BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARCOTT HOLDINGS, INC., MATT MARCOTT, and MURRAYHILL THRIFTWAY, INC., Petitioners, vs. CITY OF TIGARD, Respondent, and ALBERTSON'S INC. and SCOTT RUSSELL, Intervenors-Respondent.	LUBA No. 95-011 FINAL OPINION AND ORDER

Appeal from City of Tigard.

Jeffrey L. Kleinman, Portland, filed the petition for review and argued on behalf of petitioners.

Pamela J. Beery, Tigard City Attorney, Portland, and John W. Shonkwiler, Tigard, filed a response brief on behalf of respondent and intervenor-respondent Albertson's, Inc. John W. Shonkwiler argued on behalf of intervenor-respondent Albertson's, Inc.

Garry P. McMurry, Portland, filed a response brief on behalf of intervenor-respondent Scott Russell. With him on the brief was Garry P. McMurry & Associates. Scott Russell argued on his own behalf.

LIVINGSTON, Chief Referee; GUSTAFSON, Referee, participated in the decision.

REMANDED 10/20/95

You are entitled to judicial review of this Order.

Judicial review is governed by the provisions of ORS 197.850.

Opinion by Livingston.

NATURE OF THE DECISION

Petitioners appeal a city council decision that approves city comprehensive plan and zoning map amendments, grants site development review approval and grants minor partition approval.

MOTION TO INTERVENE

Albertson's, Inc. (Albertson's) and Scott Russell (Russell) move to intervene. There is no opposition to the motions, and they are allowed.

FACTS

On August 13, 1993, Albertson's filed an application to allow development of approximately eight acres at the southeast corner of the intersection of S.W. Scholls Ferry Road and S.W. Walnut Street. Albertson's proposed a 40,000 square foot grocery store and five tenant pads for commercial development, two of 4,000 square feet and one each of 5,950, 2,400, and 1,200 square feet.

Albertson's applied for (1) amendments to the city's comprehensive plan and zoning map that first, redesignate approximately eight acres of Tax Lot 200 (the Albertson's site) from Medium-High Density Residential to Community Commercial and rezone from R-25 (PD) (Residential, 25/units/acre, Planned Development) to C-C (Community Commercial); and second, redesignate Tax Lot 100 from Neighborhood Commercial to Medium-High Density Residential

and rezone from C-N (Neighborhood Commercial) to R-25 (Residential, 25 units/acre); (2) site development review approval to allow the construction of the grocery store and tenant pads; and (3) minor partition approval to divide Tax Lot 200 into two parcels of approximately eight acres and 3.85 acres.

The proposal reconfigures existing zoning, so that while the amount of land zoned commercial or residential remains roughly the same, some land presently zoned commercial is rezoned residential, and vice-versa. The 6.93 acres in Tax Lot 100, located at the northeast corner of the intersection, are rezoned from commercial to residential and, in exchange, eight of the 11.95 acres of Tax Lot 200, located at the southeast corner, are rezoned from residential to commercial.

The city planning commission held a hearing on Albertson's application on November 15, 1993, and recommended approval with conditions. The city council held hearings on December 14, 1993 and January 25, 1994, and then remanded to the planning commission for consideration of new evidence presented for the first time to the council. On November 7, 1994, the planning commission heard the matter on remand and again recommended approval. On December 13, 1994, the city council held another hearing and voted to approve the application with conditions. The city council adopted the challenged decision on December 27, 1994, and

this appeal followed.

FIRST ASSIGNMENT OF ERROR

In the first assignment of error, petitioners contend that although the city listed Statewide Planning Goal 14 and CDC 18.98 as applicable criteria, it does not address them in the challenged decision.

A. Goal 14

Goal 14 is listed among the "applicable approval criteria" in the notices of the November 7, 1994 planning commission and December 13, 1994 city council hearings, as well as in the challenged decision. Record 6, 218, 849. The city, Albertson's and Russell (respondents) contend that two additional mentions of Goal 14 in the record support an inference that the city applied the goal.[1] However, these mentions are simply as items in lists, identical to those in the notices, in which Goal 14 is stated to be an approval criterion. Record 6, 29.

The challenged decision states that the subject property was annexed to the city in 1983 and the annexation has been acknowledged by the Land Conservation and Development Commission. Petitioners do not dispute that statement.

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[1]The city and Albertson's jointly filed a brief. Russell filed a separate brief, but adopted the other respondents' brief as to the first through fourth, sixth and seventh assignments of error. Russell prepared a separate response to the fifth assignment of error. It does not merit discussion.

The city apparently included Goal 14 among the applicable approval criteria because of a statement in a memorandum submitted by petitioners' attorney:

> "Long term land needs are governed by Goal 14 and the findings establishing the Portland Metro UGB. This area has a history of underutilization for residential use and lack of coordination with all uses. In order to comply with Goal 14, the applicant must demonstrate that the changes proposed will not affect local and regional needs and land allocations." Record 1648.

If it is obvious from the record that a particular goal does not apply to a proposed comprehensive plan amendment, it is not a basis for remand that the local government has not actually stated that the goal does not apply. See 1000 Friends of Oregon v. Washington County, 17 Or LUBA 671, 685 (1989). Goal 14 is intended "to provide for an orderly and efficient transition from rural to urban land use." The connection between this objective and the proposed comprehensive plan amendment, whose net effect is to convert from residential to commercial use 1.07 acres that have been part of the city since 1983, is so tenuous that Goal 14 is obviously inapplicable. The city's failure to address Goal 14 in the challenged decision, despite having listed it as an applicable criterion, is at most harmless error.

B. CDC 18.98

The city lists Tigard Community Development Code (CDC) Chapter 18.98 among the "applicable approval criteria" in its notices and in the challenged decision. Record 6, 218,

849. Petitioners contend that because the city does not address CDC Chapter 18.98 in its findings, we must remand under Gage v. City of Portland, 123 Or App 269, 275, 860 P2d 282, adhered to on reconsideration 125 Or App 119, 866 P2d 466 (1993), reversed on other grounds, 319 Or 308, 877 P2d 1187 (1994) and Weeks v. City of Tillamook, 117 Or App 449, 453, 844 P2d 914 (1992). The 1995 legislature added ORS 197.829(2) to the Oregon Revised Statutes. ORS 197.829(2) states:

> "If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, [LUBA] may make its own determination of whether the local government decision is correct."

ORS 197.829(2) overturns the holding in Weeks upon which petitioners rely.[2]

The challenged decision finds the Albertson's proposal meets the requirements of CDC 18.61.050. CDC 18.61.050(A)(4) states that no building in the C-C district shall exceed 35 feet. Albertson's contends that since CDC 18.61.050(A)(4) is more restrictive than CDC Chapter 18.98, any proposal that satisfies the former also satisfies the latter.

We agree. We defer, under ORS 197.829(1) and Clark v.

[2]Because ORS 197.829(2) affects procedure and not substantive rights, we apply it immediately. See Antonnaci v. Davis, 108 Or App 693, 695, 816 P2d 1202 (1991).

Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992), to the city's listing of CDC Chapter 18.98 as an applicable approval criterion. We interpret the CDC to mean that if the 35-foot height limitation stated in CDC 18.61.050(A)(4) is satisfied, the 75-foot height limitation stated in CDC Chapter 18.98 is also satisfied.[3]

This assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners contend the city's findings are inadequate and not supported by substantial evidence with respect to Statewide Planning Goal 12, OAR Chapter 660, Division 12 (the Goal 12 Rule), and Tigard Comprehensive Plan (TCP) Policies 8.1.1, 8.1.3, 8.2.2, and 8.4.1.

Findings must (1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the decision on compliance with the approval standards. Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 20-21, 569 P2d 1063 (1977); Vizina v. Douglas County, 17 Or LUBA 829, 835 (1989); Bobitt v. Wallowa County, 10 Or LUBA 112, 115 (1984). Additionally, findings must address and respond to specific issues, raised in the proceedings below, that are relevant to compliance with applicable approval standards. Hillcrest Vineyard v. Bd. of Comm. Douglas Co.,

[3]CDC 18.98.020 establishes the 75-foot height limitation. The other provisions of CDC Chapter 18.98 have no bearing on Albertson's proposal.

45 Or App 285, 293, 608 P2d, 201 (1980); Norvell v. Portland Area LGBC, 43 Or App 849, 853, 604 P2d 896 (1979); Skrepetos v. Jackson County, ___ Or LUBA ___, (LUBA No. 94-174, April 25, 1995), slip op 22; McKenzie v. Multnomah County, 27 Or LUBA 523, 544-45 (1994); Heiller v. Josephine County, 23 Or LUBA 551, 556 (1992). We examine the city's findings in light of these standards.

A. Goal 12 and TCP Policy 8.1.1

Goal 12 is "[t]o provide and encourage a safe, convenient and economic transportation system." Goal 12 also discusses particular requirements for the development of a "transportation plan." TCP Policy 8.1.1 states: "The city shall plan for a safe and efficient street and roadway system that meets current needs and anticipated future growth and development." In response to these standards, the challenged decision states:

> "**Goal 12** (Transportation) and **Policy 8.1.1** are satisfied because the proposed redesignation would not be expected to result in unsuitable or unsafe levels of traffic on SW Walnut Street or Scholls Ferry Road. Although commercial development of this site might be expected to result in some increase in total traffic on these roads adjacent to the site as compared to what would be expected under the current designations, the impact on the city-wide or regional transportation systems will be beneficial through providing commercial opportunities closer to adjoining residential areas than is currently available. Therefore, a net reduction in total system traffic is anticipated." Record 41. (Emphasis in original.)

In addition, under the heading "Streets," the findings

state:

> "A traffic study has been submitted by the applicant that indicates that the existing improvements on SW Walnut Street and SW Northview Drive can adequately accommodate the traffic expected from the proposed development." Record 13.

The traffic study is found at Record 1283-1328. The study concludes that both in the near term and through 2010, the proposed roadway system would operate at acceptable levels of service with the site developed as proposed. Record 1288. The city adopts the traffic study in its entirety, including its conclusions and supporting evidence.

Goal 12 and TCP Policy 8.1.1 state very broad standards. The Goal 12 Rule contains more specific standards and requirements than Goal 12 itself. The city's findings and recitation of supporting evidence are adequate to satisfy Goal 12, to the extent Goal 12 may require more than the Goal 12 Rule, and TCP Policy 8.1.1.

B. Goal 12 Rule

At the time of the application, the city apparently had not adopted a transportation system plan (TSP) under Goal 12 and OAR 660-12-015.[4] However, OAR 660-12-060 became applicable upon its adoption.[5] Petitioners maintain the

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[4]We understand "Ordinance 94-07," mentioned in the Petition for Review at page 9 to be a step toward the adoption of a TSP. The Petition for Review makes it clear that Ordinance 94-07 does not apply to this application.

[5]OAR 660-12-060 states, in relevant part:

city should have made a threshold determination that the proposed plan amendments comply with the Goal 12 Rule or that compliance is unnecessary because the amendments will

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"(1) Amendments to functional plans, acknowledged comprehensive plans, and land use regulations which significantly affect a transportation facility shall assure that allowed land uses are consistent with the identified function, capacity, and level of service of the facility. This shall be accomplished by either:

"(a) Limiting allowed land uses to be consistent with the planned function, capacity and level of service of the transportation facility;

"(b) Amending the TSP to provide transportation facilities adequate to support the proposed land uses consistent with the requirements of this division; or

"(c) Altering land use designations, densities, or design requirements to reduce demand for automobile travel and meet travel needs through other modes.

"(2) A plan or land use regulation amendment significantly affects a transportation facility if it:

"(a) Changes the functional classification of an existing or planned transportation facility;

"(b) Changes standards implementing a functional classification system;

"(c) Allows types or levels of land uses which would result in levels of travel or access which are inconsistent with the functional classification of a transportation facility; or

"(d) Would reduce the level of service of the facility below the minimum acceptable level identified in the TSP.

"(3) Determinations under sections (1) and (2) of this rule shall be coordinated with affected transportation facility and service providers and other affected local governments.

"* * * * *"

not "significantly affect a transportation facility" under OAR 660-12-060(1). Petitioners Brief 10. Petitioners note that the issue of compliance was raised below. Record 524, 1647-48.

Respondents do not contend the city made the necessary determination, but direct us to points in the record where evidence exists that could support a determination that compliance with the Goal 12 Rule is unnecessary. See ORS 197.835(9)(b).[6] We have reviewed the evidence cited by both petitioners and respondents. We conclude the evidence is clear that the proposed development will not significantly affect a transportation facility.

C. Access

The challenged decision quotes a letter from the Washington County Department of Land Use and Transportation, which states that while the proposed access points meet the spacing requirements, on SW Scholls Ferry Road there are significant safety concerns which cannot be resolved until the county traffic analyst completes his report. Petitioners contend there is no evidence in the record

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[6]ORS 197.835(9)(b) states, in relevant part:

> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, [LUBA] shall affirm the decision or the part of the decision supported by the record * * *."

indicating the county traffic analyst completed his report and determined where the access points should be. Petitioners argue that without such a determination, the application, as approved with conditions, cannot be "deemed in compliance with the applicable transportation standards." Petitioners add that the question of compliance "with such mandatory discretionary approval criteria" cannot be delegated to the county's traffic analyst or deferred to a later time without assurance of further notice and public hearing. Petition for Review 11. See Citizens for Resp. Growth v. City of Seaside, 23 Or LUBA 100, 107 (1992), aff'd 114 Or App 233, rev'd on reconsideration on other grounds, 116 Or App 275, rev den 315 Or 643 (1993).

Petitioners do not specify what city transportation standards or mandatory discretionary approval criteria are at risk of being violated. Respondents argue that Washington County, not the city, must decide how to space access to address safety concerns. Petitioners' argument with respect to access is insufficiently developed to provide a basis for reversal or remand. See Testa v. Clackamas County, 26 Or LUBA 357, 373, aff'd 127 Or App 137, rev den 319 Or 80 (1994); Deschutes Development v. Deschutes Cty., 5 Or LUBA 218 (1982).

D. TCP Policy 8.1.3

Petitioners contend the city's findings with respect to TCP Policy 8.1.3 are unacceptably conclusory and defer

compliance to a future time without the requisite provision for public participation. Petitioners maintain the findings do not discuss (1) what improvements are required; (2) how they are to be obtained or financed, and whether a "rough proportionality" is to be maintained; and (3) how the application complies with the policy.

TCP Policy 8.1.3 states eight requirements pertaining to access, street right-of-way, street construction, street improvements, street signs and signals, transit stops and transit-related improvements, disabled parking, and land dedication for the city bicycle/pedestrian corridor. The challenged decision finds:

> "**Policy 8.1.3** will be satisfied as a condition of development approval under either the existing or proposed plan and zoning designations. Completion of necessary street improvements along the site's frontages will be required to be installed by the developer at the time of development. The Engineering Division and Washington County will review final development plans for the site with regard to necessary road improvements adjacent to the site and on other affected roadways." Record 41.

Respondents point to individual conditions that they maintain are sufficient to support the city's conclusion that TCP Policy 8.1.3 has been or will be satisfied. While we agree with respondents that the listed conditions adequately address TCP Policy 8.1.3(a)-(e), we do not find conditions responding to TCP Policy 8.1.3(f)-(h), which deal with transit stops and transit-related improvements,

disabled parking, and land dedication for the city bicycle/pedestrian corridor.[7]

E. TCP Policy 8.2.2

Petitioners contend the challenged decision does not properly address TCP Policy 8.2.2, which deals with public transit.[7a] The decision states that while Tri-Met does not presently serve the area, "an extension of service along SW Scholls Ferry Road appears very likely." Record 41. We understand petitioners to argue the policy requires a moratorium on land intensive uses until transit service is in place. We affirm the city's interpretation of Policy 8.2.2 to the effect that in areas where transit does not already exist, land intensive uses must be located where transit is likely to follow. See ORS 197.829; Clark v.

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[7]As petitioners remark, the challenged decision does not contain the "rough proportionality" findings required by the United States Constitution to justify the exaction of the bicycle/pedestrian corridor. See Dolan v. City of Tigard, ___ US ___, 114 S Ct 2309, 129 LEd 2d 304 (1994). However, this omission does not prejudice the substantial rights of petitioners. It may prejudice the substantial rights of Russell or Albertson's, but neither has petitioned LUBA.

The city's failure to make "rough proportionality" findings is a procedural error that does not warrant reversal or remand unless it prejudices the substantial rights of petitioners. ORS 197.835(7)(a)(B).

[7a]TDC Policy 8.2.2 states, in relevant part:

> "The city shall encourage the expansion and use of public transit by:
>
> "a. Locating land intensive uses in close proximity to transitways;
>
> "* * * * *"

Jackson County, supra.

F. TCP Policy 8.4.1

Petitioners contend the challenged decision does not adequately address TCP Policy 8.4.1, which describes how the city must locate bicycle/pedestrian corridors.[8] The city finds:

> "* * * The site does not adjoin a designated pedestrian/bikeway corridor area. The development proposes to provide sidewalks along each property frontage. * * * The applicant has addressed transit and pedestrian orientation requirements through the development of a walkway system from adjoining streets into the site." Record 41.

We understand the city to interpret TCP Policy 8.4.1 to require the location of bicycle/pedestrian corridors only where they can be part of the pathway system shown on an adopted pedestrian/bikeway path. This interpretation is not clearly wrong. See ORS 197.829; Clark v. Jackson County, supra.

This assignment of error is sustained as to TCP Policy 8.1.3(f)-(h) and otherwise denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners contend the city's findings are inadequate and not supported by substantial evidence with respect to

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[8]TDC Policy 8.4.1 states:

> "The city shall locate bicycle/pedestrian corridors in a manner which provides for pedestrian and bicycle users, safe and convenient movement in all parts of the city, by developing the pathway system shown on the adopted pedestrian/bikeway plan."

Statewide Planning Goal 6 and TCP Policies 4.1.1, 4.2.1 and 4.2.2.

A. Goal 6

Petitioners contend the challenged decision does not comply with Goal 6, which provides, in relevant part:

> "All waste and process discharges from future development, when combined with such discharges from existing developments shall not threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards. * * *"

The challenged decision finds:

> "**Goal 6** (Air/Water Quality) is satisfied because that [sic] proposed C-C zone and the surrounding residential properties will result in fewer and shorter automobile trips to obtain commercial goods and services. The proposed center, as designed and conditioned, will provide for ease of access to the surrounding neighborhoods. This in turn will help satisfy Policy 4.1.1 by reducing potential air quality impacts from the new residents and their automobiles." Record 30.

Goal 6 is limited by its terms to discharges from future development itself. It does not apply to all discharges that may occur as a result of the development, such as additional emissions from vehicles going to and from the Albertson's site. The city's findings are deficient, because they do not specifically address discharges, if any, from the proposed development, and, in addition, they are limited to air quality impacts and do not fully address "solid waste, thermal, noise, atmospheric or water pollutants, contaminants, or products therefrom."

Respondents' brief refers to various conditions which allegedly bring the challenged decision into compliance with Goal 6. Goal 6 requires findings that a proposed use will be able to comply with applicable environmental standards. It is not satisfied by findings stating only that the proposed use will be required through conditions to comply with applicable environmental standards. Eckis v. Linn County, 19 Or LUBA 15, 35 (1990). The city must make additional findings addressing the feasibility of compliance with Goal 6, meaning that "solutions to certain problems * * * posed by [the] project are possible, likely and reasonably certain to succeed" in achieving compliance. See Meyer v. City of Portland, 67 Or App 274, 280 n5, 678 P2d 741, rev den 297 Or 82 (1984).

B. TCP Policy 4.1.1

TCP Policy 4.1.1 states:

"The city shall:

"a. Maintain and improve the quality of Tigard's air quality and coordinate with other jurisdictions and agencies to reduce air pollutions [sic] within the Portland-Vancouver Air Quality Maintenance Area. (AQMA).

"b. Where applicable, require a statement from the appropriate agency, that all applicable standards can be met, prior to the approval of a land use proposal.

"c. Apply the measures described in the DEQ Handbook for 'Environmental Quality Elements of Oregon Local Comprehensive Land Use Plans' to land use decisions having the potential to

affect air quality."

The city's findings with respect to TCP Policy 4.1.1 are combined with its Goal 6 findings, quoted above. The challenged decision indicates the city interprets TCP Policy 4.1.1 as applicable to "potential air quality impacts from the new residents and their automobiles," and we defer to that interpretation.[9] ORS 197.829; Clark v. Jackson County, supra. Under the city's interpretation, the challenged decision does not contain adequate findings addressing the criteria of TCP Policy 4.1.1 as they apply to the potential air quality impacts described.

C. TCP Policy 4.2.1

TCP Policy 4.2.1 provides:

> "All development within the Tigard urban planning area shall comply with applicable federal, state and regional water quality standards.

The challenged decision defers the determination of compliance with TCP 4.2.1 to the development review and building permit processes, but does not require a hearing then.[10] If an exercise of discretion is required to

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[9]We note, however, that applying TCP Policy 4.1.1 to just "potential air quality impacts from the new residents and their automobiles," without also finding that the proposed development has no other impacts to which TCP Policy 4.1.1 applies, could violate its express language.

[10]The challenged decision finds:

> "* * * Policy 4.2.1 will be satisfied through the development review and building permit processes at which time a development proposal for this site must be shown to comply with applicable federal, state, and regional water quality

determine if the "applicable federal, state and regional water quality standards" are met, the city must provide for notice of the local proceedings and an opportunity for a public hearing. Rhyne v. Multnomah County, 23 Or LUBA 442, 446-448 (1992). Because we cannot tell from the city's findings what standards apply and whether they require discretionary decision making, the findings are deficient.[11]

This assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR

Petitioners contend the city's findings are inadequate and not supported by substantial evidence with respect to Statewide Planning Goal 9, OAR Chapter 660, Division 9, and TCP Policy 5.4.

A. Goal 9, and OAR Chapter 660, Division 9

The challenged decision contains the following Goal 9 finding:

> "**Goal 9** (Economy of the State) is satisfied because the proposed redesignation would increase the City's inventory of developable commercial land, thereby increasing employment opportunities in the City." Record 40.

Goal 9 is "to provide adequate opportunities throughout

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requirements including preparation and implementation of a non-point source pollution control plan in compliance with the Oregon Environmental Quality Commission's temporary rules for the Tualatin River Basin." Record 29.

[11]Petitioners contend that the challenged decision also violates TCP Policy 4.2.2. However their purported discussion of TCP Policy 4.2.2 actually addresses TCP Policy 4.2.1. The decision does not list TCP Policy 4.2.2 as an applicable approval criterion.

the state for a variety of economic activities vital to the health, welfare and prosperity of Oregon's citizens." It contains specific directives regarding comprehensive plans in urban areas to ensure the availability of sufficient land for a variety of commercial and industrial uses.[12]

Petitioners contend "Goal 9 requires substantially more analysis, and especially an analysis of commercial land needs within the jurisdiction." Petition for Review 17. Petitioners contend further that Goal 9's implementing rule, OAR Chapter 660, Division 9, "requires local governments to designate and prioritize economic development opportunities and sites which may be used for the same." Id. at 18. Petitioners' specific objection is that the city has not shown "how 6.93 acres of what was 'Neighborhood Commercial'

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[12]Goal 9 states, in relevant part:

"Comprehensive plans for urban areas shall:

"1. Include an analysis of the community's economic patterns, potentialities, strengths, and deficiencies as they relate to state and national trends;

"2. Contain policies concerning the economic development opportunities in the community;

"3. Provide for at least an adequate supply of sites of suitable sizes, types, locations, and service levels for a variety of industrial and commercial uses consistent with plan policies;

"4. Limit uses on or near sites zoned for specific industrial and commercial uses to those which are compatible with proposed uses.

"* * * * *"

land are equivalent to eight acres of 'Community Commercial' land." Id.

OAR 660-09-010(2) makes clear that OAR Chapter 660, Division 9 directly applies only to plan and land use amendments adopted during periodic review. Melton v. City of Cottage Grove, 28 Or LUBA 1, 12, aff'd 131 Or App 626, 877 P2d 359 (1994). However, Goal 9 itself applies to quasi-judicial changes to acknowledged comprehensive plans or land use regulations that affect continued compliance with the goal, and we may turn to OAR Chapter 660, Division 9 for interpretive guidance in applying Goal 9. Opus Development Corp. v. City of Eugene, 28 Or LUBA 670, 692 (1995).

OAR 660-09-025 states, in relevant part:

> "Measures adequate to implement [industrial and commercial] policies adopted pursuant to OAR 660-09-020 shall be adopted. Appropriate implementing measures include amendments to plan and zone map designations, land use regulations, and public facility plans:
>
> "(1) Identification of Needed Sites. The plan shall identify the approximate number and acreage of sites needed to accommodate industrial and commercial uses to implement plan policies. The need for sites should be specified in several broad 'site categories', (e.g. light industrial, heavy industrial, commercial retail, highway commercial, etc.) combining compatible uses with similar site requirements. It is not necessary to provide a different type of site for each industrial or commercial use which may locate in the planning area.

"* * * * *" (Emphasis added.)

OAR 660-09-025(1) allows a fair degree of imprecision in both the number and acreage of sites needed to accommodate industrial and commercial uses, as well as broad site categories. The criteria for uses allowed in the C-N and C-C zones are very similar. The change from C-N to C-C is minor enough and the amount of land involved in this application is small enough that it is not necessary to engage in an extensive analysis of the impacts on the values Goal 9 protects. The change is within the deviation allowed by OAR 660-09-025(1), which interprets the goal. Moreover, the city's Goal 9 finding is adequate, since the proposed amendment allows more intensive commercial uses on more land. Goal 9 requires nothing further.

B. TCP Policy 5.4

Petitioners contend the challenged decision does not adequately address TCP Policy 5.4, which states:

> "The city shall ensure that new commercial and industrial development shall not encroach into residential areas that have not been designated for commercial or industrial uses."

The city makes the following finding with respect to the policy:

> "The proposal is consistent with Policy 5.4 because the proposed C-C designation will maintain a compatible relationship with nearby residential properties as required by the Community Development Code standards. In addition, the site is physically separated from residential uses by streets on three sides of the property and a steep

slope to the south.

> "A commercial service center of modest size has been contemplated for this area since the 1983 adoption of the Bull Mountain Community Plan. The proposed C-C designation will replace the C-N designation and therefore, no encroachment into a residential area will result." Record 40. (Emphasis added.)

Respondents argue that Policy 5.4 simply means that the city must designate land for commercial development before issuing development permits. However, the first paragraph of the finding, quoted above, implies the city interprets the policy to require compatibility findings under CDC standards, and we defer to that interpretation. See ORS 197.829; Clark v. Jackson County, supra. The challenged decision includes compatibility findings under TCP Policy 12.2.1 and CDC Chapter 18.61, discussed infra.

The second paragraph falls short of describing what is proposed: the substitution of a larger development for a smaller one, on an opposite corner of the same intersection, when both the existing and proposed locations border residentially zoned property. The language of the second paragraph suggests the city interprets Policy 5.4 to say that if the proposed C-C designation did not replace the C-N designation, an encroachment into a residential area would result. Again, we defer to the city's interpretation. However, because the finding does not even acknowledge the proposed shift in location, it is inadequate.

This assignment of error is sustained as to Policy 5.4

and otherwise denied.

SIXTH ASSIGNMENT OF ERROR

Petitioners contend the city's findings are inadequate and not supported by substantial evidence with respect to Statewide Planning Goal 10, OAR Chapter 660, Division 7, and TCP Policy 6.6.1.

A. Goal 10 and OAR Chapter 660, Division 7

Goal 10 requires the city "[t]o provide for the housing needs of citizens of the state." Petitioners contend that the findings in the challenged decision with respect to OAR 660-07-030(1) are based on inaccurate calculations. OAR 660-07-030(1) states, in relevant part:

> "(1) Jurisdictions other than small developed cities must either designate sufficient buildable land to provide the opportunity for at least 50 percent of new residential units to be attached single family housing or multiple family housing or justify an alternative percentage based on changing circumstances. * * *"

OAR 660-07-035(3) requires a minimum density of 10 units per acre. The city finds the proposal will result in a loss of 1.07 acres of R-25 land (out of an inventory of 1,305 acres) and 26 residential units. Record 40. This will reduce the average possible residential density from 10.328 to 10.315 units per acre, still above the minimum density.

Petitioners base their claim that the city's calculations are inaccurate on the following statement in the challenged decision:

> "The remainder of Tax Lot 200[,] approximately 3.95 acres[,] has been discussed as being developed by property owners within the area for common open space use. Limitations to development of this area for multiple family uses would further decrease the total density of 10.27 dwelling units per acre for the remaining 1,300 developable acres of residential land. Annexation of areas such as the Walnut Island [sic] in the future is also expected to further decrease residential density of the City to [a] point below 10 units per acre. This would mean that other properties now zoned for low density residential use would need to be rezoned for higher density residential." Record 18.

Petitioners argue the city mistakenly assumes, for purposes of calculating residential densities, that the 3.95 acres of Tax Lot 200 will remain available for residential development, while simultaneously finding it will remain as open space. Petitioners contend that if the 3.95 acres do not remain available for residential development, the residential density within the city may drop below the minimum density required by OAR 660-07-035(3).

In support of their contention the 3.95 acres must become open space, petitioners point both to a plot plan, attached as an exhibit to the challenged decision, that shows the 3.45 acres as "future open space" and to the discussions with property owners. Record 18, 30, 476.

To find, as petitioners maintain, that dedication of the 3.95 acres as open space is an unstated condition of approval, we would have to find the city relied on the cited speculative and vague references to 3.95 acres of open space

in giving its approval. Cf. Wilson Park Neigh. Assoc. v. City of Portland, 27 Or LUBA 106, 123, rev'd on other grounds 129 Or App 333, 877 P2d 1205, rev den 320 Or 453 (1994)(building design features included in application become part of approved plan without express conditions so requiring). Although the plot plan attached as an exhibit to the challenged decision shows the 3.45 acres as "future open space," the text of the decision makes clear that it does not rely on that aspect of the plot plan. Record 11, 44, 49.

If the open space requirement is made more specific, as may be necessary to satisfy TCP Policy 6.6.1, the city will have to review its findings with respect to Goal 10 and OAR Chapter 660, Division 7. As it stands, the challenged decision does not violate these standards.[13]

B. TCP Policy 6.6.1

TCP Policy 6.6.1 states requirements for buffering between different types of land uses, including commercial and residential land uses.[14] The challenged decision finds:

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[13] We note the challenged decision also finds that "[w]hen the residential properties develop, common and/or private open space will be required as a condition of development." Record 43. However, the finding does not say how much open space will be required or where it will be. Until the requirement is more specifically stated, its impact on residential densities, if any, cannot be measured. However, when the open-space requirement is made definite, its impact on residential densities will have to be considered.

[14] TCP Policy 6.6.1 states:

"**Policy 6.6.1** can be satisfied because the proposed design and related conditions of approval are intended to provide buffering and visual separation between the center and nearby residential neighborhoods. As noted in this report [sic], specific landscaping noise mitigation measures must be provided to ensure that this policy and related Code and TMC provisions are met." Record 40.

Petitioners contend this finding and the findings related to noise, which arguably are incorporated by reference, do not

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"(a) Buffering between different types of land uses (for example between single family residential and multiple family residential, and residential and commercial uses, and residential and industrial uses) and the following factors shall be considered in determining the type and extent of the required buffer:

"1. The purpose of the buffer, for example to decrease noise levels, absorb air pollution, filter dust or to provide a visual barrier;

"(2) The size of the buffer needed in terms of width and height to achieve the purpose;

"(3) The direction(s) from which buffering is needed;

"(4) The required density of the buffering; and

"(5) Whether the viewer is stationary or mobile.

"(b) On-site screening of such things as service areas and facilities, storage areas and parking lots, and the following factors, shall be considered in determining the type and extent of the screening:

"(1) What needs to be screened;

"(2) The direction from which it is needed;

"(3) How dense the screen needs to be;

"(4) Whether the viewer is stationary or mobile[;]

"(5) Whether the screening needs to be year round."

adequately address TCP Policy 6.6.1.

We agree. Among other inadequacies, the findings do not explain the purpose of the buffer, state what evidence is believed or relied upon, or explain how the city determined the proposed buffer and "visual separation" are adequate to perform their (unstated) functions. It is unclear what the city means by "specific landscaping noise mitigation measures," where they are to be found in the challenged decision, and whether any evidence supports the determination that they will achieve their purpose. Also, the challenged decision states that "[t]he issue of noise impact needs further evaluation," from which we infer that more work needs to be done before a finding can be made. Record 21.

Respondents reply that "[f]or buffering and screening, the 3.95 acre parcel will provide a transition between the single family development and the shopping center." Respondent's Brief 24. However, TCP Policy 6.6.1 requires buffering between all, not just single-family, residential and commercial uses. If the city's determination that there will be adequate buffering rests on keeping the 3.95-acre or some other sized parcel as open space, the city must condition approval on the designation of a specifically described parcel as open space.[15] Otherwise, the condition

[15]The city may then have to readdress the requirements of Goal 10 and OAR Chapter 660, Division 7.

is too vague to be enforceable and does not assure compliance with the relevant standards.

Respondents also contend CDC Chapters 18.61 and 18.100 set forth requirements that implement TCP Policy 6.6.1, and point out that separate findings have been made to address the relevant provisions of these chapters. However, the city does not find that satisfaction of these CDC requirements will have the effect of satisfying TCP Policy 6.6.1. Respondents are actually asking us first to use our authority under ORS 197.829(2) to interpret the CDC as they wish, and then to use our authority under ORS 197.835(9)(b) to determine that evidence scattered throughout the record clearly supports findings under that interpretation.

LUBA is a review body. While ORS 197.835(9)(b) requires us to affirm a local government decision in the absence of adequate findings, if the parties "identify relevant evidence in the record which clearly supports the decision or a part of the decision," we interpret "clearly supports" to mean "makes obvious" or "makes inevitable." Although ORS 197.829(2) allows us, when the local government has failed to interpret its comprehensive plan or land use regulations, to make the interpretations necessary to determine whether a local land use decision is correct, it does not require us to do so. It is still the local government's responsibility to interpret its own comprehensive plan and land use regulations in the first

instance.

We view ORS 197.835(9)(b) and ORS 197.829(2) as statutes which authorize this Board to remedy minor oversights and imperfections in local government land use decisions, as a way to eliminate delays resulting from purely technical objections to a written decision. They do not permit or require LUBA to perform the responsibilities assigned to local governments, such as the weighing of evidence, the preparation of adequate findings, and the interpretation of comprehensive plans and local land use regulations.

This assignment of error is sustained.

SEVENTH ASSIGNMENT OF ERROR

Petitioners contend the city's findings are inadequate with respect to Statewide Planning Goal 11 and TCP Policy 7.1.2.[16] Since petitioners make no argument in support of

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[16]TCP Policy 7.1.2 states, in relevant part:

"The city shall require [as] as pre-condition to development approval that:

"a. Development coincide with the availability of adequate service capacity including:

"* * * * *

"3. Storm drainage.

"b. The facilities are:

"1. Capable of adequately serving all intervening properties and the proposed development; and

"2. Designed to city standards.

their contention with respect to Goal 11, we do not consider the goal. See Testa; Deschutes Cty., supra. Petitioners' discussion is limited to TCP Policy 7.1.2. Petitioners maintain the challenged decision improperly defers compliance with mandatory discretionary approval criteria concerning storm drainage.

The city imposes conditions of approval that require Albertson's to (1) satisfy the guidelines of Unified Sewerage Agency Resolution and Order 91-47; (2) demonstrate that storm drainage runoff can be discharged into the existing drainageways without significantly impacting properties downstream; and (3) obtain a joint permit from the city that meets the requirements of the "NPDES" and "Tualatin Basin Erosion Control Program." Record 25.

We accept respondents' argument that the actual design of the proposed on-site storm water management facility is a technical engineering task not reviewable through a land use proceeding. However, TCP Policy 7.1.2 requires at least a determination at the time of site plan approval that its specific requirements can be satisfied by the imposition of conditions. Kenton Neighborhood Assoc. v. City of Portland, 17 Or LUBA 784, 799-806 (1989). The city makes no findings, supported by substantial evidence in the record, with respect to feasibility.

"c. All new development utilities to be placed underground."

This assignment of error is sustained.

EIGHTH ASSIGNMENT OF ERROR

Petitioners contend the city's findings are inadequate with respect to TCP Policy 12.2.1, including its preamble, and CDC Chapter 18.61.[17]

A. Application of TCP Policy 12.2.1 Preamble

TCP Policy 12.2.1 states at the outset:

"The city shall:

"(a) Provide for commercial development based on the type of use, its size and required trade area.

"(b) Apply all applicable plan policies.

"(c) Apply the appropriate locational criteria applicable to the scale of the project."

"* * * * *"

Under the category of "Community Commercial," TCP 12.2.1(4) sets forth criteria addressing scale (trade area, trade area density, gross floor area) and locational criteria (spacing and location, access, site characteristics, and impact assessment). The objectives stated in the preamble to TCP 12.2.1 are achieved in the C-C zone through the specific criteria stated in TCP 12.2.1(4). Independent findings addressing the preamble are not necessary.

B. Analysis of Zone Substitution

[17]The market area and strip mall design issues raised by petitioners fall under the headings of zone change and design generally, and therefore, we do not discuss market area and strip mall design separately.

Petitioners attack the city's findings for failing to analyze the consequences of replacing an C-N designation with a C-C designation.

The challenged decision incorporates by reference an analysis contained in Albertson's application explaining the city's decision to rezone from C-N to C-C. Record 44, 1716-18. That incorporation is sufficient for us to treat the analysis as part of the findings. Gonzalez v. Lane County, 24 Or LUBA 251, 258-59 (1992). The analysis is adequate to justify a quasi-judicial amendment to the plan and zoning maps on the basis of an earlier mistake at the time the area including the Albertson's site was annexed by the city.[18]

C. Identification of Uses and Design Criteria

Petitioners contend that under TCP 12.2.1(4) and CDC 18.61.010, 18.61.020(C), 18.61.030, and 18.61.055(1)(A) and (B), the city must identify all uses on the site in order to review the site design "so that the effect of those uses may be assessed and dealt with by the City upon consideration of the plan amendment and zone change applications."[19] Petition for Review 29.

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[18]Petitioners direct us to a planner's report that contradicts Albertson's explanation that the C-N zoning was a mistake. Record 576-77. However, petitioners do not articulate a substantial evidence challenge to the city's decision to accept Albertson's explanation.

[19]Petitioners rely specifically on TCP 12.2.1(4)(B)(4), which states, in relevant part:

"Impact Assessment

The sections of the CDC most pertinent to petitioners' contention are CDC 18.61.010 and 18.61.055(A) and (B). CDC 18.61.010 states the purpose of the C-C District. Petitioners quote a statement in CDC 18.61.010(A) that

> "[i]t is preferable that a community commercial site be developed as one unit with coordinated access, circulation, building design, signage, and

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> "(a) The scale and intensity of the project shall be compatible with surrounding uses and consistent with the provisions of this plan. Such compatibility and consistency shall be accomplished through the approval of a Site Development Review application contemporaneous with, and a part of, the approval of a zone change to the community commercial designation. The site plan approval may include conditions relating to site and building development through conditions of approval of a zone change for the site. * * *"
>
> "(b) It is generally preferable that a community commercial site be developed as one unit with coordinated access, circulation, building design, signage and landscaping. Parcels within a community commercial site, however, may be developed independently although the City may require that developmental aspects of individual parcels be coordinated through the development review process.
>
> "* * * * *
>
> "(d) Access needs of individual parcels and uses shall be coordinated within a site so as to limit the number of access driveways to adjacent streets.
>
> "* * * * *
>
> "(f) Exterior lighting, noise, and activities associated with the Community Commercial district shall be controlled or mitigated so that they do not adversely affect adjacent residential uses and comply with any applicable provisions of the Tigard Municipal Code regulating noise, light, and nuisances. Operating hour restrictions may be placed on uses within the district, either through restrictions within the zoning district regulations or through conditions of approval of a Plan map amendment for a particular site."

> landscaping. Parcels within a community commercial site, however, may be developed independently although the City may require that developmental aspects of individual parcels be coordinated through the development review process. Access needs of individual parcels shall be coordinated within a site so as to limit the number of access driveways to adjacent streets."

CDC 18.61.055(A) sets forth building and general site design guidelines that are "strongly encouraged." CDC 18.61.055(B) sets forth mandatory design standards.

We do not accept petitioners' contention that Albertson's must identify each proposed use on the C-C site in order to satisfy the design standards in the TCP and CDC. The city's decision to list all of the possible uses in the C-C zone as potential uses is not clearly wrong.

However, we agree with petitioners that the city's findings are not adequate. The challenged decision states:

> "Section 18.61.055 contains a number of design guidelines and standards for C-C development. The basic design concepts presented by the applicant are generally consistent with these Code provisions. In some cases design concepts need to be amended and in others more detailed information needs to be provided (as conditions of approval) to ensure compliance with this Code section." Record 45.

While the decision adequately addresses certain criteria, it unacceptably defers compliance with other discretionary standards without ensuring the full opportunity for public involvement provided in the initial stage of the review process. See Citizens for Resp. Growth, supra; Holland v. Lane County, 16 Or LUBA 583, 596-97

(1988).

D. Pedestrian and Bicycle Improvements

Petitioners contend the city has not made the findings with respect to bicycles required by TCP 12.2.1(4)(B)(4)(c), which states: "Convenient pedestrian and bicyclist [sic] access to a development site from adjoining residential areas shall be provided where practical. * * *" The findings stated in the record at page 45 and the requirements stated in the record at pages 20-21 are sufficient to address this criterion.

This assignment of error is sustained, in part.

NINTH ASSIGNMENT OF ERROR

Petitioners contend the city has not demonstrated compliance with TCP Policy 12.1.1, which contains the criteria controlling housing densities. Petitioners quote the preamble to CDC 12.1.1:

> "The city shall provide for housing densities in accordance with:
>
> "a. Applicable plan policies;
>
> "b. Applicable locational criteria; and
>
> "c Applicable community development code provisions."

Petitioners "argument" is simply this: "[The city] has again failed to discuss or demonstrate compliance with the key provisions of the policy." Petition for Review 31.

The challenged decision does contain findings that apply the relevant criteria under TCP Policy 12.1.1, found

in TCP Policy 12.1.1(3). Record 42-43. Petitioners do not address these findings. Petitioners' argument under this assignment of error is insufficiently developed for us to review. See Testa; Deschutes Cty., supra.

This assignment of error is denied.

TENTH ASSIGNMENT OF ERROR

Petitioners contend that certain conditions in the challenged decision improperly delegate determination of compliance with mandatory discretionary approval criteria to a different entity or defer compliance without assurance of further notice and public hearing.

A. Condition 1

Condition 1 states "[t]he Comprehensive Plan and zoning map amendments shall be finalized at the time a building or other development permit (e.g., grading) is issued." Record 23. We agree with respondents that this is not a true condition of approval and does not improperly defer compliance with any mandatory approval criterion. Since CDC 18.61.020(C) requires site development review at the time of application for a rezone to C-C, it is appropriate to delay actual map amendments until final approval of a building or other development permit.

B. Other Conditions

The remainder of the conditions listed by petitioners address ministerial, technical reviews properly completed by the city's technical staff. They do not improperly delegate

the application of discretionary approval criteria. See Marineau v. City of Bandon, 15 Or LUBA 375, 383-84 (1987).

This assignment of error is denied.

ELEVENTH ASSIGNMENT OF ERROR

Petitioners contend they were substantially prejudiced by the city's use of different maps in various notices during the course of the local proceedings. However, petitioners do not show how they were prejudiced.

` This assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners contend the city violated Statewide Planning Goal 2 by approving amendments to the TCP that are inconsistent with the Statewide Planning Goals. Petitioners do not allege specific violations under this assignment of error. To the extent petitioner has alleged inconsistencies with the Statewide Planning Goals under their other assignments of error, these allegations have been addressed, and we do not reconsider them here.

The city's decision is remanded.[20]

[20]Since Russell is not a prevailing party, his request for attorney fees under ORS 197.830(15)(b) is denied.