BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CITIZENS FOR FLORENCE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	LUBA No. 98-029
CITY OF FLORENCE,	)	
	)	FINAL OPINION
Respondent,	)	AND ORDER
	)	
and	)	
	)	
FLORENTINE ENTERPRISES,	)	
	)	
Intervenor-Respondent.	)	

Appeal from City of Florence.

William H. Sherlock, Eugene, filed the petition for review and argued on behalf of petitioner.

No appearance by City of Florence.

Michael E. Farthing, Eugene, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Gleaves, Swearingen, Larsen, Potter, Scott & Smith.

Roger A. Alfred, Assistant Attorney General, Salem, filed a state agency brief pursuant to ORS 197.830(7), and argued on behalf of the Department of Land Conservation and Development. With him on the brief was Hardy Myers, Attorney General; David Schuman, Deputy Attorney General; Michael Reynolds, Solicitor General.

GUSTAFSON, Board Chair; HANNA, Board Member, participated in the decision.

REMANDED 10/21/98

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

Opinion by Gustafson.

NATURE OF THE DECISION

Petitioner appeals two city ordinances amending the comprehensive plan designation of a 17-acre parcel from residential to commercial and rezoning the parcel from Single Family Residential (SFR) to Highway District (HD).

MOTION TO INTERVENE

Intervenor-respondent Florentine Enterprises, Inc. (intervenor), the applicant below, moves to intervene on the side of the city. There is no opposition to the motion, and it is allowed.

MOTION TO FILE REPLY BRIEF

MOTION TO STRIKE RESPONSE TO MOTION TO FILE REPLY BRIEF

On June 29, 1998, petitioner filed a motion to allow a reply brief pursuant to OAR 661-10-039, which allows a petitioner to seek the Board's permission to file a reply brief confined to new matters raised in intervenor's brief. On July 16, 1998, intervenor filed a response arguing that petitioner was not entitled to file a reply brief under OAR 661-10-039. Petitioner then moved to strike intervenor's response, on the ground that the response was filed more than ten days after intervenor obtained knowledge that petitioner's motion did not conform with LUBA's rules. OAR 661-10-065.

We resolve petitioner's motion to strike first. Technical violations of our rules not affecting the substantial rights of the parties are not a basis to strike a pleading. OAR 661-10-005. Petitioner does not explain why intervenor's failure to file its response within 10 days of the date it knew of the alleged nonconformity with OAR 661-10-039 prejudiced petitioner's substantial rights to a speedy review or full and fair hearing. Petitioner's motion to strike is denied.

With respect to the motion to file a reply brief, petitioner argues that the response brief raises three new matters: (1) an argument that the Oregon Department of

Transportation (ODOT) concurred with the city's finding that the challenged ordinances will not allow development significantly affecting the existing traffic facility; (2) an argument that the Transportation Planning Rule (TPR), particularly OAR 660-012-0060, does not require the city to amend the city's Transportation System Plan (TSP) to provide for transportation improvements, because the city's TSP has not been formally adopted; and (3) an argument that petitioner failed to challenge the data the city relied upon in the proceedings below.

Intervenor contends that none of the three matters identified in petitioner's motion is a "new matter" raised in the respondent's brief. Intervenor argues that the reply brief merely embellishes arguments made in the petition for review, or responds to findings or facts in the challenged decision that intervenor cited in defense of that decision.

We agree with intervenor that the first and third of the matters identified in the reply brief are not "new matters raised in the respondent's brief" within the meaning of OAR 661-10-039, but are merely additional arguments embellishing assignments of error. With respect to the second matter, whether the draft status of the city's TSP affects how the city complies with the requirements of OAR 660-012-0060, we agree with petitioner that intervenor's response raises a new matter regarding the interpretation of that rule. Accordingly, we allow petitioner's reply brief to the extent it addresses that new matter.

Petitioner's motion to file a reply brief is allowed, in part.

MOTION TO STRIKE DOCUMENTS NOT IN THE RECORD

In our order dated July 13, 1998, we allowed intervenor to file a reply to the state agency brief filed by Department of Land Conservation and Development (DLCD). Intervenor submitted the reply brief July 24, 1998, attached to which were nine documents that are not part of the record in this appeal. DLCD moves to strike those documents from consideration by this Board. Intervenor acknowledges that the disputed documents attached

to its reply brief are not part of the record, but argues on various grounds that the Board should consider them in order to provide intervenor with a full and fair hearing.

DLCD's participation in this proceeding is as a state agency pursuant to ORS 197.830(7) and OAR 661-10-038, not as a party.[1] ORS 197.830(7) authorizes DLCD to file a brief where its "order, rule, ruling, policy or other action is at issue" in the proceeding. However, with the exception of a motion to participate in oral argument under OAR 661-10-040(4), neither ORS 197.830(7) nor our rules authorize DLCD to file a motion or otherwise participate as a party or as a matter of right in these review proceedings.

DLCD's motion to strike is denied.[2]

FACTS

The subject property is a 17-acre parcel designated residential and zoned SFR, located near the northern boundary of the city and adjacent to the intersection of Highway 101 and a county road, Munsel Lake Road (the intersection).

In early 1997, intervenor filed an application to rezone the subject property from SFR to HD, in order to allow development of a regional shopping mall. The contemplated mall would contain 40-50 stores, and require significant improvements to the adjoining intersection.

The city planning commission conducted hearings and on June 10, 1997, adopted a resolution recommending that the comprehensive plan designation for the subject property be changed from residential to commercial. On July 8, 1997, the planning commission adopted

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[1]ORS 197.830(7) provides:

> "If a state agency whose order, rule, ruling, policy or other action is at issue is not a party to the proceeding, it may file a brief with the board as if it were a party. The brief shall be due on the same date the respondent's brief is due."

[2]In any case, no motion to strike is necessary with respect to the disputed documents attached to intervenor's reply brief. Our review is confined to the record before the local government. ORS 197.835(2)(a). Intervenor concedes the disputed documents are not part of the local record.

a second resolution recommending approval of intervenor's application for a zoning amendment.

The city council conducted hearings on both planning commission recommendations, and on January 19, 1998, adopted Ordinance 1-1998, amending the comprehensive plan designation for the subject property, and Ordinance 2-1998, amending the city zoning on the subject property from SFR to HD.

This appeal followed.

JURISDICTION

In its state agency brief, DLCD argues that LUBA lacks jurisdiction to review periodic review matters addressed in the challenged decisions that are subject to the exclusive jurisdiction of DLCD or the Land Conservation and Development Commission (LCDC) under ORS 197.644(2)[3] and 197.825(2)(c).[4]

DLCD concedes that both challenged decisions are post-acknowledgment plan amendments that are subject to LUBA's exclusive jurisdiction under ORS 197.610 to 197.625. However, DLCD argues that both decisions rely on findings and facts found in two documents that the city has developed in the context of an ongoing periodic review process.[5]

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[3]ORS 197.644(2) provides in part:

> "The [Land Conservation and Development Commission, or LCDC] shall have exclusive jurisdiction for review of the evaluation, work program and completed work program tasks as set forth in ORS 197.628 to 197.646. * * *"

[4]ORS 197.825(2) provides:

> "The jurisdiction of [LUBA]:
>
> "* * * * *
>
> "(c) Does not include those matters over which the Department of Land Conservation and Development or the Land Conservation and Development Commission has review authority under ORS 197.251, 197.430 to 197.455, 197.628 to 197.644, 197.649 and 197.650[.]"

[5]The two documents, called Issue Papers #1 and #2, were written in response to periodic review work tasks 1 and 4, which involve the city's review of its urban growth boundary (UGB) and its transportation element, respectively. DLCD explains that work task 1 is designed to help the city determine whether it has an adequate supply of developable land within its current UGB, and that work task 1 requires the city in relevant part to (1) coordinate its 2015 population projection; (2) identify buildable and nonbuildable lands; and (3) project residential, commercial, and industrial land needs. Under work task 4, the city is undertaking review of its

DLCD explains that, under the periodic review process, the city is required to submit the results of both work tasks, including the issue papers, to DLCD and LCDC for review for compliance with the statewide planning goals. The work tasks and work program are deemed acknowledged only after DLCD has approved them and all appeals are resolved. OAR 660-025-0160. After acknowledgment of the city's periodic review program, the city must update its comprehensive plan and land use regulations accordingly. OAR 660-025-0210.

DLCD contends that the challenged decisions adopt and rely on data, information and conclusions found in the issue papers, and that the city is thereby attempting to avoid DLCD's review function by seeking acknowledgment of work tasks 1 and 4 pursuant to post-acknowledgment procedures for plan and code amendments under ORS 197.610 to 197.625. Under those procedures, post-acknowledgment plan and code amendments are deemed acknowledged if notice of the amendments is provided to DLCD and all appeals to LUBA and other appellate bodies under ORS 197.830(8) are resolved. DLCD argues that LUBA cannot resolve goal compliance issues with respect to the challenged ordinances without also resolving the issue of whether the issue papers and works tasks comply with the goals, an issue that is within DLCD and LCDC's exclusive jurisdiction.

OAR 660-025-0040, which implements the periodic review statutes at ORS 197.628 to 197.646, provides that:

> "[LCDC], pursuant to ORS 197.644(2), shall have exclusive jurisdiction for the review of the evaluation, work program and all work program tasks for compliance with the statewide planning goals. [LUBA] shall have exclusive jurisdiction over land use decisions made in periodic review for issues that do not involve compliance with the statewide planning goals, and over all other land use decisions as provided in ORS 197.825."

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transportation system plan. In response to work task 1, the city drafted the two issue papers, which contain data, information and conclusions respecting current and projected commercial and residential land needs.

LUBA has jurisdiction over decisions arising from periodic review and may consider issues addressed in those decisions, as long as those issues do not involve determining whether a work program or work program task complies with the statewide planning goals. Bice v. Jackson County, 30 Or LUBA 439, 440 (1995) (LUBA retains jurisdiction to review decisions arising from periodic review for compliance with plan and code provisions).

Further, we have held that LUBA retains jurisdiction to consider goal compliance issues raised by a post-acknowledgment plan amendment, even though that amendment implicates issues subject to ongoing periodic review. Brown v. Jefferson County, ___ Or LUBA ___ (LUBA No. 96-091/095, August 18, 1997). In Brown, the county redesignated and rezoned agricultural land to allow two-acre minimum residential use, finding in support thereof that, as provided in the county's zoning code and policies, a two-acre minimum residential lot size is rural rather than urban. One of the issues the county was currently addressing in periodic review was whether under Goal 14 (Urbanization) a two-acre minimum residential lot size is rural rather than urban. DLCD argued there, as it argues here, that LUBA may not review those findings or take any action that would have the effect of acknowledging those findings to be in compliance with the Goals. We disagreed with DLCD, concluding that

> "the county may amend its plan and zoning map by redesignating and rezoning property to any existing acknowledged designation or zone, as long as the amendment does not violate any statute, rule or statewide planning goal. We have jurisdiction under ORS 197.610 to 197.625 to review such amendments, as opposed to amendments made as part of a final decision during periodic review. LCDC has exclusive jurisdiction over the latter pursuant to ORS 197.644." Slip op 31 (emphasis added, footnote omitted).

In a footnote, we indicated that a "final decision" over which LCDC has exclusive jurisdiction refers to "completion by the local government of a work program task, including the adoption of supporting findings and any amendments to the comprehensive plan or land use regulation," as defined by OAR 660-025-0020(2). Slip op 31, n 14. Because the challenged decision was a quasi-judicial plan amendment and not a final legislative decision

made as part of periodic review, we concluded that the challenged decision was subject to our jurisdiction and subject to our review for goal compliance, as provided by ORS 197.620 and ORS 197.835. Slip op 32.

The challenged decision in the present case, like that in Brown, is not a work program task, or a decision made as part of or the result of periodic review, but rather post-acknowledgment plan and zoning map amendments. It follows under Brown that LUBA has exclusive jurisdiction to review those amendments.

We do not intend to foreclose the possibility that in some instances our goal compliance review of plan amendments that are not part of periodic review may nonetheless impermissibly interfere with periodic review, i.e. resolve or affect whether a local government's work program tasks comply with the goals. However, DLCD has not established in the present case that our review of petitioner's goal compliance challenges would resolve or have any effect on whether the city's work program tasks comply with the goals. Even if we ultimately affirm the two challenged quasi-judicial amendments, and thus those amendments become acknowledged as in compliance with the goals pursuant to ORS 197.625, we do not perceive and DLCD has not explained how that acknowledgement could have any consequences on DLCD/LCDC's review of the city's work tasks under periodic review.

For the foregoing reasons, we conclude that we have jurisdiction to review the challenged amendments for compliance with pertinent statewide planning goals.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the challenged ordinances are not consistent with the requirements of the TPR, specifically OAR 660-012-0060, and that the city's findings with respect to the TPR are inadequate and not supported by substantial evidence.

A. First subassignment of error

OAR 660-012-0060(1) requires that amendments to local plans and regulations that

significantly affect a transportation facility must assure that allowed land uses are consistent with the function, capacity and level of service of that facility.[6] An amendment "significantly affects" a transportation facility if it allows types or levels of land uses that result in travel inconsistent with the functional classification of the facility or reduce the level of service of the facility below the minimum acceptable level identified in the city's TSP. OAR 660-012-0060(2).[7]

Petitioner argues that the challenged amendments "significantly affect" a transportation facility, the intersection, and thus the city erred in failing to take one of the three actions required by OAR 660-012-0060(1): limiting uses, amending the TSP to improve the facility, or altering designations and densities to reduce travel demands. Further,

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[6]OAR 660-012-0060(1) provides that:

> "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:
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> "(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."

[7]OAR 660-012-0060(2) provides that:

> "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."

petitioner argues that the city's findings regarding whether the amendments "significantly affect" the intersection are inadequate and are not supported by substantial evidence.

According to petitioner, the city found that the proposed amendments will cause a significant impact on the existing street system, but found nonetheless that the proposed amendments will not "significantly affect" the intersection within the meaning of OAR 660-012-0060(1). The city accepted intervenor's argument that, if the number of lanes leading into the intersection were more than doubled (from three lanes on Highway 101 to seven, and from two lanes on Munsel Lake Road to five), and the intersection was signalized, the level of service in the intersection would remain at an acceptable level.[8] Accordingly, the city reasoned that, if the proposed amendments were conditioned on such improvements, the amendments would not "reduce the level of service of the facility below the minimum acceptable level" identified in the city's transportation plan and thus do not "significantly affect" the intersection. OAR 660-012-0060(2).

Petitioner contends that the city misconstrues OAR 660-012-0060(1) and (2). Petitioner argues that whether a proposed plan or land use regulation amendment significantly affects a transportation facility does not depend upon whether the amendment is conditioned on future improvements made to mitigate those impacts. According to petitioner, whether a proposed amendment "significantly affects" a facility must be determined based solely on the definition in OAR 660-012-0060(2), that is, as relevant here, if it would reduce the level of service below the minimum acceptable level. If the proposed amendment significantly affects a facility, the local government must then take one of the three actions enumerated in OAR 660-012-0060(1), including the course petitioner suggests the city should have taken, amending the city's TSP to provide for improvements to the

[8]The parties appear to agree that the intersection is currently operating at level of service "C," and further that, pursuant to the Oregon Highway Plan, level of service C is the minimum acceptable level of service for that intersection for purposes of OAR 660-012-0060(2).

intersection adequate to support the proposed land uses. Thus, petitioner argues the city erred in approving the challenged amendments without simultaneously amending its TSP to provide for the mitigatory improvements necessary to assure compliance with OAR 660-012-0060(1). Concerned Citizens of the Upper Rogue v. Jackson County, ___ Or LUBA ___ (LUBA No. 95-173/174/205/225, April 8, 1997) slip op 63-64 (a county cannot avoid the requirements of the TPR by conditioning approval of amendments significantly affecting a facility on subsequent amendments to the county's TSP).

Intervenor responds that the city does not have an acknowledged TSP, only a draft TSP that is currently in the process of periodic review. Intervenor suggests that it is absurd to require the city to amend a draft TSP in order to comply with OAR 660-012-0060(1), because any amendments would be effective only after the draft TSP obtained approval in periodic review and was ultimately adopted by the city. Intervenor argues that it is sufficient in this case for the city to condition the amendments on the applicant's agreement to pay for any improvements to the intersection required as part of any subsequent development application.

We agree with petitioner that the city's approach places the cart before the horse. The general theme of the TPR is to require local governments to develop local transportation plans in order that those plans may guide future decisions affecting transportation. OAR 660-012-0060 refines that theme by requiring that, when an amendment significantly affects a transportation facility, the city must either make decisions consistent with its TSP under OAR 660-012-0060(1)(a) or (c), or amend its TSP under OAR 660-012-0060(1)(b). The city's approach, to decide first and plan later, undermines the primacy of planning, and allows the city to make decisions allowing significant impacts on or requiring significant changes to transportation facilities, without first assuring that those impacts and changes

have a basis in and are consistent with the TSP.[9]

The flaw in the city's approach is that it reverses two distinct and sequential inquiries: (1) whether the amendment significantly affects a transportation facility; and (2) if so, whether mitigatory measures can assure that the land uses allowed by the amendment are consistent with the function, capacity and level of service of the facility. The existence of possible mitigatory measures has no bearing on and does not obviate the first inquiry, whether the amendment significantly affects a transportation facility. In other words, the city must first determine whether the amendment significantly affects a transportation facility under OAR 660-012-0060(2), without considering whether mitigatory measures such as the options listed at OAR 660-012-0060(1)(a) to (c) can maintain the facility above the thresholds stated in OAR 660-012-0060(2).

Nor do we find it significant that the city's TSP had not been adopted by the city at the time the city made the challenged decision. Even if the draft status of the city's TSP renders unavailable the option of amending that TSP under OAR 660-012-0060(1)(b), the city has other options it can exercise under OAR 660-012-0060(1)(a) and (c), as well as the option of not adopting the proposed amendments until the city's TSP is adopted.

In sum, we agree with petitioner that the city's decision is inconsistent with the requirements of OAR 660-012-0060.

B. Second subassignment of error

Petitioner argues that the city's findings of compliance with Goal 12 are inadequate and not supported by substantial evidence. Goal 12 requires that the city "provide and encourage a safe, convenient and economic transportation system." Petitioner argues that the

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[9]The staff report acknowledges that:

> "The City's draft Transportation Systems Plan did not envision this level of development or need for such significant transportation improvements at this location of Florence. As such, the City will need to address this issue during the scheduled completion of the draft TSP in early 1998, if the applicant's requested amendments are approved." Record 1030.

city erred in relying on the applicant's second traffic study, which projected traffic volumes at the intersection using a methodology called Highway Capacity Manual, or HCM, rather than a methodology currently favored by ODOT and DLCD for signalized intersections called volume/capacity (V/C).

Petitioner explains that the applicant's first traffic study used the V/C method, but that in response to objections from DLCD that were unrelated to methodology, the applicant submitted a second study that used the HCM method. The HCM method is the method officially required by the 1991 Oregon Highway Plan. Both traffic studies reached comparable conclusions regarding projected traffic volumes and capacity. Notwithstanding, petitioner argues that the city failed to explain why reliance on the second study and the HCM method was justified, given that the method preferred by ODOT and DLCD for signalized intersections is the V/C method. Further, petitioner argues that the superiority of the V/C method over the HCM method fatally undermines any findings based on the latter, with the result that such findings are not supported by substantial evidence.

We disagree with petitioner on both points. The challenged decision finds that

> "[ODOT] has played a major role in reviewing the traffic projections, analysis and systems improvements proposed by the Applicant's traffic engineer, JRH Transportation Engineering. The DLCD questioned JRH's analysis, which was accepted by ODOT. Notwithstanding the fact that the DLCD analysis relies on a methodology [V/C] that has not been officially adopted by ODOT as a method for calculating level of service, the analysis by JRH, under either methodology, demonstrated the level of service at this intersection could be maintained if certain improvements are made. * * *" Record 27-28.

The challenged decision thus made findings explaining that reliance on the HCM method used in the second study is justified because the HCM is the method officially required by ODOT and, in any case, analysis under either method supports the same conclusion. Petitioner does not argue or cite to any evidence that results under the two methods as used in this case are materially different. Absent citation to such evidence, we

agree with intervenor that the city's findings in this respect are adequate and supported by substantial evidence.

C. Third subassignment of error

Petitioner argues that the city failed to comply with OAR 660-012-0060(3) by failing to coordinate "with affected transportation facility and service providers and other affected local governments," as required by that rule. According to petitioner, the city erroneously concluded that OAR 660-012-0060 did not apply and thus failed to make findings as to whether other local governments would be affected by the proposed amendments, which allow a large regional shopping mall creating traffic volumes that will require a significant expansion of the adjoining transportation facility.

Intervenor responds that the city coordinated with ODOT and Lane County, and that there is no reason to suppose that any other city or county could possibly be affected by the proposed amendments. However, the challenged decision finds, and indeed emphasizes, that the 40 to 50-store shopping mall allowed by the amendments is designed to be a regional destination point attracting tourists and visitors from outside the city. In that circumstance, we agree with petitioner that it is incumbent on the city to determine whether and the extent to which other towns and cities in the region will be affected by the proposed development and to coordinate with those jurisdictions affected by the decision.

D. Fourth subassignment of error

Finally, petitioner argues that the city was required to apply the requirements of OAR 660-012-0045(2) and (3) in considering the proposed amendments. Petitioner explains that because the city has not yet adopted land use regulations implementing the requirements of OAR 660-012-0045, those requirements apply directly to proposed plan and zone amendments. OAR 660-012-0055(4)(b).[10]

[10]OAR 660-012-0055(4)(b) provides:

Petitioner contends that the city failed to apply requirements at 0-012-0045(3) that the city

> "provide for safe and convenient pedestrian, bicycle and vehicular circulation consistent with access management standards and the function of affected streets, to ensure that new development provides on-site streets and accessways that provide reasonably direct routes for pedestrian and bicycle travel in areas where pedestrian and bicycle travel is likely if connections are provided, and which avoids wherever possible levels of automobile traffic which might interfere with or discourage pedestrian or bicycle travel."

Petitioner argues that the city made no findings regarding pedestrian and bicycle travel and access, despite concerns raised below regarding whether forcing pedestrians and bicycles to cross a seven lane intersection is either safe or convenient.

Intervenor responds that the requirements of OAR 660-012-0045(3) do not apply because that section merely requires the city to adopt land use regulations implementing its TSP, which, as noted above, as not yet been adopted. However, intervenor does not address petitioner's point that, under OAR 660-012-0055(4)(b), the city is required to apply TPR requirements directly to land use decisions, when the city has not adopted the land use regulations required by the TPR. We agree with petitioner that the city erred in failing to apply the requirements of OAR 660-012-0045(3) regarding pedestrian and bicycle access and travel.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the city misconstrued the applicable law and failed to make adequate findings supported by substantial evidence when it concluded that the proposed

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> "Affected cities and counties that do not have acknowledged plans and land use regulations as provided in subsection (a) of this section, shall apply relevant sections of this rule to land use decisions and limited land use decisions until land use regulations complying with this amended rule have been adopted."

amendments are consistent with Goal 10 (Housing) and provisions of the city's comprehensive plan regarding needed housing.[11]

Goal 10 requires that local comprehensive plans inventory buildable land, identify needed housing, and designate and zone enough buildable land to satisfy the identified housing need. Burk v. Umatilla County, 20 Or LUBA 54, 61 (1990). Goal 10 defines "buildable land" as "lands in urban and urbanizable areas that are suitable, available and necessary for residential use." The city's buildable land inventory in its 1988 comprehensive plan found that 503 acres in the city were available for residential use, and that an additional 1,220 acres would be needed by 2005. The plan also estimated that a total of 6,510 housing units would be needed by 2005 to meet projected housing needs.

The challenged decision makes the following findings with respect to Goal 10:

> "[Goal 10] is relevant because approval of this plan amendment will result in a loss of 17 acres of residentially-designated land from the City's inventory. There are several reasons why the removal of this parcel from the inventory of vacant, residential land will not be adverse to the City or in conflict with the Goal 10.
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> "* * * * *
>
> "[T]he March 28, 1997 staff report describes the status of the City's current inventory of vacant, residentially-zoned land as found in the Residential Issue Paper. According to the staff report, there are 101 vacant lots and another 184 acres of vacant residentially-zoned land all within the current city limits. While the staff report cautions that this data is preliminary and does not yet include a detailed analysis of the suitability and availability of this vacant land for residential development, the staff concludes that conversion of the subject property's residential designation to commercial would not have an adverse

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[11]Goal 10 is

> "To provide for the housing needs of citizens of the state.
>
> "Buildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density."

impact on the City's present supply of residentially-zoned property." Record 70.

Accordingly, the decision concludes that the proposed amendment is consistent with Goal 10 because "the supply of vacant, buildable residential land can more than adequately accommodate future demand for residential development." Record 33-34.

Petitioner argues that these findings are inadequate to demonstrate consistency with Goal 10. We agree. Adequate findings must (1) identify the relevant approval standards, (2) set out the facts relied upon, and (3) explain how the facts lead to the conclusion that the request satisfies the approval standards. Le Roux v. Malheur County, 30 Or LUBA 268, 271 (1995). The city's findings fail to explain why the proposed redesignation of 17 acres from residential to commercial uses is consistent with Goal 10's requirement that the city designate enough buildable land to satisfy identified housing needs. There is no explanation why the existence of 101 vacant lots and 184 acres of vacant residentially-zoned land is sufficient to meet identified housing needs over any particular planning period. There is no discussion or identification of what those housing needs are, given population growth over a particular planning period, and no correlation drawn between the housing inventory and those needs. Further, the findings rely on a staff report reciting data that is preliminary and that does not reflect whether the identified vacant, residentially-designated land is suitable and available, i.e. whether it is "buildable land" as defined by Goal 10. We conclude that the city's findings regarding Goal 10 are inadequate.

Because the city's findings regarding Goal 10 are inadequate, no purpose is served in reviewing the evidentiary record to determine whether the city's findings are supported by substantial evidence. Murphy Citizens Advisory Comm. v. Josephine County, 25 Or LUBA 312, 326 (1993).[12]

[12]The city does not contend that we may affirm the decision under ORS 197.835(11)(b), which allows LUBA to affirm a decision notwithstanding inadequate findings where the parties identify evidence in the record that "clearly supports" the decision or part of a decision. The standard under ORS 197.835(11)(b) is a

The second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that objective 6 in the city's comprehensive plan discourages "linear commercial development" and that the city erred in allowing commercial uses that further linear commercial development in the area. Objective 6 states that one of the city's economic objectives is:

> "To encourage the clustering of commercial uses, intended to meet the business needs of area residents and highway travelers, in designated areas to prevent the undesirable effects of linear development."

The challenged decision finds with respect to objective 6 that:

> "[A]pproval of this plan change is really clustering large-scale, regional commercial development at a location that is best suited to accommodate this type of commercial development on the north side of Florence. Further, the identification and development of a north Florence shopping area is specifically recognized by the existing, acknowledged plan as needed and desirable development. * * *
>
> "On the whole, approval of this plan amendment is not a continuation of a linear pattern of commercial development, but rather a clustering of large, commercial parcels at this intersection on the north side of Florence. The plan policy that recognized the need for a clustered, north Florence shopping area will be implemented by approval of this plan amendment." Record 48-49.

The "plan policy" referred to is a provision of the Florence Comprehensive Plan (FCP) that encourages commercial development in the city's downtown while recognizing the need for commercial development in north Florence. With regard to that policy, the city found

> "The DLCD disagreed with the Planning Commission's interpretation of [the FCP] and its conclusion that [the FCP] supports approval of the present Application. The DLCD focused on a narrow portion of the statement rather than its overall direction, which suggests that the north Florence area would be better served by a clustered shopping area. The DLCD goes on to suggest

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high one: the evidence drawn to our attention must render the challenged aspect of the decision "obvious" or "inevitable." Marcott Holdings, Inc. v. City of Tigard, 30 Or LUBA 101, 122 (1995). Even if ORS 197.835(11)(b) were invoked, the city has not identified relevant evidence in the record that "clearly supports" the city's findings with respect to Goal 10.

> that approval of this plan amendment would also contribute to the commercial linear development pattern that is discouraged by the FCP.
>
> "The City Council disagrees with the DLCD's interpretation of this policy * * *. Approval of this plan amendment application and accompanying zone change will have the effect of locating a shopping area at a major intersection * * * as contemplated by the above-referenced policy. * * * This Application provides an opportunity for the City to establish the north Florence shopping area in a location best suited for it, based on its access to Highway 101, location within existing city limits and proximity to another large parcel, located across Highway 101, that is presently being considered by Fred Meyer for a large, commercial development." Record 26.

Petitioner submits that the challenged decision should be remanded because (1) the city failed to interpret what "clustered" and "linear" development means; (2) the city's findings fail to explain why the proposed development is clustered rather than linear; and (3) there is not substantial evidence to support a conclusion that the proposed development is clustered rather than linear.

Intervenor responds that the findings quoted above adequately explain why the city council believes the proposed development constitutes clustered as opposed to linear development. Further, intervenor argues that the quoted findings essentially interpret objective 6 and related policies to categorize large-scale single design commercial development at a major intersection, across the street from other land zoned and contemplated for large-scale commercial development, as clustered rather than linear development. We agree with intervenor on both points: the city's findings adequately explain why the city council believes the proposed shopping mall to be a clustered rather than linear development, and that explanation suffices to express the city's understanding of objective 6. The city's interpretation is adequate for our review. ORS 197.829(2); Weeks v. City of Tillamook, 117 Or App 449, 452 n 3, 844 P2d 914 (1992) (an interpretation is adequate for review if it suffices to identify and explain in writing the decision maker's understanding of the meaning of the local legislation). We will defer to interpretation of local ordinances, unless that interpretation is inconsistent with the express language, policy

or purposes of the local comprehensive plan or land use regulations. ORS 197.829(1)(a)-(c). Petitioner makes no attempt to explain why the city's interpretation of objective 6 is contrary to the express terms, policy or purposes of any plan provision. Further, we agree with intervenor that there is substantial evidence to support the city's conclusion that, as it interprets objective 6, the proposed shopping mall constitutes clustered rather than linear development.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner argues that the city's findings of compliance with Goal 14 (Urbanization) and Florence Zoning Code (FZC) 10-1-1-5-E are inadequate and not supported by substantial evidence.

With respect to Goal 14, petitioner cites to language requiring that:

> "Conversion of urbanizable land to urban uses shall be based on consideration of:
>
> "(1) Orderly, economic provision for public facilities and services;
>
> "(2) Availability of sufficient land for the various uses to insure choices in the market place;
>
> "(3) LCDC goals or the acknowledged comprehensive plan; and,
>
> "(4) Encouragement of development within urban areas before conversion of urbanizable areas."

Intervenor responds that the language cited by petitioner applies only to conversion of "urbanizable" land to urban uses. Intervenor argues that the city properly found the subject property to be "urban land" because it is located within city limits and the city's acknowledged urban growth boundary and is currently designated and zoned for urban uses. Petitioner makes no effort to explain why the subject property is "urbanizable" rather than "urban" land. We agree with intervenor that petitioner has not established the challenged

decision results in "conversion of urbanizable land to urban uses," and thus implicates the cited Goal 14 factors.

Petitioner also relies on the provisions of FZC 10-1-1-5-E, which requires that "[I]n the case of a rezoning request, it shall additionally be shown that a public need exists; and that the need will best be served by changing the zoning of the parcel in question." Petitioner argues that the scope and type of need for commercial development in north Florence is defined by the FCP:

> "Future development in the north area of Florence is expected to generate a need for an additional shopping area. The area at the intersection of Highway 101 and Heceta Beach Road already has some commercial development. One drawback is that this site is in many ownerships. If, at some future date, a shopping center developer wishes to suggest an alternate site which can be developed according to a single plan, such a site shall be considered as a plan amendment." FCP 53-54.

Petitioner argues first that the "need" identified in the FCP is for local commercial development, not the regional commercial venture proposed by the applicant in this case, and that the city has not adequately explained why rezoning of the subject property to commercial uses is required to meet that need.

Intervenor responds that the city made findings that identify a broader public need than argued by petitioners, namely a need for a regional commercial facility to attract tourists and generate economic activity in the city, and a finding that rezoning of the subject property was necessary because there is a shortage of large, single owner parcels suitable for large-scale commercial development.[13] Intervenor argues that these findings are adequate to

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[13]Intervenor cites to the following findings:

> "10. The City Planning staff, as part of the City's periodic review process and also in response to this application, determined there is a shortage of large, single-owner parcels that are designated and zoned commercial. Such parcels are needed to accommodate regional, commercial developments.
>
> "* * * * *

satisfy the FZC 10-1-1-5-E requirement for a demonstration of public need and that the need is best served by rezoning, and further that the findings are consistent with the FCP provisions regarding the need for commercial development in north Florence.

We agree with intervenor that the city's findings adequately explain why the proposed development meets the public need requirement at FZC 10-1-1-5-E. Le Roux, 30 Or LUBA at 271.

Petitioner next argues that the city's findings regarding public need for additional large commercial sites are not supported by substantial evidence. According to petitioner, the record shows that there are sufficient vacant commercial lands scattered around the city to allow many of the individual commercial uses in the proposed regional mall, and there is a large vacant, commercially zoned parcel across the street from the subject property that could be used for the proposed regional mall. Petitioner argues that there is thus no evidence that additional land is needed for either commercial uses in general or for large scale commercial development in particular.

The March 28, 1997 staff report stated:

> "Approximately 14.78 acres of vacant commercially planned and commercially zoned property lies immediately west of the subject site and on

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> "12. There is a shortage of entry-level jobs available for teenagers and those who have not been in the work force for a period of time. There is a need to diversify the local economy to replace jobs lost due to the decline in the fishing and wood products industries. Tourism provides a major resource to the coastal economy and it is important for the Florence area to capitalize on its central location and direct access from Interstate 5 by providing a variety of recreational and tourist activities that will attract and retain visitors in the community. A large-scale, regional commercial facility would likely complement [other tourist attractions] as tourist destination activities.
>
> "* * * * *
>
> "14. A regional commercial development would not only provide entry-level jobs but also full-time, year-round positions with salaries sufficient to support a family. Also, the presence of a regional commercial facility could stimulate other economic benefits and provide additional revenue to local governments." Record 41-42.

> the west side of Highway 101. * * * This land is essentially available for the same use as the applicant is proposing for the subject property.
>
> "Staff has received indications from a land development firm that the entire 14.78 acres has an option on it, and is currently being considered for a major retail shopping center. The city has no assurances of such development plans carrying forward, and no formal development application has been filed.
>
> "An argument could be forwarded that this land is readily planned and zoned for this applicant's proposed use and therefore the city should not support the applicant's request to convert additional lands to commercial use. However, in light of the city's draft commercial land use projections being conducted for Periodic Review, additional land will be needed to accommodate the city's future commercial land use needs. The city does not have a ready supply of large commercially planned and zoned parcels to accommodate large commercial uses. As the applicant's site and the adjacent vacant land to the west are both within the city's limits, it would be prudent to utilize these properties, if both were suitable for commercial use, prior to adding land outside of Florence city limits through annexation to address the city's future commercial land use needs." Record 1830-31.

Where there is evidence in the whole record that a reasonable person would accept to support the local government's decision, LUBA will defer to it, notwithstanding that reasonable people could draw different conclusions from the evidence. The choice between conflicting evidence belongs to the city. Stewart v. City of Brookings, 31 Or LUBA 325, 330 (1996). In the present case, petitioner has not demonstrated that a reasonable person could not draw the same conclusion as the city did with respect to either the public need for additional commercial land or the public need for more than one large commercial parcel, within the meaning of FZC 10-1-1-5-E.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioner argues that the city failed to comply with Goal 6 (Air, Water, Land Quality) and provisions of the FCP that require review of new development to ensure it does not contribute to water quality problems. Further, petitioner argues that the city's findings regarding the impact of the proposed amendment on sewage capacity and water quality are not supported by substantial evidence.

Goal 6 is to "maintain and improve the quality of the air, water and land resources of the state." Goal 6 requires that:

> "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. With respect to the air, water and land resources of the applicable air sheds and river basins described or included in state environmental quality statutes, rules, standards and implementation plans, such discharges shall not (1) exceed the carrying capacity of such resources, considering long range needs; (2) degrade such resources; or (3) threaten the availability of such resources."

Petitioner contends that the city's existing sewage treatment facility is overburdened and not in compliance with state and federal water quality laws, as demonstrated by a recent Clean Water Act lawsuit challenging unpermitted sewage discharges into the Suislaw river. Petitioner submits that because the city's existing sewer facilities are not in compliance with water quality standards, and the proposed shopping mall will significantly increase sewer flows, there is no evidence in the record that the proposed future development will not violate or threaten to violate applicable state or federal environmental laws.

Intervenor responds that the city made adequate findings, supported by substantial evidence, explaining why the proposed plan amendment was consistent with Goal 6:

> [T]he problems related to Florence's sewer system have no direct bearing on whether the Subject Property should be designated for future residential or commercial use. Given the fact that DEQ is significantly involved with the [city] in solving these problems and has the authority to stop all future connections for an interim period of time if deemed necessary, there is no direct connection between the sewer problems and approval of this plan amendment application. <u>If the owner of the Subject Property had * * * applied for a residential subdivision, the City would be required to provide sewer service to the site so long as there is no moratorium in place and sewer lines are adjacent to the site. Further, it has been demonstrated with evidence in the record that residential development of the Subject Property would place a greater demand on that sewer system than commercial use</u>." Record 29 (emphasis added).

Intervenor argues that it is undisputed that the commercial uses the proposed plan amendment allows would have less impact on sewer capacity than the residential uses the

property is currently zoned for, if either were developed. Intervenor reasons that Goal 6 is not implicated where the city approves an amendment allowing development that causes less impact on a Goal 6 resource than would development of the subject property under its acknowledged designation and zoning.

When a property's plan and zone designations are changed to allow a particular use, Goal 6 requires the local government to adopt findings explaining why it is reasonable to expect that applicable state and federal environmental quality standards can be met by the proposed use. Salem Golf Club v. City of Salem, 28 Or LUBA 561, 583 (1995). By its terms, Goal 6 requires consideration of the cumulative effects of proposed future development and existing development, and prohibits plan amendments allowing future development that alone or combined with existing development will violate or threaten to violate state or federal environmental standards, including water quality. See 1000 Friends of Oregon v. City of North Plains, 27 Or LUBA 372, 406, aff'd 130 Or App 406 (1994) (the city must consider cumulative impacts of waste and process discharges from uses to be established by a plan amendment and the existing discharges from existing sources).

Thus, where a local government's watershed is already in violation of applicable state or federal environmental standards, the local government cannot amend its plan to allow future development that will compound that violation without either finding that Goal 6 is satisfied or taking an exception to Goal 6. That the proposed future development might have less impact on the city's sewage capacity than the residential uses permitted outright by the existing designation, if developed, might be relevant to whether the city can justify a "reasons" exception to Goal 6; however, that fact does not establish that Goal 6 is inapplicable nor that the proposed amendment complies with Goal 6.[14]

[14]We note that, pursuant to OAR 660-004-0010(2), the exceptions process is "generally not applicable" or "required" with respect to certain goals, including Goal 6, but that an exception is "possible." However, we have held that where the Goals listed in OAR 660-004-0010(2), including Goal 6, are implicated by a decision, the local government must either find the proposal complies with those goals, explain why the goals do not

We conclude that the city's findings regarding Goal 6 fail to explain why the proposed amendment is consistent with the requirements of that goal. It follows that no purpose is served in addressing petitioner's substantial evidence challenges.

The fifth assignment of error is sustained.

SIXTH ASSIGNMENT OF ERROR

Petitioner argues that the city's finding that it has sufficient sewage treatment facilities to accommodate the proposed shopping mall and thus that the proposed amendment complies with Goal 11 is not supported by substantial evidence.[15] The city finds with respect to Goal 11 that "a full range of urban services and facilities are available and can be provided for commercial development of the site. In fact, commercial development of the property will place far less demands on the City's sewerage system, which is close to its maximum capacity, than residential development." Record 71.

Goal 11 defines "urban facilities and services" to refer to "key facilities and to appropriate types and levels" of various public facilities, including sanitary facilities. Further, the Goals definition section defines "key facilities" to mean facilities "essential to the support of more intensive development, including public schools, transportation, water supply, sewage and solid waste disposal. " (Emphasis added.)

Petitioner argues that Goal 11 requires the city to determine the need for sewage treatment facilities based on development plans and population projections, and to assure that the necessary facilities are available in advance of or concurrent with development.

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apply, or take an exception to those goals. Caine v. Tillamook County, 22 Or LUBA 687, 695 and n 10 (1992). The city in the present case essentially found that Goal 6 does not apply.

[15]Goal 11 is:

> "To plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development.
>
> "Urban and rural development shall be guided and supported by types and levels of urban and rural public facilities and services appropriate for, but limited to, the needs and requirements of the urban, urbanizable, and rural areas to be served."

Petitioner contends that the proposed shopping mall allowed by the challenged decision will increase the illegal sewage discharges from the city's treatment facility, and that there is no evidence or explanation in the record demonstrating that the existing treatment facility will be brought into compliance, and thus no assurance that "appropriate types and levels" of sewage facilities are or will be available to meet the needs created by the proposed shopping mall.

Intervenor responds that there is evidence in the record projecting that the city will complete upgrades to its existing treatment facility by October 2000, and in any case petitioner has not demonstrated that the challenged amendment or proposed shopping mall will increase sewage flows to the city's system. Intervenor argues that the subject property is currently zoned residential, has sewer service available to it, and that it is undisputed that the proposed shopping mall, if developed, would generate less sewage than would the residential uses allowed under existing zoning.

Unlike Goal 6, Goal 11 is invoked only where the local government approves a more intensive use than allowed under existing designations and zoning. Where a local government redesignates land to allow for more intensive uses, it must make findings that public facilities are at a level of service that is appropriate for and can accommodate the demands created by those more intensive uses. Neuharth v. City of Salem, 25 Or LUBA 267, 274 (1993) (in redesignating industrial land to allow for high density residential uses, the city must determine that schools are at an appropriate level to accommodate the proposed development). However, the present case does not involve redesignation to a more intensive use, at least with respect to sewage treatment. There is substantial evidence in the record that the proposed shopping mall allowed by the plan amendment will generate less sewage than the residential uses the property is currently zoned for. Although we determined above that that evidence does not establish compliance with Goal 6, which limits the city's ability to approve development with environmental impacts beyond a specified threshold, that

evidence is sufficient to establish compliance with Goal 11, which does not place similar restrictions on the city unless the proposed amendment allows uses that create more intensive demands on public facilities than the existing designation.

The sixth assignment of error is denied.

The city's decision is remanded.