BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GLENDA FLEMING, DAN HOWELL,
GLORIA OLSON, KYLE MOSELLE and
FRIENDS OF LINN COUNTY,
Petitioners,

vs.

CITY OF ALBANY,
Respondent,

and

558733 BRITISH COLUMBIA LTD.,
Intervenor-Respondent.

LUBA No. 2006-238

FINAL OPINION
AND ORDER

Appeal from City of Albany.

Jannett Wilson, Eugene, filed the petition for review and argued on behalf of petitioners. With her on the brief was the Goal One Coalition.

No appearance by City of Albany.

Roger A. Alfred, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief were Steven L. Pfeiffer, Corinne Sam, and Perkins Coie, LLP.

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

AFFIRMED 04/26/2007

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 council decision approving comprehensive plan map and zoning map amendments from residential to commercial to facilitate proposed commercial development.

MOTION TO INTERVENE

558733 British Columbia Ltd. (intervenor), the assignee of the original applicant below, moves to intervene on the side of the city.[1] There is no opposition to the motion and it is allowed.

FACTS

The subject property is a 16.8-acre tract located on the south side of the Santiam Highway. The northerly 4.7 acres of the property is designated General Commercial (GC) on the city's comprehensive plan map and zoned Regional Commercial (RC). The southerly 12.1 acres is designated and zoned for residential use.

In May 2003, the owner of the subject property applied for comprehensive plan map and zoning map amendments for the southerly 12.1 acres to change the existing residential designations to GC and RC, so that the entire 16.8-acre property would be zoned and planned for commercial use. The city planning commission held a hearing in October 2003, and recommended that the city council approve the application. The city council conducted a hearing in November 2003, but voted to "table" the application because of concerns that commercial development of the property under the new plan designation and zoning would generate traffic levels inconsistent with the capacity of nearby transportation facilities.

In 2005, intervenor acquired the right to pursue the application and filed new information to address the traffic impact issue, principally by proposing a cap on the number

[1] The original applicant, V. Ropp Investments, assigned the applications to intervenor effective November 1, 2005. Record 17.

of new vehicle trips allowed under the amended plan and zoning map designations. The trip cap was designed to limit the number of vehicle trips that could be generated by commercial development of the property to the number of trips that could be generated under the former split commercial and residential plan and zoning map designations that applied to intervenor's property as a whole.

The city council held a public hearing on the revised application on October 25, 2006, and voted to approve the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Albany Comprehensive Plan (ACP) Goal 2, Policy 2, provides a list of factors to be considered when amending the comprehensive plan map, including a "[d]emonstration of public need for the change," and a "[d]emonstration that the proposed amendment will best meet the identified public need versus other available alternatives." ACP Goal 2, Policy 2(f) and (g).

The city found that there is a "public need" for the proposed amendments based on the scarcity of large tracts of commercial lands in the city that could attract large regional commercial uses. The city considered three documents in reaching that conclusion: (1) the Albany Economics Opportunities Analysis (EOA) completed in 2002, (2) a 2005 inventory of vacant and redevelopable commercial parcels, and (3) a 2006 memorandum submitted by intervenor known as the Hovey Report. The city had formerly adopted the 2002 EOA as part of the comprehensive plan. However, the 2005 inventory and 2006 Hovey Report are not part of the city's comprehensive plan or land use regulations.

Petitioners argue that the city's decision is inconsistent with Statewide Planning Goal 2 (Land Use Planning), because it is not based on the city's acknowledged comprehensive plan and land use regulations, as Goal 2 requires, but instead is based in part on unacknowledged documents and inventories that are not part of the city's comprehensive plan or land use ordinance. *1000 Friends of Oregon v. City of Dundee*, 203 Or App 207,

216, 124 P3d 1249 (2005); *D.S. Parklane Development, Inc. v. Metro*, 165 Or App 1, 22, 994 P2d 1205 (2000).

Intervenor responds, initially, that no party raised any issue regarding Statewide Planning Goal 2 during the 2006 proceedings on the revised application. According to intervenors, petitioners submitted a letter dated October 25, 2006 that raised general concerns regarding traffic issues, but that letter did not reference Goal 2 or raise the issues advanced in this assignment of error. Because this issue was not raised below, intervenor argues, it is waived. ORS 197.763(1); ORS 197.835(3).[2]

At oral argument, petitioners argued that the issue of compliance with Goal 2 was raised during the initial proceedings in 2003, at Record 409. Intervenor responds, however, and we agree, that nothing at Record 409 mentions Statewide Planning Goal 2 or raises the issue presented in the first assignment of error. Because petitioners have not established that any issue regarding Statewide Planning Goal 2 was raised below, the issue is waived.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Under the second assignment of error, petitioners challenge the manner in which the city calculated the "trip cap" that the city adopted in order to ensure that the map amendments comply with the transportation planning rule, at OAR 660-012-0060.

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[2] ORS 197.763 applies to quasi-judicial land use decisions. No party disputes that the challenged map amendment decisions are quasi-judicial land use decisions. ORS 197.763(1) provides:

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

ORS 197.835(3) states:

> "Issues [before LUBA] shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

According to petitioners, the trip cap was calculated based on a figure in the 2002 EOA, that predicts future demand for commercial development assuming a .40 floor area ratio (FAR). Petitioners argue that the city should have used instead a figure in the city's transportation system plan (TSP), which assumes a .27 FAR for commercial development in the city. If the .27 FAR is used, the trip cap would have to be reduced.

Intervenor responds that no participant below raised the issue presented in this assignment of error. At oral argument, petitioners cited to three places in the record where the issue of which FAR figure to use was allegedly raised: Record 165, 168 and 175. We agree with intervenor that nothing cited to us on Record pages 165 or 175 mentions FAR or raises the issue advanced in this assignment of error.

Record 168 is part of the minutes of the city council hearing on October 25, 2006. The minutes reflect that after the public hearing had closed a city councilor moved to approve the proposed amendments. That motion was seconded, and then the city councilors deliberated on the motion. One councilor asked several questions regarding use of the .40 FAR, and ultimately voted against the application.[3] Intervenor argues that statements made by a city councilor after the close of the hearings do not satisfy the ORS 197.835(3)

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[3] The minutes of the October 25, 2006 city council deliberations state:

> "[City Councilor] Olson asked, have we developed a Transportation System Plan (TSP) based on the commercial 40 percent floor area ratio (FAR)? City Engineer Mark Shepard said the TSP is in development and is generally based on land use, not FAR. Olsen thinks the City would have to decide if commercial land use would be based on 40 percent or something less, if we intend to plan our street system appropriately. Transportation Systems Analyst Ron Irish said the computer model that the plan is based on doesn't use FAR; it assumes an employment density for commercial. The employment density roughly equates to an FAR of .27, as adopted in 1997. * * *
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> "Olsen asked, when the Council previously reviewed this property, were we concerned about the capacity of the interchange between Highway 20 and Interstate-5? [Staff] said yes. Olsen said, at that time we thought the Comprehensive Plan was satisfactory for the situation at the overpass but we did think that adding the extra commercial property would overload the interchange. * * * Olsen said it would seem to him since it was based on .27 FAR the applicant is saying that with a .40 FAR, they should have a bigger piece of property. He disagrees and will vote no." Record 168.

requirement that issues LUBA may consider must be "raised by any participant before the local hearings body" or the ORS 197.763(1) requirement that such issues be raised "not later than the close of the record at or following the final evidentiary hearing." We agree with both contentions. A member of the decision-making body is not a "participant before the local hearings body." And, in any case, the city councilor made his remarks after the close of the record following the final evidentiary hearing.

In the petition for review, petitioners cite and quote part of a passage from the staff report to the city council, at Record 206, in which staff discussed why it agreed to allow the applicant to use the .40 FAR in the EOS rather than the .27 FAR in the TSP.[4] Although the

[4] The staff report states, in relevant part:

> "Staff identified several topics that we thought needed discussion among staff and with the applicants as we reviewed the new information. It is likely the City Council will also find them to be of interest.
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> "* * * Assumptions on density: The first question was about an assumption in the applicant's new information about the density of commercial development that could be built on the property with the current map designations. The traffic engineer hired by the applicants assumes that buildings could be constructed on the property that are equal in area to 40 percent of the area of the property. This ratio is commonly expressed as floor area to property area ratio, or FAR (Floor Area Ratio). Most large scale commercial development that we see in Albany is built a density of about 0.25 FAR. This is the ratio that is also commonly used when people do studies that look at how we can expect commercial property to be developed.
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> "Staff wondered if the 0.40 FAR was a reasonable assumption to use in establishing the trip cap. More density generates more trips, which makes the assumption about the amount of traffic that could be generated with current map designations higher. The trip cap for new development would be higher using the 0.40 trip cap than with the 0.25 FAR.
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> "* * * * *
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> "In most situations, we have to use the numbers we use in the Comprehensive Plan because it is the document that prevails when there is a question about what information to use. In this case, the [EOA] uses a 0.40 FAR to project future demand for commercial land. The [TSP] uses a 0.27 FAR to project future traffic generation from commercial development on the transportation system. Both documents have been adopted by the City Council as supporting documents to the Comprehensive Plan.
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> "The applicant's traffic engineer calculated that 239,000 square feet of commercial floor area could be developed on the property using the 0.40 FAR. This results in about 800 new vehicle trips on the street system at the p.m. peak hour. Staff calculated that 149,000 square

petition for review does not frame it this way, we understand petitioners to argue that the staff report is sufficient to "raise" the issue of whether the trip cap must be based on the .27 FAR in the TSP rather than the .40 FAR in the EOS, for purposes of ORS 197.763(1) and 197.835(3).

Although it is a closer question, we do not agree that the cited passage in the staff report is sufficient to raise the issue presented in this assignment of error. Under ORS 197.763(1), issues must be "raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue." The passage in the staff report explains, essentially, why staff agreed to use the FAR figure that intervenor requested. The discussions and agreement between staff and the applicant on this point are provided to the city council in the belief that they may "be of interest." Nothing in the staff report cited to us suggests that there remains any issue to be resolved on this matter, or requests that the city council resolve the issue. The discussion is presented as an already resolved, agreed-upon issue. As far as we are informed, no other participant before the city council questioned that agreement or raised any issue regarding which FAR figure should be used.

As noted, at least one city council member apparently found this resolved issue to "be of interest," and voted against the proposal for reasons related to that issue. Nonetheless, as presented in the staff report prior to the close of the evidentiary record, a reasonable decision maker would not recognize the above-quoted passage in the staff report as raising a cognizable issue that required some response, findings or other action. In our view, a staff statement that staff has reached agreement with the applicant with respect to a particular

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feet of commercial floor area could be developed on the property using the 0.25 FAR. This results in about 525 new vehicle trips on the street system at the p.m. peak hour.

"After considerable discussion among staff and with the applicant, we have concluded that the City Council could accept the 0.40 FAR assumption. * * *" Record 206.

manner of demonstrating compliance with an approval criterion is not sufficient in itself to "raise" an issue on that point, within the meaning of ORS 197.763(1). Certainly, had another party below disputed the staff/applicant agreement, and argued to the contrary that the .27 FAR figure should be used, that would clearly be sufficient to raise the issue presented in this assignment of error. However, as noted, no other party before the city council raised any concerns regarding which FAR figure to use prior to the close of the evidentiary record.

The second assignment of error is denied.

The city's decision is affirmed.