

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

3
4 BILL LUFKIN,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF SALEM,
10 *Respondent,*

11 and

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13
14 PACIFIC REALTY ASSOCIATES LP,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2007-259

18
19 FINAL OPINION
20 AND ORDER

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22 Appeal from City of Salem.

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

26
27 Daniel B. Atchison, Assistant City Attorney, Salem, filed a joint response brief and
28 argued on behalf of respondent. With him on the brief was Wendie L. Kellington.

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30 Wendie L. Kellington, Lake Oswego, filed a joint response brief and argued on behalf
31 of intervenor-respondent. With her on the brief was Daniel B. Atchison.

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

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36 AFFIRMED

06/17/2008

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

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NATURE OF THE DECISION

Petitioner appeals a decision by the city approving a comprehensive plan amendment and zone change.

FACTS

The subject property is an 18.4-acre property located approximately one-half mile from Interstate 5’s Kuebler Boulevard exit, between Kuebler Boulevard SE and Boone Road SE, and abutting 27th Avenue SE on the east. Intervenor-respondent (intervenor) applied to change the zoning of the property from Residential Agriculture to Retail Commercial and to change the comprehensive plan designation from Developing Residential to Commercial in order to build a retail and office complex. Access to the proposed development would occur from a right-in access point on Kuebler Boulevard and from Boone Road.

The planning commission approved the application, and the city council initiated its own review of the application pursuant to Salem Revised Code (SRC) 114.210.¹ The city council affirmed the planning commission’s decision with conditions. This appeal followed.

FIRST ASSIGNMENT OF ERROR

In the first assignment of error, petitioner argues that the city misconstrued Statewide Planning Goal 12 (Transportation), the Transportation Planning Rule (TPR) at OAR 660-012-0060, and related city code provisions. If a plan amendment “significantly affects” a transportation facility, the local government must put in place one or more measures specified in OAR 660-012-0060(2).² OAR 660-012-0060(1) provides that a plan amendment

¹ SRC 114.210(a) provides in relevant part:
“Whether or not an appeal is filed pursuant to SRC 114.200, the council may by majority vote initiate review of a commission, administrator, or hearings officer decision; and the commission may initiate council review of a hearings officer final decision by resolution filed with the city recorder.”

² OAR 660-012-0060(2) provides in relevant part:

1 “significantly affects” an existing transportation facility if it would reduce the performance
2 of the facility below the minimum acceptable standard identified in the relevant
3 transportation system plan, or worsen the performance of a facility otherwise projected to
4 perform below that minimum acceptable standard, as measured at the end of the planning
5 period identified in the transportation system plan.³

6 The city found in relevant part:

“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:

“* * * * *

“(d) Amending the TSP to modify the planned function, capacity or performance standards of the transportation facility.

“(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(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:

“* * * * *

“(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

“(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.”

1 “The proposed minor plan change ensures that at the time of opening
2 (estimated in 2009), none of the adverse consequences listed in OAR 660-
3 012-0060(1)(a)-(c) will occur. The proposal also ensures that none of the
4 adverse consequences listed in OAR 660-012-0060(1)(a)-(c)(A) or (B) will
5 occur in the planning horizon year under the plan amendment or existing
6 zoning if the plan amendment did not occur. In the year 2025, the system is
7 anticipated to fall below the performance standards of the type listed in OAR
8 660-012-0060(1)(c)(C) with or without the proposed plan amendment and
9 zone change. Here, however, Council finds that the evidence in the record
10 establishes that the project is mitigated such that the impacts on the
11 performance standards for the transportation system are the same in the 2025
12 horizon as would occur under existing zoning. In other words, the applicant
13 as conditioned in this decision, under the TIA, will put measures in place such
14 that at the end of the 2025 planning horizon it has mitigated all of its impacts
15 from the proposed plan amendment in a manner that the plan amendment does
16 not cause any of the adverse consequences to the transportation system listed
17 in OAR 660-012-0060(1)(a) – (c), including (c)(A) – (C).

18 “The applicant’s TIA and the required transportation improvements to
19 mitigate the traffic impact of the proposed [plan] designation change rely on
20 and assume that certain City funded improvements to the north side of
21 Kuebler Boulevard will be completed. * * * It is necessary for all
22 transportation improvements, the applicant’s and the City’s, to be completed
23 prior to occupancy of the subject property to assure the proposal will not have
24 a significant effect on the transportation system.

25 “Accordingly, OAR 660-012-0060(1) and (2) are met.” Record 32.

26 Petitioner argues that “* * * the city council went about the process [set forth in the
27 TPR] backwards. It cited the mitigation measures as the reason why there is no significant
28 effect, rather than finding the significant effect to be allowed because of the mitigation
29 measures.” Petition for Review 7.

30 The city and intervenor (respondents) respond that because OAR 660-012-0060(2) is
31 not triggered unless there is a determination that a proposal will have a significant effect, and
32 because the city found that “OAR 660-012-0060(1) and (2) are met,” it is apparent that the
33 city first concluded under subsection (1) of the TPR that a significant effect would result
34 from the proposed plan amendment, and then concluded under subsection (2) of the TPR that
35 that the proposed mitigation measures would ensure that the proposed plan amendment
36 complies with subsection (1). Respondent also points to the city’s finding at Record 34 that

1 “* * * the most credible evidence in the record is that while the proposal if
2 unmitigated has a significant affect as defined, that with the improvements in
3 place * * * and the conditions appended to this decision, at the time of the
4 * * * opening* * * the proposal will be adequately mitigated to avoid having
5 a ‘significant affect’ on the area transportation facilities as required in OAR
6 660-012-0060(1).”

7 We agree with respondent that the city in the above-quoted findings, although inartfully
8 worded, correctly determined that the proposed plan amendment would have a significant
9 effect on the transportation facility, and then put in place mitigation measures under
10 subsection (2)(e) of the TPR to ensure that the “[plan amendment is] consistent with the
11 identified function, capacity, and performance standards * * * of the facility.” OAR 660-
12 012-0060(1).

13 Petitioner also argues that the city misapplied OAR 661-012-0060(1) and (2) because,
14 petitioner argues, “* * * many of the transportation mitigation measures - incorporated into
15 the proposal as nearly a dozen ‘conditions of approval,’ * * * - are not currently part of the
16 adopted transportation system plan (TSP) which is part of the acknowledged comprehensive
17 plan* * *.” Petition for Review 7 (citations omitted). Thus, petitioner argues, amendments to
18 the TSP are required in order to construct the mitigation measures.

19 Respondents answer first that subsection (2) of TPR allows a local government to
20 ensure that allowed uses are consistent with a transportation facility’s identified function,
21 capacity, and performance standards by one or more means, including either amendments to
22 an adopted transportation system plan (OAR 660-012-0060(2)(d)) or imposition of
23 conditions of approval (OAR 660-012-0060(2)(e)). According to respondents, the city was
24 within its authority to choose to impose conditions of approval rather than amend the TSP.
25 *See* n 3. Moreover, respondent points out, petitioner does not explain how any of the
26 mitigation measures the city imposed are inconsistent with the TSP.

27 Respondents are correct that the city may choose to comply with OAR 660-012-
28 0060(1) by one or a combination of the means listed at OAR 660-012-0060(2), and the rule

1 does not necessarily obligate the city to amend the TSP to reflect transportation
2 improvements required by conditions of approval imposed under OAR 660-012-0060(2)(e).
3 That said, if imposition of conditions of approval under OAR 660-012-0060(2)(e) would
4 require transportation improvements that are *inconsistent* with the acknowledged TSP, then
5 the city may be required to also amend the TSP, either pursuant to OAR 660-012-0060(2)(d)
6 or simply to ensure that the amendment complies with the Goal 2 (Land Use Planning)
7 consistency requirement. However, we agree with respondent that petitioner has not
8 established that any specific mitigation measure that the city's conditions require renders the
9 proposal inconsistent with the city's TSP.

10 In support of his argument, petitioner cites to Record 472. That record page is a
11 portion of a letter from a lawyer to the city council that appears to argue that a citizen's
12 proposal to increase the width of certain intersections adjacent to the subject property would
13 be inconsistent with the classification of surrounding streets.⁴ However, other than citing to
14 that record page, petitioner does not explain how any specific mitigation measure that is
15 required by the city's conditions of approval is inconsistent with the TSP. Without more
16 from petitioner, we cannot say that the adopted mitigation measures render the proposal
17 inconsistent with the city's TSP or cause the proposal to fail to comply with the TPR.

⁴ As far as we can tell, petitioner may be referring to the following paragraphs of the letter found at Record 472:

"A citizen suggested that if the intersections surrounding the property were increased in size, transportation issues associated with the project would be resolved. That is simply not the case.

"First, increasing the size of the intersections is inconsistent with the designation of Boone Road and 27th Avenue as collector streets. Collector streets are only intended to handle a certain traffic load. Increasing the size of the intersections so they can handle more traffic demonstrates the project is inconsistent with the classification of the surrounding streets.

"Second, upsizing the intersections is effectively an amendment to the [TSP] because it requires larger than anticipated intersections be constructed in order to accommodate the project. Thus, there is effectively an amendment being made to the TSP to accommodate the traffic to be created by the project. This demonstrates the project is inconsistent with the [TSP], which is part of the Comprehensive Plan. * * *."

1 Finally, petitioner challenges the alternative findings that the city adopted under OAR
2 660-012-0060(3).⁵ Because we agree with respondent that the city’s conclusions under OAR
3 660-012-0060(1) and (2) are sufficient to demonstrate that the proposed plan amendment
4 complies with the TPR, we need not address the city’s alternative findings under OAR 660-
5 012-0060(3).

6 The first assignment of error is denied.

7 **SECOND ASSIGNMENT OF ERROR**

8 In the second assignment of error, petitioner argues that the proposed amendments are
9 inconsistent with Salem Area Comprehensive Plan (SACP) Policy IV(G)(4), which requires

⁵ OAR 660-012-0060(3) provides:

“Notwithstanding sections (1) and (2) of this rule, a local government may approve an amendment that would significantly affect an existing transportation facility without assuring that the allowed land uses are consistent with the function, capacity and performance standards of the facility where:

- “(a) The facility is already performing below the minimum acceptable performance standard identified in the TSP or comprehensive plan on the date the amendment application is submitted;
- “(b) In the absence of the amendment, planned transportation facilities, improvements and services as set forth in section (4) of this rule would not be adequate to achieve consistency with the identified function, capacity or performance standard for that facility by the end of the planning period identified in the adopted TSP;
- “(c) Development resulting from the amendment will, at a minimum, mitigate the impacts of the amendment in a manner that avoids further degradation to the performance of the facility by the time of the development through one or a combination of transportation improvements or measures;
- “(d) The amendment does not involve property located in an interchange area as defined in paragraph (4)(d)(C); and
- “(e) For affected state highways, ODOT provides a written statement that the proposed funding and timing for the identified mitigation improvements or measures are, at a minimum, sufficient to avoid further degradation to the performance of the affected state highway. However, if a local government provides the appropriate ODOT regional office with written notice of a proposed amendment in a manner that provides ODOT reasonable opportunity to submit a written statement into the record of the local government proceeding, and ODOT does not provide a written statement, then the local government may proceed with applying subsections (a) through (d) of this section.”

1 community shopping and service facilities such as the one proposed by intervenor to be
2 located adjacent to major arterials.⁶ Petitioner argues that the city misconstrued the TSP
3 when it concluded that Kuebler Boulevard is a major arterial. As petitioner explains it, the
4 streets adjacent to the subject property are either designated as collectors (Boone Road and
5 27th Avenue), a minor arterial (Battle Creek Road), or a parkway (Kuebler Boulevard), and
6 no street is designated as a major arterial. Petitioner argues that because none of the streets
7 adjacent to the property is designated as a major arterial, the proposed plan amendment that
8 facilitates development of a shopping and retail center is inconsistent with Policy IV(G)(4).
9 In support of his argument, petitioner relies on TSP Street System Element 3-11, a table
10 entitled “City of Salem Street Classification System and Basic Design Guidelines.”

11 Respondent answers that the city correctly found that the city’s TSP classifies a
12 parkway as a type of major arterial, and that as such Kuebler Boulevard is a major arterial.⁷

⁶ SACP Policy 4(G)(4) provides:

“Community shopping and service facilities shall be located adjacent to major arterials and shall provide adequate parking and service areas. Land use regulations shall include provisions for siting and development which discourage major customer traffic from outside the immediate neighborhoods from filtering through residential streets.”

⁷ In response to petitioner’s argument below, the city found:

“An objection was raised concerning whether the proposal was consistent with the SACP Policy that requires Community Shopping and Service Facilities to be located along a ‘major arterial.’ Opponents of the proposal stated that Kuebler was not a ‘major arterial.’ Council finds that Kuebler Boulevard is classified as a ‘Parkway’ and a ‘Parkway’ is a type of arterial - a major arterial. Council further finds that point of the Policy as is clear from its words and context is to ensure that community shopping and service facilities are located on high traffic streets that are able to accommodate the traffic such facilities involve. Kuebler as a major arterial – a ‘Parkway.’ Thus the purpose of the SACP Commercial Development Policy is to ensure that community commercial development has adequate access and that traffic coming to and going from such development does not cause significant adverse impacts on nearby residential neighborhoods. As explained in the TIA, Kuebler Blvd. is able to accommodate the traffic from the proposed use and in fact under the proposal the area transportation system including Kuebler Blvd, will function better than it currently does under the proposal.

“However, the opponents’ primary premise: that Kuebler as a ‘Parkway’ in not a ‘major arterial’ as that term is used in the SACP is incorrect in any event. Neither the SACP nor the Salem Transportation System Plan (TSP) expressly defines a ‘major arterial.’ However, Council finds that the most reasonable interpretation of ‘major arterial’ includes a Parkway as

1 Respondent explains that the city’s TSP establishes three types of streets – arterials,
2 collectors, and local streets, and that within each type of street are different functional
3 classifications. As respondent explains it, Kuebler Boulevard is a major arterial that
4 functions as a “parkway,” and as a parkway it is required to have wider right of way and
5 more limited access than radial and peripheral streets, two other functional classes of
6 arterials. As respondent explains, Table 11 cited by petitioner merely demonstrates that
7 different design guidelines apply to parkways. Respondent also argues that under ORS
8 197.829(1), the city’s interpretation of the TSP as classifying a parkway as a type of major
9 arterial is entitled to deference and that LUBA should affirm the city’s interpretation.⁸

a type of high-capacity, high-volume arterial. The text and context of the City’s TSP supports this interpretation. Specifically, Kuebler Boulevard is expressly defined as an ‘Arterial’ street in the City’s TSP Street Classification Chapter;

“ * * * * *

“While for purposes of street design, ‘Parkways’ and ‘Major Arterials’ have different design characteristics; this does not change the fact that a Parkway is a type of major arterial that simply must be designed differently because it carries more traffic (TSP Table 11 - the city Street Classification System and Basic Design Guidelines).

“The SACP never uses the term ‘parkway.’ Rather it speaks in terms of ‘major’ arterials. This is further contextual support that the term ‘major arterial’ used in the SACP is a generic one and includes parkways as a type of major arterial.

“The Salem TSP glossary includes definitions of different classes of streets, arterials, collectors, and local streets, but does not include a separate definition of ‘parkway.’ Arterial streets are defined as ‘high capacity-and typically high speed-streets that serve both intra-and intercity travel needs of the community.’ This is a blend of the Table 11 identification of functions for Parkways and Major Arterials:

“Parkway – High Capacity, high speed roadway that primarily serves regional and intracity travel.

“Major Arterial – High-capacity street that primarily serves regional and intracity travel. Serves as main radial and peripheral routes through the City.

“This further supports that a Parkway is a type of major arterial.” Record 46-47 (Emphasis added.)

⁸ ORS 197.829 provides in relevant part:

1 We agree with respondent that under ORS 197.829(1), the city’s interpretation of the
2 TSP, as it explained in its findings, is entitled to deference and is not inconsistent with the
3 express language of the TSP. As explained by the city in its findings, the text and context of
4 the relevant provisions of the TSP makes clear that a parkway is a type of arterial, and the
5 city has adequately explained the purpose of Table 11 cited by petitioner. *See* n 7; TSP
6 Street System Element 3-1, 3-2, and 3-66.

7 The second assignment of error is denied.

8 The city’s decision is affirmed.

“(1) The Land Use Board of Appeals 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:

“(a) Is inconsistent with the express language of the comprehensive plan or land use
 regulation; * * *.”