

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

3
4 PETER THOMAS,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF VENETA,
10 *Respondent,*

11 and

12
13 FRONTIER RESOURCES, LLC,
14 *Intervenor-Respondent.*

15
16 LUBA Nos. 2002-128 and 2002-134

17
18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from City of Veneta.

23
24 Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioner.
25 With him on the brief was the Law Office of Bill Kloos, PC.

26
27 Carolyn Connolly, Eugene, filed the response brief and argued on behalf of
28 respondent. With her on the brief was Speer, Hoyt *et al.*

29
30 Gary Ackley, Cottage Grove, filed the response brief and argued on behalf of
31 intervenor-respondent.

32
33 HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member,
34 participated in the decision.

35
36 REMANDED

02/11/2003

37
38 You are entitled to judicial review of this Order. Judicial review is governed by the
39 provisions of ORS 197.850.
40

NATURE OF THE DECISIONS

In LUBA No. 2002-128, petitioner appeals Ordinance 432, which amends the:

“Veneta Transportation System Plan and associated maps; * * * [the] Veneta Comprehensive Plan and associated maps; [the Veneta] Land Development Ordinance and associated maps; and * * * the Northeast Employment Center Specific Development Plan and associated maps[.]” Record 5 (original capitalization omitted).¹

In LUBA No. 2002-134, petitioner appeals Ordinance 434, which amends the city’s zoning map to make it consistent with the maps that were adopted by Ordinance 432.

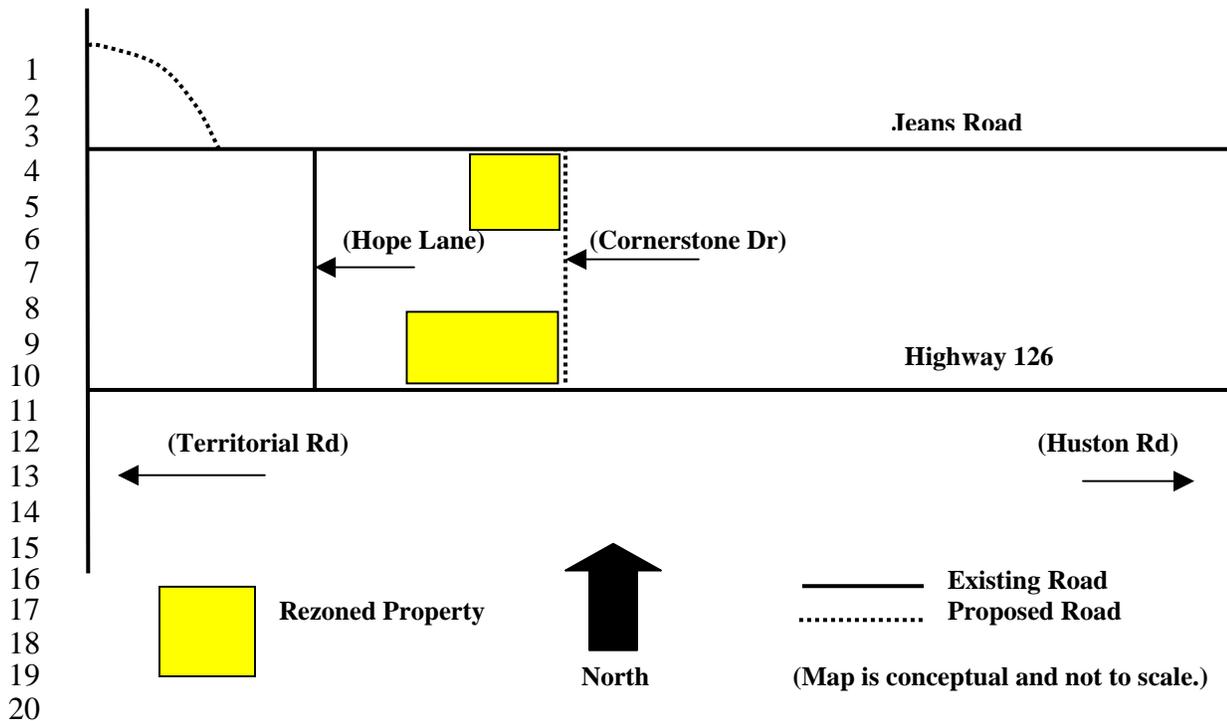
REPLY BRIEF

Petitioner moves for permission to file a reply brief. There is no opposition to the motion, and it is allowed.

FACTS

The challenged decisions approve a new collector street, Cornerstone Drive, and adopt new comprehensive plan and zoning map designations for two tax lots that total 6.40 acres. The lots are part of a 28.4-acre business park subdivision that is subject to a subarea plan, the Northeast Employment Center Specific Development Plan. The challenged decisions change the comprehensive plan map designation for the 6.40 acres from “Industrial” to “Industrial Commercial.” The zoning for the 6.40 acres is changed from “Medium Industrial” to “Industrial/Commercial.” The subdivision is bounded on the south by Highway 126, and on the west by Territorial Highway. The rezoned property and its general relationship to nearby streets is show in the map that appears below.

¹ The city filed separate records for LUBA No. 2002-128 and LUBA No. 2002-134. All citations to the record in this decision are to the record in LUBA No. 2002-128.



21 In support of the challenged application, the applicant prepared a Traffic Impact
 22 Analysis (TIA). That TIA examined the impact of the proposal on five intersections.² The
 23 Oregon Department of Transportation (ODOT) was provided an opportunity to review and
 24 comment on the application and in a June 4, 2002 e-mail message expressed concern that the
 25 TIA did not adequately address the Transportation Planning Rule (TPR) requirement that the
 26 city determine whether the proposal would significantly affect transportation facilities and if
 27 so take appropriate actions to address that impact. OAR 660-012-0060.³ The only specific
 28 objection identified by ODOT in its initial comments is set out below:

² The five intersections are: (1) Jeans Road/Territorial Road; (2) Highway 126/Territorial Road; (3) Highway 126/Hope Lane; (4) Highway 126/Cornerstone Drive; and (5) Highway 126/Huston Road.

³ As relevant here, OAR 660-012-0060(2) provides that a “land use regulation amendment significantly affects a transportation facility if it * * * [w]ould reduce the performance standards of the facility below the minimum acceptable level identified in the TSP [Transportation Systems Plan].” Where it is determined that a land use regulation amendment would significantly affect a transportation facility, OAR 660-012-0060(1) requires that the city ensure that the uses that will be allowed by the proposal will remain consistent with the capacity of the facility by:

- “(a) Limiting allowed land uses to be consistent with the planned function, capacity, and performance standards of the transportation facility;

1 “* * * Several of the assumptions used in the analysis are incorrect, including
2 the assumptions that medians are planned for by ODOT at the
3 Jeans/Territorial and Hope/126 intersections. * * *”⁴ Record 119.

4 ODOT further indicated that it was working with the city and the applicant to resolve its
5 concerns. *Id.*

6 The applicant submitted a technical memorandum (TM), dated June 13, 2002, to
7 address ODOT’s concerns regarding the Territorial Road/Jeans Road intersection and correct
8 the mistaken assumption concerning a planned median. Record 113-116. That TM
9 recognized that the intersection would operate below Transportation System Plan (TSP)
10 performance standards by the year 2022, with or without the proposed amendments and that
11 the proposed amendment would hasten that failure. The TM also recognized that while a
12 traffic signal would correct the failure, and allow the intersection to operate within the
13 performance standard, the current intersection was too close to the current Territorial
14 Road/Highway 126 intersection to the south to meet ODOT signal spacing criteria.

15 The TM’s proposed solution for the Territorial Road/Jeans Road intersection is to
16 relocate eastbound Jeans Road north and provide a new “T” intersection with Territorial
17 Road to the north, leaving the westbound lane with its own separate “T” intersection. The
18 TM takes the position that the north intersection would still operate below performance

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- “(b) Amending the TSP to provide transportation facilities adequate to support the proposed land uses consistent with the requirements of this division;
 - “(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.”

⁴ The raised median assumptions are significant because the medians that the TIA wrongly assumed that ODOT planned for would eliminate problematic turning movements that would otherwise cause the affected intersections to operate below the applicable performance standard before the planning horizon of 2022.

1 standards at some point before 2022, but that intersection could be signalized when
2 warranted to prevent or correct or that failure.

3 In a July 9, 2002 letter, ODOT stated that it supported the proposal so long as (1) the
4 TSP was amended to include the realigned Jeans Road intersection with Territorial Road and
5 the existing Jeans Road/Territorial Road intersection was limited to right turn only from
6 Territorial Road; and (2) Cornerstone Drive was added as a local collector in the TSP and
7 language was added to the TSP to indicate that intersection would be signalized when
8 warranted. Record 107. The planning commission decision recommended that the TSP be
9 amended as described above.⁵

10 The city council accepted the planning commission's recommendation and adopted
11 Ordinance 432.⁶ Petitioner appeals that ordinance in LUBA No. 2002-128. Although
12 Ordinance 432 expressly acknowledges that the application includes a request for rezoning
13 and adopts what the city refers to as sub-zone maps that show the subject property with the
14 requested rezoning, the text in sections 9 and 10 of Ordinance 432 omit any express

⁵ The planning commission decision includes the following description of the relocated Jeans Road/Territorial Road intersection and new Highway 126/Cornerstone Drive intersection:

“The redesign includes realigning Jeans Road to the north, to a new ‘T’ intersection with Territorial Highway. This new intersection will be a full move intersection and may need to be signalized during the planning period to maintain highway performance standards and provide safe and efficient flow of traffic between the NE Employment Center and Territorial Highway.” Record 74.

“The [Highway 126/Cornerstone Drive intersection] will be designed as a ‘T’ intersection * * *. The new intersection will be a full move intersection and will likely need to be signalized during the planning period to maintain highway performance standards and provide a safe and efficient flow of traffic between Highway 126 and Jeans Road.” Record 75.

⁶ Ordinance 432 includes the same language concerning the Jeans Road/Territorial Road and Highway 126/Cornerstone Drive intersections and signals that was included in the planning commission recommendation, as set out in n 5. Record 16-17. It is sufficiently clear from the language of Ordinance 432 that the city council took the position that the design of those two intersections, together with signalization of those intersections when warranted, constituted the limitations or mitigation measures the city adopted pursuant to OAR 660-012-0060(1) to ensure that the proposal would not result in a violation of the performance standards for those facilities.

1 reference to rezoning. After petitioner filed his appeal of Ordinance 432 with LUBA, the
2 city adopted Ordinance 434, without any additional hearings, to amend sections 9 and 10 of
3 Ordinance 432 to include express language approving the requested rezoning. Petitioner
4 appeals that ordinance in LUBA No. 2002-134.

5 **STANDING**

6 The city challenges petitioner’s standing to bring this appeal. However, there is no
7 dispute that petitioner’s notices of intent to appeal were timely filed. There also is no dispute
8 that petitioner appeared before the planning commission and opposed the proposal that was
9 adopted by the city in Ordinance 432.⁷ There also is no dispute that the city adopted
10 Ordinance 434 without providing a hearing.

11 Given the lack of any dispute about the critical facts noted above, petitioner has
12 standing to appeal Ordinance 432 under ORS 197.830(2).⁸ Under that statute, petitioner is
13 only required to appear before “the local government;” he is not required to have appeared
14 before the city governing body. *Warren v. Lane County*, 297 Or 290, 686 P2d 316 (1984),
15 upon which the city relies in arguing that an appearance before the city council was required,
16 was decided under different statutory language that required that a petitioner appear before

⁷ Petitioner attaches a copy of the minutes of the August 5, 2002 planning commission meeting and a sign-up sheet for that meeting to his brief to establish that he appeared at the planning commission. Because the minutes and sign-up sheet are not part of the record that the city filed in this appeal, the city moves to strike those attachments to the petition for review. Petitioner responds with a motion that we consider this extra-record evidence pursuant to OAR 661-010-0045. We do not understand the city to dispute that petitioner appeared before the planning commission. Because there is no dispute over that critical fact, we need not consider the extra-record evidence. Because we need not consider the extra-record evidence, we need not decide the motion to strike and the motion to consider extra-record evidence pursuant to OAR 661-010-0045.

⁸ ORS 197.830(2) provides:

“[A] person may petition [LUBA] for review of a land use decision or limited land use decision if the person:

“(a) Filed a notice of intent to appeal the decision as provided in [ORS 197.830(1)]; and

“(b) Appeared before the local government, special district or state agency orally or in writing.”

1 the “governing body.” Under ORS 197.830(2)(b), petitioner’s appearance before the
2 planning commission was sufficient to constitute an appearance before “the local
3 government.” Petitioner has standing to appeal Ordinance 432.

4 Petitioner also has standing to appeal Ordinance 434. The city argues that Ordinance
5 434 was adopted as an extension of the same local process that the city followed to adopt
6 Ordinance 432, and the city makes the same challenge to petitioner’s standing in his appeal
7 of Ordinance 434 that it makes in the appeal of Ordinance 432. Assuming that the city is
8 correct that the local proceedings are correctly viewed as supporting both ordinances,
9 petitioner’s appearance before the planning commission also suffices to establish his
10 standing to challenged Ordinance 434 under ORS 197.830(2).⁹

11 **FIRST ASSIGNMENT OF ERROR**

12 In his first assignment of error, petitioner alleges seven subassignments of error.
13 Petitioner contends the city failed to determine, in the way that the Transportation Planning
14 Rule (TPR) requires, whether transportation facilities would be significantly affected
15 (subassignment A). Petitioner next contends the city failed to analyze or improperly
16 analyzed a number of particular intersections or roadways: subassignment B (Cornerstone
17 Drive/Jeans Lane intersection); subassignment C (Jeans Road); subassignment D (Highway
18 126/Cornerstone Drive intersection); subassignment E (Highway 126/Huston Road
19 intersection) and subassignment F (Highway 126/Hope Lane intersection). Finally, in
20 subassignment G, petitioner contends the city has not adequately assured that the traffic

⁹ As we explain later in this opinion, it is not necessary for us to determine whether the city is correct in its view that the same local hearings support both ordinances or whether petitioner is correct that the city was required to provide an additional hearing before adopting Ordinance 434. Neither is it necessary to resolve that issue to decide the city’s standing challenge. Even if the city should have provided an additional hearing before adopting Ordinance 434, petitioner would still have standing because the city would not be permitted to (1) fail to provide the required hearing and (2) assert petitioner’s failure to appear locally as a basis for challenging his standing. *See Flowers v. Klamath County*, 98 Or App 384, 389, 780 P2d 227 (1989) (“[A] local government’s failure to abide by the statutory procedures [that bear] directly on a petitioner’s ability to appear, obviates the necessity for making a local appearance in order to have standing to challenge the government’s noncompliance with the procedural requirements.”)

1 signals that will be needed in the future at Jeans Road/Territorial Road intersection and at the
2 Highway 126/Cornerstone Drive intersection will be provided.

3 The city contends that petitioner failed to raise the issues that are raised in the first
4 assignment of error. The city argues that petitioner therefore waived those issues under ORS
5 197.763(1) and 197.835(3).¹⁰ Petitioner contends that the issues raised in the above-
6 described subassignments of error were adequately raised below by other parties, including
7 the applicant. Petitioner also contends that the challenged decision is legislative, rather than
8 quasi-judicial, and for that reason the “raise it or waive it” requirements of ORS 197.763 and
9 197.835(3) do not apply. We first consider whether the challenged decision is a quasi-
10 judicial decision to which the raise it or waive it provisions of ORS 197.763 and 197.835(3)
11 apply.

12 **A. Legislative vs. Quasi-Judicial**

13 As an initial point, while not determinative, we note that the city followed the quasi-
14 judicial procedures described at ORS 197.763 and gave the notice described in ORS
15 197.763(3)(e), which requires that the city’s notice of hearings must “[s]tate that failure of an
16 issue to be raised in a hearing, in person or by letter, or failure to provide statements or
17 evidence sufficient to afford the decision maker an opportunity to respond to the issue
18 precludes appeal to the board based on that issue.” Record 93-94. The analysis that is
19 required to determine whether a decision is quasi-judicial is set out at *Strawberry Hill 4*

¹⁰ ORS 197.763 applies to quasi-judicial land use hearings. ORS 197.763(1) provides:

“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, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

ORS 197.835(3) limits our scope of review as follows:

“Issues [in a LUBA appeal] shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.”

1 *Wheeler v. Benton Co. Bd. of Comm.*, 287 Or 591, 602-03, 601 P2d 769 (1979). The inquiry
2 can be summarized as follows:

3 “1. Is ‘the process bound to result in a decision?’

4 “2. Is ‘the decision bound to apply preexisting criteria to concrete facts?’

5 “3. Is the action ‘directed at a closely circumscribed factual situation or a
6 relatively small number of persons?’” *Leonard v. Union County*, 24
7 Or LUBA 362, 368 (1992).

8 Factors 1 and 2 are present here. Although comprehensive plan and land use
9 regulation text is amended in ways that may indirectly affect other properties and a new road
10 is approved, only two tax lots and 6.4 acres are directly affected by the challenged
11 comprehensive plan and zoning map amendments. This is a “circumscribed factual
12 situation” and a “relatively small number of persons” are affected by the rezoning.
13 Therefore, factor 3 is present as well. Although a larger number of persons may be indirectly
14 affected in some small way by other aspects of the decision, we do not believe those impacts
15 are sufficient to convert what is otherwise clearly a quasi-judicial decision into a legislative
16 decision.

17 **B. Issues Raised Below**

18 Petitioner is correct that he may raise any issue that is “raised by any participant
19 before the local hearings body.” Petitioner need not have raised the issue himself. ORS
20 197.835(3). However, preservation of error under ORS 197.763(1) and ORS 197.835(3)
21 requires that petitioner give the city “fair notice” of the error alleged so that the city has a
22 reasonable opportunity to recognize the alleged error and address the alleged error in its
23 decision. *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991). With one
24 exception, we do not agree with petitioner that the issues he raises in the petition for review
25 under the first assignment of error were adequately raised below by “any participant” to
26 preserve those issues for appeal.

1 If petitioner believed the applicant and city were not applying the TPR in the manner
2 that OAR 660-012-0060 requires (subassignment A) or that its failure to analyze Jeans Road
3 violated OAR 660-012-0060 (subassignment C), or that the applicant’s analysis of the
4 Highway 126/Cornerstone, Highway 126/Huston Road, and Highway 126/Hope Lane
5 intersections was inadequate (subassignments D, E and F) or that the signalization that
6 apparently will be necessary to avoid violation of performance standards for the Territorial
7 Road/Jeans Road and Highway 126/Cornerstone Road intersections is not adequately assured
8 (subassignment G), he was required by ORS 197.763(1) and 197.835(3) to raise those issues.
9 Because neither petitioner nor any other participant raised those issues, petitioner may not
10 raise those issues in this appeal.

11 ODOT’s general observation that it believed the applicant had not adequately
12 addressed the requirements of OAR 660-012-0060 was not adequate to preserve a right on
13 petitioner’s part to make the detailed challenges he attempts to make in these subassignments
14 of error.¹¹ ODOT followed up its general TPR challenge with more specific concerns that
15 were communicated directly to the city and applicant, who took steps to address those
16 concerns. We have no reason to suspect that if petitioner had raised the issues he raises in
17 these assignments of error, the city and applicant would not have similarly worked with
18 petitioner to address those concerns. Because neither petitioner nor any other participant
19 gave the city and applicant the “fair notice” that is required by ORS 197.763(1) and ORS
20 197.835(3), the issues raised in subassignments of error A, C, D, E, F, and G are waived.

21 Unlike the other subassignments of error noted above, an issue was raised below
22 regarding whether the Cornerstone/Jeans Road intersection had been addressed in the TIA
23 and whether that intersection would operate within performance standards (subassignment
24 B):

¹¹ Neither does the applicant’s attempt to address the requirements of OAR 660-012-0060 suffice to allow petitioner to make any challenge he wishes to present under the TPR for the first time at LUBA.

1 “The [TIA] never addresses the Cornerstone/Jeans [Road] intersection. The
2 study includes every impacted intersection but not Cornerstone/Jeans [Road]
3 other than suggesting a traffic light. Jeans [Road] within this area may require
4 widening and turn lanes or more. It could require a relocation of Cornerstone,
5 or lots 16 & 17 remaining as zoned industrial. This area needs additional
6 study for traffic impact. Without this study the Council is being asked to
7 make a zone change decision with incomplete impact information, the present
8 study is inadequate.” Record 65.

9 The above is adequate to raise an issue concerning the failure of the TIA to consider
10 whether the Cornerstone Drive/Jeans Road intersection may be significantly affected by the
11 challenged decision. The city’s failure to respond to that issue in its decision requires
12 remand.¹² *City of Wood Village v. Portland Metro Area LGBC*, 48 Or App 79, 87, 616 P2d
13 528 (1980); *Norvell v. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979);
14 *Grover’s Beaver Electric Plumbing v. Klamath Falls*, 12 Or LUBA 61, 66 (1984).

15 Subassignment of error B is sustained.

16 The first assignment of error is sustained in part.

17 **SECOND ASSIGNMENT OF ERROR**

18 The city’s legal theory for adopting Ordinance 434 without any additional hearings is
19 that it merely makes clear the rezoning of the subject property that had already been
20 accomplished by Ordinance 432. The city contends that the same hearings that were held in
21 adopting Ordinance 432 suffice to authorize adoption of Ordinance 434. In his second
22 assignment of error, petitioner disputes the city’s characterization of Ordinance 432 and
23 argues that Ordinance 434 must stand on its own. Petitioner argues it was therefore error to
24 adopt Ordinance 434 without first providing an additional hearing. In his third assignment of
25 error, petitioner incorporates the same arguments he makes under the first assignment of
26 error and directs those incorporated arguments at Ordinance 434.

¹² Intervenor-respondent cites a number of other planning documents to establish that the Cornerstone Drive/Jeans Road intersection will operate within performance standards. However without some effort by the city in its decision to explain why those documents demonstrate that the intersection will not be significantly affected, we do not agree that those documents are adequate to establish that such is the case.

1 We must remand Ordinance 432 for the city to address subassignment of error B
2 under the first assignment of error. Because the city relies entirely on the validity of
3 Ordinance 432 to support its action in adopting Ordinance 434, Ordinance 434 must also be
4 remanded. We therefore need not and do not address the merits of petitioner’s arguments
5 under the second assignment of error or the city’s response to those arguments. Similarly,
6 we need not separately address third assignment of error, which merely incorporates the first
7 assignment of error.

8 Ordinance 432 and Ordinance 434 are remanded.