BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAMES LUBISCHER,
Petitioner,

vs.

CITY OF HILLSBORO,
Respondent,

and

VENTURE PROPERTIES, INC.,
Intervenor-Respondent.

LUBA No. 2006-144

FINAL OPINION
AND ORDER

Appeal from City of Hillsboro.

James Lubischer, Hillsboro, filed the petition for review and argued on his own behalf.

Timothy J. Sercombe, Portland, filed a joint response brief and argued on behalf of respondent. With him on the brief were Preston Gates Ellis, LLP, Edward J Sullivan, Carrie A. Richter and Garvey Schubert Barer, PC.

Edward J. Sullivan, Portland, filed a joint response brief and argued on behalf of intervenor-respondent. With him on the brief were Carrie A. Richter, Garvey Schubert Barer, PC, Timothy J. Sercombe, and Preston Gates Ellis, LLP.

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

AFFIRMED 12/14/2006

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a decision of the Hillsboro City Council (city) denying petitioner's appeal of a planning commission decision, and approving a Conceptual Development Plan for a 252-unit development known as "Orenco Woods Crossing."

MOTION TO FILE A REPLY BRIEF

Petitioner moves to file a reply brief to address alleged new matters raised in the response brief. We agree with petitioner that a reply brief is warranted, and allow the motion.

MOTION TO STRIKE

Petitioner moves to strike intervenor-respondent's submission of facts petitioner alleges are not contained in the record. Specifically, petitioner argues that an assertion by intervenor-respondent in its response brief that the applicants had agreed to list the McDonald House on the National Register of Historic Places is a fact not found in the record. In view of our disposition of the fourth assignment of error below, the motion is denied.

FACTS

The subject property is a former golf course that is located next to a light rail line and adjacent to the city's Orenco neighborhood to the east. The historic McDonald House is located on the northwestern portion of the property.

In April, 2006, the comprehensive plan designation for a large portion of the property was changed from Open Space/Flood Plain to Medium Density Residential and Low Density Residential, and the property was rezoned from County Institutional to Station Community Residential – Village (SCR-V).[1] Under SCR-V zoning, a concept development plan (CDP)

[1] In connection with the rezoning, the city council adopted Ordinance 5633, which rezoned the property with certain conditions. Ordinance 5633 is not the subject of this appeal.

and a detailed development plan (DDP) are required for development approval.[2] Venture Properties, Inc. and Hillsboro Elks Lodge Number 1862 (together, intervenor or applicants) submitted a DDP and a CDP, and the planning commission approved both plans.

The Orenco Neighborhood Association appealed the planning commission's decision approving the CDP to the city council. Petitioner testified orally and in writing before the city council. The city council denied the appeal and approved the CDP with conditions. This appeal followed.

FIRST ASSIGNMENT OF ERROR

A. Introduction

The proposed development is residential, and it is undisputed that it does not include any commercial development. Petitioner contends that development in the SCR-V zone must be mixed-use development and may not be entirely residential. Petitioner contends the city erred by approving intervenor's entirely residential CDP.

Hillsboro Zoning Ordinance (HZO) Sections 136 and 137 set out detailed requirements for the city "Station Community Planning Areas." HZO Section 136(I) describes the "Purpose" of the Station Community Planning Areas (SPCAs).[3] HZO Section

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[2] The SCR-V zoning designation is one of several special zoning designations that are applied in Station Community Planning Areas (SCPAs). SPCA boundaries generally extend one-half mile from a light rail station. Hillsboro Comprehensive Plan 84. The property was zoned SCR-V even though it is not located in a SCPA. Respondent's Brief 9.

[3] HZO 136(I) provides in part:

> "A. Station Community Planning Areas (SCPAs) are established to promote transit-supportive and pedestrian sensitive *mixed use developments* in areas near light rail transit stations. The purpose of this Section is to describe the characteristics of Station Community Planning Areas and set forth clear and objective standards with which all applications for development shall comply.
>
> "B Station Community Planning Areas consist of zoning districts which share a number of qualities and characteristics but are distinguished by differences in emphasis on primary uses and intensity of development. The land use districts are designed to work together to result in a lively, prosperous *mixed-use neighborhood* providing an attractive place to live, work, shop and recreate with less reliance on the automobile than is typical elsewhere in the community. * * *" (Emphases added).

136(II) establishes 14 different SCPA land use districts, one of which is the SCR-V. HZO Section 136(II)(H) describes the intent of the SCR-V district.[4]

HZO Section 136(VII)(B)(6)(b) lists the criteria for CDP approval.[5] In particular, HZO 136(VII)(B)(6)(b)(1) requires that a CDP be consistent with the purpose of SCPAs as described in HZO 136(I), *see* n. 3, and the intent of the applicable SCPA district described in HZO Section 136(II)(H), *see* n 4. Because the purpose of the SCPAs is to "promote transit-supportive and pedestrian sensitive mixed use developments in areas near light rail transit stations," and the intent of the SCR-V district is to "to assure the development of a

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[4] HZO Section 136(II)(H) provides:

> "The SCR-V District may be applied to property containing at least thirty (30) acres in single ownership or control located within approximately 3,900 feet of a light rail station site. The SCR-V District is intended to assure the development of a pedestrian-sensitive, yet auto-accommodating, community containing a range of residential housing types, mixed use residential, free-standing neighborhood commercial uses and employment opportunities. A residential village project may be developed in one or more phases. A residential village incorporates a number of design, development and infrastructure features indicative of a self-reliant neighborhood; including, but not limited to: multi-purpose streets linking residential areas with neighborhood activity and commercial centers and the light rail station; horizontal and vertical integration through continuity of urban design befitting a growing major metropolitan area; quality and craftsmanship in the built environment; a lively mix of neighborhood shopping and community services; advantageous and sensitive use of natural resource features and open space; and innovative and imaginative site planning in order to develop a sense of place where the amenities, facilities, features, and overall urban design and architectural integration could not be achieved through application of any other individual or abutting combination of districts or zones."

[5] HZO Section 136(VII)(B)(6)(b) provides:

> "b. The Planning Commission shall approve an application for Concept Development Plan approval only upon finding the following approval criteria are met:
>
> "(1) That the proposed Concept Development Plan is consistent with the purposes identified in this section and the intent of the applicable SCPA district;
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> "(2) The phasing schedule is reasonable and does not exceed five (5) years between commencement of development on the first and last phases unless otherwise authorized by the Planning Commission; and
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> "(3) That the proposed Concept Development Plan complies with minimum residential density, minimum floor area ratio and minimum usable open space requirements of Sections 137 and 138."

pedestrian-sensitive, yet auto-accommodating, community containing a range of residential housing types, mixed use residential, free-standing neighborhood commercial uses and employment opportunities," petitioner contends that intervenor's CDP proposal for residential development without any commercial development is inconsistent with HZO 136(VII)(B)(6)(b)(1).

Looking at the text of HZO Section 136(I) and HZO Section 136(II)(H) in isolation, it would be difficult to agree with petitioner that HZO 136(VII)(B)(6)(b)(1) effectively mandates that a CDP for residential development include a commercial development component. HZO Section 136(I) states that one purpose of SCPAs is to "promote" mixed use development. Promotion is not the same thing as mandating that every separate development must be mixed use development. Even if HZO Section 136(II)(H) is interpreted to express an intent to "assure" mixed use development, an intent to assure something is not the same thing as mandating that every separate development proposal must be a mixed use development.

Petitioner cites a large number of contextual HZO provisions in support of his position that mixed use development is mandated in the SCR-V District. *See PGE v. Bureau of Labor and Industries,* 317 Or 606, 610-11, 859 P2d 1143 (1993) (first step in ascertaining the meaning of a statute is to examine the text and context of the statute). Some of those contextual provisions strongly support petitioner's position that development in the SCR-V District must be mixed use development.[6] This no doubt reflects the fact that before the HZO was amended in 2000, there was no question that the SCR-V District required that at

[6] For example, HZO Section 140(III)(D) specifically provides that "[t]he requirement for ten percent (10%) neighborhood commercial in the SCRV District" is waived in one particular SCR-V area. As petitioner correctly points out, that exemption would be unnecessary if there were no requirement that 10% of the development proposed in an SCR-V district must be commercial. Additionally, HZO Section 136(VII)(B)(2)(f)(5) specifically prohibits "[a]ny provision that would eliminate or effectively eliminate the required mix of residential, commercial and employment uses within the SCR-V District."

least 10 percent of the net acreage of a proposed development in the SCR-V District be developed with neighborhood commercial uses.

HZO Section 137(II) sets out the development criteria that apply in each SCPA District. Those development criteria appear in Tables 1.a through 1.n, and in HZO Section 137(III) through (XI). Table 1.h sets out development criteria in the SCR-V District. Prior to its amendment in 2000, Criterion 20 of Table 1.h (Criterion 20) provided as follows:

> "At least 50% of the net acreage in a SCR-V project shall be residential. Mixed use residential/commercial buildings may be up to an additional 20%. *At least 10% of net acreage shall be neighborhood commercial uses.* Up to 20% of net acreage may be other employment uses." (Emphases added).

To summarize, prior to the year 2000, Criterion 20 unambiguously required that "[a]t least 10%" of the net acreage of a SCR-V project "shall be neighborhood commercial uses." The HZO Section 136(I) purpose statement for SCPAs and the Section 136(II)(H) intent statement for the SCR-V, as well as the many contextual HZO provisions that petitioner cites are all consistent with the previously mandatory 10 percent neighborhood commercial requirement in Criterion 20.

B. Ordinance 4921

On June 20, 2000, the city adopted Ordinance 4921, which amended Criterion 20 to read as follows:

> "At least 50% of the net acreage in a SCR-V project shall be residential. Mixed use residential/commercial buildings may be up to an additional 20%. *Up to 10% of net acreage may be neighborhood commercial uses.* Up to 20% of net acreage may be other employment uses." (Emphases added). Petition for Review Appendix 58.

Ordinance 4921 converted a mandatory minimum commercial requirement of 10% neighborhood commercial uses to an option to include no more than 10% neighborhood commercial uses. The text of Ordinance 4921, which explained why the amendment was adopted, makes the legislative intent even clearer:

> "WHEREAS, the Planning Commission received testimony in support of an amendment to revise Table 1.h in Zoning Ordinance Section 137 (II), to make the 10% neighborhood commercial requirement in SCR-V zone optional, not mandatory, as it now is, and
>
> "* * * * *
>
> "WHEREAS, the Planning Commission therefore adopted Resolution No. 1144-P on April 26, 2000, initiating a Zoning Ordinance Amendment to Section 137 (II), Table 1.H. Development Criteria, Station Community Residential-Village, Subsection 20, to revise that Subsection, and
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> "* * * * *
>
> "WHEREAS, the City Council considered this matter on June 20, 2000, and voted to adopt the recommendation of the Planning Commission on this matter.
>
> "NOW, THEREFORE, THE CITY OF HILLSBORO DOES ORDAIN [THAT TABLE 1.H BE AMENDED]." Petition for Review Appendix 57.

Where there is a conflict between general and specific legislative requirements, the specific requirement controls. *See Tri-River Investment Co. v. Clatsop County*, 37 Or LUBA 195, 206 (1999), *aff'd* 165 Or App 315, 995 P2d 598 (2000); *see also* ORS 174.020(2) ("when a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent"). Moreover, rules of construction favor more current legislative policy enactments over older ones. *See State v. Langdon*, 330 Or 72, 81, 999 P2d 1127 (2000) (rule of statutory construction favors more current enactments over older enactments). Ordinance 4921 made clear that the city intended to and in fact did make commercial development in the SCR-V zone optional, notwithstanding the more generally worded provisions elsewhere that favor including mixed use development. Based on applicable rules of statutory construction, the city's resolution of the inconsistencies in the HZO was reasonable.

C. Codification of Ordinance 4921 and Adoption of Ordinance 4930

In codifying Ordinance 4921, the city made a mistake. We set out the relevant language of Criterion 20 below, first as it was amended by Ordinance 4921, and second as it was codified:

> "Up to 10% of net acreage may be neighborhood commercial uses." (As amended by Ordinance 4921)

> "At least 10% of net acreage may be neighborhood commercial uses." (As codified by Ordinance 4921)

By retaining and recodifying the pre-Ordinance 4921 words "At least 10%," rather than the adopted words "Up to 10%," an ambiguity is present in the codified language that was not present in the Ordinance 4921 amendment. The phrase "at least" suggests neighborhood commercial uses are mandatory, whereas the phrase "up to" suggests neighborhood commercial uses are an option. Although we agree with the city's interpretation that even with such an ambiguity the codified language of Criterion 20 made neighborhood commercial uses optional rather than mandatory, the language adopted by Ordinance 4921 is the actual adopted language of Criterion 20, not the mistakenly codified language. The language of Ordinance 4921 as adopted is not ambiguous and it makes neighborhood commercial uses optional under Criterion 20.

The city adopted a second ordinance, Ordinance 4930, on July 18, 2006. Ordinance 4930 was adopted with an emergency clause and therefore took effect immediately.[7] Ordinance 4930 amended certain criteria set forth in Table 1.h, and numerous other HZO provisions, but did not amend Criterion 20. The version of Criterion 20 attached to Ordinance 4930 included the old (pre-Ordinance 4921) "mandatory commercial" language regarding neighborhood commercial uses in the SCR-V District. Ordinance 4930 either

[7] HZO Section 123 provides: "No ordinance shall take effect before the expiration of thirty days from the date of its passage, unless such ordinance shall contain an emergency clause stating the reasons for the necessity of its taking effect before the expiration of thirty days."

readopted the pre-Ordinance 4921 Criterion 20 language, or simply left that mandatory commercial language in place. In either event, Ordinance 4921, which did not include an emergency clause, took effect two days later on July 20, 2000, and the new "optional commercial" language took effect on that date. The language of Criterion 20 that is actually in effect today is the language that was adopted by Ordinance 4921.

D. The Parties' Remaining Arguments

Petitioner also argues that the CDP does not meet the requirements of HZO Section 137(II), Table 1.h., Criterion 7 (Criterion 7), because Criterion 7 mandates that the CDP provide "employment opportunities."[8] Respondent answers that there is no requirement for a developer to provide employment opportunities within the proposed development. We agree with respondent that the applicable language set forth in Criterion 7 is phrased in terms of goals and objectives rather than requirements. That section uses the phrase "*target* employment density" (emphasis added) in the context of "non-residential density *objectives*" (emphasis added). In addition, HZO Section 137(VII)(A) discusses the non-residential employment "objectives" applicable in residential districts where non-residential development is a permitted or conditional use, describing them as a "tool," and states that the objective may not applicable where targets cannot be achieved.[9]

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[8] HZO Section 137(II), Table 1.h., Criterion 7 provides:

7.	Non-Residential Density objective	Target employment density within the District is 45 persons per net acre

[9] HZO Section 137(VII)(A) provides in relevant part:

> "Minimum density objectives are a tool for helping to achieve a desired intensity of development and encouraging increased use of light rail transit. These provisions are intended to help ensure development and employment opportunities will occur at levels supportive of transit in areas identified for non-residential uses which are within walking distance of light rail stations. Data on employment densities also helps the City determine the demand for and size of the roadway and infrastructure system.

In approving the CDP, the city also made an alternative finding that the proposed development was sufficiently mixed-use to satisfy approval standards, and that the mixed use character of nearby development could be taken into account. The approved CDP is for detached and attached single family uses, parkland, open space and floodplain, and preservation of the McDonald House. The city determined that the range of housing types within the CDP, including the option of retail commercial and pedestrian-related office uses on the ground and second floors of residential structures, connection to nearby parks and open space through a regional trail system, the retention of the McDonald House, and the fact that the CDP is part of the larger Orenco neighborhood were sufficient to show that the development is a mixed-use development meeting the applicable criteria. Record 24-25, 430-462. The city's findings on this issue are adequate and are supported by substantial evidence in the record.

Respondent advances other arguments under the first assignment of error that we need not consider.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner asserts that the city erred in approving the CDP because the applicants' required traffic impact analysis (TIA) did not comply with HZO Section 136(VII)(B)(5)(c)(2), which requires an applicant for development review approval to submit a "full traffic impact report" as specified in the code. HZO Section 137(XVI)(C)(1)(a) describes the requirements for the TIA, and states in relevant part:

> "The report methodology shall *generally* be in accord with the standards and procedures set forth in Washington County Resolution and Order No. 86-95 and related code provisions[.]" (Emphasis added)

"In residential districts where non-residential development is a permitted or conditional use, specified minimum non-residential density targets may not be applicable where such targets cannot be achieved by the size of commercial uses permitted in that district."

Washington County Resolution and Order No. 86-95 (Resolution 86-95) contains a requirement that for purposes of a TIA, traffic should be measured within the previous 12 months prior to the application.

The application was submitted on February 21, 2006. The applicants' TIA included traffic count data from two counts taken in December, 2005 and another count taken in May, 2004. Petitioner asserts that because the applicants' TIA used counts that were collected approximately 19 months prior to the application submittal date, the city's findings regarding traffic impacts are not supported by substantial evidence in the record.

Respondent answers that there is substantial evidence in the record to support the city's finding that the applicable review criteria regarding traffic impacts were satisfied. We agree with respondent that substantial evidence exists to support the city's finding. First, the language of HZO Section 137(XVI)(C)(1)(a) quoted above contains the word "generally," indicating that the city may require something less than absolute or strict compliance with Resolution 86-95.[10] Second, the applicants' TIA includes traffic measurements that were collected in December 2005, in compliance with Resolution 86-95. The TIA also analyzed traffic counts taken in May, 2004 because the December 2005 counts were lower than the counts taken in May, 2004. Record 895. The traffic counts taken in May, 2004 were used by the applicant to generate a "worst-case" estimate of operating conditions at the study intersections. The city's independent transportation consultant reviewed the TIA, and both the consultant and the city's transportation staff found both of the December, 2005 counts, and the May, 2004 counts to be reliable and accurate. The TIA is substantial evidence supporting the city's conclusion that the applicable transportation criteria are satisfied.

The second assignment of error is denied.

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[10] Webster's Third New International Dictionary (Unabridged) 945 defines the word "generally" to mean "in a general manner: * * * c: in disregard of specific instances and with regard to an overall picture <*generally* speaking> d: on the whole: as a rule."

THIRD ASSIGNMENT OF ERROR

Petitioner next asserts that the city erred in approving the CDP because the TIA did not contain "mid-day one hour" traffic counts as required by HZO Section 137(XVI)(C)(1), Table 137.4. HZO Section 137(XVI)(C)(1)(c) provides in relevant part:

> "The general performance standards for transportation facilities (as measured for both intersection and roadway segments) shall be the Level of Service ('LOS') measurements shown in Table 137.4 * * *."

Table 137.4 lists level of service standards within SPCAs, and sets an acceptable level of service (LOS) standard of "D" for the "mid-day one hour" time period.[11]

The city adopted the following findings to address the issue of mid-day traffic counts and analysis:

> "The short answer to this contention is that the traffic impacts were assessed for the weekday a.m. and p.m. peak hours *and that these periods always encompass higher traffic volumes than the midday peak hour, both in terms of the peaking characteristics of the proposed residential use and the peak hour of adjacent street traffic*. Moreover, the standards set out in HZO Section 137, Table 137.4 require an 'acceptable' level of service D or better under the mid-day standards (as opposed to the same or a slightly lower level of service during the peak hours.) The level of service for the intersections at issue here is projected to be D or better at peak periods of traffic. *It follows that the level of service during the mid-day, with less traffic, would be D or better and consistent with the mid-day standards announced in Table 137.4.* The analysis of traffic impacts was, therefore, conservative and evaluated worst case conditions. * * * Any deficiency in the traffic impact report [regarding the midday peak period standard] is an insufficient reason to deny the [CDP]." Record 51 (Emphases added).

In short, the city reasoned that in assessing the traffic impact of a residential subdivision, the critical time periods for measurement and analysis are the a.m./p.m. peak hour periods, presumably due to trips to and from work and school. We understand the city to have found midday traffic generation by a residential subdivision to be negligible. Since

[11] HZO Section 137(XVI)(C)(1)(c), Table 137.4 defines the "Mid-Day One Hour Standard" as "A one hour period measured during the peak hour between noon and 2:00 p.m. (whichever is higher) to assess off-peak congestion."

the TIA showed that LOS standards during the a.m./p.m. peak hours were "acceptable" under the Table 137.4 standards, it followed that the mid-day one hour LOS would not be lower than an "acceptable" level. Because the midday traffic impact of residential development is negligible, and the midday performance is likely consistent with the midday standard, we understand the city to conclude that the failure to actually measure current midday traffic is not a basis to deny the application.

Petitioner argues that the city's findings quoted above are based on assumptions and not supported by substantial evidence. Although we agree that the findings quoted above could be clearer, petitioner does not explain why, even if the city's findings are based on assumptions, those assumptions are inaccurate or impermissible. In addition, the city based its findings in part on the opinions of its independent traffic consultant and the applicants' transportation expert. Record 895, 1353. It was reasonable for the city to rely on its traffic expert and the applicants' traffic expert in assuming that mid day traffic measurements would be lower than a.m./p.m. peak hour measurements to find that the mid-day one hour standard required in Table 137.4 was met.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

In April, 2006, the city council adopted Ordinance 5633, which rezoned a portion of the property to SCR-V, with certain conditions. *See* n. 1. Condition 2(b) of Ordinance No. 5633 provided:

> "Within the Concept Development Plan/Detailed Development Plan applications, the developer shall provide the following:
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> > "(b) Information verifying that funding has been dedicated to an application to place the McDonald House on the National Register of Historic Places, and the status of the application. The developer and owner of the property shall follow the advice and conditions provided by the State Historic Preservation Office and shall make a good-faith effort in filing the application[.]" Record 464.

Petitioner asserts that the city erred in approving the CDP because the CDP application did not contain the information required by Ordinance No. 5633, Condition 2(b), and that the city impermissibly deferred compliance with Condition 2(b) to subsequent proceedings. The language of Condition 2(b) does require the applicant to provide the information listed therein "within the Concept Development Plan***application[.]" However, Condition 2(b) makes clear that what the city was interested in obtaining was *information* from the applicant showing that funding had been dedicated to the costs of filing an application to list the McDonald House on the National Register of Historic Places, *information* on the status of the application, and a future commitment to use good faith efforts in filing an application. Condition 2(b) does not require the applicant to successfully list the McDonald House.

The applicant provided evidence during the proceedings below that it had adequate funds to file an application, and also gave a status update on the application. Record 329, 667, 671, 877, 922-923, 1182-83. In addition, in the CDP approval, the city imposed a condition (Condition 64) which went beyond what was required by Condition 2(b), because Condition 64 requires Hillsboro Elks Lodge to actually file an application for listing the McDonald House. Condition 2(b) merely required the applicant to use "good faith efforts" to file an application.

The city received the information and commitments that Condition 2(b) required the applicant to provide. Because the city found compliance with Condition 2(b), and that finding was supported by substantial evidence, the city did not defer that finding of compliance to a later proceeding. *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447-48 (1992); *see also Salo v. City of Oregon City*, 36 Or LUBA 415, 425 (1999).

The fourth assignment of error is denied.

The city's decision is affirmed.