

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

3  
4                                   SCOTT E. OLSON,  
5                                   *Petitioner,*

6  
7                                   vs.

8  
9                                   CITY OF SPRINGFIELD,  
10                                  *Respondent.*

11  
12                                  LUBA No. 2007-201

13  
14                                  FINAL OPINION  
15                                  AND ORDER

16  
17                   Appeal from City of Springfield.

18  
19                   Scott E. Olson, Springfield, filed the petition for review and argued on his own  
20                   behalf.

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22                   Allen L. Johnson, Portland, and Joseph J. Leahy, Springfield, filed the response brief  
23                   and argued on behalf of respondent. With them on the brief were Johnson & Sherton, PC  
24                   and Leahy & Cox, LLP.

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

28  
29                   AFFIRMED

02/26/2008

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

**NATURE OF THE DECISION**

Petitioner appeals a city ordinance that vacates a portion of a street right-of-way.

**FACTS**

The ordinance that is before us in this appeal is one of a number of actions the city has taken in preparation for construction of a new Justice Center. The petition for review sets out the key events that preceded the ordinance that is before us in this appeal:

“The [C]ity of Springfield voters approved a Measure 20-91 in November, 2004 for the construction of a new Municipal Justice Center on the city owned site of the existing police and municipal court facilities. The ballot measure indicated that the city might need to utilize the right-of-ways of both 4<sup>th</sup> and B Streets for the construction. In July of 2005 the city entered into a \* \* \* personal services contract with Liebert and Associates for planning of the Justice Center. The city council approved the Functional and Space Program for the Justice Center Facility on November 28, 2005 \* \* \*. The city approved \* \* \* a Development Code Amendment to Article 23 of the Springfield Development Code (SDC) on February 6, 2006 which added Justice Centers as an allowed use in the [Public Land and Open Space] PLO District. On April 18, 2006 the city concurrently approved [a] Zone Change \* \* \* and Discretionary Use \* \* \* (with conditions) to provide for the Justice Center construction. A Site Plan Review \* \* \* Decision for the Justice Center was issued by the city on July 25, 2006. The city amended [SDC] Article 9, \* \* \* on April 2, 2007, which modified the right-of-way vacation approval criteria for publicly owned facilities. Finally the city approved \* \* \* Vacation of the Public Right of Way on September 17, 2007.

“B Street is designated as a collector street on the Street Functional Classification Map of the Comprehensive Plan. It intersects with the arterial street, Pioneer Parkway East immediately adjacent to the proposed Justice Center site. The Justice Center site is within a Nodal Development Overlay zone which emphasizes street connectivity, and pedestrian and bicycle facilities. The city has vacated a portion of B Street to accommodate a secure parking area and a storage building associated with the construction of a new Justice center.” Petition for Review 2-3.

1 **FIRST ASSIGNMENT OF ERROR**

2 **A. Petitioner’s Argument**

3 As relevant here, the approval criteria for vacating subdivisions, partitions and rights-  
4 of-way appear at SDC Article 9.<sup>1</sup> Before it was amended on April 2, 2007, SDC 9.060(2) set  
5 out the following approval criteria for right-of-way vacations:

6 “Where the proposed Vacation of public rights-of-way, other City property, or  
7 Partition or Subdivision Plats is reviewed under Type IV procedure, the City  
8 Council shall approve, approve with conditions, or deny the Vacation  
9 application. The application shall be approved if the Vacation is found to be  
10 consistent with the following approval criteria.

11 “(a) The Vacation shall be in conformance with the Metro Plan, TransPlan,  
12 the Conceptual Local Street Map and adopted Functional Plans, and  
13 applicable Refinement Plan diagram, Plan District map, or Conceptual  
14 Development Plan;

15 “(b) The Vacation shall not conflict with the provisions of Springfield  
16 Municipal Code, 1997; and this Code, including but not limited to,  
17 street connectivity standards and block lengths; and

18 “(c) There shall be no negative effects on access, traffic circulation,  
19 emergency service protection or any other benefit derived from the  
20 public right-of-way, publicly owned land or Partition or Subdivision  
21 Plat.”

22 Petitioner contends that the April 18, 2006 Zone Change and Discretionary Use  
23 decisions, the July 25, 2006 Site Plan Review decision and the April 2, 2007 Vacation  
24 decision described above all fail to address:

25 “1. The functional classification of B Street as a collector street, 2. The  
26 connectivity requirements of the Nodal Development Overlay zone, or 3. The  
27 maximum block length standards of the SDC.” Petition for Review 4.

28 Petitioner contends the vacation decision that is the subject of this appeal is inconsistent with  
29 the Metro Plan and TransPlan because B Street is a designated collector street. Petitioner

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<sup>1</sup> The SDC was amended and recodified on September 18, 2007. All citations in this opinion are to pre-September 18, 2007 versions of the SDC.

1 also argues that the vacation is inconsistent with other plan policies and SDC standards that  
2 promote pedestrian ways, bicycle transportation and street connectivity. Petitioner cites to a  
3 city planning staff report that was prepared during the proceedings that led to the April 18,  
4 2006 Zone Change and Discretionary Use decisions where planning staff acknowledged that  
5 plan amendments and variances would be needed to vacate the B Street right-of-way.<sup>2</sup>  
6 Petitioner contends he submitted 16 pages of testimony detailing his position that the  
7 vacation violates comprehensive plan and SDC transportation planning standards during the  
8 proceedings that led to the April 18, 2006 Zone Change and Discretionary Use decisions and  
9 those concerns were summarily dismissed by the city:

10           “The issues raised by [petitioner] pertain almost exclusively to the proposed  
11 street vacation and block length variance applications that would be referred  
12 to the Planning Commission for a recommendation at a future public hearing,  
13 prior to being presented to City Council at another public hearing meeting.  
14 Staff is unable to respond to these issues as the Discretionary Use and Zone  
15 Change request criteria do not have any direct relationship to the Metro Plan  
16 and Trans Plan transportation goals, objectives and policies.” Record 1505.

17 Petitioner also argues that the city granted Site Plan Approval on July 25, 2006 and issued  
18 building permits, notwithstanding that the April 18, 2006 Discretionary Use decision  
19 included a condition of approval that the B Street right-of-way was to be vacated prior to Site  
20 Plan Review approval.

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<sup>2</sup> A March 21, 2006 staff report included the following:

**Additional Approvals**

“The subject applications are the first steps in a series of development applications for Planning Commission and Council consideration in order to allow development of a Justice Center at the proposed location. If the Planning Commission approves the Discretionary Use and Zoning Change requests, an application would be taken to Council for a Type II TransPlan amendment to remove the affected portion of B Street from the collector street network. Application also would be required to have the affected portions of B Street, 4<sup>th</sup> Street, and the alley between A and B Street vacated. If a TransPlan amendment application is submitted, the Planning Commission would be required to provide a recommendation to City Council on that matter and proposed street and alley vacations. A variance to the block length requirement also would be required upon vacation of B Street between Pioneer Parkway East and 4<sup>th</sup> Street, as the perimeter travel distance would exceed the parameters established by the SDC.” Record 1911-12.

1 Finally, petitioner argues:

2 “Ironically, the petitioner’s testimony which was dismissed as irrelevant to the  
3 Discretionary Use approval and relevant only to the street vacation was  
4 ultimately dismissed by the city as irrelevant to the new approval criteria for  
5 the vacation of the street. The city has failed to establish that the street  
6 closure conforms with the comprehensive plan and zoning requirements.”  
7 Petition for Review 8.

8 We understand petitioner to argue the city should have applied the vacation criteria that  
9 appear at SDC 9.060(2), which would have required the city to directly address his  
10 contentions that the disputed vacation is inconsistent with the city’s adopted comprehensive  
11 plan and the SDC, rather than the vacation criteria that the city adopted on April 2, 2007,  
12 which appear at SDC 9.060(3) and do not require that the city directly apply its  
13 comprehensive plan, the Springfield Municipal Code or the “no negative effects” on  
14 transportation facilities standard that appears at SDC 9.060(2)(c).<sup>3</sup>

15 **B. Unappealed Decisions**

16 We turn first to petitioner’s arguments that the city committed errors in adopting the  
17 April 18, 2006 Zone Change and Discretionary Use decisions and the July 25, 2006 Site Plan  
18 Review decision. Those decisions are not before us in this appeal. Those decisions could  
19 have been appealed to LUBA and in those appeals petitioner could have assigned error to  
20 any aspects of those decisions that petitioner believes are inconsistent with the  
21 comprehensive plan, the SDC or any other legal requirement. Those decisions were not  
22 appealed, and petitioner may not assign error to those decisions in this appeal. *Sahagian v.*  
23 *Columbia County*, 27 Or LUBA 341, 344 (1994); *Corbett/Terwilliger Neigh. Assoc. v. City*  
24 *of Portland*, 16 Or LUBA 49, 52 (1987).

25 Similarly, the April 2, 2007 decision that amended SDC 9.060 by adding a new  
26 subsection (3) was not appealed. As discussed below, that amendment apparently was

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<sup>3</sup> We set out the text of SDC 9.060(3) and discuss that section of the SDC later in this opinion.

1 adopted specifically to avoid the SDC 9.060(2) requirement that the city’s comprehensive  
2 plan and the SDC be applied directly as approval criteria for certain vacation decisions.<sup>4</sup>  
3 Because the April 2, 2007 decision was not appealed and is not before us in this appeal, the  
4 legal propriety of amending SDC 9.060 to eliminate any requirement under SDC 9.060 that  
5 the city’s comprehensive plan or SDC transportation standards be applied directly when  
6 vacating rights-of-way in certain circumstances is not before us in this appeal.

7 **C. The New Vacation Criteria**

8 The April 2, 2007 amendment to SDC 9.060 added a new subsection (3), which  
9 appears immediately after SDC 9.060(2) quoted above. SDC 9.060(3) provides as follows:

10 “Notwithstanding the provisions of Section 9.060(2), where the land affected  
11 by the proposed Vacation of public right-of-way, other public land as  
12 specified in ORS 271.080, or public easement will remain in public ownership  
13 and will continue to be used for a public purpose, the request shall be  
14 reviewed under the Type IV procedure. The City Council may approve the  
15 Vacation application if it is found to be consistent with the following criteria:

16 “(a) The Vacation was initiated by the City Council pursuant to ORS  
17 271.130(1);

18 “(b) Notice has been given pursuant to ORS 271.110(1);

19 “(c) Approval of the vacation would be consistent with provision of safe,  
20 convenient and reasonably direct routes for cyclists, pedestrians and  
21 vehicles as provided in OAR 660-012-0045(3);

22 “(d) Whether a greater public benefit would be obtained from the vacation  
23 than from retaining the right-of-way in its present status; and

24 “(e) Whether provisions have been made to ensure that the vacated  
25 property will remain in public ownership.”

26 According to the city, under its charter, the April 2, 2007 amendment took effect 30 days  
27 after it was adopted, on May 2, 2007. The city submitted notice to the Department of Land

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<sup>4</sup> Apparently, notwithstanding that planning staff indicated during the Zone Change and Discretionary Use proceedings that the comprehensive plan and SDC would be applied directly when it came time to vacate the B Street right-of-way, the city instead decided to amend the city’s right-of-way vacation criteria to eliminate that requirement by adopting SDC 9.060(3).

1 Conservation and Development of that amendment on April 5, 2007, pursuant to ORS  
2 197.615(1). By operation of law, that amendment was acknowledged to be in compliance  
3 with the statewide planning goals on April 26, 2007. ORS 197.197.625(1)(a). The  
4 application to vacate the B Street right-of-way was submitted on May 11, 2007. There does  
5 not appear to be any dispute that the vacated right-of-way “will remain in public ownership  
6 and will continue to be used for a public purpose.” The city argues it correctly applied SDC  
7 9.060(3) rather than SDC 9.060(2). We agree with city.

8 Petitioner argues the city should be required to apply SDC 9.060(2) rather than SDC  
9 9.060(3), but offers no reason for that position that is cognizable in this appeal. As we have  
10 already explained, the April 2, 2007 ordinance that adopted SDC 9.060(3) is not before us in  
11 this appeal, and any errors the city may have committed in adopting those amendments are  
12 beyond our scope of review in this appeal. SDC 9.060(3) took effect before the application  
13 to vacate B street was submitted. SDC 9.060(3) unambiguously applies to that application in  
14 place of SDC 9.060(2). Petitioner’s position that the city should be required to apply the  
15 SDC 9.060(2) criteria to the disputed vacation is flatly inconsistent with the text of SDC  
16 9.060. Petitioner identifies no other legal authority that would require the city to apply its  
17 comprehensive plan or the SDC directly to the disputed vacation. Because petitioner  
18 identifies no legal authority that requires the city to apply its comprehensive plan and SDC  
19 transportation policies and standards to the disputed vacation, petitioner’s first assignment of  
20 error provides no basis for reversal or remand.

21 The first assignment of error is denied.

22 **SECOND ASSIGNMENT OF ERROR**

23 Under his second assignment of error, petitioner challenges the city’s findings that  
24 the disputed vacation complies with the new SDC 9.060(3) criteria.<sup>5</sup>

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<sup>5</sup> Petitioner’s challenge is limited to SDC 9.060(3)(c), (d) and (e).

1           **A.     SDC 9.060(3)(c)**

2           SDC 9.060(3)(c) requires that the city find that “[a]pproval of the vacation would be  
3 consistent with provision of safe, convenient and reasonably direct routes for cyclists,  
4 pedestrians and vehicles as provided in OAR 660-012-0045(3).” Petitioner contends that  
5 rather than apply this standard from OAR 660-012-0045(3) the city should apply its  
6 comprehensive plan and SDC transportation policies that were adopted in part to comply  
7 with the rule. Petitioner also contends that the city’s finding “that right-of-way vacation will  
8 not compromise safe, convenient and reasonable direct routes for cyclists, pedestrians and  
9 vehicles as provided in OAR 660-012-0045(3)” is “preposterous when what is being  
10 considered is the closure of a collector street in a Nodal Development zone.” Petition for  
11 Review 14.

12           Neither of the above argument provides a basis for reversal or remand. As we have  
13 already explained, SDC 9.060(3) was in effect when the disputed vacation application was  
14 submitted, and the city did not err by applying the SDC 9.060(3) criteria rather than the SDC  
15 9.060(2) criteria. With regard to petitioner’s findings challenge, petitioner must do more  
16 than quote a portion of the city’s finding concerning SDC 9.060(3)(c) and claim the finding  
17 is preposterous. The part of the city’s findings that petitioner does not acknowledge points  
18 out that trips with origins and destinations beyond the linear alignment of B Street will not be  
19 affected and the trips that will be affected will have out-of-direction travel of no more than  
20 600 feet.<sup>6</sup> While petitioner clearly has a different view of the significance of that

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<sup>6</sup> The entire finding is set out below:

“In accordance with SDC 9.060(3)(c), approval of the vacation would not compromise safe, convenient and reasonably direct routes for cyclists, pedestrians and vehicles as provided in OAR 660-012-0045(3). As described in the above findings, the out-of-direction travel distance for vehicles, cyclists and pedestrians is not expected to be more than 600 feet. The out-of-direction travel distance is minimal or non-existent for trips with origins and destinations outside the linear alignment of the street containing the vacated area.” Record 20.



1 out-of-direction travel, he must do more than claim that the city’s contrary position is  
2 preposterous.

3 This subassignment of error is denied.

4 **B. SDC 9.060(3)(d)**

5 Under SDC 9.060(3)(d), the city was required to find “a greater public benefit would  
6 be obtained from the vacation than from retaining the right-of-way in its present status[.]”  
7 The SDC 9.060(3)(d) “greater public benefit” standard is extremely subjective and calls for  
8 an exercise of judgment by the city. The city adopted several findings to explain its  
9 conclusion that the proposed vacation would result in a greater public benefit. The vacated  
10 right-of-way will allow construction of an adjacent secure parking area and “an ancillary  
11 building for retaining police and court records, evidence, recovered items, and police  
12 equipment.” Record 32. The challenged decision cites evidence of “[d]amage and  
13 vandalism to police vehicles” and a need to deter such damage as one justification for the  
14 secure parking area Record 31 (finding 31). The decision also finds that a secure parking  
15 area next to the police station will allow quicker response times and increase officer safety  
16 by eliminating the need to cross B Street to respond to police calls. Record 32 (finding 32).  
17 The city also found that the secure parking area could also function as a “contained muster  
18 area for prisoners” in the case of emergencies. *Id.* (finding 34). Regarding the ancillary  
19 building, the city found that “[p]roximity to the Justice Center and security of the ancillary  
20 building is necessary to protect the integrity of its contents.” *Id.* (finding 33).

21 Petitioner disputes findings 31-34. However, although petitioner disparages the  
22 evidence that supports the city’s findings that it needs a secure parking facility as  
23 “anecdotal,” petitioner does not dispute that there is evidence of such a need and cites no  
24 contrary evidence. Petitioner disagrees with the cited need for a secure ancillary building  
25 but, again, cites no evidence that would undercut the city’s cited need.

1           In this review, petitioner must demonstrate that the city “improperly construed” SDC  
2 9.060(3)(d) or that its findings addressing that criterion “are not supported by substantial  
3 evidence in the whole record.” ORS 197.835(9)(a)(C) and (D). Petitioner has shown  
4 neither. It is clear that petitioner places a higher value the B Street right-of-way than the  
5 secure parking facility or ancillary building. It is plain from petitioner’s arguments on  
6 review that he would have applied the SDC 9.060(3)(d) “greater public benefit” criterion  
7 differently and reached a different conclusion about whether retaining the B Street public  
8 right-of-way would result in the greater public benefit. However, the fact that petitioner  
9 would have struck that balance differently than the city is not sufficient as a basis for reversal  
10 or remand. *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587, 603 (2000); *Mazeski v.*  
11 *Wasco County*, 28 Or LUBA 178, 188-89 (1994), *aff’d* 133 Or App 258, 890 P2d 455 (1995).  
12 Given the subjective nature of the standard, it is unremarkable that reasonable persons could  
13 strike the required balance differently. We cannot say, based on this record, that the way the  
14 city struck that balance was erroneous or unsupported by substantial evidence.

15           This subassignment of error is denied.

16           **C.     SDC 9.060(3)(e)**

17           Under this criterion the city must find that “provisions have been made to ensure that  
18 the vacated property will remain in public ownership.” The city imposed a condition that the  
19 vacated right-of-way would revert back to right-of-way if it ceased to be used as part of the  
20 Justice Center. Record 32. Petitioner does not challenge the adequacy of that condition to  
21 ensure the vacation complies with SDC 9.060(3)(e). Instead, petitioner appears to challenge  
22 applying a different standard for a vacation for a *public* purpose from the standard that would  
23 apply under SDC 9.060(2) for a vacation for a *private* purpose. As we have already  
24 explained, such a challenge might have provided a basis for reversal or remand of the April  
25 2, 2007 decision to adopt SDC 9.060(3), but that challenge is simply not cognizable in this  
26 appeal of the city’s vacation decision that simply applies SDC 9.060(3)(e).

1 This subassignment of error is denied.

2 The second assignment of error is denied.

3 **THIRD ASSIGNMENT OF ERROR**

4 Under his final assignment of error, petitioner questions the adequacy and  
5 completeness of the application, but offers no argument in support of the suggestion.  
6 Petition for Review 20. Petitioner characterizes the vacation of a portion of B Street as  
7 “destruction” of a largely intact grid street system without a valid reason for doing so.  
8 Petitioner also cites the city’s many decisions that preceded the vacation decision and  
9 characterizes those decisions a manipulation of public involvement that had the result of  
10 leaving the public out and ignoring the city’s comprehensive plan and SDC transportation  
11 planning policies and objectives. Petitioner argues the citizen advisory committee that was  
12 appointed was not given an opportunity to provide meaningful input. Petitioner contends  
13 that planning staff have consistently been on the police bureau’s side. Petitioner argues the  
14 city has consistently refused to engage in meaningful consideration of alternatives that would  
15 not require vacation of the B Street right-of-way. Petitioner contends the city’s actions in  
16 this matter demonstrate it was biased in favor of vacation of the B Street right-of-way from  
17 the beginning. Because the city council was biased in this matter, petitioner suggests it  
18 should have referred the matter to a hearings officer and it erred by failing to do so.

19 An appearance of bias is always possible when the city must grant itself land use  
20 permits. *Holladay Investors, Ltd. v. City of Portland*, 22 Or LUBA 90, 94 (1991). However,  
21 petitioner must demonstrate actual bias to provide a basis for reversal or remand, and he must  
22 do so clearly. *Lovejoy v. City of Depoe Bay*, 17 Or LUBA 51, 65-66 (1988). LUBA does not  
23 lightly infer bias on the part of local government land use decision makers. *Oregon*  
24 *Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440, 445 (2000); *Gearhard v.*  
25 *Klamath County*, 7 Or LUBA 27, 31 (1982); *Northeast Neighborhood Association v. City of*

1 *Salem*, 4 Or LUBA 260, 261 (1981); *Miller v. City of Portland*, 2 Or LUBA 363, 367-68  
2 (1981), *aff'd* 55 Or App 633, 639 P2d 680 (1982).

3 We do not agree with petitioner that the city's course of conduct in this matter  
4 provides a sufficient basis for assuming the city council was biased in favor of the requested  
5 vacation. The fact that city planning staff often did not agree with petitioner regarding the  
6 importance of retaining the B Street right-of-way is not significant. It is not unusual for  
7 planning staff to take a position on permit applications. Planning staff's view of the  
8 importance of preserving the right-of-way provides no basis for inferring bias on the part of  
9 the *city council*, which was the decision maker in this matter. The city's council's decision  
10 to amend SDC 9.060 to add SDC 9.060(3) suggests that the city recognized that approval of  
11 the vacation might be difficult if the city was required to apply its comprehensive plan and  
12 land use regulation transportation policies and standards directly as approval criteria in  
13 approving a vacation. Once again, in a properly filed appeal of the April 2, 2007 decision to  
14 amend SDC 9.060 to add SDC 9.060(3), petitioner could have challenged the city's decision  
15 to adopt far less stringent standards for vacating public rights-of-way in cases where the  
16 rights-of-way will remain in public use. But neither the city council's decision to adopt SDC  
17 9.060(3) nor any of the other actions cited by petitioner provide a sufficient basis for  
18 concluding that the city council was biased in its approval of the vacation decision that is  
19 before us in this appeal.

20 The third assignment of error is denied.

21 The city's decision is affirmed.