

1 BEFORE THE LAND USE BOARD OF APPEALS  
2 OF THE STATE OF OREGON

3  
4 GERALD HEILMAN, ROBERT MASON,  
5 BARBARA ROSS and JOHN FOSTER,  
6 *Petitioners,*

7  
8 vs.

9  
10 CITY OF CORVALLIS,  
11 *Respondent,*

12 and

13  
14  
15 CORVALLIS INDUSTRIAL PARK, LLC,  
16 *Intervenor-Respondent.*

17  
18 LUBA No. 2004-069

19  
20 FINAL OPINION  
21 AND ORDER  
22

23 Appeal from City of Corvallis.

24  
25 Gerald Heilman, Barbara Ross and John Foster, Corvallis, filed the petition for review and  
26 argued on their own behalf. Robert Mason, Corvallis, represented himself.  
27

28 James K. Brewer, City Attorney, Corvallis, filed a response brief and argued on behalf of  
29 respondent. With him on the brief was Fewel and Brewer.  
30

31 Daniel A. Terrell, Eugene, filed a response brief and argued on behalf of intervenor-  
32 respondent. With him on the brief was Bill Kloos and the Law Office of Bill Kloos, PC.  
33

34 BASSHAM, Board Member; HOLSTUN, Board Chair; DAVIES, Board Member,  
35 participated in the decision.  
36

37 AFFIRMED 08/10/2004

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 challenge city approval of (1) a conceptual development plan modification, (2) a detailed development plan and (3) a partition of a 50.69-acre property, to allow for development of a home improvement center.

**MOTION TO INTERVENE**

Corvallis Industrial Park, LLC (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

**REPLY BRIEF**

Petitioners move to file a reply brief to respond to waiver issues raised in the response briefs. There is no objection to the motion, and it is allowed.

**FACTS**

The subject property consists of two vacant parcels totaling 50.69 acres within the South Corvallis Area of the city. The property is bounded to the west, north and south by lands zoned for industrial uses, and on the east by Highway 99W. Across Highway 99W to the east of the subject property are lands zoned for residential uses. The western half of the subject property carries a comprehensive plan map designation of General Industrial, while the eastern half carries a plan map designation of Limited Industrial Office (LI-O). The entire property is zoned General Industrial (GI) with a planned development overlay (PD). In 1998, the city approved a conceptual development plan for the subject property that contemplated an industrial business park with 11 lots.

In 2003, intervenor applied for a major modification of the 1998 conceptual development plan for the entire property, proposing changes to conditions of approval. Intervenor also requested partition of the 50.69-acre tract into three parcels. Parcel 1 consists of 26.30 acres in the north-east corner of the property, portions of which are designated General Industrial and LI-O. Parcel 2 consists of 15.15 acres in the southwestern portion of the subject tract, portions of which are designated General Industrial and LI-O. Parcel 3 is 5.40 acres at the southwestern corner of the

1 property, and is completely within the LI-O plan map designation. The partition plat also proposes  
2 a five-acre drainage area and wetland mitigation area in the northwestern portion of the property.  
3 Finally, intervenor submitted a detailed development plan for parcel 2, proposing development of a  
4 180,000-square foot home improvement center and 552 parking spaces.

5 The city planning commission held a public hearing on the matter and approved intervenor's  
6 applications. Petitioners appealed the planning commission decision to the city council, arguing  
7 among other things that the proposed home improvement center was not allowed in the GI zoning  
8 district. The city council held *de novo* public hearings on March 1, 2004 and March 15, 2004;  
9 and, on April 5, 2004, voted to deny the appeal and affirm the planning commission decision. This  
10 appeal followed.

11 **FIRST ASSIGNMENT OF ERROR**

12 The GI zoning district allows "Construction Sales and Services" as an outright permitted  
13 use. Corvallis Land Development Code (LDC) 3.0.30.03(i) defines "Construction Sales and  
14 Services" as follows:

15 "Construction activities and incidental storage on lots other than construction sites.  
16 Also includes the retail or wholesale sale, from the premises, of materials used in the  
17 construction, maintenance, and repair/remodel of buildings or other structures,  
18 provided that such retail or wholesale uses include the sale of heavy construction  
19 materials such as lumber, cement, fencing, and/or roofing materials. Use types  
20 classified as 'Automotive' and/or 'Heavy Equipment' are excluded. Typical uses  
21 include buildings materials stores, tool and equipment rental or sales, and building  
22 contracting/construction offices."

23 The city council concluded that "Construction Sales and Services" includes sales of any kind  
24 of home improvement materials, as long as heavy construction materials are also sold. The city  
25 council further concluded that sales of non-construction related items, such as house plants,  
26 barbeques, etc., were incidental and subordinate to the principal use and hence permitted as  
27 accessory to the principal use. Finally, the city council concluded that to the extent some sales or

1 services such as a food cart might constitute a separate use under the city’s code, such sales or  
2 services were also incidental and accessory to the primary use.<sup>1</sup>

3 Petitioners argue that the city’s interpretation of LDC 3.0.30.03 is inconsistent with  
4 comprehensive plan provisions generally requiring that lands designated for industrial use be

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<sup>1</sup> The city council’s findings state, in relevant part:

“\* \* \* Although the term ‘home improvement center’ is not used within the [LDC], the term is commonly understood, and the Council accepts the example of Lowes, Home Depot and Jerry’s, provided throughout the testimony, as an illustration of the use. Such a proposed ‘home improvement center’ falls within the definition of this use type \* \* \*

“\* \* \* \* \*

“The Council finds that the proposed use is predominantly the retail sales of materials used in the construction, maintenance and repair of buildings, which, as proposed, will include the sale of heavy construction materials such as lumber, cement, fencing, and roofing materials. The Council notes that the definition does not establish any requirements regarding the percentage or amount of sales that must be heavy construction materials. The definition merely requires that some of the sales should be heavy construction materials. Therefore the Council finds that the proposed use is consistent with the LDC Code definition of ‘Construction Sales and Services’ as long as the use continues to have some heavy construction materials sold as part of the use and the use continues to predominantly consist of the retail sales of materials used in construction, maintenance, and repair of buildings.

“The Council finds that the use, as proposed, would provide supplies for plumbing, lighting, floor covering, tools, and other items typically needed for construction, maintenance, and remodel, as well as heavy construction materials such as lumber, cement, fencing and roofing. The Council notes that typically these [home improvement] centers also provide items that would not be considered construction-related materials, such as house plants, barbeques, and seasonal items such as Christmas trees. The Council notes that the sale of these items would be considered as incidental and subordinate to the sales of materials used in the construction, maintenance, and repair/remodel of buildings or other structures. The Council sees these sales as part of the principal use. The Council accordingly classifies the proposed home improvement center use as falling within the ‘Construction Sales and Services’ use type.

“To the extent the sale of non-construction-related items on the site is a separate use (for example, a separate food or coffee cart), rather than an incidental part of the home improvement center use (and therefore within the Construction Sales and Services use type), its subordinate and incidental nature would make it an accessory use \* \* \*

“\* \* \* \* \*

“The Council notes that the sales of these non-construction items do not constitute the majority of sales for a typical home improvement center, and testimony indicates that these sales are commonly associated with the home improvement center principal use. \* \* \*” Record 39-41.

1 preserved for industrial use.<sup>2</sup> According to petitioner, allowing the proposed intensive retail use on  
2 parcel 2 would destroy the integrity of a 50-acre industrial site for industrial use, contrary to the  
3 cited policies. Petitioners further argue, based on the history of amendments to LDC 3.0.30.03,  
4 that the current version of LDC 3.0.30.03 is intended to allow traditional lumber and construction  
5 supply stores to sell a limited array of home improvement items, such as paint, hardware and  
6 fixtures, not the entire universe of home improvement materials. In addition, petitioners argue that  
7 there is no evidence supporting the city’s conclusion that sales of non-construction items such as  
8 house plants are “incidental and subordinate” to construction sales at home improvement centers or  
9 that sales of such items will not in fact constitute the principal use of the proposed center.

10 The city and intervenor-respondent (together, respondents) argue that the city council’s  
11 interpretation of LDC 3.0.30.03 is consistent with the express language, purpose and underlying  
12 policy of that code provision, and therefore not reversible under the deferential scope of review  
13 applicable to governing bodies’ interpretations of local land use regulations, pursuant to  
14 ORS 197.829(1).<sup>3</sup> We agree. As the city’s findings explain, LDC 3.0.30.03 includes within the

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<sup>2</sup> Petitioners cite to the following Corvallis Comprehensive Plan (CCP) policies and findings:

“Lands designated for industrial use shall be preserved for industrial and other compatible uses and protected from incompatible uses.” CCP Industrial Land Development and Land Use Policy 8.9.3:

“Residential, office, retail, and wholesale activities (as accessory uses) \* \* \* can be compatible with general industrial uses through appropriate design.” CCP Industrial Land Development and Land Use Finding 8.9.c:

“Large parcels of general industrial land are key elements of the industrial land market that serve as magnets for development. Many firms require areas of at least 30 to 50 acres \* \* \*.” CCP Industrial Land Development and Land Use Finding 8.9.o.

<sup>3</sup> ORS 197.829(1) provides, in relevant part:

“[LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

“(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

“(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

1 definition of “Construction Sales and Services” retail sale of “materials used in construction,  
2 maintenance, and repair/remodel of buildings or other structures,” as long as certain types of “heavy  
3 construction materials” are also sold. Nothing in the text of LDC 3.0.30.03 limits the definition to  
4 “traditional” lumber and construction supply stores, or limits the “materials used in construction,  
5 maintenance and repair/remodel” that may be sold to any particular subset of home improvement  
6 items.

7 As petitioners point out, the former version of LDC 3.0.30.03 expressly excluded “retail  
8 sales of paint, fixtures and hardware” from the definition of “Construction Sales and Service.”<sup>4</sup>  
9 Sometime prior to the challenged application, LDC 3.0.30.03 was amended to remove that  
10 exclusion, and to clarify that the definition included retail sales of materials used in the “maintenance  
11 and repair/remodel” of buildings and structures, not just their “construction.” The amendments  
12 further added the requirement that “heavy construction materials” also be sold. Petitioners again  
13 suggest that the intent of these amendments was to allow traditional lumber and construction supply  
14 stores to also sell paint, fixtures and hardware, but not the entire range of home repair and remodel  
15 items typically sold at home improvement stores, such as carpets, wallpaper, etc. However, nothing  
16 in the text, context or legislative history of LDC 3.0.30.03 cited to us supports that limited view.<sup>5</sup> If

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“(c) Is inconsistent with the underlying policy that provides the basis for the  
comprehensive plan or land use regulation[.]”

<sup>4</sup> Petitioners urge us to consider the prior enacted version of LDO 3.0.30.03 and the amendments leading to the current version as “legislative history.” Intervenor points out that prior enacted versions of a statute are considered “context” rather than “legislative history,” for purposes of applying the methodology for statutory construction set out in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993). *City of Salem v. Salisbury*, 168 Or App 14, 25, 5 P3d 1131 (2000), *rev den* 331 Or 633 (2001). As explained in the text above, whether considered as context or legislative history, petitioners’ arguments based on the prior version of LDO 3.0.30.03 and its amendment to the current version do not demonstrate reversible error in the city’s interpretation of that provision.

<sup>5</sup> Petitioners cite a document at Record 69 that was apparently drafted by a current city council member opining that the amendments to LDC 3.0.30.03 were intended to authorize only sale of “heavy construction materials” and a limited range of other home improvement materials such as paint, fixtures and hardware. However, as far as we can tell, that document is simply a post-enactment expression or opinion of legislative intent by one member of the governing body that is not properly considered legislative history, or otherwise entitled to any particular weight.

1 anything, the differences between the former and current version of LDC 3.0.30.03 suggest that the  
2 city intended to expand the definition of “Construction Sales and Services” to authorize retail  
3 commercial uses like the proposed home improvement center.

4 The comprehensive plan industrial policies and findings cited by petitioners at best express a  
5 general policy to preserve industrial lands for industrial uses. Those policies and findings do not  
6 suggest that all large parcels zoned for industrial uses must be preserved for industrial uses, as  
7 opposed to non-industrial uses permitted outright in the GI zone. Petitioners have not demonstrated  
8 that the city’s interpretation of LDC 3.0.30.03—that the proposed home improvement center falls  
9 within the “Construction Sales and Services” use category as a use permitted outright in the GI  
10 zone—is inconsistent with the cited policies, for purposes of ORS 197.829(1)(c).

11 With respect to the sales of materials not related to construction/maintenance/repair or  
12 remodel—such as house plants, barbeques or comestibles from food or coffee carts—the city  
13 concluded that sale of such items would be incidental and subordinate to the principal use: retail  
14 sale of materials related to construction/maintenance/repair or remodeling of structures. Petitioners  
15 cite to testimony suggesting that sales of non-construction items are a significant portion of the sales  
16 at a typical home improvement stores, and argue that there is no substantial evidence to the  
17 contrary. However, the cited testimony is based on a narrow view of what constitutes construction-  
18 related material and a broad view of what constitutes non-construction related material, views the  
19 city council clearly did not share. In any case, the cited testimony does not establish that sales of  
20 non-construction related items at typical home improvement stores are so predominant as to make  
21 such sales the principal use. The city did not err in concluding the contrary.

22 The first assignment of error is denied.

23 **SECOND ASSIGNMENT OF ERROR**

24 The city’s decision modified a condition of the 1998 conceptual development plan to state  
25 that uses on the subject property shall be consistent with those allowed under the GI zoning district  
26 that applies to the entire subject property, instead of those uses contemplated in the conceptual

1 development plan. Petitioners note that part of the subject property carries a comprehensive plan  
2 designation of LI-O, but that the LI-O plan designation is not currently implemented by any zoning  
3 district in the city’s acknowledged land use regulations.<sup>6</sup> Under these circumstances, petitioners  
4 argue, the city cannot simply rely on the GI zoning district, but must instead limit uses on the portions  
5 of the subject property designated LI-O to uses that are consistent with the LI-O plan designation.  
6 According to petitioners, some of the uses allowed in the GI zoning district, including “Construction  
7 Sales and Services,” are inconsistent with the LI-O plan designation.

8 Petitioners do not explain why the use type “Construction Sales and Services” in general or  
9 home improvement centers in particular are inconsistent with the LI-O comprehensive plan  
10 designation.<sup>7</sup> That problem aside, even assuming that there is some inconsistency between the LI-O  
11 plan designation and the GI zone, petitioners do not explain why that alleged inconsistency is a basis  
12 to challenge the current decision, which does not apply the GI zone to the subject property. In  
13 effect, petitioners’ arguments are a collateral attack on earlier decisions to apply the GI zone to the  
14 property and to change a portion of the subject property’s plan designation from General Industrial  
15 to LI-O, without also changing the GI zoning.

16 That problem aside, the city expressly relied on a comprehensive plan article, Article  
17 51.5.b, to authorize continued application of the GI zone. Article 51.5.b provides in relevant part  
18 that “[u]ntil such time as the [LDC] Zoning Map is revised to implement the Comprehensive Plan  
19 Map, the existing development zones apply.” The city found that Article 51.5.b is specifically  
20 intended to resolve any conflicts that may exist between acknowledged comprehensive plan

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<sup>6</sup> According to the city, it is currently in an “interminable” periodic review. The city’s comprehensive plan, including the plan map that designates a portion of the subject property as LI-O, was acknowledged in 2000. However, the land use regulations the city adopted to implement the newly acknowledged comprehensive plan, including an LI-O zoning district, have been appealed to the Land Conservation and Development Commission and have not yet been acknowledged.

<sup>7</sup> As intervenor points out, the challenged decision notes that the unacknowledged LI-O zoning district allows “Construction Sales and Services” as an outright permitted use, which does not suggest that that use type is inconsistent with the LI-O plan designation. Record 42.



1 designations and existing zoning map designations, until such time as the new LDC is acknowledged.  
2 The city concluded that Article 51.5.b means what it says, that until the new LDC is acknowledged,  
3 the existing development zone shall continue to apply. Petitioners argue Article 51.5.b must instead  
4 be read to state that until the new LDC is acknowledged, the city must apply existing development  
5 zones only in a manner that is consistent with current acknowledged comprehensive plan policies.  
6 However, Article 51.5.b simply does not say that, and that Article would serve no apparent function  
7 if it did say that. Petitioners’ arguments under this assignment of error do not provide a basis for  
8 reversal or remand.

9 The second assignment of error is denied.

10 **THIRD ASSIGNMENT OF ERROR**

11 LDC 2.5.40.10 requires that, in reviewing a request to modify a conceptual development  
12 plan, the modification must be consistent with the review criteria in LDC 2.5.40.04. In turn,  
13 LDC 2.5.40.04 requires that a conceptual development plan must be reviewed to assure  
14 consistency with the policies of the Corvallis Comprehensive Plan (CCP). Petitioners argue that the  
15 city failed to address whether the modified conceptual development plan is consistent with several  
16 CCP policies identified below, and further that the city adopted inadequate findings with respect to  
17 the CCP policies it did address.

18 **A. CCP Policies 8.10.1, 8.10.4 and 8.10.7**

19 CCP 8.10.1, 8.10.4 and 8.10.7 are included in a CCP subsection governing “Commercial  
20 and Office Land Development and Land Use.”<sup>8</sup> The city’s decision determines that these plan

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<sup>8</sup> CCP 8.10.1, 8.10.4 and 8.10.7 provide, in relevant part:

8.10.1: “The location, type, and amount of commercial activity within the Urban Growth Boundary shall be based on community needs.”

8.10.4: “New commercial development shall be concentrated in designated mixed use districts, which are located to maximize access by transit and pedestrians.”

8.10.7: “The City shall develop standards for a hierarchy of mixed use commercial districts with minor neighborhood centers serving neighborhood shopping and office needs,

1 policies may be applicable to comprehensive plan amendments or zone change decisions, but they  
2 are not applicable to the challenged decision amending the conceptual development plan for the  
3 subject property.<sup>9</sup>

4         Petitioners first fault the city’s findings for determining that these CCP policies do not apply  
5 to “site review.” Petitioners point out that the challenged decision does not involve an application  
6 for site review. However, we do not see that the city’s choice of language to describe the  
7 challenged decision makes any difference. The city’s findings distinguish between decisions  
8 involving a comprehensive plan map or zoning map amendment, on the one hand, and decisions that  
9 involve the physical characteristics and impacts of uses permitted outright in the applicable zone, on  
10 the other, and determined that these policies apply to the former and not the latter. Whether the  
11 challenged decisions involve “site review” as such, they clearly fall within the latter category of  
12 decisions.

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and the professional and the downtown commercial districts serving regional shopping and office needs. \* \* \*

<sup>9</sup> The city’s findings state, in relevant part:

“The Comprehensive Plan has a wide range of policies. \* \* \* [Some] policies are directed at land use decisions related to zoning and Comprehensive Plan Map designations, such as the policy to ensure that adequate land is zoned to allow for manufactured home parks and subdivisions. There are also policies that are specifically directed at site development such as encouraging parking on or beside a building rather than in front, or having development plant trees to shade streams where shading is not adequate.

“The Council notes that Policy 8.10.1 (amount/location of commercial activity), is one of those policies that are applicable in determining what uses should be permitted by a specific land use designation or in determining what land use designations are appropriate for specific pieces of land. This policy, and others like it, are not applicable to site review in cases that do not involve a Comprehensive Plan Map and District Map Change because the need issue was decided during previous public hearings that established the Comprehensive Plan Map and District Map designations. If the applicant or the City initiated a Comprehensive Plan Map Amendment process or a District Map Change request, then such policies related to need would be applicable. The Council finds that neither the applicant nor the City have initiated such requests for the subject site, so Policy 8.10.1 is not applicable to this decision. The Council notes that the same consideration applies to appeal items related to Policy 8.10.4 [and] 8.10.7 \* \* \*. In addition, Policy 8.10.7 includes wording saying ‘the City shall develop standards for . . .’ This type of wording is a directive to the City and not a directive to developers. Therefore, the Council finds that because the proposal does not include a map change request, Policies \* \* \* 8.10.1, 8.10.4 [and] 8.10.7 \* \* \* are not applicable.” Record 34-35.

1           Petitioners next argue that nothing in the cited policies or elsewhere indicates that these  
2 policies apply only to plan map and zoning map amendments, and not to other types of land use  
3 decisions. If the city is correct that compliance with plan policies was established during plan map  
4 or zoning map adoption, petitioners argue, then LDC 2.5.40.04 would not require review for plan  
5 compliance. Finally, petitioners argue that it is particularly appropriate to consider compliance with  
6 Policy 8.10.1 and its requirement that the location, type and amount of commercial activity be based  
7 on community need, given that when the city applied the GI zone to the subject property the then-  
8 applicable definition of “Construction Sales and Services” would not have allowed the proposed  
9 home improvement center.

10           The city’s decision does not, as petitioners suggest, determine that no comprehensive plan  
11 policies apply to a conceptual development plan modification decision. Rather, it considered the  
12 text of CCP 8.10.1, 8.10.4 and 8.10.7 and determined based on their text that those policies are  
13 planning directives to the city to be used in determining the appropriate plan designation or zone for  
14 property within the city, not standards that an applicant for development permitted outright in a  
15 particular zone must address and satisfy. While petitioners are correct that nothing in 8.10.1, 8.10.4  
16 and 8.10.7 expressly states that those policies apply only to plan map and zoning map amendments,  
17 the city is correct that, as written, these particular policies read more like planning directives rather  
18 than approval criteria for specific development proposals. The city’s interpretation to that effect is  
19 consistent with the express language of these policies, and not reversible under ORS 197.829(1).

20           **B.       CCP Policies 13.11.13 and 13.11.18**

21           CCP Policy 13.11.13 provides:

22           “Future \* \* \* planned developments shall submit development plans consistent with  
23 the neighborhood planning principles outlined in the South Corvallis Area Plan  
24 [SCAP], including neighborhood edges and focal points, open space connections,  
25 and street connectivity.”

1 CCP Policy 13.11.18 provides a number of “guidelines” to be used for review of development  
2 proposals within the South Corvallis Town Center, including a requirement that “[r]etail uses within  
3 the Town Center shall be limited to no more than 100,000 square feet.” CCP Policy 13.11.18(K).

4 The city council’s decision determines that most of the SCAP “neighborhood planning  
5 principles” apply only to residential neighborhoods east of Highway 99W, and that the only SCAP  
6 principles applicable to the subject property, located west of Highway 99W, are streetscape and  
7 connectivity provisions.<sup>10</sup> With respect to the guidelines in CCP Policy 13.11.18, the city found  
8 those guidelines to be inapplicable, because the subject property is not within the Town Center.  
9 The city further explained that retail uses within the Town Center are intended to serve the needs of  
10 South Corvallis residents, while the proposed home improvement center is intended to serve a  
11 broader community. Record 38.

12 Petitioners contend that there is no basis to apply some of the SCAP neighborhood planning  
13 principles, but not others, to the subject property. According to petitioners, there is no reason to  
14 treat the area west of Highway 99W including the subject property as not being part of a  
15 “neighborhood” for purposes of the SCAP neighborhood planning principles. With respect to CCP  
16 Policy 13.11.18(K), petitioners do not dispute that that provision applies only within the Town

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<sup>10</sup> The city’s decision states, in relevant part:

“Policy 13.11.12 states that the Neighborhood Plan Map in the SCAP will serve as a guide to future developments. It should be noted that this map illustrates land development patterns on the east side of HWY 99W. Therefore, the City Council finds that this Policy is not applicable to the subject property, which is on the west side of HWY 99W.

“Policy 13.11.13 states that development shall be consistent with the neighborhood planning principles outlined in the SCAP. These principles were implemented in creating the LI-O and Mixed Use Commercial designations, and in creating streetscape provisions, such as buildings near the street, direct pedestrian access from the street, and boulevard treatments such as special landscape street buffers and landscape planting islands within the street. The SCAP recognizes that other neighborhood planning principles are to be applied where there are neighborhoods (i.e., where there are areas with surrounding residential lands). As noted on the Neighborhood Plan Map, these residential lands are east of HWY 99W. The City Council finds that other than the streetscape and connectivity provisions, the [GI] lands [west of Highway 99W] are not subject to additional neighborhood planning provisions.” Record 37-38.

1 Center. However, petitioners note that the Town Center is identified as the focal point of South  
2 Corvallis, and argue that it is inconsistent with the SCAP to limit retail commercial development  
3 within that focal point to 100,000 square feet, while allowing much larger retail commercial square  
4 footage outside the Town Center.

5 The city’s findings appear to determine that those SCAP neighborhood planning principles  
6 that relate to residential neighborhoods apply only within residential areas depicted on the SCAP  
7 neighborhood map, while only those SCAP neighborhood planning principles that are not specific to  
8 residential neighborhoods apply to nonresidential areas of the SCAP, which include the subject  
9 property. That interpretation of the SCAP is within the city’s discretion under ORS 197.829(1).  
10 With respect to the alleged incongruity between the size of retail commercial uses allowed in the  
11 Town Center under CCP Policy 13.11.18(K) and that allowed outside the Town Center, that is  
12 what the SCAP and the city’s land use regulations appear to allow. Petitioners’ disagreement with  
13 that policy result does not provide a basis to fault the city’s findings that the proposed development  
14 plan is consistent with the SCAP.

15 **C. CCP Policy 11.4.6**

16 CCP Policy 11.4.6 is part of the Transportation Element of the CCP, under the subheading  
17 “Auto Parking.” It provides in full that “[n]ew industrial and commercial development shall provide  
18 preferential car pool and van pool parking near primary building entrances.” Petitioners raised  
19 below the issue of compliance with CCP Policy 11.4.6.<sup>11</sup> According to petitioners, the city council  
20 failed to adopt any findings regarding that policy, and further that nothing in the record indicates that  
21 car pool or van pool parking is proposed.

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<sup>11</sup> Petitioners raised several parking-related issues at Record 255-56 and Record 437. Most of those issues relate to other code or plan provisions, and the city adopted extensive findings addressing these issues. Petitioners’ arguments under CCP Policy 11.4.6 consisted of a quotation of that policy and a single sentence, that “[n]o car pool or van pool parking is proposed[.]” Record 256, 437. The city apparently overlooked that sentence.

1 The city concedes that its decision does not specifically address CCP Policy 11.4.6, or the  
2 provision of preferential carpool/vanpool parking. However, the city argues, and we agree, that  
3 petitioners have not demonstrated that any error in failing to adopt findings with respect to  
4 CCP Policy 11.4.6 is a basis for reversal or remand.

5 According to the city, the challenged decision requires the applicant to comply with all LDC  
6 parking requirements, and any additional requirements imposed by the City Engineer with respect to  
7 bicycle parking. The city argues that in order to obtain a building permit the applicant will need to  
8 comply with all applicable parking standards, including any required reservation of parking spaces  
9 for carpool and vanpool parking.

10 LDC Section 4.1 governs parking. Nothing in the currently applicable LDC Section 4.1  
11 specifically requires provision of carpool or vanpool parking spaces. However, in relevant part  
12 LDC 4.1.40 states that off-street parking facilities “shall be designed, paved, curbed, drained,  
13 striped, and constructed in accordance with the standards established by the City Engineer.” Under  
14 the LDC, and the challenged decision, it appears that many of the details regarding the actual  
15 construction and striping of the parking lot are determined by the City Engineer, presumably as part  
16 of building permit review. For example, LDC Section 4.1 does not appear to require the applicant  
17 to provide any particular number or location of handicapped parking spaces, and the approved site  
18 plan does not appear to depict any. The code apparently leaves such details up to the City  
19 Engineer, along with similar details regarding the actual construction and striping of parking spaces.

20 Petitioners offer no reason to believe that the City Engineer cannot require, and the  
21 applicant cannot provide, carpool or vanpool parking. Nor do petitioners challenge the condition of  
22 approval requiring the applicant to comply with all code parking provisions, or explain why that  
23 condition is insufficient to ensure that any required carpool and vanpool parking will be provided.  
24 Given that condition, and that the LDC appears to leave details such as the reservation, location and  
25 striping of parking up to the City Engineer during building permit review, we do not see that the

1 city's failure to adopt findings addressing CCP Policy 11.4.6, or to specifically require carpool and  
2 vanpool parking, is a basis for reversal or remand.

3 The third assignment of error is denied.

#### 4 **FOURTH ASSIGNMENT OF ERROR**

5 Petitioners argue that (1) the city erred in failing to address compliance with the  
6 Transportation Planning Rule (TPR) at OAR 660-012-0060, (2) the city erred in failing to consider  
7 impacts on key intersections affected by the proposed home improvement center, under applicable  
8 CCP and LDC transportation standards, and (3) the city inadequately addressed impacts on the  
9 intersections it did consider under those CCP and LDC standards.

##### 10 **A. OAR 660-012-0060**

11 The city's decision concludes that because the proposed development does not involve any  
12 comprehensive plan or land use regulation amendments, the proposal does not trigger the  
13 requirements of OAR 660-012-0060. In relevant part, OAR 660-012-0060 requires that  
14 amendments to functional plans, comprehensive plans and land use regulations that significantly  
15 affect a transportation facility assure that the land uses allowed by the amendments are consistent  
16 with the function, capacity and performance standards of the facility.

17 Petitioners contend that the city's decision is a *de facto* comprehensive plan amendment,  
18 because it allows uses allegedly inconsistent with the LI-O plan designation that applies to portions  
19 of the subject property. Therefore, petitioners argue, the city's decision triggers application of OAR  
20 660-012-0060.

21 As explained above, petitioners have not demonstrated that uses allowed in the GI zone are  
22 inconsistent with the LI-O plan designation. Therefore, even if a *de facto* plan amendment would  
23 trigger compliance with OAR 660-012-0060, petitioners have not demonstrated that the challenged  
24 decision is a *de facto* plan amendment. OAR 660-012-0060 does not apply to the challenged  
25 decision.

1           **B.       Intersections North of the Subject Property**

2           The city required intervenor to submit a traffic impact study (TIS) evaluating impacts of the  
3 proposed home improvement center on affected intersections. The TIS calculated that the center  
4 would generate a total of 267 trips during the a.m. peak hour, 517 trips during the p.m. peak hour,  
5 and a daily total of 6,310 trips. Intervenor proposed construction of two access points to the  
6 proposed home improvement center: (1) improvements to the Highway 99W/Rivergreen Avenue  
7 intersection at the southeastern corner of the subject property, and (2) a new access road  
8 approximately 870 feet north of the Highway 99W/Rivergreen Avenue intersection. The TIS  
9 evaluated the capacity of these access points and concluded that the proposed Highway  
10 99W/Rivergreen Avenue intersection, if signalized, is expected to meet operational standards. The  
11 TIS did not recommend a signal for the intersection of the northern access road and Highway 99W,  
12 or consider the capacity of any other intersections.

13           Petitioners fault the city for failing to require evaluation of intersections north of the subject  
14 property. According to petitioners, the city’s Transportation System Plan (TSP) requires that the  
15 TIS for a large project such as the proposed home improvement center “assess all nearby key  
16 intersections[.]”<sup>12</sup> Petitioners point out that, according to the TIS, 80 percent of the trips generated  
17 by the center will come and go from the north along Highway 99W. Petitioners further cite to CCP  
18 Finding 13.11.m, a finding in the CCP element addressing the South Corvallis Area, that describes a  
19 portion of the Highway 99W corridor five or six blocks north of the subject property as a “critical

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<sup>12</sup> The Corvallis TSP at 3-80 provides:

“To implement the level of service policies, language requiring review of development proposals for conformance with the level of service standards has been incorporated into the [LDC]. Traffic studies are required of developments as determined by the City Engineer. The study requirements must reflect the magnitude of the project: larger projects should assess all nearby key intersections, small projects should not require significant effort. If a traffic study identifies level of service conditions less than the minimum standard, resulting from either existing traffic plus traffic associated with the proposed development or cumulative conditions, improvements or other efforts for mitigating the problem and strategies for their funding, construction or implementation shall be prepared and considered with the development proposal.”



1 transportation constraint,” with intersections expected to fall below operational thresholds (Level of  
2 Service “D”) by the year 2005.<sup>13</sup> Similarly, petitioners point out, the TIS projects that north-south  
3 p.m. peak hour trips through the Highway 99W corridor will increase by 32 percent by 2005 over  
4 1997 levels, and nearly double by 2012. Under these circumstances, petitioners contend, the  
5 intersections north of the subject property that are identified as being a “critical transportation  
6 constraint” must be considered “nearby key intersections” that the TIS and the city must evaluate.

7 The city adopted findings that address CCP Finding 13.11.m and impacts on the corridor  
8 north of the subject property.<sup>14</sup> Intervenor argues that those findings, and other adopted findings  
9 addressing traffic impacts, adequately explain why detailed evaluation of intersections other than the

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<sup>13</sup> CCP Finding 13.11.m states:

“The critical transportation constraint for the south Corvallis area is the section of South 3rd Street [Highway 99W] from the Avery Avenue – Crystal Lake Drive intersection to the Lilly Avenue intersection. In 1997, this section operated at an estimated ‘C/D’ level-of-service (LOS) threshold. It is estimated that in approximately 2005 this section will exceed the ‘D’ LOS threshold.”

<sup>14</sup> The city’s findings state, in relevant part:

“South 3rd Street [Highway 99W] has been identified as a ‘critical transportation constraint’ and several Policies have been developed to address this concern, specifically [CCP] Policies 13.11.15 through 13.11.10. These policies recommend a number of mitigation options such as a road connection between South 3rd Street and 53rd Street, conducting a corridor study, considering TDM measures, additional street connections, and landscaped medians.

“The Council notes that the City is planning to construct 9 medians along South 3rd Street this summer, consistent with the recommended mitigation measures. In addition, the constraints on South 3rd Street occur during the am and pm peak, roughly 7:30 – 8:00 am and are worst during the pm peak, roughly 5:00 – 5:30 pm. These periods of high congestion are primarily the result of employees driving to and from work. The Corvallis Home Improvement Center will have relatively few employees compared to other 15-acre industrial sites. The contractors and residents that patronize this facility will do so throughout the day, and mostly on the weekend when there are no transportation constraints on South 3rd Street. The Corvallis Home Improvement Center has also been designed to encourage alternative modes of transportation. \* \* \* Therefore, the Council finds that the design of the project, coupled with the City’s improvement plans will help address the anticipated transportation constraints on South 3rd Street.

“The Council recognizes that the proposed construction sales and service use represents a high rate of trip generation within the industrial use category. However, the Council acknowledges that the South Corvallis Area Plan does not apply any trip generation limits or other development constraints due to traffic volume on South 3rd Street. \* \* \*” Record 47.

1 two the TIS studied is unnecessary, and why the proposed home improvement center complies with  
2 all applicable local transportation standards. The city argues that, read as a whole, the city council’s  
3 findings implicitly determine that only the Highway 99W/Rivergreen Avenue and the new access  
4 road are “key intersections” for purposes of the TSP requirement to “assess all nearby key  
5 intersections[.]”

6 The city’s findings do not explicitly address the question of whether intersections several  
7 blocks north of the subject property are “nearby key intersections” for purposes of the TSP  
8 requirement that the TIS “should assess all nearby key intersections.” However, the TSP assigns  
9 responsibility for determining the need for, and the scope of, the TIS to the city engineer. The TSP  
10 does not indicate what “key” or “nearby” means,  
11 or otherwise limit the city engineer’s discretion in determining the scope of the TIS. The city  
12 engineer apparently decided to limit the TIS to the intersections immediately adjacent to the subject  
13 property, and chose not to require that the TIS study more distant intersections, including the  
14 intersections that concern petitioners that are located some distance north of the subject property.  
15 The city council’s findings implicitly endorse that approach. Absent a more focused explanation for  
16 why those intersections must be considered both “key” and “nearby” and therefore included within  
17 the scope of the TIS, petitioners have not established that the city engineer erred in not requiring the  
18 TIS to study those intersections.

19 Petitioners do not acknowledge or specifically challenge the findings quoted at n 14  
20 addressing CCP Finding 13.11.m and the Highway 99W corridor north of the subject property.  
21 Those findings conclude that the design of the project coupled with planned improvements to the  
22 corridor will “help address the anticipated transportation constraints” on the corridor. The findings  
23 note that the SCAP does not impose any trip generation limits or other development constraints due  
24 to traffic volume on Highway 99W. To the extent petitioners’ arguments go beyond the scope of  
25 the TIS, and challenge the adequacy of the city’s findings regarding CCP Finding 13.11.m and  
26 impacts on the Highway 99W corridor north of the subject property, petitioners’ arguments under

1 this subassignment do not demonstrate that those findings are inadequate or not supported by  
2 substantial evidence.

3 **C. Intersections Considered**

4 As noted, the TIS studied the Highway 99W/Rivergreen Avenue intersection and the new  
5 access road approximately 870 feet north of the Highway 99W/Rivergreen Avenue intersection.

6 The city adopted extensive findings and conditions of approval regarding these intersections.

7 Petitioners contend that the city's findings with respect to these intersections are inadequate.

8 According to petitioners, the TIS indicates that both intersections will likely fail to meet applicable

9 operating standards sometime prior to expiration of the TSP planning period, even with the

10 improvements required by the city's decision. Petitioners further contend that Condition of

11 Approval 13 defers consideration of these future failures to a subsequent proceeding that offers no

12 opportunity for public hearing or input.

13 Petitioners cite to no applicable TSP, CCP or other local authority that requires the city to

14 ensure that intersections affected by the proposed development meet operational standards

15 throughout the TSP planning period. Petitioners' arguments to that effect appear to be based on

16 their view, rejected above, that the challenged decision is in essence a comprehensive plan

17 amendment that triggers application of the Transportation Planning Rule. As far as we can tell and

18 petitioners make known to us, the local standards applicable to the challenged decision to approve

19 the proposed home improvement center require only consideration of the current condition of

20 affected intersections and the impacts of the proposed development, and that the city require

21 improvements or other efforts to mitigate those impacts. Nothing cited to us requires that such

22 improvements ensure that affected intersections will not fall below operational standards throughout

23 the TSP planning period.

24 As for Condition of Approval 13, that condition simply requires that when a detailed

25 development plan for parcel 1 is proposed, the adequacy of the access road be reassessed, subject

1 to review by the city engineer and ODOT.<sup>15</sup> Petitioners do not explain how that condition defers a  
2 finding of compliance with criteria applicable to the challenged decision to approve a home  
3 improvement center on parcel 2, and we do not see that it does.

4 The fourth assignment of error is denied.

5 **FIFTH ASSIGNMENT OF ERROR**

6 Petitioners argue that the city misconstrued and failed to adopt adequate findings with  
7 respect to LDC 2.5.60.01, which describes the purposes of a Planned Development  
8 Modification.<sup>16</sup> According to petitioners, LDC 2.5.60.01 only allows a “limited amount of  
9 flexibility” with respect to modifications to conceptual development plans, and further limits  
10 modifications to those that are consistent with the “intent of the original approvals.” Petitioners argue  
11 that the 1998 conceptual development plan contemplated an industrial park with 11 lots, and that

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<sup>15</sup> Condition of Approval 13 states, in relevant part:

“The proposed local street access to the highway, located at the approximate midpoint of the site, shall be subject to the conditions of approval established [in a previous 1999 modification decision]. As a caveat to Condition No. 4 of the [1999 approval], both the final alignment of the west leg of Goodnight Avenue and the potential to retain the interim access shall be evaluated and addressed with future detailed development plans for Parcel 1. This evaluation shall include an expanded traffic impact study \* \* \* The study shall be subject to the review of the City Engineer and ODOT.

“With further development of Parcel 1 under the final access strategy, the applicant shall either obtain City and ODOT approval of plans to remove the interim access or receive approval of a Major Modification that allows the interim access to remain. At the time that Lot 1 is proposed for development, the applicant shall apply to ODOT for a future pedestrian crossing on HWY 99W at or near the interim access. The location will be determined in consultation with the City Engineer.” Record 13.

<sup>16</sup> LDC 2.5.60.01 provides:

**“Purposes of a Planned Development Modification**

- “(a) Provide a limited amount of flexibility with regard to site planning and architectural design for approved Conceptual or Detailed Development Plans; and
- “(b) Provide elements within the development site that compensate for requested variations from approved Conceptual or Detailed Development Plans such that the intent of the original approvals is still met.”

1 modifying the conceptual plan to allow a home improvement center on one of three parcels is  
2 inconsistent with that conceptual plan.

3 The city council rejected petitioners' view of LDC 2.5.60.01, concluding that even  
4 "substantial" major modifications are consistent with the purpose statement.<sup>17</sup> The city council  
5 noted that the LDC distinguishes between major and minor modifications and, while defining an  
6 "upper limit" to minor modifications, sets forth no "upper limit" to major modifications. Further, the  
7 city council noted that LDC 2.5.40.10 provides that the planning commission may consider "the  
8 redesign in whole or in part," subject to the review criteria for conceptual development plan  
9 approval in LDC 2.5.40.04.<sup>18</sup> Reading the LDC 2.5.60.01 purpose statement to limit major

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<sup>17</sup> The challenged decision states, in relevant part:

"The Council notes that the appellants contend that the proposed changes to the previously approved Conceptual Development Plan exceed those permitted in [LDC] 2.6.60.01—'Purposes of a Planned Development Modification.' \* \* \*

"The Council notes that [LDC 2.5.40.10(b)]—'Modification of a Conceptual Development Plan,' provides the decision makers the ability to consider a redesign of an approved Conceptual Development Plan in whole or in part. Additionally, LDC 2.5.50.04 outlines the thresholds for discerning between a Minor Planned Development Modification of a Conceptual Development Plan and a Major Planned Development Modification of a Conceptual Development Plan. This section of the LDC states that proposed changes that exceed the thresholds for a Minor Planned Development Modification shall constitute a Major Planned Development Modification and be processed accordingly. Though there are thresholds that create a 'upper limit' on Minor Modifications, the Council notes that there are not 'upper limit' thresholds within the procedures listed for review criteria for a Major Modification as identified in LDC 2.5.60.03. Therefore, the Council finds that changes to a Conceptual Development Plan may be substantial, as long as the review criteria in LDC 2.5.40.04 are met and the procedures identified in LDC 2.5.60.03 are followed.

"The Council notes that the purpose statement for a Planned Development Modification needs to be viewed in context with the rest of the Planned Development chapter provisions, that these other provisions allow the decision makers to review a modification 'in whole or in part,' and that these provisions do not have an upper limit for the changes that can occur as part of a Major Planned Development Modification (other than those limitations associated with ensuring that a proposed modification meets the applicable review criteria in LDC 2.5.40.04). The Council therefore finds that the proposed Major Modification to the previously approved Conceptual Development Plan is consistent with the Planned Development provisions." Record 26-27.

<sup>18</sup> LDC 2.5.40.10 provides:

**"Modification of a Conceptual Development Plan**

1 modifications to those consistent with the intent of the original approval, the city council concluded,  
2 is inconsistent with express authority in LDC 2.5.40.04 to consider “redesign in whole or part.”

3 Respondents argue, and we agree, that the city’s interpretation of LDC 2.5.60.03 is  
4 consistent with its text and context, and not reversible under ORS 197.829(1). As the city’s  
5 decision notes, LDC 2.5.60.02 carefully defines a number of thresholds that separate minor  
6 modifications from major modifications, but nothing in the LDC expressly defines an upper threshold  
7 or limit for a major modification. Further, the criteria applicable to a major modification to a  
8 conceptual development plan are precisely the same criteria applicable to the original conceptual  
9 development plan.<sup>19</sup> The express authority to consider “redesign in whole or in part” as a major  
10 modification, coupled with the absence of any criteria applicable to a major modification that  
11 suggest a limit to the type or degree of modifications proposed, supports the city council’s  
12 interpretation that the purpose statement at LDC 2.5.60.01 does not function to limit the type or  
13 degree of modifications that may be approved as a major modification. While petitioners’ contrary  
14 interpretation is also plausible, we cannot say the city council’s interpretation is inconsistent with the  
15 express text and context of LDC 2.5.60.01.

16 The fifth assignment of error is denied.

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- “a. An applicant may petition for review of previously approved plans for purposes of modifying such plans, stating the reasons.
  - “b. The Planning Commission, upon finding that the petition is reasonable and valid, may consider redesign in whole or in part of the original Conceptual Development Plan.
  - “c. In reviewing a modification request, the Commission shall follow the procedures required for a Conceptual Development Plan submittal. The Commission’s decision must be consistent with the review criteria in [LDC] 2.5.40.04 above.”

<sup>19</sup> We note that minor modifications, unlike major modifications, are subject to additional standards requiring in relevant part that “[n]ew benefits are provided that functionally compensate for any negative effects caused by the requested variations from the original project design.” LDC 2.5.60.05(d)(1). The parallel language between LDC 2.5.60.05(d)(1), applicable to minor modifications but not to major modifications, and the purpose statement at LDC 2.5.60.01(b), suggests that the latter is describing one of the purposes of minor modifications, not major modifications. Similarly, the scope of the redesign allowed as a minor modification must fall within the thresholds for a minor modification. LDC 2.5.60.05(e). That suggests that the reference to “limited amount of flexibility with regard to site planning and architectural design” in LDC 2.5.60.01(a) is, again, a reference to minor modifications rather than major modifications.

1           The city's decision is affirmed.