

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 BLAKE BARTON, and
5 FRIENDS OF LINN COUNTY,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF LEBANON,
11 *Respondent,*

12
13 and

14
15 LEBANON THEATERS, INC.,
16 *Intervenor-Respondent.*

17
18 LUBA Nos. 2003-003, 2003-004 and 2003-005

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from City of Lebanon.

24
25 Christine M. Cook, Portland, filed the petition for review and argued on behalf of
26 petitioners.

27
28 Gregory S. Hathaway, and E. Michael Connors, Portland, and Thomas McHill and
29 Natasha Zimmerman, Lebanon, filed a joint response brief. With them on the brief were
30 Davis Wright Tremaine LLP and Morely Thomas McHill & Phillips LLC. Thomas McHill
31 argued on behalf of respondent. E. Michael Connors argued on behalf of intervenor-
32 respondent.

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

36
37 AFFIRMED

08/22/2003

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

NATURE OF THE DECISION

Petitioners appeal three decisions that amend the city’s comprehensive plan text, annex property, and change the comprehensive plan map and zoning map designations for the annexed property.

FACTS

The subject property is located south of the Highway 20/Market Street intersection and north of the Highway 20/Cascade Drive intersection. The subject property includes approximately 25.5 acres and is composed of two adjoining properties—the Champion property (approximately 15 acres) and the Motor-Vu property (approximately 10.5 acres). The Champion property borders the Motor-Vu property on its north side. The Champion property was already located inside city limits and is designated Special Development District (SPD) by the Lebanon Comprehensive Plan (hereafter LCP or plan) and zoned Mixed Use (MU) by the Lebanon Zoning Ordinance (LZO).¹ The Champion property is not affected by the city’s annexation decision and its SPD and MU comprehensive plan and zoning map designations are not affected by the challenged decisions.

Prior to the challenged decisions, the Motor-Vu property was located outside the city’s municipal boundaries, but inside the city’s urban growth boundary. Prior to the challenged decisions, the Motor-Vu property carried a *city* comprehensive plan map designation but was subject to *county* zoning. One of the challenged decision (the plan map amendment decision) changes the existing LCP Mixed Density Residential designation to the SPD designation. A second decision (the annexation/zoning decision) annexes the Motor-Vu property and replaces the county’s Urban Growth Management 10 Acre Minimum zoning for

¹ The LCP Special Development District is sometimes called the Special Plan District and the challenged decision generally uses the acronym “SPD” to refer to the Special Development District. We also use that acronym in this opinion.

1 the property with the city's MU zone.² As a result of these two decisions, the Champion
2 property and the Motor-Vu property are both designated SPD by the LCP and zoned MU by
3 the LZO. Petitioners appeal both of those decisions.

4 A third decision (the plan text amendment decision), which was initiated by the city,
5 is also challenged in this appeal. That decision amends the text of an LCP commercial lands
6 policy. Prior to that amendment, the LCP commercial lands policy would have prohibited
7 commercial development of the subject property with direct access to Highway 20.³

8 In a fourth decision, which is not one of the decisions at issue in this appeal, the city
9 planning commission granted planned development approval for a Wal-Mart Superstore on
10 the subject property, with a number of conditions.⁴ The planning commission's planned
11 development approval was conditioned on city council approval of the annexation and
12 zoning, plan map amendment and plan text amendment described above.⁵

13 The planning commission recommended that the city council approve each of the first
14 three actions described above. The city council held public hearings on November 13, and
15 14, 2002. On December 11, 2002, the city council adopted its annexation and zoning, plan
16 map amendment and plan text amendment decisions. Petitioners filed three appeals with
17 LUBA challenging each of those three city council decisions. Those appeals have been
18 consolidated for LUBA review.

² The applications that led to both of the decisions described above were initiated by intervenor Lebanon Theaters, Inc.

³ As we note later in this opinion, the parties dispute the precise nature and scope of the prohibition in the LCP commercial lands policy.

⁴ According to petitioners, the approved Wal-Mart Superstore would be located a few hundred feet southeast of an existing Wal-Mart store located inside the city.

⁵ Intervenor contends that a timely appeal of the planning commission's planned development approval decision was not filed with the city council. Petitioners do not dispute that contention.

1 **FIRST ASSIGNMENT OF ERROR**

2 **A. The City Council’s Interpretation of LCP Commerical Land Use Policy 5**
3 **(LCP Commercial Policy 5)**

4 Petitioners first challenge the plan text amendment decision. That decision amends
5 LCP Commerical Land Use Policy 5 (hereafter LCP Commercial Policy 5). Prior to the plan
6 text amendment decision (Old LCP Commercial Policy 5) read as follows:

7 “Highway commercial development along U.S. 20 should be terminated at the
8 Southgate Shopping Center, located at the intersection of Market Street and
9 U.S. 20.”

10 As previously noted, the challenged decisions collectively were adopted to allow commercial
11 development of the subject property; and the subject property (1) adjoins U.S. Highway 20,
12 and (2) is located south of the Highway 20/Market Street intersection. As amended by the
13 challenged plan text amendment decision, (New LCP Commercial Policy 5) reads as follows:

14 “Highway commercial development with direct access to U.S. Highway 20
15 (Santiam Highway) should not be allowed south of the intersection of Cascade
16 Drive and U.S. Highway 20 (Santiam Highway).”⁶

17 The LCP distinguishes between “Major Revisions” and “Minor Changes.” LCP 1-15.
18 The city found that the disputed plan text amendment is a minor change. The LCP includes
19 the following regarding minor changes:

20 “Minor changes are those which do not have significant effect beyond an
21 immediate area or are individual aspects of the [LCP] that do not represent a
22 major policy change relative to the community as a whole. Minor changes
23 should be based on special studies or other information which will serve as
24 the factual basis to support the change. *The public need and justification for*
25 *the particular change should be established.* Minor changes should be made
26 as needed to maintain the [LCP] as an up-to-date guideline for community
27 growth and development.”⁷ (Emphasis added.)

⁶ As previously noted, the subject property lies *north* of the Highway 20/Cascade Drive intersection.

⁷ Statewide Planning Goal 2 (Land Use Planning) includes “Guidelines” for major and minor comprehensive plan amendments. The Goal 2 Guideline for “Minor Changes” also provides “The public need and justification for the particular change should be established.”

1 To address the LCP requirement for a “public need and justification for the” plan text
2 amendment, the city found that the text amendment is needed to revise LCP Commercial
3 Policy 5 so that it will not conflict with LCP amendments that were adopted to implement a
4 1995 “Commercial Lands Study and Highway Access Plans” (1995 Commercial Lands
5 Study). Record 1473.

6 In its findings supporting the plan text amendment, the city interprets LCP
7 Commercial Policy 5 to prohibit *any commercial development* along Highway 20 south of
8 the Highway 20/Market Street intersection. The 1995 Commercial Lands Study considered
9 five sites. For at least two of those sites (sites 3 and 4) the LCP and zoning map designations
10 were changed to SPD and MU, respectively, to allow commercial development. However, as
11 interpreted by the city council, LCP Commercial Policy 5 would prohibit commercial
12 development of those sites because they adjoin Highway 20 and are entirely or partially
13 south of the Highway 20/Market Street intersection. The city council found that the disputed
14 plan text amendment is needed to eliminate this inconsistency in the LCP.⁸

15 Petitioners contend that the city has improperly manufactured the above-described
16 LCP inconsistency. Because the asserted inconsistency does not exist, petitioners allege, the

⁸ The text of the city council’s findings is as follows:

“This proposed [LCP] Text Amendment is based on a special study that provides information that serves as a factual basis to support the proposed change, and thereby complies with this requirement * * *. In June of 1995, the City completed its ‘Commercial Lands Study and Highway Access Plans’ in partial fulfillment of these Goal 2 requirements. The City then approved this study based on the City’s public policy (both then and now) of encouraging a variety of economic development throughout the City, in addition to the need for more, large size commercial sites to meet the growth and employment needs of the City.

“This proposed [LCP] Text Amendment implements the previously adopted Commercial Lands and Highway Access Plans Study (June 1995) and accompanying Comprehensive Plan Map Amendments Approved by the Lebanon City Council on September 27, 1995. This amendment now corrects [LCP Commercial Policy 5], an action that was inadvertently overlooked in 1995 when it should have been amended to bring it into conformity with the Lands Study and accompanying Comprehensive Plan Map Amendments. This proposed [LCP] Text Amendment and the September 27, 1995 Comprehensive Plan Map Amendments are both necessary to enable the intended uses of several [commercially planned and zoned] parcels * * *.” Record 235-36.

1 city may not rely on that asserted inconsistency to establish a “public need” for the disputed
2 plan text amendment. Petitioners argue that Old LCP Commercial Policy 5 simply prohibits
3 “Highway Commercial Zoning” south of Market Street, and does not prohibit other kinds of
4 commercial zoning so long as commercial development under that zoning does not directly
5 access Highway 20.⁹ If Old LCP Commercial Policy 5 is interpreted in this way, petitioners
6 argue, the properties south of the Highway 20/Market Street intersection that were placed in
7 MU zones as a result of the 1995 Commercial Lands Study could be developed
8 commercially.

9 Both petitioners’ and the city council’s interpretations of Old LCP Commercial
10 Policy 5 are plausible, because the meaning of “highway commercial development” in Old
11 LCP Commercial Policy 5 is undefined and somewhat ambiguous. However, the city
12 council’s interpretation that Old LCP Commercial Policy 5 prohibits any commercial
13 development along Highway 20 south of the Highway 20/Market Street intersection,
14 regardless of zoning, is actually more consistent with the language of Old LCP Commercial
15 Policy 5 than is petitioners’ suggested interpretation. The subject of Old LCP Commercial
16 Policy 5 is “highway commercial development.” Had the intended subject of the prohibition
17 been Highway Commercial *zoning* or commercial development with direct access to
18 Highway 20, it would have been a simple matter to insert the word “zoning” in place of the
19 word “development” or simply prohibit direct commercial access to Highway 20.

20 Finally, we acknowledge that the LCP language that petitioners cite in support of
21 their interpretation can be read to suggest that the underlying concern with commercial
22 development along Highway 20 is direct access onto the highway and the auto-orientation
23 and traffic conflicts that result with commercial development with such direct access rather

⁹ The LZO includes three zones that are nominally commercial zones, “Neighborhood Commercial,” “Central Business Commercial,” and “Highway Commercial.” LZO 3.1. In addition, the MU zone allows a variety of uses, including commercial uses. LZO 4-24 through 4-26. As we note later in this opinion, the city also apparently allows commercial development in at least one of its residential zones in certain circumstances.

1 than with commercially developable land that is located along Highway 20 but is not allowed
2 direct access to Highway 20. However, that discussion falls considerably short of
3 demonstrating that the city council’s interpretation of Old LCP Commercial Policy 5 is
4 impermissibly broad or incorrect.

5 **B. Current Need for Commercially Developable Land**

6 Petitioners next argue that even if Old LCP Commercial Policy 5 needs to be
7 amended to allow the anticipated commercial development of the sites south of the Highway
8 20/Market Street intersection that were planned and zoned to allow commercial development
9 in 1995, the city must establish that there is a *current* need to develop those lands
10 commercially. Intervenor and respondent (respondents) dispute that argument and contend
11 that the city is not required to rejustify its 1995 decision to amend the LCP to implement the
12 1995 Commercial Lands Study. We agree with respondents. The time to challenge the need
13 to adopt LCP and zoning designations to allow commercial development was when those
14 designations were adopted in 1995. The city’s plan text amendment to eliminate the LCP
15 inconsistency that frustrates implementation of those designations does not require that the
16 city rejustify its earlier decision to apply those LCP and zoning designations in the first
17 place.

18 **C. Other LCP Policies and State Transportation Planning Requirements**

19 Petitioners finally contend that the plan text amendment decision is inconsistent with
20 a number of LCP policies that (1) discourage commercial sprawl; (2) favor protecting a
21 compact commercial core; (3) encourage a diversified economic base; and (4) favor
22 protecting historic resources.¹⁰ Petitioners also contend that the plan text amendment is

¹⁰ Petitioners specifically identify the following LCP Policies.

“Existing commercial centers should be reinforced and expanded prior to development of new outlying centers.” LCP Commercial Land Use Policy 7 (hereafter LCP Commercial Policy 7).

1 inconsistent with OAR 660-012-0000 *et seq* (the Land Conservation and Development
2 Commission’s Transportation Planning Rule (TPR)), Statewide Planning Goal 12
3 (Transportation) and LCP Transportation Policies.¹¹

4 Respondents contend that the arguments that petitioners advance in support these
5 policies are directed at the Wal-Mart Superstore rather than the plan text amendment
6 decision. We agree with respondents that at least some of petitioners’ arguments are
7 specifically directed at the Wal-Mart Superstore rather than at anything that is authorized by
8 the plan text amendment decision. However, even if all of petitioners’ arguments under this
9 assignment of error can be read to express a more general challenge that goes beyond the
10 specific impacts of the Wal-Mart Superstore, we find that those arguments fail to

“Lebanon shall encourage its own business and employment activity, while also capitalizing on its livability potential within the larger regional economic context.” LCP Population and Economy Policies and Recommendations 1 (hereafter LCP Economy Policy 1).

“The city shall encourage a diversified economic base for the community which broadens and improves long-term employment opportunities and is compatible with the environmental resources of the community.” LCP Population and Economy Policies and Recommendations 2 (hereafter LCP Economy Policy 2).

“The city shall assist local organizations or groups in preserving places of historic, cultural, or special significance.” LCP Urbanization Policies and Recommendations Historic Sites and Structures 1 (hereafter LCP Historic Policy 1).

“The city shall work to preserve identified historic sites within the Lebanon Urban Growth Boundary by considering identified historic sites and their preservation when making land use decisions.” LCP Urbanization Policies and Recommendations Historic Sites and Structures 3 (hereafter LCP Historic Policy 3).

¹¹ The LCP Transportation Policies that petitioners cite are as follows:

“The city shall seek to develop a balanced transportation system which includes all transportation modes appropriate to the city’s needs.” LCP Transportation Policies and Recommendations General Policies 1 (hereafter LCP Transportation Policy 1).

“Transportation Proposals shall be reviewed to minimize adverse social economic, energy and environmental impacts and costs.” LCP Transportation Policies and Recommendations General Policies 3 (hereafter LCP Transportation Policy 3).

1 demonstrate that the challenged plan text amendment violates the cited LCP, TPR or Goal 12
2 requirements.¹²

3 The first assignment of error is denied.

4 **SECOND ASSIGNMENT OF ERROR**

5 As noted earlier, one of the challenged decisions changes the LCP map designation
6 for the Motor-Vu property from Mixed Density Residential to SPD. In their second
7 assignment of error, petitioners challenge that decision.

8 **A. Incorporated Arguments**

9 Petitioners' first argument under the second assignment of error is as follows:

10 "Petitioners restate and incorporate in their entirety their arguments raised
11 under the First Assignment of Error." Petition for Review 16.

12 Respondents first contend that LUBA should refuse to consider petitioners'
13 incorporated arguments from the first assignment of error. According to respondents,
14 petitioners' unexplained attempt to incorporate those arguments is "not sufficiently
15 developed for review by [LUBA]." Joint Response Brief 31.

16 Petitioners' summary incorporation of its arguments under their first assignment of
17 error to support their second assignment, without any additional elaboration to account for
18 the different nature of the two decisions challenged in those assignments of error, presents
19 some difficulties in considering those incorporated arguments. Nevertheless, we do not
20 believe it is appropriate in this case to refuse to consider those incorporated arguments,
21 simply because they are not more fully or more particularly developed under the second
22 assignment of error.

¹² Respondents point out that petitioners did not appeal the planning commission's planned development approval decision that approved development of the Wal-Mart Superstore. Intervenor also cites to findings in the record that were provided to the planning commission to address the LCP policies that petitioners identify. Record 882-887, 891-898. We understand intervenor to contend that while the planned development decision itself is not included in the record in this consolidated appeal, the planning commission adopted the cited findings in support of its planned development approval decision.

1 Although we do not agree with respondents that petitioners incorporated arguments
2 are insufficiently developed to *consider*, we agree that they are inadequate to provide a basis
3 for reversal or remand of the plan map amendment decision. We concluded under the first
4 assignment of error that petitioners’ arguments under the cited LCP policies and state
5 transportation planning requirements do not provide a basis for reversal or remand of the
6 plan text amendment. For essentially the same reason we conclude that petitioners’
7 incorporation of those same arguments in support of their second assignment of error
8 provides no basis for reversal or remand of the plan map amendment decision.

9 The plan map amendment decision includes the following additional relevant
10 findings:

11 “The Comprehensive Plan Map Amendment will not result in additional
12 commercial lands because commercial development is already allowed under
13 the existing Comprehensive Plan designation pursuant to the Commercial
14 Reserve and Commercial Development Standards and Commercial Land Use
15 Policy Nos. 8 and 9 of the Comprehensive Plan.^{13]} The purpose for the
16 Comprehensive Plan Map Amendment is not to allow for a commercial use,
17 but to make the Motor-Vu Property consistent with the SPD designation
18 currently on the Champion Property so that the Properties can be developed
19 under the same development standards and criteria.” Record 210.

20 The city’s findings go on to explain that the 1995 Commercial Lands Study “relied on the
21 Motor Vu Property and the Champion Property as part of the City’s existing commercial
22 [land] inventory because both properties were being used for commercial purposes.” Record
23 211. Petitioners do not assign error to any of these findings. Given those findings and
24 petitioners’ failure to offer any additional explanation for how their incorporated arguments

¹³ Apparently the Motor-Vu property could be developed commercially, notwithstanding its Mixed Density Residential LCP designation, because it has been used for commercial purposes in the past and on that basis the city assumes that the Motor-Vu property will be available for commercial use in the future. LCP Commercial Land Use Policy 8, which is one of the policies cited in the city’s findings, provides as follows:

“Future commercial centers should be allowed within the Mixed-Density Residential District based upon an approved development plan in conformance with the Planned Development standards and procedures of the Zoning Ordinance, provided access is from a designated highway or arterial and urban services are available.” LCP 5-P-3.

1 from the first assignment bear on the plan map amendment for the Motor-Vu property, we
2 conclude that they are inadequate to demonstrate that the plan map amendment decision is
3 inconsistent with the LCP and state transportation planning requirements that are cited in
4 those incorporated arguments.

5 We next turn to petitioners' arguments that the city failed to establish a "public need"
6 for the plan map amendment.

7 **B. Public Need**

8 Respondents describe the city's four reasons for finding the plan map amendment
9 will satisfy a public need as follows:

10 " * * * First, the City Council concludes that the Comprehensive Plan Map
11 Amendment will better enable the Motor Vu Property and the Champion
12 Property, which is designated SPD under the [LCP], to be developed in
13 conjunction by providing consistent [LCP] designations and therefore the
14 same development standards for the two properties. Second, the City Council
15 concludes that the Comprehensive Plan Map Amendment will facilitate a
16 commercial development more likely to provide the necessary funding for the
17 realignment and signalization of the Highway 20 and Cascade Drive
18 intersection. Third, the City Council notes that the Comprehensive Plan Map
19 amendment completes the corridor of the SPD designated properties given
20 that the properties surrounding the Motor-Vu Property are currently
21 designated SPD under the [LCP]. Lastly, the City Council notes that the
22 existing commercial use on the Motor-Vu property is nonconforming under
23 the existing Comprehensive Plan designation and zone, and therefore the
24 Comprehensive Plan Map Amendment will make it conforming. * * * " Joint
25 Response Brief 33-34.

26 Petitioners take the position that the first of the above four reasons responds to a
27 "private" need rather than a "public" need. Petitioners contend that the second reason is
28 invalid, because separate smaller developments on the Motor-Vu and Champion Properties
29 could be expected to result in the same public improvements. Regarding the third and fourth
30 reasons, petitioners contend those reasons "do not reflect needs at all." Petition for Review
31 17.

32 Respondents answer that petitioners offer no explanation for why having these
33 adjacent properties developed under the same development standards (the first reason) would

1 not serve a public need. Respondents also contend that petitioners’ argument that smaller
2 developments might result in the noted improvements to the Highway 20/Cascade Drive
3 intersection (the second reason) is simply speculation. More importantly, respondents argue
4 that petitioners’ argument does not mean that the joint development of the Motor-Vu and
5 Champion Properties, which the plan map amendment decisions facilitates, does not serve a
6 public need by facilitating the improvements now rather than at some unspecified future date.
7 We agree with respondents on both points, and we also agree with respondents that
8 petitioners’ contention that the third and fourth reasons “do not reflect needs at all,” is not
9 sufficiently developed to demonstrate that those reasons are inadequate to identify a public
10 need.

11 The second assignment of error is denied.

12 **THIRD ASSIGNMENT OF ERROR**

13 In separate subassignments of error, petitioner challenges the city’s annexation and
14 rezoning decision.

15 **A. Annexation Decision**

16 City of Lebanon Resolution 11 (1982) (Annexation Policies) adopts five annexation
17 policies. Petitioners contend the city failed to demonstrate that its decision to annex the
18 Motor-Vu property is consistent with those annexation policies.

19 **1. Annexation Policies 1 and 3 (Adequate Public Facilities and**
20 **Services).**

21 Annexation Policies 1 and 3 require that annexed property have adequate urban
22 services or that such services be made available and that any public facilities that do not meet
23 city standards be upgraded by the party seeking annexation.¹⁴

¹⁴ Annexation Policy 1 provides:

“The City of Lebanon shall require proof that urban services are available or can be made available to serve the property considered for annexation and that the additional demands that would be placed on those services will not overburden their present capacities.”

1 **a. Transportation Facilities**

2 Petitioners first “restate and incorporate in their entirety their arguments concerning
3 Goal 12, the TPR, and LCP transportation policies that were raised under the First
4 Assignment of Error.” Petition for Review 18-19. In their transportation-related arguments
5 under the first assignment of error, petitioners cite Goal 12’s requirement to “provide and
6 encourage a safe, convenient and economic transportation system.” Petitioners also cite the
7 TPR, although they do not cite any specific provisions of that rule. Petitioners also cite the
8 two LCP Transportation Policies that were set out earlier in this opinion under our discussion
9 of the first assignment of error. See n 11.

10 Petitioners contend the city failed to establish that the challenged decision will result
11 in a “balanced” and multi-modal approach to the city’s transportation needs, as LCP
12 Transportation Policy 1 requires. Petitioners contend the proposal is auto-oriented, bicycle
13 and pedestrian needs have been ignored and “there is no evidence that the social, economic,
14 environmental and energy costs and impacts of the proposal have been considered.” Petition
15 for Review 15. Petitioners also contend that their consulting transportation engineer
16 identified a number of criticisms of the Transportation Impact Analysis (TIA) prepared by
17 the applicant.

18 The city adopted several pages of findings addressing the transportation section of the
19 LCP generally and petitioners’ criticisms of the applicant’s TIA. Record 191-193. The city
20 adopted findings that specifically address LCP Transportation Policies 1 and 3.¹⁵ Petitioners

Annexation Policy 3 provides:

“Parties involved in seeking the annexation or who may be included in the annexation shall initiate a program to upgrade any urban services and/or public facilities within the area considered for annexation that do not meet standards as may be established by the City of Lebanon.”

¹⁵ The city’s findings misidentify LCP Transportation Policy 3 as LCP Transportation Policy 2, but the city’s findings accurately quote the language of Transportation Policy 3 and explain why the city believes the proposal is consistent with the policy. Record 194.

1 neither acknowledge nor specifically challenge these findings. In the absence of such a
2 challenge, we conclude the city’s findings are adequate to respond to petitioners’
3 transportation impact concerns and adequate to demonstrate compliance with Goal 12, the
4 TPR and the two LCP Transportation Policies that petitioners cite.

5 **b. Stormwater Facilities**

6 Petitioners contend that the city’s findings do not establish that existing stormwater
7 drainage problems in the area have been solved. While the annexation decision is
8 conditioned on three culvert and pipeline improvements, petitioners contend there is no
9 evidence these improvements will correct the existing stormwater problems. Petitioners also
10 argue the city failed to quantify the stormwater from the proposed development so the city is
11 in no position to find the stormwater facilities are adequate.

12 Respondents identify findings in the challenged decision that address the requirement
13 that adequate stormwater facilities be present for the proposed development or be provided
14 as part of the development. Joint Response Brief 38 (citing findings at Record 182).
15 Respondents also cite to evidence that was produced in response to stormwater facility
16 capacity issues raised by the Oregon Department of Transportation (ODOT) and opponents.
17 Joint Response Brief 39. Finally, respondent identify findings in the challenged decision that
18 explain why, based on that evidence, the city concluded that with the stormwater facility
19 improvements that will be required of the proposed development, those facilities will be
20 adequate. Joint Response Brief 39. We conclude that those findings are adequate to respond
21 to the issues petitioners raised concerning stormwater and to explain why those facilities will
22 be adequate to serve the proposed development. We also conclude that those findings are
23 supported by substantial evidence in the record.

24 **2. Annexation Policy 2.**

25 Annexation Policy 2 provides:

1 “Public rights-of-way necessary for the safe and efficient movement of traffic,
2 bicycles and pedestrians shall be provided with the annexation and without
3 obligation to the City of Lebanon.”

4 Tax lot 1900 is a relatively small property owned by ODOT. It is located along
5 Highway 20 and adjoins both the Champion and the Motor-Vu properties. Some of the
6 planned transportation improvements for the approved Wal-Mart Superstore will be located
7 on Tax lot 1900. Petitioners contend the city’s failure to include tax lot 1900 in the
8 challenged annexation decision results in a violation of Annexation Policy 2.

9 The city’s findings addressing these concerns include the following:

10 “1. The annexation process is not the process used to dedicate rights-of-
11 way to the City. It is done through a platting process.^[16] The
12 Applicant provided the proposed location of the necessary rights-of-
13 way and the proposed pedestrian and bicycle facilities pursuant to the
14 City’s request. These proposed rights of way provide for the safe and
15 efficient movement of traffic, bicycles and pedestrians. All the rights-
16 of-way required by the City will be dedicated to the City.

17 “2. It is not necessary to annex tax lot 1900 to provide the necessary
18 rights-of-way because ODOT will surplus tax lot 1900 to the City
19 upon completion of the Santiam Wagon Road protection measures.
20 Tax lot 1900 was not included in the Annexation and Zone
21 Establishment request because that property is owned by ODOT, not
22 the Applicant. Once ODOT surpluses this property to the City, the
23 City can annex that parcel at anytime. * * *” Record 184.

24 We conclude that the city’s findings are adequate to respond to petitioners’ concerns
25 regarding Annexation Policy 2 and to demonstrate that the disputed annexation decision does
26 not violate Annexation Policy 2.

27 **3. Annexation Policies 4 and 5.**

28 Annexation Policy 4 requires that the annexation “conform with the Lebanon
29 Comprehensive Plan and its goals and policies.” Annexation Policy 5 requires proof of a

¹⁶ We are not sure what the city means by a “platting process.” It could be a reference to the city’s final planned development plan approval for the Wal-Mart Superstore. Whatever the city means, petitioners do not assign error to the finding or explain why the finding is inadequate or legally incorrect.

1 public need for a proposed annexation.¹⁷ Petitioners’ entire argument regarding Annexation
2 Policy 4 is as follows:

3 “For the reasons set forth in this section, as well as those arguments in the
4 First Assignment of Error, the applicant has not demonstrated compliance
5 with this policy.” Petition for Review 20.

6 Petitioners’ entire argument with regard to Annexation Policy 5 is as follows:

7 “Petitioners hereby incorporate and restate their arguments pursuant to the
8 First Assignment of Error. There is no public need for this parcel to be
9 included within the city as commercial land.” Petition for Review 20.

10 With regard to the Annexation Policy 5 requirement for a demonstration of public
11 need, respondents point out that the city adopted three pages of findings in which it offers a
12 number of reasons why the city believes the disputed annexation will fill a public need.
13 Record 185-187. Petitioners offer no specific challenge to those findings. In the absence of
14 such a challenge, we conclude that they are adequate to demonstrate that the disputed
15 annexation will serve a public need, as Annexation Policy 5 requires.

16 With regard to Annexation Policy 4, the challenged annexation decision includes
17 findings that address some of the LCP policies that petitioners cite in their first assignment of
18 error and are set out at ns 10 and 11. Record 190 (LCP Commercial Policy 7); Record 193-
19 194 (LCP Transportation Policies 1 and 2 [sic Policy 3]); Record 196 (LCP Economy Policy
20 2).

21 LCP Economy Policy 1 is not specifically addressed in the annexation decision.
22 However, it is not apparent to us that LCP Economy Policy 1 adds anything of substance to
23 LCP Economy Policy 2, which is specifically addressed in the challenged decision and

¹⁷ The text of Annexation Policies 4 and 5 is set out below:

“No annexation shall be considered that does not conform with the Lebanon Comprehensive Plan and its goals and policies.” (Annexation Policy 4)

“It shall be the burden of proof of the applicant that a public need exists for the proposed annexation and that the annexation is in the public’s interest.” (Annexation Policy 5)

1 includes a response to petitioners' expressed concerns with Wal-Mart's employment
2 practices. Neither are the LCP policies concerning historic sites specifically referenced in
3 the annexation decision. However, in rejecting petitioners' arguments concerning the LCP
4 Historic Policies in the comprehensive plan text amendment decision the city explained:

5 "Protection of the Santiam Wagon Road is not relevant to the Comprehensive
6 Plan Text Amendment because there is no impact to the Historical Resource
7 created by the Text Amendment.

8 "Within the Wal-Mart proposed development, which is not relevant to the
9 Comprehensive Plan Text Amendment, impacts on the Santiam Wagon Road
10 will be considered. SHPO [the State Historic Preservation Office], in a letter
11 dated August 5, 2002, cites several conditions that must be agreed to by the
12 developer prior to ODOT's approval for the development. * * * SHPO in a
13 letter dated September 5, 2002 * * * indicates that if the conditions
14 established by SHPO are implemented it will not only benefit the historic
15 resources (the Santiam Wagon Road) and the community, but will in fact
16 demonstrate a 'private/public, state/local partnership' that will be a 'success
17 story for other communities.'" Record 248-249.

18 We understand the above findings to conclude that the LCP historic resource policies are met
19 because there are measures in the contemporaneously approved planned development plan
20 for the Wal-Mart Superstore that will ensure the required protection.

21 Without some specific challenge to the above noted findings in the annexation
22 decision and the comprehensive plan text amendment that address the LCP policies that
23 petitioners identify, we conclude that those findings are adequate to demonstrate that the
24 disputed annexation is consistent with those policies.

25 **B. The Zoning Decision**

26 As noted earlier, the city applied the SPD comprehensive plan map designation to the
27 Motor-Vu property and also applied MU zoning to the property. It does not appear to be
28 disputed that MU zoning corresponds with the SPD comprehensive plan map designation, in
29 the sense that MU zoning is at least one of the potentially available zoning designations that
30 implement the SPD comprehensive plan map designation. In fact, many properties in the
31 area, including the Champion property, carry the SPD comprehensive plan map designation

1 and are zoned MU. It is unclear to us whether there are other city zoning designations that
2 could have been applied to the Motor-Vu property instead. For purposes of petitioners’
3 argument under this part of the third assignment of error, we assume that there are such other
4 zones.

5 LZO 3.050 is entitled “Zoning of Annexed Areas” and provides as follows:

6 “All areas annexed to the City shall be placed in a zoning classification in
7 accordance with the adopted Comprehensive Plan. If a zoning designation
8 other than one in accordance with the Comprehensive Plan is requested by an
9 applicant, the zoning requested shall not be granted until the plan is amended
10 to reflect concurrence.”

11 Petitioners contend that the city erred by failing to require that the applicant file an
12 application and filing fee for a zoning map amendment. Petitioners contend that such an
13 application is required by LZO 9.010.¹⁸ Petitioners also contend that the city was required to
14 process that application for a zoning map amendment in accordance with LZO 9.020.¹⁹ The
15 city provided notice in advance of the planning commission and city council hearings in this
16 matter that it proposed to annex and apply MU zoning to the Motor-Vu property. Record
17 781, 1083. However, petitioners contend that no separate notice of the proposed zoning was
18 given. Petitioners also contend that the city’s failure to specify the applicable criteria for a
19 zone change left them unprepared to address the zone change below. Petitioners assert these
20 procedural errors prejudiced their substantial rights and warrant remand. Petitioners also

¹⁸ As relevant, LZO 9.010 provides:

“An amendment to * * * a zoning map may be initiated by the City Council, the City Planning Commission or by application of a property owner. The request by a property owner for an amendment shall be accomplished by filing an application with the Planning Official using forms prescribed pursuant to [LZO] 2.070. A filing fee in accordance with the provisions of [LZO] 2.080 shall accompany an application by a property owner for an amendment.”

¹⁹ LZO 9.020 sets out a procedure for considering zoning map amendments and requires (1) notice and a public hearing before the planning commission, (2) a planning commission recommendation to the city council on the application, (3) notice and a public hearing on the application before the city council, and (4) written notice of the planning commission recommendation and the city council’s final decision to the applicant.

1 assert that “the city must formally consider the propriety of [the] proposed zoning in light of
2 the [LZO]” and that the city failed to do so.²⁰ Petition for Review 21.

3 The city council adopted the following findings in response to petitioners’ argument
4 concerning the zoning of the Motor-Vu property:

5 “The Opposition asserts that the Applicant was required to file a Zone Change
6 Application and demonstrate compliance with the zone change criteria. This
7 assertion is contrary to the express language of [LZO] 3.050, which clearly
8 states that the zoning for property that is being annexed into the City is
9 established as part of the annexation process itself. The City cannot change a
10 City zone until the City first establishes a zone for the property pursuant to
11 [LZO] 3.050. Moreover, the Opposition fails to explain what different or
12 additional Comprehensive Plan and LZO provisions are applicable that have
13 not already been considered as part of the Annexation and Zone Establishment
14 and Comprehensive Plan Amendment review.” Record 180.

15 Petitioners and the city read LZO 3.050 and 9.010 differently. The city’s reading of those
16 provisions to limit zoning map changes or amendments to circumstances where the subject
17 property already is zoned by the city and to allow the city to replace county zoning with city
18 zoning at the time of annexation, and as part of an application to annex the property without
19 a separate zoning amendment application, is not inconsistent with the language of LZO 3.050
20 and 9.010 and their apparent purpose. We defer to the city’s understanding of its zoning
21 ordinance. In addition, as respondents point out, the procedures that the city followed in this
22 case included notice of the proposed zoning in advance of the planning commission and city
23 council hearings and that petitioners in fact raised issues before both the planning
24 commission and city council concerning the proposed zoning. Even if the city committed a
25 procedural error in the way the zoning was applied to the property, petitioners identify no
26 prejudice to their substantial rights.

²⁰ Petitioners cite the following language from the LCP:

“It is important that zone change proposals be considered in relation to the policies and aims
of the Comprehensive Plan.” LCP 9-2.

1 Petitioners do contend that their procedural rights were violated because the zone
2 change criteria were never identified and the city never considered the propriety of the
3 zoning under the LCP. However, as far as we can tell, there are no zone change criteria
4 (denominated as such) in either the LZO or the LCP. If there are such zone change criteria,
5 neither petitioners nor respondents have called them to our attention. Unless and until
6 someone identifies zone change criteria, it is unnecessary for us to determine whether they
7 would apply in a circumstance where city zoning is being applied to annexed property for the
8 first time or to determine whether the city's failure to apply such criteria in this case warrants
9 remand.

10 Petitioners' suggestion that the city failed to consider applicable LCP policies, if that
11 is the case, might provide a basis for reversal. However, the city applied a number of LCP
12 policies that it determined were applicable to its annexation and rezoning decision. Record
13 188-196. In their arguments concerning the zoning of the Motor-Vu property, petitioners do
14 not acknowledge those findings, explain why the findings are inadequate to support the
15 annexation and zoning decision, or identify additional LCP policies that they believe the city
16 should have applied to the annexation and zoning decision.

17 We conclude that petitioners fail to demonstrate error in the city's decision to zone
18 the Motor-Vu property MU.

19 The third assignment of error is denied.

20 The city's decision is affirmed.