BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON TRANSFER COMPANY, INC., RUDIE WILHELM WAREHOUSE CO., ANDERSON DIE & MFG. CO., OREGON WORSTED COMPANY, HOLMAN DISTRIBUTION CENTER OF OREGON, INC., R & R TEXTILES, INC., CORINTHIAN TEXTILES, HEIBERG GARBAGE & RECYCLING, AMERICAN MEDICAL RESPONSE, STX OREGON PROPERTY MANAGEMENT and 6710 LLC,
Petitioners,

vs.

CITY OF MILWAUKIE,
Respondent,

and

TRIMET,
Intervenor-Respondent.

LUBA No. 2006-106

FINAL OPINION
AND ORDER

Appeal from City of Milwaukie.

Roger A. Alfred, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief were Mark D. Whitlow and Perkins Coie LLP.

Gary F. Firestone, Portland, filed a response brief and argued on behalf of respondent. With him on the brief was Ramis Crew Corrigan, LLP.

Steven W. Abel, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Stoel Rives LLP.

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

AFFIRMED 12/12/2006

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 decision approving an application to apply a Community Service Overlay (CSO) designation and related permits to allow construction of a 329-space public park and ride.

MOTION FOR REPLY BRIEF

Petitioners move to file a reply brief to address a new matter raised in intervenor-respondent's response brief, specifically whether a prior use of the subject property remains a valid conditional use under the city's code. The reply brief is allowed.

FACTS

The subject property is the site of the former Southgate movie theatre, constructed in 1972 along with an associated parking lot pursuant to a conditional use permit. The parcel is located in a city industrial district adjacent to the intersection of McLoughlin Boulevard (Highway 99E) and SE Millport Road, and zoned Manufacturing (M) with an Industrial comprehensive plan designation. In 1984, intervenor-respondent (TriMet) entered into a private agreement with the owner of the theater allowing TriMet to use part of the theater parking lot as a free park and ride. However, TriMet did not seek city approval to use the property as a park and ride.

In 2000, the property changed hands, and its use as a theater and a free park and ride ceased.[1] In 2006, TriMet applied to the city for approvals necessary to redevelop the site as a park and ride. TriMet proposes to demolish the existing theater building, and reconstruct the parking lot, which currently has 381 spaces, into a 329-space parking facility. The existing parking lot does not conform to current city parking lot standards, at Milwaukie Municipal Code (MMC) 19.500. TriMet proposes reconstructing the parking lot so that it

[1] A traffic impact analysis in the record states that after closure of the theater and the free park and ride a limited, fee-based park and ride (30 to 40 users per day) continued. Record 1284.

conforms or comes closer to conformance with the MMC 19.500 standards. The city planning commission approved the CSO application and the proposed parking lot, notwithstanding noncompliance with some MMC 19.500 standards. The planning commission relied on MMC 19.502.B, which provides that the MCC 19.500 parking lot standards apply to uses with nonconforming parking and loading facilities "in an attempt to bring them into conformance with current standards when remodeling or change in use occurs."[2] The planning commission interpreted MMC 19.502.B to allow noncomplying parking lots, as long as the applicant attempts to bring the existing lot into closer conformance with MMC parking lot standards.

Petitioners, who are a group of business and property owners in the city's north industrial district, appealed the planning commission decision to the city council. The city council denied the appeal, affirming the planning commission interpretation and decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the city erred in applying MMC 19.502.B to allow less than complete compliance with the parking lot standards at MMC 19.500. According to petitioners, the theater to which the existing parking lot is accessory became a nonconforming use in 1985, when the industrial zone was amended to delete the conditional use under which the city had granted the theater a permit in 1972. Petitioners argue that that nonconforming theater use was abandoned in 2000 and no longer has any legal status. The

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[2] MMC 19.502 provides:

> "A. The standards and procedures of Chapter 19.500 shall apply to all development, remodeling and changes of use that increase parking and loading demand.
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> "B. The standards and procedures of this section shall also apply to uses with nonconforming parking and loading facilities, in an attempt to bring them into conformance with current standards when remodeling or change in use occurs."

park and ride use of the property prior to 2000 was never approved by the city, petitioners argue, and therefore that prior use also has no legal status. Because there are no current legal uses of the property, petitioners contend, TriMet's proposal for a park and ride should be viewed as a proposal for brand-new development on essentially a vacant lot, and not a proposal for "remodeling" or "change in use" to which MMC 19.502.B might apply. Therefore, petitioners conclude, the city must require full compliance with all of the MMC 19.500 parking standards.

Petitioners also argue that even if the proposal is properly seen as "remodeling" or "change of use" rather than a new use, because there is currently no lawful or unlawful use of the property, the current "parking and load demand" of the property is zero, for purposes of MMC 19.502.A. If so, petitioners argue, the proposed park and ride will necessarily "increase parking and load demand" and thus trigger application of MMC 19.502.A rather than 19.502.B. Petitioners argue that the city erred in construing MCC 19.502 otherwise.

Intervenor TriMet disputes petitioners' presumption that the theater and accessory parking lot are nonconforming uses. According to TriMet, the theater and parking lot were approved as conditional uses under the then-applicable industrial zone, that conditional use permit has no expiration date, and the theater remains a conditional use to this day, with an entitlement to 381 parking spaces.

The city found that its application of MMC 19.502 did not rely on any nonconforming use status for the existing structure or parking lot.[3] Record 288-90. As we

[3] The city council found as follows:

> "The appellant claims that TriMet cannot rely on a nonconforming use status in order to argue for a less than conforming parking lot design on the site. * * * The appellant misreads what the code provisions allows. The recommended findings for approval do not rely on a nonconforming use status. The only nonconformity on the site is with regard to parking design standards. Therefore, MMC Section 19.800 [Nonconforming Uses], which applies only to nonconforming uses and nonconforming structures, does not apply.

understand the city's findings, whether MMC 19.502.A or 19.502.B applies does not depend on the lawful status of the uses or structures existing on the property. The proposed park and ride is not "new development," we understand the city to find, because the property is currently is developed with a building and parking lot. The legal status of that existing development is irrelevant, in the city's view. Because the proposal is to demolish the building and reconstruct the parking lot, the city found, the proposal is for "remodeling" or a "change of use." Consequently, the city found, the baseline for determining whether that remodeling or change of use "increase[s] parking and loading demand," and thus whether MMC 19.502.A applies, is the parking demand created by the pre-existing theater use, 389 spaces. The city found that the proposed 329-space park and ride did not "increase parking and loading demand" compared to that previous use, and accordingly MMC 19.502.A did not apply.

> "When applying parking design standards on previously-developed sites, the City relies on MMC Section 19.502 'Off-Street Parking and Loading Applicability' to determine the extent to which parking design standards apply. Section 19.502.A states that the standards and procedures of the Off-Street Parking Code 'shall apply to all development, remodeling and changes of use that increase parking and loading demand.' When the lot was originally developed as a theater use, the demand was determined to be 381 spaces. The proposed 329 space park-and-ride will reduce the overall number of spaces, but will fulfill an overall regional parking demand for parking spaces along transit corridors. TriMet projects that demand for this lot to be equal to the 329 spaces provided since the lot will be absorbing an overall regional demand for commuter parking along transit corridors. The proposed park-and-ride will not increase parking and loading demand.
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> "For property with nonconforming parking and loading facilities, Section 19.502.B requires 'an attempt to bring them into conformance when remodeling or change of use occurs.' Nonconforming parking facilities are neither 'nonconforming uses' nor 'nonconforming structures' and are therefore not subject to Chapter 19.800, which only regulates nonconforming uses and nonconforming structures. The parking lot on this site is a nonconforming parking and loading facility since it was consistent with then applicable code when originally provided as parking for the theater use of the property, but does not currently conform with several design requirements, including landscaping/buffering requirements and disabled parking as to its design. In this situation, Section 19.502.B requires 'an attempt to bring [the parking design] into conformance with current standards.' The Planning Commission found and Staff agrees that the parking lot design proposed by the applicant is significantly closer to conformance with current parking design standards, particularly as to landscaped area." Record 289-90.

Petitioners have not demonstrated that the city council's interpretation of MMC 19.502 is reversible under the deferential standard of review LUBA applies to governing body interpretations of local land use legislation, under *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003) and ORS 197.829(1).[4] MMC 19.502.A does not indicate one way or another whether the pre-existing use or structure on developed property must *currently* be lawful, in order for redevelopment of the property to constitute "remodeling" or "change of use" rather than new "development." The city's view that a proposal to demolish and reconstruct existing development is properly viewed as "remodeling" or a "change of use" regardless of the current legality of that existing development is reasonable, and consistent with the plain language of the code.

Similarly, the city did not err in determining whether the proposed use "increase[s] parking load and demand" based on a comparison between parking demand created by the former theater use that ended in 2000 and the proposed park and ride. The fact that there has been little or no use of the theater or parking lot between 2000 and 2006 does not necessarily mean that the baseline for the comparison required by MMC 19.502.A is zero. In many if not most cases involving "remodeling" of existing development or a "change in use" there will be intervals of days, months or years between uses where no use or associated parking is

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[4] ORS 197.829(1) provides:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
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> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
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> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
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> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

occurring on the property. The city's apparent view that such intervals between uses do not reset the baseline to zero is reasonable, and not inconsistent with the text of MMC 19.502.A. In short, petitioners have not demonstrated that the city erred in concluding that MMC 19.502.B rather than 19.502.A governed application of the MMC 19.500 parking standards.

With respect to MMC 19.502.B, the city found that it applies to "remodeling" or "changes of use" involving "nonconforming parking and loading facilities" in circumstances where MMC 19.502.A does not apply, *i.e.*, where there is not an increase in parking demand or loading. The city further found that the existing parking lot is a "nonconforming parking and loading facilit[y]" because it does not comply with current parking lot standards. Petitioners challenge that finding, repeating their arguments that the existing use or structures must be a lawful use or structure, and arguing that "nonconforming parking and loading facilities" must be limited to parking facilities accessory to currently lawful uses. We reject that argument for the reasons set out above.

Petitioners further challenge the city's interpretation of the word "attempt" in MMC 19.502.B. While acknowledging that that word suggests some leeway in applying the parking standards in MMC 19.500, petitioners argue that MMC 19.502.B must be interpreted to allow incomplete compliance with those parking standards only where it would be physically impossible to comply. The city erred, petitioners contend, in interpreting MMC 19.502.B to allow incomplete compliance with parking standards simply because full compliance would reduce the number of parking spaces allowed.

MMC 19.502.B does not specify how much leeway from full compliance is permitted, "in an attempt to bring [the parking facility] into conformance with current standards[.]" The city interpreted MMC 19.502.B to allow incomplete compliance with current standards when full compliance would result in a significant loss of parking spaces and the applicant brings the parking facility into closer conformance with current standards than the existing facility. While petitioners' preferred interpretation might also be consistent

with MMC 19.502.B, we cannot say that the city's council's interpretation is inconsistent with the language of the code provision, or otherwise reversible under ORS 197.829(1).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

The Transportation Planning Rule (TPR) at OAR 660-012-0060(1) requires local governments to conduct certain analyses and adopt findings and mitigatory measures when local governments adopt an "amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation" that "significantly affects" a transportation facility.[5] An amendment to a local government's zoning map is an amendment to a "land use regulation," for purposes of OAR 660-012-0060(1). *Adams v. City of Medford*, 39 Or LUBA 464, 475 (2001).

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[5] OAR 660-012-0060(1) provides:

> "Where an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation would significantly affect an existing or planned transportation facility, the local government shall put in place measures as provided in section (2) of this rule to 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. A plan or land use regulation amendment significantly affects a transportation facility if it would:
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> "(a) Change the functional classification of an existing or planned transportation facility (exclusive of correction of map errors in an adopted plan);
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> "(b) Change standards implementing a functional classification system; or
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> "(c) As measured at the end of the planning period identified in the adopted transportation system plan:
>
> "(A) Allow land uses or levels of development that would result in types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;
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> "(B) Reduce the performance of an existing or planned transportation facility below the minimum acceptable performance standard identified in the TSP or comprehensive plan; or
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> "(C) Worsen the performance of an existing or planned transportation facility that is otherwise projected to perform below the minimum acceptable performance standard identified in the TSP or comprehensive plan."

The challenged decision approves a use allowed under the CSO zone on the subject property. The CSO zone is an "overlay zone" that is listed among the two dozen or so "use zones" in the city's zoning ordinance. MMC 19.321.1 states that the purpose of the CSO zone is to provide for the development of special uses that, because of their "public convenience, necessity, and unusual character, may be appropriate in one district but not another."[6] According to MMC 19.321.1, the CSO functions "as an overlay designation for public and private institutions in most zones and districts." MMC 19.321.2 sets out a list of "community service uses" that may be approved, including "public transit facilities." MMC 19.321.2.B.8. The standards to approve a CSO use are set out in MMC 19.321.4. Approval results "in the application of the community service overlay designation to a particular piece of land, subject to any conditions the planning commission may attach." MMC 19.321.4.D.[7]

Petitioners argue that approval of a CSO use under MMC 19.321 requires an amendment to the city zoning map, which therefore triggers the obligation to address and comply with the requirements of OAR 660-012-0060.

The city rejected that argument, finding that:

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[6] MMC 19.321.1 states:

> "**Purpose.** This section provides for the development of special uses which, because of their public convenience, necessity, and unusual character, may be appropriate in one district but not another. This section also provides for the review and approval of various kinds of public and private facilities including utility and recreational facilities. The community service overlay will function as an overlay designation for public and private institutions in most zones and districts."

[7] MMC 19.321.4.D provides:

> "The planning commission will hold a public hearing on the establishment of the proposed community service use. If the commission finds that the establishment of the community service use is in the general public interest and that the benefits to the public outweigh the possible adverse impacts of the use, then the commission may approve the designation of the site for community service use. If the commission finds otherwise, the application may be denied. This approval will result in the application of the community service overlay designation to a particular piece of land, subject to any conditions the planning commission may attach."

> ""[t]he CSO is an overlay designation that must meet development standards of the underlying zone and other criteria for CSO uses. Nothing in MMC Section 19.321 provides for a map change or imposition of a zone. CSO uses are similar to conditional uses in this respect. CSO approvals are not a map amendment since they do not amend the zoning map. Therefore, CSO uses are not required to conform with the Statewide Planning Goals or the TPR." Record 291.

Petitioners dispute that application of the CSO zone does not require a zoning map amendment. According to petitioners, the MMC 19.321.1 description of the CSO zone as an "overlay designation" suggests that it overlays, is placed on, the zoning map and thus amends that map. Even if application of the CSO zone does not require a zoning map amendment, petitioners argue that:

> "[T]he actual impact of the city's decision is no different than a zone change. Under the city's interpretation, the city is free to allow the establishment of intensive uses such as hospitals, schools, government office buildings, public transit facilities and many other listed uses and developments permitted in the CSO zone, in any base zone within the city, without considering whether the new uses allowed by the CSO zoning designation will affect a transportation facility within the meaning of the TPR. Such an ability to randomly allow new uses in the city's base zones, which are established in conformance with the acknowledged comprehensive plan, violates the Goal 12 requirement to ensure that existing and planned transportation facilities are adequate to service the *uses allowed under local zoning designations*. The city's interpretation of the CSO zone creates an 'end run' around the state TPR requirements, and also violates the city's comprehensive planning responsibilities under 197.175(2)." Petition for Review 14-15 (emphasis original).

The city and TriMet respond that under the MMC the CSO functions much more like a conditional use permit than a traditional overlay zone. According to respondents, MMC 19.321 allows an applicant to apply for a particular use approved by the planning commission; CSO approval does not allow any other CSO uses to operate on the site without a further CSO approval. Respondents argue that nothing in MMC 19.321 requires a zoning map amendment. At oral argument, the city pointed out that, in contrast to the CSO zone, other overlay zones in the city do specify that a zoning map amendment is required. MMC

19.323.2 (Historic Preservation Overlay Zone "may be designated HP on the zoning map"); MMC 19.318.2 (the Mixed Use [MU]Overlay Zone "will be applied to the zoning map").

Respondents are correct that, as the MMC is written, the CSO zone does not function like a traditional overlay zone, or even like the city HP and MU overlay zones. Under MMC 19.321, an applicant files an application for "the establishment of the proposed community service use," not for a zoning amendment to apply the CSO zone *per se*. MMC 19.321.4.D. If approved, the result is an approval for a particular use, and that approval carries no implication with respect to other listed CSO uses. Other than the categorization of the CSO zone as an "overlay" zone or overlay designation, nothing in MMC 19.321 indicates that CSO approval requires a zoning map amendment. In contrast, the HP and MU overlay zones clearly function as traditional overlay zones. The HP and MU overlay zones are added to the zoning map. Like traditional overlay zones, the HP and MU zones set out a range of uses in different categories requiring different levels of review, some permitted outright, and some subject to discretionary review, including conditional use review. The CSO zone, in contrast, provides a single list of uses, all of which require discretionary review.

For these reasons, the city's interpretation of the CSO zone to not require a zoning map amendment is consistent with the text and context of that provision. Accordingly, we defer to that interpretation. ORS 197.829(1).

Petitioners' argument that the CSO zone functions as an "effective" or *de facto* zoning map amendment for purposes of OAR 660-012-0060(1) presents a more difficult question. Petitioners are correct that the core function of OAR 660-012-0060 is to ensure appropriate consideration and mitigation for plan and zoning amendments that "significantly affect" transportation facilities, an inquiry which often requires some comparison between traffic impacts of uses allowed under the plan and zoning amendments and traffic impacts of uses allowed under the pre-existing plan and zoning scheme. For example, if the city's

transportation planning is based in relevant part on assumptions that certain property in the M zone would be developed only with uses allowed in the M zone, and the city rezones that property to allow more traffic-intensive uses than permitted in the M zone, in the typical circumstance the city would be required to evaluate whether the rezone "significantly affects" nearby transportation facilities, pursuant to OAR 660-012-0060(1)(c). Petitioners are correct that the CSO zone allows approval of a number of relatively high traffic-intensive uses not expressly allowed in the M zone, such as hospitals and public transit facilities. However, under the MMC as interpreted by the city council, such uses may be approved in the M zone without any evaluation under OAR 660-012-0060. A zoning scheme that includes a process such as the CSO zone might accurately be characterized as an "end run" around the requirements of OAR 660-012-0060, as petitioners contend. It is arguable that such a scheme is inconsistent with at least the intent of OAR 660-012-0060.

However, we need not further consider petitioners' argument to that effect. The city's zoning ordinance is acknowledged to comply with all statewide planning goals, and the TPR. If the city's acknowledged CSO provisions apply in a way that is inconsistent with the intent or even the text of OAR 660-012-0060, any inconsistency cannot be challenged in an appeal of a decision that simply applies those acknowledged provisions. *See Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 46, 911 P2d 350 (1996) (a goal or rule compliance challenge cannot be advanced to an interpretation of an acknowledged ordinance, when, however phrased, the challenge necessarily depends on the thesis that the acknowledged local land use legislation itself does not comply with a goal or rule). Here, under the text and context of relevant code provisions, it is reasonably clear that approvals under the CSO zone do not require a zoning map amendment or other amendment that would trigger OAR 660-012-0060. The city council's interpretation to that effect is a relatively straightforward reading of the relevant code provisions. Accordingly, petitioners' interpretational challenge is in essence an argument that the acknowledged CSO zone

violates OAR 660-012-0060. That argument is beyond our scope of review. Therefore, petitioners' arguments under this assignment of error do not provide a basis for reversal or remand.[8]

The second assignment of error is denied.

The city's decision is affirmed.

[8] Respondents also argue, in the alternative, that the city required TriMet to submit a traffic impact analysis to demonstrate compliance with applicable city transportation requirements for "adequate transportation facilities," and that the city adopted findings concluding that the proposed park and ride met those standards. Respondents argue that even if OAR 660-012-0060 is triggered, the same evidence is sufficient to demonstrate that the proposed use will not "significantly affect" any transportation facility, within the meaning of OAR 660-012-0060(1). We need not and do not address this argument.