BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CARL BOTHMAN, CHRIS BOTHMAN,
and CARLEE INVESTMENTS, LLC,
Petitioners

vs.

CITY OF EUGENE
Respondent,

and

KNUTSON FAMILY, LLC,
Intervenor-Respondent.

LUBA No. 2005-171

FINAL OPINION
AND ORDER

Appeal from City of Eugene

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

Emily N. Jerome, Eugene, filed a response brief and argued on behalf of respondent. With her on the brief was Harrang Long Gary Rudnick, P.C.

Dan Terrell, Eugene, filed a response brief on behalf of intervenor-respondent. With him on the brief was the Law Office of Bill Kloos, PC. Bill Kloos, Eugene, argued on behalf of intervenor-respondent.

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

DAVIES, Board Chair, did not participate in the decision.

REMANDED 03/02/2006

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 a city planning commission decision rezoning a five-lot tract to Community Commercial (C-2) with a site review overlay.

MOTION TO INTERVENE

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

FACTS

The challenged decision is on remand from this Board. *Knutson Family LLC v. City of Eugene*, 48 Or LUBA 399 (2005). We recite the basic facts from that opinion:

> "The subject property consists of five parcels totaling approximately 2.92 acres in size, owned or controlled by petitioner Knutson. Tax lots 4000, 4100, 4300 and 4400 front on Coburg Road, a north-south arterial, and are zoned Neighborhood Commercial (C-1). Tax lot 4000 is developed with a medical clinic. Tax lots 4100, 4300 and 4400 are vacant. Tax lot 4900 fronts on Willakenzie Road, an east-west street, and is zoned General Office (GO), a commercial zone. Tax lot 4900 is developed with an office building.
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> Two properties south and east of the subject parcels, at the intersection of Coburg Road and Willakenzie Road, are zoned Community Commercial (C-2). Carlee owns one of these C-2 zoned properties. Further south across Willakenzie Road are a number of parcels zoned C-1 and C-2. To the east across Coburg Road are a number of properties zoned C-1, C-2 and R-2 (Medium Density Residential) and R-3 (High Density Residential). North of the subject property are three lots zoned GO, and further north a strip of land zoned R-1. A large area west of the subject property is zoned R-2, while an area further to the west is zoned Public Land (PL) and developed with a high school. * * *
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> "* * * * *
>
> "In November 2003, Knutson applied to rezone all five parcels to C-2, which allows more intensive commercial uses than the C-1 or GO zones. The city hearings official held a public hearing on February 25, 2004, and accepted evidence with respect to whether the proposed rezoning complied with zone change criteria at Eugene Code (EC) 9.8865(1)-(3). Following the public hearing, Knutson submitted a traffic impact analysis to address concerns raised at the hearing regarding road capacity and compliance with

> EC 9.8865(3). On April 13, 2004, the hearings official denied the application for failure to comply with EC 9.8865(1)–(3). In particular, the hearings official concluded based on the Metro Plan diagram that the subject property is designated Medium Density Residential and that the proposed C-2 zoning is inconsistent with that plan designation and with applicable Metro Plan and WAP policies, under EC 9.8865(1) and (2). In addition, the hearings official denied the application under EC 9.8865(3), after concluding that the applicant failed to demonstrate that the transportation facilities in the area can adequately serve uses allowed in the C-2 zone.
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> "Petitioner Knutson appealed the hearings official decision to the planning commission. The planning commission affirmed the hearings official's conclusion under EC 9.8865(1) and (2) that the Metro Plan designation for the subject property is Medium Density Residential, not Commercial, and that rezoning the property to C-2 would be inconsistent with applicable Metro Plan and WAP policies. However, the planning commission disagreed with the hearings official that the applicant had failed to demonstrate compliance with EC 9.8865(3) and modified the hearings official's decision to remove that basis for denial." *Id.* at 402-406 (footnotes and illustration omitted).

Both Knutson and petitioners (hereafter, Carlee) filed cross-appeals of the planning commission decision to LUBA. LUBA remanded both appeals, agreeing with Knutson that the planning commission erred in finding that the comprehensive plan designation for the subject property is Commercial, not Medium Density Residential, and agreeing with Carlee that the planning commission's findings of compliance with EC 9.8865(3) were inadequate. Carlee appealed aspects of the LUBA decision to the Court of Appeals, which affirmed LUBA's decision. *Knutson Family LLC v. City of Eugene*, 200 Or App 292, 114 P3d 1150 (2005).

On remand, the planning commission reconsidered its decision based on the record compiled in the first proceeding, and sustained Knutson's challenges to the hearings officer's denial, thus approving the zone change application for all five parcels. This appeal followed.

FIRST ASSIGNMENT OF ERROR

EC 9.8865(3) requires an applicant for rezoning to demonstrate in relevant part that "the uses and density that will be allowed by the proposed zoning in the location of the proposed change can be served through the orderly extension of key urban facilities and

services."[1] In response to concerns raised by staff and Carlee regarding the adequacy of the Coburg Road/Willakenzie Road intersection, Knutson submitted a limited traffic study. The traffic study assumed that the two developed tax lots would not redevelop under C-2 zoning, and confined its analysis to the three vacant tax lots. The study listed a number of uses allowed in the C-1 and C-2 zones, and examined several "likely" uses under both zones, given the small size (1.33 acres) of the vacant parcels. Record 267. The study concluded that rezoning the property to C-2 would not necessarily result in higher trip generation than leaving the property zoned C-1. The study also noted that Coburg Road is currently operating within capacity, and identified several potential means to improve capacity and functioning if future development of the property would threaten to exceed capacity.

The hearings officer criticized the study for assuming that the two developed parcels would not redevelop under C-2 zoning and for assuming that, given the small size of the three vacant parcels, those parcels would be developed with less intensive uses allowed in the C-2 zone. As noted, the planning commission disagreed with the hearings officer on this point, but the planning commission findings failed to provide a reviewable interpretation of EC 9.8865(3) or explain why the study satisfied that criterion. On remand, the planning commission interpreted EC 9.8865(3) to require that the applicant demonstrate only that the

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[1] EC 9.8865 provides, in pertinent part:

> "Approval of a zone change application, including the designation of an overlay zone, shall not be approved unless it meets all of the following criteria:
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> "(1) The proposed change is consistent with applicable provisions of the Metro Plan. The written text of the Metro Plan shall take precedence over the Metro Plan diagram where apparent conflicts or inconsistencies exist.
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> "(2) The proposed zone change is consistent with applicable adopted refinement plans. In the event of inconsistencies between these plans and the Metro Plan, the Metro Plan controls.
>
> "(3) The uses and density that will be allowed by the proposed zoning in the location of the proposed change can be served through the orderly extension of key urban facilities and services."

transportation system can serve some (at least two) of the uses allowed in the C-2 zone that are not allowed in the C-1 zone, but need not attempt to demonstrate that the system can serve all the uses or the most intensive uses in the C-2 zone.[2] The planning commission then reviewed the traffic study, noted that it evaluated several uses not allowed in the C-1 zone, and found the study sufficient to demonstrate compliance with EC 9.8865(3), under its interpretation.[3]

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[2] The planning commission findings state, in relevant part:

> "We also reject an interpretation that would require an applicant to show that the transportation infrastructure is adequate to serve the *most intense* use allowed in the proposed zone or to provide a worst-case traffic impact analysis. * * * Taking the zone change criterion in the context of the code's TIA requirements, it does not make sense to require, at the time of zone change, that an applicant show that the most intense [use] allowed in the zone could be served. The zone change criteria was not intended to limit a zone's applicability to only those parcels that can accommodate *every* use allowed in that particular zone. By requiring a showing that the zone's most intense use can be served, the city would essentially be applying such a limit. For example, some parcels in the city's C-2 zone cannot be served to the degree necessary for a university or college. That does not mean that the C-2 zone is inappropriate for those parcels, which can be served to the degree necessary to accommodate other C-2 uses.
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> "The criterion is intended to ensure that the city does not rezone a parcel if no new uses that would be allowed on the property as a result of the zone change could be established due to the inability to serve any such uses. EC 9.8865(3) requires that, with respect to traffic, the applicant/appellant show that *at least two of the uses allowed in the proposed zone, which are not allowed in the subject property's current zone, can be served through the orderly extension of the transportation infrastructure*. The applicant/appellant must describe the traffic impacts that would likely be generated by such uses and show that the current transportation infrastructure can accommodate the impact or that it may be extended in an orderly way to accommodate that impact." Record 26 (emphasis in original).

[3] The planning commission findings go on to state:

> "* * * The Planning Commission finds that [Knutson] has shown that transportation facilities area available or can be extended to serve at least two of the uses allowed in the C-2 zone, which are not allowed in the C-1 or GO zone.
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> "[Knutson] provides a traffic and trip generation report that demonstrates multiple C-2 uses (including uses that are not allowed in the C-1 or GO zones such as auto parts store, furniture store, quick lubrication vehicle service, etc.) could be served at the proposed location. * * * We find that this is sufficient to satisfy the criterion.
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> "The subject parcels are located near the Coburg Road/Willakenzie Road intersection. These two roads are developed, functioning facilities. The applicant has submitted credible evidence that the intersection is currently adequate and that the facility's capacity can be

Carlee challenges the planning commission interpretation of EC 9.8865(3), arguing that it requires an evaluation of the "worst-case" development scenario, using the most intensive uses allowed in the C-2 zone. Carlee contends that there is no justification in EC 9.8865(3) for evaluating only some of the C-2 uses not otherwise allowed in the C-1 zone. According to Carlee, EC 9.8865(3) requires evaluation of the "uses and density that will be allowed," without qualification. Even if the evaluation can be limited to a subset of uses, Carlee argues, the study must evaluate the most intensive uses theoretically possible on the property.

Further, Carlee argues that it is error to assume that the two developed tax lots will not be redeveloped with uses allowed in the C-2 zone. Carlee notes that that assumption is not supported by any deed restriction or other binding limitation that would assure that the low-intensity uses currently on those lots will remain. According to Carlee, the planning commission erred in failing to evaluate the entire five-lot tract, which if redeveloped could allow larger traffic-intensive uses such as a multiplex theater or parking garage.

The city and Knutson argue, and we agree, that Carlee has not demonstrated reversible error in the planning commission findings or interpretation. EC 9.8865(3) does not require the city to evaluate the "worst-case" development scenario, or the "most-intensive" uses allowed in the C-2 zone. Of course, neither does EC 9.8865(3) purport to authorize consideration of only two uses allowed in the C-2 zone. As Carlee notes, the planning commission's interpretation could, if taken to its logical extent, allow an applicant to obtain rezoning approval based on consideration of two of the least intensive uses not

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further improved by the addition of turn lanes, modification of median islands and improvements in signal operations to accommodate the increase in traffic that could be caused by the rezoning. The traffic and trip generation report submitted by the applicant shows, through analysis of actual C-2 uses, that allowing C-2 uses on the property may result in little or no increase in traffic from the uses currently allowed on the property. It concludes that there is substantial overlap between the amount of traffic that could be generated by C-1 uses of the property and the amount of traffic that would be expected from C-2 uses. It also provides details as to how the potential increase in traffic for some C-2 uses could be accommodated through the orderly extension of services." Record 27.

allowed in the existing zone. However, we do not understand the traffic study to limit its analysis to the least intensive uses. Rather it evaluated "likely" development scenarios in both zones, given the relatively small size of the vacant tax lots and other development constraints. The planning commission found that EC 9.8865(3) does not require consideration of uses that cannot be practicably sited on the property, even if hypothetically allowed in the C-2 zone. We see no error in that view of EC 9.8865(3). Carlee does not dispute that the uses the traffic study evaluated are indeed "likely" development scenarios for the three vacant lots under the C-1 and C-2 zones.

Carlee's main dispute appears to be that the traffic study should have assumed that the two developed lots would be redeveloped in combination with the vacant lots into a single larger, more traffic-intensive use, such as a multiplex or multi-story parking garage. While it is a closer question, we do not agree with Carlee that EC 9.8865(3) requires the city to assume that lots already developed with uses allowed in the C-2 zone will be redeveloped to other uses. We might agree with Carlee on this point, if the present rezoning decision were the city's last chance to evaluate the adequacy of transportation facilities to accommodate uses allowed under the rezone. However, the city found and Carlee does not dispute that the city's code requires traffic impact analysis and mitigation of any development proposal that generates more than 100 peak hour trips, contributes to existing traffic problems or results in substandard levels of service, under EC 9.8650 to 9.8680. The city further identified various means to improve capacity to the adjoining transportation facility, if future development proposals trigger review under such code provisions. EC 9.8865(3) requires only that uses and density "can be served through the orderly extension of key urban facilities and services," which suggests that the proposed zone may be appropriate even if the existing facilities are insufficient to serve the uses allowed in the new zone, where such facilities can be improved. In this context, we cannot say that the city

erred in declining to assume that the developed lots would be redeveloped in combination with the vacant parcels into a hypothetical, more intensive use.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

EC 9.8865(1) and (2) requires in relevant part that the proposed zone change be consistent with applicable provisions of the Metro Plan and applicable refinement plans. *See* n 1. The Metro Plan is the comprehensive plan that governs the metropolitan area including the city. The applicable refinement plan is the Willakenzie Area Plan (WAP). The WAP includes specific policies governing the Sheldon Sub-Area, a relatively circumscribed geographic area at the approximate center of which is the subject property. The hearings officer addressed a number of Metro Plan provisions and WAP policies, found that many of them required consideration under EC 9.8865(1) and (2), and denied the proposed zone change for lack of consistency with certain WAP policies. The planning commission reversed the hearings officer on these points, concluding that none of the cited WAP policies are mandatory applicable approval standards or bases to deny the proposed rezone. Carlee challenges that conclusion, and further argues that the city failed to address other applicable plan policies. We address each of the disputed policies individually.

A. Commercial Lands Study Policies 16 and 18

Commercial Lands Study Policy 16 states:

> "Take steps to address the underlying goal in the Metro Plan to have viable neighborhood commercial uses that meet the needs of nearby residents and reduce the use of the automobile."

Commercial Lands Study Policy 18 states:

> "Identify appropriate areas within the Willakenzie subarea to accommodate office development and address neighborhood commercial needs. In identifying commercial sites, evaluate impacts on traffic patterns and surrounding land uses."

Carlee contends that the planning commission failed to address consistency with these policies. The city and Knutson respond that Carlee failed to raise these issues in the initial appeal of the hearings officer's decision to the planning commission, or before LUBA, and thus these issues are waived under the reasoning in *Miles v. City of Florence*, 190 Or App 500, 507, 79 P3d 382 (2003), or barred by the law of the case doctrine, under *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 1327 (1992). Knutson further argues, on the merits, that both Policy 16 or 18 are planning directives to the city, not policies applicable to quasi-judicial rezoning decisions.

We need not address respondents' waiver theories, because we agree with Knutson that Policies 16 and 18 are planning directives to the city rather than policies applicable to a quasi-judicial rezoning decision. The text of both policies plainly direct the city to undertake planning efforts, which is made even clearer by the implementation strategies that accompany each policy. For example, implementation strategy 16.1 directs the city to "create plan text that clarifies the goal to have neighborhood commercial uses that serve nearby residents and reduce automobile usage," a task that is to be performed "[d]uring the next major update of the Metro Plan." Nothing cited to us in the text or context of Policy 16 or 18 suggests that those policies are intended to apply to individual rezoning decisions.

B. WAP Land Use Policy 1

WAP Land Use Policy 1 states that:

> "The City shall use the Land Use Diagram and accompanying text and policies of the [WAP], as well as other applicable City goals, policies, and plans, to provide policy direction for public decisions affecting the plan area."

The city and Knutson again respond that the issue of consistency with Land Use Policy 1 was not raised below or presented to LUBA in the prior appeal and is therefore waived or barred. In addition, the city and Knutson argue that while Policy 1 indicates that WAP policies provide policy direction for decisions within the WAP area, nothing suggests

that Policy 1 itself is a policy that is applicable as a decisional standard. We agree with the latter contention.

C. WAP Land Use Policy 2

WAP Land Use Policy 2 states that:

> "The City shall ensure that future commercial development and redevelopment in the Willakenzie planning area is sensitive to and compatible with existing and planned development in the surrounding area."

The planning commission found that Policy 2 is a planning directive to the city, as indicated by the accompanying "proposed actions," which direct the city to (1) amend the code in certain ways and (2) apply the site review overlay to all parcels zoned C-1 or C-2. According to the planning commission, the city has fulfilled both actions. We agree with the city that Policy 2 is a planning directive to the city and not a policy potentially applicable to a quasi-judicial rezoning application.

D. Sheldon Sub-Area Policy 4

Sheldon Sub-Area Policy 4 (policy 4) requires the city to "[r]ecognize the existing general office and commercial uses located along the west side of Coburg Road, north of Willakenzie Road, and discourage future rezonings of these properties." The planning commission addressed this policy as follows:

> "The applicant/appellant and opponents addressed this policy and it appears that the Hearings Official considered this policy as a basis for denial of the proposed rezone. To the extent that she did so, she erred. We agree with the applicant/appellant that this policy is not mandatory because it requires the city only to 'recognize' and 'discourage' but does not prohibit certain types of rezoning proposals. The policy cannot be a basis for denial." Record 24 (record citations omitted).

Carlee argues that policy 4 is specifically directed at a very small geographic area comprised mostly of the subject property, and that the policy unequivocally requires the city to protect the existing office and commercial uses, and to discourage rezoning of the subject property. While conceding that plan policy language that merely encourages or discourages

certain actions is generally aspirational in nature, and not a mandatory applicable criterion with respect to quasi-judicial decisions, Carlee argues that a policy that is specifically directed at future rezoning of the subject property is a policy that applies by its terms to a proposal to rezone the property. According to Carlee, such site-specific and subject matter-specific policies must be considered under rezoning criteria like that of EC 9.8865(1) and (2), which require that the proposed rezoning be consistent with applicable plan policies.

The city and Knutson cite to a number of Court of Appeals and LUBA precedents for the general proposition that plan policies couched in non-mandatory, hortatory terms are not approval criteria for land use permit decisions. According to respondents, the fact that policy 4 refers to a small geographic area including the subject property and expresses a policy to discourage rezoning of that area does not convert a hortatory policy into an approval criterion that an applicant for permit approval must satisfy.

As our cases have recognized, local governments face a "recurring problem" in "identifying the relevant approval standards, if any, in the local government's comprehensive plan." *Save Our Skyline v. City of Bend*, 48 Or LUBA 192, 209 (2004). As we explained,

> "* * * The comprehensive plan is a potential source of standards for review of a quasi-judicial land use permit application, because ORS 197.175(2)(d) expressly provides that where a local government's comprehensive plan and land use regulations have been acknowledged by LCDC, the local government is required to 'make land use decisions and limited land use decisions in compliance with the acknowledged plan and land use regulations[.]' *Donivan v. City of La Grande*, 43 Or LUBA 477, 479-80 (2003); *Durig v. Washington County*, 35 Or LUBA 196, 202-03 (1998), *aff'd* 158 Or App 36, 969 P2d 401 (1999). Many local governments also impose a local requirement that the comprehensive plan be considered in approving a land use permit application. As far as we can tell, the fourth general conditional use criterion at [Bend Code] 10-10-29(3)(d) is such a local requirement.
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> "As intervenor correctly points out, local and statutory requirements that land use decisions be consistent with the comprehensive plan do not mean that all parts of the comprehensive plan necessarily are approval standards. *McGowan v. City of Eugene*, 24 Or LUBA 540, 546 (1993); *Neuenschwander v. City of Ashland*, 20 Or LUBA 144, 154 (1990); *Bennett v. City of Dallas*, 17 Or LUBA 450, 456, *aff'd* 96 Or App 645, 773 P2d 1340 (1989). Local governments and this Board have frequently considered the text and context

> of cited parts of comprehensive plans and concluded that the alleged comprehensive plan standard was not an applicable approval standard. *Stewart v. City of Brookings*, 31 Or LUBA 325, 328 (1996); *Friends of Indian Ford v. Deschutes County*, 31 Or LUBA 248 258 (1996); *Wissusik v. Yamhill County*, 20 Or LUBA 246, 254-55 (1990). Even if the comprehensive plan includes provisions that can operate as approval standards, those standards are not necessarily relevant to all quasi-judicial land use permit applications. *Bennett v. City of Dallas*, 17 Or LUBA at 456. Moreover, even if a plan provision is a relevant standard that must be considered, the plan provision might not constitute a separate mandatory approval criterion, in the sense that it must be separately satisfied, along with any other mandatory approval criteria, before the application can be approved. Instead, that plan provision, even if it constitutes a relevant standard, may represent a required *consideration* that must be balanced with other relevant *considerations*. *See Waker Associates, Inc. v. Clackamas County*, 111 Or App 189, 194, 826 P2d 20 (1992) ('a balancing process that takes account of relative impacts of particular uses on particular [comprehensive plan] goals and of the logical relevancy of particular goals to particular uses is a decisional necessity')." *Id.* at 209-210 (emphasis in original).

Thus, even where a plan provision might not constitute an independently applicable mandatory approval criterion, it may nonetheless represent a relevant and necessary consideration that must be reviewed and balanced with other relevant considerations, pursuant to ordinance provisions that require, as does EC 9.8865(1) and (2), consistency with applicable plan provisions.

We noted further in *Save Our Skyline* that it is appropriate to "consider first whether the comprehensive plan itself expressly assigns a particular role to some or all of the plan's goals and policies." *Id.* at 210. Turning first to that consideration, the WAP describes WAP policies as follows:

> "**Policies** are statements that suggest a specific course of action that will move the plan toward attainment of its goals. Policies are adopted by the City Council as guidance for decision-making within the plan area. City programs, actions, and decisions will be evaluated on the basis of their ability to implement adopted policies in this plan as well as other adopted City goals and policies. Because they are adopted by the council as the City's guide for action in this area, policies are the most important statements in the plan." WAP 4.

The WAP clearly assigns WAP policies a role, albeit a limited one, in making land use decisions within the plan area, at least for those policies that are written in a manner that provides relevant "guidance for decision-making" with respect to specific land use decisions. The exact nature and extent of the role played by any WAP policy depends, presumably, on the actual text and context of the particular policy. The hearings officer understood certain WAP policies to have a decisional role under EC 9.8865(1) and (2), including policy 4, and accordingly she considered a number of different, sometimes conflicting, WAP policies.

Turning to policy 4, we agree with petitioners that its geographic specificity and its subject-matter focus on preserving existing office and commercial uses and discouraging rezoning of the subject property are highly significant. It is difficult to imagine a policy that provides more relevant "guidance for decision-making" with respect to a proposal to rezone the C-1 and GO-zoned portions of the subject property than policy 4.

It is true, as the city noted, that policy 4 does not *prohibit* rezoning the subject property, but merely requires the city to "recognize" existing uses and merely "discourages" rezoning the subject property. However, that policy 4 is not couched in absolute terms and instead appears to require the city to exercise some discretion, presumably after considering and balancing all applicable policies, does not mean that policy 4 can be ignored. Policy 4 expresses a clear policy preference that the subject property remain in its existing C-1 and GO zoning. While that preference is not absolute, and can be overcome by sufficient reasons and/or competing policy considerations, read in context the policy clearly requires the city to at least *consider* whether the applicant has established a basis to overcome that policy preference. The hearings officer found that the applicant had not, and the planning commission did not address that issue, under its view that policy 4 is not a "mandatory" approval criterion because it does not "prohibit certain types of rezoning proposals." We believe that view of policy 4 to be incorrect. As stated, policy 4 expresses a policy preference that the subject property remain in its existing zoning, and read in context the

policy clearly mandates that the city be guided by—at a minimum, consider—that preference in the context of an application to rezone the subject property under EC 9.8865(1) and (2). The planning commission erred in failing to apply and consider policy 4.

E. Sheldon Sub-Area Policy 5

Sheldon Sub-Area Policy 5 (policy 5) states that "[t]he City shall encourage the location of general office uses as a transition between commercial and residential uses." The hearings officer noted that parcel 4900 is zoned and developed for general office use, and that it separates the existing residential areas west of the subject property from the commercially zoned and developed uses along Coburg Road. The hearings officer concluded that rezoning parcel 4900 from GO to a commercial zone is inconsistent with policy 5, because the applicant had not established a "basis to deviate from adherence to this guiding policy." *Knutson Family* Record 116.

The planning commission reversed the hearings officer on this point, finding that policy 5 is "not mandatory because it 'encourages,' but does not require, the location of general office uses." Record 24. Consequently, the planning commission found, policy 5 "cannot be a basis for denial." *Id.*

Petitioners argue that policy 5 provides specific policy guidance with respect to a proposal to rezone property developed with general office uses that serves as a transition between residential areas and commercial areas in the Sheldon Sub-Area. Once rezoned to C-2, petitioners argue, tax lot 4900 can be redeveloped with intensive commercial uses, eliminating the existing transition between residential and commercial uses in the area. Petitioners contend that for the same reasons the planning commission erred in refusing to consider whether the proposed rezoning is consistent with policy 4, the planning commission also erred in refusing to consider whether the proposed rezoning is consistent with policy 5.

The city and Knutson respond that policy 5, like policy 4, is not a mandatory approval criterion, because it simply "encourages" the city to take certain actions.

While policy 5 is less site-specific than policy 4, and not specifically directed at rezoning decisions, it expresses a clear policy preference to buffer residential and commercial uses with general office uses in the Sheldon Sub-Area. For the reasons expressed above, we agree with petitioners that the planning commission erred in dismissing policy 5 from consideration for purposes of EC 9.8865(1) and (2). As the hearings officer noted, the applicant asserted that the existing general office uses on lot 4900 will remain, which makes it unclear why the applicant is seeking to rezone that lot from GO to C-2. Nothing cited to us in the record indicates why the property is being rezoned to a commercial zone, or provides a basis to disregard policy 5. Under our view of the WAP and EC 9.8865(1) and (2), the city must at least consider the policy preference expressed in policy 5 as guidance in deciding whether to approve the requested rezone of tax lot 4900 from GO to C-2. The planning commission erred in failing to do so.

The second assignment of error is sustained, in part.

The city's decision is remanded.