BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MICHAEL J. SWYTER,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent.

LUBA No. 2001-014

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Michael J. Swyter, Milwaukie, filed the petition for review and argued on his own behalf.

Michael E. Judd, Assistant County Counsel, Oregon City, filed the response brief and argued on behalf of respondent.

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

REMANDED 06/12/2001

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 appeals a decision that changes the comprehensive plan and zoning map designations for a 1.94-acre parcel.

REPLY BRIEF

Petitioner moves for permission to file a reply brief. The proposed reply brief responds, in part, to respondent's argument that petitioner waived his right to assert the eleventh assignment of error by failing to raise the issue asserted in that assignment of error below. Reply Brief 4-6. A reply brief is appropriate to respond to waiver arguments, and respondent does not dispute that that portion of the reply brief should be allowed. *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587, 590 (2000); *Donnelly v. Curry County*, 33 Or LUBA 624, 626 (1997). The remainder of the reply brief merely elaborates on arguments that are already contained in the petition for review. For that reason, the remainder of the reply brief is not allowed. *Wild Rose Ranch Enterprises v. Benton County*, 37 Or LUBA 368, 370 (1999); *Wissusik v. Yamhill County*, 20 Or LUBA 246, 250 (1990).

The motion requesting permission to file a reply brief is allowed in part and denied in part.

FACTS

The subject property was previously designated Low Density Residential by the county's comprehensive plan and was previously zoned Urban Low Density Residential (R-10). The property is fully developed with an abandoned restaurant and lounge and parking lot. The restaurant and lounge began operation on the subject property in 1938 and continued operation until 1990. The county first applied zoning to the subject property sometime during this period. At the time the restaurant and lounge closed in 1990, it was a nonconforming use in the R-10 zone.

On May 5, 1999, the applicant's request for a zone change from R-10 to Neighborhood Commercial (NC) was denied. On June 23, 1999, the applicant's request that the county verify that he has a right to continue to operate a restaurant on the property as a nonconforming use was denied.[1] The application that led to the decision at issue in this appeal sought a change in the comprehensive plan designation to Community Commercial with a corresponding change in zoning to Community Commercial C-2. The challenged decision grants the request.

FIRST ASSIGNMENT OF ERROR

The C-2 zone allows both "restaurants" and "cocktail lounges," as well as many other commercial uses.[2] There does not appear to be any question that the applicant seeks the disputed comprehensive plan and zoning map amendments to allow a restaurant and lounge to be reestablished on the subject property. Record 378-79. Petitioner argues that a lounge cannot legally be established on the subject property and that the county therefore erred by approving an illegal use. We understand petitioner to contend that the existing building on the subject property is less than 100 feet from the adjoining residential zoning districts, which petitioner believes would make use of the existing building for a lounge inconsistent with the 100-foot setback required by ZDO 502.03(A)(35). *See* n 2.

The county responds that the county granted the requested comprehensive plan and zoning map amendments, but it did not specifically approve a lounge or any other use of the

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[1]The county hearings officer concluded the restaurant and lounge use had been discontinued for more than one year and for that reason any nonconforming use rights were terminated under the Clackamas County Zoning and Development Ordinance (ZDO).

[2]Restaurants are listed as an allowed primary use in the NC zone, and the C-2 zone allows as primary uses all primary uses allowed in the NC zone. ZDO 501.03(A)(5); 502.03(A)(1). ZDO 502.03(A)(35) also allows the following as a primary use in the C-2 zone:

> "Taverns, bars, cocktail lounges if all activities and operations (except offstreet parking and loading) are confined, contained, and conducted wholly within completely enclosed buildings and not located closer than 100 feet from a residential district or closer than 500 feet from a school."

property. We agree with the county. To the extent petitioner argues that Clackamas County Comprehensive Plan (CCCP) Commercial Policy 8.0 requires that the county identify and approve a specific use for property when applying the Community Commercial comprehensive plan map designation, we do not agree.[3]

The first assignment of error is denied.

SECOND AND THIRD ASSIGNMENTS OF ERROR

ZDO 1202.01 sets forth approval criteria for zoning map amendments.[4] Petitioner argues that ZDO 1202.01 requires that the applicant and county identify the proposed use of the property so that it can be determined whether the request is consistent with the comprehensive plan, as ZDO 1202.01(A) requires, and whether the affected area currently has or can be "provided with adequate public facilities, services and transportation networks to support the use," as ZDO 1202.01(B) requires. Petitioner nevertheless concedes that the county may approve a zoning map amendment without designating a use. However, petitioner argues, in that event the county must consider "all possible uses or any possible combination of uses allowed under [C-2] zoning against [ZDO 1202.01(A) and (B)]."

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[3]CCCP Commercial Policy 8.0 provides:

> "Determine permitted uses through zoning. Zoning of Community Commercial areas shall be consistent with this Plan and the stated purpose of compatible zoning districts. Timing of zoning district application shall be in accord with the orderly development of the County."

[4]ZDO 1202.01 provides as follows:

> "The [county] shall allow a zone change, * * * provided that the applicant provides evidence substantiating the following, unless otherwise provided for in this Ordinance:
>
> "A. Approval of the request is consistent with the Comprehensive Plan;
>
> "B. The property and affected area is presently provided with adequate public facilities, services and transportation networks to support the use, or such facilities, services and transportation networks are planned to be provided concurrently with the development of the property."

Petition for Review 13.[5] Petitioner argues the county did not consider all possible uses in the C-2 zone and that the record does not include substantial evidence that public services and facilities can be provided for all the uses that might be allowed on the subject property under that zoning.

The county offers the following response to petitioner's arguments:

> "In considering a zone change such as this, the local decision maker has to be cognizant of the variety of uses allowed in the proposed zone, but need not specifically evaluate each of the many (in this case 44) permitted uses, as petitioner seems to argue. ZDO 1202 * * * requires the decision maker to find that 'the property and affected area is presently provided with adequate facilities, services and transportation networks to support the use * * *.' If approval is not to be limited to any specific use, the question becomes whether there are adequate facilities, etc. for all of the uses permitted in the zone." Respondent's Brief 4.

It is not clear to us whether petitioner and respondent have a material disagreement about how ZDO 1202.01 must be interpreted and applied. Both petitioner and respondent seem to agree that the county may either designate a particular use or, if not, consider all the permitted uses in the C-2 zone when applying ZDO 1202.01. To the extent petitioner argues that where the county does not designate a specific use, it must adopt findings that specifically address every possible use and combination of uses allowable in the C-2 zone, we agree with the county that more general findings may suffice. Moreover, we see no reason why the analysis required under ZDO 1202.01(B) necessarily requires that the county consider specific uses beyond the use that is proposed by the applicant, so long as no issue is raised concerning other uses that might place more stringent demands on public services than the proposed use.

Petitioner does not make any focused challenge under the second and third assignments of error to the adequacy of the county's findings concerning ZDO 1202.01. We

[5]Petitioner only develops an argument under these assignments of error with regard to the ZDO 1202.01(B) public services criterion, and our consideration of these assignments of error is therefore limited to that criterion.

consider petitioner's evidentiary challenge concerning ZDO 1202.01 next, under our discussion of the seventeenth assignment of error.

The second and third assignments of error are denied.

SEVENTEENTH ASSIGNMENT OF ERROR

Petitioner argues the record does not include substantial evidence that the subject property, if rezoned C-2 and developed with the uses that are allowed in that zone, is presently served or can be served by adequate sewer services and adequate fire protection services.[6] Therefore, petitioner argues, the county's findings that ZDO 1202.01(B) is satisfied with regard to those services and facilities are not supported by substantial evidence.

In response to the county's request for comments on the disputed proposal, the Oak Lodge Sanitary District responded on August 16, 1999, that it had "no comment." Record 344. The county's findings note that when the sanitary district was asked to comment on the applicant's earlier unsuccessful attempt to have the property rezoned to NC, the sanitary district indicated on December 21, 1998, that a number of considerations would need to be addressed. But there is nothing in that letter that suggests adequate sewer services could not be provided to the subject property. Record 320, 351-54. The findings speculate that the "no comment" response is because the sanitary district had already indicated the property could be served when it commented on the prior request for comprehensive plan and zoning map amendments.

The findings indicate that the fire district did not submit a response to the county's request for comments on the disputed application. Record 320. However, the findings note

[6]Petitioner mentions "public facilities" and "transportation networks" in his arguments under this assignment of error, but the only developed arguments in the petition for review concern the evidence regarding sewer and fire service availability.

that the fire district did comment on the prior zoning application on December 2, 1998.[7] Fairly read, the fire district's December 2, 1998 comments take the position that adequate fire services can be provided if certain specified improvements are made when the property is developed.

Although it is not clear what assumptions the sanitary district and fire district made in preparing their comments in 1998, it is clear that they were based on the 1998 request for rezoning from R-10 to NC, which would allow commercial development of the property. While it is true that the uses allowed in the NC zone are not the same as the uses allowed in the C-2 zone, and the districts' comments on the prior rezoning request were almost nine months old at the time they were considered in the present matter, we agree with the county that it was not unreasonable for the county to rely on those comments to find that the subject property is or can be adequately served with sewers and fire protection services. Our conclusion might be different if some question was raised below concerning the respective districts' ability to deliver these services or a need to address particular commercial uses in the C-2 zone that might place extraordinary demands on these services. However, petitioner does not argue that any such questions were raised below regarding sewers and fire protection.[8]

The seventeenth assignment of error is denied.

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[7]The county's findings mistakenly state that the fire district's prior comments had indicated that fire and emergency service could be provided for "residential" use of the property. Record 320. However, the notice and comment form clearly states the requested zoning is from R-10 to NC and there is nothing in the district's December 2, 1998 comments to suggest the fire district erroneously believed the property was to be developed residentially. Record 356.

[8]We note that the county planning staff did raise questions about the applicant's failure to address C-2 uses that could generate significant amounts of traffic. In response, the applicant submitted a traffic report that examined a number of C-2 uses, including service stations and supermarkets. The traffic report concluded that a supermarket represented the "worst case scenario for traffic generation for the proposed zone change," and found that the area intersections would function at acceptable levels even under the worst case scenario. Record 239. Based on the traffic report, the county found that the proposal complies with ZDO 1202.01(B), with regard to the transportation network. Record 283. As noted earlier, petitioner does not specifically challenge the county's findings concerning the adequacy of the transportation network.

FOURTH AND EIGHTEENTH ASSIGNMENTS OF ERROR

Application of the Community Commercial plan map designation is governed in part by CCCP Commercial Policy 7.0.[9] The county found that subparagraph (a) of Policy 7.0 was satisfied in this case and specifically rejected petitioner's argument that the word "area" in Policy 7.0 requires that, in addition to the subject property, other adjoining properties must also have historically been committed to commercial use. Petitioner argues under his fourth assignment of error that it was legal error to construe the word "area" in that manner.

The board of county commissioners enjoys considerable deference in interpreting its comprehensive plan. ORS 197.829(1); *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). We may not reverse such interpretations unless they are clearly wrong. *Huntzicker v. Washington County*, 141 Or App 257, 261, 917 P2d 1051 (1996) (the "clearly wrong standard" requires that LUBA find "that no person could reasonably interpret the provision in the manner that the local body did"). The interpretation of CCCP Commercial Policy 7.0 that is challenged under these assignments of error easily falls within the board of commissioners' interpretive discretion under ORS 197.829(1) and *Clark*.

Under his eighteenth assignment of error, petitioner argues the board of county commissioners erred by interpreting and applying CCCP Commercial Policy 7.0 differently than the planning commission did. The county responds that the board of county commissioners simply interpreted CCCP Commercial Policy 7.0 differently than the planning commission did and, because that interpretation is within the board of commissioners' interpretive discretion, there is no legal error in its doing so. We agree with the county.

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[9]As relevant, CCCP Commercial Policy 7.0 provides as follows:

"The following areas may be designated Community Commercial * * *:

"a. Areas having an historical commitment to commercial uses."

The fourth and eighteenth assignments of error are denied.

FIFTH ASSIGNMENT OF ERROR

Under the fifth assignment of error, petitioner challenges a second interpretation of CCCP Commercial Policy 7.0. *See* n 9. The essence of petitioner's argument under this assignment of error is that an area that was not used for commercial purposes between 1990 and 2001 cannot qualify as an "[area] having an historical commitment to commercial uses." The critical facts are not in dispute. The commercial building on the subject property was originally constructed in 1925. Record 378. That building was converted to a restaurant and lounge in 1938 and continued to operate as such until 1990. The building has not been put to any use, commercial or otherwise, since that date. The county found that the applicant's post-1990 loss of a right to continue commercial use of the property as a nonconforming use and lack of use of the building for the past 11 years does not preclude a finding that the subject property has a historical commitment to commercial use.

We agree with the county that lack of commercial activity on the subject property for the last 11 years does not *require* the county to ignore the prior 65 years of commercial use. Viewed over the last 76 years, we agree with the county that the subject property has historically been put to commercial use. Certainly there is nothing about the county's interpretation that is reversibly wrong under ORS 197.829(1) or *Clark*.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Under ORS 215.130(7)(a) a property owner may lose the right to continue a nonconforming use through "a period of interruption or abandonment." ZDO 1206.02 specifically provides that "[i]f a nonconforming use is discontinued for a period of more than twelve (12) consecutive months, the use shall not be resumed * * *." Petitioner argues that the county's decision in this case is at odds with these provisions, which discourage continuation of nonconforming uses,

As the county correctly points out, different criteria are applied to (1) establish the existence of a right to continue a nonconforming use and (2) change a property's comprehensive plan and zoning map designations. Neither ORS 215.130(7)(a) nor ZDO 1206.02 are directly relevant in changing the comprehensive plan and zoning map designations, and they certainly do not have the prohibitive effect that petitioner argues they have.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

Amendments to acknowledged comprehensive plans and land use regulations must comply with the statewide planning goals. ORS 197.175(2)(a); 197.835(6) and (7); *see 1000 Friends of Oregon v. Jackson Co.*, 79 Or App 93, 98, 718 P2d 753, *rev den* 301 Or 445 (1986) (comprehensive plan amendments); *Ramsey v. City of Portland*, 23 Or LUBA 291, 299, *aff'd* 115 Or App 20, 836 P2d 772 (1992) (land use regulation amendments). Statewide Planning Goal 6 (Air, Water and Land Resources Quality) provides, in part, as follows:

> "All waste and process discharges *from future development*, when combined with such discharges from existing developments shall not threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards. * * *" (Emphasis added.)

The applicant indicated during the local proceedings that there might be hazardous waste on the subject property. Record 183. The county found that the possible existence of hazardous waste on the site is irrelevant to the challenged application.[10] Petitioner argues that evidence of the existence of hazardous waste is relevant under Goal 6, and that the county's finding to the contrary is error.

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[10]The county's actual finding is as follows:

> "* * * The question of possible hazardous waste on the property, raised by an opponent, is not relevant to this application." Record 4.

Petitioner is correct that LUBA has held that where comprehensive plan and zoning map amendments are adopted to authorize a particular use, a local government is obligated under Goal 6 to demonstrate that it is reasonable to expect that the use will be able to comply with applicable state and federal environmental standards. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101, 114 (1995); *Salem Golf Club v. City of Salem*, 28 Or LUBA 561, 583 (1995). However, as the county correctly notes, petitioner's focus under this assignment of error is on hazardous waste that allegedly already exists on the subject property, rather than on any "future development" that may be allowed on the subject property as a result of the disputed plan and zoning map amendments. Because Goal 6 is directed at future development, petitioner's arguments provide no basis for reversal or remand under this assignment of error. *Neighbors for Livability v. City of Beaverton*, ___ Or LUBA ___ (LUBA No. 2000-201/202/203, May 14, 2001), slip op 12 (environmental concerns attributable to existing site conditions, as opposed to "future development," provide no basis for reversal or remand under Goal 6).

The seventh assignment of error is denied.

EIGHTH AND NINTH ASSIGNMENTS OF ERROR

Petitioner contends the county erred by failing to include a condition of approval requiring that any application for development of the subject property under the new plan and zoning map designations must be subject to design review. Petitioner also argues the county erred by failing to apply and demonstrate compliance with several plan policies.[11]

[11]Petitioner cites the following CCCP Commercial Policies:

"9.0 Require in Community Commercial development and redevelopment a minimum of 15 percent of the total developed area to be in landscaping.

"10.0 Require all developments to be subject to the design review process.

"11.0 Require improvements to streets and/or transit access when necessary prior to or concurrent with development.

The county first responds that ZDO 1102.01 specifically provides that design review "shall apply to all development, redevelopment, expansions, and improvements in all commercial * * * zones[.]" Because ZDO 1102.01 requires design review prior to development of the property, the county argues it is not required that the county duplicate that mandate through a condition of approval. We agree with the county.

With regard to petitioner's allegations that the county erred by failing to apply the cited plan policies to the challenged zoning and comprehensive plan map amendments, the county responds that the policies are addressed at the time of design review and that consideration of the policies is premature at the comprehensive plan and zoning map amendments stage, where no specific development is being approved. Again, we agree with the county.[12]

The eighth and ninth assignments of error are denied.

TENTH ASSIGNMENT OF ERROR

ZDO 1502.03 provides that "failure to submit the required fee with an application or notice of appeal, including return of checks unpaid or other failure of consideration, shall be a jurisdictional defect." Petitioner argues that the applicant in this case withdrew his application for Community Commercial plan and zoning map designations in a letter dated

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> "12.0 Require sidewalks and bicycle facilities.
>
> "* * * * *
>
> "14.0 Require curbs, drainage controls, underground utilities and street lighting." CCCP 67.

[12]We note that ZDO 1001.02(A) also addresses applicability of development standards and does not mention comprehensive plan and zoning map amendments:

> "The standards set forth in Section 1000 shall apply to partitions; subdivisions; commercial and industrial projects; multifamily and commonwall structures of three (3) or more dwellings. * * *"

March 13, 2000, and asked for a refund of his application fee.[13] It is not entirely clear why the applicant wished to withdraw the application, but apparently there was some confusion about whether it was possible to condition the requested rezoning in a way that would limit the uses that would be allowed under the C-2 zone. The county thereafter sent out a notice canceling the April 6, 2000 planning commission hearing on the application, indicating that the application had been withdrawn at the applicant's request. However, the county continued attempts to discuss the application with the applicant and apparently offered to continue processing the application without requiring a new application fee. In a May 20, 2000 letter, the applicant indicated his understanding that the county was willing "to reinstate" his application, and he indicated he wished to do so. Record 291. Petitioner argues that once the application was withdrawn, the applicant's attempt to reinstate his application must be viewed as a new application and that, under ZDO 1502.03, the applicant's failure to submit a second application fee deprived the county of jurisdiction to review the application.

No party has identified any ZDO provisions that govern the manner in which an application, once submitted, must be considered "withdrawn" in the sense the application may no longer be considered by the county and the applicant must file a new application and a new application fee. Given the lack of any ZDO standards governing how withdrawal of an application becomes final and irreversible, and the difficulty the county and the applicant had in communicating and the confusion that was present in those communications, we agree with the county that it did not commit error in agreeing to consider the application after the applicant's attempt to withdraw it or in not requiring a new application fee.

The tenth assignment of error is denied.

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[13]In an April 4, 2000 letter, the county explained that action on the application had proceeded past the point where the application fee could be refunded, and the application fee was not refunded. Record 22.

ELEVENTH ASSIGNMENT OF ERROR

As noted earlier in this opinion, amendments to acknowledged comprehensive plans and land use regulations must comply with the statewide planning goals. As relevant, Goal 10 (Housing) is as follows:

> "To provide for the housing needs of citizens of the state.
>
> "Buildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density.
>
> "Buildable Lands -- refers to lands in urban and urbanizable areas that are suitable, available and necessary for residential use."

Petitioner argues the county erroneously found that Goal 10 is among the statewide planning "Goals and LCDC Administrative Rules [that] are not relevant to this application."[14] Record 2. Petitioner argues the goal and rules are clearly relevant to a decision that changes the planning and zoning designations of a 1.94-acre parcel from residential to commercial, thus eliminating the potential of residential development of the property.

The county offers two responses to this assignment of error. First, the county argues petitioner did not sufficiently raise any issue below concerning Goal 10 and related administrative rules and therefore has waived the issue. ORS 197.763(1); 197.835(3). Second, the county argues:

> "Neither does petitioner's argument in the Petition for Review point out any possible violation of Goal 10. In fact, it seems highly unlikely that Goal 10 would be violated by the commercial designation of a single lot which has never been used for residential purposes." Respondent's Brief 11.

[14]Petitioner also cites as applicable here Land Conservation and Development Commission (LCDC) Goal 10 rules that provide more elaborate definitions of "Buildable Lands," and "Suitable and Available Land." OAR 660-008-0005(2) and (13). Petitioner also cites OAR 660-008-0010, which requires that "[s]ufficient buildable land shall be designated on the comprehensive plan map to satisfy housing needs * * *."

Regarding the county's first argument, petitioner clearly argued below that Goal 10 and OAR 660-008-0010 apply and that the applicant failed to address those criteria. Record 172. Petitioner did not waive the issue. *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991) (ORS 197.763(1) "requires no more than fair notice to adjudicators and opponents, rather than the particularity that inheres in judicial preservation concepts").

Regarding the county's second argument, the county confuses the issue of whether the redesignation of this 1.94-acre parcel from residential to commercial use *violates* Goal 10 and its implementing rules with the issue of whether Goal 10 and its implementing rules are *relevant*. Goal 10 and the implementing rules are clearly relevant, and the county erred in concluding to the contrary. The county may be correct that the past history of commercial use, relatively small size of the property and other factors support a conclusion that the subject property can be redesignated for commercial use without affecting comprehensive plan and zoning ordinance compliance with Goal 10. However, the county may not avoid addressing that question by finding Goal 10 and its implementing rules are irrelevant.

The eleventh assignment of error is sustained.

FOURTEENTH ASSIGNMENT OF ERROR

Petitioner argues the county erred in finding that certain CCCP Housing and Urbanization Goals that he identified during the local proceedings are irrelevant to the application. Record 3.

Petitioner does not identify what CCCP Housing Goals he believes apply to the challenged decision. The record pages petitioner cites do not disclose any comprehensive plan Housing Goals that he raised below. Accordingly the county did not err in failing to apply them to the disputed application.[15]

[15]Although the county does not raise a waiver defense, had it done so we likely would agree petitioner waived his right to raise issues concerning comprehensive plan Housing Goals.

Petitioner did argue below that a CCCP Urbanization Goal and two CCCP Urbanization Policies apply here.[16] Regarding Urbanization Policy 1.0, we do not believe Urbanization Policy 1.0 applies to the challenged decision, since the decision involves land that has already been designated for urban uses. However, without some assistance from the county, we are unable to agree that the cited Urbanization Goal and Policy 3.0(c) are irrelevant. Again, we express no view concerning whether the proposal complies with the cited Urbanization Goal and Policy, only that we cannot agree based on the record and the parties' arguments that they are irrelevant.

The fourteenth assignment of error is sustained in part.

TWELFTH ASSIGNMENT OF ERROR

Under this assignment of error, petitioner argues the challenged decision violates Title 1 of the Metro Functional Plan (hereafter Title 1), which is codified at Metro Code (MC) 3.07.110 through 3.07.170. There are several problems with petitioner's arguments under this assignment of error. First, petitioner attaches a Metro-prepared summary of Title I, rather than Title I itself, and bases many of his arguments on the county's failure to adhere to that summary. Second, the county's findings addressing Title I appear to address specific

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[16]The pages of the record cited by petitioner show he identified the following CCCP Urbanization Goal and Policies:

"GOALS

"INSURE AN ADEQUATE SUPPLY OF LAND TO MEET IMMEDIATE AND FUTURE URBAN NEEDS. * * *

POLICIES

"1.0 RECOGNIZE THE STATUTORY ROLE OF METRO IN MAINTENANCE OF AND AMENDMENTS TO THE REGONAL GROWTH BOUNDARY. * * *

"3.0c ENHANCE ENERGY CONSERVATION AND TRANSPORATION SYSTEM EFFICIENCY BY LOCATING OPPORTUNITIES FOR HOUSING NEAR WORK AND SHOPPING AREAS. * * *" Record 166.

provisions of MC 3.07.130.[17] While petitioner expresses disagreement with those findings, his arguments are insufficiently developed to show that the county's findings with regard to MC 3.07.130 are inadequate. Finally, we agree with respondent that all of the provisions identified by petitioner under this assignment of error appear to be directed at requiring legislative action by the county to conform its comprehensive plan and land use regulations to Title I, and do not appear to be directed at individual quasi-judicial comprehensive plan and zoning map amendments such as the one at issue in this appeal. Even if some Title 1 provisions could be applied as approval criteria for some quasi-judicial plan and zoning map amendments, petitioner makes no attempt to explain why the challenged decision involves such amendments.

The twelfth assignment of error is denied.

THIRTEENTH ASSIGNMENT OF ERROR

The county's comprehensive plan includes the following Commercial Goals:

> "Provide opportunities for a wide range of commercial activity ranging from convenience establishments close to neighborhoods to major regional shopping centers.
>
> "Ensure that traffic attracted to commercial development will not adversely affect neighborhoods." CCCP 65.

In rejecting petitioner's argument below that the above goals are violated by the application, the county found "[t]he two Commercial Goals cited by an opponent are not decision-making criteria in this application." Record 4.

As we have already noted, comprehensive plan provisions are potentially applicable approval criteria for the disputed plan and zoning map amendments. The county correctly

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[17]MC 3.07.130 provides that cities and counties must amend their comprehensive plans to include the boundaries of a number of Metro "2040 Growth Concept design types." One of those identified Growth Concept design types is "corridors," which are described as follows: "Corridors--along good quality transit lines, corridors feature a high-quality pedestrian environment, convenient access to transit, and somewhat higher than current densities." The county's findings express some uncertainty about whether the subject property is within a corridor, but go on to say the proposal is consistent with the overall intent of Title 1, which includes attaining county job targets. Record 321.

notes that not all comprehensive plan provisions are mandatory approval criteria in all contexts. *Eskandarian v. City of Portland*, 26 Or LUBA 98, 103 (1993). However, where a party identifies specific comprehensive plan provisions and argues that they are applicable criteria, the county must respond to such issues. Where the county explains why it interprets such provisions as inapplicable, it is entitled to great deference. *See Langford v. City of Eugene*, 126 Or App 52, 57, 867 P2d 535 (1994) (local government's interpretation concerning "which of two or more arguably applicable approval criteria in its legislation applies * * * will seldom be reversible under the *Clark* standard"). Where, as here, the county simply declares that the provisions are not applicable approval criteria, without explaining why it believes such is the case, the county's declaration does not express a reviewable interpretation and is not entitled to any deference. *Johns v. City of Lincoln City*, 146 Or App 594, 600, 933 P2d 978 (1997). In that context, we look at the text and context of the plan provisions to determine if the county's declaration is legally correct. *Canfield v. Yamhill County*, 142 Or App 12, 19, 920 P2d 558 (1996).

Based on the text of the above-quoted plan goals, we agree with the county that the first of the quoted goals is either too generally worded to be applied in a meaningful manner in this case or it is directed at how the comprehensive plan and zoning ordinance provisions themselves are written rather than at individual quasi-judicial plan and zoning map amendments.

However, we see no obvious reason why the second of the above-quoted goals does not apply in this context. As we earlier noted, ZDO 1202.01(B) includes a specific provision that requires that the applicant demonstrate there is an adequate transportation network to serve the subject property.[18] The applicant prepared a traffic report to address traffic impacts and petitioner does not challenge the county's findings that the subject property is served by

[18]*See* discussion of the second, third and seventeenth assignments of error.

an adequate transportation network. While that traffic report might also provide a basis for the county to conclude that the traffic that may be generated by the subject property under the new plan and zoning map designations "will not adversely affect neighborhoods," it is for the county to explain why it believes that is the case.

The thirteenth assignment of error is sustained in part.

FIFTEENTH ASSIGNMENT OF ERROR

Statewide Planning Goal 9 (Economic Development) is "[t]o provide adequate opportunities throughout the state for a variety of economic activities vital to the health, welfare, and prosperity of Oregon's citizens." The county adopted the following findings to address Goal 9:

> "* * * Goal 9 refers to providing adequate opportunities throughout the State for a variety of economic activities vital to the health, welfare and prosperity of Oregon citizens. This proposal would provide opportunities for commercial economic activities on the subject property consistent with this broad goal." Record 320.

Petitioner argues the above finding is too brief to adequately address Goal 9 or the LCDC implementing administrative rules at OAR 660-009-0015 through 660-009-0025. However, petitioner makes no attempt to identify the provisions of Goal 9 and OAR chapter 660, division 9 that he believes the county's findings do not adequately address. Because petitioner's argument under this assignment of error is not sufficiently developed, it is rejected. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

The fifteenth assignment of error is denied.

SIXTEENTH ASSIGNMENT OF ERROR

Petitioner argues the county erred by not including a condition of approval requiring that the applicant replace a significant natural buffer on the subject property that the

applicant apparently removed at some point in the past and by failing to address the buffer issue.[19]

The county responds that the disputed buffer need not be addressed as part of the disputed comprehensive plan and zoning map amendment. If a buffer is required, the county argues that requirement will be imposed at the time of development through design review. For the reasons already explained in our discussion of the eighth and ninth assignments of error, we agree with the county.

The sixteenth assignment of error is denied.

Because we sustain the eleventh, thirteenth and fourteenth assignments of error, in whole or in part, the county's decision is remanded.

[19]Petitioner contends the buffer is required by ZDO Development Standards, which are set out at ZDO Section 1000.