BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

STANLEY R. HERMAN,	)	
	)	
Petitioner,	)	LUBA No. 98-146
	)	
vs.	)	FINAL OPINION
	)	AND ORDER
CITY OF LINCOLN CITY,	)	
	)	
Respondent.	)	

Appeal from Lincoln City.

Joan M. Chambers, Lincoln City, filed the petition for review and argued on behalf of petitioner. With her on the brief was Kulla, Ronnau, Schaub & Chambers.

Christopher P. Thomas, Lincoln City, filed the response brief and argued on behalf of respondent. With him on the brief was Moskowitz & Thomas.

BASSHAM, Board Member; HOLSTUN, Board Chair; BRIGGS, Board Member, participated in the decision.

REMANDED 08/18/99

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals the city's decision to amend the comprehensive plan map and zoning map designation of petitioner's property from high density, multi-family residential (R-M) to medium density, single-family residential (R-1-7.5).

FACTS

The subject property is a vacant 14.4-acre parcel planned and zoned for high density, multi-family residential uses. The surrounding area to the north, west, south and southeast are zoned and developed for low density, single-family residential use. To the northeast of the subject property are several parcels zoned for multi-family residential use.

In 1992, the city approved a site plan for an apartment complex on the subject property. The neighborhood association appealed that approval to the city council, which denied the appeal. However, the applicant proceeded no further and the apartment complex was never built, although the 1992 site plan approval remains valid. At some point thereafter, petitioner acquired the subject property.

On June 30, 1997, the neighborhood association requested that the planning commission initiate a comprehensive plan map and zoning ordinance map amendment to redesignate the subject property from multi-family to single-family residential uses. City planning staff sent petitioner a staff report indicating that the planning commission would consider the request at its August 5, 1997 meeting. The report was mailed to the address for petitioner that staff had in its files, but that address was no longer correct and petitioner did not receive the report or other notice of the meeting. At the August 5, 1997 meeting, the planning commission approved a motion to conduct a public hearing on the neighborhood association's request.

City staff scheduled the public hearing for October 21, 1997, but did not send notice of the hearing to petitioner. Petitioner learned of the hearing on the morning of October 21,

1997, and attended the hearing. At the hearing, the planning commission took testimony from city staff and others, but continued the hearing until January 6, 1998, to allow petitioner an opportunity to prepare his testimony. At the January 6, 1998 hearing, petitioner testified in opposition to the proposed rezoning. The planning commission closed the record and voted to recommend to the city council that the city not change the plan designation or zoning of the subject property. The planning commission reconsidered its vote on January 20, 1998, and again adhered to its January 6, 1998 recommendation.

On June 8, June 22, and July 13, 1998, the city council conducted public hearings to consider the planning commission's recommendation. The city council closed the record at its July 13, 1998 hearing and voted to change the plan land use designation from high-density residential to medium-density residential, and the zoning from multi-family residential (R-M) to Residential Single-Family (R-1-7.5). For the city council's August 10, 1998 meeting, planning staff submitted a revised ordinance rezoning the subject property that differed from the ordinance that had been filed and made available for public review. The city council adopted the revised ordinance.

This appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Petitioner argues that the city's failure to provide him notice that the planning commission intended to consider initiating a rezone of the subject property at its August 5, 1997 meeting, and the city's failure to provide him notice of the public hearing before the planning commission on October 21, 1997, prejudiced petitioner's substantial rights to participate in those proceedings.

With respect to the August 5, 1997 meeting, petitioner argues that if he had received notice of the planning commission's intentions, he would have appeared and submitted testimony that would have influenced the planning commission not to initiate a rezone of his property. With respect to the October 21, 1997 hearing, petitioner contends that, even

though he appeared at that hearing, the lack of timely notice prevented adequate preparation and hence deprived him of the right to participate in the process. Petitioner argues that the continuance to January 6, 1998, did not cure the city's procedural error or the prejudice to petitioner.

The city responds, and we agree, that nothing in the city's code or elsewhere required the city to provide petitioner notice that the planning commission would consider initiating the rezone process for the subject property at its August 5, 1997 meeting. The city acknowledges that petitioner was entitled to notice of the planning commission's October 21, 1997 hearing, at which the commission accepted testimony regarding the proposed rezone. However, the city argues, and again we agree, that the continuance the commission granted until January 6, 1998, avoided any prejudice to petitioner's substantial rights. Petitioner does not explain why that continuance failed to offer him an adequate opportunity to prepare for and participate in the planning commission's proceedings.

The first and second assignments of error are denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the process by which the planning commission initiated the challenged rezone decision violated Lincoln City Zoning Ordinance (LCZO) 12.020, resulting in procedural error that prejudiced petitioner's substantial rights.

LCZO 12.020 provides:

> "An amendment to the text of this zoning ordinance or to the zoning map and/or to the comprehensive plan map or text may be initiated by:
>
> "A. Motion of the planning commission.
>
> "B. Motion of the city council.
>
> "C. Application filed by an owner of record, a purchaser under a recorded land sale contract, or the holder of an option to purchase property which is the subject of the application for rezoning or comprehensive plan map redesignation.

"D. A Lincoln City resident requesting a change to the text of the comprehensive plan or zoning ordinance document(s)."

Petitioner argues that the planning commission essentially allowed the neighborhood association to "initiate" a map amendment process, contrary to LCZO 12.020, which allows only the commission, the council, or the property owner to initiate map amendments. Petitioner argues that the planning commission cannot be considered to have "initiated" the proposed rezone in the present case, for several reasons. First, the planning committee's motion to proceed with rezoning at its August 5, 1997 meeting was literally a motion to have a hearing on the neighborhood association's request and was not phrased as a motion to have the planning commission itself initiate the rezoning process.[1] Second, petitioner notes that the notice of the proposed amendment sent to the Department of Land Conservation and Development (DLCD) summarized the proposal as a petition from area residents rather than a proposal initiated by the planning commission. Third, petitioner argues that the planning commission could not be deemed to initiate the rezoning process on its own motion, because the commission ultimately recommended against rezoning the property. According to petitioner, only if the planning commission recommends in favor of rezoning property can the commission be deemed to have initiated the rezoning process. Finally, petitioner contends that even if the rezoning was properly before the commission or city council, the city did not follow the timelines set forth in LCZO 12.040(B).[2]

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[1]The motion considered at the August 5, 1997 meeting was as follows:

"It's been moved and seconded that we have a public hearing on a request from the Nelscott Neighborhood Association to rezone a 14.4 acre site from residential multi-family RM to residential single-family R-1-7.5. Could we have a vote, please." Transcript of August 5, 1997 planning commission meeting, Petition for Review App 2.

[2]LCZO 12.040(B) provides in relevant part:

"The report and recommendations of the planning commission shall be made within 60 days after the filing of a complete application * * *. Failure of the commission to so report within 60 days * * * shall be deemed to be a recommendation of approval of the proposed amendment of the planning commission."

The city council addressed petitioner's arguments in the challenged decision, interpreting LCZO 12.020 to allow residents to request that the planning commission itself initiate a rezoning, and finding that the planning commission had, by motion, itself initiated consideration of the proposed rezoning. Record 9, 13. The city council also considered petitioner's argument regarding the notice to DLCD, and rejected that argument on the grounds that the summary of the proposal in the DLCD notice, while factually accurate as far as it goes, does not purport to describe the procedure under which the commission considered the proposed rezone. Record 13. Further, the city council interpreted LCZO 12.040(A) as requiring that the planning commission recommend approval or disapproval once the rezone process is initiated. The city council rejected petitioner's argument that the planning commission's disapproval in this case signifies that the planning commission did not initiate the proposed rezone.[3] Record 14. With respect to petitioner's argument that the city failed to follow the timelines described in LCZO 12.040(B), the city council interpreted those timelines as being applicable only where the property owner files an application to rezone property, not where the planning commission or city council initiates the rezone process. Record 17.

Petitioner does not challenge any of the foregoing city council interpretations, which are directly adverse to petitioner's arguments under this assignment of error. To the extent petitioner challenges the evidentiary basis for the city's finding that the planning commission, rather than the neighborhood association, initiated the proposed rezone, we agree with the city that its finding is supported by substantial evidence. In its response brief, the city notes

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[3]LCZO 12.040(A) provides in relevant part:

> "Upon filing of said application for an amendment as described in [LCZO] 12.030, or upon motion of the city council or planning commission for the initiation of an amendment, the matter shall automatically be referred to the planning commission. The planning commission shall study the matter to the extent that it considers such study to be necessary * * * and shall, in open meeting, recommend the approval or disapproval of said amendment."

that during the August 5, 1997 planning commission meeting planning staff advised the commission that a map amendment could only be initiated by a motion of the planning commission, city council or application of the property owner. See Petition for Review App 1. Given that context, we agree with the city that the terms of the motion adopted by the planning commission simply acknowledge that the commission's initiation of the process was brought about by the neighborhood association's request, not that the association "initiated" the process within the meaning of LCZO 12.020.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner argues that the city failed to make adequate findings, supported by substantial evidence, that the proposed plan and zoning map amendments are consistent with applicable provisions of the Lincoln City Comprehensive Plan (LCCP).

LCZO 12.050(D) requires findings that the proposed amendment complies with LCCP goals and policies. The notice of public hearing for the city council's June 8, 1998 hearing listed as applicable criteria "the unamended portions of the Comprehensive Plan goals, policies and land use map," but did not specify what LCCP goals and policies are applicable. Record 254. In the challenged decision, the city addressed and found compliance with LCCP provisions regarding housing. Record 26-28. However, petitioner argues that the city failed to address other applicable LCCP provisions regarding public services and utilities, urbanization, economy and transportation.

The city does not dispute that the city failed to address whether the LCCP goals and policies regarding public services and utilities, urbanization, economy and transportation are applicable to the challenged amendments, and whether the amendments are consistent with those goals and policies. However, the city responds that petitioner did not raise any issues below regarding compliance with the cited LCCP provisions, and thus petitioner has waived

those issues. ORS 197.763(1).[4] The city recognizes that, pursuant to ORS 197.835(4)(a), petitioner may raise new issues before LUBA where the local government fails to list the applicable criteria for a decision as required by ORS 197.763(3)(b). In such cases, petitioner may raise new issues regarding applicable criteria that were omitted from the notice. However, the city argues that the ORS 197.763(3)(b) requirement applies only where the decision involves an "application" for a land use decision.[5] Because the challenged decision did not involve an "application" within the meaning of ORS 197.763, the city argues, the requirements of ORS 197.763(3)(b) do not apply. Even if those requirements apply, the city contends, the notice given in the present case satisfies ORS 197.763(3)(b) or was sufficient to place petitioner under the obligation of bringing to the city's attention any LCCP provisions that petitioner felt the city should address. ORS 197.835(4)(a).[6]

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[4]ORS 197.763(1) provides that:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

[5]ORS 197.763 provides in relevant part:

> "The following procedures shall govern the conduct of quasi-judicial land use hearings conducted before a local governing body, planning commission, hearings body or hearings officer on application for a land use decision and shall be incorporated into the comprehensive plan and land use regulations:
>
> "* * * * *
>
> "(3) The notice provided by the jurisdiction shall:
>
> "* * * * *
>
> "(b) List the applicable criteria from the ordinance and the plan that apply to the application at issue[.]"

[6]ORS 197.835(4)(a) provides:

> "A petitioner may raise new issues to the board if:

Other than the reference to "application" in ORS 197.763, the city cites no authority for the proposition that the requirements of ORS 197.763(3)(b) do not apply when the local government itself initiates a quasi-judicial land use proceeding.[7] We perceive no principled reason why the proposed rezoning the city initiated and approved in this case does not involve an "application for a land use decision" subject to the requirements of ORS 197.763.[8] Nor do we agree with the city that listing "unamended portions of the Comprehensive Plan goals, policies and land use map" satisfies the requirements of ORS 197.763(3)(b). ONRC v. City of Oregon City, 29 Or LUBA 90, 97-98 (1995) (listing an entire zoning ordinance or chapters of the ordinance as the applicable criteria in a local government's notice on a quasi-judicial land use application does not satisfy ORS 197.763(3)(b)); Eppich v. Clackamas County, 26 Or LUBA 498, 503 (1994) (ORS 197.763(3)(b) requires a local government to identify which comprehensive plan goals and policies the local government considers to be "applicable" criteria for the subject application). Nor, finally, do we agree with the city's suggestion that the notice was sufficient in itself to obligate petitioner to raise issues regarding LCCP provisions omitted from the notice, pursuant to ORS 197.835(4)(a). See n 6; City of Newberg v. Yamhill County, ___ Or LUBA ___ (LUBA No. 98-141, July 29, 1999) slip op 11 (where the notice fails to list any of the comprehensive plan policies that the county found to be applicable, ORS 197.835(4)(a) does not require the petitioner to comb through the entire plan looking for other applicable criteria that were also omitted from the notice). Listing the entire comprehensive plan as applicable criteria is equivalent to not

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> "(a) The local government failed to list the applicable criteria for a decision under ORS 197.195 (3)(c) or 197.763 (3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. However, the board may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government[.]"

[7]The parties agree that the challenged decision is a quasi-judicial, and not a legislative, decision.

[8]It may be that the city need not give itself notice of the applicable criteria when it initiates a quasi-judicial land use proceeding, but other participants need notice even when the city initiates the application process.

listing any applicable criteria in terms of the reasonable obligations that notice places on the petitioner to raise issues during the local proceedings under ORS 197.835(4)(a).

On the merits, we agree with petitioner that remand is appropriate for the city to address whether LCCP provisions regarding public services and utilities, urbanization, economy, and transportation are applicable and whether the proposed rezoning is consistent with those provisions.

The fourth assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR

Petitioner argues that the notice of hearing failed to list and the city failed to address applicable Statewide Planning Goals 11 (Public Facilities and Services), 12 (Transportation), and 13 (Energy Conservation).

ORS 197.763(3)(b) requires that the city list applicable criteria from its zoning ordinance and comprehensive plan, but does not require that the city list the statewide planning goals as the applicable criteria. See ODOT v. Clackamas County, 23 Or LUBA 370 (1992) (statewide administrative rules need not be listed as applicable criteria under ORS 197.763(3)(b)). The city's failure to list applicable statewide planning goals in the notice of hearing is thus not a basis for reversal or remand and does not operate to allow petitioner to raise new issues before LUBA regarding compliance with such goals, pursuant to ORS 197.835(4)(a).

In the challenged decision, the city addressed and found compliance with Statewide Planning Goals 2, 10, and 14. The city argues that petitioner failed to raise below any issues regarding Goals 11, 12, and 13, and thus those issues have been waived. ORS 197.763(1). Petitioner has failed to identify any places in the record where the issue of the applicability or compliance with Goals 11, 12, and 13 were raised below. We agree with the city that the issues raised under this assignment of error have been waived.

The fifth assignment of error is denied.

SIXTH AND SEVENTH ASSIGNMENTS OF ERROR

Petitioner argues that the city failed to adopt adequate findings, supported by substantial evidence, demonstrating that the proposed rezoning complies with Statewide Planning Goals 10 (Housing) and 14 (Urbanization) and corresponding LCCP provisions.

In the challenged decision, the city found compliance with Goals 10 and 14 and applicable LCCP provisions based on findings that there is a surplus of existing vacant R-M zoned land in the city beyond that needed to meet the city's present or foreseeable multi-family housing needs, even after the subject property is rezoned. Petitioner challenges the evidentiary basis for those findings, arguing that the staff estimates on which the city's findings are based employed several flawed assumptions.

Although the parties' view of the record diverges rapidly, the parties appear to agree on the following points: (1) the city last conducted a population forecast and buildable lands inventory in 1984; (2) the 1984 figures predicted a year 2000 urban growth boundary (UGB) population of 16,181, and a need for 1,081 multi-family dwelling units (MDUs) to accommodate that population;[9] (3) 208 MDUs existed in the city in 1978; (4) the city has issued permits for 610 MDUs since that year; (5) the 1984 inventory estimated that there were 111 acres of vacant R-M zoned land inside the UGB; and (6) the 1984 inventory also estimated that 62 acres of R-M land would be needed to accommodate the 873 additional MDUs (1,081 less 208) needed to accommodate the expected year 2000 population. Both parties treat the issue of consistency with Goals 10 and 14 and the LCCP housing provisions as being a matter of satisfying the city's obligation to provide opportunities to develop the number of MDUs projected for the year 2000.

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[9]The challenged decision notes that the city's actual population growth since 1984 has lagged considerably behind the 1984 population projection. The LCCP predicts a 1995 city population of 10,037, while the city's actual population in 1995 was 6,570, according to the Portland State University School of Urban and Public Affairs. Record 233. The decision relies on the 1984 population figures to conclude that the supply of R-M-zoned land exceeds the city's needs by 51 acres, but it notes that, if more current population figures were used, the surplus of land would be even larger.

The city staff conducted two separate analyses to update the 1984 inventory and determine whether the proposed rezone would leave a sufficient supply of R-M-zoned land in the city. The first analysis started with the 111 acres of land zoned R-M in the 1984 inventory. Then, based on the assumption that each MDU consumes 2,500 square feet of land area per dwelling, and that 20 percent of each acre is used for roads and other infrastructure, city staff determined that the 610 MDUs built since 1978 had consumed 42 acres of the 111-acre supply, and that the remaining 263 units (873 less 610) would require 18 additional acres. This analysis suggests a surplus of 51 acres zoned R-M.

The second analysis is based on a present inventory of vacant R-M zoned land within the city larger than one acre in size, not including 30 acres of land owned by the Confederated Tribes of the Siletz Indians of Oregon (Tribes). The staff identified 14.89 acres of R-M zoned land without identified wetlands, and 26.74 acres with identified wetlands. The staff then assumed that one-quarter of the areas with identified wetlands was not buildable, reducing those areas to 20.05 acres, and the total to 34.94 acres. The staff concluded that under the proposed rezoning the supply of vacant R-M-zoned land exceeded the 18 acres needed to build the remaining 263 MDUs.

In addition to the foregoing analyses, the decision also relies on the fact that the city recently approved a preliminary planned unit development application for a large phased development, the Villages at Cascade Head, that will ultimately include approximately 1,000 MDUs on land zoned for single-family residential use. The decision noted that the city is currently processing an application for the first phase of the project, which includes approximately 730 MDUs. The city council found that these MDUs, while not built on land zoned for multi-family residential use, would significantly enhance the city's inventory of multi-family residential units and help ensure that the proposed rezoning is consistent with the city's obligation to provide for multi-family dwellings.

Petitioner challenges the assumptions underlying the first analysis, arguing, first, that

the city failed to take into account land that was removed from the R-M zoning inventory since 1984. Petitioner cites to testimony that in 1992 the city rezoned 25.31 acres of vacant R-M zoned property to single-family residential. Similarly, petitioner argues that city staff failed to examine demolition permits to determine how many existing MDUs had been lost since 1978. Further, petitioner contends that the first analysis erroneously takes into account 30 acres of R-M zoned land that is owned by the Tribes, who have applied to the United States Department of the Interior to take that land into trust, in which case, petitioner argues, the city's R-M zoning will no longer apply.

In an argument applicable to both analyses, petitioner contends that the city erred in failing to consider the MDUs needed for seasonal housing, arguing that the 1,081 MDUs estimated in the 1984 inventory in the year 2000 includes only housing needed for year-round residents, and an additional 182 MDUs are needed for seasonal homes, resulting in a need for an additional 13 acres of land.

Petitioner also attacks the city's reliance on the MDUs approved as part of the Villages at Cascade Head development, arguing that those MDUs were erroneously approved, because multi-family uses are not allowed in the single family residential zone applicable to that development. Similarly, petitioner contends that the city cannot take into account the MDUs to be developed as part of the Cascade Head project, because those MDUs will be built on land zoned for single family residential use, and thus that approval does nothing to ensure that the city has an adequate supply of land zoned R-M.

The city responds that both staff analyses are sufficient, independently, to demonstrate that the proposed rezoning is consistent with Goals 10 and 14 and the LCCP housing provisions. However, the city's response brief does little to address petitioner's challenges to the first staff analysis. With respect to petitioner's challenge to the second analysis, the city argues that multi-family seasonal housing is allowed in other zones in the city and thus R-M zoned land need not be available to meet that need. The city also responds

specifically to petitioner's arguments regarding the city's reliance on the MDUs approved as part of the Cascade Head development, arguing that those units have been approved and the owner has a vested right to build them. Further, the city does not agree with petitioner that the Cascade Head MDUs are irrelevant to the challenged decision, simply because those units will be built on land zoned for single-family residential uses. The city argues that the need for land zoned for multi-family dwellings is a product of the need for multi-family dwellings, and thus the supply of MDUs built or to be built on land zoned other than R-M is properly considered in determining whether the proposed rezoning of the subject property is consistent with Goals 10 and 14 and the LCCP housing provisions.

Substantial evidence is evidence a reasonable person would rely upon in making a decision. Dodd v. Hood River County, 317 Or 172, 179, 855 P2d 608 (1993). Where the evidence is conflicting, if a reasonable person could reach the decision the local government made, in view of all the evidence in the record, LUBA will defer to the city's choice between conflicting evidence. Tigard Sand and Gravel, Inc. v. Clackamas County, 33 Or LUBA 124, 138, aff'd 149 Or App 417, 943 P2d 1106, adhered to 151 Or App 16, 949 P2d 1225 (1997), rev den 327 Or 83 (1998).

We agree with the city it did not err in considering the MDUs approved as part of the Cascade Head proposal. As the city points out, the Cascade Head proposal was not appealed and the applicant now has a right to build approved MDUs, notwithstanding any errors in approving the proposal. Further, we agree with the city that the relevant issue for purposes of these assignments of error is not the need for R-M zoned land itself, but the need for multi-family dwelling units. Thus, to the extent the Cascade Head development meets the need for MDUs, those units may be considered in determining whether the proposed rezoning is consistent with Goals 10 and 14 and the LCCP housing provisions.

If the city's analyses stood alone, without consideration of the Cascade Head development, then the alleged flaws in the city's analyses identified by petitioner might be

such that a reasonable person could not conclude, as the city did, that the proposed rezoning is consistent with the city's obligation to provide for 1,081 MDUs by the year 2000, and hence consistent with Goals 10 and 14 and the LCCP housing provisions. That is because petitioner's alleged flaws, if valid, make uncertain how many MDUs exist in the city and thus how much land is needed to provide for 1,081 MDUs. However, that uncertainty is not such that, when the evidence is considered as a whole, including the large number of approved Cascade Head MDUs, a reasonable person could not reach the conclusion that the city did. In short, whatever the flaws in the city's two analyses, a reasonable person could conclude that the addition of the MDUs approved as part of the Cascade Head development are sufficient to ensure that the city meets its obligation to provide for 1,081 MDUs.

The sixth and seventh assignments of error are denied.

EIGHTH ASSIGNMENT OF ERROR

Petitioner argues that the challenged decision is void because it was not adopted in compliance with mandatory requirements of the city's charter. Section 9.2(3) of the city charter provides:

> "An ordinance read by title only has no legal effect if it differs substantially from its terms as it was filed prior to the reading unless each section so differing is read fully and distinctly in open council meeting before the council adopts the ordinance."

According to petitioner, when the city council met August 10, 1998, to adopt the challenged decision, staff submitted to the council a revised ordinance that differed from the version filed prior to adoption. The changes to the ordinance consisted of attaching an assessor's map depicting the site, and correcting a scrivener's error in referring to the zoning designation of the subject property. At the August 10, 1998 meeting, staff advised the city council of the modifications, and the city council then, after a vote, proceeded to read the ordinance by short title only, and ultimately adopted the ordinance as revised. Petitioner contends that the city's failure to read the revised ordinance in its entirety is inconsistent with

the city charter, because the revised ordinance differed substantially from the earlier version.

Petitioner does not explain what impact either of the two modifications has or could have on the legal effect of the ordinance. The city responds, and we agree, that absent some meaningful difference in legal consequences between the two versions, the revised ordinance does not "differ substantially" from the earlier filed version. The city did not violate the charter by reading the challenged ordinance only by its short title.

The eighth assignment of error is denied.

NINTH, TENTH, AND ELEVENTH ASSIGNMENTS OF ERROR

In these assignments of error, petitioner contends that the city erred in failing to adopt findings supported by substantial evidence addressing whether the proposed rezone complies with the requirements of LCZO 12.010, which provides:

> "This zoning ordinance and/or the comprehensive plan map or text may be amended by changing the boundaries of districts or designations or by changing any other provisions thereof, whenever the public necessity and convenience and the general welfare requires such an amendment, by following the procedure of this article."

Petitioner argues that LCZO 12.010 requires that the city adopt findings that there is a "public need" for the proposed rezoning, similar to the standard described in Fasano v. Washington Co. Comm., 264 Or 574, 507 P2d 23 (1973).

The city makes several responses, but the dispositive one is that LCZO 12.010 itself specifies how the city is to determine whether the amendment is required by the public necessity and convenience and general welfare: by the following the procedure set forth in LCZO article 12. As the city points out, other sections of LCZO article 12 provide specific standards to be applied in evaluating a zoning ordinance amendment. We agree with the city that, read in context, LCZO 12.010 does not require that the city make findings regarding whether the public necessity and convenience and the general welfare requires an amendment.

The ninth, tenth, and eleventh assignments of error are denied.

TWELTH AND THIRTEENTH ASSIGNMENTS OF ERROR

In these assignments of error, petitioner alleges that the city council was influenced by undisclosed ex parte contacts and actual bias against petitioner that prejudiced his substantial rights and denied him an impartial tribunal.

A. Councilor Nelson

Most of petitioner's arguments relate to alleged ex parte contacts and bias involving City Councilor Randy Nelson. Petitioner explains that Nelson's wife testified at the June 8, 1998 hearing in favor of the proposed rezoning. Ms. Nelson testified that her best friend lives in the neighborhood surrounding the subject property and that Ms. Nelson is a member of the neighborhood association. Based on that testimony, petitioner speculates that there must have been ex parte contacts between Councilor Nelson and his wife regarding the rezoning, and perhaps also between Councilor Nelson and his wife's friend, who petitioner assumes is also a proponent of the rezoning. Petitioner argues that Councilor Nelson was required to disclose any such contacts during the June 8, 1998 hearing, and further that Councilor Nelson likely had, as a result of his relationship with his wife and her friend, a personal interest in the rezoning that should have disqualified him from participating.

The city responds, and we agree, that petitioner has not established from this record either that any ex parte contacts occurred between the Nelsons regarding the proposed rezoning, or that Councilor Nelson had a personal interest in the rezoning that required his disqualification from the proceeding. Further, the city points out, petitioner's counsel questioned Councilor Nelson at the next hearing, June 22, 1998, regarding ex parte contacts and impartiality. Councilor Nelson responded that it is a small town and that he knows nearly everyone who testified at the June 8, 1998 hearing, but that he had not had contacts with anybody that gave him information that was not part of the public record. Councilor Nelson also stated that he felt he could participate impartially in the decision. Petitioner's counsel accepted these representations, and did not pursue them further. Record 51-52.

More particularly, petitioner's counsel did not then challenge the participation of Councilor Nelson on grounds of ex parte contacts and partiality, as required by LCZO 9.030(1).[10] Although petitioner now complains that Councilor Nelson admitted on June 22, 1998, to some ex parte contacts and failed to disclose the contents of those contacts, petitioner failed to object to that inadequate disclosure or pursue the issue of contacts or bias in the manner specified by LCZO 9.030(1). Having made that election, petitioner may not raise those issues before LUBA. ORS 197.763(1); see Jones v. Lane County, 28 Or LUBA 193, 197 (1994) (failure to object to completeness of disclosure waives right to pursue ex parte contact before LUBA); Toth v. Curry County, 22 Or LUBA 488, 495 (1991) (same).

Petitioner also objects to two statements by Councilor Nelson during the July 13, 1998 city council deliberations on the challenged ordinance. Petitioner argues that the statements refer to other land use decisions that the councilor had participated in and were based on information that Councilor Nelson necessarily obtained outside the record of this proceeding. Petitioner argues that Councilor Nelson's experiences with other land use decisions constitute ex parte contacts that Councilor Nelson was required to disclose and allow petitioner to rebut. The city responds that the prohibition on ex parte contacts is directed at communications regarding the matter under consideration, and does not necessarily extend to a decision maker's prior experience with other land use decisions. We agree with the city that Councilor Nelson's recollections of prior land use decisions that he has been involved with are not ex parte communications, and therefore such experiences are

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[10]LCZO 9.030(1)(d) provides that:

> "A party to a hearing * * * may challenge the qualifications of a member of the hearing body to participate in the hearing and decision regarding the matter. The challenge shall state the facts relied upon by the challenger relating to the person's bias, prejudgment, personal interest, ex-parte contact or other facts from which the challenger has concluded that the member of the hearing body cannot participate in an impartial manner. The hearing body shall deliberate and vote on such a challenge. The person who is the subject of the challenge may not vote on the motion."

not matters that require disclosure and an opportunity for rebuttal.

B. Councilor Johann

Petitioner also argues that undisclosed ex parte communications occurred with Councilor Johann, based on his comments made at the close of the July 13, 1998 hearing, during deliberations:

> "I've had people contact me, Mr. Mayor, that they thought it was very unfair for a person to put time and efforts and money into a piece of property and then have the rules changed against them and their usage." Record 45.

Petitioner argues that this comment demonstrates that Councilor Johann had ex parte communications that the councilor should have disclosed earlier on the record.[11] Petitioner concedes that the ex parte communication as described is opposed to the rezoning and thus favorable to him, and does not object to the communication itself. However, petitioner argues that he should have been given the opportunity to inquire into whether the councilor had had other, perhaps prejudicial, communications.

The city responds, and we agree, that petitioner has not established that Councilor Johann had ex parte communications other than as described at Record 45. Petitioner merely speculates that where one ex parte communication occurred, others that petitioner would have wanted to rebut might also have occurred. Petitioner's speculations regarding the possibility of other ex parte communications do not provide a basis to reverse or remand the challenged decision.[12]

C. Open Space Bond Measure

Finally, petitioner argues that the entire city council was biased in favor of the rezoning, as evidenced by the fact that at the same August 10, 1998 meeting where the

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[11]We question whether the comments described in the foregoing quote demonstrate that the cited contacts are ex parte communications that give rise to a right of rebuttal. However, for purposes of this assignment of error we assume that they do.

[12]We emphasize that petitioner does not object to the ex parte communications that Councilor Johann disclosed at the July 13, 1998 hearing.

council approved the ordinance challenged in this appeal, the city council also discussed as a separate agenda item a report on a proposed open space bond measure. The report proposes that the city issue bonds allowing the city to acquire property for open space. The first property proposed in the report for acquisition is the subject property, for an estimated value of $319,550. Petitioner argues that the report constitutes an ex parte contact that the city council should have disclosed before voting on the final adoption of the challenged ordinance. As described further in the fourteenth assignment of error, below, petitioner speculates that the city council's primary motivation in adopting the proposed rezoning of his property was to restrict potential development on the subject property in order to drive down the ultimate purchase price the city would have to pay to acquire the property.

The open space bond measure report was prepared by city staff and presented at the request of City Councilor Lori Hollingsworth. Communications between city staff and local decision makers regarding the subject of a land use decision is not an ex parte communication. ORS 227.180(4). A fortiori, communications between city staff and local decisionmakers regarding another matter that touches on the subject of a land use decision is also not an ex parte communication. Petitioner has not established that the city council's consideration of or failure to disclose the report violates ORS 227.180(3) or LCZO 9.030.

The twelfth and thirteenth assignments of error are denied.

FOURTEENTH ASSIGNMENT OF ERROR

Petitioner argues that the city council downzoned the subject property for the purpose of reducing the value of the property in order that the city might acquire it at a reduced cost. Petitioner contends that the resulting loss of value is an unconstitutional taking of private property without compensation, citing to Dolan v. City of Tigard, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994).

The city responds that there is no evidence in the record to support petitioner's theory that the challenged rezoning was motivated by the city's desire to obtain the subject property

at a reduced cost. In any case, the city argues that Dolan, the only authority petitioner cites, has nothing to do with the validity of rezoning property in a way that limits the allowed uses of the property.

We agree with the city that petitioner's constitutional argument is neither well developed nor well taken. Dolan involves the extent to which local governments may exact property from applicants for development approval to offset the impacts of that development, and is not germane to the type of regulatory takings argument that petitioner raises here. To demonstrate that the city has effected a regulatory taking, petitioner must show, inter alia, that the challenged ordinance deprives him of any economically beneficial use of the property. Cope v. City of Cannon Beach, 317 Or 339, 344-45, 855 P2d 1083 (1993). Petitioner retains the ability to build both the previously approved apartment complex as well as single family dwellings under the new zoning. Even assuming that the challenged ordinance resulted in a loss of value, something petitioner has not attempted to demonstrate, that loss of value does not result in loss of all economically beneficial use of the subject property, and does not constitute a regulatory takings. Id.

The fourteenth assignment of error is denied.

The city's decision is remanded.