BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON DEPARTMENT OF LAND
CONSERVATION AND DEVELOPMENT,
Petitioner,

vs.

CITY OF WARRENTON,
Respondent,

and

WARRENTON LAND AND INVESTMENT
COMPANY, LLC,
Intervenor-Respondent.

LUBA No. 2000-182

FINAL OPINION
AND ORDER

Appeal from City of Warrenton.

Lynne A. Perry, Assistant Attorney General, Salem, filed the petition for review and argued on behalf of petitioner. With her on the brief were Hardy Myers, Attorney General, and Michael D. Reynolds, Solicitor General.

No appearance by City of Warrenton.

Michael C. Robinson, Portland, and Michelle Rudd, Portland, filed the response brief. With them on the brief was Stoel Rives, LLP. Michael C. Robinson argued on behalf of intervenor-respondent.

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

AFFIRMED 06/01/2001

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 Department of Land Conservation and Development (DLCD) appeals a city decision rezoning property from Intermediate Density Residential (R-10) to General Commercial (C-1).

MOTION TO INTERVENE

Warrenton Land and Investment Company, LLC (intervenor), the applicant below, moves to intervene on the side of respondent. There is no objection to the motion and it is allowed.

FACTS

This is the second time this matter has been appealed to LUBA. In *DLCD v. City of Warrenton*, 37 Or LUBA 933, 935-36 (2000) (*Warrenton I*), we set out the relevant factual and procedural background as follows:

> "The subject property is a 41-acre parcel located to the west of and adjacent to Oregon State Highway 101 (Highway 101). The property is comprised of five tax lots, and is bisected by Dolphin Avenue (also known as Rodney Acres Road). A majority of the property is zoned R-10; however, a portion of tax lot 8-10-28-1900 is zoned Aquatic Conservation (A5). In March 1999, intervenor applied for a zone change from R-10 to C-1, proposing to lease or sell the property for retail development.
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> "Dolphin Avenue will be the primary access to the property. Dolphin Avenue intersects with Highway 101, and traffic is controlled by a stop sign on Dolphin Avenue. Traffic on this segment of Highway 101 is uncontrolled, with a general speed limit of 45-55 miles per hour.
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> "The traffic impact study submitted by the applicant to support the zone change indicates that several improvements to the Dolphin Avenue/Highway 101 intersection will be necessary to lessen the impact the proposed commercial uses will have on Highway 101. The improvements include acceleration/deceleration lanes, turning refuges and traffic signals. The traffic impact study assumes similar improvements will be made to seven other nearby intersections, including five intersections on Highway 101. The traffic impact study also assumes that the relevant segment of Highway 101 will be improved to five lanes within the 20-year study period." (Footnote omitted.)

In *Warrenton I*, DLCD challenged the city's findings of compliance with the Transportation Planning Rule (TPR) set forth in OAR chapter 660, division 12. DLCD also challenged the city's findings that the proposed rezone complies with Statewide Land Use Planning Goal 10 (Housing), arguing that the building inventories the city relied upon to determine there was sufficient land zoned R-10 to satisfy the need for intermediate density residential housing after the rezone was approved were not acknowledged Goal 10 housing inventories. We sustained DLCD's assignments of error pertaining to the TPR and Goal 10, and remanded the decision to the city.

On remand, intervenor modified its application to request that only a 17.4-acre portion of the property located north of Dolphin Avenue be rezoned to C-1, and that retail development be limited to 165,000 square feet.[1] The city council again approved the application. DLCD and the Oregon Department of Transportation (ODOT) appealed the city's decision to LUBA. The city then withdrew its decision for reconsideration, pursuant to OAR 661-010-0021.[2] During its proceedings on reconsideration, the city received additional testimony and evidence regarding compliance with transportation-related criteria. The city adopted a new decision to approve the proposal and adopted additional findings to support its decision. Two conditions of approval require intervenor to apply for and receive approval to rezone two other properties, totaling approximately 20 acres, to the "R-10 zone or a lesser

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[1]The 17.4-acre portion is comprised of tax lots 8-10-27-2800, 8-10-27-2802, 8-10-27-2900 and 8-10-27BC-800.

[2]OAR 661-010-0021 provides in relevant part:

> "(1) If a local government or state agency * * * withdraws a decision for the purposes of reconsideration, it shall file a notice of withdrawal with the Board on or before the date the record is due. A decision on reconsideration shall be filed with the Board within 90 days after the filing of the notice of withdrawal or within such other time as the Board may allow.
>
> "* * * * *
>
> "(4) Petitioner(s) may seek review of the decision on reconsideration * * *."

intense zone" before final development approval can be given for the subject 17.4 acres. Record 37. In addition, the city required that intervenor install a traffic signal at a relocated Dolphin Avenue/Highway 101 intersection. DLCD filed a renewed notice of intent to appeal the city's decision on reconsideration.

FIRST ASSIGNMENT OF ERROR

In *Warrenton I,* DLCD alleged that the city's decision violated the TPR because the city prematurely considered proposed mitigation measures in determining whether the proposed rezone would "significantly affect" a transportation facility, as that concept is used in OAR 660-012-0060(1) and (2).[3] 37 Or LUBA at 940. DLCD argued that the local

[3]OAR 660-012-0060(1) and (2) provide, in relevant part:

> "(1) Amendments to * * * acknowledged comprehensive plans, and land use regulations which significantly affect a transportation facility shall assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility. This shall be accomplished by either:
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> "(a) Limiting allowed land uses to be consistent with the planned function, capacity, and performance standards of the transportation facility;
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> "(b) Amending the [transportation systems plan (TSP)] to provide transportation facilities adequate to support the proposed land uses consistent with the requirements of this division;
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> "(c) Altering land use designations, densities, or design requirements to reduce demand for automobile travel and meet travel needs through other modes; or
>
> "(d) Amending the TSP to modify the planned function, capacity and performance standards, as needed, to accept greater motor vehicle congestion to promote mixed use, pedestrian friendly development where multimodal travel choices are provided.
>
> "(2) A plan or land use regulation amendment significantly affects a transportation facility if it:
>
> "(a) Changes the functional classification of an existing or planned transportation facility;
>
> "(b) Changes standards implementing a functional classification system;

government first had to determine whether the proposed amendment, exclusive of proposed mitigation measures, would significantly affect a transportation facility before proceeding to mitigate those impacts through one or more mitigatory measures. We agreed, concluding that:

> "* * * OAR 660-012-0060(1) and (2) require a local government to establish whether an amendment will 'significantly affect' a transportation facility, as defined by the rule, without considering potential improvements affecting that facility. * * * In other words, OAR 660-012-0060(1) and (2) contemplate that mitigation necessary to ensure that land uses allowed by amendments remain consistent with a facility's function, capacity and performance standards [is] considered once the local government has determined that the amendment significantly affects that facility." 37 Or LUBA at 941-42.

On remand, the city found that the rezone *would* significantly affect transportation facilities, but that the anticipated effects could be mitigated by satisfying the conditions the city placed on its approval, including rezoning other property in the vicinity to R-10 or a lesser zone, and installing a signal at the Highway 101/Dolphin Avenue intersection. Record 24.

DLCD argues that the city's options for mitigating the impacts caused by the additional traffic are limited to those options set out in OAR 660-012-0060(1).[4] DLCD concedes that the city's condition requiring that property in the vicinity be rezoned to permit uses that generate less traffic falls within OAR 660-012-0060(1)(a). However, DLCD argues that the city's condition of approval that requires a traffic signal at Highway 101 and Dolphin

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> "(c) Allows types or levels of land uses which would result in levels of travel or access which are inconsistent with the functional classification of a transportation facility; or
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> "(d) Would reduce the performance standards of the facility below the minimum acceptable level identified in the TSP."

[4]At the time the city initially adopted its decision, OAR 660-012-0060(1) provided only three options for mitigating the significant effects a proposed amendment would have on a transportation facility. In 1998, the Land Conservation and Development Commission (LCDC) adopted OAR 660-012-0060(1)(d) to permit an additional option. Petitioner's arguments concern only OAR 660-012-0060(1)(a) and (b), which were included in both versions of the rule.

Avenue does not fall into any of the options set out OAR 660-012-0060(1). DLCD argues that the installation of a traffic signal may be an acceptable mitigation measure pursuant to OAR 660-012-0060(1)(b), if the city had a TSP to amend. However, because the city has yet to adopt a TSP, DLCD argues, it could not rely on the installation of a signal at Highway 101/Dolphin Avenue to demonstrate that the impacts on the transportation facility have been mitigated. DLCD argues that the rezoning of 20 acres to a less intense use is not sufficient, by itself, to alleviate all of the transportation impacts caused by intervenor's proposed development and, therefore, the city erred in its conclusion that OAR 660-012-0060(1) was satisfied.

Intervenor argues that DLCD waived its right to raise this issue. According to intervenor, the city's initial decision relied in part on the installation of a signal at various intersections on Highway 101, including Dolphin Avenue, to conclude that the proposed development would not significantly affect a transportation facility. On remand, consistent with our decision in *Warrenton I*, the city concluded that the proposed development would have a significant effect on the Highway 101/Dolphin Avenue intersection and also concluded that a traffic signal would mitigate that impact. Intervenor contends that DLCD was aware that the city would rely on the signal to satisfy OAR 660-012-0060(1), but failed to raise, either in its petition for review in *Warrenton I* or in the local proceedings after remand, the issue of whether the city could use the installation of a signal at the intersection to mitigate traffic impacts, given that the mitigation measure did not fall within one of the options listed in OAR 660-012-0060(1).

Intervenor argues that DLCD's failure to raise compliance with OAR 660-012-0060(1) below is amplified by the fact that DLCD has an obligation under ORS 197.610(3) to point out deficiencies in proposed amendments and to recommend mechanisms to resolve

those deficiencies.[5] Intervenor contends that DLCD had several opportunities to raise the issue below, including the proceedings on remand, and during the proceedings after the city withdrew its decision from LUBA for reconsideration.

DLCD responds that it could not anticipate that the city would rely on the same mitigation measures to offset anticipated impacts in its petition for review in *Warrenton I*. DLCD further argues that it could not know, until the city adopted its decision and findings on remand, that a signal at Highway 101 and Dolphin Avenue would be a basis for the city's conclusion that OAR 660-012-0060(1) is satisfied.[6]

DLCD also relies on *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992) to support its claim that it did not have to raise the issue of compliance with OAR 660-012-

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[5]ORS 197.610(3) provides, in relevant part:

> "When [DLCD] participates in a local government proceeding [to amend an acknowledged comprehensive plan or land use regulation, DLCD] shall notify the local government of:
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> "(a) Any concerns [DLCD] has concerning [the proposed amendment]; and
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> "(b) Advisory recommendations on actions [DLCD] considers necessary to address the concerns, including, but not limited to, suggested corrections to achieve compliance with the [statewide land use planning] goals."

[6]The relevant city finding states:

> "[Intervenor] shall mitigate transportation impacts as required by the TPR and [the Oregon Highway Plan] by undertaking those specific mitigation measures described in the August 4, 2000 letter from Kittelson & Associates * * *. These mitigation measures are described as follows:
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> "(a) A subsequent post-acknowledgement combined comprehensive plan map/zoning map amendment to change the existing plan map and zoning map designation on [an] 11.9 acre parcel from its current C-1 zoning to the R-10 zone or a lesser-intense zone (the 'Harbor Site').
>
> "(b) A subsequent post-acknowledgment combined comprehensive plan/zoning map amendment to change the existing comprehensive plan map/zoning map designation on [an] 8.18 acre parcel from its current C-1 zoning to the R-10 zone or a lesser intense zone (the 'Marlin Site').
>
> "(c) The installation of a traffic signal at the intersection of relocated [Dolphin Avenue] and * * * Highway 101 * * *." Record 36-37.

0060(1) in *Warrenton I*. DLCD claims that under *Beck*, the only issues that are precluded from being raised in an appeal after remand are "old, resolved" issues, meaning issues "LUBA actually resolved and those that could have been raised in the first appeal." Petition for Review 11. DLCD argues that issues that are the subject of the remand cannot be "old, resolved" issues. LUBA explicitly instructed the city to evaluate the adequacy of mitigating conditions on remand. Therefore, DLCD contends, it cannot be precluded from challenging the adequacy of the mitigation in an appeal of the remand decision.

ORS 197.763(1) provides, in relevant part:

> "An issue which may be the basis for an appeal to [LUBA] 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 * * * and the parties an adequate opportunity to respond to each issue."

Under ORS 197.835(3), our scope of review is limited to issues that are raised below as provided by ORS 197.763 and the corresponding provisions at ORS 197.195 pertaining to limited land use decisions. Implicitly, the raise it or waive it rule in ORS 197.763(1) and 197.835(3) applies only where there was opportunity to raise an issue before the close of the record at or following the final evidentiary hearing. Generally, parties are not required to raise issues below regarding the adequacy of findings, the evidence supporting those findings, or interpretations of applicable criteria, when those findings or interpretations appear for the first time in the challenged decision. *Terra v. City of Newport*, 36 Or LUBA 582, 595 (1999); *Lucier v. City of Medford*, 26 Or LUBA 213, 216 (1993); *Eskandarian v. City of Portland*, 26 Or LUBA 98, 115 (1993); *Washington Co. Farm Bureau v. Washington Co.*, 21 Or LUBA 51, 57 (1991).

DLCD's first assignment of error in the present case is that the city's findings of compliance with OAR 660-012-0060(1) misconstrue the TPR and are not supported by substantial evidence. We agree with intervenor that, under the present circumstances, DLCD had an opportunity to raise those issues during the evidentiary proceedings below and its failure to do so waives the right to raise them before LUBA. The city's initial decision adopted findings of compliance with OAR 660-012-0060(1), based in part on the disputed condition requiring installation of a signal at Highway 101 and Dolphin Avenue. After DLCD appealed that decision to LUBA, the city withdrew the decision for reconsideration. The city then conducted further evidentiary proceedings, after which it adopted the decision challenged in this appeal, which also finds compliance with OAR 660-012-0060(1) based in part on the disputed condition. There is no question that DLCD had an opportunity during the

evidentiary proceedings on reconsideration to raise the issues it now seeks to raise for the first time before LUBA under the first assignment of error. Therefore, those issues are waived.[7]

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

The city concluded that its inventory of buildable R-10 zoned land will satisfy its Goal 10 housing obligations despite the proposed rezone. It gave two reasons to support its conclusions: (1) the city's buildable lands inventory has a surplus of R-10 zoned land; and (2) as a condition of development approval for the subject property, intervenor is required to rezone approximately 19.98 acres of C-1 land to an R-10 or lesser zone. Record 22-24; 37.[8]

DLCD contends that the city's findings that the city's inventory of R-10 zoned land will continue to satisfy Goal 10 after the subject property is rezoned to C-1 are not supported by substantial evidence. DLCD argues that the city cannot rely on an outdated buildable lands inventory to support its conclusion that Goal 10 is satisfied. DLCD explains that the buildable lands inventory was first adopted in 1978, and contains projections "to year 2000." Petition for Review 16. DLCD contends that the phrase "to year 2000," is most easily understood to mean "through the year 1999," and not to include the year 2000. DLCD argues that, even if the inventory is considered to be effective through the year 2000, the city's reliance on subsequent rezoning decisions to support a finding that there is a 5.84-acre surplus of R-10 zoned land is misplaced. According to DLCD, the city did not include

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[7]We note, however, that we do not believe that ORS 197.610(3) imposes on DLCD a *greater* burden to specifically raise issues before the local government or that, if DLCD fails to provide suggestions to achieve compliance with statewide planning goals as required by ORS 197.610(3)(b), DLCD necessarily waives its right to raise the issue before LUBA under ORS 197.763(1) and ORS 197.835(3).

[8]The city recognizes that its 1978 buildable lands inventory shows that there is a projected shortage of 20 acres of R-10 zoned land. Record 23. However, the city concluded that a net surplus of 23.14 acres of R-10 zoned land exists in 2000, due to subsequent rezoning decisions. *Id*. The city also concluded that with 17.4 acres being rezoned to C-1 as part of the challenged decision, there remains a net 5.84-acre surplus of R-10 zoned land. *Id*.

changes in R-10 zoning designations from the time the buildable lands inventory was created in 1978 to the time the comprehensive plan was acknowledged in 1983. DLCD also argues that one of the properties that was added to the base inventory amount contains far fewer acres than the city's estimate.

DLCD also challenged the city's alternative finding, arguing that the city cannot rely on the additional acreage that is intended to be rezoned as part of this development proposal, because it is not apparent that those two parcels will actually be zoned R-10 or any other residential zone. DLCD points to testimony from one of intervenor's representatives, where he states that the Marlin site and the Harbor site would be suitable for wetlands mitigation zoning, or some other open-space designation. Record 460-63. DLCD contends that if the two sites are not zoned R-10, then the city does not have enough buildable land zoned R-10 to satisfy projected needs.

A. Reliance on the City's 1978 Buildable Lands Inventory

1. The Inventory and Post-Acknowledgement Updates

The Court of Appeals has held that, in adopting a comprehensive plan amendment implicating the supply of buildable land, a local government must rely on the planning documents that have been adopted to implement goal policies as a basis for decision making and cannot rely on contrary evidence that was not generated and adopted to implement the goals. *D.S. Parklane Development, Inc. v. Metro*, 165 Or App 1, 22, 994 P2d 1205 (2000); *Residents of Rosemont v. Metro*, 173 Or App 321, 333-34; ___ P3d ___ (2001); *1000 Friends of Oregon v. Metro*, ___ Or App ___, ___ P3d ___ (May 30, 2001). Here, the city relied on a planning document that was acknowledged to implement Goal 10, *i.e.*, its buildable lands inventory, and supplemented it by other evidence, *i.e.*, post-acknowledgement plan amendments, that also were adopted consistent with that goal.

As for DLCD's argument regarding the failure of the city to consider lands rezoned between creation of the buildable lands inventory in 1978 and when the buildable lands

inventory was acknowledged in 1983, DLCD does not argue or cite to any evidence that the city rezoned any lands to or from R-10 between 1978 and 1983. Absent an argument that such evidence exists, DLCD had not demonstrated that the city's error, if any, in considering only rezones after 1983 undermined the accuracy of its buildable lands assessment.

2. Inaccuracy in Calculations

DLCD contends that the city erred by including one parcel in its calculation of post-acknowledgement plan amendments that have increased the supply of R-10-zoned land. DLCD explains that the city determined that tax lot 8-10-17-3900 (tax lot 3900) contains 42 acres that were rezoned from R-D to R-10. In fact, DLCD argues, tax lot 3900 currently contains only 16.44 acres, not 42 acres, *and* is currently zoned for open space and institutional use. According to DLCD, the city's open space and institutional zone prohibits residential housing. Therefore, DLCD contends the city's finding that there is a surplus of R-10 zoned lands is in error, because if 42 acres are subtracted from the total number of acres of R-10 zoned lands, there is a net *deficit* of 19 acres of R-10 zoned land. If the subject property is rezoned to C-1, DLCD contends that the net deficit increases to 34 acres.

Intervenor argues that DLCD has waived these arguments by not raising them below. According to intervenor, it presented evidence from DLCD's own files regarding the number of amendments and the number of acres included in those amendments to show that Goal 10 is satisfied. Intervenor contends that DLCD cannot now challenge that evidence before LUBA, because it did not challenge the evidentiary support for the city's conclusions below.

Intervenor also argues that the evidence cited by DLCD regarding the current size and zoning of tax lot 3900 does not undermine the evidentiary support for the city's calculations. Intervenor points out that there is no indication that the current tax lot 3900 is the same tax lot 3900 that was rezoned in 1992. Even if it is assumed to be the same, intervenor argues, the size of tax lot 3900 could have been adjusted sometime after 1992. With respect to zoning, intervenor points to evidence that the current tax lot 3900 is zoned R-

10. At best, intervenor argues, there is conflicting evidence in the record regarding the size and zoning of tax lot 3900. Intervenor argues that the Board should defer to the city's choice between conflicting evidence, because a reasonable person could reach the decision made by the city, in view of all the evidence in the record. *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991).

We do not address intervenor's waiver argument because we agree with intervenor that, based on the evidence in the record, a reasonable person could reach the decision made by the city, even considering the contrary evidence cited by DLCD. DLCD has not demonstrated that the city's calculations regarding tax lot 3900 are unsupported by substantial evidence.

B. Rezoning of Land to R-10 as a Condition of Approval

DLCD also challenges the city's alternative findings that Goal 10 remains satisfied because the city required, as a condition of development approval for the 17.4 acres, that 19.98 acres of C-1 land must be rezoned to R-10. DLCD contends that it cannot be assumed that Goal 10 will be satisfied, because the condition of approval permits the city to approve a "lesser intense" zone. DCLD argues that a "lesser intense" zone may not permit the residential densities that are required for the city to continue to comply with Goal 10.

Intervenor responds that development on the subject property will not occur until a comparable amount of acreage is rezoned to R-10. Intervenor contends that the city correctly conditioned development to ensure no net loss of intermediate density housing, and that those conditions are sufficient to satisfy Goal 10.

We need not address the city's alternative conclusion that Goal 10 has been met by the imposition of conditions that require other, comparable property to be rezoned to R-10. As we explained above, DLCD has not demonstrated error in the city's conclusion that there currently is sufficient land designated R-10 to satisfy Goal 10, even with the rezoning of the subject property, irrespective of the condition requiring rezoning. *Sullivan v. City of Ashland,*

28 Or LUBA 699, 701 (1995) (an evidentiary challenge does not provide a basis for reversal or remand where the city adopts alternative, unchallenged findings that support a conclusion that a criterion is satisfied).

The second assignment of error is denied.

The city's decision is affirmed.