BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CYNDIE DOUGLAS,
Petitioner,

vs.

CITY OF LAKE OSWEGO,
Respondent,

and

ALBERTSON'S, INC.,
Intervenor-Respondent.

LUBA No. 99-137

FINAL OPINION
AND ORDER

Appeal from City of Lake Oswego.

Meg Reinhold, Lake Oswego, filed the petition for review and argued on behalf of petitioner.

David D. Powell, City Attorney, Lake Oswego, filed the response brief and argued on behalf of respondent.

John W. Shonkwiler, Tigard, filed the response brief and argued on behalf of intervenor-respondent.

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

AFFIRMED 03/24/2000

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioner appeals a decision by the city council to rezone property from Low Density Residential (R-7.5) to General Commercial (GC) to allow the expansion of a grocery store parking lot.

MOTION TO INTERVENE

Albertsons, Inc. (intervenor) moves to intervene on the side of respondent.[1] There is no opposition to the motion, and it is allowed.

FACTS

Intervenor owns and operates a retail grocery store on property located at the intersection of Boones Ferry Road and Firwood Road in Lake Oswego. The store and an existing parking lot are zoned GC. In 1999, intervenor applied for a zone change for property located to the west of the existing store from R-7.5 to GC to permit the expansion of the parking lot. The application indicated that the zone change was necessary to accommodate an additional 46 parking spaces.

City staff recommended denial of the application, on the basis that the additional 46 spaces exceeded the number allowed under Goal 12 (Transportation), the Transportation Planning Rule (TPR), the Metro Urban Growth Management Functional Plan (UGMFP), and local zoning code requirements that implement Goal 12, the TPR and the UGMFP. The planning commission reviewed the application, and denied it for the same reasons.

On appeal, the city council reviewed the evidence, overturned the decision of the planning commission and approved the zone change.

This appeal followed.

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[1]Because many of the city's and intervenor's arguments overlap, we refer to them together as "respondents."

FIRST ASSIGNMENT OF ERROR

A. Violation of the TPR

The TPR requires that local governments within Metro's boundaries "adopt land use and subdivision regulations to reduce reliance on the automobile" to achieve

> "a 10 [percent] reduction in the number of parking spaces per capita in the [Metro] area over the planning period. This may be accomplished through a combination of restrictions on development of new parking spaces and requirements that existing parking spaces be redeveloped to other uses." OAR 660-012-0045(5)(c)(A).

Petitioner argues that this provision requires that the city deny the subject application, because otherwise the city will be increasing, rather than decreasing, the number of parking spaces within the city.

The TPR requires that local governments within the Metro planning area "evaluate alternative land use designations, densities and design standards to meet local and regional transportation needs." OAR 660-012-0035(2). The city adopted legislation to address this aspect of the TPR in part by placing a cap on the number of parking spaces that could be established for certain uses. The Lake Oswego Design Standards (LODS) require that the maximum number of parking spaces not exceed 125 percent of the minimum number of required spaces. LODS 7.020(1)(b)(ii). In this case, LODS Table 7.1 establishes that the minimum number of spaces allowed for supermarkets in the commercial zone is 2.9 spaces per 1,000 square feet of gross floor area (G.F.A).

Respondents argue that the TPR does not require that each and every development conform to the 10 percent parking space reduction; it requires merely that the city adopt regulations that would have the effect of achieving the goal of a 10 percent reduction in parking spaces in the Metro area. The city contends that by adopting the maximum parking space cap, it adopted regulations that would over time implement the TPR provisions. The city argues that petitioner has not challenged those provisions. Because petitioner has not demonstrated that any regulation she has cited requires that this particular development

reduce the number of parking spaces serving the store, the city contends that her argument under the first assignment of error must fail.

We read OAR 660-012-0045(5)(c) as imposing a burden on local governments to adopt legislation to comply with the parking reduction requirement, and not as a decisional criterion applying to every quasi-judicial application that involves parking. Therefore, OAR 660-012-0045(5)(c) does not provide a basis for reversal or remand.

This subassignment of error is denied.

B. Violation of Policies and Regulations implementing the TPR

According to petitioner, there are currently 97 parking spaces on the store property. The store contains 30,900 square feet of G.F.A. According to city staff's calculations, the maximum number of parking spaces allowed under the city's code for stores of that size is 113 spaces. Petitioner argues that the city approved the siting of an additional 46 spaces, exceeding the parking ceiling by 30 spaces.[2] Therefore, petitioner argues, as a matter of law, the city's decision violates LODS 7.020(1)(b)(ii). Petitioner contends that because the city's decision violates LODS 7.020(1)(b)(ii), the decision must be reversed.

Respondents argue that the city's decision merely approves a zone change from residential to commercial to allow for parking, and does not approve a particular number of spaces. The city contends that documents submitted during the proceedings below are conceptual in nature, and that final approval of the number and layout of the parking spaces is left to the design review stage of the approval process.[3] Respondents argue that even if the city could not approve an additional 46 spaces in the course of this proceeding, intervenor is not *categorically* prohibited from applying for a variance, or otherwise establishing grounds

[2]Intervenor disputes both staff's estimate of the current number of parking spaces and the G.F.A. of the store. For the purposes of this assignment of error, we need not decide which calculation is accurate.

[3]At oral argument, the parties agreed that the city's design review provides for notice and an opportunity for hearing.

to exceed the 113-space cap.[4]

We agree with respondents that the city's decision approves a zone change only, and does not approve a specific number of parking spaces to be allowed on the subject property. The challenged decision therefore does not violate LODS 7.020(1)(b)(ii).

This subassignment of error is denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Lake Oswego Comprehensive Plan (LOCP) Goal 9, Policy 2c(vi) directs the city to "[p]revent expansion of 'strip commercial development.'" LOCP Goal 9, Policy 8 requires the city to:

> "Prevent further expansion of 'strip commercial development' and encourage redevelopment of existing strip commercial areas to become more attractive and oriented toward pedestrians and transit."

The LOCP defines "strip commercial development" as:

> "Commercial or retail uses, usually one-story high and one store deep, that front on a major street and are oriented towards access by the automobile. Strip commercial development is typically characterized by street frontage parking lots serving individual stores or strips of stores. Strip commercial development differs from central business districts in at least two of the following: 1) there are no provisions for pedestrian access between individual uses; 2) the uses are only one store deep; 3) buildings are arranged linearly rather than clustered; and 4) there is no design integration among individual uses." LOCP Definitions, D-17.

In addressing Goal 9, Policy 2c(vi), the council found:

> "The City Council does not interpret the policy against expansion of strip development to forbid expansion of a use already within a commercial strip. The intent of the policy is to prevent expansion of strip development itself. * * * [T]he 6-4-99 Staff Report shows that applicant's existing commercial development is located in the center of a strip of [GC] land running along the northwest side of Boones Ferry Road. Expanding applicant's parking facility

[4]Intervenor argues that if it expanded the G.F.A. of the store, it could justify additional spaces, as would a "correction" to previous errors in calculating allowed parking spaces under prior land use approvals. In the alternative, respondents argue that intervenor could seek a variance from the parking cap.

> to the west does not increase the length of the strip itself. If anything, it somewhat 'thickens' the commercial area. If a proposal were submitted requesting expansion of commercial uses at either terminus of the current commercial strip abutting Boones Ferry Road, Policy 2c[(vi)] might come into play, since such a change would arguably be a true expansion of commercial strip zoning. The present application would make the commercially zoned property more than one lot deep at one point along Boones Ferry Road and would not increase the length of the strip itself.
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> "The City Council finds that the application does not violate Policy 2c(vi) of Goal 9." Record 42-43.

In addressing Goal 9, Policy 8, the council found:

> "The site plan and landscape plan assure that the parking facility will be effectively screened from neighboring residential uses, provide an attractive asset to the surrounding neighborhood, and provide better orientation for pedestrians and access to transit facilities.
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> "* * * The City Council * * * incorporates its findings relating to Goal 2, Policy 2c(vi) and concludes that the application is not inconsistent with Goal 9, Policy 8." Record 49-50.

Petitioner argues that the city council's interpretation and findings are inadequate and not supported by substantial evidence. According to petitioner, the grocery store is one story high, the use is one store deep, and the current parking lot is street-fronting and serves only the store. In addition, petitioner contends there is no design integration between the grocery store and other commercial development nearby. Petitioner argues, therefore, that the expansion of parking to the west constitutes strip commercial development by definition, because the parking lot expands commercial uses in a strip on Firwood Road. Petitioner contends that the city's interpretation that the proposed GC area "thickens" an existing commercial area because the expansion of the commercial area is not along Boones Ferry Road, the identified commercial strip, is disingenuous. According to petitioner, the effect of the rezoning is to create a new commercial strip along Firwood Road, and that action is prohibited by Goal 2, Policy 2c(vi) and Goal 9, Policy 8.

Respondents argue that the city council's interpretation of the above plan policies and its subsequent determination that, as interpreted, the application satisfies the policies, is

entitled to deference, pursuant to ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), and is supported by substantial evidence in the record.[5]

Petitioner presents a plausible interpretation of the city's ordinance. However, the city's interpretation is at least equally plausible and is not "inconsistent with the express language" of the ordinance. Nor is it "inconsistent with the purpose" of the comprehensive plan provision. We must affirm the local government's interpretation of its comprehensive plan and land use regulations unless it is "clearly wrong." *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 217, 843 P2d 992 (1992); *deBardelaben v. Tillamook County*, 142 Or App 319, 324-26, 922 P2d 683 (1996). The city's interpretation is not reversible under ORS 197.829 and *Clark*.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the city's determination that there is a need for the proposed zone change because the store's existing parking lot is often at capacity, and that potential customers are discouraged from shopping at intervenor's store during certain hours because of a lack of parking, is not supported by substantial evidence. Petitioner relies on

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[5]ORS 197.829(1) provides:

> "The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

intervenor's professional parking study and testimony from other opponents to support her contention that only in a few instances is the current parking lot inadequate to serve the store.

The parking study analyzed traffic counts at the store at different times throughout the day during a three-day period in February 1999. Based on the traffic counts and the pattern of store activity, the study concluded that existing parking is adequate and, except for limited times during the year, sufficient to serve the needs of the store's customers. In addition, the record includes an informal traffic count made by an opponent to the zone change that tracked parking availability over a two-year period. That informal study indicates that for a majority of the time, there were spaces available for parking. In addition, petitioner argues that there is no need for additional parking, especially in light of the fact that two other retail grocery stores have been established in the vicinity within the last few years, and have eroded this store's customer base.

Respondents argue that the city's decision is supported by a marketing study by intervenor that concludes that the loss in customer base at the Boones Ferry Road Albertson's is directly attributable to a lack of parking. Respondents cite to testimony from many customers that they avoid shopping at the store during peak afternoon and evening hours, because of the perceived lack of parking. In addition, respondents argue that the council's findings conclude that, despite the conflicting testimony, (1) there is a shortage of parking at the store, (2) there are no reasonable alternative sites available, and (3) a need therefore exists for the zone change. Respondents also cite to findings where the council discounted the credibility of the professional traffic study, because it was based on limited data and did not take into consideration the loss in customer base attributable to the perceived lack of parking. Respondents argue that it is the city's responsibility to weigh the evidence in the first instance and that the city could and did find that there was substantial evidence to justify the need.

As a review body, we are authorized to reverse or remand the challenged decision if it

is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff'd* 108 Or App 339 (1991). In reviewing the evidence, we may not substitute our judgment for that of the local decision maker. Rather, we must consider and weigh all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decision maker's conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988).

Based on the testimony cited by the parties, we believe that the city's determination that the zone change is necessary to accommodate a need for parking is supported by substantial evidence.

The third assignment of error is denied.

The city's decision is affirmed.[6]

[6]At oral argument, petitioner conceded the fourth and final assignment of error; therefore, we do not address it.