BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WILLAMETTE OAKS, LLC,
Petitioner,

vs.

CITY OF EUGENE,
Respondent,

and

GOODPASTURE PARTNERS, LLC,
Intervenor-Respondent.

LUBA No. 2008-173

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Zack P. Mittge and William H. Sherlock, Eugene, filed the petition for review and argued on behalf of petitioner. With them on the brief was Hutchinson, Cox, Coons, DuPriest, Orr & Sherlock, PC.

No appearance by City of Eugene.

Seth J. King and Michael C. Robinson, Portland, filed the response brief and argued on behalf of intervenor-respondent. With them on the brief was Perkins Coie LLP.

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

AFFIRMED 05/20/2009

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 by the city approving a zone change from Medium Density Residential (R-2) to Limited High-Density Residential (R-3).

FACTS

The subject property is approximately 23 acres in size and is located on Alexander Loop Road, a local street that is a dead end street. The property is designated on the city's comprehensive plan map as "High Density Residential" and, prior to the disputed zone change, was designated on the city's zoning map as Medium Density Residential with planned unit development (PUD) and water resources conservation overlays. Intervenor-respondent Goodpasture Partners, LLC's (intervenor's) predecessor applied to change the zoning to Limited High-Density Residential. The hearings officer approved the zone change, and petitioner appealed the decision to the city's planning commission. The planning commission approved the zone change, and this appeal followed.

MOTION TO FILE A REPLY BRIEF

Petitioner moves for permission to file a reply brief to address a new matter that petitioner alleges was raised for the first time in the response brief. A reply brief must be confined solely to "new matters" raised in the response brief. OAR 661-010-0039. Petitioner argues that the response brief contains a "new matter" in the form of a statement in the brief that evidence in the record suggested that 2002 amendments to the city's adopted Transportation Systems Plan (TSP) analyzed the traffic impacts resulting from the subject property's high density residential plan designation, so that additional trips that could be generated from a higher density zoning designation on the subject property have been taken into account under the most current version of the TSP. Petitioner argues that that statement in the response brief "relies on a discredited staff position that the [TSP] incorporated planned transportation improvements that would accommodate the increase in density

associated with [the new zone]." Reply Brief 1. We agree with petitioner that that issue is a "new matter." The reply brief is allowed.

ASSIGNMENT OF ERROR

This appeal involves the city's decision to defer a showing of compliance with OAR 660-012-0060(1), which provides in relevant part:

> "Where an amendment to 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 city's decision to approve a zone change qualifies as "an amendment to a * * * land use regulation," within the meaning of OAR 660-012-0061(1). *Just v. City of Lebanon*, 49 Or LUBA 180, 184 (2005).

The planning commission affirmed the hearings officer's decision approving the zone change, and imposed a condition of approval prohibiting development of the property without approval of a planned unit development (PUD) application and a showing of consistency with the TPR as part of the PUD application and review.[1] Petitioner's single assignment of error argues that the planning commission erred in various ways in approving the zone change without conducting the analysis required under the TPR at the time it approved the zone change. Petitioner first argues that the planning commission erred by failing to make current findings that the zone change would or would not have a significant effect on the transportation facility, and instead deferring findings on that question to a later

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[1] The condition provides:

> "Pursuant to [Eugene Code] 9.4310, no development permit may be approved for the subject property without prior City approval of a Planned Unit Development (PUD). An application for a Tentative PUD for the subject property shall include analysis of the traffic impact. As part of the City's Type III review of the PUD, in addition to any applicable requirements of the Traffic Impact Analysis Review in the City Code, the City shall require the applicant to demonstrate consistency with the Transportation Planning Rule at OAR 660-012-0060." Record 15.

development phase. Petitioner also argues that the evidence in the record conclusively demonstrates that the zone change will have a "significant effect" on a transportation facility, and that the planning commission erred in failing to specify mitigation measures or improvements to mitigate traffic impacts based on that evidence under OAR 660-012-0060(2).[2] Finally, petitioner argues that the planning commission is prohibited from imposing a condition of approval on a zone change. We address each argument in turn.

A. Deferral of the TPR Findings

As explained above, the city approved the zone change and imposed a condition of approval prohibiting all development of the property until a later PUD approval process at which time the applicant must demonstrate compliance with the TPR. The city relied in part on our decision in *Citizens for Protection of Neighborhoods v. City of Salem*, 47 Or LUBA

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[2] OAR 660-012-0060(2) provides:

> "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:
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> "(a) Adopting measures that demonstrate allowed land uses are consistent with the planned function, capacity, and performance standards of the transportation facility.
>
> "(b) Amending the TSP or comprehensive plan to provide transportation facilities, improvements or services adequate to support the proposed land uses consistent with the requirements of this division; such amendments shall include a funding plan or mechanism consistent with section (4) or include an amendment to the transportation finance plan so that the facility, improvement, or service will be provided by the end of the planning period.
>
> "(c) Altering land use designations, densities, or design requirements to reduce demand for automobile travel and meet travel needs through other modes.
>
> "(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."

111 (2004) (*Citizens*), to approve the zone change and require a future showing of compliance with the TPR. Record 11. In *Citizens*, the City of Salem approved a zone change to allow mixed residential and commercial use of a 275-acre property. That approval included a condition that prohibited development of the property until later adoption of a master plan for the property. The City of Salem's code criteria applicable during the master plan process included requirements that were substantially identical to the requirements of the TPR. Based on the condition requiring master plan approval, the city found that the zone change did not significantly affect the transportation facility because no development could occur until the subsequent master plan phase. *Id*. at 115, 116. We held that the city could properly conclude that the rezoning of the property did not significantly affect any transportation facility because the condition essentially prohibited development on the property without first showing that any allowed development is consistent with the function, capacity and performance standards of affected transportation facilities. *Id*. at 120. *See also ODOT v. City of Klamath Falls*, 39 Or LUBA 641, 660, *aff'd* 177 Or App 1, 34 P2d 667 (2001) (approval of a zone change with a condition that prevents development from impacting a transportation facility is sufficient to ensure compliance with the TPR).

Petitioner attempts to distinguish *Citizens* by pointing out that unlike *Citizens*, where the city found that the proposal did not have a significant effect on transportation facilities, in the present appeal the city did not make any decision regarding whether the rezone would have a significant effect on transportation facilities. Petitioner also notes that, unlike in *Citizens*, the Eugene Code (EC) does not include provisions that mirror the TPR's provisions.

We do not think there is any material difference between what the City of Salem did in *Citizens* and what the City of Eugene did in the present appeal. Although the City of Salem purported to make a "significance" determination, and the City of Eugene specifically did not make a "significance" determination, in effect the City of Salem in *Citizens* found

that the zone change would have no significant effect because the city ensured that no development would occur inconsistent with the TPR's requirements until those requirements were fully addressed. That approach is substantially similar to what the City of Eugene did in the present appeal. Additionally, we do not think it is legally significant that in *Citizens*, the City of Salem's code contained provisions that were nearly identical to the TPR's provisions, while in the present appeal the EC does not contain provisions that require TPR-like analysis. The condition of approval requires a future showing of compliance with the TPR itself, independent of any EC provisions that may or may not be similar to the TPR's provisions. In this respect, the city's approach appears to offer even greater assurance of compliance with the TPR than did the approach in *Citizens*.

Petitioner also cites our decision in *Citizens for Florence v. City of Florence*, 35 Or LUBA 255 (1998) for the proposition that other attempts by local governments to defer transportation planning under the TPR have been rejected. However, *Citizens for Florence* does not assist petitioner. In *Citizens for Florence*, the city approved a comprehensive plan amendment, notwithstanding that the proposed amendment would significantly affect an intersection, based on the applicant's agreement to pay for proposed improvements to the highway intersection. The difficulty in *Citizens for Florence* was that the city had no TSP and that city TSP would have had to be adopted before the improvements to the intersection could have been constructed.[3] In this case city has not attempted to approve development with mitigation measures. Rather the city has prohibited all development of the property until a later stage (PUD approval) and that PUD approval must include a demonstration of consistency with the TPR.

Petitioner also cites *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997). That case involved a challenge under Statewide Planning Goal 12 (Transportation) to the

[3] Since the facility at issue in *Citizens for Florence* was a state highway subject to the Oregon Highway Plan, an amendment to the Oregon Highway Plan likely would have been required as well.

county's approval of a UGB amendment. We held that the county erred in approving the amendment with a condition that required a future amendment of the county's transportation systems plan because the UGB amendment took effect whether or not those TSP amendments were ever adopted. That case does not assist petitioner in the present appeal.

In sum, with one caveat discussed below, we think it is permissible for the city to defer consideration of compliance with the TPR to a subsequent review process at the time actual development is proposed, provided that the zone change or plan amendment is effectively conditioned to prohibit traffic or other impacts inconsistent with the TPR's requirements unless and until those requirements are fully addressed. Petitioner offers no reason in the present case why deferring the application of the provisions of the TPR to a later PUD application process is insufficient to ensure that allowed uses of the subject property are consistent with the function, capacity and performance standards of the affected transportation facilities.[4] *ODOT v. City of Klamath Falls*, 39 Or LUBA at 660.

The caveat mentioned above is that unless the local government takes steps to ensure otherwise, the subsequent review process may not require a comprehensive plan or land use regulation amendment and therefore will not trigger the notice obligations of a post-acknowledgement action under ORS 197.610 *et seq.* Under those statutes, a local government that amends its comprehensive plan or land use regulations, including zone changes, must provide to the Department of Land Conservation and Development (DLCD) timely notice of the hearing on the proposed amendments as well the decision adopting the amendments. DLCD, in turn, provides notice of the proposed amendments and any

[4] In reality, the longer the amount of time that passes before the TPR requirements are addressed, the greater the risk for intervenor that neighboring development will consume any existing capacity, such that by the time intervenor seeks to develop the property, the affected transportation facility could exceed its function, capacity or performance standards and the TPR could not be satisfied even with mitigation measures. Intervenor concedes that in the event the TPR cannot be satisfied even with mitigation, intervenor would be forced to rezone the property in order to develop it at a level that complies with the TPR. Response Brief 19.

subsequent adoption to persons or agencies who request such notice. OAR 660-018-0025. The requirement to provide notice of post-acknowledgment plan amendments to DLCD and other parties is a critical component of a statutory and rule-based scheme that is designed to ensure that post-acknowledgment plan and land use amendments comply with the applicable statewide planning goals and rules, including the TPR. *See Oregon City Leasing, Inc. v. Columbia County*, 121 Or App 173, 177, 854 P2d 495 (1993) (failure to provide DLCD the notice required under ORS 197.610 *et seq*. is a substantive, not procedural error). The efficacy of that scheme is undermined if a local government defers consideration of compliance with the TPR to a subsequent review process that does not provide equivalent notice to that required by ORS 197.610 *et seq*. Without such notice, it is possible that DLCD and parties who may rely on DLCD's re-notice, potentially including ODOT, may not learn of the review proceeding or have an opportunity to participate in that proceeding.

Where a local government defers compliance with the TPR to a subsequent review proceeding, the local government could nonetheless ensure that the intent of ORS 197.610 is met, in at least two ways. First, the local government could impose an overlay zone or some other zoning restriction on the subject property, such that any subsequent review proceeding to develop the property under the new zoning would require a land use regulation amendment to remove the overlay or restriction, thus triggering the obligations of ORS 197.610 *et seq*. Second, if the subsequent review proceeding is not or cannot be made a post-acknowledgment plan amendment or zone change, the local government could impose an explicit condition of approval on the initial post-acknowledgment plan decision requiring that notice of the subsequent review proceeding be provided to DLCD in the same manner as a post-acknowledgment plan amendment.

In the present case, the city took neither of those approaches, and as far as we are informed made no effort to ensure that DLCD or ODOT will be provided notice of the PUD process in which the issue of TPR compliance will be addressed. However, petitioner does

not assign error to that omission, assuming it is error, and we therefore do not consider it further.

B. Substantial Evidence

Petitioner also argues that the evidence in the record conclusively indicates that the rezone to a higher density will have a significant effect on the transportation facility and that the city should have imposed mitigation measures under OAR 660-012-0060(2). We understand petitioner to argue that under ORS 197.835(9), the decision should be reversed or remanded because the city "made a decision not supported by substantial evidence in the whole record." However, the city did not make a determination as to whether the evidence in the record demonstrated that the proposed rezone would significantly affect the transportation facility and did not evaluate the evidence before it. LUBA's role does not include an evaluation of that evidence in the first instance. *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261, 276 (2006).

C. Rezoning with Conditions

Petitioner also argues that there is no authority under state law for the city to condition its approval of the rezone. Intervenor responds that ORS 227.175(4) allows the city to condition its approval of an application for a zone change consistent with ORS 227.215 or any city legislation.[5] EC 9.7330 authorizes the city to impose conditions on an

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[5] ORS 227.175 provides in relevant part:

> "**Application for permit or zone change; fees; consolidated procedure; hearing; approval criteria; decision without hearing.**
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> "(1) When required or authorized by a city, an owner of land may apply in writing to the hearings officer, or such other person as the city council designates, for a permit or zone change, upon such forms and in such a manner as the city council prescribes.
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> " * * * * *
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> "(4) The application shall not be approved unless the proposed development of land would be in compliance with the comprehensive plan for the city and other applicable land use regulation or ordinance provisions. *The approval may include*

approved rezoning. We agree with intervenor that the statute gives the city authority to impose conditions on approval of an application for a zone change.

Finally, petitioner argues that the condition requiring compliance with the TPR at the PUD phase constitutes a *de facto* amendment of the EC because the condition amends the PUD provisions of the EC to add the requirements of the TPR. Intervenor responds that the city's imposition of the condition is consistent with the provisions of the ECC governing PUDs. Intervenor notes that the EC provisions governing PUDs contain a requirement for a Transportation Impact Analysis and a requirement that development must have only minimal off-site traffic impacts. EC 9.8320(5)(c) and 9.8320(12).

We do not think that the condition is a *de facto* amendment of the ECC. While the condition imposes an additional burden on intervenor, by requiring that intervenor demonstrate that the proposal complies with the TPR at the PUD phase, it does not eliminate other EC provisions regarding transportation impacts or amend the provisions of the EC to include compliance with the TPR for all applicants.

The assignment of error is denied.

The city's decision is affirmed.

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*such conditions as are authorized by ORS 227.215 or any city legislation. * * *"* (Bold in original, italics added.)