

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

3
4 LARMER WAREHOUSE COMPANY,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF SALEM,
10 *Respondent.*

11
12 LUBA No. 2001-169

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from City of Salem.

18
19 Norman R. Hill and Michael J. Martinis, Salem, filed the petition for review. With
20 them on the brief was Webb, Martinis and Hill. Michael J. Martinis argued on behalf of
21 petitioner.

22
23 C. Randall Tosh, Assistant City Attorney, Salem, filed the response brief and argued
24 on behalf of respondent. With him on the brief was Sharman Meiners, Salem.

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

28
29 REMANDED

09/26/2002

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

NATURE OF THE DECISION

Petitioner appeals a city decision that denies its request for rezoning.

FACTS

The subject 14.24-acre parcel is located in the Pringle Road industrial area. Southern Pacific Railroad tracks run in a generally north-south direction along the east side of the property and separate the property from other industrially zoned lands on the east side of the railroad tracks. To the west, Pringle Road runs in a north-south direction and borders part of the western edge of the property. Another part of the western edge of the property adjoins residentially zoned land, which lies between the subject property and Pringle Road. Additional residentially zoned land is located across Pringle Road to the west. With one commercially zoned exception, the remaining adjoining property is zoned industrial.

The subject property includes two large warehouses (72,000 square feet and 48,000 square feet) and “eight small buildings that are used for a variety of industrial/service activities.” Record 58. Petitioner seeks to rezone its property from Industrial Park (IP) to Industrial General (IG). The IG zone allows some industrial uses that the IP zone does not allow. The IG zone also allows as *permitted* uses certain uses that the IP zone only allows through a conditional use approval process. According to petitioner, this industrial area is in a state of transition from older manufacturing uses to service and distribution uses. We understand petitioner to be seeking the requested rezoning to facilitate a transition to such service and distribution uses on the subject property.

A. April 10, 2001 Hearings Officer Decision

The criteria that must be satisfied to grant the requested zone change are set out at Salem Revised Code (SRC) 114.160.¹ The hearings officer found that some of the relevant

¹ As relevant, SRC 114.160 sets out the following factors that must be considered in reviewing an application for a zoning map change:

1 criteria were met. However, the hearings officer also found that SRC 114.160(c)(4) and (5)
2 were not met. The hearings officer explained that the list of permitted uses in the IG zone
3 includes some uses that are not permitted in the IP zone and that those additional permitted
4 uses are not compatible with and would adversely affect nearby residential uses. The
5 hearings officer also explained that certain uses that are conditional uses in the IP zone are
6 allowed outright in the IG zone and that, without the conditional use review process, such
7 uses might be incompatible with and adversely affect residential uses. The hearings officer
8 ultimately concluded that because the applicant did not propose to limit permitted uses or
9 subject any of those permitted uses to conditional use review, nearby residential uses might

“CRITERIA AND BURDEN OF PROOF. (a) The applicant for any quasi-judicial land use action under this zoning code * * * shall have the burden of proving justification for the proposal. The greater the impact of the proposal in an area, the greater is the burden on the proponent.

“* * * * *

“(c) [T]he following factors should be evaluated by the proponent of a zone change and shall, where relevant, be addressed by the administrative body in its final decision:

“* * * * *

“(4) The effect of the proposal on the neighborhood, the physical characteristics of the subject property, and public facilities and services;

“(5) All other factors relating to the public health, safety, and general welfare which the administrative body deems relevant.

“(d) The extent of the consideration given to the various factors set forth in subsection (c) of this section will depend on the nature and circumstances of each individual case. Unless any of the factors is deemed irrelevant, something more than an unsupported conclusion will be required, but the degree of detail in the treatment of relevant factors will depend on the degree of the proposed change or deviation, and the scale and intensity of the proposed use or development. The requisite degree of consideration is directly related to the provision of subsection (a) of this section that the greater the impact of a proposal in an area, the greater is the burden on the proponent.”

1 be adversely affected. Based on that concern, the hearings officer denied the requested
2 rezoning.²

3 **B. September 18, 2001 Planning Staff Report and Planning Commission**
4 **Decision**

5 Following the hearings officer's denial, the applicant proposed limiting the requested
6 rezoning in three ways. First, the applicant proposed a condition that would prohibit
7 "outdoor manufacturing, processing or storage in the area of the property west of the existing
8 buildings." Record 34. Second, the applicant proposed a condition that "[t]here will be no
9 new industrial buildings west of the existing buildings." *Id.* Finally, the applicant identified
10 several uses that are not permitted in the IP zone, but would be permitted outright in the IG
11 zone, that are "particularly intensive." *Id.* The applicant proposed a condition that these
12 enumerated uses be allowed only if they are approved through the city's conditional use
13 review process.

14 The September 18, 2001 planning staff report recommended "that the Planning
15 Commission reverse the decision of the Hearings Officer and [grant] the request to change
16 the IP * * * zone to IG," based on the above described applicant-proposed conditions and
17 other conditions listed in the September 18, 2001 planning staff report that would mitigate
18 impacts on the nearby residential properties. Record 29.

² The relevant hearings officer's findings state:

"[T]he Hearings Officer [finds] that without any testimony from the applicant concerning the restriction of the more intense uses specifically allowed in the IG zone, the applicant cannot meet the burden of proving that the proposal would not have a negative effect on the neighborhood. While the applicant has testified as to their intentions with regard to the property, they clearly have also indicated the need to have all of the permitted outright uses available through the IG zone[,] which certainly means that it is the responsibility of the Hearing Officer to look at the most egregious types of uses to determine if they should be [permitted outright]. [T]he Hearings Officer [finds] that the only way to adequately protect the adjacent residential property would be to have either a condition restricting the uses allowed or a conditional use process to analyze each proposed use as it is requested. Since there is no condition proposed restricting the use, it is the finding of the Hearings Officer that maintaining the protection of [the] IP zone's conditional use process is the only means available to provide continued protections for the adjacent property." Record 41.

1 At its September 18, 2001 hearing, the planning commission voted 3-3 to approve the
2 requested rezoning. Legal counsel initially advised the planning commission that the tie vote
3 meant that the application was denied.

4 **C. October 16, 2001 Planning Staff Report and Planning Commission**
5 **Decision**

6 After the October 16, 2001 hearing, legal counsel changed his initial advice regarding
7 the legal effect of the September 18, 2001 tie vote and advised the planning commission that
8 the tie vote meant there was no decision. An October 16, 2001 planning staff report cited
9 concerns that the applicant might file a mandamus proceeding to seek a court-ordered
10 approval of the requested zone change. The October 16, 2001 planning staff report went on
11 to recommend that the planning commission reconsider its September 18, 2001 decision and
12 either approve the requested zone change with conditions or deny “the zone change upon the
13 findings developed by staff (Attachment A)[.]” Record 18.

14 The referenced “Attachment A” is a one-page document that explains why the
15 planning staff interprets relevant SRC and comprehensive plan provisions to require that
16 zone changes affecting industrial areas must be compatible with adjoining areas. The
17 planning staff report notes that an adjacent property is developed with “[a]n apartment
18 complex for individuals with special needs[.]” Record 19. Attachment A goes on to reject
19 the applicant’s proposed conditions as being inadequate to mitigate the adverse impacts on
20 nearby residential properties from potentially incompatible industrial development on the
21 subject property under IG zoning.³

³ Attachment A to the October 16, 2001 planning staff report offers the following reasoning in support of a conclusion that the requested rezoning should be denied:

“* * * The noise and other operational impacts ordinarily associated with the addition of [the] proposed [industrial] uses reasonably create discord and disharmony with adjacent residential use. These impacts could have the potential to reduce the desirability for this to remain a residential area, therefore causing the area to transition to non-residential uses. Such a transition would impact the conservation of the housing stock.

1 In summary, the October 16, 2001 planning staff report recommended that the
2 planning commission reconsider its September 18, 2001 tie vote and either approve the
3 requested rezoning or deny the requested rezoning. Attachment A to the October 16, 2001
4 planning staff report was provided in the event the planning commission voted to deny the
5 requested rezoning.⁴

6 At the October 16, 2001 planning commission hearing, the planning commission
7 voted 3-1, with two members absent, to deny the requested rezoning. The October 16, 2001
8 planning commission decision apparently adopted the above-described Attachment A as its
9 findings.

10 **D. January 15, 2002 Decision**

11 The applicant (petitioner in this appeal) appealed the planning commission's October
12 16, 2001 decision to LUBA. The city withdrew its October 16, 2001 decision and the
13 planning commission adopted a new decision on January 15, 2002.⁵ The minutes of the
14 January 15, 2002 planning commission meeting explain that the new decision

“Although the applicant offers to maintain the conditional use process for some of the new uses, for others it does not. Therefore, the application does not fully indicate the specific mitigation for such potential impacts as noise, hours of operation, traffic impacts, air pollution, and potential environmental impacts. The sensitive nature of the residents and the fact that most residents are in the complex around the clock, increases the burden on the applicant showing compatibility. However, beyond proposing screening, which does little to mitigate nonvisual impacts, the applicant has failed to show how the development and operation of the proposed uses, without the development standards process through a conditional use permit process, is compatible with the surrounding land uses.

“* * * * *

“Without demonstrating compliance with the requirements in SRC 114.160, the applicant cannot satisfy the criteria necessary for a zone change from [IP] to [IG].” Record 19

⁴ Presumably, the planning staff intended its September 18, 2001 planning staff report to provide the required findings in support of a decision to grant the requested rezoning, if the planning commission decided to approve the requested rezoning.

⁵ Pursuant to ORS 197.830(13)(b) and OAR 661-010-0021, after a notice of intent to appeal is filed with LUBA, the local government that adopted the challenged decision may withdraw the decision for reconsideration provided it does so before the deadline for filing the local record expires.

1 “more fully reflects the [planning] commission’s reasoning for the denial and
2 properly approves the correct findings which will be defended at LUBA when
3 the appeal comes forward. This resolution would supercede the [October 16,
4 2001 decision] as well as the original Hearings Officer decision.” Record 2.

5 Section 1 of the January 15, 2002 decision adopts findings and provides in relevant part:

6 “The [planning] commission hereby adopts as findings of fact the staff report
7 on this matter dated September 18, 2001 * * *, the staff report dated October
8 16, 2001, with attachment, and the Hearings Officer Decision from which
9 appeal was taken, all of which documents are incorporated herein by this
10 reference.” Record 1.

11 After the city filed its January 15, 2002 decision with LUBA, this appeal continued as
12 provided by ORS 197.830(13)(b) and OAR 661-010-0021.

13 **FIRST ASSIGNMENT OF ERROR**

14 Petitioner first argues that the challenged decision must be remanded because the
15 findings the city adopted to support its decision are inconsistent. Petitioner is correct.

16 As we explained in *Hannah v. City of Eugene*, 35 Or LUBA 1, 4, *aff’d* 157 Or App
17 396, 972 P2d 1230 (1998):

18 “The practice of incorporating other decisions or documents as findings can
19 present problems, and local governments that do so run the risk of adopting
20 inconsistent findings. *Wilson Park Neigh. Assoc. v. City of Portland*, 24 Or
21 LUBA 98, 106 (1992); *Gonzalez v. Lane County*, 24 Or LUBA 251, 259
22 (1992). * * *”

23 We assume the city withdrew its October 16, 2001 decision because it was concerned that the
24 one-page Attachment A did not, by itself, provide an adequate rationale for denying the
25 requested rezoning. It is likely that the city simply made a mistake when it included the
26 September 18, 2001 planning staff report (which provides a rationale for *approving* the
27 rezoning and recommends that the rezoning be *approved*) as part of its findings in support of
28 *denying* the requested rezoning. If so, the planning commission can easily correct that
29 mistake on remand by not adopting findings that are flatly inconsistent with its ultimate
30 decision.

1 Finally, as guidance to the planning commission on remand, we note that the planning
2 commission's ultimate decision and the October 16, 2001 planning staff report suggest that
3 the planning commission is concerned about some of the permitted uses that (1) would be
4 allowed outright on the subject property by the IG zone and (2) the applicant has not yet
5 agreed to subject to the conditional use review process. It appears that the planning
6 commission is concerned that those outright permitted uses, allowable without conditional
7 use review, could therefore have unmitigated adverse impacts on nearby residential uses.
8 However, in part because of the current confused state of the planning commission's
9 findings, it is impossible to be sure which outright permitted uses in the IG zone the planning
10 commission is concerned about. Unless the planning commission identifies the uses that it is
11 concerned about, the applicant is no position to know whether or how its application for
12 rezoning could be further modified to address those concerns. *See Salem-Keizer School Dist.*
13 *24-J v. City of Salem*, 27 Or LUBA 351, 371 (1994) (findings of noncompliance with
14 applicable criteria must suffice to inform the applicant of the steps that will be necessary to
15 obtain approval or that it is unlikely that the application will be approved).

16 The first assignment of error is sustained.

17 **SECOND ASSIGNMENT OF ERROR**

18 In its second assignment of error, petitioner argues the planning commission's
19 decision is not supported by substantial evidence and that petitioner is entitled to the
20 requested zone change as a matter of law.

21 Although the planning commission's decision must be remanded because its findings
22 are inconsistent, we do not agree with petitioner that it has demonstrated that the disputed
23 criteria governing zoning map changes are met in this case as a matter of law. The October
24 16, 2001 planning staff report interprets the relevant criteria to require that the requested
25 rezoning not have the ultimate result of allowing industrial uses that would be incompatible
26 with nearby residential uses. That same planning staff report concludes that the conditions

1 that petitioner has proposed to mitigate potential incompatibilities that might be associated
2 with some uses that will be allowed by the requested IG zoning would not be adequate to
3 mitigate those potential incompatibilities. The September 18, 2001 planning staff report
4 apparently takes the same approach, but reaches an opposite conclusion about the adequacy
5 of the proposed conditions to mitigate potential incompatibilities. Where the relevant
6 criterion is so subjective, an applicant faces an exceedingly difficult task in producing and
7 identifying evidence that the criterion is satisfied as a matter of law. The evidence petitioner
8 cites might well constitute substantial evidence in support of a decision that finds any
9 incompatibility with adjoining residential uses will be adequately mitigated by the proposed
10 conditions. However, the evidence that petitioner cites falls well short of the type and
11 quantity of evidence that would permit no other decision but approval. *Jurgenson v. Union*
12 *County Court*, 42 Or App 505, 600 P2d 1241 (1979); *Towry v. City of Lincoln City*, 26 Or
13 LUBA 554, 560-61 (1994); *Kropf v. Marion County*, 18 Or LUBA 577, 585-86 (1989).

14 The second assignment of error is denied.

15 The city's decision is remanded.