BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

VINCENT DIMONE and
DEBRA DIMONE,
Petitioners,

vs.

CITY OF HILLSBORO,
Respondent,

and

ZOE ANNE ARRINGTON,
Intervenor-Respondent.

LUBA No. 2002-150

EDWARD DAVIS,
Petitioner,

vs.

CITY OF HILLSBORO,
Respondent,

and

ZOE ANNE ARRINGTON,
Intervenor-Respondent.

LUBA No. 2002-151

FINAL OPINION
AND ORDER

Appeal from City of Hillsboro.

Michael Lilly and Todd Sadlo, Portland, filed a joint petition for review. Michael Lilly argued on behalf of petitioners Dimone. Todd Sadlo argued on behalf of petitioner Davis.

Timothy J. Sercombe and E. Michael Conners, Portland, filed a joint response brief and argued on behalf of respondent and intervenor-respondent. With them on the brief was

Preston Gates & Ellis, Davis Wright Tremaine and Gregory S. Hathaway.

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

AFFIRMED 6/16/03

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal Ordinance 5200, a city decision that amends the zoning map designation for intervenor-respondent's property that was annexed to the city in November, 2000.

FACTS

This matter is before us for the second time. Our February 6, 2003 Order regarding petitioners' record objections and motion for evidentiary hearing explain the important parts of our prior decision, the Court of Appeals' decision that reversed and remanded our first decision and the city's proceedings and decision following remand:

> "This dispute began when the city planning commission adopted a resolution to initiate a process that led to rezoning intervenor's * * * annexed property from its county zoning designation to the city's Station Community Commercial-Multi Modal (SCC-MM) zoning designation. The requested rezoning was referred to the city's Planning and Zoning Hearings Board (PZHB). The PZHB held a public hearing and voted to deny the requested rezoning on April 26, 2001. Intervenor-respondent appealed that decision to the city council; the planning commission did not separately appeal. The city council held a partial *de novo* public hearing on June 5, 2001. On July 3, 2001, the city council voted to reverse the PZHB and adopted Ordinance 5040, which approved the SCC-MM zoning.
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> "Petitioners appealed Ordinance 5040 to LUBA. On December 11, 2001, LUBA affirmed the city council's decision. *Dimone v. City of Hillsboro*, 41 Or LUBA 167 (2001) [*Dimone I*]. In doing so, LUBA rejected petitioner Davis's fourth assignment of error and part A of petitioners Dimone's first assignment of error. In those assignments of error petitioners challenged the evidentiary support for a city finding. That finding can be read to state that rezoning the subject property to SCC-MM is needed, at least in part, to correct a shortage of commercially zoned land. We rejected petitioners' arguments under those assignments of error, concluding that it did not matter whether the evidentiary record established that there was a shortage of commercially zoned land, because the disputed finding that such a shortage exists was only one of several reasons the city gave for its rezoning decision.
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> "Our decision in *Dimone* was appealed to the Court of Appeals, and the court disagreed with our resolution of the above-noted assignments of error. *Dimone v. City of Hillsboro*, 182 Or App 1, 47 P3d 529 (2002) [*Dimone II*]:

> "'* * * Respondents may be correct that a need for commercial property is not a prerequisite to applying the SSC-MM zone to this property. The problem with respondents' argument, however, is that it appears from the record before us that the city's decision to impose this zone was based, in part, on its determinations that there was such a need and that allowing commercial uses on this property helps satisfy that need. The city's findings addressing the need for commercially zoned land gave no indication that the discussion was not necessary to its decision or was intended as surplusage or simply as an observation. The city's findings supporting the rezoning are stated in terms demonstrating the city council's belief that each of the reasons for its decision contributed to its ultimate decision. Were the city's findings to have stated clearly its understanding of the significance of the need issue and, in so doing, advised LUBA and us of the relative importance of the issue to its decision, our conclusion might be different. Based on the existing record, we must conclude that the need for commercial property in this area played a role in the city's decision.
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> "'In reviewing a local government decision, we are limited to the findings and conclusions that the local government actually made. * * * If the city believes that the need for commercial land is irrelevant to its decision to apply the SCC-MM zone on remand, it can say so.' 182 Or App at 13-14 (citations omitted).

"Following the Court of Appeals' remand, LUBA issued a final opinion on September 12, 2002 that remanded Ordinance 5040, so that the city could respond to the error identified by the Court of Appeals. Following the Court of Appeals' decision, the city council met with the city attorney in executive session on at least two occasions.[1] On September 18, 2002, petitioners and intervenor-respondent were provided a draft ordinance that was prepared to respond to the Court of Appeals' remand. Petitioners and intervenor-respondent were given an opportunity to provide written comment on the draft ordinance and the city's planned procedures for adopting the ordinance on remand. Aside from this limited opportunity for written comment, no public hearing was held to accept additional evidence or legal argument from the parties. On October 15, 2002, the city council adopted Ordinance 5200. On November 5, 2002, petitioners appealed Ordinance 5200 to LUBA." *Dimone v. City of Hillsboro*, 44 Or LUBA ___ (LUBA Nos. 2002-150/151, February 6, 2003, Order), slip op at 2-4 (footnotes omitted).

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[1] It appears that the parties agree that the city held three executive sessions during the remand proceedings.

INTRODUCTION TO PETITIONERS' ASSIGNMENTS OF ERROR

It is not disputed that there are potentially three zoning map designations that could be applied to the subject property under its current Station Community Planning Area (SCPA) comprehensive plan map designation. Those potentially applicable zoning map designations are: "(1) Station Community Residential-Low Density (SCR-LD); (2) Station Community Residential-Medium Density (SCR-MD) and (3) Station Community Commercial-Multi-Modal (SCC-MM)." *Dimone I*, 41 Or LUBA at 171. The SCC-MM zone is the only one of the three potentially applicable zones that would allow the subject property to be developed commercially.[2]

City of Hillsboro Zoning Ordinance (HZO) 114(2) establishes two criteria that govern intervenor's requested SCC-MM zoning map designation for the subject property:

> "(a) That the request must conform with the Hillsboro Comprehensive Plan and this Ordinance;
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> "(b) That, where more than one designation is available to implement the Comprehensive Plan designation (e.g. R-7 vs. R-10), the applicant must justify the particular zoning being sought and show that it is best suited for the specific site, based upon specific policies of the Hillsboro Comprehensive Plan."

The city's key findings in support of Ordinance 5200 are set out below:

> "WHEREAS, the City Council wishes to clarify and amend [its prior] findings. The City Council determines that, in this case, evidence of a commercial land supply or need was not a necessary part of the record needed to justify the requested rezoning under the rezoning criteria set forth in Hillsboro Zoning Ordinance [(HZO)] 114(2). In the context of this rezoning, the need for commercial land is not a controlling factor in assessing whether to change the zoning of the property to SCC-MM. This is because the proposed zone, SCC-MM, is a mixed use zone, allowing a variety of uses, including both residential and commercial. The Council's selection of this zoning district for the property would have been the same, even if there was persuasive evidence in the record of an abundance of commercial land in the

[2] Petitioners contend that intervenor plans to construct a Wal-Mart store on the subject property and that such a store with its related parking needs and off-site traffic impacts would be inconsistent with adjacent residential development.

> marketplace. In addition and alternatively, the Council does not interpret the rezoning standards and plan policies raised in this case to require evidence of land supply or need for the type of land for which rezoning is sought, in order to justify a rezoning. *This includes the Urbanization Goal set out in section 2(I) of the Hillsboro Comprehensive Plan, which refers to land use designations in the comprehensive plan.* The discussion about commercial land need in the adopted findings set out in Attachment A to Ordinance No. 5040 was surplusage and intended as an observation." Remand Record 5 (emphasis added).[3]

The first two assignments of error challenge the adequacy of the city's findings. The fifth assignment of error alleges procedural errors that petitioners contend prejudiced their substantial rights. The third and fourth assignments of error allege misconstructions of applicable local law. Because petitioners' findings challenges in the first and second assignments of error frequently assume the correctness of their interpretational challenges in the third and fourth assignments of error, we briefly describe that interpretational challenge before turning to petitioners' findings challenges in the first and second assignments of error.

Petitioners' interpretive challenge in the third and fourth assignments of error is relatively straightforward. Petitioners contend that the record in this appeal establishes that there is no need for additional commercially zoned land. Unlike the SCR-LD and SCR-MD zones, which are generally limited to residential uses, the SCC-MM zone would allow intervenor's property to be developed for both residential and commercial uses. Contrary to the city's interpretation of the HZO and Hillsboro Comprehensive Plan (HCP), petitioners interpret the HZO and HCP to dictate that rezoning decisions consider whether there is a need for the land uses that would be allowed under a proposed zoning map designation and then apply the zoning map designation that is best suited to meet that identified need. Given the lack of evidentiary support in the record of this appeal for a need for additional

[3] Both the record in *Dimone I* and a separately compiled record on remand are included in the record the city filed in this appeal. We cite the record that was separately compiled by the city following our remand in *Dimone I* as "Remand Record" to distinguish it from the record document that was previously filed in *Dimone I*, which we cite as "Record."

commercially zoned land in Hillsboro, petitioners contend that the city's selection of the SCC-MM zone is inconsistent with the HCP and inconsistent with the HZO 114(2) directive that the selected zone be the "best suited for the specific site, based upon specific policies of the Hillsboro Comprehensive Plan." We now turn to petitioners' assignments of error.

FIRST ASSIGNMENT OF ERROR

Petitioners first argue that the above-quoted findings

> "are inadequate as a whole because they fail to address petitioners' assertion that specifically identified plan policies require a demonstration of need in the circumstances of this rezoning, in which both commercial and residential zone designations were 'available to implement the plan designation.'" Petition for Review 11.

Petitioners contend that the comprehensive plan provisions they cited to the city below

> "are relevant, and it is not adequate for the city to shrug them off without explanation, in a whereas clause. The one-sentence finding dismissing the comprehensive plan provisions raised by petitioners is inadequate as a matter of law. * * *" Petition for Review 13.

Petitioners' reference to an inadequate "one-sentence finding" presumably refers to the sixth sentence in the above-quoted findings on remand where the city explains that it "does not interpret the rezoning standards and plan policies raised in this case to require evidence of land supply or need for the type of land for which rezoning is sought, in order to justify a rezoning." Petitioners neither acknowledge nor challenge the emphasized sentence that follows the sixth sentence. That unchallenged finding expressly identifies the HCP Urbanization Goal, the only comprehensive plan goal that petitioners identified in making their HZO 114(2) arguments below. That unchallenged finding interprets that HCP goal to address *comprehensive plan* map designations, not *zoning* map designations. In addition, the fourth sentence of the above-quoted findings explains that because the SCC-MM zone allows both residential and commercial development, proof of a need for commercially zoned land is not needed. Putting aside the merits of the city's interpretation of its land use legislation,

which we address under the third and fourth assignments of error, we do not agree that the city's decision must be remanded for inadequate findings.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that "[g]iven the [remand] findings * * * removing need from the equation for establishing the appropriateness of a commercial versus a residential zone for [intervenor's] property, the remaining findings are inadequate to demonstrate compliance with HZO 114(2)(b)." Petition for Review 19.

Respondents argue that petitioners are barred from challenging the remaining findings in support of the SCC-MM zoning designation because petitioners failed to challenge those other findings in support of the SCC-MM zoning designation in *Dimone I*.[4] Respondents explain their argument as follows:

> "* * * Petitioners [are] precluded from asserting that the remaining findings are inadequate to support the conclusion that SCC-MM zone is the most appropriate zone because Petitioners were required to raise these issues in the first appeal. * * * In fact, LUBA specifically noted that Petitioners failed to challenge other findings that the City Council relied upon in determining that the SCC-MM zone is appropriate for this property. LUBA explained:
>
> > "'Moreover, as we have already noted, the disputed prior determinations of need for commercial land are not the only reasons the city council gave for applying the SCC-MM zone. The city council's findings concerning (1) a desire to avoid development conflicts between the subject property and the Gabrilis property and (2) the property's location on the periphery of the SCPA and proximity to arterials and suitability for development are other factors the city council relied on in selecting the SCC-MM zoning and those findings are not challenged. [*Dimone I*], 41 Or LUBA at 180. (Emphasis added [by respondents])." Respondents' Brief 16-17.

[4] The city and intervenor-respondent filed a single brief, and we refer to them collectively as respondents.

A. Waiver

The difficulty with respondents' preclusion or waiver argument is that the Court of Appeals did not agree that the city's initial decision expressed an alternative basis for selecting the SCC-MM zone as the "best suited" zone under HZO 114(2)(b). If the court had agreed with LUBA on this point, there would have been no reason to reverse and remand our first decision. If the Court of Appeals did not understand the city's initial decision to express an alternative basis for applying the SCC-MM zone (an alternative basis that was independent of any finding of need for commercially zoned property), petitioners can hardly be faulted for reading the findings in the city's initial decision concerning a current need for additional land zoned for commercial uses as critical to its initial decision to apply the SCC-MM zone to the subject property.

Because petitioners successfully argued before the Court of Appeals that the city failed to establish in its initial decision that its finding concerning a need for commercial land was (1) supported by substantial evidence, or (2) not critical to its initial decision, petitioners are entitled to challenge the adequacy of the remaining findings in this appeal of the city's subsequent decision on remand to support its decision to approve SCC-MM zoning for the subject property.

B. The Remaining Findings in Support of SCC-MM Zoning

As we explained in our decision in *Dimone I*, the city relied on more than one factor in reaching its decision to apply the SCC-MM zone to the subject property. Two of those factors are noted in the portion of our opinion in *Dimone* I that respondents quote above in their waiver argument. As we noted in *Dimone I*, the city's desire to "coordinate commercial development on the subject property and the Gabrilis property would appear to apply without regard to the issue of whether there is a current unmet need for additional commercial land." *Dimone I*, 179 n 8. As we also noted in *Dimone I*, while the SCC-MM is nominally a commercial zone and we have no reason to doubt that intervenor intends to commercially

develop the subject property, the SCC-MM zone nevertheless allows residential development and, therefore, even if there is a need for more land zoned for residential use, applying the SCC-MM zone is not inconsistent with such a need.

With regard to petitioners' challenge to the adequacy of the city's findings to explain why it did not apply the SCR-LD zone instead, we rejected petitioners' challenge to the city's findings in *Dimone I* that address that question. 41 Or LUBA at 181. Petitioners' arguments do not persuade us that a different conclusion regarding the adequacy of those findings is warranted in this appeal.

The city adopted the following findings in support of its initial decision, to explain why it did not believe the SCR-MD zone should apply instead of the SCC-MM zone:

> "[T]he Council also finds that the SCR-MD District is not well-suited for the [subject property] and is a less-appropriate zone. As is indicated by the zone description, the zone is to be generally used within 2,600 feet from a light rail station and is intended to assure medium density multi-family and detached single-family dwelling units.[5] (The SCC-MM District is to be generally located more than 2,600 feet from the light rail station.) Another function of this district is as a transition zone between higher density residential and commercial activities. The residential development in the vicinity of the [subject property] is already well-established and is primarily single-family residential. Thus, no transition would be facilitated." Record 12-13.

Although petitioners argued in *Dimone I* that the city inadequately explained its choice of the SCC-MM zone over the *SCR-LD* zone, petitioners did not argue that the city's findings

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[5] The HZO description of the SCR-MD district is as follows:

> "The SCR-MD District may be applied to property identified for residential use located generally within 2,600 feet from a light rail station site, but it may apply to property located up to 3,900 feet of a light rail station site. The SCR-MD District is intended to assure medium density multi-family, attached and detached single family residential development and ancillary dwellings. The District may be applied as a transition zone between higher density residential and commercial activities nearer than 2,600 feet of a light rail station site, and may also be applied to property at the outside edge of a higher density SCPA District in order to buffer a less dense existing residential community outside the SCPA." HZO 136(II)(F).

The subject property is located more than 2,600 feet from a light rail station.

inadequately explain why the *SCR-MD* is not the "best suited" zone for the subject property. Petitioners appear to make that argument for the first time in this appeal.

Even if we assume, as we do, that petitioners' argument concerning the adequacy of the SCR-MD zone can be raised for the first time in this appeal of the city's decision on remand, we reject their argument. Petitioners simply claim that the city's "findings are not responsive to the standard, which requires that the city explain why medium-density residential uses, and other uses allowed in such a zone, are less appropriate for [the subject property] than intensive, auto-oriented retail." Petition for Review 16. As noted elsewhere in this opinion, it is clear that the city does not agree with petitioners' characterization of what HZO 114(2) requires and takes the position that such a comparison is not required because the SCC-MM zone allows both commercial and residential uses. Moreover, petitioners do not dispute that the subject property is located further from a light rail station than the 2,600-foot general standard for the SCR-MD district, and do not dispute the city's finding that no transition would be effected by applying the SCR-MD zone. Given that the SCR-MD district is generally to be applied to properties that are closer than 2,600 feet from a light rail station and given the city's other reasons for applying the SCC-MM district instead of the SCR-MD district, we conclude the city's findings are adequate to explain why it did not apply the SCR-MD district.

The second assignment of error is denied.[6]

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[6] As we explained in *Dimone I*, the city went through a planning process and applied a "shadow" SCC-MM zone to the subject property in 1997, before the subject property was annexed. At that time the property was zoned for residential purposes by the county. Petitioners also suggest under the second assignment of error that the real reason the city applied the SCC-MM zone is the shadow SCC-MM zone that was previously applied to the subject property. We rejected that suggestion as a basis for remand in our decision in *Dimone I*, and we reject it here for the same reasons. Petitioners also take the position under the second assignment of error, that the city erred by not identifying "the most intensive use likely to occur on the site and explain[ing] why, in light of that most intensive use, [SSC-MM] is still the most suitable designation for the property." Petition for Review 15. As we explain in our discussion of the fourth assignment of error, there is no HZO requirement, or other generally applicable requirement, that the city must base its choice of the "best suited" potential zoning district under HZO 114(2)(b) on the most intensive use each zoning district would allow.

THIRD ASSIGNMENT OF ERROR

As previously noted, HZO 114(2)(a) requires that the request zoning "conform with the [HCP]," and HZO 114(2)(b) requires that "the requested zone be the "best suited for the specific site, based on specific policies of the [HCP]." Petitioners cite the HCP Urbanization Goal, which, as relevant, provides:

> **"Section 2. Urbanization.**
>
> **"(I) Goal**. To provide for an orderly and efficient transition of land from rural to urban use through the identification and establishment of areas designed to accommodate the full range of urban uses within the Hillsboro Planning Area. Establishment of land use designations in particular areas will be based upon the need to:
>
> "(A) Accommodate long-range population growth within the Hillsboro planning area.
>
> "(B) Control the economic, environmental and energy consequences of urban growth.
>
> "(C) Retain agricultural land outside the urban area.
>
> "(D) Provide for the orderly and efficient extension of public facilities and service.
>
> "(E) Assure efficient development of land consistent and compatible with the community's needs and resources.
>
> "(F) Provide decent housing, employment opportunities and an environment with a high degree of livability for the citizens of Hillsboro and surrounding community.
>
> "(G) Assure consistency with the Regional Urban Growth Boundary." Petition for Review 22 (emphases added by petitioners).[7]

[7] In addition to the above Urbanization Goal, petitioners cite Urbanization Policies III(B) and (C), which provide:

> "(B) Land use designations within the Hillsboro Planning Area shall be designed to accommodate projected commercial and industrial growth and population densities through at least the year 2000.

In this assignment of error, petitioners challenge the city's findings that HZO 114(2)(a) and (b) and the HCP Urbanization Goal do not require that the applicant demonstrate that there is a need for the uses that are likely to be developed under the requested rezoning.[8]

Respondents offer several arguments in defense of the city's decision. They again argue that petitioners waived their right to make the argument that is presented in the third assignment of error because it was not presented in the appeal of the city's first decision. However, the disputed interpretation appears for the first time in the remand decision that is before us in this appeal. Because that interpretation was not presented in the city's initial decision, petitioners had no reason to make the argument that they present in the third assignment of error. Petitioners have not waived their right to advance the argument that is presented in the third assignment of error.

Respondents next argue that the language from the Court of Appeals decision in *Dimone II*, quoted earlier in this opinion, recognizes that the challenged interpretation is plausible and that it therefore cannot be "clearly wrong," which it must be to be reversible

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> "(C) Any land use implementation measure adopted by the City or other government agency shall be consistent with and supportive of the need to expand public facilities and services as outlined in this goal, and shall be designed in a manner which accommodates increased public demands for urban services and is responsive to both expected growth in the commercial and industrial sectors and to population growth in the area."

[8] The relevant findings are quoted earlier in this opinion. They are set out again below:

> "The Council's selection of this zoning district for the property would have been the same, even if there was persuasive evidence in the record of an abundance of commercial land in the marketplace. In addition and alternatively, the Council does not interpret the rezoning standards and plan policies raised in this case to require evidence of land supply or need for the type of land for which rezoning is sought, in order to justify a rezoning. This includes the Urbanization Goal set out in section 2(I) of the Hillsboro Comprehensive Plan, which refers to land use designations in the comprehensive plan. The discussion about commercial land need in the adopted findings set out in Attachment A to Ordinance No. 5040 was surplusage and intended as an observation." Remand Record 5.

under *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992) and ORS 197.829(1). Respondents' Brief 21.[9]

The Court of Appeals recently disavowed the "clearly wrong" shorthand description of the deference that is due local government interpretations of their own land use legislation, although it continues to describe the standard of review that must be applied to such interpretations under *Clark* and ORS 197.829(1) as "limited."[10] *Church v. Grant County*, 187 Or App 518, 523-525, ___ P3d ___ (2003). Regardless of the level of deference that is required under ORS 197.829(1), we do not agree with respondents that the Court of Appeals already determined in *Dimone II* that the interpretation it suggested the city might adopt on remand is necessarily within the city's discretion under ORS 197.829(1). While it might be possible to read the court's decision in the way respondents suggest, that interpretation was not before the court in *Dimone II*. We do not believe the Court of Appeals' decision in

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[9] Respondents particularly rely on the following language in the Court of Appeals' decision:

> "Were the city's findings to have stated clearly its understanding of the significance of the need issue and, in so doing, advised LUBA and us of the relative importance of the issue to its decision, our conclusion might be different. * * *
>
> "* * * If the city believes that the need for commercial land is irrelevant to its decision to apply the SCC-MM zone on remand, it can say so." 182 Or App at 13-14.

[10] ORS 197.829(1) sets out LUBA's standard of review of such interpretations as follows:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless [LUBA] determines that the local government's interpretation:
>
> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
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> "(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."

Dimone II is properly interpreted as affirming that interpretation in advance of the city's decision to adopt it.

Finally, respondents argue that petitioners misread the cited Urbanization Goal to "require the City to perform a market needs analysis for rezones * * *." Respondents' Brief 21. Respondents further argue that HZO 114(2)(b) specifically refers to HCP "policies" not the HCP "goals." Respondents also argue that the only two HCP policies that petitioners cite in support of the third assignment of error lend no support to the third assignment of error. HCP Urbanization Policy III(B) refers to land use designations, which the decision explains refers to HCP map designations rather than zoning map designations. HCP Urbanization Policy III(C) refers to "need to expand public facilities and services." We agree with respondents that neither of the cited HCP Urbanization Policies, by their terms, require that the applicant or the city establish that there is a market need for the particular uses that a proposed zoning map designation would allow. The city's interpretation that HZO 114(2)(b) and the cited policies do not impose that requirement is not reversible under *Clark v. Jackson County* and ORS 197.829(1).

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Because we deny the third assignment of error, we need not consider petitioners' challenge to the city's alternative basis for concluding that a demonstration of a current need for commercial land is not a prerequisite to SCC-MM zoning.[11]

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[11] The relevant finding was quoted earlier; it is as follows:

> "The City Council determines that, in this case, evidence of a commercial land supply or need was not a necessary part of the record needed to justify the requested rezoning under the rezoning criteria set forth in Hillsboro Zoning Ordinance [(HZO)] 114(2). In the context of this rezoning, the need for commercial land is not a controlling factor in assessing whether to change the zoning of the property to SCC-MM. This is because the proposed zone, SCC-MM, is a mixed use zone, allowing a variety of uses, including both residential and commercial." Remand Record 5.

Petitioners point out, correctly, that the descriptions of the SCR-LD, SCR-MD and SCC-MM zoning districts make it clear that the first two emphasize residential use and the latter district emphasizes commercial use. Petitioners reason that given this differing emphasis, it is inconsistent with the HZO and HCP to interpret HZO 114(2) and the HCP not to require that there is a need for commercial uses before the SCC-MM zone is applied to the subject property.

There is a commonsense ring to petitioners' argument that when required to choose a zoning map designation from more than one possible zoning map designation, the one that emphasizes the types of uses that most closely match current needs should be selected. We see no reason why the city could not have interpreted HZO 114(2)(a) and (b) in the same way that petitioners do. However, that is not the relevant question on review before LUBA in this appeal. The relevant question is whether there is anything about the city's rejection of that interpretation that violates the deferential standard of review that LUBA must apply under *Clark* and ORS 197.829(1). In approaching that question we note that just because there may be commonsense arguments in favor of petitioners' preferred interpretation, that does not mean there are not other legitimate planning concerns that (1) might equally apply, (2) have nothing to do with the most pressing current land use needs, and (3) support the city's contrary interpretation.[12]

Even without the excessive deference that may have been associated in the past with the "clearly wrong," shorthand description of our review under *Clark* and ORS 197.829(1), the city interpretation that is challenged under this assignment of error must be sustained. As we already concluded in *Dimone I*, the SCC-MM zone expressly provides that "[r]esidential uses are permitted in free-standing residential structures and on or above the second story of

[12] For example, the city found that the commercial development of the subject property that would be possible under the SCC-MM zone would be desirable to compliment, and avoid conflicts with, the adjoining Gabrilis property that has already been zoned to allow commercial use.

commercial buildings throughout the [SCC-MM] District." The city has chosen to interpret that feature of the SCC-MM zone in context with HZO 114(2)(a) and (b) to conclude that proof of a need for commercially zoned land, as opposed to residentially zoned land, is not a legal prerequisite to SCC-MM zoning. Petitioners have not demonstrated that the city's interpretation violates the standard of review set out in ORS 197.829(1).

Finally, we note and reject one additional argument that petitioners advance under this assignment of error. As they did under the second assignment of error, petitioners argue that the city "must consider the most intensive uses allowed in the new zone" when it is choosing the zone to apply under HZO 114(2). Petition for Review 28 (quoting from LUBA's opinion in *Younger v. City of Portland*, 15 Or LUBA 210 (1987), *rev'd on other grounds*, 305 Or 346, 752 P2d 262 (1988)). Petitioners apparently read *Younger* to establish a general rule that goes considerably beyond the rule that we actually discussed in that case. *Younger* and the cases we cited in *Younger* involved approval criteria that required that the impacts on adjoining properties be considered in approving rezoning. In that context, both LUBA and the Court of Appeals explained that all uses, or at least the use that would likely have the most significant impacts, must be considered before the rezoning is granted. This is because the use with the most significant impacts could be the use ultimately constructed on the rezoned property. Petitioners' arguments under this assignment of error are directed at HZO 114(2), which does not expressly require consideration of the impacts that the three zoning districts might have on adjoining properties. Although the more general charge under HZO 114(2)(b) to select the "best suited" zoning district might permit the city to examine the most intense uses allowed by the three candidate zoning map designations, it does not require that the city do so. We reject petitioners' argument under this assignment of error that *Younger* requires that the city consider the most intensive uses that would be allowed in the SCC-MM zone before applying that zone to the subject property.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

As we have already noted, although evidentiary hearings preceded the city's initial decision in this matter, the city decision following remand from the Court of Appeals and LUBA that is the subject of this appeal was rendered without any additional evidentiary proceedings. Petitioners were allowed to submit written argument to the city council before it rendered its decision, but the evidentiary record was not reopened during the remand proceedings. Petitioners allege it was error for the city to adopt its decision on remand without first providing notice to petitioners and an opportunity for an evidentiary hearing. This assignment of error also includes three additional somewhat related arguments. First, petitioners repeat arguments that were advanced early in this appeal, before the parties' briefs were filed, that the city council meetings with its attorney in executive sessions following the Court of Appeals' decision to discuss the city council's response to that decision constituted a procedural error that prejudiced petitioners' substantial rights. Petitioners apparently contend that those *ex parte* meetings either should not have been held or that petitioners should have been allowed an opportunity to rebut whatever advice the city attorney may have provided in those executive sessions after full disclosure of that advice. Second, petitioners argue the city improperly relied on the prior *shadow* SCC-MM zoning that the city applied to the subject property before it was annexed. Third, petitioner Davis contends that his substantial rights were prejudiced by the city's initial refusal to allow him to submit written argument during the remand proceedings.

A. Executive Sessions

With regard to the propriety of the three executive sessions in which the city council apparently consulted with the city attorney regarding its legal options in responding to the remand that was required by the Court of Appeals' decision in Dimone *II*, petitioners offer no arguments that were not already considered and rejected in our February 6, 2003 order in this matter in which we denied petitioners' record objections and motion for evidentiary

hearing. *Dimone v. City of Hillsboro*, slip op at 4-9. Petitioners do not establish that there was any error in holding those executive sessions that would provide a basis for reversal or remand of the city's decision in this matter.

B. The Shadow Zone

Petitioner cites statements made by the city attorney during the remand proceedings that, read in isolation, can be understood to take the position that the city was bound to apply the SCC-MM zone because the SCC-MM "shadow zone" was applied before the subject property was annexed, at a time when county zoning still applied. As in our first decision in this matter, given that the balance of the record and the decision make it clear that the city applied the HZO rezoning criteria and did not rely on the shadow zone to support its decision, we do not believe similar isolated statements during the remand proceedings demonstrate legal error in the city's decision on remand.

C. Petitioner Davis's Participation on Remand

The city initially took the position that petitioner Davis was not entitled to present written argument during the city's remand proceedings. The city's apparent theory for taking the position that it could deny petitioner Davis the right to submit written argument to the city council was that the Court of Appeals' decision in *Dimone II* was based exclusively on an assignment of error that was presented by petitioners Dimone and was not based on any of the assignments of error that petitioner Davis presented to that court. Respondent's Brief 31 n 11.

We question whether that initial position was legally correct. Once the city determined that it would allow the applicant and petitioners Dimone to present additional legal argument on remand, we seriously question whether it is appropriate to exclude another party to the local, LUBA and appellate court proceedings simply because that party's assignments of error to the appellate court did not form the ultimate basis for remand. Since the part of LUBA's decision that ultimately was reversed by the Court of Appeals was

responding, in part, to one of petitioner Davis's assignments of error to LUBA, the city's position seems particularly suspect. Nevertheless, we need not and do not decide whether the city's initial decision was correct. Petitioner Davis was permitted to submit written argument to the city council. Given that opportunity, we conclude the city's initial decision provides no basis for reversal or remand, even if it was legally incorrect.

D. Failure to Provide a Public Hearing on Remand

When a land use decision is remanded, the city is entitled to limit its proceedings on remand to such proceedings as are necessary to respond to the remand. *Port Dock Four, Inc. v. City of Newport*, 36 Or LUBA 68, a*ff'd* 161 Or App 199, 984 P2d 958 (1999). Where a land use decision is remanded, and the legal error that forms the basis for remand can be corrected by adopting additional findings, the parties to the proceedings that led to the remand have no unqualified right to a public hearing to expand their "argument and evidentiary presentation." *Arlington Heights Homeowners v. City of Portland*, 41 Or LUBA 185, 209 (2001).

Nevertheless, as the parties recognize, there are circumstances where the parties to a land use proceeding may have a right to expand their legal or evidentiary presentation after the public hearing portion of the land use proceeding has concluded. *Gutoski v. Lane County*, 155 Or App 369, 963 P2d 145 (1998). However, as the Court of Appeals explained in *Gutoski*, those circumstances are narrowly circumscribed:

> "[I]n certain limited situations, the parties to a local land use proceeding should be afforded an opportunity to present additional evidence and/or argument responsive to the decisionmaker's interpretations of local legislation and that the local body's failure to provide such an opportunity when it is called for can be reversible error. [H]owever, *at least* two conditions must exist before [LUBA] or [the Court of Appeals] may consider reversing a land use decision on that basis. First, the interpretation that is made after the conclusion of the initial evidentiary hearing must either significantly change an existing interpretation or, for other reasons, be beyond the range of interpretations that the parties could reasonably have anticipated at the time of their evidentiary presentations. Second, the party seeking reversal must demonstrate to LUBA that it can produce specific evidence at the new hearing

> that differs in substance from the evidence it previously produced and that is directly responsive to the unanticipated interpretation." 155 Or App at 373-374 (emphasis in original; footnote omitted).

As an initial point, we note again that the city gave petitioners a copy of the disputed interpretation before the city council adopted that interpretation. Petitioners were permitted an opportunity submit written argument challenging the wisdom and legal correctness of that interpretation and whether the remaining findings and the evidence supporting those findings would be adequate to demonstrate that the SCC-MM zone could be applied to the subject property consistently with HZO 114(2). Remand Record 60-70. Petitioners were also allowed to object in writing to the procedures the city employed on remand. Remand Record 71-87. These opportunities were sufficient to satisfy any rights petitioners had to present legal argument following remand. Therefore, the only remaining question is whether petitioners had a right to present additional evidence during the remand proceedings. We conclude that neither of the *Gutoski* conditions are present here and that petitioners had no right to an expanded evidentiary presentation on remand.

With regard to the first *Gutoski* condition, both the implicit interpretation in the city's initial decision that led to the Court of Appeals remand in *Dimone II* (that a demonstrated need for additional commercially zoned land is a critical factor in selecting the zoning that is "best suited" under HZO 114(2)(b)) and the city's contrary interpretation in its findings in the ordinance it adopted on remand were adopted after the initial evidentiary proceedings were concluded. We have already decided that while the HZO and HCP can be read to support either interpretation; neither interpretation is compelled by the HZO or HCP. We therefore believe either interpretation was within "the range of interpretations that the parties could reasonably have anticipated at the time of their evidentiary presentation."

With regard to the second *Gutoski* condition, it is not clear to us that petitioners identify *any* new evidence that they would have presented had the city provided an additional evidentiary hearing. Petitioners clearly do not identify "specific evidence * * * that differs in

substance from the evidence [petitioners] previously produced and that is directly responsive to the unanticipated interpretation," as required under the second *Gutoski* condition. Petitioners argument under *Gutoski* is that they were entitled to a hearing to attempt to convince the city council not to adopt the interpretation they ultimately adopted and to argue that the evidentiary record was insufficient to support the remaining findings that the city would be relying on if it elected to make clear that it was not relying on a need for commercially zoned land to zone the subject property SCC-MM. Those are *legal* arguments rather than an argument for an expanded *evidentiary* presentation. Petitioners do argue that the "remaining evidence is inadequate to support a determination that commercial zoning is more appropriate for the site than either of the two available residential zones." Petitition for Review 35. However, petitioners never identify specific evidence that differs in substance from the evidence they already submitted during the evidentiary phase of these proceedings. Petitioners were not entitled to an expanded evidentiary presentation under *Gutoski*.

The fifth assignment of error is denied.

The city's decision is affirmed.