

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 ELINOR GRIFFITHS
5 and GERALD HEILMAN,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF CORVALLIS,
11 *Respondent,*

12
13 and

14
15 GROUP MACKENZIE,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2005-122

19
20 FINAL OPINION
21 AND ORDER

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23 Appeal from City of Corvallis.

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25 Elinor Griffiths and Gerald Heilman, Corvallis, filed the petition for review.

26
27 James K. Brewer, Corvallis, filed a response brief and argued on behalf of respondent.
28 With him on the brief was Fewel and Brewer.

29
30 Michael J. Lilly, Portland, filed a response brief and argued on behalf of intervenor-
31 respondent.

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

35
36 AFFIRMED

11/17/2005

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

NATURE OF THE DECISION

Petitioners appeal a city council decision that, among other things, rezones a 17.5 acre portion of a 32.34-acre tract from PD(RTC) (Research Technology Center with Planned Development overlay) to PD(GI) (General Industrial with Planned Development overlay).

MOTION TO INTERVENE

Group Mackenzie (intervenor), the applicant below, moves to intervene on the side of the city. There is no opposition to the motion, and it is allowed.

MOTION TO FILE REPLY BRIEF

Petitioners move to file a reply brief to address an issue regarding waiver raised in the response briefs. There is no opposition to the motion, and it is allowed.

FACTS

This appeal involves the city’s decision on remand in *Staus v. City of Corvallis*, 48 Or LUBA 254 (2004). In *Staus*, we rejected all assignments of error but one involving compliance with the Transportation Planning Rule (TPR) at OAR 660-012-0060.¹ Accordingly, we recite only the facts pertinent to that issue.²

In 1993, the subject site (known as the Corvallis Station site) was included in an area zoned PD(RTC) pursuant to Corvallis Land Development Code (LDC) 3.26. Rezoning property to RTC requires concurrent approval of a Conceptual Development Plan (CDP) under LDO 2.5.40.

¹ The TPR was amended in April 2005. We cite and discuss the version applicable at the time intervenor’s application was filed.

² The petitioners in *Staus* appealed our decision to the Court of Appeals, challenging our resolution of assignments of error other than the one we sustained. During the pendency of that appeal, the city council adopted a decision responding to our remand for findings addressing the TPR. That decision was appealed to LUBA. We reversed that decision, concluding that the city lacked jurisdiction to adopt a decision on remand while the *Staus* decision was pending before the Court of Appeals. *Rose v. City of Corvallis*, 49 Or LUBA 260 (2005). The court ultimately affirmed our decision in *Staus*. *Staus v. City of Corvallis*, 199 Or App 217, 111 P3d 759 (2005). After the appellate judgment issued in that appeal, the city council again conducted remand proceedings and issued the decision that is before us in this appeal.

1 LDO 3.26.20.01. The 1993 decision approved a CDP for a portion of the subject property that
2 includes the Corvallis Station site. That CDP was subsequently modified in 1998. In 2003,
3 intervenor filed several related applications that in relevant part seek to rezone the Corvallis Station
4 site from PD(RTC) to PD(GI). The purpose of the requested zone change is to facilitate
5 development of a retail home improvement store on the Corvallis Station site. A retail home
6 improvement store is permitted in the GI district, but not the RTC district. The subject site borders
7 and takes access from Highway 99E.

8 On remand, the city council held a public hearing at which it accepted additional evidence
9 and testimony regarding compliance with the TPR. In particular, intervenor submitted a
10 supplemental traffic study dated May 31, 2005, that compared the traffic generated by uses allowed
11 in the PD(RTC) zone with traffic generated by uses allowed under the proposed PD(GI) zone.
12 Based on that study and testimony from city staff and city engineer, the city council concluded that
13 uses allowed under the PD(RTC) have equal or greater traffic impacts as uses allowed under the
14 PD(GI). Accordingly, the city council concluded that the zone change did not “significantly affect”
15 any transportation facility, and was therefore consistent with OAR 660-012-0060. This appeal
16 followed.

17 **FIRST ASSIGNMENT OF ERROR**

18 **A. Significantly Affect**

19 Petitioners challenge the city’s finding that the zone change “does not, by itself, significantly
20 affect any transportation facility, because the permitted uses within the prior PD(RTC) district have
21 as great (if not a greater) traffic impact as the uses allowed within the proposed PD(GI) district.”
22 Record 17.³ Petitioners argue that the city made several analytical errors in reaching that

³ The city council found, in relevant part:

“* * * The City Council finds that the proposed District Map amendment, which would change the site from the PD(RTC) * * * to the PD (GI) * * * District is an amendment to a land use regulation. But the City Council also finds that the proposed District Map amendment does not, by itself, significantly affect any transportation facility, because the permitted uses within

1 conclusion. Under a correct analysis, petitioners contend, it is clear that the PD(GI) allows more
2 traffic-intensive uses than the PD(RTC) zone, and therefore the city erred in failing to apply
3 OAR 660-012-0060.

4 OAR 660-012-0060(1) requires that plan amendments, including zone changes, that
5 “significantly affect” a transportation facility shall assure that “allowed land uses are consistent with
6 the identified function, capacity, and performance standards” of that facility, by means of one or
7 more of four specified strategies.⁴ Under OAR 660-012-0060(2), a plan amendment “significantly

the prior PD(RTC) district have as great (if not a greater) traffic impact as the uses allowed within the proposed PD(GI) district.

“The City Council notes that the analysis of the existing traffic originally provided by the applicant was based on conservative assumptions regarding the potential PD(RTC) district uses * * *. The original traffic analysis considered only one specific development proposal, and did not consider more intensive uses allowed under the PD(RTC) district. The City Council notes that the applicant provided a supplemental narrative, dated May 31, 2005, regarding the trip generation potential for development on the property. The supplemental narrative is not as conservative as the original traffic analysis. The supplemental narrative illustrates possible peak PM traffic generated by development allowed under the PD(RTC) district use types and possible peak PM traffic generated by development allowed under the proposed PD(GI) district use types. * * * The supplemental narrative shows a variety of uses allowed under both the PD(RTC) and the PD(GI) district. The City Council notes that staff has evaluated the narrative and has identified which uses are reasonably likely in each district. The Staff’s analysis concludes that under reasonable development scenarios for both the PD(RTC) and PD(GI) use types, including a scenario for the proposed development under a PD(GI) district, the PD(RTC) use types would generate more peak PM vehicle trips than the PD(GI) use types. The City Council agrees with the staff analysis. Based on this evidence, the City Council finds that the potential traffic generated by the potential likely uses under the PD(GI) District will not generate additional traffic compared to the potential likely uses under PD(GI) District and therefore concludes that the District Change will not have a significant impact on any transportation facility.” Record 17-18.

⁴ Former OAR 660-012-0060(1) provided:

“Amendments to functional plans, acknowledged comprehensive plans, and land use regulations which significantly affect a transportation facility shall assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility. This shall be accomplished by either:

- “(a) Limiting allowed land uses to be consistent with the planned function, capacity, and performance standards of the transportation facility;
- “(b) Amending the TSP to provide transportation facilities adequate to support the proposed land uses consistent with the requirements of this division;

1 affects” a transportation facility if, in relevant part, it “[w]ould reduce the performance standards of
2 the facility below the minimum acceptable level identified” in the applicable transportation system
3 plan (TSP). OAR 660-012-0060(2)(d).⁵

4 Implicit in OAR 660-012-0060(2)(d) is a causative element. *ODOT v. City of Klamath*
5 *Falls*, 39 Or LUBA 641, 647, *aff’d* 177 Or App 1, 34 P3d 667 (2001). The focus of inquiry
6 under OAR 660-012-0060(2)(d) is on “transportation impacts from uses allowed by the proposed
7 amendment, not on impacts from uses already allowed under the existing plan or zoning.” *Id.*
8 Therefore, the initial question under OAR 660-012-0060(2)(d) is whether the plan amendment
9 causes a net increase in impacts on transportation facilities, comparing uses allowed under the
10 unamended plan and zoning code with uses allowed under the amended plan and zoning code. *Id.*
11 If the answer to that initial question is no, then the plan amendment does not “significantly affect” any
12 transportation facility, within the meaning of OAR 660-012-0060(2)(d).⁶

“(c) Altering land use designations, densities, or design requirements to reduce demand
for automobile travel and meet travel needs through other modes; or

“(d) Amending the TSP to modify the planned function, capacity and performance
standards, as needed, to accept greater motor vehicle congestion to promote mixed
use, pedestrian friendly development where multimodal travel choices are provided.”

⁵ Former OAR 660-012-0060(2) provided:

“A plan or land use regulation amendment significantly affects a transportation facility if it:

“(a) Changes the functional classification of an existing or planned transportation facility;

“(b) Changes the standards implementing a functional classification system;

“(c) Allows types or levels of land uses which would result in levels of travel or access
which are inconsistent with the functional classification of a transportation facility; or

“(d) Would reduce the performance standards of the facility below the minimum
acceptable level identified in the TSP.”

Petitioners do not argue that the challenged zone change significantly affects any transportation facility within
the meaning of OAR 660-012-0060(2)(a) through (c).

⁶ If the answer to that initial question is yes, further analysis is required to determine whether the plan
amendment “significantly affects” a transportation facility within the meaning of OAR 660-012-0060(2)(d). *Craig*

1 Turning to the present case, petitioners argue that the city erred in evaluating the traffic
2 impacts of uses allowed in the PD(RTC) zone based on the most traffic-intensive uses potentially
3 allowed in that zone, rather than the actual uses contemplated in the CDP that was approved when
4 the site was rezoned PD(RTC) in 1993. As noted, LDC 3.26.20.01 requires that when property is
5 zoned RTC the city must also approve a CDP, under the standards at LDC 2.5.40. The city
6 approved a CDP in 1993 when zoning the property to RTC, and that CDP was modified in 1998.
7 The current CDP apparently contemplates a 176,800-square foot research and development facility
8 on the Corvallis Station site.

9 According to petitioners, the approved CDP defines and limits the universe and intensity of
10 uses allowed on the subject site, and therefore the city must assume the uses contemplated in the
11 CDP in answering the initial question posed under OAR 660-012-0060(2)(d). Petitioners contend
12 that the initial traffic study did just that, evaluating the traffic impacts of the 176,800-square foot
13 research and development facility contemplated under the CDP, and concluding that it would
14 generate 193 new p.m. peak hour trips, significantly less than the 252 new p.m. peak hour trips
15 generated by the proposed 225,000-square foot home improvement center, which is one of the
16 most traffic-intensive uses allowed in the GI zone. Record 368. Petitioners argue that the
17 supplemental traffic study abandoned that approach, and instead evaluated the most traffic-intensive
18 uses allowed in the RTC zone, such as health and fitness clubs and office supply superstores,
19 without regard for the limitations imposed by the CDP. Further, petitioners note, the supplemental
20 study compared facilities of the same size (225,000 square feet) under each zone, rather than the
21 actual facility size allowed under the CDP. Under that approach, analysis of the “worst-case”
22 scenario in each zone indicates that the RTC zone allows more traffic intensive impacts than allowed
23 in the GI zone.⁷

Realty Group v. City of Woodburn, 39 Or LUBA 384, 389 (2001) (describing analysis under OAR 660-012-0060(2)(d) where the plan amendment results in a net increase in traffic compared to preexisting plan and zoning).

⁷ The supplemental study concludes, in relevant part:

1 The city and intervenor respond that the supplemental study correctly evaluated the “worst-
2 case” scenario under each zone, and was not limited to the research and development facility
3 contemplated by the CDP. According to the respondents, LDC 2.5.40.10 provides that at any
4 time a CDP may be modified or even redesigned “in whole or in part.”⁸ The city argues that such
5 CDP modifications are not plan amendments subject to review under OAR 660-012-0060.
6 Because CDPs can be modified or redesigned in whole or in part at any time subsequent to
7 establishing the RTC zone, respondents argue, the particular uses proposed and approved as part
8 of the CDP should not be the basis for the comparison of traffic impacts required under OAR 660-
9 012-0060(2)(d), when rezoning the property. The proper focus of that comparison, respondents
10 contend, is the set of uses allowed in each zone, in particular the most traffic-intensive uses allowed
11 in each zone.

12 We agree with respondents. While LDC 3.26.20.01 requires approval of a CDP in
13 conjunction with zoning land to RTC, the fact that the CDP can be modified or even redesigned in
14 whole at any point thereafter hardly suggests that the CDP plays the limiting role that petitioners

“The worst case uses for the RTC zone have higher traffic impacts than the worst case uses for the GI zone. This is true regardless of the size of the development, so long as developments of the same size are compared to each other. The worst case scenario for the RTC zone generates 820 trips in the PM peak hour, while the worst case use for the GI zone generates 379 trips in the PM peak hour. * * * The worst case RTC uses tend to have a more significant traffic impact due to higher employee density, and as a result the RTC uses tend to put more traffic on the streets at a time when the streets are already the busiest. The worst case GI uses spread their traffic out during the day more than the RTC uses. * * *” Record 400-01.

⁸ LDC 2.5.40.10 provides:

“Modification of a Conceptual Development Plan

- “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 2.5.40.04 above.”

1 assign it. Respondents are correct that, as a general matter, the causative analysis under OAR 660-
2 012-0060(2)(d) requires a comparison of the traffic impacts from uses allowed in each zone, usually
3 by comparing the most traffic intensive use allowed in each zone. Development plans approved
4 concurrently with a zone change do not set the baseline for that zone, in subsequent zone change
5 decisions, for purposes of OAR 660-012-0060(2)(d). Unless such development plans become
6 part of the rezoning decision itself or the zone change decision is conditioned in some way that
7 would effectively require a new zone change decision in order to modify those plans, the proper
8 baseline for purposes of applying OAR 660-012-0060(2)(d) continues to be the set of uses
9 allowed in the zone, not the uses allowed under the approved development plan. Here, because the
10 approved CDP can be modified at any time without a plan amendment or zone change, the proper
11 baseline continues to be the set of uses allowed in the RTC zone, not the particular use approved
12 for the Corvallis Station site in the CDP.

13 **B. Likely Uses**

14 Petitioners also include an argument under the first assignment of error that the city actually
15 evaluated “likely” uses allowed under the two zones, rather than uses “allowed” under the two
16 zones. Petition for Review 6 (citing Record 17-18); *see* n 3 (quoting the cited portions of the
17 decision). It is not clear whether this argument is intended as a distinct sub-assignment of error, or
18 whether it is merely part of petitioners’ broader argument that the focus of comparison under
19 OAR 660-012-0060(2)(d) is the uses allowed in the two zones, which in petitioners’ view is limited
20 to the uses allowed under the CDP. The last sentence of the findings quoted at n 3 does suggest
21 that based on a staff report the city council evaluated the “potential likely uses” under both zone
22 districts. However, the second sentence of the findings quoted at n 3 suggests that the city council
23 evaluated the “permitted uses.” The supplemental traffic study the city council relies upon evaluated
24 the uses allowed in both zones, specifically the most traffic-intensive uses, rather than “likely” uses,
25 as far as we can tell.

1 While it could potentially be error under OAR 660-012-0060(2)(d) for a local government
2 to evaluate “likely” uses *rather than* “allowed land uses,” it appears that the city evaluated both.
3 That being the case, the fact that the city evaluated “likely” uses is harmless error, assuming it is
4 error at all.

5 C. Transportation System Plan

6 Finally, petitioners challenge under this assignment of error what appears to be an alternative
7 rationale for concluding that the proposed zone change does not “significantly affect” a
8 transportation facility under OAR 660-012-0060(2)(d). In the challenged decision, the city council
9 adopted Finding 2.2, which notes that at the time the city adopted its transportation system plan
10 (TSP) the subject property was zoned GI.⁹ According to the city, the TSP assumed that the
11 subject site would be developed for uses allowed in the GI zone. Therefore, the city concluded,
12 returning the subject site to GI zoning cannot have any unanticipated affect on the planned functions,
13 capacities and performances standards of transportation facilities in the TSP.

14 Petitioners argue that the city fails to appreciate that subsequent to adoption of the TSP the
15 city’s code was amended to permit home improvement centers in the GI zone, and that the GI zone
16 at the time the city adopted the TSP did not allow such uses.

⁹ Finding 2.2 states:

“The City Council notes that the supplemental staff report dated June 9, 2005, states that the property in question was subject to the GI district when the City developed the [TSP]. The City Council notes that the [TSP] was developed anticipating General Industrial uses on the property. The TSP specifically identifies ‘[l]imiting allowed land uses to be consistent with the planned function, capacity, and performance standards of the transportation facility’ as a method for assuring that amendments to land use regulations are consistent with the ‘identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of transportation facilities.’ In this case, the TSP was developed, and the transportation facilities were planned based on the assumption that development of the site would be for [GI] uses. Consistent with OAR 660-012-0060(1)(a), the amendment of the district map to include the site as PD(GI) has not permitted any land use that is not consistent with the planned function, capacity, and performance standards of any transportation facility within the TSP. The uses and traffic volumes allowed under the General Industrial District are the land uses and traffic volumes on which the planned functions, capacities and performance standards of the TSP are based. Consequently, amending the District Map to include the PD(GI) district on this site cannot have any affect on the planned functions, capacities and performance standards of the TSP at all.” Record 18-19.

1 Intervenor responds that this issue was not raised below and is thus waived.
2 ORS 197.763(1), ORS 197.835(3). According to intervenor, Finding 2.2 was proposed in draft
3 findings attached to the June 9, 2005 staff report, at Record 386. Intervenor argues that at no
4 point during the proceedings below did petitioners or other parties raise any issue regarding Finding
5 2.2 or the city’s reasoning that the TSP assumes development allowed under the GI zone. In a
6 reply brief, petitioners respond that the city itself raised the issue of what uses were allowed in the
7 GI zone at the time the TSP was adopted when it proposed Finding 2.2.

8 We tend to agree with intervenor that the issue raised under this sub-assignment of error—
9 whether changes to the GI zone after the TSP was adopted invalidates the reasoning set out Finding
10 2.2—could have been but was not raised during the proceedings below. However, we need not
11 resolve the question of waiver, because Finding 2.2. is an alternative basis for the city’s conclusion
12 that the challenged zone change does not significantly affect a transportation facility within the
13 meaning of OAR 660-012-0060. Because we affirmed the city’s principal basis for that
14 conclusion, the arguments under this sub-assignment of error, even if preserved, provide no basis
15 for reversal or remand.

16 The first assignment of error is denied.

17 **SECOND ASSIGNMENT OF ERROR**

18 The city council adopted another alternative set of findings based on the assumption that the
19 PD(GI) zone allows uses that are more-traffic intensive than those allowed in the PD(RTC). Even
20 under that assumption, however, the city council concluded that the zone change will not
21 “significantly affect” any transportation facility within the meaning of OAR 660-012-0060(2)(d),
22 because existing and planned transportation facilities can accommodate increased traffic generated
23 by the proposed use.

24 Petitioners challenge that alternative rationale on a number of grounds. However, because
25 we affirmed the city’s principal basis for concluding that the proposed zone change is consistent with
26 the TPR, we must affirm the challenged decision even if we were to sustain this assignment of error.

1 Accordingly, the arguments under this assignment of error do not provide a basis for reversal or
2 remand. We do not consider the merits of this assignment of error.

3 The city's decision is affirmed.