BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LINDA KINGSLEY, ANNA PERRY,
CLIFF PERRY, ROBERT WOLDT and
GLADYS WOLDT,
Petitioners,

vs.

CITY OF SUTHERLIN,
Respondent,

and

GERALD VAN DE HEY,
Intervenor-Respondent.

LUBA No. 2004-187

FINAL OPINION
AND ORDER

Appeal from City of Sutherlin.

Douglas M. DuPriest, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Hutchinson, Cox, Coons, DuPriest, Orr and Sherlock P.C.

No appearance by City of Sutherlin.

Meg E. Kieran, Springfield, filed the response brief and argued on behalf of intervenor-respondent. With her on the brief was Harold, Leahy & Kieran.

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

REMANDED 04/15/2005

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal an ordinance that (1) annexes a 1.9-acre parcel into the city, (2) redesignates and rezones part of the property from Heavy Industrial (M3) to Medium Density Residential (R-2), and (3) rezones an adjoining .67-acre parcel from Low Density Residential (R-1) to R-2.

MOTION TO INTERVENE

Gerald Van De Hay (intervenor) moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property consists of two adjoining parcels, tax lots 2200 and 3600. Tax lot 2200 is a rectangular parcel 1.9 acres in size that is planned and zoned M3. Adjoining tax lot 2200 to the east is tax lot 3600, a narrow .67-acre strip of land that is zoned R-1 and burdened with a natural gas easement. Tax lot 2200 is developed with a small house, but both parcels are otherwise flat and undeveloped. Fort McKay Road borders both parcels to the south. Residential development within the city limits borders the subject parcels on all other sides.

Tax lot 3600 is already within the city limits. Intervenor applied to the city to annex tax lot 2200 and redesignate and rezone it from M3 to R-2, and to rezone tax lot 3600 from R-1 to R-2. The R-2 zone allows duplexes, triplexes and fourplexes, in addition to single-family homes and manufactured dwellings. The city mailed notice of a public hearing before the planning commission to property owners within 300 feet of the property. A number of neighbors appeared at the hearing in opposition to the proposed R-2 zoning. The planning commission recommended that the city council deny the application under Sutherlin Municipal Code (SMC) 17.12.060(2), a rezoning criterion requiring that the site be "suitable" for the proposed zone with respect to the "public health, safety, and welfare of the surrounding area." The city council held a hearing September 13, 2004,

and voted to approve the proposed annexation and plan and zoning amendments with conditions. This appeal followed.

WAIVER

Intervenor argues that the issues raised in the first, second and third assignments of error were not raised before the city and are thus waived. ORS 197.763(1); 197.835(3).[1] In the first assignment of error, petitioners argue that the annexation proposal is inconsistent with Sutherland Comprehensive Plan (SCP) Land Use Policy (A)(2).[2] In the second assignment of error they argue that the plan and zoning amendments for tax lot 2200 are inconsistent with four statewide planning goals. In the third assignment of error they argue that the plan and zoning amendments are inconsistent with a number of comprehensive plan policies, some of which were addressed in the city council's decision and some of which were not.

---

[1] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

ORS 197.835(3) and (4) provide, in relevant part:

> "(3) Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.
>
> "(4) A petitioner may raise new issues to the board if:
>
> "(a) The local government failed to list the applicable criteria for a decision under ORS 197.195 (3)(c) or 197.763 (3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. However, the board may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government[.]"

[2] SCP Land Use Policy (A)(2) states:

> "Work toward development of 'open' lands identified as suitable for development within the existing city limits before annexing additional lands."

Petitioners respond that the notice of hearing did not identify any comprehensive plan policies or statewide planning goals as approval criteria, and therefore petitioners may raise issues regarding such policies or goals notwithstanding their failure to raise them below, pursuant to ORS 197.835(4)(a). *See* n 1. Intervenor argues that the notice of hearing listed the applicable criteria as required by ORS 197.763(3)(b). Even if it did not, intervenors contend, petitioners could have raised those issues below. Thus, intervenors argue, LUBA should refuse to allow those issues to be raised before LUBA, pursuant to the second sentence of ORS 197.835(4)(a).

A. Statewide Planning Goals

ORS 197.763(3)(b) requires that the notice of hearing list the "applicable criteria from the ordinance and the plan that apply to the application at issue." As intervenor correctly notes, ORS 197.763(3)(b) does not require the city to list applicable statewide planning goals. *Herman v. City of Lincoln City*, 36 Or LUBA 521, 531-32 (1999). The city's failure to list applicable statewide planning goals is therefore not a basis to allow petitioners to raise new issues concerning the statewide planning goals under ORS 197.835(4). Petitioners do not argue that any issues were raised below regarding consistency with the statewide planning goals. Accordingly, the issues raised in the second assignment of error are waived.

B. SCP Land Use Policy (A)(2)

The notice of public hearing states that "[a]pproval criteria for Comprehensive Plan and Zoning Map amendment applications are described in [SMC] 17.12.060 and 17.100." Record 541. The notice does not list SCP Land Use Policy (A)(2) as an applicable criterion, or any comprehensive plan policy for that matter. That omission allows petitioners to raise new issues regarding Land Use Policy (A)(2) notwithstanding their failure to raise such issues below, unless LUBA concludes that the issue could have been raised before the local government. Intervenor contends that the issue of consistency with Land Use Policy (A)(2) could have been raised below and, in any case, the city's findings adequately address the substance of that policy.

We do not address either contention, because petitioners have not and cannot show that Land Use Policy (A)(2) is an applicable criterion with respect to the proposed annexation. The policy simply states a city policy to "[w]ork toward" development of vacant lands within the city before annexing additional lands. That language does not mandate anything. Certainly nothing in Land Use Policy (A)(2) suggests that it is a mandatory approval criterion that must be satisfied before the city can approve a specific annexation proposal. Because Land Use Policy (A)(2) is not an approval criterion for the annexation proposal, the city did not err in failing to address it in its decision.

C. Other SCP Policies

The third assignment of error argues that the plan amendment and rezoning of the property to R-2 is inconsistent with a number of SCP policies, specifically Land Use Policy A(1), Residential Land Use Policy 1 and 2, Housing Element Policy C1 and C2, and Population and Economic Element Policy A7. Intervenor first argues that petitioners cannot invoke ORS 197.835(4)(a), because the notice lists SMC 17.12.060 as an approval criterion, and that code section includes a requirement that the proposed rezoning be in conformance with the comprehensive plan.[3] That reference to SMC 17.12.060, intervenor argues, is sufficient to satisfy the ORS 197.763(3)(b) requirement that the notice list "applicable criteria from the ordinance and the plan that apply to the application at issue." We disagree. To comply with ORS 197.763(3)(b), the notice must identify the applicable criteria from the ordinance and plan by number or similar means of identification sufficient to direct the recipient of the notice to the actual code provision or plan language that the

[3] Sutherlin Municipal Code (SMC) 17.12.060(B) provides:

> "Criteria for Zone Change. The approving authority may grant a zone change only if the following circumstances are found to exist:
>
> "1. The rezoning will conform with the Sutherlin Comprehensive Plan, including the land use map and written policies; [and]
>
> "2. The site is suitable to the proposed zone with respect to the public health, safety and welfare of the surrounding area."

city deems to be an approval criterion. Reference to a code provision that in turn simply requires "conformance with the comprehensive plan" is insufficient to provide notice of any comprehensive plan provisions, for purposes of ORS 197.763(3)(b) and 197.835(4)(a). *See Herman*, 39 Or LUBA at 530 (listing unspecified portions of comprehensive plan does not satisfy ORS 197.763(3)(b); *ONRC v. City of Oregon City*, 29 Or LUBA 90, 97-98 (1995) (listing entire zoning ordinance as applicable criteria does not satisfy ORS 197.763(3)(b)).

Intervenor next argues that petitioners could have raised below the issues raised under the third assignment of error, and therefore should not be allowed to invoke ORS 197.835(4)(a) to raise those issues for the first time before LUBA. According to intervenor, the staff report to the planning commission, the planning commission recommendation, and the staff report to the city council each include findings addressing and finding conformance with Land Use Policy A1, Housing Element Policy C1, and Population and Economy Element Policy A7. Record 105-07, 391-93, 418-20. These findings were unchanged at all stages of the proceedings below, and were adopted verbatim by the city council. Record 35-37. Intervenor argues that at no point did any party raise any issues regarding these findings or indeed any comprehensive plan policies.

We agree that issues raised in the third assignment of error concerning Land Use Policy A1, Housing Element Policy C1, and Population and Economy Element Policy A7 "could have been raised before the local government" within the meaning of ORS 197.835(4)(a). Notwithstanding that the notice of hearing did not list these policies as approval criteria, the two staff reports and the planning commission decision gave more than adequate notice that the city believed the policies were approval criteria. Indeed, as a practical matter the staff reports and planning commission decision give much more effective notice that the city believes the policies are approval criteria than would a listing of those policies in the notice of hearing. In the third assignment of error, petitioners argue that city council findings regarding Land Use Policy A1, Housing Element Policy C1, and Population and Economy Element Policy A7 fail to demonstrate that the proposed rezoning conforms with those policies. However, the city council findings are virtually identical to the findings

in the two staff reports and planning commission, which petitioners knew or should have known about. Because petitioners were given ample constructive notice that the city believed Land Use Policy A1, Housing Element Policy C1, and Population and Economy Element Policy A7 to be approval standards, we find that the issues petitioners attempt to raise regarding these policies could have been raised below. Accordingly, those issues are waived.

Turning to Residential Land Use Policies 1 and 2, and Housing Element Policy C2 the staff reports, planning commission decision, and city council decision do not address those policies. Intervenor does not explain why LUBA should conclude that the issues raised regarding these policies could have been raised below. Absent some focused argument that the issues could have been raised below, we decline to conclude that those issues are waived. The remaining issues under the third assignment of error are waived.

THIRD ASSIGNMENT OF ERROR

A. SCP Residential Land Use Policy 1

SCP Residential Land Use Policy 1 (Policy 1) states "[p]romote development involving varied housing types at medium and high densities adjacent to the community's two service areas." Petitioners argue that Policy 1 directs the city to locate medium and high density development adjacent to the city's two service areas. According to petitioners, the SCP identifies two service areas: downtown and adjacent to Interstate-5. The subject property is not adjacent to or even near either service area, petitioners contend.

Intervenor responds that Policy 1 merely requires that the city "promote" medium and high-density housing near the service areas, and does not *prohibit* medium or high-density housing in other areas of the city. That may be true, but Policy 1 appears to establish as city policy a preference, at least, for locating medium and high-density residential development adjacent to two identified service centers. The negative implication is that the city does not prefer to locate such development in other areas. The city did not consider or interpret Policy 1, and the decision provides no explanation for why allowing medium density residential development far from service

centers conforms with the policy. We agree with petitioners that remand is necessary for the city to adopt findings addressing Policy 1.

B. Residential Land Use Policy 2

SCP Residential Land Use Policy 2 (Policy 2) states "[p]rovide incentives to enable medium and high density infilling within existing neighborhoods." Petitioners argue that Policy 2, like other SCP policies, encourages locating medium and high-density development as infill within existing neighborhoods rather than on vacant, newly urbanized lands.

Policy 2 may embody a preference for infill, as petitioners argue, but the stated vehicle chosen to implement that policy preference is for the city to "provide incentives to enable" medium and high density infill. Policy 2 is not written in terms suggesting that it applies to a quasi-judicial rezoning application. In any case, even if Policy 2 does apply to a quasi-judicial rezoning application, the city adopted findings concluding that, because the subject property is bordered on three sides by an established residential neighborhood, development of the property under the R-2 zone is essentially infill. Record 36.[4] Petitioners do not explain why those findings are insufficient to also address the preference for infill in Policy 2.

C. SCP Housing Element Policy C(2)

SCP Housing Element Policy C(2) states:

> "Provide buffer zones between residential areas and conflicting land uses (i.e., industrial, certain kinds of commercial, residential, etc.) in order to protect the overall livability of those areas."

Petitioners argue that Housing Policy C(2) requires that the city provide buffer zones between residential areas and conflicting land uses, including higher-density residential uses. Policy

[4] The city's findings addressing Housing Element Policy C1 state, in relevant part:

> "* * * As stated previously, the land on three sides of the subject property is part of the already-serviced Mont Claire Estates subdivision. From a practical standpoint, therefore, the proposal supports the City's policy of encouraging infill development in existing residential areas. The proposal appears to be consistent with this policy and the Housing Element of the Comprehensive Plan." Record 36.

C(2) lists "residential" uses as one of the uses that may conflict with "residential areas," and it appears to require the city to consider whether "buffer zones" must be provided between such "conflicting land uses," in order to protect the overall livability of the residential area. Presumably petitioners are correct that Policy C(2) is concerned in part with conflicts between higher and lower density residential development. If so, the policy is perhaps somewhat at odds with other SCP policies, such as Residential Land Use Policy 2, quoted above, that encourages the city to provide incentives for medium and high-density residential infill within existing neighborhoods. Be that as it may, intervenor cites to no findings that address or interpret Policy C(2) or that provide a basis to affirm the city's decision notwithstanding findings addressing it. Remand is necessary to adopt findings addressing this plan policy.

The third assignment of error is sustained, in part.

FOURTH ASSIGNMENT OF ERROR

SMC 17.12.060(2) requires a finding that "[t]he site is suitable to the proposed zone with respect to the public health, safety, and welfare of the surrounding area." As noted, the planning commission recommended denial based on noncompliance with SMC 17.12.060(2). That recommendation was based on opposition from neighbors to medium density residential development allowed under the R-2 zone, including concerns regarding compatibility with single-family dwellings, perceived higher crime rates, and traffic exiting onto Fort McKay Road. The city council declined to accept that recommendation, finding that (1) development under the existing M-3 zoning would have more adverse impacts than under R-2 zoning, (2) there was no evidence of higher crime rates associated with R-2 development, and (3) the county public works department had no concerns with access onto Fort McKay Road.[5] Nonetheless, the city council imposed a

[5] The city council's findings state, in relevant part:

> "The requested R-2 zoning would permit duplexes, triplexes, and fourplexes outright, in addition to single-family homes and manufactured homes. The applicant currently has a legal right to locate a heavy industrial use on the 1.9-acre parcel, subject to Douglas County standards, and without a public hearing before the [city]. Depending upon how the property

condition of approval requiring public hearings for any use allowed under the R-2 zone other than single family dwellings.

---

was developed under R-2 zoning, it may be reasonable to assume some effect on the value of directly abutting properties, but properties some distance away are much less likely to be affected (and opponents have submitted no specific evidence of such impact). In any event, County M-3 zoning could arguably have a more detrimental impact on nearby properties. In addition, the applicant's attorney submitted a letter from [a certified appraiser] that concludes there is no evidence of potential increased crime or reduction of adjacent property values. Instead, [the appraiser] raises concerns about the existing M-3 zoning of the 1.9-acre parcel. See also the Affidavit statement of [intervenor] regarding his conversation with Sutherlin Chief of Police Tom Boggs." Record 40.

"The neighboring property owners obviously have legitimate concerns about the type or quality of development that may ultimately be constructed on the subject property. The applications before the City at this time, however, only address the annexation of the 1.9-acre parcel and the zoning and Comprehensive Plan map amendments necessary to rezone the whole 2.57-acre subject property to City R-2." Record 41.

"* * * Opponents of the zone change to R-2 primarily argued that the value of their own properties, and all other properties in the vicinity, would be adversely affected by the proposed R-2 zoning. The neighbors further suggested that the City disregard the applicant's request and zone the property R-1 instead.

"The applicant argued that the existing County M-3 zoning on the 1.9-acre parcel should be of more concern to the neighbors due to its greater potential for negatively impacting their properties' attractiveness to buyers. The applicant provided the following additional findings addressing [SMC 17.12.060(2)]:

> "As currently zoned, county M-3 (Heavy Industrial), the applicant may develop the subject property for the following uses: manufacturing, repairing, fabricating, processing, parking and storage uses, welding and machine shop, lumberyard, and other various industrial uses, outright, and without a public hearing process. Other conditional uses that may potentially be allowed on the subject property under the current classification of M-3 include a salvage yard, wrecking yard, or a slaughterhouse.
>
> "Clearly, the current zoning classification, M-3, may potentially be developed in a manner that would have a more detrimental impact on nearby properties. A change from M-3 to R-2 is a vast improvement for nearby residential property owners. Therefore, because the zone change from M-3 to R-2 limits potential, incompatible industrial development next to the existing residences, this application meets and exceeds [SMC 17.12.060(2)]. The health, safety, and welfare of the surrounding area will be improved by [intervenor's] annexation, comprehensive plan amendment, and zone change application." Record 41-42.

"Conclusion: With the conditions of approval described in this decision, the site is suitable to the proposed zone with respect to the public health, safety, and welfare of the surrounding area." Record 42.

Petitioners argue that the city's findings misconstrue SMC 17.12.060(2), are inadequate, and are not supported by substantial evidence. Petitioners' arguments regarding suitability under SMC 17.12.060(2) focus on three basic themes: (1) property values, (2) crime, and (3) traffic access.

A. Property Values

Petitioners first argue that the condition of approval requiring a hearing before approving any development other than single-family dwellings is an implicit concession that medium density residential development is potentially unsuitable for this site. According to petitioners, the city's findings fail to explain why "[t]he site is suitable to the proposed zone with respect to the public health, safety, and welfare of the surrounding area." Further, petitioners argue, the city erred in comparing development under the existing M-3 zoning to development under R-2 zoning. The standard is "suitability," petitioners argue, not whether the proposed zone has fewer adverse impacts than the current zone.

Petitioners also argue that the city erred in failing to assume that the subject property would be developed with medium density residential development. According to petitioners, the only difference between the R-1 and R-2 zones is that the latter allows duplexes, triplexes and fourplexes. Therefore, petitioners argue, the suitability analysis requires the city assume that the property will be developed with the multi-family dwellings allowed in the R-2 zone. However, petitioners argue, the city declined to speculate on how the property would be developed and dismissed neighbors' concerns because those concerns "have more to do with the quality and density of the development they speculate on the subject property, rather than the zoning specifically." Record 38.

Intervenor responds, and we agree, that the condition of approval is simply the city's effort to provide a forum for neighbors to provide input into any development other than single-family residences, and not a concession that such development is potentially unsuitable. The city adopted extensive findings under SMC 17.12.060(2), only a portion of which are quoted at n 5. It is true,

as petitioners point out, that the bulk of those findings focus more on the benefits of rezoning from M-3 rather than the suitability of the site for R-2 zoning. We tend to agree with petitioners, at least in the abstract, that the benefits of rezoning from M-3 do little to explain why the site is suitable for R-2 zoning.[6] No party disputes that the site is unsuitable for industrial zoning, and suitable for residential zoning of some kind. The real issue is whether the site is suitable for R-2 zoning.

We also tend to agree with petitioners that inquiry into whether the site is suitable for the R-2 zone requires an assumption that the property will be developed with uses allowed in the R-2 zone, specifically with the multi-family dwellings that distinguish the R-1 and R-2 zones. However, as far as we can tell, the findings assumed that the property would develop with multi-family dwellings allowed in the R-2 zone, although absent a specific development proposal the city could not evaluate the particular quality or density of actual development. The city cited the existence of numerous examples of R-1 development abutting R-2 zoned property, and appeared to reject opponents' arguments that R-1 and R-2 development is inherently incompatible.[7] The city also relied on an appraiser's letter submitted by intervenor, who opined in relevant part that whether

---

[6] To be fair, the city's lengthy findings on this point were drafted to respond to a particular issue raised by petitioners: whether multi-family dwellings allowed under the R-2 zone will reduce the property values of nearby property zoned R-1? Intervenor argues that the current M-3 zoning of the property is an appropriate consideration in responding to that issue, because the property values of surrounding residential lots presumably reflect the fact that those lots adjoin a parcel zoned for heavy industrial uses. In other words, intervenor argues, rezoning the subject parcel to the less offensive R-2 zone cannot possibly *reduce* surrounding property values. That much seems indisputable. Nonetheless, that reasoning does not assist the city here, because, as petitioners point out, under that reasoning a less intensive industrial zone would be "suitable" under SMC 17.12.060(2). We agree with petitioners that SMC 17.12.060(2) requires the city to determine whether the R-2 zone is suitable, not whether the R-2 zone is less unsuitable than the current zoning.

[7] The city findings state, in relevant part:

> "A zone change to City R-1 would make the subject property identical in zoning to the surrounding subdivision—which would obviously be consistent with the existing residential subdivision that surrounds the property on three sides. However, [intervenor] has requested zone changes to City R-2, which would permit duplexes, triplexes, and fourplexes outright, in addition to single family homes and manufactured homes. There are numerous examples throughout the City of R-1 property abutting R-2 property—including the fact that Westlake Estates subdivision (zoned R-2—and from which many of the letters of opposition came) abuts the Mont Claire Estates subdivision (zoned R-1). The homeowners' concerns in this case may have more to do with the quality and density of development they speculate on the subject property, rather than the zoning specifically." Record 38.

multi-family development impairs the property value of single-family residential development depends on the design, maintenance and management of the project, not the existence or type of multi-family dwelling.[8] To ensure that concerns regarding specific proposals for multi-family

[8] The appraiser's letter states, in relevant part:

> "2. Diminution of value of adjacent or abutting parcels to a particular parcel is more dependent upon * * * the maintenance and management of that parcel rather than [the] particular use of that development. As an example, a residence adjoining a lot with a home that is not maintained and which has a yard which is not landscaped or may contain equipment and older cars, debris, etc., may experience sales resistance in the event of a proposed sale, or a diminution of value. My experience shows management of a particular property has a far greater impact upon particular adjacent property values than simply a zone on which no development has occurred.
>
> "* * * * *
>
> "5. In my experience, an R-2 zone utilizing a combination of R-1 and other opportunities for density offered by an R-2 zone would be far more attractive and appealing and of more value than a basic subdivision in which lots are simply laid out in a standard fashion.
>
> "6. In terms of impact of a parcel on adjacent property owners, the real key is the maintenance and management of that investment, whatever it may be. The fact that maintenance and home ownership are shouldered by an owner of a residence, an absentee owner of a residence, the owner of a duplex, an absentee [owner] of a duplex, the owner of a condominium, or the absentee owner of a condominium is irrelevant. The important factor and requirement is that someone is paying attention to the property and maintaining it, not the type of zone it is located in.
>
> "* * * * *
>
> "8. I could point to numerous examples of very high valued subdivisions located in virtually every community in Oregon with high-valued single-family residences willingly buil[t] adjacent to multiple-family projects with absolutely no diminution in value * * *.
>
> "* * * * *
>
> "10. It is this appraiser's opinion that the highest and best use of the subject property (primarily due to its long narrow shape) would be for some sort of multiple-family development. If the property were a wider parcel, the highest and best use would clearly be for some sort of single-family residential subdivisions similar to that currently surrounding it. Because the property is only 190 [feet] in width, it is not practical to develop the site into single-family residential use as a street to access the site would take up a large portion of the development area. Therefore, the most practical development use of the site, in my opinion, would be for some sort of multiple-family use which could include single-family residential in the sense that row houses, townhouses, or condominiums could be built on the subject site only in a

development are considered, the city imposed a condition of approval requiring that any application for development other than single-family dwellings be processed with a public hearing. The city then concluded that, as conditioned, the site is suitable for R-2 zoning. We agree with intervenors that the city's findings to that effect are adequate and supported by substantial evidence.

B. Crime

The city's findings regarding crime state:

> "Crime rate is not provided in the decision criteria of the [SMC], unless the decision-making body determines that a crime rate change can be anticipated to be significant enough to affect the public health, safety, and welfare of the surrounding area. There is no evidence in the record from which one could conclude that the R-2 zone would result in an increase in the crime rate." Record 39.

The city also relied on an affidavit that describes intervenor's conversation with the city police chief in which the police chief stated that there was no difference in crime rate between the R-1 zoned area immediately bordering the subject property and an R-2-zoned area to the north. Record 371.

Petitioners argue that the city ignored contrary testimony and improperly shifted the burden of proof to the opponents regarding evidence of the crime rate. Further, petitioners argue, the city's findings regarding crime are not supported by the evidence in the record. According to petitioners, the R-2 zoned area north of the subject property is in fact developed with single-family dwellings rather than higher-density dwellings, so it is not surprising that there is no difference in the crime rate between that area and the R-1 zoned area.

That the city found no evidence indicating that rezoning the subject property to R-2 would increase the crime rate is not the same thing as shifting the burden of proof to the opponents. Intervenor argues, and we agree, that there is at best conflicting evidence in the record regarding whether R-2 zoning would increase crime rates and whether such increase, if any, would be significant enough to affect public health, safety, and welfare. While the applicant's evidence on these points is not compelling, neither is the evidence submitted by opponents, which consists mostly

---

more dense layout with attractive landscaping yard areas and other potential amenities." Record 342-44.

of speculative fears that "rental units" would increase the crime rate in the neighborhood. The choice between conflicting evidence is up to the city, as long as a reasonable person could believe the evidence the city relied upon. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). Petitioners have not demonstrated that no reasonable person could rely on the affidavit and other evidence cited by the city.

C. Traffic

Petitioners cite to testimony expressing concern regarding the safety of traffic access to and from the property onto Fort McKay Road, based on visibility. The city relied on an e-mail from the county public works department, which expressed no concern regarding visibility.[9] Petitioners contend, however, that the public works department merely concurred that future access to the subject property should be located at the current access location, and that no other access should be granted. The department did not address visibility, and the fact that the department raised no concerns regarding visibility is insufficient to dismiss the concerns opponents raised regarding visibility at the access point. Petitioners direct us to photographs in the record that, petitioners argue, show limited sight distance east of the proposed access point.

Intervenor responds, and we agree, that the city's findings regarding traffic access are supported by substantial evidence. While the e-mail from the county public works department did not specifically address visibility, it approved access to the property at the site of the current access, which is some evidence that the department believes that the location is safe. Intervenor also cites to the city's Goa1 12 findings, which recite testimony that the proposed access "has great [sight] visibility in both directions for safe access." Record 32. The contrary evidence cited by petitioners

---

[9] The city's decision states, in relevant part:

> "The existing point of Ft. McKay Road access for the subject property is located in the southeast corner of the site, at the crest of a low hill. In discussions with Douglas County Public Works staff, no concern was raised about visibility at this location due to the topography. Douglas County Public Works indicated that no additional accesses onto Ft. McKay Road (which is a County road) would be permitted." Record 39.

consists of testimony from neighbors and photographs that intervenor submitted to demonstrate safe access. While the contrary evidence may be substantial evidence that the city could have relied upon, a reasonable person could also rely on the evidence the city chose to rely on. The choice between conflicting substantial evidence is up to the city. *Younger v. City of Portland*, 305 Or 346, 350, 752 P2d 262 (1988).

The fourth assignment of error is denied.

The city's decision is remanded.