

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 DON RAMSEY, NANCY RAMSEY,
5 PAM GARCIA, MICHAEL O'BRIEN,
6 FRED RAW, DEBBIE THORPE,
7 DEAN HUTSELL, VINCENTE SOLTERO,
8 DALE COLLINS, DENNY NUSBAUM,
9 RALPH GASTON, JERI WISCHNOFSKE,
10 NADER FAHOURY, DAVID HINES,
11 DON GIST, MELINDA BLEGEN,
12 LARRY HEALTH, JERRY WALKER,
13 MIKE DeLUSE, MIKE MONDAZZE,
14 GARY WHITE, GRANT LAIBLIN,
15 JEFF LAMB, TERRY NIEMCZAK,
16 JONAS FLECK, GEORGE'S SERVICE AND
17 REPAIR, CASEY MOORE, DONNA BEVERLY,
18 TONY ARLYN, JERRY BEAVER
19 BARBARA BEAVER and AIMEE LESIEUTRE,
20 *Petitioners,*

21
22 vs.

23
24 CITY OF PHILOMATH,
25 *Respondent,*

26
27 and

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29 OREGON DEPARTMENT OF
30 TRANSPORTATION,
31 *Intervenor-Respondent.*

32
33 LUBA No. 2003-136

34
35 FINAL OPINION
36 AND ORDER

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38 Appeal from City of Philomath.

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40 Peggy Hennessy, Portland, filed the petition for review and argued on behalf of
41 petitioners. With her on the brief was Reeves, Kahn and Hennessy.

42
43 James K. Brewer, Corvallis, filed a response brief and argued on behalf of respondent.
44 With him on the brief was Fewel and Brewer.

1 Bonnie E. Heitsch, Assistant Attorney General, Salem, filed a response brief and
2 argued on behalf of intervenor-respondent.

3
4 HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member,
5 participated in the decision.

6
7 AFFIRMED

01/15/2004

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

NATURE OF THE DECISION

Petitioners appeal a city decision that interprets the city’s Transportation System Plan.

FACTS

The City of Philomath adopted its Transportation System Plan (TSP) in 1999. The TSP has been adopted as part of the city’s comprehensive plan. U.S. Highway 20 and State Highway 34 (Highway 20/34) join a short distance west of the city and continue eastbound through the city’s central business district as Main Street.¹ Highway 20/34 continues on to Corvallis to the east and is also referred to as Corvallis-Newport Highway No. 33.

“[Main Street] is a three-lane facility with [a travel lane in each direction,] a continuous left-turn lane and intermittent on-street parking between the western city limits and 19th Street. Outside this area the highway is a rural two-lane roadway with no on-street parking.” TSP 31.

Main Street does not have bicycle lanes and the existing sidewalk system is incomplete.

Traffic congestion on the Main Street portion of Highway 20/34 is a problem. When the TSP was prepared, the city considered a number of options to reduce traffic congestion on Main Street. Among the options considered were Options 11A, 11B, 11C, and 11D. TSP 66-74. The city selected Option 11C. Option 11C includes a one-way couplet that would divert through-traffic from Main Street to other streets for several blocks.² The recommended couplet is depicted most clearly in Figure 7-1 of the TSP. We have reproduced TSP Figure 7-1 as Figure 1 in this opinion on the following page.

¹ Three figures are included later in this opinion to facilitate an understanding of the existing street system and the street improvements that are at issue in this appeal.

² According to ODOT, one-way couplets are a commonly employed technique for increasing the traffic-carrying capacity of overburdened two-way state highways in urban areas. One or more parallel local roads are designated as state highways and a section of the state highway becomes a one-way highway. ODOT cites the City of Salem’s Liberty and Commercial Streets and the City of Newberg’s Hancock and First Streets as examples.



Figure 1 (Figure 7-1 City of Philomath Transportation System Plan, November 1999)

1 Option 11C is actually the couplet that is called for in Option 11A along with some
2 additional improvements. TSP 71-72. As recommended in the TSP, Option 11A would
3 result in westbound Highway 20/34 traffic being routed north onto College Street, which
4 would be a one-way street west until it crossed over south onto Main Street at approximately
5 12th Street. That traffic would then continue one-way west on Main Street to the west end of
6 town and there become two-way Highway 20/34. Eastbound Highway 20/34 traffic would be
7 routed south onto Applegate Street at the west end of town. Applegate Street would be a
8 one-way street east until it crossed over north onto Main Street at approximately 15th Street.
9 Eastbound traffic would continue east on one-way Main Street to the east end of town. The
10 TSP estimates the cost of Option 11A at \$10,550,000. Option 11C, which includes Option
11 11A, adds more Highway 20/34 improvements that are not at issue in this appeal on the east
12 and west sides of town. The TSP estimates the total cost of Option 11C couplet project at
13 \$14,950,000.

14 Option 11B, which the TSP does not recommend, would have extended the Applegate
15 eastbound one-way couplet further to the east instead of crossing back to Main at 15th Street,
16 and would have used Main Street as the one-way westbound travel lane. Option 11D, which
17 the TSP also does not recommend, would have extended a Main Street/Applegate Street one-
18 way couplet further to the east and west.

19 Shortly after the TSP was adopted, \$10,935,000 was allocated to construct the couplet
20 project. ODOT initiated design of the couplet project and began working with a local
21 Stakeholder Working Group (SWG). A large number of design options were considered, and
22 some of those designs deviated significantly from the College/Applegate Street couplet that is
23 recommended in the TSP. Eight alternative alignments were analyzed in some detail by
24 ODOT and the SWG and the results of that analysis are set out in the Philomath Couplet
25 Project Plan Report. Record 191-292. Two of those alternatives are at issue in this appeal.
26 The street alignments and traffic flow proposals in Alternative 3C most closely match TSP

1 Option 11C. The alternative that the city selected is sometimes referred to as Alternative 2B
2 MOD and is sometimes referred to as the Preferred Alternative. We refer to it as the
3 Preferred Alternative in this opinion. The maps included in the record are poor quality
4 photocopies of aerial photo maps. While they are of poor quality, we have reproduced the
5 maps showing Alternative 3C and the Preferred Alternative on the following page as figures
6 2 and 3 to demonstrate the similarities and differences between TSP Option 11C (figure 1),
7 Alternative 3C (figure 2) and the Preferred Alternative (figure 3).

8 If figures 1 and 2 are compared, for all practical purposes the alignment and one-way
9 traffic flow proposed by Option 11C and Alternative 3C are identical. The new westbound
10 connection from Highway 20/34 to College Street in Alternative 3C is longer and the
11 westbound crossover from Applegate Street to Main Street in Alternative 3C was shifted
12 slightly to the east. However, the TSP expressly notes that each crossover alignment shown
13 on figure 1 is a “conceptual alignment.”

14 If figure 3 is compared with figures 1 and 2, there are similarities and differences.
15 The important difference is the absence of the College Street westbound one-way portion of
16 the couplet.³ The omission of College Street from the one-way couplet necessitates
17 additional improvements to Main Street. Main Street would be restriped from a three-lane
18 facility to a five-lane facility east of 16th Street, with a continuous center lane/median.⁴ From
19 16th Street east, Main Street would carry both eastbound and westbound traffic. From 16th
20 Street west, Main Street would carry westbound one-way traffic.

³ Additional right of way would be acquired to connect westbound Highway 20/34 with College Street at its intersection with 20th Street under the Preferred Alternative. This right of way connection between Highway 20/34 and College Street at 20th Street would be improved with a one-lane road and could later be improved with a two-lane roadway. However, the westbound College Street portion of the couplet that is envisioned by Option 11C, and is part of Alternative 3C, would not be built under the Preferred Alternative.

⁴ According to ODOT, the addition of bicycle lanes and sidewalk improvements along this portion of Main Street would necessitate the acquisition of some additional right of way. However, ODOT notes that there is no on-street parking on this section of Main Street currently. ODOT contends that contrary to petitioners’ arguments, the Preferred Alternative does not eliminate existing parking.

Figure 2 [Alternative 3C – College Street/Applegate St. Couplet]

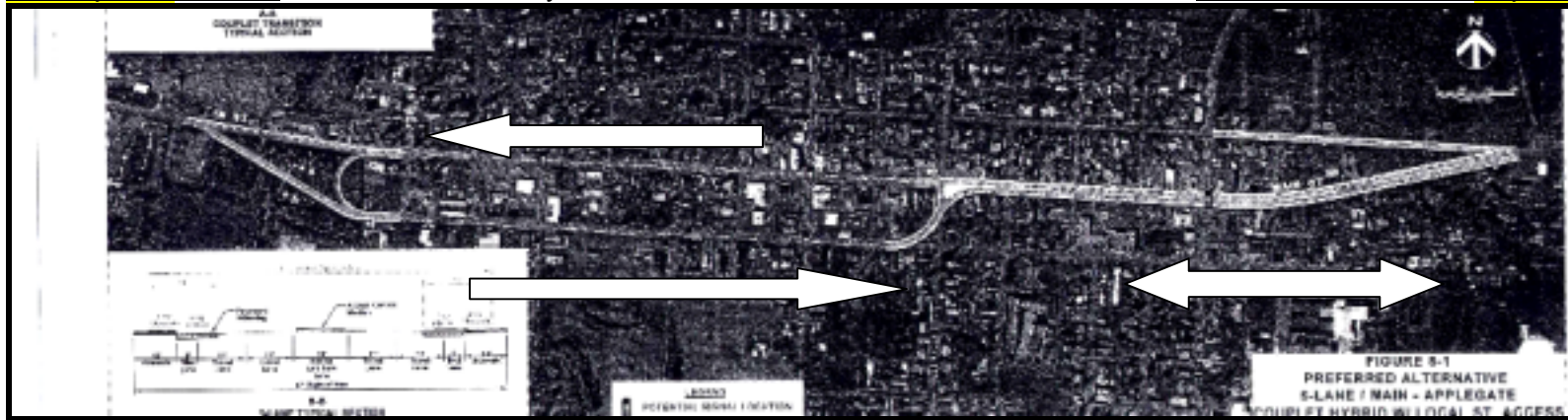
◀◀ Hwy 20/34 ▶ Main St. One-Way Westbound From 12th St. Cross Over ◀ College St. One-Way Westbound to 12th St. Cross Over ▶ Hwy 20/34 ▶▶



◀◀ Hwy 20/34 ▶ Applegate St. One-Way Eastbound to 15th St Cross Over ▶ Main St. One-Way Eastbound from 15th St. Cross Over ▶ Hwy 20/34 ▶▶

Figure 3 [Preferred Alternative – Main Street/Applegate St. Couplet]

◀◀ Hwy 20/34 ▶ 2-Lane Main St. One-Way Westbound from 15th St. ◀ 20th St ▼ Hwy 20/34 ▶▶



◀◀ Hwy 20/34 ▶ Applegate St. One-Way Eastbound to 15th St Cross Over..... ▶▶ 5-Lane Main St. Two-Way East of 16th ▶▶ Hwy 20/34 ▶▶

1 **THIRD ASSIGNMENT OF ERROR**

2 Before the city council selected the Preferred Alternative, it conducted a public
3 hearing on July 28, 2003. At that public hearing, ODOT made its initial presentation.
4 Record 175. Petitioners requested that the record be held open to allow them an opportunity
5 to review the proposal and compare the Preferred Alternative with the couplet that is
6 envisioned by TSP Option 11C. Instead of holding the record open, the city council
7 continued the public hearing to August 11, 2003. At the August 11, 2003 continued hearing,
8 ODOT chose to reserve its comments to the end of the continued hearing as part of its
9 rebuttal. Petitioners objected to the city allowing ODOT to submit new written testimony at
10 the end of the August 11, 2003 continued hearing. The city then left the record open to
11 August 18, 2003, to allow petitioners time to submit additional written rebuttal. Petitioners
12 filed additional written rebuttal, and on August 18, 2003 the city adopted its decision.

13 Petitioners contend that the city erred by allowing ODOT to waive its initial
14 presentation on August 11, 2003 and reserve its entire presentation to its rebuttal at the end of
15 the continued hearing.

16 We agree with the city and ODOT that the challenged decision is properly viewed as a
17 legislative decision rather than a quasi-judicial decision.⁵ Petitioners do not cite any
18 authority that dictates a particular order that parties must follow in presenting evidence and
19 argument during legislative land use proceedings. While the city elected to follow quasi-
20 judicial land use procedures, the city's election to do so does not make a legislative land use
21 decision into a quasi-judicial land use decision. *See ODOT v. Klamath Falls*, 25 Or LUBA
22 761, 765 (1993) (“observance of quasi-judicial procedures would not necessarily convert
23 what would otherwise be a legislative decision into a quasi-judicial decision”).

⁵ As ODOT points out, the disputed project is nearly two miles long and affects a large portion of the City of Philomath.

1 Moreover, even if the challenged decision were properly viewed as a quasi-judicial
2 land use decision, nothing in ORS 197.763 prohibits an applicant from reserving its entire
3 presentation at a continued hearing to its final rebuttal. In this case, petitioner asked for and
4 was granted an opportunity to file a written response to new evidence that was included in
5 ODOT’s final rebuttal. That is precisely the procedure that ORS 197.763(6)(b) envisions.⁶
6 We see no error in the procedure the city followed in this matter.

7 The third assignment of error is denied.

8 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

9 Petitioners central position in this appeal is that, among the eight alternatives
10 considered by ODOT and the SWG, only Alternative 3C is consistent with TSP Option 11C.
11 Petitioners contend that the city must amend the TSP if it wishes to construct the Preferred
12 Alternative.

13 The city suggests that because the selection of Option 11C is stated as a
14 “recommendation” rather than as a “mandate” the city is free to follow or ignore adopted TSP
15 recommendations as it chooses. We reject that suggestion. Recommended Option 11C
16 clearly calls for a one-way couplet that utilizes College Street and Applegate Street to remove
17 existing through-traffic from sections of Main Street. The TSP makes it clear that the exact
18 locations of the crossovers that are shown and discussed in the TSP are “conceptual
19 alignment[s].” TSP Figure 7-5 expressly states that the “crossover alignment needs to be
20 refined.” The TSP makes it reasonably clear that the alignments shown in the TSP are

⁶ ORS 197.763(6)(b) provides:

“If the hearings authority grants a continuance, the hearing shall be continued to a date, time and place certain at least seven days from the date of the initial evidentiary hearing. An opportunity shall be provided at the continued hearing for persons to present and rebut new evidence, arguments or testimony. If new written evidence is submitted at the continued hearing, any person may request, prior to the conclusion of the continued hearing, that the record be left open for at least seven days to submit additional written evidence, arguments or testimony for the purpose of responding to the new written evidence.”

1 somewhat conceptual. The TSP does not include the design and engineering detail that is
2 needed to actually construct planned facilities and a certain amount of discretion in selecting
3 a particular design or engineering solution to implement the couplet is implied. However, the
4 solution to Main Street congestion that the TSP selects is the College Street/Applegate Street
5 couplet that is conceptually depicted in figure 1. A final city decision to replace the one-way
6 traffic carrying function that the College Street portion of the couplet would have provided
7 with an improved Main Street would not be consistent with Option 11C, which the TSP
8 recommends.

9 In defending the city’s decision in this matter, ODOT and the city point out that the
10 transportation planning rule (TPR) specifically provides that transportation facility timing and
11 financing decisions in a transportation financing program are not land use decisions.⁷
12 Perhaps more importantly, the TPR also specifically embraces phasing of major
13 transportation facilities.⁸

14 ODOT first argues that LUBA does not have jurisdiction over the challenged decision
15 because it is merely a “timing and financing provision[.]” within the meaning of OAR 660-
16 012-0040(4). We reject that argument. The city’s decision may ultimately be driven in part
17 by timing or financing questions, but it also decides that the Preferred Alternative is

⁷ OAR 660-012-0040(4) provides:

“Anticipated timing and financing provisions in the transportation financing program are not considered land use decisions as specified in ORS 197.712(2)(e) and, therefore, cannot be the basis of appeal under ORS 197.610(1) and (2) or ORS 197.835(4).”

⁸ OAR 660-012-0040(5) provides:

“The transportation financing program shall provide for phasing of major improvements to encourage infill and redevelopment of urban lands prior to facilities and improvements which would cause premature development of urbanizable lands or conversion of rural lands to urban uses.”

1 consistent with Option 11C in the TSP. That essential part of its decision interprets the TSP,
2 which is part of the city’s comprehensive plan, and for that reason is a land use decision.⁹

3 Petitioners compare Alternative 3C and the Preferred Alternative and identify a
4 number of differences in the operational characteristics of those alternatives. Petition for
5 Review 8-9. We have no doubt that if the city’s decision is read to say that construction of
6 the Preferred Alternative is intended to fully implement TSP Option 11C, that interpretation
7 of the TSP would be wrong. Eliminating the College Street portion of the couplet is
8 inconsistent with Option 11C. Although petitioners do not raise the issue, it does not appear
9 that the Preferred Alternative includes the additional improvements to Highway 20/34 on the
10 east and west sides of town that Option 11C adds to the Option 11A couplet.

11 Simply stated, the city’s and ODOT’s defense of the challenged decision is that the
12 Preferred Alternative should be viewed an initial phase of Option 11C. The challenged
13 decision explains:

14 “The Preferred Alternative represents the first phase of the potential multi-
15 phase implementation of the adopted TSP. A future phase could consist of
16 modifying the local street connection from Main Street to College [Street] to
17 route westbound highway traffic onto College Street. In addition, a
18 westbound crossover could be constructed to route College Street traffic onto
19 Main Street at about 12th Street. The approval of the Preferred Alternative
20 does not obligate the City to build subsequent phases. Nor does it preclude
21 the City from building subsequent phases.” Record 9.¹⁰

⁹ LUBA has “exclusive jurisdiction to review any land use decision.” ORS 197.825(1). As relevant, ORS 197.015(10)(a) defines the term “land use decision” to include a decision that “concerns the * * * application of * * * [a] comprehensive plan provision[.]”

¹⁰ The Philomath Couplet Project Plan Report includes a similar description of the Preferred Alternative:

“The preferred alternative combines elements of Alternatives 2B MOD and 3C MOD to create a facility that provides an initial phase of the alternative presented in the Philomath TSP. The alternative builds on Alternative 2B by building a westbound Main Street/eastbound Applegate Street couplet at the west end of town that transitions at 15th Street to a five-lane widened Main Street through the east end of town. Traffic signals are proposed at the intersections of 9th, 13th and 19th Streets/Main Street and at the 13th Street/Applegate Street intersection. A signalized pedestrian-only crossing may be considered in the vicinity of 16th Street.

1 Although the challenged decision does not cite cost as a reason for selecting the
2 Preferred Alternative over Alternative 3C, we note that the low estimated cost of the
3 Preferred Alternative is \$10,900,000, which is the amount currently budgeted for the couplet,
4 whereas the estimated cost of Alternative 3C is \$13,500,000. Record 273, 281. Because
5 petitioners do not argue that the funds available to construct the couplet are sufficient to
6 construct Alternative 3C, the parties have not addressed a potentially troubling issue. If
7 either Alternative 3C or the Preferred Alternative could be built with available funds, and the
8 city elected to build the Preferred Alternative solely due to public opposition to Alternative
9 3C or due to a change in its view of the efficacy of Alternative 3C, a much stronger case
10 might be made for petitioners' view that the TSP must be amended first. In that
11 circumstance, it would be more difficult for the city and ODOT to justify the Preferred
12 Alternative as a first phase of Option 11C. This is because as least some of the additional
13 improvements that will be necessary to the eastern portion of Main Street under the Preferred
14 Alternative to allow it to carry two-way traffic would have to be removed if Alternative 3C
15 were fully implemented in the future and that section of Main Street became a one-way street
16 eastbound as Alternative 3C (and TSP Option 11C) envision. Given that petitioners do not
17 address this issue, we do not consider the issue; and we express no view regarding how we
18 would resolve that issue if it were presented.

19 Resolution of petitioners' first two assignments of error requires that we answer two
20 questions. First, can construction of the Preferred Alternative be viewed as construction of a

“A local street connection from westbound [Highway 20/34] to College Street that approximates the connection shown in the TSP is part of the concept. In this initial phase of the project, the local street connection is a one-lane roadway with bike and pedestrian access. The right-of-way for this local street connection is sufficient enough to provide a future two-lane phase. This project plan is fully consistent with the 1999 TSP because it completes the College Street leg of the TSP couplet and channels the traffic in the corridor as specified by the TSP. However, this project plan does not require completion of that final phase to the couplet to be functional, and the project plan does not preclude the city from reconsidering the planned use of College Street at another time.” Record 280.

1 phase or part of Option 11C, which is the option that the TSP recommends? We answer that
2 question in the affirmative. The Preferred Alternative only accomplishes a part of the larger
3 improvement that Option 11C envisions, but it is located within the alignment anticipated by
4 Option 11C. Petitioners do not argue that there is anything about the Preferred Alternative
5 that would prevent completion of the couplet envisioned by Option 11C. Second, is a city
6 decision to construct the Preferred Alternative as a first phase of Option 11C consistent with
7 the TSP? We conclude that it is. The executive summary of the TSP specifically recognizes
8 that the couplet may be constructed in phases.¹¹ While the first phase that is described in the
9 two-page TSP executive summary differs from the first phase that the Preferred Alternative
10 would represent, we attach more significance to the TSP's recognition that phasing may be
11 necessary than to the precise first phase that is described in the TSP executive summary. The
12 precise first phase that is described in the executive summary is not mentioned in the more
13 detailed discussion of Options 11A and 11C in the body of the TSP, which does not expressly
14 discuss phasing at all. Additionally, as we have already noted, the TPR expressly recognizes
15 that the timing and funding of planned facilities is uncertain and expressly embraces phasing
16 of planned facilities. *See* ns 7 and 8.

17 We have little doubt that the city's decision to construct an initial phase of Option
18 11C that appears to be fully functional may make it unlikely that the College Street portion of
19 the couplet envisioned by Option 11C will ever be funded and constructed. If that proves to
20 be the case, and the city ultimately decides to abandon the recommended College Street
21 portion of the Option 11C couplet, it will need to amend the TSP to reflect that decision.

¹¹ The TSP Executive Summary states:

“* * * As a result of the public input and the analysis performed, a phased one-way couplet project was recommended as part of the 20-year plan for Philomath. The first phase of this project would make improvements to College and Applegate Streets, maintaining two-way traffic on all the streets until the second phase is needed and constructed using Main, Applegate and College Streets. * * *” TSP 1.

1 However, for the reasons expressed above, we do not agree with petitioners that the city must
2 do so now before it can decide to construct to the Preferred Alternative.

3 The first and second assignments of error are denied.

4 The city's decision is affirmed.