BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HOMEBUILDERS ASSOCIATION OF
METROPOLITAN PORTLAND,
Petitioner,

vs.

CITY OF PORTLAND,
Respondent.

LUBA No. 99-128

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Anthony J. Motschenbacher, Portland, filed the petition for review. With him on the brief was Nunn, Motschenbacher and Blattner. Anthony J. Motschenbacher and David J. Hunnicutt, Tigard, argued on behalf of petitioner.

Peter A. Kasting, Portland, Senior Deputy City Attorney, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 03/01/2000

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner challenges Ordinance 173593, a legislative amendment to the city's acknowledged zoning ordinance. The challenged ordinance is referred to as the Base Zone Design Standards (BZDS) ordinance, and it adopts amendments to the city's zoning ordinance that restrict design elements of main entrances, garages and street-facing windows of certain residential structures.

FACTS

On October 23, 1998, the city provided notice of a public hearing before the planning commission to consider amendments to the city's zoning ordinance. The October 23, 1998 notice included the following description of the proposal:

> "On November 24, 1998, the Planning Commission will hold a public hearing on proposed amendments to Title 33, Planning and Zoning. The proposal adds standards for houses, manufactured homes, duplexes and attached houses (rowhouses) in all zones that allow residential uses [except certain large-lot zones]. The proposed standards work together to strengthen the visual and physical connection between new residential development and the street. The proposals address:
>
> "► The location and orientation of the main entrance.
>
> "► Windows on the street-facing façade.
>
> "► The width of an attached garage on the street-facing façade.
>
> "► The location of an attached garage relative to the front wall of the residence.
>
> "► Porches and balconies for rowhouses.
>
> "► Driveway spacing for rowhouses.
>
> "The Planning Commission's recommendation will be forwarded to City Council." Record 1903.

At the conclusion of the November 24, 1998 planning commission hearing the written record was held open until November 30, 1998. After the planning commission public

hearing was closed, the planning commission considered the proposal at subsequent meetings on December 8, 1998, December 15, 1998, and January 26, 1999. At its February 9, 1999 meeting, the planning commission directed planning staff to prepare final code language and to return with a revised purpose statement before forwarding the planning commission's recommendation to city council. At its March 23, 1999 meeting, the planning commission approved the revised purpose statement.

The planning commission's proposed zoning ordinance amendments were considered by the city council at a public hearing on June 30, 1999. That public hearing was continued to July 14, 1999. At its July 21, 1999 meeting, the city council approved the BZDS ordinance.

The BZDS ordinance imposes standards that effectively prohibit garage-dominated front façades and impose minimum standards for the area of the front façade that must be made up of windows and doors.[1]

---

[1]The challenged decision imposes the following restrictions on main entrances:

"At least one main entrance must:

"● Be within eight feet of the longest street-facing wall of the dwelling unit, and

"● Face the street or be at an angle of up to 45 degrees from the street. The main entrance does not have to face the street if it opens onto a porch that faces the street." Record 25.

The challenged decision imposes the following restriction on street-facing facades:

"● At least 15 percent of the area of street-facing facades must be windows or doors. [The calculation includes the area of all street-facing windows--except windows in garage doors--and the door at the main entrance if it faces the street.]" *Id*. (Brackets in original.)

The challenged decision imposes the following restrictions on garages:

"● The length of a garage wall facing the street may be up to 50 percent of the total length of the façade. Buildings with a length of 24 feet or less may have a 12-foot long garage if there is living area or a covered balcony above the garage. **This standard will not apply to attached houses.**

THIRD ASSIGNMENT OF ERROR

In 1997, the Oregon Legislature enacted HB 2515. HB 2515 was referred to the voters as Ballot Measure No. 56 (hereafter Measure 56). On November 3, 1998, the voters approved Measure 56, and it became law on December 3, 1998. Petitioner argues the city's decision in this appeal is "void" because the city failed to give written individual notice of hearing to all property owners who are entitled to such notice under section 3 of Measure 56.[2] Petition for Review 24.

> "● A garage wall that faces a street may be no closer to the street lot line than the longest street-facing wall of the dwelling unit. Garage walls that are 40 percent or less of the total length of the street-facing façade may be up to six feet in front of the longest street-facing wall of the dwelling unit if there is a porch. The garage wall can be no closer to the street than the front of the porch." *Id*. (Emphasis in original.)

[2]Measure 56 includes separate sections that require that written individual notice be given to property owners when certain land use legislation is adopted by the legislature, Land Conservation and Development Commission (LCDC), Metropolitan Service District, counties and cities. Section 3 of Measure 56 applies to cities and, as relevant, provides:

> "(2) All legislative acts relating to comprehensive plans, land use planning or zoning adopted by a city shall be by ordinance.
>
> "* * * * *
>
> "(4) At least 20 days but not more than 40 days before the date of the first hearing on an ordinance that proposes to rezone property, *a city shall cause a written individual notice of a land use change to be mailed to the owner of each lot or parcel of property that the ordinance proposes to rezone*.
>
> "(5) An additional individual notice of land use change required by subsection * * * (4) of this section shall be approved by the city and shall describe in detail how the proposed ordinance would affect the use of the property. The notice shall:
>
> "(a) Contain substantially the following language in boldfaced type extending from the left-hand margin to the right-hand margin across the top of the face page of the notice:
>
> "This is to notify you that (city) has proposed a land use regulation that will affect the permissible uses of your land.
>
> "(b) Contain substantially the following language in the body of the notice:
>
> "On (date of public hearing), (city) will hold a public hearing regarding the adoption of Ordinance Number _____. The (city) has determined that adoption of this

The parties dispute whether the challenged decision "rezoned property," within the meaning of subsection 3(9) of Measure 56.[3] Even if the BZDS ordinance does rezone property, within the meaning of subsection 3(9) of Measure 56, the city argues the notice required by subsection 3(4) of Measure 56 is notice of the first public hearing on the proposed legislation that was ultimately adopted by Ordinance 173593. According to the city, that hearing was the planning commission's November 24, 1998 public hearing, not the city council's June 30, 1999 public hearing. On November 24, 1998, Measure 56 was not yet in effect, and the city's failure to provide notice of that hearing in accordance with section 3(4) of Measure 56 was not error. Petitioner argues the city council's June 30, 1999 hearing was the first public hearing on Ordinance 173593. Petitioner contends that because Measure 56 came into effect well before the June 30, 1999 city council public hearing, subsection 3(4) of Measure 56 required notice of that hearing.

We first turn to a more fundamental threshold question that is not addressed by the parties. If subsection 3(4) of Measure 56 applies in the manner petitioner argues that it does,

---

ordinance will affect the permissible uses of your property and may reduce the value of your property."

"* * * * *

"(9) For purposes of [section 3 of Measure 56], property is rezoned when the city:

"(a) Changes the base zoning classification of the property; or

"(b) *Adopts or amends an ordinance in a manner that limits or prohibits land uses previously allowed in the affected zone*.

"* * * * *." (Emphases added.)

[3]The city argues that zoning ordinances generally, and the city's zoning ordinance in particular, identify uses or use categories and also impose approval criteria that must be met to obtain city approval to construct certain allowable uses. The city argues that where an ordinance adopts new or amended approval criteria for allowed uses in a zoning district, without otherwise affecting the zoning ordinance's list of allowed uses, property is not "rezoned" within the meaning of subsection 3(9) of Measure 56.

Petitioner argues that new or amended approval criteria can easily have the effect of limiting or prohibiting land uses that were previously allowed under the zoning ordinance and that "property is rezoned," within the meaning of subsection 3(9) if a new or amended approval criterion "limits or prohibits land uses previously allowed in the affected zone."

the city should have mailed written notice to "the owner of each lot or parcel of property that the ordinance proposes to rezone" prior to the June 30, 1999 city council public hearing. The city admittedly did not do so. However, petitioner does not argue that it is a property owner entitled to receive notice under subsection 3(4) of Measure 56. Even if the city had given the mailed written notice that petitioner argues the city should have given in this case, petitioner does not argue that it would have been entitled to receive that notice. Moreover, petitioner was an active participant in this matter before the city at all levels. In fact petitioner submitted evidence and argument to the city council prior to and during its June 30, 1999 public hearing. In short, petitioner does not allege that its substantial rights were prejudiced in any way by the city's failure to provide mailed written notice of its June 30, 1999 public hearing under section 3(4) of Measure 56, even if such mailed written notice was required.

For a "procedural error" to be reversible by LUBA, it must "[prejudice] the substantial rights of the petitioner." ORS 197.835(9)(a)(B). We have previously held that a local government's failure to provide notice of hearing required by local legislation constitutes a procedural error and could only provide a basis for reversal or remand if a petitioner's substantial rights were prejudiced by that failure. *Woodstock Neigh. Assoc. v. City of Portland*, 28 Or LUBA 146, 151 n 3 (1994); *Apalategui v. Washington County*, 14 Or LUBA 261, 267, *rev'd in part on other grounds*, 80 Or App 508, 723 P2d 1021 (1986). Similarly, in *Lee v. City of Portland*, 57 Or App 798, 806, 646 P2d 662 (1982), the Court of Appeals explained that failure to provide required "notice of any action affecting the livability of the neighborhood" to a neighborhood association as required by city code provides no basis for remand where the neighborhood association fails "to demonstrate any prejudice resulting from the alleged notice violation."

We have also found that failure to provide *statutorily* required notice of hearing constitutes a procedural error and would only provide a basis for reversal or remand if such a failure to provide notice of hearing prejudices the petitioner's substantial rights. *Versteeg v.*

City of Cave Junction, 17 Or LUBA 25, 28-29 (1988). The Oregon Supreme Court and Court of Appeals also view statutory notice of hearing requirements as procedural. *See Warren v. Lane County*, 297 Or 290, 299 n 12, 686 P2d 316 (1984) (describing failure to provide statutory notice of hearing as a "failure of process" and a "procedural error" that would provide a basis for reversal or remand if such failure "prejudiced substantial rights of the petitioner"); *Flowers v. Klamath County*, 98 Or App 384, 388-89, 780 P2d 227 (1989) (same). The city's failure to provide written individual notice in accordance with subsection 3(4) of Measure 56, assuming such notice was required, was a procedural error. Because petitioner does not allege the claimed failure by the city to provide notice in accordance with subsection 3(4) of Measure 56 prejudiced petitioner's substantial rights in any way, its arguments under this assignment of error do not provide a basis for remand.[4]

The third assignment of error is denied.[5]

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the BZDS ordinance violates the Takings Clause of the Fifth Amendment to the United States Constitution.[6] We understand petitioner to argue that the

---

[4]We note that the Court of Appeals in *Oregon City Leasing, Inc. v. Columbia County*, 121 Or App 173, 177, 854 P2d 495 (1993) held that failure to comply with ORS 197.610(1) and ORS 197.615(1) constitutes a substantive error rather than a procedural error. However, neither of those statutes addresses notices of hearing. ORS 197.610(1) requires that local governments forward proposals to amend an acknowledged comprehensive plan or land use regulation to the director of the Department of Land Conservation and Development (DLCD) before the final hearing on adoption. ORS 197.615(1) requires that local governments forward copies of amendments to an acknowledged comprehensive plan or land use regulation to the director of DLCD after they are adopted. Neither of those statutes are at issue in this appeal. The Court of Appeals' conclusion that those statutes impose substantive requirements appears to have been based on the integral role they play in assuring DLCD involvement in the post-acknowledgement process that leads to new and amended plans and land use regulations being deemed acknowledged under ORS 197.625.

[5]Our disposition of the third assignment of error makes it unnecessary for us to resolve petitioner's pending motion to take judicial notice of certain legislative committee minutes, which the city opposes.

[6]The Takings Clause of the Fifth Amendment states:

"[N]or shall private property be taken for public use, without just compensation."

The Takings Clause is made applicable to the states by the Fourteenth Amendment. *Nollan v. California Coastal Comm'n*, 483 US 825, 827, 107 S Ct 3141, 97 L Ed 2d 677 (1987). Petitioner also asserts that the

BZDS ordinance is unconstitutional on its face. Accordingly, the challenge is ripe for review. *Cope v. City of Cannon Beach*, 317 Or 339, 342, 855 P2d 1083 (1993).

In *Agins v. Tiburon*, 447 US 255, 260, 100 S Ct 2138, 65 L Ed 2d 106 (1980), the Supreme Court of the United States explained that a land use regulation:

> "effects a taking if the ordinance does not substantially advance legitimate state interests * * * or denies an owner economically viable use of his land[.]"

Petitioner's argument under the first assignment of error is based entirely on the first prong of the *Agins* test, *i.e*. that "the ordinance does not substantially advance legitimate state interests."[7]

Petitioner argues that the purpose of the BZDS ordinance, which petitioner describes as ensuring that residents are "connected to the public realm," is not a legitimate state interest. Petitioner contends that the BZDS ordinance is not "aesthetic zoning," which petitioner characterizes as "among the furthest reaches of valid exercise of police power." Petition for Review 5. Even if aesthetic zoning does constitute a legitimate state interest, petitioner argues that the challenged decision does not substantially advance that interest.

We first consider whether the BZDS ordinance was adopted pursuant to a legitimate state interest before considering whether the BZDS ordinance substantially advances a legitimate state interest.

A. Existence of a Legitimate State Interest

1. Aesthetic Zoning

The city first disputes petitioner's arguments that the challenged ordinance was not adopted, in part, to address aesthetic concerns.[8] The city contends that aesthetic objectives

---

BZDS ordinance violates Article I, section 18, of the Oregon Constitution. However, petitioner makes no arguments in support of its Article I, section 18 claim, and we do not consider that claim further.

[7]Petitioner makes no attempt to describe the protected property interest that it believes the BZDS ordinance takes. *Ruckelshaus v. Monsanto Co*., 467 US 986, 1001, 104 S Ct 2862, 2871-72, 81 L Ed 2d 815 (1984). For purposes of this opinion we assume, without deciding, that there may be such a protected property interest.

[8]The BZDS ordinance includes the following explanation for why the standards are needed:

are a proper basis for regulation under the police power and therefore are a legitimate state interest. The city argues that the ordinance includes findings that demonstrate that "aesthetic objectives are a major motivation for the BZDS ordinance."[9] Respondent's Brief 3-4. We agree with the city that the cited findings are sufficient to demonstrate that the BZDS ordinance was adopted, in part, to further aesthetic concerns. We turn to the question of whether aesthetic concerns may constitute a legitimate state interest.

If aesthetic concerns are within the city's police power, it necessarily follows that such aesthetic concerns are a legitimate state interest. The appellate courts in this state have long recognized that local governments may adopt land use regulations for aesthetic

---

> "People have expressed concern that some * * * new development does not have a positive influence on the livability and safety of surrounding neighborhoods. Many of these new homes do not have a visual or physical connection to the public realm because they have some, or all, of the following characteristics:
>
> "● Front facades that are dominated by the garage;
>
> "● Living areas that are set behind the garage;
>
> "● Main entrances that are not as prominent as the entrance to the garage;
>
> "● Main entrances that are set so far back that the front door is obscured from the street; and
>
> "● Street-facing facades that have very few, or no, windows.
>
> "These design characteristics do not promote community life or enhance neighborhood safety. Residents are not able to visually survey the activities occurring around their houses and they are less likely to interact with their neighbors." Record 24 (emphasis omitted).

[9]The following findings are illustrative:

> "The amendments * * * address building characteristics that the public has identified as subtracting from livability, such as dominance of the automobile on the streetscape and lack of connection between the living areas of homes and the public realm." Record 11.
>
> "The amendments [will] create a pleasant pedestrian experience by reducing the dominance of the automobile on street-facing facades of houses, attached houses, and duplexes." Record 15.
>
> "The amendments * * * will improve the attractiveness of houses, attached houses and duplexes by reducing the dominance of the automobile on street-facing facades and providing more of a connection between the living area of the home and the public realm." Record 16.

purposes. In *Hartke v. Oregon City*, 240 Or 35, 46-49, 400 P2d 255 (1965), the Oregon Supreme Court reviewed the growing judicial acceptance of zoning "to prevent or minimize discordant and unsightly surroundings." In *Hartke* the court concluded "that aesthetic considerations alone may warrant an exercise of the police power." 240 Or at 49. The court ultimately concluded that the ordinance at issue in that appeal, which wholly excluded automobile wrecking yards from the city, was "a valid exercise of the police power." 240 Or at 50. *See also Miller v. Columbia River Gorge Commission* 118 Or App 553, 556, 848 P2d 629 (1993) (under both federal and Oregon case authority construing the takings provisions of the federal and state constitutions, the police power encompasses the authority to regulate land, *inter alia*, for aesthetic purposes and for purposes of channeling development to existing urban areas).

We find petitioner's attempts to distinguish the legislation at issue in *Hartke* from the BZDS ordinance to be unpersuasive. If the City of Oregon City acts within its police power in excluding automobile wrecking yards from the city altogether, based on aesthetic considerations, the city here acts within its police power to prohibit certain design features that the city finds objectionable, in part, on aesthetic grounds.[10]

---

[10]We note that petitioner argues that the sole source of authority for the BZDS ordinance is "Article 1, Section 2-105(a) 1 of Portland's City Charter [which] grants to the City 'power and authority to exercise within the City and City-owned property, all the power commonly known as the police power * * *.' Petition for Review 4. Petitioner argues the city's authority to adopt the BZDS ordinance must "be placed within the parameters of the City's police power as granted within its charter." *Id*.

Because we agree with the city that the BZDS ordinance is clearly within the city's "police power" and the city does not dispute petitioner's argument, we need not and do not address petitioner's police power argument at length, except to note our disagreement with the argument. *See City of Hillsboro v. Purcell*, 306 Or 547, 551, 761 P2d 510 (1988) (city authority to enact anti-solicitation ordinance is not limited to police power); Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 Or L Rev 125, 146-158 (1970) (criticizing use of the term police power to describe legislative power). The city's authority to adopt legislation such as the BZDS ordinance is governed in large part by state statute. For example, the city is directed by ORS 197.175(2) to adopt comprehensive plans and land use regulations in compliance with the statewide planning goals. The statewide planning goals require that the city consider a broad range of planning issues. The statutory definition of "comprehensive plan" at ORS 197.015(5) is exceedingly broad. ORS 227.215(2) specifically authorizes the city to regulate "development," which is defined by ORS 227.215(1) as follows:

2. Public Safety and Alternative Transportation

The city also claims the BZDS ordinance was adopted in part to address public safety concerns and to further alternative transportation goals. Petitioner does not dispute that these are legitimate public purposes that the city may address through its comprehensive plan and land use regulations. Petitioner does challenge the city's claim that the BZDS ordinance substantially advances those public purposes. We address that challenge below.

This subassignment of error is denied.

B. Substantially Advance a Legitimate State Interest

In *Cope,* 317 Or at 345, the Oregon Supreme Court found that the connection between the regulation and legitimate governmental interests that is required by the first prong of the *Agins* test was met by an ordinance that prohibited transient occupancy in certain residential zones. The court explained

> "We first ask whether the challenged regulation substantially advances legitimate governmental interests. [The regulation] was adopted by the city as an amendment to its comprehensive plan for community development. Goals of the comprehensive plan include the provision of affordable housing for permanent residents and the preservation of the residential character of certain neighborhoods. In a 1991 study, the city's planning commission determined that, by encouraging the construction and ownership of housing units intended for the transient occupancy market, the 1987 ordinance permitting those rentals had diminished the availability of affordable housing for permanent residents. The planning commission also determined that the presence of transient occupants in residential zones adversely affected the 'character' and 'integrity' of residential areas by, for example, resulting in increased traffic and noise levels in those areas. The planning commission concluded that permitting transient occupancy of dwelling units in residential zones had 'substantial' and 'unmitigatable' adverse impacts on those zones that were

---

> "As used in this section, 'development' means a building or mining operation, *making a material change in the use or appearance of a structure or land*, dividing land into two or more parcels, including partitions and subdivisions * * *." (Emphasis added.)

ORS 227.020 authorizes the city to create a planning commission. Among other things, ORS 227.090(1)(b)(D) grants the planning commission power to "[r]ecommend to the council and other public authorities plans for regulating the future growth, development and beautification of the city in respect to its public and private buildings * * *."

> 'inconsistent' with the purposes of the city's comprehensive plan. In response to those concerns, the city adopted [the regulation].
>
> "We conclude that [the regulation] substantially advances legitimate governmental interests. * * *." (Footnotes and citations omitted.)

We conclude that a similar connection is present here and that it is sufficient to comply with the requirement under *Agins* that the BZDS ordinance substantially advance legitimate state interests. The city is not required under *Agins* to establish in advance that the BZDS ordinance will in fact result in more livable or aesthetically pleasing residential neighborhoods. Rather, the city is obligated to establish that the challenged regulations substantially advance a legitimate governmental interest. *See Monterey v. Del Monte Dunes*, 526 US ___, 119 S Ct 1624, 143 L Ed 2d 882 (1999) (in considering Fifth Amendment takings claims, U.S. Supreme Court cases have not provided "a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions," *citing Nollan v. California Coastal Comm'n*, 483 US at 834-35 n 3); *Dolan v. City of Tigard*, 512 US 374, 391 n 8, 114 S Ct 2309, 129 L Ed 2d 304, 320 n 8 (1994) (distinguishing the essential nexus that is required under the Fifth Amendment for exactions and the requirement that land use legislation substantially advance a legitimate state interest in other contexts and noting that outside the "exactions" context a party challenging land use legislation must prove that the legislation "constitutes an arbitrary regulation of property rights").[11] The BZDS ordinance directly regulates the design features that the city has determined negatively affect identified aesthetic and livability concerns and, therefore, substantially advances the aesthetic and livability concerns cited by the city. *See* n 9.

---

[11]We note that following *City of Monterey v. Del Monte Dunes* and *Eastern Enterprises v. Apfel*, 524 US 498, 118 S Ct 2131, 141 L Ed 2d 457 (1998) the validity and nature of the means-ends inquiry under the first prong of *Agins* and whether that prong actually provides an independent basis for invalidating a land use regulation as a taking under Fifth Amendment outside the "exaction" context is somewhat uncertain. Neither party addresses the question. For purposes of this opinion, we assume that if the challenged ordinance does not comply with the first prong of *Agins*, it would constitute an invalid takings under the Fifth Amendment.

The city also argues the challenged decision can be affirmed because it substantially advances the city's legitimate interest in improving public safety and encouraging alternative transportation modes. As noted earlier, petitioner does not dispute that those interests constitute legitimate state interests under *Agins*, but does dispute the city's contention that the BZDS ordinance substantially advances those interests.

Looking first at public safety, the city cites the following findings which identify how the city believes the BZDS ordinance promotes public safety.

> "**Policy 11.60, Crime Prevention,** calls for reducing citizen fear of and susceptibility to crime through increasing awareness of crime prevention methods and involving the entire community in crime prevention programs. The amendments support this policy by ensuring that houses, attached house, and duplexes have a connection to the public realm. The standards increase neighborhood safety by ensuring that:
>
> "(a) The main entrance is clearly identifiable from the street to allow ease of access for emergency services, such as police or fire, and to increase safety for visitors and residents when entering the house or answering the door.
>
> "b) There is a minimum amount of windows on street-facing facades. As shown in Exhibit B: Testimony from Charles Moose, Chief of Police, Portland Bureau of Police, windows on street-facing facades provide the opportunity for neighbors to keep an eye on the street and sidewalk from inside their residences; this contributes to neighborhood safety and livability.
>
> "c) The garage does not create a physical barrier between the living area and the public realm that blocks views of the street from inside the residence." Record 15-16.

The record includes a letter from the city chief of police in which he takes the position that the BZDS ordinance would increase "eyes on the street" and thereby deter criminal activity. Record 181-82. The chief of police's letter also takes the position that "[c]rime is lowest in buildings that have the most visibility and the best surveillance based on building orientation and street location." *Id*. The letter also cites a document entitled "Crime Prevention

Through Environmental Design: Why regulate main entrances, windows and garages?" Record 757-62.

Petitioner argues that the BZDS ordinance will not actually achieve the desired public safety goals for a number of reasons.[12] Petitioner's disagreement with the city about whether the BZDS ordinance will actually achieve the desired objectives is based on the kind of arguments over which reasonable persons can disagree and which are clearly within the city's legislative discretion. We agree with the city that the BZDS ordinance has the nexus required by *Agins* with the city's legitimate interest in securing public safety and preventing crime.

The city also found that the BZDS ordinance would foster alternative modes of transportation. The city's central thesis is that the BZDS ordinance will reduce the dominance of the automobile on street-facing facades and thereby make residential neighborhoods more inviting to pedestrians, with the ultimate result of reducing auto trips.

Again, while petitioner disagrees with that thesis, the findings cited by the city that express that view are adequate to establish that the BZDS ordinance will substantially

---

[12]Petitioner's arguments include the following:

> "The City makes many statements generally suggesting that garages create a barrier between the living area of a house and the public realm. So to alleviate this perceived problem, the City requires that garages be limited in width and may only protrude eight feet from the body of the house. There is no evidence that narrow garages or garages protruding only eight feet encourage connected-ness. On the contrary, limiting garage width will inevitably result in additional cars being parked either in the driveway or on the street which would actually further obstruct the view of the street as seen from the living area of a home." Petition for Review 10 (citations omitted).

> "[T]he record includes a discussion of visibility and 'real and territorial barriers'. [T]he effectiveness of visibility is limited by the requirement that a person must [be] present to perform the surveillance, and, in the case of the window requirement, keep their blinds open. These are requirements for which the BZDS makes no provision, and therefore the interest cannot be substantially advanced. In addition, the idea of real and territorial barriers is actually hindered by the BZDS. * * * A garage placed in the front of a home, between the living space and the public, is the ultimate real barrier. It is a real barrier that operates regardless of whether the occupant is home. It prevents potential criminals from looking into a home to survey its contents or occupants. It creates a private, quiet living area, sheltered behind it. * * *" Petition for Review 12.

advance a legitimate city interest in encouraging the pedestrian environment and reducing vehicular trips.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues the BZDS ordinance violates Statewide Planning Goal 10 (Housing), Land Conservation and Development Commission rules adopted to implement Goal 10 and a number of city comprehensive plan provisions.

A. Goal 10 and OAR Chapter 660, Division 8

Amendments to acknowledged land use regulations must comply with the statewide planning goals. ORS 197.175(2)(a). Goal 10 provides, in part:

> "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."

One of the stated purposes of LCDC's Goal 10 interpretive rule is "to provide greater certainty in the development process so as to reduce housing costs." OAR 660-008-0000(1). OAR 660-008-0015 requires that land use regulations imposed on development of "needed housing must be clear and objective, and must not have the effect, either of themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

Petitioner argues the BZDS ordinance violates the above Goal 10 and rule requirements because (1) it will significantly increase housing costs and (2) it will discourage "flexibility of housing location, type, and density." We address these arguments separately below.

1. Increased Cost

The record includes a study that identifies nine BZDS ordinance features that have potential financial impact on new home construction. Petitioner points out that six of these nine features result in estimated cost increases ranging from $361 to $9,880. Petitioner

argues that if the BZDS ordinance is applied "to a scenario with a narrow lot, an angled front door, and a tandem garage, the estimated additional cost is $15,942 according to the City's own study." Petition for Review 15.[13] Petitioner argues that this unreasonable cost increase violates Goal 10 and OAR 660-008-0015. Petitioner further argues that the impact of this cost increase is all the more serious because the city estimates that 4,000 to 4,700 houses will be constructed in the city over the next 20 years on small vacant infill sites. *Id.*[14]

The city responds that the issue of potential costs associated with the BZDS ordinance was debated extensively during the proceedings before the city. The study cited earlier by petitioner includes a discussion of cost impacts:

> "Regarding costs, this study shows that although some of the Base Zone Design standards create slight cost savings, several will contribute modest additional costs to houses. In looking at likely combinations of the Base Zone Design standards, the additional costs will run between .3% and 1.6%. For a more atypical narrow lot unit, the costs could be higher, more like 6%. The concern over the costs of narrower garage doors is completely unfounded, as the study demonstrates, and in fact there will be cost savings because of shorter headers, etc.
>
> "* * * * *
>
> "In conclusion, the costs of the BZD standards are small compared to the added benefits to housing quality, community safety and livability." Record 1600-01.

The city also cites the following testimony by an architect:

> "I am * * * a representative of the Designed Infill Task Force. This task force is a group of architects, planners, market analysts and professors who, with neighborhood input, are developing community friendly alternatives to infill development.
>
> "* * * * *

---

[13]Petitioner contends that this cost increase represents an added cost of $42,267.60 over the life of a 30-year, eight percent mortgage.

[14]Petitioner also notes a letter in the record from a bank official that takes the position that the BZDS ordinance would have increased costs and prevented development of a particular project under a housing assistance program that imposes a $140,950 purchase price limit.

"If you will remember, after I read my last testimony, I commented quite passionately on the fact that these guidelines would not increase the cost of building a house by $10,000 - $16,000. And, that in fact, there were a number of decreases that would balance out any potential increases. The following is a brief explanation of the key points.

"● The entry door: A door is a door is a door, regardless of where it is located. A side door **costs the same** as a front door.

"● The increase from 8% to 15% in the amount of windows in the front elevation: This would **possibly involve an increased cost** with the addition of more windows. However, there is the potential for the builder / developer to relocate windows that were once on the side to the front of the house. Although this is not the intent of the code, it is allowed and will probably be exploited by the building community. Therefore, **the potential for no cost increase also exists**.

"● The relationship of garage front to entry door: 'Pulling' the garage back and including it with the rest of the house **creates a great cost savings**. There is less footing, foundation wall and excavation required. The amount of exterior wall is reduced. That means less siding, vapor barrier, sheathing, insulation and roofing materials.

"● The addition of a porch in certain circumstances. This will **lead to an increase in construction cost** but it is **minimized** by only having to be 30% covered. The above mentioned cost savings related to garage location outweighs the extra requirements for a porch.

"● There are **some minimal increases** which include an extra layer of wall board between the garage and interior rooms and the potential for a longer driveway depending on the house to street location. But again the savings created can more than cover these expenditures as well.

"Overall, the new guidelines will not significantly increase the cost of a house as was suggested. As with everything, thoughtful design is the key. I have included a number of options to help you better envision what these new homes could look like. * * *" Record 213-214 (emphasis in original).

The city also cites other testimony of the Executive Director of Portland Community Design who claimed to have constructed "hundreds of new homes over the last eight years" that were consistent with the BZDS ordinance and were "affordable to individuals at 80% or less of Median Family Income." Record 317.

The provisions of Goal 10 and OAR chapter 660, division 8, cited by petitioner, require that the city consider the financial impact of land use regulation amendments that may increase housing costs and ensure that the amendment will not "discourage needed housing through unreasonable cost or delay." The evidence cited by the city in its brief demonstrates that the city did so here. We believe a reasonable person could conclude from that evidence, as the city did, that the BZDS ordinance will "not significantly increase the cost of housing construction." Record 10. With regard to the possibility that particular house plans for particular lots may be significantly more expensive under the BZDS ordinance, we agree with the city that "Goal 10 does not require that every conceivable house plan be held harmless from increased costs." Respondent's Brief 15. The evidence cited by the city is adequate to demonstrate that to the extent the BZDS ordinance could increase costs, those increased costs can be avoided or minimized and that there are many existing house plans that comply with its requirements. Goal 10 and OAR 660-008-0015 do not require more.

This subassignment of error is denied.

2. Housing Type Flexibility

As noted earlier in this opinion, Goal 10 includes a requirement that the city "allow for flexibility of housing location, type and density." Petitioner notes that a review of permit applications submitted during one week in November 1998 showed that over half of the applications would not have complied with the BZDS ordinance. Petitioner argues the BZDS ordinance discourages "flexibility of housing type," and thereby violates Goal 10.

The city responds that the cited language in Goal 10 protects flexibility of housing "type," not "particular house designs or plans." Respondent's Brief 19. The city contends that while some persons may prefer house plans that conflict with the BZDS ordinance, that "does not mean that the 'range of housing *types*' has been impermissibly constrained within the meaning of Goal 10." *Id* (emphasis in original).

Goal 10 does not define "housing type," and we are aware of no universally accepted breakdown of housing types.[15] Nevertheless, we generally agree with the city that petitioner has not demonstrated that the flexibility of housing "type" required by Goal 10 extends to protect the particular design features at issue in this appeal. It may be that a local government could so heavily regulate the permissible design of dwellings that the requirement for flexibility of housing "type" under Goal 10 could be violated. However, petitioner does not demonstrate that such is the case here.

This subassignment of error is denied.

B. Comprehensive Plan Requirements

LUBA is required to reverse or remand an amendment to a land use regulation if the amendment does not comply "with the comprehensive plan." ORS 197.835(7)(a). Petitioner argues the BZDS ordinance does not comply with a number of comprehensive plan provisions.

1. Plan Policy 2.9

The city adopted the following findings addressing Plan Policy 2.9:[16]

> "**Policy 2.9, Residential Neighborhoods,** calls for allowance of a range of housing types to accommodate increased population growth while improving and protecting the city's residential neighborhoods. The amendments are consistent with this goal because the standards will ensure that houses, duplexes and attached houses improve the safety and community of the surrounding neighborhood while still allowing a range of house sizes, architectural styles, and floor plans. The amendments are tools for addressing

---

[15]The city argues that:

> "* * * Portland City Code Chapter 33.910 identifies the following residential structure types: Accessory Dwelling Unit; Attached Duplex; Attached House; Duplex; Dwelling Unit; Group Living Structure; House; Houseboat Moorage; Mobile Home; Multi-Dwelling Development; Multi-Dwelling Structure; Single Room Occupancy Housing * * *." Respondent's Brief 19.

[16]Plan Policy 2.9 provides:

> "Allow for a range of housing types to accommodate increased population growth while improving and protecting the city's residential neighborhoods."

community concerns that infill and redevelopment have a negative impact on neighborhood livability. The standards will improve and protect the livability of residential neighborhoods." Record 11.

Petitioner argues the BZDS ordinance violates Plan Policy 2.9 because it "limits the range of housing types" by imposing standards that "severely restrict and hinder the possibilities of design and affordability." Petition for Review 19.

The standard imposed by Plan Policy 2.9 mirrors the requirement of Goal 10 discussed above, except that it also requires the city to improve and protect residential neighborhoods. Like Goal 10, Plan Policy 2.9 protects housing types; it does not protect individual house styles or designs. Moreover, as the city notes, the record shows a variety of existing housing designs meet the BZDS ordinance requirements.

This subassignment of error is denied.

2. Plan Policy 2.19

The city adopted the following findings addressing Plan Policy 2.19:[17]

"**Policy 2.19**, **Infill and Redevelopment**, calls for encouraging infill and redevelopment as a way to implement the Livable City growth principles and accommodate expected increases in population and employment. The amendments are consistent with this goal because they address building characteristics that the public has identified as subtracting from livability, such as dominance of the automobile on the streetscape and lack of connection between the living areas of homes and the public realm. As the city grows, it will be necessary to accommodate growth into existing neighborhoods. These standards will help the city accommodate future growth without eroding the livability of individual neighborhoods." Record 11.

Petitioner argues that Plan Policy 2.19 is violated because, rather than encourage infill, the BZDS ordinance discourages infill by increasing housing costs.

---

[17]Plan Policy 2.19 provides:

"Encourage infill and redevelopment as a way to implement the Livable City growth principles and accommodate expected increases in population and employment. Encourage infill and redevelopment in the Central City, at transit stations, along Main Streets, and as neighborhood infill in existing residential, commercial and industrial areas."

Petitioner does not argue that the city improperly favored livability concerns over encouraging infill. Petitioner's argument focuses exclusively on the requirement to encourage infill and does not recognize the livabilty component of Plan Policy 2.19. Plan Policy 2.19 encourages both infill and "Livable City growth principles." The policy does not impose an absolute policy favoring infill. It also does not prohibit city regulations that may prevent certain house designs on infill lots, where those house designs are determined to negatively impact livability. As the city notes, the BZDS ordinance is no impediment at all to developers who wish to build houses without dominant garages on infill lots.

This subassignment of error is denied.

3. Plan Goal 3

The city adopted the following findings addressing Plan Goal 3:[18]

> "**Goal 3, Neighborhoods,** calls for preservation and reinforcement of the stability and *diversity* of the city's neighborhoods while allowing for increased density. The amendments are consistent with this goal because they address building characteristics that the public has identified as subtracting from livability, such as dominance of the automobile on the streetscape and lack of connection between the living areas of homes and the public realm. As the city grows, it will be necessary to accommodate growth into existing neighborhoods. These standards will help the city accommodate future growth without eroding the livability of individual neighborhoods." Record 11 (emphasis added).

Petitioner argues the city's findings fail to address the "diversity" requirement of Plan Goal 3. Petitioner argues that by severely restricting housing design the city has violated its obligation under Plan Goal 3 to reinforce diversity.

The city argues in its brief that the "diversity" referred to in Plan Goal 3 is "described in terms of age, income, race and ethnic background of the neighborhood's residents."[19]

---

[18]Plan Goal 3 provides:

> "Preserve and reinforce the stability and diversity of the City's neighborhoods while allowing for increased density in order to attract and retain long-term residents and businesses and insure the City's residential quality and economic vitality."

Respondent's Brief 23. According to the city Plan Goal 3 requires a diversity of people, not a diversity of housing designs or styles.

The city's decision does not interpret the word "diversity" in Plan Goal 3. Therefore we have no interpretation that we must defer to under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). Nevertheless, we agree with the city's explanation in its brief regarding the intended meaning of the word "diversity" in Plan Goal 3. Plan Goal 3 does not require diversity of housing designs.

This subassignment of error is denied.

4. Plan Goal 4

The city adopted the following findings addressing Plan Goal 4:[20]

> "**Goal 4, Housing,** calls for enhancing Portland's vitality as a community at the center of the region's housing market by providing housing of different types, tenures, density, sizes, costs and locations that accommodates the needs, preferences, and financial capabilities of current and future households. The amendments are consistent with this goal because they ensure that houses, attached houses and duplexes have a connection to the public realm by reducing the dominance of the garage on street-facing facades. The standards respond to the public's preference for neighborhoods where the automobile is subordinate to the living areas of homes and people can easily interact with their neighbors as expressed in the results of the Visual Preference Survey, 1993.
>
> "The standards are also flexible and provide for a wide range of house sizes, architectural styles, and floor plans. They take into account the preference many people have for an attached garage by allowing every building to have a

---

[19]The city argues in its brief that this meaning is made clear by Plan Policy 3.3, which follows Goal 3 and provides:

> "Promote neighborhood diversity and security by encouraging a diversity in age, income, race and ethnic background within the City's neighborhoods."

[20]Plan Goal 4 provides:

> "Enhance Portland's vitality as a community at the center of the region's housing market by providing housing of different types, tenures, density, sizes, costs, and locations that accommodate the needs, preferences, and financial capabilities of current and future households."

> 12 foot wide attached garage (typical single car garage). On houses less than 24 feet long, a covered balcony or living area must be provided over the garage. This is the typical design of attached houses and narrow houses currently being built. Houses 40 feet or longer can have a 20 foot long garage (typical side-by-side double car garage). In addition, other ways to accommodate parking, such as garages behind the house or tandem parking with access from a single car garage door are not affected by these amendments." Record 12.

Petitioner argues that the above findings interpret Plan Goal 4 as being met, notwithstanding the fact that persons who wish to construct a house that is less than 24 feet long with an attached garage must provide a covered balcony or living area on top of the garage. Petitioner argues the extra cost required to meet this requirement very likely places the house outside "the financial capabilities of many households. Petitioner argues this fails to accommodate "the preferences of current and future households." Petition for Review 21. Petitioner argues the city's interpretation is "clearly wrong."

The city argues that Plan Goal 4 addresses housing "types," not particular designs of a particular type of housing. Moreover, to the extent Plan Goal 4 does address housing design, the city argues that there was significant testimony by persons who oppose the design features that are restricted by the BZDS ordinance. The city cites testimony that questions whether persons actually prefer houses with dominant garages or have no other choice because there are few houses being constructed at this time that do not have these design features. The city does not dispute that the record shows a significant number of houses that would not meet the BZDS ordinance requirements have been built and sold in the past. However, the city argues that fact alone does not demonstrate household "preferences" for those designs that must be protected under Plan Goal 4.

Even if some households may prefer houses with dominant garages, the city clearly, albeit implicitly, does not interpret Plan Goal 4 to require that the city provide every housing style that an identifiable segment of "households" may prefer. That interpretation is not inconsistent with the language of Plan Goal 4 and is well within the city's interpretive

discretion under ORS 197.829(1) and *Clark*. Petitioner argues that our review of the city council's interpretations of its comprehensive plan is not governed by ORS 197.829(1) and *Clark* because this is a legislative proceeding rather than a permit proceeding and "tens of thousands of homeowners in Portland" are affected. Petition for Review 19. Petitioner is incorrect about our standard of review. The interpretive discretion the city is extended under *Clark* is based on the city council's presumed "better understanding" of the intended meaning of the legislation it adopts and the city council's political accountability for that legislation. *Gage v. City of Portland*, 319 Or 308, 316-17, 877 P2d 1187 (1994). Deference under *Clark* and ORS 197.829(1) has nothing to do with the nature of the decision in which the city council expresses its interpretation or nature of the proceeding in which the interpretation is rendered.

This subassignment of error is denied.

5. Plan Policy 4.11

The city adopted the following findings addressing Plan Policy 4.11:[21]

> "**Policy 4.11, Housing Affordability,** calls for promoting the development and preservation of quality housing that is affordable across the full spectrum of household incomes. The amendments support this policy because they do not significantly increase the cost of housing construction for the following reasons:
>
> "a) The standards, with their exceptions, allow a great deal of flexibility in their application. Some design solutions that meet the standards are less expensive than others; this allows the developer to make the appropriate decision.
>
> "b) The standards will not allow houses built today that are dominated by the garage. However, there are homes being built in Portland and the metropolitan area that meet the standards. Stock plans are available for some of these homes.

[21]Plan Policy 4.11 provides:

> "Promote the development and preservation of quality housing that is affordable across the full spectrum of household incomes."

"c) Objective development standards are a cost effective way to regulate design because they are administered through the existing plan check procedures and add minimum time and cost to the permitting process." Record 12-13.

Petitioner argues the BZDS ordinance will admittedly increase the cost of certain housing designs. For some designs, in certain circumstances, the cost increase may be significant. Petitioner argues this violates Plan Policy 4.11.

The city responds that in amending its land use regulations in conformance with its comprehensive plan, the city must consider a number of competing plan goals. *Waker Associates, Inc. v. Clackamas County*, 111 Or App 189, 194, 826 P2d 20 (1992). Therefore, while Plan Policy 4.11 requires that housing affordability be considered, other plan goals such as those calling for public safety and livability must also be considered. As we have already noted, cost impacts were considered by the city. The city points out that the scope and cost impact of the regulations challenged in this appeal were reduced over the course of deliberations on the legislation. The city also identifies particular amendments that were included to add development flexibility and minimize costs. Petitioner's argument focuses exclusively, and improperly, on the potentially significant impact the BZDS ordinance may have in particular circumstances and ignores the discussion in the above-quoted findings about features that were incorporated to reduce the cost impact of the BZDS ordinance. *Waker Associates, Inc.*, 111 Or App at 194.

This subassignment of error is denied.

6. Plan Policy 6.15

The city adopted the following findings addressing Plan Policy 6.15:[22]

[22]Plan Policy 6.15 provides:

"Manage the supply, operations and demand for parking and loading in the public right-of-way to encourage economic vitality, traffic safety, and livability of residential neighborhoods. Parking in the right-of-way, in general, should serve land uses in the immediate area. Maintain existing on-street parking in older neighborhoods where off-street parking is inadequate. Parking for individuals, or at specific locations, is not guaranteed by this policy.

> "**Policy 6.15, On-Street Parking Management,** calls for managing the supply, operations and demand for parking and loading in the public right-of-way to encourage economic vitality, traffic safety, and livability of residential neighborhoods. The amendments are not inconsistent with this policy because they do not change the required minimum off-street parking requirements for houses, attached houses or duplexes." Record 14.

Petitioner argues that "[b]y limiting the size of garages the BZDS will adversely affect the availability of on-street parking by placing additional vehicles [in the street] that would otherwise be in garages[.]" Petition for Review 21.

Although the BZDS ordinance clearly will affect the permissible design and placement of garages, the findings explain that the existing requirements for off-street parking are not affected by the BZDS ordinance. In view of that unchallenged finding, we fail to see how Plan Policy 6.15 is violated by the BZDS ordinance.

7. Plan Policies 4.1, 4.10 and 4.12

Petitioner argues that Plan Policies 4.1, 4.10 and 4.12 were not addressed in the city's findings.[23] Petitioner argues that those plan policies are violated due to increased housing

---

> However, the City should act to protect parking, first for residents and second for customers and visitors."

[23]Plan Policy 4.1 provides:

> "Ensure that an adequate supply of housing is available to meet the needs, preferences, and financial capabilities of Portland's households now and in the future."

Plan Policy 4.10 provides:

> "Promote creation of a range of housing types, prices, and rents to 1) create culturally and economically diverse neighborhoods; and 2) allow those whose housing needs change to find housing that meets their needs within their existing community."

Plan Policy 4.12 provides:

> "Ensure that a range of housing from temporary shelters, to transitional, and to permanent housing for renters and owners is available, with appropriate supportive services for those who need them."

costs for certain housing designs, failure to allow housing designs that some households prefer, and failure to encourage production of a variety of housing types.

Where a legislative decision such as the one challenged in this appeal is alleged to violate comprehensive plan policies, and the decision does not include findings addressing those policies, we rely on the respondent to explain in its brief why the cited plan policies are not violated. *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 560, 564 (1994); *Von Lubken v. Hood River County*, 22 Or LUBA 307, 314 (1991).

The city points out that the arguments petitioner advances under these plan policies duplicate arguments it presents under Goal 10, OAR chapter 660 division 8 and the plan goals and policies discussed above. Petitioner does not argue that the plan policies cited in this subassignment of error impose obligations in addition to those imposed by the goal, rule and plan provisions that we have already discussed, and we do not see that they do. We reject petitioner's arguments under these plan policies for the same reasons we rejected those arguments above.

This subassignment of error is denied.

The city's decision is affirmed.