BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SAVE DOWNTOWN CANBY,
Petitioner,

vs.

CITY OF CANBY,
Respondent,

and

GREAT BASIN ENGINEERING,
Intervenor-Respondent.

LUBA No. 2013-114

FINAL OPINION
AND ORDER

Appeal from City of Canby.

E. Michael Connors, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Hathaway Koback Connors LLP.

Joseph Lindsay, City Attorney, Canby, filed a joint response brief and argued on behalf of respondent.

Steven W. Abel and Elaine R. Albrich, Portland, filed a joint response brief. With them on the brief was Stoel Rives LLP. Steven W. Abel argued on behalf of intervenor-respondent.

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

AFFIRMED 07/23/2014

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a city decision approving (1) a text and zoning map amendment, to facilitate approval of a fuel station, and (2) site design approval for the fuel station.

REPLY BRIEF

Petitioner moves to file a reply brief to address two alleged "new matters" raised in the response brief, pursuant to OAR 661-010-0039. Intervenor-respondent (intervenor) objects, arguing that the response brief simply responded to the arguments in the petition for review and raised no "new matters."

The reply brief is allowed. The petition for review raised two challenges under the Transportation Planning Rule (TPR); the response brief responded in part that two conditions of approval that were not intended to assure compliance with the TPR will nonetheless operate to assure compliance. The response is a "new matter" that warrants a reply brief.

MOTION TO STRIKE; MOTION TO TAKE EVIDENCE

Attached to the joint response brief is a July 8, 2013 transportation impact analysis (TIA) that intervenor submitted to the city during the remand proceedings, parts of which were incorporated by reference into the city council's final decision. Because the TIA was indisputably placed before the final decision, there is no question that it should have been included in the record filed with LUBA. However, for unknown reasons, the TIA was not included in the local record filed with LUBA, and no party spotted the omission until briefing was well advanced.

Petitioner moves to strike the attached TIA, arguing that LUBA's evidentiary review is confined to the local record, and the TIA is not in the local record. Intervenor responded by filing a motion to take evidence outside the record pursuant to OAR 661-010-0045, requesting that LUBA consider the TIA. Petitioner opposes the motion to take evidence, arguing that such a motion is not a permissible vehicle to allow LUBA to consider the TIA for any purpose. Further, petitioner contends that allowing the record to be supplemented in this manner long after the record is settled would set a bad precedent, removing the incentive for parties to follow the strict deadlines for resolving record objections and settling the record, and creating unnecessary delay in LUBA's proceedings.

Respondents' attempt to put the TIA before LUBA by attaching the TIA to the joint response brief is, in essence, a belated supplement to the record. We have allowed such belated supplements to the record for documents that indisputably belong in the record, where the timing of submission does not cause prejudice to any party's substantial rights, pursuant to OAR 661-010-0005 (technical violations of LUBA's rules do not affect review unless the violation prejudices a party's substantial rights). *Conte v. City of Eugene*, 65 Or LUBA 326, 330-31 (2012). Petitioner does not dispute that the TIA belongs in the record (indeed is partly incorporated into the final decision), or argue that the late supplement to the record would prejudice its substantial rights. We note that the petition for review assumed that the TIA was in the record all along. Petition for Review 18. In addition, LUBA allowed petitioner to file a supplemental brief to add any additional arguments petitioner wished to make regarding the TIA, and petitioner did so. Finally, we see little potential for delay or undermining the record settlement process by allowing a belated

supplement under the present circumstances. Indeed, if LUBA could not consider the TIA because it was not in the record, and had to remand the decision due to the absence of the TIA from the record, such remand to place the TIA in the record would cause far more needless delay than allowing the city to belatedly supplement the record before LUBA.

The record is supplemented with the July 8, 2013 TIA. Accordingly, the motion to strike is denied, and the motion to take evidence is denied, as moot.

FACTS

The city's decision is on remand from LUBA. *Save Downtown Canby v. City of Canby*, __ Or LUBA __ (LUBA No. 2012-097, June 4, 2013) (*Save Downtown Canby I*). We repeat the facts from that opinion:

> "The subject property is a .75 acre tract located at the corner of Highway 99E and S Locust Street in the City of Canby. The property's base zone is Highway Commercial (C-2). The property and most of the surrounding land are also subject to the Downtown Canby Overlay (DCO) zone, which has several sub-areas. Each of the DCO sub-areas allow the same uses, which are determined by the base C-2 zone, but each DCO sub-area has slightly different site design review standards.
>
> "The DCO sub-area that applies to the subject property is the Core Commercial (CC) sub-area. The CC sub-area is intended to foster pedestrian-oriented development, and its design criteria generally reflect that intent. The subject property is the north-easternmost property from the city center that is zoned CC. Properties farther to the northeast are also within the DCO, but subject to the Outer Highway Commercial (OHC) sub-area, which is generally intended to foster more automobile-oriented development.
>
> "On February 28, 2012, [intervenor had a pre-application conference with city staff concerning a site design review application for a proposed Fred Meyer fuel station on the subject property. City staff advised intervenor that placing a fuel station within the CC sub-area would pose problems in demonstrating

> consistency with the intent of the CC sub-area. City staff suggested that intervenor first apply to rezone the property from CC to OHC, which would basically involve a minor text amendment to the geographic descriptions of the DCO sub-areas, and a map amendment to shift the boundary between the CC and OHC sub-areas approximately 150 feet southwestward to include the subject property in the OHC sub-area.
>
> "Intervenor applied to rezone the property from CC to OHC, and for site design review approval of a six-unit fuel station under the OHC design review criteria. The city planning commission held a hearing on the proposed text and map amendments, and recommended denial. Because the site design review application followed a different procedure, and was dependent on the text and zoning amendments, the planning commission deferred hearings on the site design review application until the city council reviewed its recommendation on the text and zoning amendments. The city council held a hearing on the text and map amendments, and on December 5, 2012, adopted Ordinance No. 1365, which approved the text and map amendments." *Slip op* 2-3.

Petitioner appealed Ordinance No. 1365 to LUBA. While the appeal to LUBA was pending, the city began processing the site design review application (SDR application). On June 4, 2013, LUBA remanded the ordinance on two grounds. First, LUBA held that the city must reconsider its conclusion that the rezone from CC to OHC complies with the Transportation Planning Rule (TPR) at OAR 660-012-0060, specifically whether development under the OHC sub-area design standards—which include different setback, height, and other standards than the CC sub-area—would increase the traffic-generative capacity of potential development of the property, compared to similar development under the CC sub-area design standards. If so, then additional analysis under the TPR was warranted. Second, LUBA held that the city should determine whether a text amendment standard requiring consideration of the comprehensive plan requires the city to consider potential

conflicts with a future pedestrian crossing contemplated in the city's transportation system plan (TSP).

On remand, the city consolidated the remand proceedings on the ordinance with the SDR application. Intervenor's traffic expert submitted a revised TPR analysis concluding that development under the OHC subarea design standards would not generate more traffic than under the CC subarea design standards. Petitioner's traffic expert submitted an analysis that argued the contrary.

With respect to the future pedestrian crossing, the city council considered a supplemental traffic impact analysis submitted by intervenor's traffic engineer, and concluded that access to the fuel station would not cause safety conflicts with the future pedestrian crossing.

The city council re-approved the text and map amendments, and in the same decision approved the site design application for the proposed fuel station. This appeal followed.

FIRST ASSIGNMENT OF ERROR

In *Save Downtown Canby I*, the city concluded that because the base C-2 zone is unchanged, and therefore the same uses are allowed on the subject property in either the CC subarea or the OHC subarea, the amendment to the OHC subarea does not increase the potential traffic generation of uses allowed on the property. Accordingly, the city concluded that no further analysis is needed to determine that the amendment does not "significantly affect" a transportation facility within the meaning of OAR 660-012-0060. However, LUBA remanded, agreeing with petitioner that because the CC and OHC subareas have different setback, frontage development, minimum floor area ratios, footprint, and height requirements, which might affect the maximum

square footage of potential development and hence the potential traffic generative capacity, the city was required to consider whether rezoning the property to the OHC subarea would increase the potential traffic generative capacity of uses allowed on the property after the amendment, considering the most-traffic intensive use of the property that could reasonably be constructed. If so, then additional analysis under the TPR was required, and potentially mitigation or other actions.

On remand, intervenor's traffic engineer submitted a "TPR analysis" dated July 9, 2013, which analyzed the size and traffic-intensity of development that could occur on the property under the CC and OHC design standards. [1] The TPR analysis concluded, and no party disputes, that the most traffic-intensive use permitted in the base C-2 zone that could reasonably be constructed on the subject property is a fueling station. Generally, the traffic generative capacity of a fueling station depends on the number of fuel

[1] The following table summarizes the relevant Canby Municipal Code (CMC) 16.41.050 design standards:

	CC Subarea	OHC Subarea
Minimum Setback	0 Feet	10 Feet
Minimum Percentage of Frontage Developed With Building(s) at the Setback	60 Percent	40 Percent
Minimum Floor Area Ratio	None	0.25
Maximum Building Footprint	30,000 square feet	80,000 square feet
Maximum Building Height	60 Feet	45 Feet

dispensers. The TPR analysis noted that the CC subarea has no minimum setback, while the OHC subarea has a minimum 10 foot setback, which would potentially allow a larger developable area under the CC subarea standards, and hence more fuel dispensers, compared to the OHC subarea standards.[2] The TPR analysis ultimately concluded that the potential maximum number of fuel dispensers, and hence the traffic generative capacity, would remain unchanged under the OHC subarea, and hence no further analysis under the TPR was required.

In response, petitioner submitted an analysis from a planner arguing that the different CC and OHC design standards would significantly affect the number of fuel dispensers that could be developed on the property. The planner calculated that under the CC design standards, only eight fuel dispensers could be constructed, while up to 18 fuel dispensers could be constructed under the OHC design standards. The planner's calculations depended on the assumption that the CC design standards would require that the lot frontage be developed with two accessory commercial buildings, such as a convenience store or coffee shop, with associated parking, which would

---

[2] The TPR analysis stated, in relevant part:

> "In the case of fuel facilities, the number of fueling positions that could be located at the site would only depend on the setback requirements of the CC and OHC design overlay zones. With a minimum 10 foot setback in the proposed OHC overlay zone, less area would be available for fuel dispensers and vehicle queuing than in the current CC zone with no minimum setback. It is unlikely that eliminating the 10 foot setback would allow sufficient area for additional fuel dispenser lanes, so we have assumed no change between the two overlay zones." Record 237.

effectively reduce the maximum size of the fueling station and the number of fuel dispensers, while under the OHC design standards no such buildings are required. The planner's analysis was accompanied by two site designs, one under the CC subarea showing two accessory buildings, parking, and an 8-dispenser fuel station, and another under the OHC subarea with no accessory buildings or parking, which left room for an 18-dispenser fuel station. Based on the planner's analysis, petitioner's traffic expert concluded that an 18-dispenser fuel station would generate more traffic than an 8-dispenser station. We refer to these two memoranda collectively as the "opposition analysis."

The city council rejected the opposition analysis, and chose to rely on the July 9, 2013 TPR analysis submitted by intervenor. The city council concluded that the same number of fuel dispensers could be developed on the property under either the CC or OHC design standards.[3]

---

[3] The city's findings state:

> "* * * The City Council finds that the Applicant's analysis provides an analysis of what reasonably can be constructed on the subject property. While opponents assert that the evidence demonstrates that the change in the overlay zone from CC to OHC increases the amount of potential development, the City Council disagrees. When applying the different footprint, height, setback and floor area ratios that apply to the two subareas, the City Council believes that the same level of development can occur on both the CC and OHC sub-zoned properties whether the analysis is made on the building square foot basis or on the fueling position count basis.
>
> "Opponents simply do not recognize requirements under the CMC with respect to what constitutes a building under the Canby code. Opponents make several arguments for why Applicant's analysis under the TPR is incorrect for the site. Ultimately, Opponents

On appeal, petitioner argues that the city council's findings are inadequate and not supported by substantial evidence. Petitioner contends that the TPR analysis is mostly concerned with comparing the maximum size and traffic-generative capacity of various commercial uses under the CC and OHC design standards, and devotes only a paragraph to the most-traffic intensive

---

> argue that Applicant underestimated the level and intensity of development that could occur on the site and therefore underestimated potential impacts under the TPR. The City rejects these arguments and finds that Applicant properly addressed the TPR in the LUBA remand portion of this appeal. Opponents fail to accept the City's interpretation and application of the provisions of the C-2 zone and the DCO standards. Opponents make the assumption that the fuel station layout they proposed for the CC subarea is the only way to satisfy the CC subarea development and design criteria; it is not. Opponents fail to consider that the minimum setback requirement in the CC subarea is zero, compared to the OHC's 10-foot minimum setback requirement. Further, the CC subarea requires building(s) to be located at the minimum street lot setback along at least 60 percent of a site's street frontage, whereas the OHC only requires it along 40 percent. The footprint of the development on the CC subarea could be greater than that in the OHC, as Applicant has demonstrated. Opponents may try to make arguments based on their interpretation of the CMC provisions and terms, but such interpretations are in error and inconsistent with the City's findings under the SDR criteria described below, which are incorporated herein to support the City's findings rejecting Opponents' arguments. Given the City's reasonable interpretation of the terms building, structure and coverage, it is not possible for Applicant to somehow later intensify the use onsite by adding fueling pumps. Applicant's analysis under the TPR is consistent with the possible development scenarios allowed under the CMC, based on the City's application and interpretation of the CMC provisions and terms. No further analysis is required to address the issue raised in this portion of LUBA's remand." Record 6-7.

use, a fuel station. *See* n 2. With respect to a fuel station, petitioner argues that the TPR analysis considered only the setback standard, and did not evaluate development of a fuel station on the property under the other CC and OHC design standards, including, most importantly, the street frontage requirement. As explained below, and also under the fourth assignment of error, CMC 16.41.050(A)(1)(b) applies in both subareas, and requires in the CC subarea that at least 60 percent of the street frontage be occupied by "buildings," while in the OHC subarea 40 percent of the street frontage must be occupied by "buildings." As shorthand, we refer to this as the "frontage standard." According to petitioner, the frontage standard effectively requires that in the CC subarea more of the site will be occupied by buildings, reducing the maximum number of fuel dispensers, as compared to a fuel station if developed under the OHC design standards.

Petitioner contends that the opposition analysis is the only expert evidence in the record addressing the frontage standard, and intervenor's traffic expert offered no rebuttal to the opposition analysis. Accordingly, petitioner argues, there is not conflicting expert evidence regarding the impact of the frontage standard, but rather the opposition analysis is the only substantial evidence in the record on this point. Petitioner argues, therefore, that the city's findings on the TPR issue that rely on the TPR analysis and reject the opposition analysis are not supported by substantial evidence.

In addition, petitioner argues that the city's findings on the TPR remand issue are inadequate, concluding only that "[o]pponents fail to accept the City's interpretation and application of the provisions of the C-2 zone and the DCO standards," and faulting opponents for failing to correctly take into account the different setback, street frontage, and footprint requirements, without

explaining why it chose to rely on the TPR analysis rather than the unrebutted opposition analysis. *See* n 3.

Respondents argue, and we agree, that the city's findings regarding the TPR remand issue are adequate and supported by substantial evidence. The city's findings on the TPR issue incorporate, by reference, the city's findings approving the SDR application under the OHC design standards. As discussed under the fourth assignment of error, the city interpreted the term "building," for purposes of the frontage standard, to include the proposed trellis wall that borders the fuel station on three sides, at the 10 foot setback line applicable in the OHC subarea. For the reasons explained under the fourth assignment of error, we must affirm that interpretation under the deferential standard of review that applies to a governing body's code interpretation.

Under the city's council's interpretation of "building," it is not the case, as petitioner assumes, that substantial buildings like a convenience store or coffee shop, with associated parking, must be constructed on the site, in addition to the fuel station, under either the CC or OHC subarea design standards. In both subareas, CMC 16.41.050(A)(1)(b), Tables 1 and 2, require that "building(s)" be located on the street lot line (in the CC subarea), or 10 foot setback line (in the OHC subarea), along a percentage of the street frontage. Under the city council's interpretation, however, such "building(s)" may consist, in part, of a trellis wall with the required length along the frontage, but with little or no depth. Consequently, in both the CC and OHC subareas, the frontage standard may be satisfied without significantly reducing the area potentially available for fuel dispensers. Therefore, the key assumption in the opposition analysis, that the frontage standard requires that

large "building(s)" such as a convenience store or coffee shop be constructed on the property, is inaccurate.

An additional problem with the opposition analysis is that, for unexplained reasons, it does not appear to recognize that CMC 16.41.050(A)(1)(b) also applies in the OHC subarea. The opposition analysis states that the OHC subarea "does not require additional structures be built adjacent to the street frontages." Supplemental Record 90. Consistent with that statement, the OHC subarea design submitted with the opposition analysis shows no buildings or structures on or near the setback line. *Id.* at 92. As explained above, CMC 16.41.050(A)(1)(b) also applies in the OHC zone, and requires that "building(s)" be constructed along the street frontage, set back 10 feet from the street lot line. In comparing uses across different zones for purposes of determining whether further analysis is required under the TPR, it is important to employ consistent development assumptions as much as possible, in order to avoid comparing apples to oranges. To make a meaningful comparison in the present case, similar assumptions should be made about the "building(s)" that could be constructed on the property to satisfy the frontage standard, with the only pertinent variables reflecting the different standards that would apply, *i.e.*, a zero setback versus 10 foot setback, and 60 percent frontage versus 40 percent frontage. Because the opposition analysis assumed different building scenarios not based on the relevant differences in standards, its conclusions regarding the traffic generative capacity of potential development—which boils down to how many fuel dispensers can be constructed on the property under the CC and OCH standards—are not particularly probative, and do not undermine the evidence that the city relied

upon to conclude that the zone change would not increase the traffic generative capacity of the uses allowed on the property.

As the findings note, due to the zero setback in the CC subarea, the maximum developable area of the property under the CC subarea standards may be greater than the maximum developable area of the property under the OHC subarea standards. Under the applicable setbacks and the city's interpretation and application of "building" for purposes of the frontage standard, a fuel station on the property under the CC standards could well have more fuel dispensers than a fuel station under the OHC standards. In any case, for the foregoing reasons, the city's findings adequately explain why it concluded that the zone change would not increase the traffic generative capacity of the uses allowed on the property, and those findings are supported by substantial evidence.

As a final argument, petitioner argues that the city failed to address the "glaring flaw" in intervenor's claim that the zone change does not impact the size of the fuel station that can be constructed on the property. Petition for Review 17. Petitioner notes that at the initial pre-application conference for the site design application, planning staff advised intervenor to apply for a zone change from CC to OHC, based on concerns that the proposed fuel station may not be able to demonstrate compliance with the intent of the CC subarea or with the design standards. Staff suggested that approval under the OHC design standards would be "more easily demonstrated." Supplemental Record 735. Intervenor accordingly applied for a rezone from CC to OHC. Petitioner argues that the fact that the city staff believed a zone change was necessary to accommodate the proposed fuel station undercuts the city's conclusion that the zone change has no impact on the size or type of fuel station that can be

constructed on the property, for purposes of evaluating compliance with the TPR. We understand petitioner to argue that if the proposed fuel station could not be approved under the CC design standards, then the rezone to OHC to allow the proposed fuel station necessarily represents an increase in the traffic generative capacity of the property. Petitioner contends that, at a minimum, the city was required to adopt findings addressing this issue after it was raised below.

We disagree with petitioner that remand is necessary to adopt additional findings to address whether the proposed fuel station could have been approved under the CC design standards. For one thing, the issue of compliance with the TPR that was the subject of our remand concerns a fairly abstract comparison between the most traffic intensive use that could be reasonably constructed on the property under the different subarea zoning, and is not concerned with the design of the actual fuel station that intervenor proposed during the initial pre-application conference or that design as subsequently revised and approved. As it turned out, on remand the city determined that the most traffic intensive use allowed in the C-2 zone and in both the CC and OHC subareas happens to be a fuel station. Nonetheless, it seems legally irrelevant for purposes of OAR 660-012-0060 whether the particular *design* of the fuel station that intervenor initially proposed during the pre-application conference would have met the CC subarea design standards, had an application been filed under those standards.

In addition, the pre-application conference staff did not opine that the design of the proposed fuel station, if applied for, would fail to comply with the CC subarea design standards, only that it would be easier for the design to demonstrate compliance with the OHC design standards. Further, the record

does not show, and petitioner does not explain, why staff believed that it would be more difficult to demonstrate compliance with the intent of the CC subarea or its design standards, or which design standards staff were concerned about. The pre-application conference, of course, was conducted long before the city council provided an interpretation of "building," as discussed above. Under that interpretation, a fuel station without a traditional "building" could more easily meet the design standards in both the CC and OHC subareas. Finally, we note that the "intent" of the subarea design standards is relevant under an alternative process at CMC 16.49.035 that the city applied to approve the design of the proposed fuel station, which allows the city to approve designs that do not meet the CC and OHC architectural design standards at CMC 16.41.070, but which meets the "intent" of those standards. The city approved the design under that alternative process. Record 20. The same alternative process applies to property within the CC subarea, and it is not at all clear why it would have been more difficult for the proposed design to be approved under that alternative process had the property remained within the CC subarea.

The city found that the rezone from CC to OHC did not increase the amount or intensity of potential development, and fuel station development with the same traffic generating characteristics can occur on under the CC and OHC standards. Supplemental Record 6-7. For the foregoing reasons, petitioner has not demonstrated that the city's findings on the TPR remand issue are inadequate or unsupported by substantial evidence.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

CMC 16.88.160(D)(1) requires the city to "consider" the comprehensive plan in judging whether or not to amend the CMC. The city's TSP, which is

part of its comprehensive plan, proposes a future pedestrian crossing of Highway 99E in the vicinity of the subject property. In *Save Downtown Canby I*, LUBA remanded the ordinance to the city to address potential conflicts between the pedestrian crosswalk and access to the subject property, or explain why such conflicts need not be considered under CMC 16.88.160(D)(1).

On remand, the city council reviewed a supplemental traffic impact analysis (TIA) dated July 8, 2013, and the city council incorporated Section VI of the TIA by reference into its decision. Section VI concluded that even if the pedestrian crossing is constructed in close proximity to the fuel station that all traffic movements at site accesses and intersections in the vicinity would continue to operate satisfactorily, although access to the site may need to be limited. Based on Section VI, the city found compliance with CDC 16.88.160(D)(1). The city also imposed Condition 14, which requires the property owner to accept an access limitation to right in/right out if it is determined that unrestricted site access presents safety conflicts with a future pedestrian crossing.

On appeal, petitioner argues that the city's findings regarding the crosswalk are inadequate and not supported by substantial evidence. According to petitioner, the July 8, 2013 TIA failed to evaluate potential conflicts between the fuel station and the future pedestrian crosswalk through the end of the 20 year planning period beginning with the adoption of the city's TSP, as the TPR requires.

However, petitioner does not explain why the TPR applies to require the city to consider conflicts between site access and the future pedestrian crossing "through the end of the planning period." Nothing in our remand, or in any portion of TPR cited to us, required the city to apply the TPR to consider

potential conflicts between site access and the future pedestrian crossing.[4] Instead, our remand was based solely on CDC 16.88.160(D)(1). On remand, the city found compliance with CDC 16.88.160(D)(1), and petitioner does not dispute that finding.

Accordingly, petitioner's arguments under the second assignment of error do not provide a basis for reversal or remand.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

As explained, the city suspended the proceedings on the SDR application, while proceeding with the application to change the sub-area zoning from CC to OHC. On remand of the city's initial zone change decision, the city consolidated the SDR application with the remand proceedings on the zone change, conducted joint proceedings, and ultimately issued a single decision approving both the zone change and the SDR application. The SDR approval applies the design standards of the OHC sub-area.

---

[4] Petitioner does not cite to any portion of the TPR that requires that the city to consider conflicts between site access and the pedestrian crossing "through the end of the planning period," but petitioner presumably relies on OAR 660-012-0060(1)(c). That rule provides that a plan amendment "significantly affects" a transportation facility—potentially requiring further analysis and action—if among other things the amendment would "[r]esult 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." Paragraphs (A) through (C) are concerned with impacts on the functional classification or performance standards of a transportation facility. However, petitioner does not explain what potential conflicts between site access and a nearby pedestrian crossing have to do with the functional classification or performance standards of Highway 99E or any transportation facility.

Petitioner argues that the city erred in approving the SDR application under the OHC design standards, and instead the city should have applied the CC design standards. According to petitioner, the city can evaluate the SDR application under the OHC design standards only if the two applications are consolidated and processed together. Because the SDR application was initially processed separately from the zone change application, and was not processed together with the zone change application until shortly before the city issued the joint decision, petitioner argues that the "fixed goal-post rule" at ORS 227.178(3) compels the city to evaluate the SDR application under the CC design standards that applied to the property on the date the SDR application was filed.

The "fixed goal-post rule" at ORS 227.178(3)(a) requires the city to approve or deny a permit application based on the standards and criteria in effect when the permit application is submitted.[5] A significant exception to that requirement is when the permit application is consolidated with a zone change application. ORS 227.175(2) requires cities to establish a consolidated procedure by which an applicant may apply at one time for all permits or zone changes needed for development.[6] Where a permit application is consolidated

---

[5] ORS 227.178(3)(a) provides:

> "If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the city has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

[6] ORS 227.175(2) provides:

with a zone change, the standards and criteria of the new zone will govern approval or denial of the permit application, not the standards and criteria of the zone in effect when the permit application was submitted. *See NE Medford Neighborhood Coalition v. City of Medford*, 53 Or LUBA 277, 282-83, *aff'd* 214 Or App 46, 162 P3d 1059 (2007) (a permit application consolidated with a zone change application is reviewed under new zone, even if the zone change application was not filed on the same date as the permit application).

In the present case, the city found that the two applications were consolidated, notwithstanding that the SDR application was suspended at one point and initially subject to a separate process. The city rejected petitioner's argument that, in order to be consolidated, the two applications must be subject to the same procedures throughout and processed on the same timeline. The city's findings note that under its code a SDR application and a text/zoning map amendment application are subject to different review procedures. Under the city's code, a text/zoning map amendment is subject to a Type IV legislative process requiring a city council decision, while the SDR application is subject to a Type III quasi-judicial process, with the final decision made by the planning commission, subject to appeal to the city council.

> "The governing body of the city shall establish a consolidated procedure by which an applicant may apply at one time for all permits or zone changes needed for a development project. The consolidated procedure shall be subject to the time limitations set out in ORS 227.178. The consolidated procedure shall be available for use at the option of the applicant no later than the time of the first periodic review of the comprehensive plan and land use regulations."

Petitioner argues first that LUBA has already ruled in an interlocutory order in *Save Downtown Canby I* that the two applications had not been consolidated. *Save Downtown Canby v. City of Canby*, __ Or LUBA __ (LUBA No. 2012-097, June 4, 2013) (rejecting intervenor's motion to dismiss the appeal of the city's initial ordinance rezoning the property). Citing *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992), petitioner contends that the issue of whether the two applications are consolidated is a "resolved" issue that cannot be revisited on remand. Relatedly, petitioner argues that the city did not process the two applications together until after remand in *Save Downtown Canby I*. Under *Beck*, petitioner argues, remand narrowed the scope of review to those issues left alive on remand. Further, petitioner argues that different procedures applied to the remand proceedings and to proceedings on the SDR application, and for that additional reason LUBA should not affirm the city's conclusion that the two applications were processed according to a consolidated procedure.

In sum, petitioner argues that because the two applications were not processed together under the same procedures they were not "consolidated" for purposes of ORS 227.175(2), and therefore ORS 227.175(2) does not operate to allow the city to avoid the ORS 227.178(3) requirement to apply the CC sub-area design standards to the SDR application.

Respondents argue, and we agree, that ORS 227.175(2) does not require that a permit application and a zone change application necessarily be subject to the same procedures throughout the entire proceedings below in order to be "consolidated" for purposes of that statute. As the city's findings note, a city's code may require that different types of applications follow different procedures or be reviewed by different review bodies. For example, the code

may require that a site design application be reviewed by a special architectural or historical design body that does not have authority to review zone changes. In that circumstance, that the city places the site design application on the code-required special review path does not "de-consolidate" the applications for purposes of ORS 227.175(2), or preclude the city from subsequently processing the applications together to issue a final decision that applies the new zone's standards to the design review decision. Similarly, we do not believe that placing a permit application on hold in order to proceed with the zone change application precludes the city from later continuing to process the two applications together and issuing a final decision or decisions that approve the permit under the new zone standards, for purposes of ORS 227.175(2) and ORS 227.178(3).

As we explained in *NE Medford Neighborhood Association*, ORS 227.175(2) and ORS 227.178(3) must be read to work together to achieve their respective purposes. The text and purpose of ORS 227.175(2) do not require that a permit application and zone change application be processed simultaneously under the exact same procedures, throughout the entire course of the proceedings below, in order to be "consolidated." The text and purpose of ORS 227.178(3) do not require that a permit application that is predicated on and approved as part of a zone change be reviewed under the standards and criteria of the former zone that no longer apply. Under petitioner's interpretation of those statutes, any procedural divergence between the processing of a permit application and the processing of the predicate zone change application means that the permit application must be evaluated under the former zone's standards and criteria—which are no longer applicable—instead of the new zone's applicable standards and criteria. That result makes

no practical sense, is not compelled by the text or context of either statute, and is contrary to the purpose of ORS 215.175(2). We reject the argument.

In the present case, the SDR application and the zone change application were filed on the same date, and initially processed together. At some point, the SDR application was placed on hold while the zone change application from CC to OHC proceeded to an initial decision. While the zone change decision was on appeal to LUBA, the city re-activated the SDR application and processed it according to the code-required procedures. After remand of the zone change decision, the city re-consolidated the two applications and thereafter processed them together, culminating in a single decision approving both applications. Petitioner has not demonstrated that the city's proceedings on the two applications violated either ORS 215.175(2) or ORS 215.178(3), or otherwise constituted substantive or procedural error.[7]

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

The fourth assignment of error challenges the SDR approval, and the city's conclusion that that the proposed fuel station meets the OHC site design requirements for building lot frontage and minimum floor area ratio (FAR).

---

[7] We note that if the city processed the two applications in a manner that denied participants adequate notice of and an opportunity to address the approval criteria applied in the final decision to approve the permit application, then the city would likely commit procedural error, in violation of ORS 197.763. However, petitioner does not suggest in the present case that the procedures the city followed caused any confusion or uncertainty regarding what standards the city would apply to the SDR application, or that the city committed procedural error that prejudiced its substantial rights. Throughout the proceedings below, it was clear that intervenor and the city intended that the SDR application would be evaluated under the OHC design standards.

The subject property is 32,457 square feet in size, with frontage on three streets, and access to two streets. The proposed fuel station covers approximately 16,736 square feet of the property, and includes a canopy, 12 fuel dispensers, a kiosk, restrooms, equipment structure, and paved drive lanes. Initially, that was all that was proposed. After petitioner argued that the fuel station did not comply with the frontage and FAR standards, intervenor revised the application to propose the additional construction of a four-foot high wooden trellis or "living wall," on which vegetation will grow, located at the 10 foot setback line on three sides of the property, in a U-shaped configuration. The city council agreed with intervenor that the proposed fuel canopy and the living wall collectively constitute a "building" and "structure" for purposes of the frontage and minimum floor area ratio standards discussed below.[8]

---

[8] The city council found:

> "The minimum setback in the OHC subarea is 10 feet and there is no maximum setback from street lot lines. At least 40 percent of the length of each lot frontage must be developed with a building built at the 10-foot setback. Under CMC 16.04.090, a building means 'a structure built for the shelter or enclosure of persons, animals, chattels or property of any kind.' In turn, CMC 16.04.590 defines structure as 'that which is built up or constructed. Structure means an edifice or building of any kind or piece of work artificially built up or composed of parts joined in some manner and which requires a location on the ground.' The City finds that collectively the proposed fuel canopy and living wall are a structure within the meaning of CMC 16.04.590 because both are artificially built up, joined in some manner and require a location on the ground. The proposed fuel canopy and living wall also fall within the definition of building under CMC 16.04.090 because collectively it is a structure that is built for shelter (i.e., covers the fueling area and service areas) and the living walls

As noted under the first assignment of error, CMC 16.41.050(A)(1)(b), Table 2, requires for all development in the OHC subarea that 40 percent of the street frontage be developed with "building(s)" built at the minimum setback from the street lot line, in this case 10 feet. The subject property has street frontage on three sides, and therefore at least 40 percent of each frontage must be developed with "building(s)." CMC 16.04.590 defines "building" to mean "a structure built for the shelter or enclosure of persons, animals, chattels or property of any kind." In turn, CMC 16.04.590 defines "structure" in relevant part as "any piece of work artificially built up or composed of parts joined in some manner and which requires a location on the ground."

CMC 16.41.050(A)(2), Table 3, requires a minimum FAR of .25. As defined at CMC 16.04.222, FAR is a "method of calculating structural massing on a lot," calculated by the "sum of the gross floor area of all stories above grade plane, as measured to the outside surface of exterior walls," divided by the lot area. The subject property is 32,457 square feet in size, so the FAR standard is met if the proposed development has a "gross floor area of all

---

> encompass and provide a boundary for Applicant's property. Nothing in the code requires that a building be completely enclosed. In fact, the code only requires that the structure be built for 'shelter *or* enclosure.' Further, the building definition is broad in that it includes a structure to shelter 'property of *any* kind.' The City finds that the Applicant's fuel pumps and related infrastructure like the kiosk, mechanical room, and bathrooms are 'property of any kind.' The City also finds that the fuel canopy provides shelter as in a cover for such property and the living walls enclose such property. Therefore, the City considers that collectively, the fuel canopy and living walls are both a structure and building for purposes of evaluating the project against the DCO design and development standards." Record 16 (Emphasis in original).

stories above grade plane" totaling at least 8,114 square feet (32,457 X .25). The city council found that the project as a whole, which totals 16,736 square feet, exceeds the .25 minimum floor area ratio. Supplemental Record 17.

Petitioner challenges the city council's interpretation of "building" and "structure" as those terms are used under the frontage and FAR standards and related definitions. Petitioner characterizes the findings quoted at n 8, as concluding that "the building lot frontage and minimum floor area ratio requirements were satisfied based exclusively on the trellis or vegetative wall," Petition for Review 30. According to petitioner, the city council's interpretation is implausible and inconsistent with the text, context, and purpose of the frontage standard and the FAR standard.[9] Petitioner argues that the text, context and purpose of the frontage and FAR standards demonstrate that a "building" or "structure" for purposes of those standards must be a substantial building of some kind, and that a four-foot high trellis wall cannot possibly satisfy those standards.

As petitioner recognizes, LUBA must affirm a governing body's interpretation of local land use legislation unless that interpretation is "implausible," *i.e.*, inconsistent with the express language, purpose or policy underlying the legislation. ORS 197.829(1)(a)-(c); *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2009). The code definitions of "building" and "structure" quoted above are very broad, and potentially include a wide range

[9] For example, petitioner argues that viewing the trellis as a "building" is inconsistent with the definition of "height of building" at CMC 16.04.230, which requires a "roof" to determine height. Similarly, petitioner argues that it is impossible to calculate the square footage of a linear wall for purposes of standards that impose minimum or maximum square footage.

of structures. Nonetheless, petitioner is correct that much of the context of the frontage and FAR standards suggests that the author of those standards contemplated that the "buildings" that must occupy the required percentage of frontage and the "structures" that supply the requisite floor area would constitute substantial buildings in the traditional sense, with exterior walls, a roof, windows, doors, etc. If the interpretative question were whether the trellis wall *in itself* constitutes a "building" or "structure" capable of satisfying the frontage and FAR standards, we would almost certainly agree with petitioner that the city council's interpretation is not sustainable even under the deferential standard of review we must apply to such interpretations.

The difficulty for petitioner is that it challenges an interpretation the city council did not adopt. The city council did not conclude that "the building lot frontage and minimum floor area ratio requirements were satisfied based *exclusively* on the trellis or vegetative wall," as petitioner argues (emphasis added.) Instead, the city council concluded that all of the fuel station structures, including the canopy and the trellis wall, *collectively* constitute a "building" or structural massing for purposes of the frontage and FAR standards. *See* n 8.

The city council's "collective" interpretation is not without its own problems, but petitioner has not meaningfully challenged the interpretation that the city council actually adopted, and has not demonstrated that that interpretation is inconsistent with the text, context or purpose of the frontage standard, the FAR standard, or the relevant code definitions. As the findings explain, the canopy and kiosk have roofs that function to "shelter" persons and property, and the trellis wall "encloses" the fuel station on three sides. We cannot say that it is implausible to conclude that those structures collectively

fall within the broad code definition of "building." The project viewed as a whole has height and other spatial dimensions for purposes of standards that require such measurements. Perhaps the most problematic standard for the city's interpretation is the FAR standard, which requires a calculation of "gross floor area of all stories above grade plane." "Grade plane" and "Story above grade plane" are defined at CMC 16.04.228 and 16.04.567, and essentially refer to finished floors above the finished ground level adjacent to the exterior walls.[10] The city council apparently views the area of the fuel station's finished concrete or paved ground surface that is enclosed by the trellis walls to constitute a "story" for purposes of the FAR standard. The merits of that view are debatable, but in the absence of a focused challenged to the interpretation the city council actually made, petitioner's arguments do not provide a basis for reversal or remand.

The fourth assignment of error is denied.

---

[10] CMC 16.04 includes the following definitions:

> "16.04.228. Grade plane means the average of finished ground level adjoining the building at exterior walls. Where the finished ground level slopes away from the exterior walls, the reference plane shall be established by the lowest points within the area between the building and the lot line or, where the lot line is more than 6 feet from the building, between the building and a point 6 feet from the building."
>
> "16.04.567. Story above grade plane means any story having its finished floor surface entirely above grade plane, except that a basement shall be considered as a story above grade plane where the finished surface of the floor above the basement is either (1) more than 6 feet above grade plane, or (2) more than 12 feet above the finished ground level at any point."

The city's decision is affirmed.