

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 MARTIN NYGAARD,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF WARRENTON,
10 *Respondent,*

11 and

12
13 ATLIN INVESTMENTS, INC. and
14 WES GIESBRECHT,
15 *Intervenor-Respondents.*

16
17 LUBA No. 2007-195

18
19 FINAL OPINION
20 AND ORDER

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22 Appeal from the City of Warrenton.

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24 Peter Livingston, Portland, filed the petition for review and argued on behalf of
25 petitioner. With him on the brief were James F. Dulcich and Schwabe, Williamson & Wyatt
26 P.C.
27

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29 No appearance by the City of Warrenton.

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31 Steven L. Pfeiffer, Portland, filed the response brief and argued on behalf of
32 intervenor-respondents. With him on the brief were Corinne S. Celko and Perkins Coie LLP.
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34 BASSHAM, Board Member; HOLSTUN, Board Chair; RYAN, Board Member,
35 participated in the decision.

36
37 REMANDED

01/25/2008

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

NATURE OF THE DECISION

Petitioner appeals a city commission decision rezoning a 75-acre parcel from General Industrial (I-1) to General Commercial (C-1), to facilitate a future large-format retail use.

MOTION TO INTERVENE

Atlin Investments, Inc. and Wes Giesbrecht move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is roughly triangular in shape, with the long northwest property line fronting on Highway 101. South of the subject property, Dolphin Avenue approaches Highway 101 from the south at an angle, forming an unsignalized “skewed intersection,” and continues northwest. On the west side of Highway 101 opposite the subject property is a large tract recently rezoned to allow for a Home Depot and auto center. The city’s transportation plan calls for future realignment of the Highway 101/Dolphin Avenue intersection and signalization of that intersection, if warranted, as part of future development on adjacent properties.

Intervenors-respondent (intervenors) intend to construct a large (over 100,000-square foot) retail center anchored by a Costco Store. Intervenors submitted a traffic impact analysis (TIA) to support the proposed rezoning. The TIA indicated that the proposed commercial use of the property would reduce the performance of Highway 101 below the applicable mobility standards, unless certain improvements were constructed. The TIA proposed replacing Dolphin Avenue with a new Dolphin Lane, which will cross the subject property, intersect Highway 101 at right angles at a new signalized intersection, and continue west through the large tract on the other side of the highway, and east to connect with 19th Avenue, and thence to Business Highway 101. Existing Dolphin Avenue would become a

1 cul-de-sac. With the proposed improvements, the TIA concluded that all affected
2 intersections would meet projected mobility standards within the planning period.

3 The city planning commission conducted a hearing and recommended that the city
4 commission approve the proposed rezone. The city commission conducted several hearings
5 and, on September 11, 2007, adopted an ordinance, supported by findings, approving the
6 rezone. The findings adopted in support of the decision state that the proposed transportation
7 improvements will be funded pursuant to “development agreements and conditions of
8 approval for this proposal[.]” However, the decision imposes no conditions of approval.
9 This appeal followed.

10 **ASSIGNMENT OF ERROR**

11 Petitioner argues that the city erred in failing to impose any conditions of approval
12 that ensure compliance with OAR 660-012-0060. OAR 660-012-0060(1) requires that plan
13 and zoning amendments not “significantly affect” transportation facilities. As relevant here,
14 plan and zoning amendments “significantly affect” a transportation facility if they would
15 allow uses generating traffic that would reduce the performance of an existing or planned
16 transportation facility below the minimum acceptable performance standard, as measured at
17 the end of the planning period identified in the applicable transportation system plan.¹

¹ OAR 660-012-0060(1) provides, in relevant part:

“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:

“* * * * *

“(c) As measured at the end of the planning period identified in the adopted transportation system plan:

“* * * * *

1 OAR 660-012-0060(2) requires in relevant part that when proposed plan or zoning
2 amendments would allow uses that “significantly affect” a transportation facility, the local
3 government must adopt one or more of the measures specified in OAR 660-012-0060(2)(a)
4 through (e).² In the present case, the city relied on OAR 660-012-0060(2)(e), which states
5 that local governments may provide “other measures as a condition of development or
6 through a development agreement or similar funding method, including transportation system
7 management measures, demand management or minor transportation improvements.” Under
8 OAR 660-012-0060(2)(e), local governments must “as part of the amendment specify when
9 measures or improvements provided pursuant to this subsection will be provided.”

10 OAR 660-012-0060(4)(a) provides in relevant part that in making a “significant
11 effect” determination under OAR 660-012-0060(1)(c), local governments shall rely on
12 existing transportation facilities, and on “planned transportation facilities” described in
13 OAR 660-012-0060(4)(b) and (c).³ The city found that the proposed improvements to

“(B) Reduce the performance of an existing or planned transportation facility below the minimum acceptable performance standard identified in the TSP or comprehensive plan[.]”

² OAR 660-012-0060(2) provides, as pertinent:

“Where a local government determines that there would be a significant effect, compliance with section (1) shall be accomplished through one or a combination of the following:

“* * * * *

“(e) Providing other measures as a condition of development or through a development agreement or similar funding method, including transportation system management measures, demand management or minor transportation improvements. Local governments shall as part of the amendment specify when measures or improvements provided pursuant to this subsection will be provided.”

³ OAR 660-012-0060(4) provides, in relevant part:

“(a) In determining whether an amendment has a significant effect on an existing or planned transportation facility under subsection (1)(c) of this rule, local governments shall rely on existing transportation facilities and services and on the planned transportation facilities, improvements and services set forth in subsections (b) and (c) below.

1 Highway 101 and other transportation facilities are “planned transportation facilities” within
2 the meaning of OAR 660-012-0060(4)(b)(B), which describes transportation facilities or
3 improvements “that are authorized in a local transportation system plan and for which a
4 funding plan or mechanism is in place or approved.” Examples of such planned
5 transportation facilities include facilities for which (1) a development agreement has been
6 adopted, or (2) conditions of approval to fund the improvement have been adopted.

7 The city found that the proposed improvements “will be funded under development
8 agreements and conditions of approval for this proposal[,]” and that the “funding
9 mechanism” for purposes of OAR 660-012-0060(4)(b)(B) is “the combination of conditions
10 of approval and development agreements covering this property and the commercial property
11 directly across Highway 101.” However, petitioner notes, the city decision in fact imposes
12 no conditions of approval at all, much less any conditions that require that the proposed
13 transportation improvements be constructed or specify how such improvements will be
14 funded. Petitioner contends that such conditions of approval are mandated by OAR 660-012-
15 0060(4)(b)(B). Further, petitioner notes that the record does not reflect that any development
16 agreement has been entered into that apportions financial responsibility for the improvements
17 among the city, intervenor and the owners of the large tract west of Highway 101 opposite
18 the subject property.

“(b) Outside of interstate interchange areas, the following are considered planned facilities, improvements and services:

“(B) Transportation facilities, improvements or services that are authorized in a local transportation system plan and for which a funding plan or mechanism is in place or approved. These include, but are not limited to, transportation facilities, improvements or services for which: transportation systems development charge revenues are being collected; a local improvement district or reimbursement district has been established or will be established prior to development; a development agreement has been adopted; or conditions of approval to fund the improvement have been adopted.”

1 Intervenors respond, initially, that petitioner raised no issues below regarding
2 compliance with OAR 660-012-0060, and failed to raise any specific objections either to the
3 proposed mitigation or the lack of conditions of approval. Therefore, intervenors argue, the
4 issue raised in this assignment of error is waived, pursuant to ORS 197.763(1).⁴

5 In the petition for review, petitioner quotes portions of a letter from a representative
6 of the Oregon Department of Transportation (ODOT), who recommended that conditions of
7 approval be imposed for the improvements identified in the TIA, among other recommended
8 conditions. Record 274. At oral argument, petitioner asserted that the ODOT testimony
9 adequately raises the issue of the necessity of conditions of approval regarding the necessary
10 improvements, and that it is irrelevant whether petitioner raised that issue or some other
11 party.

12 We agree with petitioner that the ODOT letter is sufficient to give the city and other
13 participants “fair notice” that conditions of approval regarding the proposed improvements
14 are necessary. *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991).
15 The city was evidently aware of the necessity for conditions of approval, because both the
16 staff report to the planning commission and the city commission findings contemplate that
17 conditions of approval will be necessary to ensure compliance with OAR 660-012-
18 0060(4)(b)(B). That ODOT rather than petitioner raised the issue is immaterial. *See* ORS
19 197.835(3) (LUBA’s scope of review is limited to issues raised below “by any participant”).
20 Once that issue was raised by any participant, petitioner is entitled to assign error to the

⁴ 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.”

1 city's failure to impose necessary conditions of approval regarding the proposed
2 improvements.

3 On the merits, intervenors argue that the absence of conditions of approval is not
4 error, because the city's decision expressly references the application and TIA, which
5 propose and agree to the mitigation, and further references the ODOT testimony that
6 describes the necessary improvements. According to intervenors, under the city's decision it
7 is clear that intervenor will be required to construct the identified improvements as part of
8 any future development on the subject property, pursuant to development agreements and
9 cost-sharing arrangements that have yet to be finalized. Under such circumstances,
10 intervenors argue, it is unnecessary to impose explicit conditions of approval requiring that
11 intervenors construct or fund the agreed-to improvements. Intervenors cites to *Hildenbrand*
12 *v. City of Adair Village*, 54 Or LUBA 734, 741-42 (2007), to support the proposition that
13 failure to impose explicit conditions of approval to construct necessary transportation
14 improvements is not reversible error where the decision itself clearly requires that the
15 necessary improvements be constructed.

16 In *Hildenbrand* the challenged decision expressly incorporated into the decision the
17 applicant's TIA and supplemental information, which proposed and agreed to construction of
18 particular transportation improvements necessary to avoid "significantly affect[ing]" a
19 transportation facility under OAR 660-012-0060(1). We held that the absence of an explicit
20 condition of approval mandating that the applicant construct the proposed improvements was
21 not reversible error under those circumstances. However, in the present case, the city did not
22 purport to incorporate the TIA into the decision. That alone distinguishes *Hildenbrand*.

23 Further, *Hildenbrand* did not involve the issue of what counts as a "planned
24 transportation facility" under OAR 660-012-0060(4)(b)(B). The primary concern of
25 OAR 660-012-0060(4)(b)(B) is with assuring that necessary improvements are actually
26 funded. Accordingly, the rule requires that the city find that a funding plan or mechanism is

1 in place or approved. Such a plan or mechanism can take different forms, but the challenged
2 decision expressly relies on two mechanisms listed in OAR 660-012-0060(4)(b)(B): (1) a
3 development agreement and (2) conditions of approval to fund the improvement. However,
4 there is no dispute that no “development agreement has been adopted” and the city made no
5 findings to that effect. Nor did the city adopt any “conditions of approval to fund the
6 improvement.” Nothing cited to us in the decision makes the ability to develop property as
7 permitted under the new commercial zone contingent on assuring funding for the needed
8 transportation improvements pursuant to one or more of the mechanisms identified in
9 OAR 660-012-0060(4)(b)(B). Accordingly, we agree with petitioner that remand is
10 necessary for the city to adopt any amended findings and any conditions of approval
11 necessary to ensure compliance with OAR 660-012-0060(2) and (4).

12 The assignment of error is sustained.

13 The city’s decision is remanded.