

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CITIZENS FOR PROTECTION
5 OF NEIGHBORHOODS, LLC,
6 ROBERT THOMPSON and
7 RODNEY STUBBS,
8 *Petitioners,*

9
10 vs.

11
12 CITY OF SALEM,
13 *Respondent,*

14
15 and

16
17 SUSTAINABLE FAIRVIEW ASSOCIATES, LLC,
18 *Intervenor-Respondent.*

19
20 LUBA No. 2003-201

21
22 FINAL OPINION
23 AND ORDER

24
25 Appeal from City of Salem.

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27 Paul R. J. Connolly, Salem, filed the petition for review and argued on behalf of petitioners.

28
29 Randall Tosh, City Attorney, and Kris Jon Gorsuch, Salem, filed a joint response brief and
30 argued on behalf of respondent and intervenor-respondent.

31
32 BASSHAM, Board Member; HOLSTUN, Board Chair, participated in the decision.

33
34 AFFIRMED

06/09/2004

35
36 You are entitled to judicial review of this Order. Judicial review is governed by the
37 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners challenge a decision that amends the city comprehensive plan and development code to adopt new mixed use plan and zoning designations and also applies those designations to a 275-acre parcel.¹

FACTS

The subject property is the location of the former Fairview Training Center, a state facility that for over 90 years housed and provided training for mentally and physically disabled persons. In 1999, the state decided to close the facility. In anticipation of the closure, the state initiated a master planning process to consider options for post-closure use (1999 redevelopment plan). The 1999 redevelopment plan produced for the state recommended that the property be conveyed to private ownership and developed for mixed commercial and residential uses.

In 2003, the state conveyed the subject property to intervenor-respondent. Also in 2003, the city began proceedings to include mixed use development designations in its comprehensive plan and development code. While the city was evaluating the establishment of the mixed use zoning designations, the city considered the application of those designations to the subject property. The city's proceedings culminated in two ordinances: (1) Ordinance 59, which amends the Salem Area Comprehensive Plan (SACP) by adopting a mixed use comprehensive plan designation, and (2) Ordinance 58, which applies that designation to the subject property and rezones the property for mixed use development. Petitioners challenge the city's adoption of the two ordinances.²

¹ The challenged decision is embodied in two ordinances, Ordinances 58 and 59. The city does not dispute petitioners' description of the two ordinances as one decision for the purposes of LUBA review.

² Ordinance 58 applies the Fairview Mixed Use (FMU) zone and four mixed use overlays (Low-Intensity Residential, Mixed Intensity, Adaptive Use and Village Center) to the subject property.

1 **REPLY BRIEF**

2 Petitioners move to file a nine-page reply brief, arguing that a reply brief is necessary to
3 respond to new matters raised in the joint response brief. Respondent and intervenor-respondent
4 (respondents) object, arguing that (1) the reply brief is not timely, and (2) the reply brief is not
5 confined to new matters, as is required by OAR 661-010-0039.³

6 The joint response brief was filed on Wednesday, April 28, 2004. The reply brief was filed
7 and a copy of the reply brief was provided to respondents on Wednesday, May 5, 2004, one day
8 prior to oral argument. While one day is a relatively short period of time to review a reply brief and
9 prepare for oral argument, we do not believe that respondents were prejudiced in their ability to
10 respond to the reply brief. Therefore, we do not deny the reply brief because it was not timely filed.

11 However, we agree with respondents that the reply brief either amplifies arguments made in
12 the petition for review or includes additional arguments for remand not presented in the petition for
13 review. It is not limited to new matters included in the response brief. Therefore, we will not
14 consider the reply brief.

15 **RENEWED MOTION TO TAKE EVIDENCE/OBJECTION TO THE RECORD**

16 On March 23, 2004, petitioners moved for LUBA to consider evidence not in the record
17 pertaining to a transportation analysis performed for the state in 1999 (1999 transportation
18 analysis). In that same motion, petitioners requested that we reconsider our February 18, 2004
19 order on record objections where we declined to order the city to include the 1999 transportation
20 analysis in the record of this appeal. We denied petitioners' objection and motion to take evidence
21 in an order dated April 7, 2004. Petitioners renew their motions in a footnote on page 13 of the

³ OAR 661-010-0039 provides, in relevant part:

“A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies as soon as possible after respondent’s brief is filed. A reply brief shall be confined solely to new matters raised in the respondent’s brief. A reply brief shall not exceed five pages, exclusive of appendices, unless permission for a longer reply brief is given by the Board.”

1 petition for review. Petitioners provide no reason that persuades us that we should reconsider our
2 April 7, 2004 order, and we decline to do so. Petitioners’ motions are denied.

3 **FIRST ASSIGNMENT OF ERROR**

4 OAR 660-012-0060(1), part of the Transportation Planning Rule (TPR), requires that a
5 local government evaluate applications for post-acknowledgement plan amendments and take
6 certain steps to address traffic impacts if the local government determines the proposed amendment
7 will “significantly affect” a transportation facility.⁴ As defined by OAR 660-012-0060(2) and as
8 relevant here, a proposed amendment will “significantly affect” a transportation facility if the

⁴ OAR 660-012-0060 provides, in relevant part:

- “(1) Amendments to functional plans, acknowledged comprehensive plans, and land use regulations which significantly affect a transportation facility shall assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility. This shall be accomplished by either:
 - “(a) Limiting allowed land uses to be consistent with the planned function, capacity, and performance standards of the transportation facility;
 - “(b) Amending the [transportation system plan (TSP)] to provide transportation facilities adequate to support the proposed land uses consistent with the requirements of this division;
 - “(c) Altering land use designations, densities, or design requirements to reduce demand for automobile travel and meet travel needs through other modes; or
 - “(d) Amending the TSP to modify the planned function, capacity and performance standards, as needed, to accept greater motor vehicle congestion to promote mixed use, pedestrian friendly development where multimodal travel choices are provided.
- “(2) A plan or land use regulation amendment significantly affects a transportation facility if it:
 - “* * * * *
 - “(c) Allows types or levels of land uses which would result in levels of travel or access which are inconsistent with the functional classification of a transportation facility; or
 - “(d) Would reduce the performance standards of the facility below the minimum acceptable level identified in the TSP.”

1 proposal “[a]llows types or levels of land uses which would result in levels of travel or access which
2 are inconsistent with the functional classification of a transportation facility” or “[w]ould reduce the
3 performance standards of the facility below the minimum acceptable level identified” in the local
4 government’s transportation system plan (TSP).

5 The city found that the challenged decisions do not “significantly affect” any transportation
6 facilities within the meaning of OAR 660-012-0060 because (1) Ordinance 58 allows no
7 development at all of the subject property, other than a 20-acre portion, until subsequent master
8 plan and refinement plan(s) are adopted, (2) traffic generated by development of the 20-acre
9 portion would not exceed traffic generated by the former state facility under the former zoning, and
10 (3) any development that would be allowed pursuant to subsequently adopted master plans and
11 refinement plans would be subject to review under standards that ensure that allowed land uses are
12 consistent with the identified function, capacity, and performance standards of affected
13 transportation systems.⁵

⁵ The city’s findings state, in relevant part:

“* * * The proposed amendments to the SACP do not significantly affect a transportation facility because no specific development that can be assessed to have an impact is permitted by the amendment. The proposed amendments do however call for a development type that is new to Salem that encourages a more compact urban form of development that preserves open space, encourages reduction in [single-occupancy vehicle] trips, promotes the pedestrian, and facilitates the use of multi-modal transportation options. * * * The proposed amendment[s] to the comprehensive plan [are] consistent with the intent and purpose of the TPR and will become an additional tool to enable Salem to meet the requirements of Goal 12.

“[The] TPR also requires that amendments to land use regulations that significantly affect a transportation facility be in compliance with the provision of [the] TPR. The proposed amendment establishing the FMU zone does not significantly affect a transportation facility because the FMU zone only allows a limited amount of development until such time when the required Fairview Plan and Refinement Plan(s) are submitted for review and public hearing. The amount of development permitted by the FMU zone prior to the approval of the Fairview Plan does not significantly affect a transportation facility. In a trip generation comparison study conducted by Kittleson and Associates, Inc., and provided by [intervenor-respondent] * * *, it determines that the amount of development permitted by the FMU zone prior to Fairview Plan and Refinement Plan(s) approval will not generate a traffic impact that exceeds the levels of traffic that the site, surrounding neighborhoods, and existing transportation system has already experienced when the site was operating as the Fairview Training Center.

1 Petitioners argue that the city erred in concluding that the challenged decision will not
2 “significantly affect” a transportation facility under OAR 660-012-0060. According to petitioners,
3 the city cannot defer evaluation of the traffic impacts of uses allowed under the challenged
4 amendments to subsequent decisions that are not subject to compliance with the TPR. Petitioners
5 particularly fault the city for failing to require that the applicant prepare a traffic impact analysis
6 (TIA) and use that TIA to determine whether the challenged amendments “significantly affect” any
7 transportation facilities. Petitioners contend that evaluation of a TIA is necessary to determine
8 whether proposed amendments comply with OAR 660-012-0060. In addition, petitioner argue
9 that the city’s TSP independently requires a TIA whenever traffic generated by proposed
10 development would exceed thresholds defined by the city’s public works department.⁶ Petitioners
11 cite to a bulletin issued by the city public works department indicating that a TIA is required for any
12 development proposal that generates more than 100 vehicle trips.

“As a requirement of the Fairview Plan, a transportation impact analysis (TIA) of the major transportation and circulation elements intended to serve the FMU zone is required, as well as an overall transportation and mobility plan addressing the integration of pedestrian, transit, and vehicular use on the site. In order to further address the requirements of [the] TPR, * * * [the challenged decision adopts TPR] language into the FMU zone to require that the Fairview Plan, subsequent refinement Plan(s), or development within the FMU zone identify whether it significantly affects a transportation facility. It would also require that any component of the Fairview Plan, Retirement Plan(s), or development that is determined to affect a transportation facility assure that the proposed uses or development are consistent with the identified function, capacity, and performance standards of the transportation facility. This amendment assures compliance with [the] TPR before the Fairview Plan can be adopted.

“In addition to the requirements of the FMU zone, the Fairview Plan, and Refinement Plan(s) noted above, the FMU zone also requires that Refinement Plan(s) provide an update to the TIA approved with the Fairview Plan. The update is required to include trip generation factors for various modes, estimated trips per day by land use, proposed vehicular access and circulation plans, and traffic impacts by mode on adjacent development.” Record 141-142.

⁶ Petitioners cite to Policy 5.1 of the TSP, which states:

“The City shall require Traffic Impact Analyses as part of land use development proposals to assess the impact that a development will have on the existing and planned transportation system. Thresholds for having to fulfill this requirement and specific analysis criteria are established in the *City of Salem Street Design Standards*.” (Italics in original).

1 Petitioners also challenge the city’s determination that residential development of a 20-acre
2 portion of the subject property would not generate greater traffic than allowed under current zoning.
3 That determination rested on a trip generation analysis comparing the traffic impacts of the Fairview
4 Training Center when it last operated, and the estimated traffic impacts of residential development of
5 the 20-acre portion. According to petitioners, that comparison is flawed, because it fails to take
6 into account the degree to which traffic generated by the Fairview Training Center contributed to
7 nearby transportation facility failures.

8 Respondents argue that Ordinance 59 does not implicate OAR 660-012-0060 at all
9 because it simply establishes new mixed use plan and zoning designations that can be applied to
10 property in the city. While Ordinance 58 applies the new FMU zoning to the subject property, and
11 that zoning *potentially* allows uses with significant traffic impacts, respondents argue that the terms
12 of the FMU zone limit development of the subject property in such a way as to ensure that traffic
13 impacts from any future development will be consistent with the function, capacity and performance
14 standards. of affected transportation facilities. Respondents emphasize that SRC 143C.165, which
15 is part of the new zoning restrictions applicable to the subject property, is substantially identical to
16 the requirements of OAR 660-012-0060(1) and (2).⁷ According to respondents, requiring that all

⁷ SRC 143C.165 provides, in relevant part:

“(b) The Fairview Plan, and any subsequent Refinement Plan, or any site plan or other development proposal within the FMU zone shall identify whether the plan or development significantly affects a transportation facility by:

- “(1) Changing the level of service of an existing or planned transportation facility;
- “(2) Changing standards implementing the street classification system;
- “(3) Allowing types or levels of land uses which would result in levels of travel or access which are inconsistent with the level of service of a transportation facility; or
- “(4) Reducing the level of service of the facility below the minimum acceptable level identified in the City of Salem Transportation System Plan.

1 development of the subject property (other than a 20-acre portion) comply with SRC 143C.165 is
2 sufficient to ensure that Ordinance 58 complies with the TPR.

3 With respect to the 20-acre portion that is available for development under Ordinance 58
4 without complying with SRC 143C.165, respondents argue that the trip generation report relied
5 upon by the city establishes that the additional trips generated by a 20-acre residential subdivision
6 will not exceed the number of trips that the prior use of the Fairview Training Center generated.
7 Therefore, respondents argue, the city could find, as it did, that Ordinance 58 does not significantly
8 affect a transportation facility, within the meaning of OAR 660-012-0060(2).

9 With respect to the necessity for a TIA, respondents argue that nothing in OAR 660-012-
10 0060 requires that a local government prepare or evaluate a TIA. Further, respondents argue that
11 any local requirement for a TIA applies only when there is a “development proposal,” *i.e.*, a specific
12 subdivision, master plan or similar application proposing development, and that nothing in the TSP
13 or elsewhere requires a TIA for a rezoning application that does not itself propose any
14 “development.”

15 We agree with respondents that the city properly found that Ordinance 58 does not
16 “significantly affect” any transportation facility within the meaning of OAR 660-012-0060. It is
17 permissible to find that a proposed amendment complies with OAR 660-012-0060 based on
18 conditions or restrictions that limit allowed uses on the subject property to levels consistent with the
19 function, capacity and performance standards of affected transportation facilities. *ODOT v. City of*

“(c) Any component of the Fairview Plan, any subsequent Refinement Plan, or any development, which significantly affects a transportation facility shall assure that the proposed uses or development are consistent with the identified function, capacity, and performance standards of the transportation facility by either:

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

“(2) Altering densities or design requirements to reduce demand for automobile travel and meet travel needs through other modes; or

“(3) Providing transportation facilities adequate to support the proposed uses.”

1 *Klamath Falls*, 39 Or LUBA 641, 660, *aff'd* 177 Or App 1, 34 P2d 667 (2001) (a condition
2 that effectively prevents development allowed by the amendment from impacting a transportation
3 facility at all unless and until the facility is improved is sufficient to ensure compliance with the TPR).
4 Here, no development under the FMU zone is permitted at all (other than development of 20 acres,
5 as we discuss below) unless and until a master plan is approved. That master plan must
6 demonstrate, based on a TIA, that allowed development will be consistent with the function,
7 capacity and performance standards of affected transportation facilities.

8 It is true, as petitioners point out, that the master plan process does not involve a plan or
9 zoning amendment to which OAR 660-012-0060 is directly applicable. Nonetheless, petitioners
10 offer no reason why application of the FMU standards at SRC 143C.165, which substantially
11 replicate the standards at OAR 660-012-0060, will be insufficient to ensure that allowed uses are
12 consistent with the function, capacity and performance standards of affected transportation facilities.

13 With respect to the 20-acre portion that is available for residential development without
14 evaluation under SRC 143C.165, we agree with respondents that the trip generation report is a
15 sufficient basis under which the city could conclude that development allowed on that portion of the
16 property will not “significantly affect” any transportation facility within the meaning of OAR 660-
17 012-0060(2). As respondents point out, the focus of inquiry under OAR 660-012-0060(2)(d) is
18 the *net difference* in impacts on transportation facilities between the unamended plan and zoning
19 code and the amended plan and zoning code. *ODOT v. Klamath Falls*, 39 Or App at 648. Here,
20 the city compared traffic generated by the former Fairview Training Center allowed under the
21 former zoning, and traffic that would be generated by residential development of the 20-acre
22 portion, and found that the former exceeded the latter. Petitioners’ only criticism of that approach is
23 that it fails to take into account any transportation facility failures caused by the former Fairview
24 Training Center. However, as respondents correctly point out, the causative element inherent in
25 OAR 660-0012-0060(2) and the focus of the rule on the net difference between the amended and

1 unamended plan and zoning code renders it legally irrelevant whether the former Fairview Training
2 Center caused transportation facility failures.

3 With respect to the necessity for a TIA, we generally agree with respondents that
4 OAR 660-012-0060 does not *require* preparation or analysis of a TIA, although depending on the
5 nature of the proposed amendment and the local government’s approach to finding or ensuring
6 compliance with the TPR, some kind of traffic generation or traffic impact analysis may be
7 necessary. Here, the only aspects of Ordinance 58 that require some kind of traffic generation
8 analysis are those provisions allowing 20 acres to develop as a residential subdivision. Petitioners
9 do not explain why the traffic generation report the city relied upon is insufficient to support the
10 city’s conclusions with respect to that 20-acre portion, and we do not see that it is. As explained,
11 the other aspects of Ordinance 58 that govern the remainder of the subject property do not allow
12 any development at all in the absence of master plan approval, which will require both a TIA and an
13 evaluation of the traffic impacts of such development consistent with OAR 660-012-0060.
14 Petitioners have not demonstrated that the current proceeding must include an analysis of traffic
15 generation or traffic impact under that approach, and we do not see that it does.

16 Further, we agree with respondents that the TSP provisions cited to us by petitioners fail to
17 establish that the rezoning application at issue here is the kind of “land use development proposal”
18 that requires a TIA under the TSP.

19 The first assignment of error is denied.

20 **SECOND ASSIGNMENT OF ERROR**

21 Petitioners argue that the city erred in considering and approving Ordinance 58 (and by
22 extension, Ordinance 59) as legislative amendments to the city’s comprehensive plan and
23 development ordinance. According to petitioners, the city’s code distinguishes between “major plan
24 changes,” which are subject to legislative procedures and standards, and “minor plan changes,”

1 which are subject to quasi-judicial procedures and standards.⁸ Petitioners contend that the city
2 erred in processing Ordinance 58 as a legislative “major plan change” rather than as a quasi-judicial
3 “minor plan change.” Petitioners argue that the city’s error in applying legislative procedures and
4 approval standards means that the city failed to require the applicant to bear the appropriate burden
5 of proof with respect to Statewide Planning Goal 12 (Transportation) and the TPR. Petitioners
6 repeat their arguments under the first assignment of error that the city erred in failing to require a
7 TIA.

8 Petitioners also argue that even if the challenged decision is a legislative decision under the
9 SRC, it is a quasi-judicial decision under the factors set out in *Strawberry Hill 4 Wheelers v.*
10 *Benton Co. Bd. of Comm.*, 287 Or 591, 602-03, 601 P2d 769 (1979).⁹

11 Respondents contend that the city did not err in using the procedures and approval criteria
12 for a legislative “major plan change” because the challenged ordinances are properly characterized
13 as “major plan changes.” SRC 64.040(f). As such, respondents contend, the amendments are
14 legislative acts of the city council and are subject to the legislative approval criteria set out in SRC
15 64.070 rather than the quasi-judicial approval criteria set out in SRC 64.090. According to

⁸ SRC 64.040(f) defines “major plan change” as “a single proceeding which amends, supplements or repeals SRC 64.020 to 64.220 including the comprehensive plan * * *.” A “minor plan change” is an exception to the definition of “major plan change.” SRC 64.040(g) defines “minor plan change” as “single proceeding for amendment to the comprehensive plan map affecting [fewer] than five privately and separately owned tax lots * * *.”

⁹ We summarized the *Strawberry Hill 4 Wheelers* factors in *Valerio v. Union County*, 33 Or LUBA 604, 607 (1997)

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

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

“3. Is the action ‘directed at a closely circumscribed factual situation or a relatively small number of persons?’

“The more definitely these questions are answered in the negative, the more likely the decision under consideration is a legislative land use decision. The answer to each of the questions must be weighed; no single answer is determinative. *Estate of Paul Gold v. City of Portland*, 87 Or App 45, 740 P2d 812, *rev den* 304 Or 405 (1987).”

1 respondents, a “minor plan change” is limited to those circumstances that involve only plan map
2 designation amendments, and does not include ordinances, such as Ordinances 58 and 59, that (1)
3 repeal a section of the comprehensive plan, (2) adopt new plan text to replace the repealed text,
4 and (3) apply newly adopted plan map designations to property. To the extent petitioners argue
5 that use of the legislative process prejudiced petitioners’ ability to participate, respondents argue
6 that the legislative approval process provided adequate opportunity for public input, and petitioners
7 were provided multiple opportunities to raise issues and provide evidence to support their
8 arguments.

9 With regard to *Strawberry Hill 4 Wheelers*, respondents argue that even if the factors set
10 out in *Strawberry Hill 4 Wheelers* are used to identify whether the challenged decision is legislative
11 or quasi-judicial, the challenged decision is clearly legislative.

12 We agree with respondents that the challenged ordinances are not “minor plan changes,”
13 because they involve considerably more than simple plan map amendments. As respondents point
14 out, the challenged decisions repeal the prior plan text that provided for a development overlay for
15 the subject property, adopt new plan text to allow for mixed use development throughout the city,
16 and apply those newly adopted designations to the subject property. Under SRC 64.040(f), the
17 challenged decisions are clearly “major plan changes” that are reviewed under legislative procedures
18 and according to the city’s approval criteria for legislative actions.

19 Given that conclusion, it is not clear to us whether it matters whether the challenged
20 ordinances would be viewed as legislative or quasi-judicial under the *Strawberry Hill 4 Wheelers*
21 factors. Even if the challenged ordinances can be viewed as quasi-judicial under the *Strawberry*
22 *Hill 4 Wheelers* factors, petitioners do not explain why that characterization would alter what
23 procedures and criteria govern the application, or why that characterization would provide an
24 independent basis for reversal or remand. In any case, we agree with respondents that the
25 challenged ordinances, taken together, are properly viewed as legislative in character under the
26 *Strawberry Hill 4 Wheelers* factors. Ordinance 59 adopts new comprehensive plan and zoning

1 text and designations that can be applied across the city. That Ordinance 58 applies those new
2 designations to a single property does not detract from the legislative character of the city's actions.

3 The second assignment of error is denied.

4 The city's decision is affirmed.