BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GRAHAM OIL CO.,
Petitioner,

vs.

CITY OF NORTH BEND,
Respondent,

and

SAFEWAY INC.,
Intervenor-Respondent.

LUBA No. 2002-133

FINAL OPINION
AND ORDER

Appeal from City of North Bend.

Jerry O. Lesan, Coos Bay, filed the petition for review and argued on behalf of petitioner.

No appearance by City of North Bend.

Roger A. Alfred, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Perkins Coie, LLP.

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

AFFIRMED 02/12/2003

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a city decision approving a fuel station in an existing shopping mall parking lot.

MOTION TO INTERVENE

Safeway, Inc. (intervenor), the applicant below, moves to intervene on the side of the city. There is no opposition to the motion, and it is allowed.

FACTS

Intervenor leases the northwestern portion of the Pony Village Mall, a large mall-style shopping center. The leased portion fronts on Virginia Avenue to the north, and Marion Street on the west. Virginia Avenue is a four-lane state highway with a center refuge lane. In 1997, intervenor constructed a grocery store on the leased portion, with a large parking lot adjacent to the intersection of Virginia Avenue and Marion Street. The subject property is zoned General Commercial (GC).

The North Bend Airport (airport) is north of the subject property. The airport has two runways: Runway 13-31, a visual-flight-rules runway that extends generally north-south, and Runway 4-22, an instrument-landing runway that extends east-west. A Runway Protection Zone (RPZ) extends south 1000 feet from the terminus of Runway 13-31, and extends onto the northwest corner of the subject property. The purpose of the RPZ is to protect people and property on the ground. The RPZ is imposed pursuant to the Airport Planning Rule at OAR chapter 660, division 13, the exhibits attached to that rule, and Federal Aviation Administration (FAA) requirements. In relevant part, the administrative rule requires that the RPZ for a visual runway serving aircraft categories A & B be 1,000 feet

long. Exhibit 4 to OAR chapter 660, division 13.[1] Public assembly uses and fuel storage facilities are prohibited within the RPZ.[2]

The choice of which runway to use is up to the pilot. Due to prevailing winds, Runway 13-31 is the most frequently used runway at the airport. Although Runway 13-31 has an RPZ designed for category A or B aircraft, larger and faster aircraft in categories C or D frequently use the runway as well.

In 2001, intervenor applied to the city for site review approval of a fuel station, a permitted use in the GC zone, at the northwest corner of the subject property. The proposed station is a five-island gas station with double-sided pumps, a canopy and a kiosk for two attendants. Two 20,000-gallon gas tanks buried on the site will be filled by tanker truck three times a week. After the initial public hearing, it was discovered that the proposed location was within the RPZ. Intervenor then withdrew the application, and submitted a new application proposing to place the fuel station at the northeast corner of the site, just outside the RPZ, but still under the approach and take-off path. The proposed location, while not within the RPZ, is within an aviation easement that generally restricts the height of structures.

The FAA had previously determined that the height of the canopy of the proposed fuel station will not present a hazard to air navigation, as long as certain lighting standards are met. During hearings before the planning commission, petitioner argued that the presence of a fuel station just outside the RPZ presented a ground safety concern in the event of a plane crash on take-off or landing. Petitioner argued that the city is authorized to apply

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[1] A visual runway serving aircraft in categories C or D requires a 1,700-foot RPZ. Aircraft are categorized depending on their approach speed; generally, aircraft with approach speeds below 121 knots are either category A or B, while aircraft with approach speeds more than 121 knots are either category C or D. *Id.* n 1.

[2] Petitioner owns a gas station at the corner of Virginia Avenue and Marion Street, within the RPZ. The parties disagree whether a gas station is a "fuel storage facility" prohibited within the RPZ. We need not resolve that dispute, because the location of the proposed fuel station is outside the RPZ.

more stringent requirements than those imposed by the state to address safety and compatibility concerns, pursuant to ORS 836.623(1).[3] The city planning commission approved the proposed fuel station, conditioned on intervenor seeking a ground safety study from the FAA. Petitioner appealed the planning director's decision to the city council. While the appeal was pending before the city council, the FAA declined to conduct a ground safety study, stating that all applicable criteria under FAA purview were considered in its previous determination regarding air navigability. After conducting a hearing, the city council voted to deny the appeal, thus approving the proposed fuel station. The city council decision declined to apply ORS 836.623(1) to impose more stringent requirements than applicable state standards. This appeal followed.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR

Petitioner argued below, based on testimony of the airport manager and other aviation officials, that the presence of a fuel station located adjacent to a shopping mall and immediately outside the RPZ of a runway that is designed for category A and B aircraft presents an obvious ground safety issue in the event of a crash, particularly where that runway is frequently used by category C and D aircraft. Petitioner argued that the city must adopt findings addressing that issue, pursuant to ORS 836.623(1).

In response to petitioner's arguments, the city council adopted the following finding:

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[3] ORS 836.623(1) provides:

> "A local government may adopt land use compatibility and safety requirements that are more stringent than the minimum required by Land Conservation and Development Commission rules * * * where such regulations are within its authority. * * * If a local government receives information in a hearing on a land use application alleging that public safety requires a higher level of protection than the minimum established in commission rules and if the information is supported by evidence, the governing body shall consider the information and adopt findings explaining the bases for any decision regarding the need for more stringent requirements. Land use requirements regarding safety and compatibility shall consider the effects of mitigation measures or conditions that could reduce safety risks and incompatibility."

> "The City Council considered the specific criteria of ORS 836.623(1), which provides that under certain circumstances local governments may adopt more stringent standards regarding airport safety than currently existing state or local standards. The City Council finds that more stringent standards are not necessary under the circumstances of this application, and that this application should be approved under existing standards and criteria as required by ORS 227.173(1)." Record 44.

In the first and second assignments of error, petitioner argues that it is unclear what the above-quoted finding means. If it means that the city council believes that is not necessary to consider the testimony of aviation experts regarding ground safety, petitioner argues that the finding misconstrues ORS 836.623(1). According to petitioner, the statute clearly requires that when information is received alleging that public safety requires a higher level of protection than the minimum established by LCDC rules, and that information is supported by evidence, the city "shall consider the information and adopt findings explaining the basis for any decision regarding the need for more stringent requirements." *See* n 3.

To the extent the quoted finding means that the city construes the statute to require findings *only* if it concludes that more stringent requirements are necessary, petitioner argues that the statute plainly imposes an explanatory findings obligation on *any* decision *regarding* the need for more stringent requirements, whether that decision is to impose more stringent requirements or not. Petitioner argues that the city's findings must address the evidence regarding ground safety and, at a minimum, explain why it is not appropriate to apply more stringent requirements.

In the third assignment of error, petitioner argues that if LUBA concludes that the city properly construed the statute and adopted adequate findings required by the statute, the city's findings regarding ground safety are not supported by substantial evidence.

Intervenor responds first that ORS 836.623(1) requires explanatory findings only if the local government concludes that there is a "need for more stringent requirements." Because the city reached the contrary conclusion, intervenor argues, the statute is satisfied.

We disagree. Although it is possible to read the statute in the manner intervenor suggests, if that is what the legislature intended it is difficult to see why the legislature would require local governments to explain "the basis for *any* decision *regarding* the need for more stringent requirements." The emphasized language suggests that the findings obligation extends to any decision regarding the alleged need for more stringent requirements, even if the local government ultimately concludes that more stringent requirements are not necessary. In addition, one presumed purpose of any findings requirement is to facilitate judicial review of the local government's decision. That purpose is not served by intervenor's view of the statute, under which LUBA and other review bodies are left to speculate as to why the local government does not believe more stringent requirements are necessary.

Intervenor next argues that the city's findings regarding safety are adequate, particularly given that petitioner never identified below exactly what LCDC standard is inadequate, or what LCDC standard should be made more restrictive. The only possible candidate for such a standard, intervenor argues, is the 1,000-foot RPZ standard in OAR chapter 660, division 13 for visual runways serving category A and B aircraft. According to intervenor, under ORS 836.623(1) a local government may consider making existing LCDC standards more stringent, *i.e.*, the only possible "higher level of protection" the city can consider in the present case is to extend the RPZ, presumably to the length required for category C or D aircraft. However, intervenor points out that petitioner disavowed below any argument that the RPZ should be extended to the 1,700-foot distance required for category C or D aircraft. Further, intervenor notes that the city adopted findings that the airport has no plans to expand Runway 13-31 or designate the runway to accommodate larger aircraft, in part because either option would require relocation of

Virginia Avenue to accommodate a larger RPZ.[4] Intervenor argues that petitioner failed to suggest any other "more stringent requirement," or any measure to improve safety, other than to deny the project entirely.

[4] Intervenor cites to the following findings addressing the issue of ground safety:

"3.b. * * * The issue of ground safety and the possibility of a longer runway to accommodate larger planes in the future was raised by the opponent.

"3.c * * * The applicant's proposed fueling center will be located outside the [RPZ] * * * and will have a height of approximately 20 feet at its tallest point. Because the fueling center is outside the RPZ, and does not extend into any of the three-dimensional surfaces created by OAR Chapter 660-013 or North Bend Ordinance NO. 1398, none of the restrictions imposed by those regulations apply to this application.

"3.d * * * The applicant applied to the [FAA] for an Aeronautical Study regarding the proposed fueling center, which resulted in a 'determination of No Hazard to Air Navigation' from the FAA.

"3.e * * * The FAA's Determination of No Hazard concludes that the proposed fueling center will not be a hazard to air navigation as long as certain lighting standards are met, and the applicant will be required to comply with the requisite FAA lighting standards as a condition of approval.

"3.f * * * The Planning Commission required the applicant to obtain a ground safety study from the FAA in order to assure ground safety.

"3.g. * * * The Planning Commission determined that if a ground safety study could not be obtained from the FAA, the location outside the state's required RPZ and the Airport Manager's review in regards to height limitations are the best criteria to be utilized, and that there are no additional safety concerns to be addressed by the Planning Commission.

"3.h * * * Because a letter from the FAA dated February 6, 2002, explains that no such study exists, and that all applicable criteria under FAA purview were considered in the Aeronautical study, the City Council adopts the Planning Commission's finding that there are no additional aviation safety standards to be addressed with respect to the application.

"3.i * * * North Bend Airport Runway 13-31 is officially designated as a runway for B-III aircraft, and has an RPZ that extends 1000 feet from a point 200 feet beyond the end of the runway. [The airport manager] testified at the hearing before the City Council that the airport has no plans to expand Runway 13-31 or designate the runway to accommodate larger aircraft. [The airport manager] also testified that if any runway will be expanded to accommodate larger aircraft in the future, it will be Runway 4-22, not Runway 13-31, in part because any expansion of Runway 13-31 would require the relocation of Virginia Avenue to accommodate a larger RPZ.

Given the absence of argument for extending the RPZ, and petitioner's failure to identify any "higher level of protection" short of denial, intervenor argues that the city's findings are adequate to explain its conclusion that the proposed development complies with all applicable criteria and that no additional requirements are necessary to address public safety.[5]

The above-quoted finding addressing ORS 836.623(1) simply concludes that more stringent requirements are unnecessary, without any explanation for reaching that conclusion. Considered in isolation, that finding is inadequate. *LeRoux v. Malheur County*, 30 Or LUBA 268, 271 (1995) (adequate findings must identify the relevant approval standard, set out the facts relied upon, and explain how the facts lead to the conclusion that the request satisfies approval standards). However, the city adopted a number of other findings

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> "3.j * * * The City Council, finds that the applicant is in compliance with all applicable standards and criteria regarding aviation and runway safety.
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> "* * * * *
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> 3.l * * * The City Council considered the specific criteria of ORS 836.623(1), which provides that under certain circumstances local governments may adopt more stringent standards regarding airport safety than currently existing state or local standards. The City Council finds that more stringent standards are not necessary under the circumstances of this application, and that this application should be approved under existing standards and criteria as required by ORS 227.173(1)." Record 44.

[5] Intervenor also argues that if ORS 836.623(1) is read to authorize application of ad-hoc "requirements," it is inconsistent with ORS 227.173(1) and 227.178(3), which require respectively that approval or denial of a permit shall be based on standards and criteria set forth in the development ordinance, and that review of land use permits must be based on regulations that were applied at the time the application was filed. According to intervenor, ORS 836.623(1) can be read consistently with these statutes only if it is understood as simply authorizing the imposition of additional conditions and mitigation, where necessary, rather than authorizing imposition of new, ad-hoc safety standards.

Relatedly, intervenor argues that ORS 836.623(1) does not purport to allow an outright denial of an application, even where evidence supports a finding that more stringent requirements are necessary. Instead, intervenor argues, the city need only "consider the effects of mitigation measures or conditions that could reduce safety risks and incompatibility." According to intervenor, that view is consistent with ORS 197.522, which obligates local governments to approve an application for development that is consistent with applicable standards, or impose reasonable conditions to make it consistent with applicable standards. Our disposition of the first and second assignments of error makes it unnecessary to address or resolve these contentions.

addressing ground safety, quoted at n 4. Those findings conclude that the proposed fuel station satisfies all FAA and other applicable requirements, and that there is no plan for expanding Runway 13-31 or its RPZ. We agree with intervenor that there is some burden on a proponent of "more stringent requirements" under ORS 836.623(1) to identify what those requirements might be. Here, petitioners disavowed the most obvious "more stringent requirement," *i.e.* extending the RPZ, and instead argued only that public safety required denial of the proposed fuel station at that location. The city council clearly disagreed with that position, and found that existing standards were sufficient to protect public safety. While it is a close question, we agree with intervenor that the challenged findings as a whole are adequate to explain the basis for the city's decision not to impose more stringent requirements under ORS 836.623(1).

Turning to the evidentiary challenge, intervenor cites to the testimony of intervenor's consultants, to the effect that the 1000-foot RPZ is adequate to protect public safety and that location of the fuel station outside the RPZ as proposed is safe. Intervenor also cites to testimony that the proposed station will include safety features designed to prevent fuel flow in the event of an accident, and that intervenor proposes to bury the fuel tanks eight feet deep, rather than the customary five feet, under 18 inches of concrete. Intervenor argues that, even considering petitioner's contrary evidence, the city's finding that more stringent requirements are unnecessary to protect public safety is supported by substantial evidence.

Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, LUBA may not substitute its judgment for that of the local decision maker. Rather, LUBA must consider all the evidence in the record to which it is directed, and determine whether, based on that evidence a reasonable local decision maker could reach the decision that it did. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d

441 (1992). We agree with intervenor that a reasonable person could conclude, based on the whole record, that public safety does not require imposition of more stringent requirements, or a higher level of protection than the minimum established in LCDC rules.

The first, second and third assignments of error are denied.

FOURTH ASSIGNMENT OF ERROR

North Bend Zoning Ordinance (NBZO) 45(4) requires city approval of proposed access roads, driveways, fire lanes, and the location, design and adequacy of off-street parking facilities, among other things.[6] In the fourth assignment of error, petitioner argues that the city's findings regarding the adequacy of access and traffic control are insufficient, because they fail to address problems associated with internal traffic circulation between the proposed fuel station and the adjacent shopping mall. In the fifth assignment of error, petitioner argues that there is insufficient evidence to support the city's findings regarding off-street parking.

A. Internal Traffic Circulation

Petitioner explains that the Safeway store, its parking lot, and the proposed fuel station are separated from the shopping mall structure by a two-lane "drive aisle." The loading docks for the shopping mall structure are located adjacent to the drive aisle, and semi-trucks delivering products to the mall sometimes block part of the drive aisle. The

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[6] NBZO 45(4) governs development in the C-G zone, and provides:

> "No construction, reconstruction, expansion, addition or alteration shall be commenced in a unified shopping area without approval * * * of the location and design of any use, structure, access road, driveway or fire lane; the location, design and adequacy of off-street parking facilities; the height of buildings; and the location, type and sufficiency of screening of adjacent residential areas."

NBZO 45 also provides that:

> "In granting approval under this subsection, the Planning Commission may impose conditions and restrictions for the purpose of insuring orderly commercial development with adequate access, parking and traffic control. * * *"

drive aisle provides entry from and exit onto Virginia Avenue. Directly across the drive aisle from the proposed fuel station is a bank, with two drive-up aisles for banking and ATM use, and a third driveway that connects the drive aisle with the main shopping mall parking lot to the east.

According to petitioner, bank representatives testified before the city that the intersection between the drive aisle and Virginia Avenue is already congested, and that the proposed fuel station will add 90 vehicles to that intersection at the p.m. peak hour. The bank testified that the additional traffic generated by the proposed facility will impact traffic entering and exiting the bank's drive-up facility, and cause dangerous backups affecting traffic on the drive aisle and on Virginia Avenue. Record 60.

The city's findings rely on intervenor's traffic study to establish that there is adequate access and traffic control.[7] However, petitioner criticizes that study, arguing that it counted

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[7] The city's findings state, in relevant part:

> "2.2m * * * The Traffic Impact Analysis concludes that the transportation facilities near the site will continue to operate acceptably with the addition of the new trips that will be generated by the proposed fueling center, specifically the intersection of Marion Street/Virginia Avenue, and the intersection of the site access driveway at the northeast corner of the Safeway lot and Virginia Avenue.
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> "2.2n * * * The opponents challenged the Traffic Impact Analysis prepared by traffic engineers Kittelson and Associates for the proposed fuel center, and argue that the proposed fuel center will generate 'dangerous congestion.'
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> "2.2o * * * The opponents did not provide a Traffic Impact Analysis prepared by a transportation planning/traffic engineering firm or any other evidence sufficient to refute the Kittelson and Associates Traffic Impact Analysis." Record 36.

In addition, the city adopted the following findings:

> "2.2ax * * * The Oregon Department of Transportation (ODOT) issued a Road Approach Permit for the proposed fuel center that allows unsignalized access onto Virginia Avenue for the proposed use. In correspondence dated September 27, 2001, ODOT planner Thomas Guevara sated that the permit had been issued, and that ODOT 'has no further access concerns with the proposed project.'
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> "2.2ay * * * The access and entrance proposed from Virginia Avenue through the shared access drive with Pony Village Shopping Center and the Safeway supermarket will be adequate because of the traffic patterns proposed by the applicant, the easement

only cars that enter from or exit onto Virginia Avenue using the drive aisle, and did not count internal traffic passing between the mall, the bank and the Safeway store. Because the study did not quantify internal traffic patterns, petitioner argues, there is no evidence demonstrating that the proposed fuel station will not impact the internal traffic pattern. Further, petitioner argues that the city failed to address the bank's testimony regarding traffic congestion at the intersection, as well as testimony regarding sight distances and blockage of the drive aisle by delivery trucks.

Intervenor responds, and we agree, that the city's findings are adequate and supported by substantial evidence. In response to opposition testimony regarding traffic impacts, the city imposed a condition that intervenor complete re-striping and channelization of the easterly access point at the intersection of the drive aisle and Virginia Avenue, to comply with ODOT specifications. The city relied upon the traffic study to conclude that, as conditioned, the easterly access point complies with NBZO 45(4). Petitioner's only critique of that study is that it counted only traffic that enters from or exits onto Virginia Avenue, and did not include internal traffic passing between the mall, the bank and the Safeway store. However, petitioner cites to no evidence, and does not even allege, that such internal traffic is significant. Notwithstanding that the study did not quantify internal traffic, a reasonable person could rely on the study to support a finding of compliance with NBZO 45(4).

The city's findings did not specifically address the bank's testimony regarding traffic congestion, or the testimony regarding sight distances or semi-trucks blocking part of the

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which allows for the use of the shared drive by customers and trucks accessing the proposed fueling center, the adequacy of the approach for the proposed trip generation, and re-striping and channelization that will be completed by the applicant to comply with ODOT standards and to alleviate concerns raised at the hearing regarding conditions on the site with respect to the easterly driveway.

"2.2az * * * Based upon the Kittelson Traffic Impact Analysis [and other evidence], the City Council determined that the use will comply with [NBZO] 45 because orderly commercial development, adequate access and traffic control will be provided." Record 40.

drive aisle. However, the city rejected opposition testimony regarding "dangerous congestion," because that testimony was not supported by a traffic study or any other evidence sufficient to refute the conclusion of intervenor's traffic study that the easterly access would continue to operate within accepted limits. Record 36. The city is not required to address all conflicting evidence in its findings, although its findings must address and respond to specific issues raised below that are relevant to compliance with approval standards. *Thomas v. Wasco County*, 30 Or LUBA 302, 310 (1996). Reduced to essentials, that testimony asserts that the additional traffic from the proposed fuel station will result in dangerous congestion. The city concluded otherwise. To the extent petitioner challenges that conclusion, it is supported by substantial evidence. We do not believe that remand is warranted to adopt findings specifically addressing the opposing testimony.

B. Parking

The fifth assignment of error argues that the city erred in determining that it is feasible for intervenor to comply with applicable parking standards. Petitioner explains that NBZO 45(4) requires adequate off-street parking facilities, and that under the city's code one parking space is required per 2,000 square feet of lot area for the proposed fuel station. The city's findings state that there is insufficient information in the record to determine the exact size of the "lot area" for the proposed station, as it interpreted that term, although it also found that it is feasible for the applicant to comply with parking standards.[8] Accordingly,

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[8] The city's findings state, in relevant part:

> "2.2bg * * * The fueling center will be located on the lot of the existing Safeway store, which has its own parking requirements.
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> "2.2bh * * * The existing Safeway building is 48,494 square feet which requires 242.47 parking spaces.
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> "2.2bi * * * The required amount of parking spaces for the existing Safeway supermarket will not be reduced when the proposed fueling center is constructed.
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> "2.2bj * * * [247] spaces are proposed by Safeway on Sheet DD1 * * *.

the city found that the exact size of the lot area and hence the exact number of required parking spaces will be determined by the city planner and building inspector, as part of the application for the building permit, pursuant to a "clear and objective" method described in finding 2.2bp. *See* n 8. The city also imposed condition 8, which requires that:

> "The exact size of the lot area for purposes of required parking shall be determined by the City Planner and Building Inspector as part of the application for a building permit, applying the clear and objective standards set forth in Finding 2.2bp in this Final Order. If any further interpretation or exercise of policy or legal judgment is required in determining the lot area for

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"2.2bk * * * The applicant has proposed that the "Lot Area" for purposes of determining the amount of parking required for the fueling center should be determined by the size of the area being leased for the fueling center. The Planning Commission agreed with this interpretation, but did not have the exact square footage of the area to be leased by Safeway. Therefore, the Planning Commission approved a maximum leased area of 'up to 9,000 square feet' as the 'Lot Area' for purposes of calculating the parking requirements, which would require the fueling center to have 4.5 parking spaces in addition to the 242.47 spaces required for the Safeway supermarket.

"2.2bl * * * Before the City Council, the applicant provided evidence that the size of the parking lot area to be leased for the fuel center was 8,248 sq. ft, which was the area beneath the canopy, and above the underground fuel tanks.

"2.2bm * * * The City Council determined that for the purposes of calculating the amount of required parking for this application * * *, the term 'lot area" must be interpreted to mean the total site area that will be occupied by the fueling center, including all necessary components.

"* * * * *

"2.2bo * * * Based upon the above stated findings, the City Council determined that there is not sufficient information at this time to determine the exact size of the lot area for purposes of parking, although it is feasible that the applicant can comply with the parking standards.

"2.2bp * * * The City Council finds that the exact size of the lot area for purposes of required parking will be determined by the City Planner and Building Inspector as part of the application for a building permit, applying the clear and objective standards set forth in this Finding. Within the northeast corner of the Safeway lot, the size of the lot area of the fueling center for purposes of calculating parking required by Section 80 shall be determined by drawing a rectangular shape over the fueling center just large enough to encompass all of the components of the fueling center, as shown on the applicant's site plan (Sheet No. DD2) and itemized as follows: (a) all canopy areas, (b) the area above the underground storage tanks, (c) the new vent stacks, (d) the new telephone unit, (e) the new air/water unit, and (f) the new curbs and planters surrounding items (c) – (e). * * *" Record 41-42.

parking purposes, the issue shall be referred back to the Planning Commission for a decision." Record 45.

Petitioner argues that the city's finding regarding the feasibility of providing the required parking spaces is not supported by substantial evidence. To illustrate this argument, petitioner attaches to the petition for review a copy of the site plan (sheet DD2, referenced in finding 2.2bp). Petitioner modified the copy by attempting to apply the methodology described in finding 2.2bp. Petitioner drew a rectangle on the site plan encompassing all of the elements described in that finding, and then calculated the "lot area" of that rectangle, using the appropriate scale. The result, petitioner argues, is 14,284 square feet, which translates into a need for 7.15 parking spaces. Petitioner then adds that number to the 242.47 spaces required by the existing Safeway store, and argues that the total number of required spaces is 250. Petitioner then argues that Safeway proposed only 247 parking spaces for both uses. Further, petitioner contends that nine of the proposed 247 spaces are in fact of insufficient size under the city's code, and therefore there are only 238 legal size parking spaces, which is fewer than the required number of spaces for Safeway alone. Therefore, petitioner argues, the city's finding regarding the feasibility of providing the required number of parking spaces to support both uses is not supported by substantial evidence.

Intervenor objects to our consideration of the modified site plan attached to the petition for review, arguing that it was not submitted during the proceedings below, and cannot now be considered by LUBA. Intervenor also argues that the modified plan represents only the calculations of petitioner's attorney based on a conceptual site plan, a task better left to qualified persons when presented with final construction plans. Finally, intervenor argues that no issue was raised below regarding the size of proposed parking stalls, and therefore such issues are waived. ORS 197.763(1). Because all of the arguments under the fifth assignment of error are based on petitioner's exhibit, intervenor argues that the assignment must be summarily denied.

If the Board addresses the merits, intervenor emphasizes that the site plan is conceptual, and the location of the depicted elements can and probably will change in the final construction plans to be reviewed by the planning director and building inspector, pursuant to finding 2.2bp, which will change the "lot area" and hence the number of required parking spaces. Intervenor also notes the existence of a large, seldom-used parking lot south of the existing grocery store that potentially can be used if the parking lot north of the structure, on which the proposed fuel station will be located, cannot supply enough spaces. Intervenor finally argues that condition 8 ensures that no building permit will be issued unless the city planner and building inspector conclude that the requisite parking spaces are available. That approach is permissible, intervenor argues, under *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447-48 (1992) (a local government may find compliance with an approval criterion by finding that compliance is feasible, and imposing conditions of approval to ensure that the criteria is met).

We agree with intervenor that it would not be appropriate for LUBA to decide part of the fourth assignment of error, based on the modified site plan attached to the petition for review. *See Carver v. City of Salem*, 42 Or LUBA 305, 309, *aff'd* 184 Or App 503, ___P3d ___ (2002) (striking a record map attached to the petition for review that was altered to illustrate petitioner's argument). We also agree that any issue regarding the size of the proposed spaces was not raised below, and is therefore waived. To the extent those two rulings do not entirely eliminate the evidentiary challenge under this assignment of error, we agree with intervenor that the city's finding that it is feasible to comply with parking requirements is supported by substantial evidence. As intervenor notes, the site plan is conceptual in nature and the location of the various elements encompassed by the "lot area" of the proposed fuel station, as defined in the city's findings, may very well change. In addition, while the city found that intervenor had proposed 247 parking spaces, it did not find that 247 parking spaces are the maximum that is available, as petitioner's argument

presumes. Given these considerations, a reasonable person could conclude, as the city did, that it is feasible for the proposed fuel station to comply with the parking requirements. The city's findings regarding off-street parking requirements are adequate and supported by substantial evidence.

The fifth assignment of error is denied.

The city's decision is affirmed.