BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAKE MINTZ, PAUL SCHAEFER,
and LAWRENCE BATES,
Petitioners,

vs.

CITY OF BEAVERTON,
Respondent,

and

J. PETERKORT AND COMPANY,
Intervenor-Respondent.

LUBA No. 2013-010

FINAL OPINION
AND ORDER

Appeal from City of Beaverton.

Charles Swindells, Portland, filed the petition for review and argued on behalf of petitioners.

William B. Scheiderich, City Attorney, Beaverton, filed a response brief and argued on behalf of respondent.

Damien Hall, Lake Oswego, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief were Timothy V. Ramis and Jordan Ramis PC.

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

AFFIRMED 05/23/2013

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a city decision that applies city zoning designations to six parcels that were annexed by the city in 2005 and 2011.

MOTION TO INTERVENE

J. Peterkort and Company moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

INTRODUCTION

The city's initial attempt to apply city zoning designations to a number of annexed parcels was appealed to LUBA and remanded. *Mintz v. City of Beaverton*, ___ Or LUBA ___ (LUBA Nos. 2012-020, 2012-021, 2012-022 and 2012-023, August 22, 2012) (*Mintz I*). That opinion with appendices was 42 pages long and reflected the complexity of the dispute and the parties' arguments. The issues in this appeal are considerably narrowed. *Mintz I* included a discussion of the affected property, which is in the neighborhood of the Sunset Transit Center along US Highway 26 west of Portland, and the rather complicated city and county zoning codes at issue in this appeal. We do not repeat that discussion in this appeal.

As we explained in *Mintz I*, the city and Washington County entered into an Urban Planning Area Agreement (UPAA) in 1988. Under the UPAA, upon city annexation of county lands, the city agreed to apply to annexed property the "[city] plan and zoning designation which most closely approximate the density, use provisions and standards of the [county] designations."[1] In *Mintz I*, we referred to this standard as the "most closely

[1] The UPAA provides, as relevant:

> "D. The CITY and the COUNTY agree that when annexation to the CITY takes place, the transition in land use designation from one jurisdiction to another should be orderly, logical and based upon a mutually agreed upon plan. *Upon annexation, the CITY agrees to convert COUNTY plan and zoning designations to CITY plan and zoning designations which most closely approximate the density, use provisions and standards of the COUNTY designations*. Such conversions shall be made according

approximate" standard, and we do so in this opinion as well as well. We also explained in *Mintz I*, that the "most closely approximate" standard has also been adopted as part of the city's comprehensive plan and land use regulations. Beaverton Comprehensive Plan, Volume I, 3.15; Beaverton Development Code (BDC) 40.97.15.4(C)(3); BDC 10.40.3(B).

Six properties are at issue. In its decision following remand, as in the remanded decision, the city applied its Station Community Sunset (SC-S) zone to the disputed properties. The SC-S zone was adopted specifically for use when the areas around the Sunset Transit Center were annexed. Petitioners argue that the city's Station Community High Density Residential (SC-HDR) zone more closely approximates the county zoning that was replaced by the SC-S zone and should have been applied to the six properties instead of the SC-S zone.

In resolving petitioners' challenge under the "most closely approximate" standard in *Mintz I*, we separately addressed each of the three considerations or prongs under that standard, "density, use provisions and standards." Before doing so, we noted that "it would be a mistake to underestimate the potential complexity of applying [the 'most closely approximate'] standard." *Mintz I*, slip op at 6. Both the city's and county's zoning codes are quite complicated, which makes direct and meaningful comparison of density, use provisions and standards challenging to say the least. Complicating an ultimate decision under the "most closely approximate" standard is the fact that the standard itself does not indicate whether any of the three prongs of the standard is more important than the others. Later in our opinion in *Mintz I*, we emphasized that point:

> "It is reasonably clear from [the city's] findings just how difficult it is to apply the 'most closely approximate' criterion to city zones and county land use district designations that are complicated to begin with, take somewhat different approaches in regulating land use, and are littered with endnotes,

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to the tables shown on Exhibit 'B' to this agreement." *Mintz I* Record 228 (emphasis added).

> footnotes and other special qualifications that make a meaningful and understandable comparison a daunting task. It is also reasonably clear from those findings that in applying the 'most closely approximate' criterion, the city did not assign as much importance to similarity of uses as it did to other considerations, particularly meeting minimum residential development targets that require higher density in the areas it zoned SC-S[.]" *Mintz I*, slip op at 21.

A. The "Standards" Prong

In addressing this prong of the "most closely approximate" standard, we noted in *Mintz I* that the same city standards "apply in both the SC-HDR zone and the SC-S zone." *Mintz I*, slip op 23. We concluded that as far as the "standards" prong goes, the SC-HDR and SC-S zone approximate the replaced county zoning equally as well, and that petitioners failed to establish otherwise. *Id.* at 23-24.

B. The "Density" Prong

The county zoning districts that previously applied to the annexed properties were Transit Oriented Residential Districts. One of those zoning districts (the TO:R40-80 District) required a minimum residential density of 40 dwelling units per acre and a maximum residential density of 80 dwelling units per acre. The other replaced county zoning district (the TO:R80-120 District) required a minimum residential density of 80 dwelling units per acre and a maximum residential density of 120 dwelling units per acre.

As we explained in *Mintz I*, with one exception, the densities required under the SC-S and SC-HDR zone are the same. Both the SC-S and SC-HDR zones have no *maximum* residential density. And both the SC-S and SC-HDR zones have a minimum residential density of 30 or 21 dwelling units per acre, depending on proximity to light rail. But BDC 20.20.40 imposes an additional requirement in the SC-S zone that distinguishes it from the SC-HDR zone. BDC 20.20.40 requires a minimum of 1,899 residential dwelling units on the SC-S zoned parcels. In *Mintz I*, the city took the position that with the BDC 20.20.40 minimum residential development requirement, the effective minimum residential densities

for the SC-S zoned parcels would exactly match the minimum residential densities under the county zoning that the SC-S zoning replaced.

However, our decision in *Mintz I* identified two problems with the city's assumption that BDC 20.20.40 would be sufficient to result in the desired 1,899 residential units on the SC-S zoned parcels and thereby achieve the same minimum density as the replaced county zoning. First, the city relied on planned unit development (PUD) review to implement BDC 20.20.40. However, there is a one-half acre exception in BDC 40.15.15.4(A)(2) that would potentially allow parcels of less than one-half acre to be developed without PUD review. Without PUD review of all SC-S zoned lands, the desired 1,899 residential units might not be achieved. Second, it was not clear how the transportation capacity necessary to serve the anticipated 1,899 residential units would be accounted for and preserved so that nonresidential development would not leave some of the desired 1,899 residential development without the needed transportation capacity to allow those residential units to be developed. However, if those two problems could be corrected, we concluded the city could rely on the increased density that would result under BDC 20.20.40 to find that the SC-S zone more closely approximates the county zoning the SC-S zone replaced, with regard to density:

> "[W]e conclude that the city could reasonably rely on the increased density that would be required under BDC 20.20.40 to conclude that the SC-S zone more closely approximates the county TO:R40-80 and TO:R80-120 designations with regard to density, so long as the BDC 40.15.15.4(A)(2) one-half acre exception is eliminated and BDC 20.20.40.4 is amended to make clear that the transportation capacity necessary to serve any undeveloped 1,899 residential units must be accounted for and preserved in any PUD applications for approval of non-residential development." *Mintz I*, slip op 18.

C. The "Use Provisions" Prong

In addressing the "use provisions" prong in *Mintz I*, we noted that both the SC-HDR and the replaced county zoning district required that any nonresidential development had to

be mixed use development that included residential development, whereas the SC-S zone did not impose such a requirement:

> "[O]ne of the more significant limitations imposed by the SC-HDR zone and the county designations is a requirement that any proposal for non-residential development be mixed use development that includes residential development. That required mixed use feature is present in the county's land use designations but is missing from the SC-S zone that the city applied in this case." *Mintz I*, slip op 19 (footnote omitted).

In its brief, the city points out that under the BDC "mixed use" and "multiple use" are not the same thing. [2] The city contends the prior county zoning required "mixed use" development, whereas the SC-HDR zone requires "multiple use" development, as the BDC defines those terms. As discussed later the city contends that although the SC-S zone does not require multiple use development, in precisely the same way the SC-HDR zone does, the SC-S zone can also be expected to result in multiple use development.

In assessing petitioners' challenge regarding the "use provisions" prong, in *Mintz I* we identified what we referred to as 46 "More Specific Uses." *Mintz I*, slip op at 19. For 22 of those More Specific Uses, the SC-HDR and SC- zones are identical. For 11 of those More Specific Uses, the SC-HDR and SC-S zones have only minor differences that petitioners did not argue were important. Therefore, for 33 of the 46 More Specific Uses, under the "use provisions" prong, both zones are equally approximate to the replaced county zone. But for 13 of the More Specific Uses, the city SC-HDR zone is more similar to the county zone,

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[2] BDC Chapter 90 includes the following definitions:

> "**Mixed Use Development.** * * * Development in which multiple land uses are mixed within a single building, such as residential units over commercial space, also known as vertical mixed use development."

> "**Multiple Use Development.** * * * A building or groups of buildings under one ownership designed to encourage a diversity of compatible land uses, which include a mixture of two or more of the following uses: residential, office, retail, recreational, light industrial, and other miscellaneous uses."

because it requires that those uses be developed as multiple use development that includes residential development. Simply stated the county zoning required that commercial uses be developed as mixed use development that includes residential development and did not permit industrial development. The SC-HDR zone similarly requires that commercial development and residential development occur together as multiple use development and does not permit industrial development. But the SC-S zone does not require that all development be mixed or multiple use development and allows some industrial development. One of our bases for remand in *Mintz I* was the city's failure to address these 13 More Specific Uses:

> "It is not clear to us that the city was even aware that the SC-S and SC-HDR zone treat those 13 More Specific Uses quite differently and that the SC-HDR zone much more closely matches the way the county's TO:R40-80 and TO:R80-120 designations regulate those uses. On remand the city will need to adopt findings that address the 13 More Specific Uses for which the SC-HDR zone much more closely approximates the way the county's TO:R40-80 and TO:R80-120 designations regulate those uses and determine whether the SC-S zone nevertheless satisfies the 'most closely approximate' criterion." *Mintz I*, slip op 23.

ASSIGNMENT OF ERROR

A. The "Density" Prong

Following our remand the city council adopted ordinances that correct the half-acre exception and traffic capacity accounting problems that we identified in *Mintz I*. The city council also adopted a number of findings. The city council first found that although the "most closely approximate" standard does not distinguish between the three prongs, the city council found that in this case the "density" prong is more important than the other two prongs:

> "The Urban Planning Area Agreement (UPAA) between the County and City is a three pronged criterion. The City Council finds that the three prongs for residential density, use provisions, and development standards are not equally weighted, in so far as the City is required to satisfy Title 1 of Metro's *Urban*

> *Growth Management Functional Plan and Regional Functional Plan Requirements*.
>
> "* * * * *
>
> "Although Section 3.07.120.B of Metro's *Regional Functional Plan Requirements* for Title 1 does not require minimum dwelling unit density for mixed use zones, the County had adopted minimum density requirements for development of the subject parcels and required that non-residential uses could only be approved if combined with residential uses. The SC-S zoning district requires development of a minimum of 1,899 residential units, the same as the minimum residential density under County zoning, equivalent to 30 units per gross acre or 48 units per net acre. * * *" Record 36-38.

And, as it had before, the city council also found that the SC-S zone is more closely approximate to the county zoning it was replacing, with regard to the "density" prong.

In challenging the city's findings regarding the "density" prong, petitioners first point out, as the city recognized, that the Metro's Title 1 planning does not mandate minimum residential density in mixed use zones. But we fail to see the significance of that observation. In response to Metro's Title 1 zoning, whether it was legally required to do so or not, the county applied zoning with relatively high minimum residential densities. Although the city may not be legally required by Metro to carry that relatively high minimum residential density forward in the multiple use zone it applies to replace the county's mixed use zone, we are aware of no reason why the city could not elect to do so voluntarily under the "most closely approximate" standard. Similarly we are not aware of any reason why the city could not interpret the "most closely approximate" standard to make the "density" prong more important than the other two prongs in the circumstances presented here, where the regional planning agency is calling for high density residential development. As we have already noted the "most closely approximate" standard does not expressly state that the three prongs must be applied with equal weight in all cases. We cannot say the city council's interpretation that emphasizes the "density" prong under the "most closely approximate"

standard in this case represents an improper construction of the "most closely approximate" standard.[3]

Petitioners make additional arguments under the "density" prong. First, petitioners point out that the city's findings appear to assume, incorrectly, that the SC-HDR zone has a maximum density. However, that finding constitutes harmless error, at most, since the city's finding was simply speculating that even the maximum density allowed in the SC-HDR zone would not equal the minimum density that was required by county zoning. Next, petitioners argue "'uses' should arguably be weighed more heavily than 'density' to find the closest approximation, and not *vice versa*, contrary to respondent's assertion." Petition for Review 8. Petitioners' expression of disagreement with the city's decision to more heavily weigh the "density" prong provides no basis for remand. Next, petitioners point out that the SC-HDR zone has a maximum Floor Area Ratio that could "accommodate the intensity of mixed-use development authorized by the county's districts." *Id*. But the same thing can be said about the SC-S zone, and we fail to see the significance of the argument.

Finally, petitioners argue that the BDC 20.20.40.5 "requirement" for 1,899 residential units is not an absolute requirement. Rather, as LUBA pointed out in *Mintz I*, under BDC 20.20.40.5 development of additional non-residential development must stop once 80 percent of the allowable nonresidential development has been constructed, until 1,899 residential units have been constructed in the SC-S zoned areas. Whether it is an absolute requirement or not, we found that BDC 20.20.40.5 is undeniably an incentive to construct those residential uses, an incentive that is not present in the city's SC-HDR zone.

On remand the city corrected the problems that we identified in its initial decision's conclusion that SC-S zone is more closely approximate to the prior county zoning under the

[3] One of LUBA's statutory bases for reversal or remand is where a local government "[i]mproperly construed the applicable law." ORS 197.835(9)(a)(D).

"density" prong. The city also found that the "density" prong is the most important of the three prongs. We reject petitioners' challenges in this appeal to those city findings.

B. The "Standards" Prong

As previously noted the same design standards apply in both the SC-S and SC-HDR zones. However, the city found that more restrictive design standards apply (1) along major pedestrian routes and (2) to PUDs. Since development within the SC-S zone requires PUD approval and the SC-S zoned properties are located along major pedestrian routes, the city suggests the more restrictive design standards "will fully achieve the purposes of mixed use development." Record 65. If the city intended by those findings to suggest that the SC-S zone more closely approximates the county zoning it replaced, under the "standards" prong, we do not understand the suggestion. Even if the more restrictive design standards may "achieve the purposes of mixed use development," that does not necessarily mean the SC-S zone design standards more closely approximate the county design standards than the SC-HDR design standards. For purposes of this opinion, we assume the SC-S and SC-HDR design standards equally approximate the county zoning design standards.

C. The "Use Provisions" Prong

Our remand in *Mintz I* required that the city consider the 13 More Specific Uses for which the county zoning and the SC-HDR zone seem to regulate more similarly. The city did so in its decision on remand, adopting three pages of single-spaced findings that, to put it charitably, are not easy reading. Record 63-65. Petitioners devote six pages of their petition for review to challenging the reasoning in those findings. With one exception, petitioners generally succeed in identifying flaws in the city's reasoning that the SC-S zone's treatment of the 13 More Specific Uses more closely approximates the county zone's treatment of those uses, as compared to the SC-HDR zone.

That exception is the city's explanation that while the SC-S zone, unlike the county and SC-HDR zones, does not directly require mixed or multiple use development to ensure

that a residential component is developed at the same time a number of the 13 More Specific Uses are developed, the SC-S zone will indirectly achieve the same result. As the city's findings explain, the SC-S zone does that because BDC 20.20.40.5 requires that at least 1,899 dwelling units be developed before the SC-S zoned properties can be fully developed with nonresidential uses, and by reserving transportation capacity for that residential development.[4]

Stripped of the complexity engendered by our decision in *Mintz I* and the parties' arguments in this appeal, the SC-S zone more closely approximates the county zoning it replaced under the "density" prong of the more closely approximates standard, which is the prong that the city believes is most important of the three. The SC-S zone and SC-HDR zone equally approximate the replaced county zone under the "standards" prong of the "most closely approximate" standard. For 33 of the 46 More Specific Uses the SC-S and SC-HDR equally approximate the replaced county zoning. For the 13 More Specific Uses we identified in *Mintz I*, petitioners are correct that for those 13 More Specific Uses, the SC-HDR zone more closely approximates the county zoning than does the SC-S zone, although the BDC requirement for 1,899 dwelling units makes the SC-S zone more similar than would otherwise be the case. Given that breakdown of the three prongs of the "most closely approximate" standard, we cannot say the city council misconstrued the "most closely approximate" standard in concluding that the SC-S zone "most closely approximates" the county zoning it replaced.

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[4] The city council's findings explain:

"For the SC-S zoning district, non-residential development is limited, but not through use restrictions. The residential 1,899 dwelling unit requirement of [BDC] 20.20.40.2 for the SC-S zoning district has the effect of the 1,899 dwelling units absorbing transportation capacity for a development, thereby limiting the amount of non-residential development that can be accommodated in this planning area." Record 64.

We have just concluded that the city did not improperly construe the "most closely approximates" standard and therefore its decision is not subject to reversal or remand under ORS 197.835(9)(a)(D). *See* n 3. Although we therefore need not consider respondent's and intervenor's argument that the city council's decision is subject to the deferential standard of review set out in ORS 197.829(1), as interpreted and applied by *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010), we agree that it is.[5] Under that deferential standard of review, LUBA must affirm the city council's interpretation of its plan and land use regulations, including the "most closely approximate" standard, unless that interpretation is "implausible."[6] There can be no serious question that the city council's interpretation of the "most closely approximate" standard in this case is plausible and therefore must be affirmed.

Petitioners did not file a reply brief, to respond to respondent's and intervenor's contention that the city's interpretation of the "most closely approximate" standard is entitled to deference under ORS 197.829(1) and *Siporen*. As noted earlier, the "most closely approximate" standard originated in the UPAA, an agreement between Washington County and the City of Beaverton. Citing *Trademark Construction, Inc. v. Marion County*, 34 Or LUBA 202 (1998) and *City of Newberg v. Yamhill County*, 36 Or LUBA 473 (1999), at oral argument, petitioners argued the city council is not entitled to deference under ORS 197.829(1) and *Siporen*. If the city had not adopted the "most closely approximate" standard as part of its comprehensive plan and land use regulation, the city would likely not be entitled

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[5] In fact, we concluded in *Mintz I* that the city council's interpretation of the "most closely approximate" standard would be subject to the deferential review required by ORS 197.829(1) and *Siporen*. *Mintz I*, slip op 24. Our decision in *Mintz I* was not appealed to the Court of Appeals. The problem in *Mintz I* that led to our remand is that the city council failed to adopt an adequate interpretation of the "most closely approximate" standard.

[6] ORS 197.829(1) provides in relevant part that LUBA must affirm a local government's interpretation of local land use law, unless the interpretation is inconsistent with the express language, purpose or underlying policy of that law. The Oregon Supreme Court has construed ORS 197.829(1) to require LUBA to affirm a local government code interpretation if the interpretation is "plausible." *Siporen*, 349 Or at 255.

to deference under ORS 197.829(1). *See Trademark Construction, Inc.*, 34 Or LUBA at 211 (a county is not entitled to deference under *Gage v. City of Portland*, 319 Or 308, 877 P2d 1187 (1994) when interpreting another jurisdiction's land use law); *City of Newberg v. Yamhill County*, 36 Or LUBA at 480 (leaving open the question whether a county is entitled to deference under ORS 197.829(1) when interpreting an urban area growth management agreement with a city). But the city has adopted the "most closely approximate" standard as part of both its comprehensive plan and its land use regulations. The city council's interpretation of the "most closely approximate" standard is entitled to deference under ORS 197.829(1) and *Siporen.*

Petitioners' assignment of error is denied.

The city council's decision is affirmed.