

5 **B. Merits**

6 SZO 4.021 provides:

7 "The Planning Commission will do a site review of
8 all proposed developments on or adjacent to
9 Highway 101 to consider impacts of the development
10 on the traffic carrying capacity and safety of
11 [Highway] 101.

12 "The city and State Highway Division shall
13 cooperate to reduce traffic congestion along
14 [Highway] 101 through:

15 "(a) The requirements that new uses access onto
16 side streets whenever possible; and

17 "(b) Widening or relocation of street right-of-
18 ways particularly in the south part of the
19 city."

20 Petitioners challenge the evidentiary support for the
21 following findings:

22 "* * * By interoffice memo [the Oregon Department
23 of Transportation (ODOT)] requested further
24 [access] analysis by the applicant's traffic
25 engineer. That analysis was submitted directly to
26 ODOT. By letter dated August 20, 1993, ODOT
27 notified the City that it approved [the] access
28 plan and street improvement proposed by the
29 applicant subject to specific conditions that are
30 incorporated into this order. Therefore, the
31 [City] Council determines that the applicant's
32 traffic analysis and proposals have satisfied the
33 requirements of ODOT for Highway 101 access,
34 subject to the conditions adopted hereby.

35 "* * * The overall capacity and safety of Highway

1 101 will be improved over the existing condition.

2 * * * * *

3 "The single access on Highway 101 cannot safely be
4 eliminated without creating congestion at the 12th
5 Avenue intersection and potential for interference
6 with emergency vehicle access. The presence of
7 the limited, right turn in, right turn out access
8 on Highway 101 will not interfere with Highway
9 traffic. (Emphasis supplied.) Record 5-6.

10 Petitioners argue the August 20, 1993 letter cited in
11 the above quoted findings does not answer the inquiry posed
12 by SZO 4.021, i.e. whether indirect, rather than direct,
13 access onto Highway 101 is possible. Petitioners also
14 contend the evidentiary basis for the conclusion that the
15 ODOT requirements regarding access to Highway 101 are
16 satisfied is the applicant's traffic engineer's report,
17 which is not in the record. Petitioners contend that in the
18 absence of the applicant's traffic engineer's report, upon
19 which ODOT and the city relied to determine ODOT's
20 requirements were met, the city had no evidentiary basis
21 upon which to determine those requirements were met.

22 We believe the city may rely on ODOT's statements that
23 ODOT's requirements are met, even though the evidence
24 underlying ODOT's statement is not included in the local
25 record. However, petitioners are correct that satisfying
26 ODOT's requirements is not the equivalent of establishing
27 that the requirements of SZO 4.021 are met.

28 The city relies upon the applicant's July, 1993 traffic
29 analysis in determining that it is not possible to provide

1 indirect access from the proposed shopping center onto
2 Highway 101 through side streets. The July, 1993 report
3 states the following concerning the possibility of using 9th
4 Avenue:

5 "The only other alternative available for access
6 would be 9th Street. The propert[ies] on the
7 south side of 9th Street are currently zoned for
8 residential uses. The Planning Commission has
9 indicated that those residential properties should
10 not be subjected to commercial traffic on the
11 street and that the 9th Street/Highway 101
12 intersection could not handle the projected
13 traffic loads. Therefore, the use of 9th Street
14 was not considered." Record 120-21.

15 Petitioner contends this statement is insufficient for
16 a reasonable decision maker to rely upon to reach a
17 conclusion that 9th Avenue should be excluded from
18 consideration as an indirect access from the proposed
19 shopping center onto Highway 101.

20 In 1000 Friends v. Marion County, 116 Or App 584, 588,
21 842 P2d 441 (1992), the court of appeals determined this
22 Board exceeded its scope of review in determining particular
23 evidence, of a quality not unlike that quoted above, was
24 insufficient for a reasonable decision maker to utilize in
25 drawing certain conclusions. While the above quoted
26 evidence is certainly not compelling, we cannot say it is
27 unreasonable for the local decision maker to have relied
28 upon it, especially in view of the lack of better evidence
29 in the record to the contrary. We conclude a reasonable
30 decision maker could rely on the above quoted evidentiary

1 statement to determine that 9th Avenue is not a possible
2 alternative for the provision of indirect access from the
3 proposed shopping center onto Highway 101.

4 The first assignment of error is denied.

5 **FOURTH ASSIGNMENT OF ERROR**

6 "The city's conclusion that Plan Policy 5.1.2 does
7 not apply to its decision is unreasonable."

8 **FIFTH ASSIGNMENT OF ERROR**

9 "The city's conclusion that Plan Policy 5.1.6 does
10 not apply to its decision is unreasonable."

11 Plan Policy 5.1.2 provides:

12 "Continued support should be given to the
13 upgrading and revitalizing of the Broadway core
14 area. The Urban Renewal District is seen as an
15 important means of achieving this goal."

16 Plan Policy 5.1.6 provides:

17 "The city, through the Comprehensive Plan and
18 Zoning Ordinance, shall protect the very limited
19 amount of industrial sites in the Urban Growth
20 Area."

21 The city determined that neither plan policy 5.1.2 nor
22 plan policy 5.1.6 is a mandatory approval standard
23 applicable to the proposal. We are required to defer to the
24 city's interpretation of its comprehensive plan unless (1)
25 the interpretation is contrary to the express words, policy
26 or context of the plan, or (2) the interpretation is
27 contrary to a statute, statewide planning goal (goal), or
28 administrative rule provision that the disputed plan
29 provision implements. ORS 197.829; Clark v. Jackson County,

1 313 Or 508, 836 P2d 710 (1992). The city's interpretation
2 that plan policies 5.1.2 and 5.1.6 are not mandatory
3 approval standards applicable to the subject conditional use
4 permit application is not contrary to the express words,
5 policy or context of those policies, and we defer to it.
6 Further, petitioners do not cite any specific statute, goal
7 or rule provision directly or indirectly implemented by plan
8 policies 5.1.2 and 5.1.6.⁶ Accordingly, these assignments
9 of error provide no basis for reversal or remand of the
10 challenged decision.

11 The fourth and fifth assignments of error are denied.

12 The city's decision is affirmed.

⁶Petitioners do cite statutory provisions that require local governments to adopt zoning regulations to implement their comprehensive plans and that require land use decisions to be consistent with the acknowledged comprehensive plan. However, we determine above the city's interpretation that policies 5.1.2 and 5.1.6 are not mandatory approval standards applicable to the challenged conditional use permit decision is not contrary to other provisions of the comprehensive plan.