

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 MICHAEL J. SWYTER,
5 *Petitioner,*

6
7 vs.

8
9 CLACKAMAS COUNTY,
10 *Respondent.*

11
12 LUBA No. 2001-198

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Clackamas County.

18
19 Michael J. Swyter, Milwaukie, filed the petition for review and argued on his own
20 behalf.

21
22 Michael E. Judd, Assistant County Counsel, Oregon City, filed the response brief and
23 argued on behalf of respondent.

24
25 HOLSTUN, Board Chair; BASSHAM, Board Member; BRIGGS, Board Member,
26 participated in the decision.

27
28 AFFIRMED

04/03/2002

29
30 You are entitled to judicial review of this Order. Judicial review is governed by the
31 provisions of ORS 197.850.
32

NATURE OF THE DECISION

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

FACTS

We previously remanded a county decision concerning the subject property. *Swyter v. Clackamas County*, 40 Or LUBA 166 (2001). We described the application in our prior opinion as follows:

“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. 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.” 40 Or LUBA at 169 (footnote omitted).

In our prior opinion, we sustained one of petitioner’s assignments of error and sustained two other assignments of error, in part. Following our remand, the county conducted a public hearing and limited its consideration to the issues that formed the basis for LUBA’s remand. At the conclusion of that hearing, the board of county commissioners adopted the decision that is challenged in this appeal.

1 **FIRST ASSIGNMENT OF ERROR**

2 The first assignment of error concerns one of the county comprehensive plan
3 commercial goals, which provides as follows:

4 “Ensure that traffic attracted to commercial development will not adversely
5 affect neighborhoods.”

6 The decision cites and relies on a staff report that in turn relies on the applicant’s
7 traffic study to conclude that the disputed plan and zoning map changes would not violate the
8 above-quoted plan commercial goal because they will not adversely affect neighborhoods. In
9 his first assignment of error, petitioner argues the county adopted an improperly narrow
10 interpretation of the commercial goal and that the county’s findings are not supported by
11 substantial evidence.

12 McLoughlin Boulevard, an arterial that runs generally north and south, is located a
13 short distance east of the subject property. The subject property is connected to McLoughlin
14 by Glen Echo Avenue, which runs generally east and west. Glen Echo continues west past
15 the subject property and eventually turns north and provides access to the residentially
16 developed area that lies to the west and north of the subject property. River Road, a minor
17 arterial, parallels McLoughlin Boulevard and passes the subject property on its east side.

18 The traffic study that the county relied upon determined that of the uses allowed
19 under the C-2 zone, a supermarket would generate the most traffic. The traffic study used a
20 supermarket as a worst-case scenario to determine whether the surrounding roadways were
21 adequate to accommodate the additional traffic that commercial development of the subject
22 property would generate. A staff report that the board of commissioners relied on found that
23 “the transportation system is adequate, both in terms of capacity and level [of] service at the
24 affected intersections, to accommodate traffic * * *.” Record 6. That staff report also states,
25 “very little traffic to the site will be generated or routed directly through ‘local’ residential

1 streets and the associated neighborhoods.”¹ *Id.* In finding that the traffic study showed
2 there would be no adverse effect on neighborhoods, the board of county commissioners
3 adopted the following interpretation of the plan commercial goal:

4 “* * * This Board finds [the plan commercial goal] would not be violated by
5 this application for the reasons stated in the planning staff memorandum. As
6 this Board interprets it, this goal would apply only to traffic going to or from a
7 commercial facility on the property along Glen Echo Avenue west of River
8 Road, which would be ‘neighborhood traffic.’ * * * [T]he cited
9 Comprehensive Plan [Goal] applies only to the traffic effect on local
10 neighborhood roads, not River Road, Glen Echo Avenue east of the site or
11 [McLoughlin Boulevard].” Record 3.

12 **A. Erroneous Interpretation of the Plan Commercial Goal**

13 Petitioner argues that the above-quoted interpretation is improperly narrow.
14 According to petitioner the county misconstrued the plan commercial goal to apply only to
15 one road serving only the westerly residential neighborhood. Petitioner contends that the
16 county should have considered as neighborhoods the areas adjoining River Road some
17 reasonable distance to the north and south as well as areas adjoining Glen Echo Avenue east
18 to McLoughlin Boulevard.

19 Petitioner is clearly correct that the plan commercial goal need not be interpreted as
20 narrowly as the board of county commissioners did here. To interpret the goal as only
21 applying to residential neighborhoods and the local streets that serve such residential
22 neighborhoods limits the commercial goal in ways that are not expressly stated in the goal
23 itself. Nevertheless, the concept of neighborhoods is sufficiently ambiguous that we cannot
24 say the board of county commissioners’ narrow interpretation of that term in the commercial
25 goal is reversibly wrong under ORS 197.829(1), as the Court of Appeals interprets our scope

¹A Department of Transportation and Development memorandum explains that only five percent of the vehicle trips generated by a supermarket on the site, an estimated total of 222 daily trips, would use Glen Echo west of River Road. The remaining trips would utilize River Road or Glen Echo Avenue east of the site toward McLoughlin Boulevard.

1 of review under that statute.² *Huntzicker v. Washington County*, 141 Or App 257, 260-62,
2 917 P2d 1051, *rev den* 324 Or 322 (1996); *Zippel v. Josephine County*, 128 Or App 458, 461,
3 876 P2d 854, *rev den* 320 Or 272 (1994).

4 **B. Traffic Safety Issues**

5 The board of commissioners adopted the planning staff report by reference. The
6 adopted staff report includes the following statement:

7 “[T]he traffic study indicates there are no traffic safety issues in the area.”
8 Record 6.

9 Petitioner argues that finding is not supported by substantial evidence, because the traffic
10 study did not consider safety issues as such. Respondent concedes that the traffic “study
11 does not specifically mention safety.” Respondent’s Brief 4. However, respondent argues
12 that while the board of commissioners incorporated the staff report, including the disputed
13 finding, “the staff memorandum is directed at trip generation rather than safety concerns *per*
14 *se.*” Respondent’s Brief 4. Respondent contends that the lack of evidence to support this
15 single finding provides no basis for reversal or remand.

16 The petition for review includes no citations to the record to identify particular safety
17 issues that were raised below. At oral argument, petitioner cited to a number of places in the

²ORS 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:

- “(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.”

1 record where he believes safety concerns were raised. Some of the cited pages raise general
2 traffic safety concerns and others do not.³ The generally stated safety issues that were raised
3 below were not, in our view, sufficiently stated to require that the county include a specific
4 responsive finding addressing traffic safety *per se* under the plan commercial goal. The only
5 possible exception is petitioner’s complaint below that many of the streets in the area do not
6 have sidewalks and that under existing conditions it is hazardous for neighborhood children
7 to walk to the five schools in the general area. This complaint appears to be directed in large
8 part at streets other than the western portion of Glen Echo Avenue, which, under the county’s
9 interpretation, would not be a consideration under this plan goal. We also note that because
10 the alleged safety concern related to the lack of sidewalks in the area is an existing problem,
11 the added 222 daily trips would at most exacerbate an existing problem to some unspecified
12 degree rather than be the cause of the problem.

13 Although it is a close question, we do not believe petitioner’s evidentiary challenge
14 provides a basis for remand. As the county argues, in addressing the more general
15 “adversely affect neighborhoods” standard, the county’s focus was on roadway and
16 intersection capacity concerns. The county ultimately found there is sufficient roadway and
17 intersection capacity. Safety appears to have been at most an issue that was peripheral to
18 those capacity concerns rather than a separate and independent concern under the
19 commercial goal. In that context, the lack of evidentiary support for the finding provides no
20 basis for remand.

21 This subassignment of error is denied.

22 **C. Substantial Evidence Challenge**

23 The Department of Transportation and Development memorandum that the board of
24 commissioners relies on states, “[f]rom a neighborhood standpoint, the additional vehicles

³The record citations that petitioner provided at oral argument included: Record 12-14, 26, 35-38; Prior Record 132, 183, 234-35, 238, 247-48.

1 could be considered an adverse impact.” Record 49.⁴ Petitioner argues that this statement
2 undermines the board of commissioners’ ultimate finding that the plan commercial goal is
3 satisfied. Petitioner also points out that the traffic study that the county relied on is based on
4 data collected in August when traffic related to nearby schools was not present. Petitioner
5 further questions whether the supermarket worst-case scenario is actually the worst-case
6 scenario. Finally, petitioner contends the traffic study, which was done in 2000, is outdated.

7 We agree with respondent that the Department of Transportation and Development
8 memorandum statement, viewed in context, simply stated the author’s view that the proposal
9 could be viewed as having an adverse impact or a beneficial impact. We also agree with
10 respondent that despite the criticism petitioner directs at the traffic study, it constitutes
11 evidence that a reasonable person would rely on to judge the likely traffic impacts on the
12 neighborhood if the subject property is planned and zoned for commercial use. *Dodd v.*
13 *Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993).

14 This subassignment of error is denied.

15 The first assignment of error is denied.

16 **SECOND ASSIGNMENT OF ERROR**

17 Petitioner argues the county erred in finding that all of the subject property has an
18 historical commitment to commercial use.

19 As previously noted, the county limited its consideration on remand to the issues that
20 formed the basis for remand in the prior appeal in this matter. Respondent contends that the
21 issue that petitioner raises under this assignment of error was resolved against petitioner in
22 our prior decision in this matter, and is not included in the issues that formed the basis for
23 remand. We agree with respondent.

⁴Immediately after saying the neighborhood could view the added traffic as an adverse impact, the author of the memorandum stated, “[h]owever, having a supermarket or restaurant close by could also be viewed as a benefit to a neighborhood.” Record 49.

1 The second assignment of error is denied.

2 **THIRD ASSIGNMENT OF ERROR**

3 Petitioner argues that the applicant plans to develop the subject property with a
4 restaurant and lounge. As we noted in our prior opinion, petitioner believes that approving a
5 lounge on the subject property would violate a zoning setback requirement that applies to
6 cocktail lounges. 40 Or LUBA at 169 n 2. We rejected petitioner’s argument in the prior
7 appeal that approval of the disputed plan and zoning map amendments constituted approval
8 of an illegal use, concluding that the challenged map amendments do not approve a cocktail
9 lounge or any other specific use of the property. We reject petitioner’s attempt to revive that
10 issue in this appeal because the issue is not included in the issues that formed the basis for
11 our remand.

12 The third assignment of error is denied.

13 **FOURTH ASSIGNMENT OF ERROR**

14 The board of county commissioners found that the application is consistent with
15 Comprehensive Plan Urbanization Policy 3.0(c) for two reasons.⁵ First, “for the reasons
16 stated in the planning staff memorandum,” and second, “because as [the board of county
17 commissioners] interprets that policy, the idea is not only to locate housing near work and
18 shopping areas, but also the obverse, to locate work and shopping areas near housing, which
19 this application does.”⁶ Record 4.

⁵The policy provides:

“Enhance energy conservation and transportation system efficiency by locating opportunities for housing near work and shopping areas.”

⁶The staff memorandum includes the following explanation for why the policy is met by the disputed application:

“[T]he application is consistent with the policy because the subject property, if rezoned would provide commercial lands and employment opportunities in a transition area between commercial and multi-family zoned lands along the McLoughlin Corridor to the east and near the Low Density Residential lands to the west. Also the small size of the property will only

1 Petitioner contends that the interpretation that is adopted in the second reason is
2 reversibly wrong under ORS 197.829(1). *See* n 2. In the context of this application, we fail
3 to see how the board of commissioners could interpret and apply the policy in any other way
4 than the way it did. In any event, the board of commissioners' interpretation is reasonable
5 and clearly within its discretion under ORS 197.829(1).

6 We also agree with respondent that the first reason stated by the board of county
7 commissioners is a separate reason for concluding that the request complies with the policy,
8 and petitioner does not assign error to that reason. For that additional reason, the fourth
9 assignment of error provides no basis for reversal or remand.

10 The fourth assignment of error is denied.

11 The county's decision is affirmed.

allow perhaps 7-8 additional dwelling units and have an insignificant effect on energy conservation and the transportation system." Record 7.