

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

3
4 OREGON COAST ALLIANCE and BRUCE W. HADLEY,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF FLORENCE,
10 *Respondent,*

11
12 and

13
14 BENEDICK HOLDINGS, LLC,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2021-051

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from City of Florence.

23
24 Sean T. Malone filed the petition for review and reply briefs and argued
25 on behalf of petitioners.

26
27 Ross A. Williamson filed a response brief and argued on behalf of
28 respondent. Also on the brief was Local Government Law Group, P.C.

29
30 Michael E. Farthing filed a response brief and argued on behalf of
31 intervenor-respondent.

32
33 RYAN, Board Member; ZAMUDIO, Board Chair; RUDD, Board
34 Member, participated in the decision.

35
36 REMANDED

01/28/2022

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

NATURE OF THE DECISION

Petitioners appeal a city decision applying a low-density residential city zoning designation to property newly annexed into the city.

FACTS

The subject property is an approximately 49-acre property located west of Heceta Beach Road and east of Rhododendron Drive. Access between the property and Rhododendron Drive is via Oceana Drive, which terminates at the property.

Prior to 2021, the property was included in the city’s urban growth boundary, and the Florence Comprehensive Plan (FCP) map designated the property Low Density Residential with a majority designated as coastal shorelands.¹ In 2021, intervenor-respondent (intervenor) applied for annexation of the subject property and the portion of Oceana Drive from the property west to its intersection with the city road Rhododendron Drive, and to assign the Low Density Residential (LDR) and Prime Wildlife Management Shorelands Overlay District zones to the property. Record 248. The city council approved the annexation application in Ordinance 2021-001 and approved the application to

¹ Lane County zoned the property Suburban Residential (SR), interim urban combining district overlay, and prime wildlife. Supplemental Record 14.

1 zone the property LDR with a majority in the coastal shorelands overlay district
2 in Ordinance 2021-002 (Ordinance).² This appeal followed.

3 **FIRST ASSIGNMENT OF ERROR**

4 Petitioners' first assignment of error implicates Florence City Code (FCC)
5 10-1-2-3, "Zoning of Annexed Areas," and FCC 10-1-3, "Amendments and
6 Changes," which we set out below.

7 "10-1-2-3

8 "The City Council may establish zoning and land use regulations
9 that become effective on the date of annexation. This zoning district
10 shall be consistent with the objectives of the Florence
11 Comprehensive Plan and Zoning Code. *When zoning is not*
12 *established at the time of annexation, an interim zoning*
13 *classification most nearly matching the existing County zoning*
14 *classification shall be automatically applied until the City Council*
15 *establishes zoning and land use regulations in accordance with the*
16 *conditions and procedures of Chapter 1 of this Title.*

17 "10-1-3

18 "A. Purpose: As the Comprehensive Plan for the City is
19 periodically reviewed and revised, there will be a need for
20 changes of the zoning district boundaries and the various
21 regulations of this Title. Such changes or amendments shall
22 be made in accordance with the procedures in this Section.

23 "B. Type III (Quasi-Judicial) Changes:

² We dismissed petitioners' appeal of Ordinance 2021-001 as untimely filed.
____ Or LUBA ____ (LUBA No 2021-050, Oct 18, 2021), *aff'd*, 317 Or App 137
(2022).

- 1 “1. Initiation: A quasi-judicial zoning change and related
2 Comprehensive Plan changes may be initiated by
3 application of a property owner within the affected
4 area, by a person having substantial ownership interest
5 in the property, by resolution of the Planning
6 Commission or motion of the City Council, and also by
7 individual citizens or citizen groups during Plan update
8 as provided in The Comprehensive Plan.
- 9 “2. Application Fees: When proceedings are initiated by a
10 property owner, filing fees shall be collected. The
11 schedule of application fees shall be established by the
12 City Council by resolution. The fee charged shall be no
13 more than the average cost of providing service.
- 14 “3. Notice and Public Hearing: Notice and public hearing
15 for quasi-judicial changes to this Code and the
16 Comprehensive Plan shall be in accordance with Code
17 Section 10-1-1-6.
- 18 “4. Planning Commission Review: The Planning
19 Commission shall review the application for quasi-
20 judicial changes and shall receive pertinent evidence
21 and testimony as to why or how the proposed change is
22 consistent or inconsistent with and promotes the
23 objectives of the Florence Comprehensive Plan and
24 Zoning Ordinance and is or is not contrary to the public
25 interest. *The applicant shall demonstrate that the*
26 *requested change is consistent with the Comprehensive*
27 *Plan and Zoning Ordinance and is not contrary to the*
28 *public interest.*
- 29 “C. Type IV (Legislative) Changes:
- 30 “1. Initiation: A legislative change in zoning district
31 boundaries, in the text of this Title, (Title 10), Title 11,
32 or in the Comprehensive Plan may be initiated by
33 resolution of the Planning Commission or by a request
34 of the Council to the Planning Commission that
35 proposes changes be considered by the Commission

1 and its recommendation returned to the Council, or by
2 an application for an amendment by a citizen.

3 “2. Notice and Public Hearing: Such notice and hearing as
4 prescribed by state law and the Comprehensive Plan
5 then in effect.” (Emphases added.)

6 Petitioners’ first assignment of error is that the city’s findings that FCC 10-
7 1-3(B)(4) is met are inadequate and not supported by substantial evidence in the
8 record. In their first subassignment of error, petitioners argue that the city’s
9 findings that the requested change “is not contrary to the public interest” are
10 inadequate. Petition for Review 20-21. In their second subassignment of error,
11 petitioners argue that the requested change is not consistent with FCP Land Use
12 Policy 1 because the city council improperly construed Land Use Policy 1 and
13 because the decision that Policy 1 is met is not supported by substantial evidence.
14 ORS 197.835(9)(a)(B) and (C).

15 Intervenor and the city (together, respondents) respond, initially, that FCC
16 10-1-3(B)(4) does not apply to intervenor’s application because the application
17 sought an initial assignment of zoning in connection with the concurrent
18 annexation of the property. Rather, respondents argue FCC 10-1-2-3 and FCC
19 10-1-3(C) apply and require the property to be zoned LDR because the LDR
20 zoning designation is the only zoning designation that implements the previously
21 designated LDR FCP designation for the property. Intervenor points to findings

1 the city adopted addressing FCC 10-1-2-3 and argues that those findings establish
2 that the city determined that FCC 10-1-3(B) does not apply.³

3 In their reply brief, petitioners respond that during the proceedings below,
4 which, as noted, were consolidated proceedings to consider both the annexation
5 and zone change applications, intervenor did not take the position that FCC 10-

³ The city found:

“The zoning district corresponding to the subject property’s Comprehensive Plan designation is Low Density Residential. The Low Density District will be assigned upon approval of the request from Council and finalization of the annexation process with the county and state. Property designated as Prime Wildlife with the County will transfer applicable regulations from Lane County’s Chapter 10.245 to the Florence City Code Title 10 Chapter 19. FCC 10-19-5: B. states: ‘As lands are annexed overtime, Coastal Shorelands shall include all lands contiguous with the ocean, the Siuslaw Estuary, and four lake areas: Munsel Lake, Heceta Junction Lake, South Heceta Junction Seasonal Lakes, and North Jetty Lake. Upon annexation, Coastal Shorelands Overlay Zoning Districts are applied to the properties depicted on the Map 17-1 Estuary and Coastal Shoreland Management Units in the Florence UGB in the Comprehensive Plan...’. Therefore, there is technically no zone change rather a change in regulation assignment. Therefore, the shorelands are not included on the Florence Zoning Map because they are represented in 17-1 and regulated by FCC 10-19 where the map is called out specifically and these lands under annexation consideration are illustrated and represented with the Prime Wildlife designation already. Review of the applicable code and comp plan objectives and policies are contained within these findings. It is found that the petition and application are consistent with the Florence Realization 2020 Comprehensive Plan and the Title 10 Zoning Regulations of the Florence City.” Supplemental Record 40.

1 1-2-3 and FCC 10-1-3(C) rather than FCC 10-1-3(B) applied. Petitioners point
2 out that the city’s decision does not take that position either, and instead includes
3 findings addressing FCC 10-1-3(B)(4) and does not include any findings
4 addressing FCC 10-1-3(C).⁴

5 We agree with petitioners that the position respondents take in their briefs
6 is not reflected in the challenged decision. While respondents’ theory set out in
7 their briefs is arguably a correct interpretation of the various provisions of the
8 FCC they cite and rely on, neither that theory nor any interpretation to that effect,
9 either express or implied, are contained in the decision.⁵ Rather, the decision
10 includes findings addressing FCC 10-1-3(B)(4), and nothing in those findings or
11 the findings addressing FCC 10-1-2-3 suggests that either are alternative

⁴ The decision includes the following findings:

“On November 10, 2020, the Planning Commission held a public hearing on this annexation request and quasi-judicial zone assignment. The findings of fact were available in advance of the hearing and were reviewed against the applicable city and state policies. The applicant provided a statement of compliance in Exhibit J that demonstrated that the requested change is consistent with the Comprehensive Plan and Zoning Ordinance and is not contrary to the public interest. Annexation of properties within the UGB is permitted if the request meets the applicable ORS and the city’s urbanization policies. These have been reviewed earlier with supporting findings.” Supplemental Record 41.

⁵ We note that the FCP provides that the only zoning district that implements the LDR plan designation is the LDR zoning designation (formerly called Restricted Residential). FCP 2 (Land Use), 7.

1 findings. Supplemental Record 41. Accordingly, we do not consider respondents'
2 alternative theory set out in their briefs but not in the decision.

3 **A. Public Interest**

4 Adequate findings are required to support quasi-judicial land use
5 decisions. *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 20-21,
6 569 P2d 1063, 1076-77 (1977). Generally, findings must: (1) identify the relevant
7 approval standards; (2) set out the facts which are believed and relied upon; and
8 (3) explain how those facts lead to the decision on compliance with the approval
9 standards. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992).

10 Petitioners argue that the findings at Supplemental Record 41 that the zone
11 change is not contrary to the public interest are inadequate and are not supported
12 by substantial evidence in the record, because the city's findings cite intervenor's
13 Exhibit J to intervenor's application, and the proposed findings included in
14 Exhibit J do not include an adequate explanation of why FCC 10-1-3(B)(4) is
15 met. Petition for Review 20-21 (citing Record 270-301). Exhibit J comprises 31
16 pages and includes intervenor's application addressing the applicable approval
17 criteria for both the annexation and the zone change, and additional information.
18 In response, the city does not take the position that the findings are adequate, but
19 rather points to evidence in the record that zoning the property LDR is not
20 contrary to the public interest because (1) LDR zoning provides residential
21 housing supply identified as needed in the city's most recently adopted Buildable
22 Lands Inventory; (2) LDR zoning implements the pre-existing FCP plan

1 designation of LDR; and (3) the property can be served with existing city sewer
2 and by a water district. Record 13.

3 We agree with petitioners that the findings regarding the public interest
4 criterion are inadequate. Exhibit J to which the findings refer includes only the
5 following addressing FCC 10-1-3(B)(4):

6 “The Planning Commission will hold a public hearing on this
7 annexation request and quasi-judicial zone assignment. The findings
8 of fact will be available in advance of the hearing. Annexation of the
9 Property within the UGB is permitted if the request meets the
10 applicable ORS and the City’s urbanization policies.” Record 289.

11 That explanation does not explain in any way why the zone change satisfies the
12 public interest provision.

13 The first subassignment of error is sustained.⁶

14 **B. Land Use Policy 1**

15 Land Use Policy 1 provides:

16 “Designation and location of land uses shall be made based on an
17 analysis of documented need for land uses of various types, physical
18 suitability of the lands for the uses proposed, adequacy of existing
19 or planned public facilities and the existing or planned
20 transportation network to serve the proposed land use, and potential
21 impacts on environmental, economic, social and energy factors.”

⁶ Because the city’s findings fail to identify the facts the city relied on and explain how those facts lead to the conclusion that the public interest standard is satisfied, it would be premature to resolve petitioners’ substantial evidence challenge, and accordingly we do not resolve it here.

- 1 In its second subassignment of error, petitioners argue that the city’s findings that
- 2 Land Use Policy 1 is met improperly construe the policy and are not supported
- 3 by substantial evidence in the record.⁷ The city responds that the findings

⁷ The findings provide:

“The designation of this property as Low Density (previously named Restricted Residential) was adopted in 2002 as part of Periodic Review following a Buildable Lands Inventory which was updated in 2005 and again most recently in 2018. Plan designating this private land for single family detached home use in the least dense of all the available residential districts is the most physically suitable option to be placed adjacent to the sensitive natural resources to the east.

“The recent BLI and Housing Needs Analysis (p.3) Appendix 10 of the Comprehensive Plan found that ‘Florence should plan for 1,624 net new dwelling units over the next 20 years. This net new housing need is expected to consist of: 764 owner-occupied dwellings, 597 renter-occupied dwellings and 263 short-term rental units...The planned net new housing mix over the next 20 years would consist of: 858 single-family detached homes, 145 manufactured housing units, 265 townhomes/duplexes, 357 multifamily housing units, and 40+/- special needs housing units. The amount of required land area to accommodate this level of housing development is expected to be approximately 231 acres (gross buildable land area).’ There is a documented need for housing of this housing type...858 detached single family.

“Testimony included that there was already sufficient Low Density zoned land within the city limits citing 222 acres. This statement comes from page 42 of the HNA section VI.B.1. and Exhibit VI.6. This statement was misinterpreted. Appendix I on page 69 of the HNA classifies the Low Density District (formerly Restricted), Coast Village District and Medium Density District (formerly

1 addressing Land Use Policy 1 that are included in the portion of the findings
2 addressing the zone change were adopted “to be overly thorough,” and that Land
3 Use Policy 1 does not apply to the zone change where the comprehensive plan
4 designation is not also being amended. City’s Response Brief 9. According to the
5 city, the use of the word “designation” refers to a comprehensive plan
6 designation.

7 We agree with the city that the city’s findings regarding Land Use Policy
8 1 interpret the policy to apply when a comprehensive plan designation occurs.
9 We defer to that interpretation. ORS 197.829(1); *Siporen v. City of Medford*, 349
10 Or 247, 243 P3d 776 (2010). No change to the comprehensive plan was proposed
11 or approved here. Accordingly, petitioners’ arguments provide no basis for
12 reversal or remand.

13 The second subassignment of error is denied.

Single Family) as ‘low density’. So, of the 222 acres only around 78.4 of it is actually zoned Low Density and with around 30 of that being developable due to critically steep slopes and Goal 5 Significant Riparian Area setbacks. Also, half of that land is in multiple ownerships with no immediate street access and utility solutions for stream crossings. The subject property has immediate access to a street network and utilities and is more suitable for development presently than some of the other land. The natural resource impacts are discussed at length in multiple sections in the findings and the policies are in support of this zone being the most suitable because there is adequate city code criteria and comprehensive plan policy related to protecting the resources and addressing hazards (FCC 10-7 & 19).” Supplemental Record 13.

1 The first assignment of error is sustained, in part.

2 **SECOND ASSIGNMENT OF ERROR**

3 In their second assignment of error, petitioners argue that the city
4 improperly construed FCC 10-1-1-4(E) in determining that a traffic impact study
5 (TIS) was not required. FCC 10-1-1-4(E)(2) provides in relevant part:

6 “Criteria for Warranting a Traffic Impact Study: All traffic impact
7 studies shall be prepared by a professional engineer in accordance
8 with the requirements of the road authority. The City shall require a
9 Traffic Impact Study (TIS) as part of an application for
10 development; a proposed amendment to the Comprehensive Plan,
11 zoning map, or zoning regulations; a change in use, or a change in
12 access, if any of the following conditions are met:

13 “a. A change in zoning or plan amendment designation where
14 there is an increase in traffic or a change in peak-hour traffic
15 impact[.]”

16 The city concluded that a TIS was not required because zoning the property LDR
17 would decrease the density from the prior county Suburban Residential (SR)
18 zoning designation, and that consequently there would be no “increase in traffic:”

19 “Testimony was received whereby it was thought a TIS was
20 required. The zoning is changing from [SR] (a County designation
21 permitting 6,000 sq. ft. residential lots (LC 10.135)) to [LDR] (a
22 City designation permitting 7,500 sq. ft. residential lots (FCC 10-
23 10)). Additionally, the city is more restrictive permitting just houses,
24 parks, child care, and churches whereas Lane County zoning permits
25 also permits hospitals and schools. The similar yet reduced density
26 of this zone change does not increase traffic. And the proposed
27 eventual use is the same having the same peak hour traffic impact.
28 The developable land area is significantly reduced due to the
29 intermittent lake system and associated 100’ buffer area and reduced
30 lot size with the zone amendment. The addition of a predicted 40 or

1 so residences as interpolated from the illustration in Exhibit K58
2 spread out across four access points onto Rhododendron Drive will
3 not significantly affect the Idylewood subdivision roadways.
4 Additionally, this zone change approval limits the residential
5 density to that permitted with the zone assigned rather than granting
6 an exception for greater density as offered through the Planned Unit
7 Development procedure. This criterion is met in that it does not
8 apply.” Record 36.

9 Petitioners argue that the zone change to LDR would result in “an increase in
10 traffic” from traffic currently generated by the vacant parcel - none - and therefore
11 a TIS is required.

12 The city responds initially that the issue was not raised during the
13 proceedings below and petitioners are precluded from raising the issue for the
14 first time at LUBA. ORS 197.835(3); ORS 197.763(1). Petitioners cite Record
15 179-80. We agree with petitioners that the issue of whether a traffic study is
16 required was raised prior to the close of the initial evidentiary hearing.

17 Respondents next respond that FCC 10-1-1-4(E) does not apply because
18 the application does not propose any concurrent development. However, FCC
19 10-1-1(4)(E) requires a TIS in certain circumstances for “a change in zoning.”
20 Here, the zoning is changing from the county’s Suburban Residential zone to the
21 city’s LDR zone, and therefore FCC 10-1-1(4)(E) applies.

22 The city interpreted FCC 10-1-1-4 to require a comparison of the traffic
23 that could be generated under the prior zoning to traffic that would be generated
24 under the new zoning in order to determine whether the new zone results in an
25 “increase in traffic” that warrants a TIS. That interpretation is not inconsistent

1 with the express language of the provision and is plausible. ORS 197.829(1)(a);
2 *Siporen*, 349 Or 247. Based on the evidence in the record regarding the number
3 of potential dwellings under the county’s SR zone and the city’s LDR zone, and
4 the additional uses allowed under the county’s SR zone that are not allowed in
5 the city’s LDR zone, we agree with the city that the city correctly concluded that
6 no increase in traffic would result from the traffic that could be generated under
7 the prior county SR zoning, which would allow more dwellings than are allowed
8 under the city’s LDR zoning.

9 The second assignment of error is denied.

10 **THIRD ASSIGNMENT OF ERROR**

11 As noted, a majority of the subject property is located within the Coastal
12 Shorelands management overlay district. The third assignment of error implicates
13 FCP Coastal Shorelands Policy 17 (Policy 17).⁸ The city found that Policy 17

⁸ Policy 17 provides:

“In Prime Wildlife Management Units, the following additional policies shall apply:

“a. For Shorelands in the Prime Wildlife MU within the Florence UGB, implementation requirements in Lane Code Chapter 10 Overlay Zoning Districts shall apply outside city limits, and the Prime Wildlife Overlay Zoning District in Florence City Code Title 10 Chapter 19 shall apply inside city limits.

“b. Uses shall fall within Priority 1 of the General Priority Statement (Policy 12). No use shall be permitted within a Prime Wildlife Shorelands MU unless that use is determined

1 does not apply to the zone change because no development is proposed, and that
2 the criteria in FCC 10-19, to which a future application to subdivide and develop
3 the property will be subject, implement Policy 17.⁹

to be consistent with protection of natural values identified in the description of the MU.

- “c. For any approved development in this MU, a minimum 100’ horizontal buffer zone from the coastal lakes is required.
- “d. Outside of the buffer zone, development shall not result in the clearance of native vegetation in excess of that which is necessary for the actual structure’s required access and fire safety requirements. Areas of excessive vegetation removal shall be replanted as soon as possible.
- “e. State Fish and Wildlife Biologists shall have a 14-day ‘review and comment’ period to evaluate the impact of any development on critical habitats and to make suggestions concerning ways to avoid or mitigate identified adverse impacts.
- “f. Filling in of freshwater marshes or coastal lakes adjacent to this MU is prohibited.
- “g. Development on lots less than five acres in size shall be prohibited. Where lots less than five acres existed on July 24, 1980, development may occur if in conformance with the requirements of the base zoning district and this management unit.
- “h. No dredge spoils deposition shall be allowed in the Prime Wildlife management unit.”

⁹ The draft ordinance provided to the city council at the February 1, 2021 hearing included proposed findings that took the position that Policy 17 does not apply to the zone change proposal because the zone change proposal is not

1 Petitioners argue that Policy 17 applies to the zone change application
2 because it proposes “development” of the property within the meaning of
3 “develop” as defined in FCC 10-2-13. The city responds that the issue raised in
4 the third assignment of error was not raised prior to the close of the initial
5 evidentiary hearing and may not be raised for the first time at LUBA. ORS
6 197.763(1); ORS 197.835(3). In response, petitioners cite Record 262, 288, 358,
7 1402, 1692, 1800, 1801. We have carefully reviewed the cited record pages and
8 we agree with the city that nothing in the cited record pages raises the issue that
9 petitioners raise in their third assignment of error—that Policy 17 applies to the
10 zone change proposal because it proposes “development” within the meaning of
11 “development” as used in FCC 10-2-13. Accordingly, petitioners may not raise
12 the issue raised in the third assignment of error for the first time at LUBA.

13 The third assignment of error is denied.

14 **FOURTH ASSIGNMENT OF ERROR**

15 The findings the city council adopted in support of Ordinance 2021-002
16 include a list of exhibits to the ordinance and exhibits “to the record.”
17 Supplemental Record 44. The list of exhibits “to the record” includes other
18 exhibits referenced in the materials presented to the city council during the
19 consolidated public hearings on the annexation and zone change. In their fourth

accompanied by any land division, clearing, grading, or construction.
Supplemental Record 190. The final findings that the city adopted include
additional explanation for why the city council concluded that Policy 17 does not
apply to the zone change. Supplemental Record 28-29.

1 assignment of error, petitioners argue that the reference to exhibits “to the record”
2 at the conclusion of the findings is intended to incorporate as findings all of the
3 materials placed before the city council and that such an incorporation produces
4 inconsistent findings.¹⁰

5 Respondents respond, and we agree, that the exhibit list does not purport
6 to be incorporated findings and as such, petitioners’ argument provides no basis
7 for reversal or remand. The Ordinance identifies Exhibit B as the city’s findings
8 in support of the decision. The list of exhibits included after the conclusion of the
9 findings is most clearly a reference to the location where evidence in support of
10 the findings is located.

11 The fourth assignment of error is denied.

12 The city’s decision is remanded.

¹⁰ Petitioners do not otherwise develop their argument or explain why the presence of inconsistent findings requires reversal or remand.