BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SANDRA SAVAGE,
Petitioner,

vs.

CITY OF ASTORIA,
Respondent,

and

210 DEVELOPERS LLC and MARK TOLLEY,
Intervenors-Respondents.

LUBA No. 2013-059

FINAL OPINION
AND ORDER

Appeal from City of Astoria.

Ty K. Wyman, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Dunn Carney Allen Higgins & Tongue LLP.

Blair J. Henningsgaard, Astoria, filed a joint response brief on behalf of respondent.

Daniel Kearns, Portland, filed a joint response brief and argued on behalf of intervenors-respondents. With him on the brief was Reeve Kearns, PC.

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

AFFIRMED 09/08/2013

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

Petitioner appeals a city council decision approving a zoning map amendment.

MOTION TO INTERVENE

210 Developers LLC and Mark Tolley, the applicants below, move to intervene on the side of respondent in this appeal. There is no opposition to the motion, and it is granted.

FACTS

Intervenors own a 2.09-acre property located in the city of Astoria, north of Leif Erikson Drive (Highway 30) and south of the Columbia River. Access to the property from Highway 30 is via 39th Street (a north/south city street) and then Abbey Lane. 39th Street travels from its intersection with Highway 30 a short distance north to the Columbia River. Abbey Lane is short east/west street that extends east from 39th Street and ends in a cul-de-sac at the subject property.

The challenged decision changes the zoning map designation for the subject property from GI (General Industrial) to S-2A (Tourist Oriented Shoreland). The subject property and adjoining properties to the west were approved for development of three multi-family condominium buildings in 2004. Two of those condominiums have been constructed on property to the west of the subject property. The subject property is undeveloped. Both the GI and S-2A zones allow multi-family development, but the GI zone requires that the first floor be put to uses other than residential. The S-2A zone does not impose that requirement. Intervenors apparently sought the zone change because the two existing condominium buildings have been unsuccessful in attracting non-residential uses for ground floor spaces. The S-2A zoning would allow the entire building to be developed for residential use.

ASSIGNMENT OF ERROR

A. The Issue Raised by Petitioner's Assignment of Error

The disputed zoning map amendment is an amendment of the city's land use regulations. OAR chapter 660, division 12 is the transportation planning rule (TPR). OAR 660-012-0060(1) requires certain specified mitigation measures if a land use regulation amendment "would significantly affect an existing or planned transportation facility." Determining whether a land use regulation amendment would significantly affect a transportation facility requires a rather complicated inquiry under OAR 660-012-0060(1).[1]

In her assignment of error, petitioner argues the city's findings are inadequate to establish that the zoning map amendment complies with OAR 660-012-0060(1). In her findings challenge, petitioner contends the city failed to establish under OAR 660-012-

---

[1] OAR 660-012-0060(1) provides in part:

> "A * * * land use regulation amendment significantly affects a transportation facility if it would:
>
> "(a) Change the functional classification of an existing or planned transportation facility (exclusive of correction of map errors in an adopted plan);
>
> "(b) Change standards implementing a functional classification system; or
>
> "(c) Result in any of the effects listed in paragraphs (A) through (C) of this subsection based on projected conditions measured at the end of the planning period identified in the adopted TSP. As part of evaluating projected conditions, the amount of traffic projected to be generated within the area of the amendment may be reduced if the amendment includes an enforceable, ongoing requirement that would demonstrably limit traffic generation, including, but not limited to, transportation demand management. This reduction may diminish or completely eliminate the significant effect of the amendment.
>
> "(A) Types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;
>
> "(B) Degrade the performance of an existing or planned transportation facility such that it would not meet the performance standards identified in the TSP or comprehensive plan; or
>
> "(C) Degrade the performance of an existing or planned transportation facility that is otherwise projected to not meet the performance standards identified in the TSP or comprehensive plan."

0060(1) that the proposed rezoning will not significantly affect nearby transportation facilities because the city failed to identify the traffic-generating potential of the property with the proposed zoning and failed to identify the functional classifications of nearby transportation facilities. Petitioner further argues that the TPR findings the city did adopt are not supported by substantial evidence.

B. Waiver

The challenged decision is quasi-judicial and subject to ORS 197.763. ORS 197.763(1) requires that:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

ORS 197.835(3) similarly provides that the issues that may be raised in a LUBA appeal challenging a quasi-judicial land use decision "shall be limited to those raised by any participant before the local hearings body as provided by ORS * * * 197.763[.]" Respondents contend that petitioner raised no issue below concerning the TPR and that the issues presented in her assignment of error were therefore waived and are beyond LUBA's scope of review under ORS 197.835(3).

If petitioner or some other party complied with the ORS 197.763(1) requirement that "issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue," petitioner may challenge the adequacy of and evidentiary support for the city's TPR findings. *Lucier v. City of Medford*, 26 Or LUBA 213, 216 (1993); *Spiering v. Yamhill County*, 25 Or LUBA 695, 714-15 (1993). But unless petitioner or some other party asserted below that the proposed rezoning does not comply with the TPR, so that the city had "fair notice" that it needed to address that issue,

petitioner's TPR issues were not preserved for review in this appeal. *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991).

Astoria Development Code (ADC) 10.070(B) provides in part:

> "Before an amendment to a zone boundary is approved, findings will be made that the following criteria are satisfied:
>
> "* * * * *
>
> "2. The Amendment will:
>
> "a. Satisfy land and water use needs; or
>
> "b. Meet transportation demands; or
>
> "c. Provide community facilities and services.
>
> "* * * * *."

In an April 8, 2013 planning staff report to the planning commission, planning staff proposed findings that address ADC 10.070(B)(2). Record 111-22. Those findings explain that the zoning map amendment must comply with the TPR ("In accordance with * * * OAR 660-010-060 * * * any plan amendment having a significant effect on a transportation facility * ** must assure that the allowed land uses are consistent with the function, capacity, and level of service of the facility.") Record 117. The findings then compare the uses allowed in the existing GI zone and proposed S-2A zone and conclude that the proposed zone would allow a "wider variety of uses" and allow an "increase in potential vehicle trips" and the increased trips would be by "private vehicles versus the larger commercial trucks associated with the industrial uses." Record 118. However, the findings then conclude that because the largest traffic generator in both zones is multi-family development, which is allowed in both the existing GI zone and the proposed S-2A zone, "the change in traffic impact to the area should not be significant." Record 119. The city's findings then take the additional position that with facilities proposed by the East Gateway Transportation System Plan, which was adopted by the city in 2007, and specific roadway improvements that were required as a condition of

approval of an earlier rezoning that was approved for development of a Hampton Inn located west of 39th Street, "it appears that the transportation facilities in this area are sufficient to accommodate the uses allowed in the S-2A Zone." Record 119-20. Those improvements that were required for development of the Hampton Inn included a road parallel to Highway 30 between 38th and 39th Streets and a turn lane on Highway 30 to facilitate turning movements from Highway 30 to 39th Street. The city's findings explain that both those improvements have been constructed. Record 119. The proposed staff findings were later adopted without change by the planning commission (Record 63) and the city council (Record 3).

Petitioner's only appearance below was in a May 20, 2013 letter that appears at Record 103-05. Petitioner contends the portion of that letter set out below is adequate to raise the TPR issues she raises in her assignment of error in this appeal:

> "[W]e feel that [ADC] 10.070(B.2) is being misinterpreted. The requirement is to assure the zone has a worthy community purpose in meeting or furthering a goal or need in any of the three categories listed. But it is interpreted here to mean the change will not exceed transportation demands. Again, this doesn't make sense. The intent of this requirement is not explained. In fact, the change would:
>
> "a. Remove a valuable industrial site from the lands inventory
>
> "b. Place new demands on the transportation system
>
> "c. Remove community services in the form of lost vistas and potential park land[.]" Record 104-105.

The scope and nature of the ADC 10.070(B) issue raised by petitioner above is far from clear. But it is quite clear that the above-quoted argument raises no issue under the TPR. Petitioner appears to take the position that ADC 10.070(B)(2) was "being misinterpreted" because ADC 10.070(B)(2) requires that the proposed zone must have "a worthy community purpose in meeting or furthering a goal or need in any of the three categories listed." One of those categories is "[m]eet[ing] transportation demands."

Petitioner apparently took the position before the city that because the new zone will "place new demands on the transportation system," it follows that the new zone does not comply with ADC 10.070(B)(2). Putting aside the merits of that ADC 10.070(B)(2) argument, the argument simply is not sufficient to raise any issue under the TPR generally or OAR 660-012-0060 specifically. At best, the argument raises a generalized traffic issue, without citing the TPR or any of the substantive requirements of the TPR, and raising such a generalized traffic issue is not sufficient to preserve the technical TPR issues that petitioner raises in her assignment of error. See *Cornelius First v. City of Cornelius*, 52 Or LUBA 486, 495 (2006) (generalized arguments about lack of justification for commercial zoning are insufficient to raise an issue under Goal 9 (Economic Development) or the Goal 9 rule where neither Goal 9 nor the Goal 9 rule were cited and no issue was raised regarding the substantive requirements of Goal 9 or the Goal 9 rule); *Cox v. Yamhill County*, 29 Or LUBA 263, 266 (1995) (general argument that good farm land should not be used for a church insufficient to raise an issue under OAR 660-033-0120 which prohibits churches on high value farm land); *Spiering v. Yamhill County*, 25 Or LUBA 695, 712 (1993) (no issue raised regarding the ORS 215.296 EFU zone standards where the statute was not cited and none of the operative terms of the statute were employed in petitioner's arguments below); *ODOT v. Clackamas County*, 23 Or LUBA 370, 375 (1992) (general references to Goal 12 (Transportation) are insufficient to raise an issue under OAR 660-012-0060).

At oral argument, petitioner offered two additional responses to respondents' waiver arguments. First, citing *Olstedt v. Clatsop County*, 62 Or LUBA 131 (2010), petitioner contends planning staff clearly raised the issue of whether the TPR applies to the proposed rezoning, and because staff raised that issue below the TPR issues raised in the petition for review are preserved for LUBA review in this appeal. Second, citing ORS 197.835(4), petitioner argues the city's notice of hearing, which appears at Record 133, fails to provide

notice that the TPR applies to the proposal.[2] Petitioner contends that failure permits it to raise the TPR issue for the first time at LUBA.

Petitioner's reliance on *Olstedt* is misplaced. *Olstedt* concerned a development ordinance requirement that prohibited approval of development permits for land that had been developed in violation of the development ordinance. Planning staff initially took the position in *Oldstedt* that it was probable that the property for which a development permit was sought had been illegally partitioned. 62 Or LUBA at 138. The planning staff later took the position that the illegal partition had been "eliminat[ed]." *Id.* In that case, LUBA concluded that legality of the partition had been sufficiently raised by planning staff to preserve that issue for appeal. But in this case the only positions taken by planning staff were that the TPR applies and that the proposed rezoning *complies* with the TPR. Planning staff never took the position that the proposed rezoning will significantly affect transportation facilities or implicate or violate the TPR, which are the positions that petitioner asserts in this appeal. Planning staff therefore did not raise the TPR issues presented by petitioner in this appeal. *Just v. Linn Coun*ty, 60 Or LUBA 74, 90-91 (2009).

Petitioner's reliance on ORS 197.835(4) is similarly misplaced. Under ORS 197.835(4), issues regarding criteria that should have been listed under ORS 197.195(3)(c) or 197.763(3)(b) but were not, may be raised in a LUBA appeal. *See* n 2. ORS 197.763(3)(b) is the applicable statute here, and that statute requires that the city's notice of hearing "[l]ist the applicable criteria from the *ordinance and the plan* that apply to the application at

---

[2] ORS 197.835(4) provides, in part:

> A petitioner may raise new issues to the board if:
>
> "(a) The local government failed to list the applicable criteria for a decision under ORS 197.195(3)(c) or 197.763(3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. * * *
>
> "* * * * *."

issue[.]" (Emphasis added.) Petitioner does not argue the TPR is part of the city's ordinances or plan. Therefore, the city's failure to list the TPR as an applicable criterion does not excuse petitioner from having to raise the issue below to preserve TPR issues for appeal. *St. Johns Neighborhood Assn. v. City of Portlan*d, 33 Or LUBA 836, 840 (1997); *ODOT v. Clackamas County*, 23 Or LUBA 370, 375 (1992).

Because the TPR issues raised by petitioner in her assignment of error were not raised by any participant before the city, those issues were not preserved for LUBA review. *Wethers v. City of Portlan*d, 21 Or LUBA 78, 92 (1991); *Keudell v. Union County*, 19 Or LUBA 394, 400-01 (1990). Petitioner's assignment of error is denied.

The city's decision is affirmed.