

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 WOODBURN PETROLEUM, LLC,
5 RONALD JAMES PED
6 and DON SIDHU,
7 *Petitioners,*
8

9 vs.

10 CITY OF WOODBURN,
11 *Respondent,*
12

13 and
14

15 WOODBURN FAST SERV INC.,
16 and LB GROUP, LLC,
17 *Intervenors-Respondents.*
18

19 LUBA No. 2022-077
20

21 FINAL OPINION
22 AND ORDER
23

24 Appeal from City of Woodburn.
25

26 Wallace W. Lien filed the petition for review and argued on behalf of
27 petitioners.
28

29 N. Robert Shields filed the respondent's brief. McKenzie Granum argued
30 on behalf of respondent.
31

32 David J. Petersen filed the intervenors-respondents' brief and argued on
33 behalf of intervenors-respondents.
34

35 RUDD, Board Member; RYAN, Board Chair; ZAMUDIO, Board
36 Member, participated in the decision.
37
38

AFFIRMED

01/09/2023

1
2
3
4

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

NATURE OF DECISION

Petitioners appeal the city council’s denial of petitioners’ consolidated applications for a conditional use permit (CUP), design review, a street exception, and a phasing plan for development of a gas station, a convenience store/office, and a commercial office building on property zoned Commercial General (CG).

MOTION TO INTERVENE

Woodburn Fast Serv Inc. and LB Group, LLC (intervenors), move to intervene on the side of the city. The motion is unopposed and is granted.

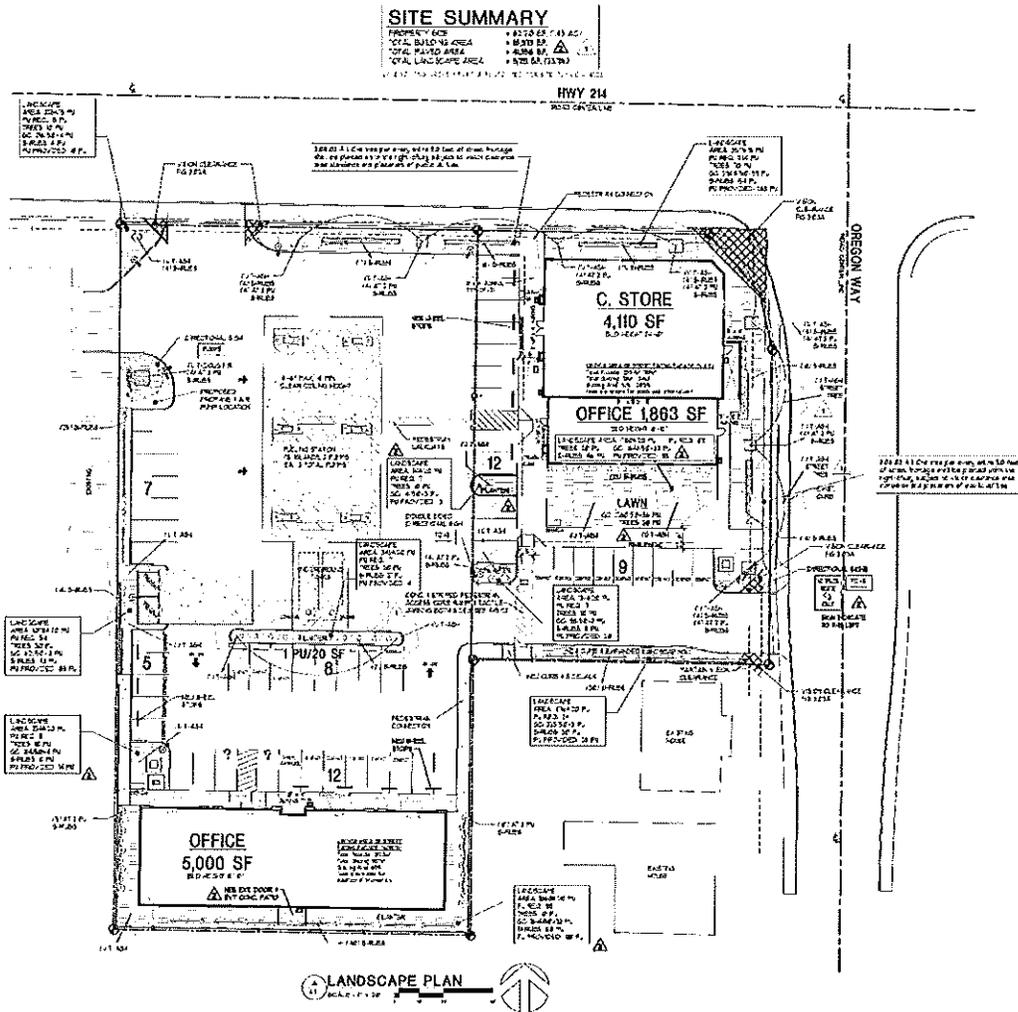
FACTS

The 1.42-acre subject property is located at the southwest corner of the intersection of Oregon Highway 214 (OR 214) and Oregon Way, a local street. The subject property and the properties to its north and west are zoned CG. Properties to the east are zoned Retirement Community Single Family Residential (R1S). Property to the southwest is zoned CG and to the southeast is zoned R1S.

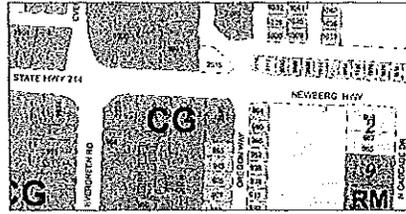
“The site is bounded on the north side by [OR 214], on the west side by a Dairy Queen fast food restaurant, on the west and part of the south side by a senior-living condominium building (Panor 360 Condominiums), and on the remainder of the south boundary and on the east boundary by single-family residential homes that make up part of the Woodburn Estates 55+ residential living community.”
Record 11.

The subject property was previously developed with two bank buildings on two tax lots. The bank buildings were demolished in 2021 and, in October

- 1 2021, petitioners submitted applications to redevelop the subject property.
- 2 Petitioners proposed a gas station and office building on tax lot 3700 and a
- 3 convenience store/office building, and associated drives, parking and
- 4 landscaping on tax lot 3600. A zoning map and site plan are provided below.



Surrounding Properties and Neighborhood



Zoning map excerpt

| Cardinal Direction | Adjacent Zoning |
|--------------------|--|
| North | Across OR Hwy 214: Commercial General (CG) |
| East | Across Oregon Way: Retirement Community Single Family Residential (R1S) |
| South | East to west: R1S (943 & 953 Oregon Way; houses) and CG (950 Evergreen Rd; Panor 360 condominiums) |
| West | CG (950 Evergreen Rd; Panor 360 condominiums; and 2620 Newberg Hwy; Dairy Queen) |

*Surrounding Properties and Neighborhood Table

1

2 Record 8, 102.

3 Petitioners sought approval of a phased development plan “to allow
 4 different timing to develop the gas station/convenience store versus the office
 5 building[.]” Record 7. The size of the convenience store and office buildings
 6 trigger a city requirement for design review. Modifications to the required street
 7 improvements require a street adjustment. A CUP is required because the gas
 8 station is proposed within 200 feet of the adjoining residential area.

9 Woodburn Development Code (WDC) 4.01.07¹ provides:

10 “An applicant may request, in writing, to consolidate applications
 11 needed for a single development project. Under a consolidated
 12 review, all applications shall be processed following the procedures
 13 applicable for the highest type decision requested. It is the express
 14 policy of the City that development review not be segmented into
 15 discrete parts in a manner that precludes a comprehensive review of

¹ The WDC has been amended twice since petitioners’ application was filed. The amendments do not affect the analysis in this opinion, we therefore refer to the current version of the WDC.

1 the entire development and its cumulative impacts.”
2 Petitioners filed consolidated applications for a CUP (city file no. 21-02), design
3 review (city file no. 21-10), a street exception (city file no. 21-05), and a phasing
4 plan (city file no. 21-01). Record 1258. Petitioners included with the applications
5 a transportation impact analysis (TIA), dated August 13, 2021, and revised May
6 26, 2022.² Record 9. The TIA showed that the development would generate more
7 daily vehicle trips than the prior two banks, with a 422 net trip increase. *Id.* There
8 would be lower peak traffic associated with the development of the gas station,
9 convenience store, and office buildings than occurred with the previous bank uses
10 but more traffic overall. Record 11.

² An October 4, 2021 letter from Petitioner Ped to the city, addressing the site plan, includes the following statement summarizing issues raised by the city during a preapplication meeting:

“Per 3.04.05, ‘A Traffic Impact Analysis (TIA) may be required by the Director prior to the approval of a City access permit when the Director estimates a development proposal may generate either 100 or more additional, peak hour trips, or 1,000 or more additional daily trips, within ten years of a development application.’ In practice, the Director can and does exercise discretion when requiring a TIA. Provide a TIA for this project and study at least the following intersections:

“1. I-5 & OR 214

“2. OR 214 & Evergreen Road, and

“3. OR 214 & Oregon Way.

“Set the traffic background growth rate equal to zero or up to no more than 0.5%.” Record 1317.

1 On June 9, 2022, the planning commission approved the consolidated
2 applications with conditions. Intervenors appealed the approvals to the city
3 council. On July 25, 2022, the city council held a *de novo* hearing and voted to
4 reverse the planning commission decision. On August 8, 2022, the city council
5 adopted its written decision.

6 This appeal followed.

7 **FIRST ASSIGNMENT OF ERROR**

8 **A. Background**

9 WDO Table 2.03A provides that gasoline stations within 200 feet of a
10 residentially zoned area are conditionally allowed in the CG zone.³ Approval of
11 a CUP requires that the city find that the following criteria are met:

12 “1. The proposed use shall be permitted as a conditional use
13 within the zoning district.

14 “2. The proposed use shall comply with the development
15 standards of the zoning district.

16 “3. The proposed use shall be compatible with the surrounding
17 properties.

18 “Relevant factors to be considered in determining whether the
19 proposed use is compatible include:

20 “a. The suitability of the site, shape, location and topography of
21 the site for the proposed use;

³ Gasoline stations are permitted outright in the CG zone if not within 200 feet of a residentially zoned area.

- 1 “b. The capacity of public water, sewerage, drainage, street and
2 pedestrian facilities serving the proposed uses;
- 3 “c. The impact of the proposed use on the quality of the living
4 environment:
- 5 “1. Noise;
- 6 “2. Illumination;
- 7 “3. Hours of operation;
- 8 “4. Air quality;
- 9 “5. Aesthetics; and
- 10 “6. Vehicular traffic.
- 11 “d. The conformance of the proposed use with applicable
12 Comprehensive Plan policies; and
- 13 “e. The suitability of proposed conditions of approval to ensure
14 compatibility of the proposed use with other uses in the
15 vicinity.” WDO 5.03.01(B).

16 Petitioners’ first assignment of error is that the city council misapplied
17 WDO 5.03.01(B), made inadequate findings, and made a decision not supported
18 by substantial evidence. Petition for Review 7. Petitioners divide the first
19 assignment of error into “Misapplication of the WDO,” “Inadequate Findings,”
20 and “Lack of Substantial Evidence.” Because arguments in petitioners’
21 subcategories overlap, we will first resolve all of the misapplication and
22 interpretation arguments and then apply the appropriate interpretations to the
23 findings and substantial evidence challenges. We will reverse or remand a local
24 government decision if the local government improperly construed the applicable

1 law. ORS 197.835(9)(a)(D). We will reverse or remand a local government
2 decision that is not supported by substantial evidence in the whole record. ORS
3 197.835(9)(a)(C).

4 **B. Interpretation of the WDO**

5 ORS 197.829(1) provides:

6 “The Land Use Board of Appeals shall affirm a local government’s
7 interpretation of its comprehensive plan and land use regulations,
8 unless the board determines that the local government’s
9 interpretation:

10 “(a) Is inconsistent with the express language of the
11 comprehensive plan or land use regulation;

12 “(b) Is inconsistent with the purpose for the comprehensive plan
13 or land use regulation;

14 “(c) Is inconsistent with the underlying policy that provides the
15 basis for the comprehensive plan or land use regulation; or

16 “(d) Is contrary to a state statute, land use goal or rule that the
17 comprehensive plan provision or land use regulation
18 implements.”

19 “[U]nder ORS 197.829(1), LUBA is required to defer to a local government’s
20 interpretation of its land use regulations unless the interpretation is inconsistent
21 with the express text of the regulation, the purpose of the regulation, the
22 underlying policy implemented by the regulation, or a state law that the
23 regulation carries out.” *Kaplowitz v. Lane County*, 285 Or App 764, 773, 398 P3d
24 478 (2017).

1 Petitioners’ first subassignment of error is that the city council misapplied
2 the WDO. First, petitioners argue that the city council misapplied the WDO
3 because it failed to limit its application of the CUP criteria to the gas station only.
4 Relatedly, petitioners argue that the city council misapplied the WDO because it
5 considered the entire subject property when evaluating project impacts, as
6 opposed to limiting its analysis to the land underlying the gas station. Third,
7 petitioners argue that the city council misapplied a site suitability criterion at
8 WDO 5.03.01(B)(3)(a). Fourth, petitioners argue that the WDO requires that the
9 city council impose conditions to achieve compatibility. We address each of the
10 application and interpretation issues raised in the petition for review and then
11 summarize our conclusions to set the framework for our review of the challenged
12 findings and supporting evidence.

13 **1. Application of CUP criteria to elements of development other**
14 **than the gas station**

15 Preserving an issue for LUBA review requires that the issue:

16 “be raised not later than the close of the record at or following the
17 final evidentiary hearing on the proposal before the local
18 government. Such issues shall be raised and accompanied by
19 statements or evidence sufficient to afford the governing body,
20 planning commission, hearings body or hearings officer, and the
21 parties an adequate opportunity to respond to each issue.” ORS
22 197.797(1).

23 OAR 661-010-0030(4)(d) provides that the petition for review shall:

24 “Set forth each assignment of error under a separate heading. Each
25 assignment of error must demonstrate that the issue raised in the
26 assignment of error was preserved during the proceedings below.

1 Where an assignment raises an issue that is not identified as
2 preserved during the proceedings below, the petition shall state why
3 preservation is not required.”

4 Petitioners argue that the city council erred by applying the conditional use
5 criteria to elements of the development proposal other than the gas station.
6 Petition for Review 12. Petitioners argue that they were not required to preserve
7 this issue, that other aspects of the development are not subject to the CUP
8 standards, because the error did not become clear until the city council adopted
9 its findings. The city does not challenge petitioners’ preservation of error. City
10 Response Brief 8. Intervenors do challenge petitioners’ preservation of error.

11 Petitioners submitted a comprehensive development proposal which
12 contained a transportation impact statement that treated the gas station and
13 convenience store as one use. Record 1351-52. Intervenors argue that the staff
14 report to the planning commission, which ultimately voted to approve the
15 applications, applied CUP criteria to other project components other than the gas
16 station, that petitioners failed to object, and that the issue is not preserved.
17 Intervenors’ Response Brief 5-6; *see* Record 141-42, 151. Essentially,
18 intervenors argue, petitioners were on notice that the city considered the CUP
19 criteria to apply to all four applications. We agree. The issue was not preserved.

20 **2. Interpretation of Surrounding Properties**

21 WDO 5.03.01(B)(3) requires that the proposed use “be compatible with
22 the surrounding properties.” Petitioners maintain that the city council erred in
23 considering the subject property as the conditional use site, as opposed to just the

1 land under the gas station element of the development. According to petitioners,
2 “[t]he appropriate and correct legal standard for review of this conditional use
3 may only deal *with the location* and impacts *of the fueling station*, and may not
4 lump into the consideration the other uses proposed for the site, and decide the
5 application based on the consideration of other uses which are allowed outright.”
6 Petition for Review 12-13 (emphases added).

7 Nothing in the text or context suggests to us that the city was required to
8 identify a subarea of the subject property as the gas station site and consider
9 compatibility based on that smaller site. WDO 5.03.01(B)(3) requires that a
10 conditional use be compatible with “surrounding properties” and we agree that it
11 is a plausible interpretation by the city council that impacts of the gas station be
12 compared to properties surrounding the subject property as determined by its
13 property lines.

14 **3. Interpretation of Site Suitability**

15 Petitioners also argue that the city council misapplied WDO
16 5.03.01(B)(3)(a), which provides that relevant factors be considered in
17 determining whether a use is compatible with surrounding properties, and include
18 “[t]he suitability of the size, shape, location and topography of the site for the
19 proposed use[.]” Petitioners argue that the city erred in concluding that, because
20 there are two other gas stations nearby and residential uses in the area, the
21 suitability criteria were not satisfied because “[t]hose considerations are not part

1 of the suitability criteria, as they involve an off-site analysis.” Petition for Review

2 16. Petitioners maintain:

3 “The suitability criteria only deals with the site upon which the
4 conditional use is proposed. It has nothing to do with suitability of
5 the use to surrounding zones or uses. The question posed is if the
6 site itself where the fueling station will go is suitable in its size,
7 shape, location and topography. In other words, can the site itself
8 support the proposed use.” Petition for Review 16.

9 Petitioners’ proposed interpretation may or may not be the stronger one, but we
10 defer to the city council’s interpretation so long as it is supported by the text and
11 context. The overarching provision in WDO 5.03.01(B)(3) is that “[t]he proposed
12 use shall be compatible with the surrounding properties.” The factors set out in
13 WDO 5.03.01(B)(3)(a) through (e) are “[r]elevant factors to be considered in
14 determining whether the proposed use is compatible[.]” We defer to the city
15 council’s interpretation that (3)(a) is a factor that has to be considered in light of
16 the greater purpose of ensuring compatibility with the area. The city council was
17 not required to interpret “location” as limited to the onsite features of the subject
18 property, prohibiting consideration of the proximity of other gas stations and of
19 residential uses as elements of the proposed gas station’s location.

20 **4. Requirement to Approve with Conditions**

21 Petitioners argue that “[w]here there are reasonable conditions that can
22 mitigate impacts, WDO 5.03.01(A) mandates [conditions].” Petition for Review
23 20. WDO 5.03.01(A) is the “Purpose” section of the WDO’s CUP section and
24 provides:

1 “A conditional use is an activity which is permitted in a zone but
2 which, because of some characteristics, is not entirely compatible
3 with other uses allowed in the zone, and cannot be permitted
4 outright. A public hearing is held by the Planning Commission and
5 conditions *may be imposed* to offset impacts and make the use as
6 compatible as practical with surrounding uses. Conditions can also
7 be imposed to make the use conform to the requirements of this
8 Ordinance and with other applicable criteria and standards.
9 Conditions that decrease the minimum standards of a development
10 standard require variance approval.” (Emphasis added.)

11 Petitioners have not explained why a purpose statement is controlling but,
12 assuming that it is, the purpose statement says that the conditions “may be
13 imposed” not that they must be imposed.

14 Responding to WDO 5.03.01(B)(3)(e)’s requirement that the city council
15 consider “[t]he suitability of proposed conditions of approval to ensure
16 compatibility of the proposed uses with other uses in the vicinity,” the city
17 council determined that

18 “the conditional use criteria (WDO 5.03.01.B.3), has not been met
19 by the [petitioners] on the basis that evidence in the record
20 demonstrates that the proposed gas station development will not be
21 compatible with surrounding properties. Furthermore, the Council
22 finds that it cannot reasonably condition the proposed use given the
23 problematic vehicular traffic findings and adverse livability issued
24 discussed above, and must therefore deny the application.” Record
25 14.

26 The city council findings include

27 “While staff proposed a number of conditions for the project that
28 may have mitigated some of the traffic safety concerns (including
29 added onsite directional signage and proportional cost-sharing for
30 future signal timing studies), the Council finds that the most
31 effective and compelling mitigation option would be to deny the

1 project. The Council finds this option to be reasonable primarily
2 because the proposed gas station use would not only increase a
3 particularly dangerous condition, but it would do so without clear
4 assurances or evidence from [petitioners] that any of the proposed
5 mitigation measures would effectively reduce or address the
6 vehicular traffic impacts of the use.” Record 14.

7 We agree with the city that the city council is not required to impose conditions.

8 “An applicant bears the burden of proof to demonstrate that an application
9 complies with applicable approval standards, and a local government is not
10 required to approve a noncomplying development proposal, even if conditions of
11 approval might be imposed that would render the proposal consistent with the
12 applicable criteria.” *Wilson v. Washington County*, 63 Or LUBA 314, 322-23
13 (2011).

14 **5. Conclusion**

15 Petitioners’ assignment of error that the city council improperly applied
16 CUP criteria to the entire development was not preserved and we do not address
17 it further.

18 The city council did not commit error in construing its code and concluding
19 that it is not required to consider the boundary of the gas station use as opposed
20 to the subject property boundaries when evaluating impacts. This subassignment
21 of error is denied.

22 The city council did not commit error is construing its code and concluding
23 that the city may consider proximity to other uses when evaluating the site
24 suitability of the use. This subassignment of error is denied.

1 Lastly, we agree with the city and intervenors that the city is not required
2 to impose conditions of approval.

3 This subassignment of error is denied.

4 **C. Findings and Substantial Evidence**

5 Petitioners argue that the city council’s findings, that the gas station is
6 incompatible with the surrounding area, are inadequate and not supported by
7 substantial evidence. Substantial evidence is evidence a reasonable person would
8 rely upon to make a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855
9 P2d 608 (1993). The city council’s decision must be supported by adequate
10 findings. Adequate findings identify the applicable law and the evidence relied
11 upon and explain how the evidence led to the city council’s conclusion. *Heiller*
12 *v. Josephine County*, 23 Or LUBA 551 (1992).

13 **1. Site Suitability Given Proximity to Other Gas Stations**
14 **and Single Family Homes**

15 When considering compatibility in light of the “suitability of the size,
16 shape, location and topography of the site for the proposed use” factor in WDO
17 5.03.01(B)(3)(a), the city council’s findings conclude that the subject property is
18 different from other nearby gas station sites located closer to I-5 because

19 “this site would be bounded by properties that are used solely for
20 residential purposes. The secondary access to the site would be
21 along a local residentially-classified street. Additionally, currently
22 single -family homes that are located directly across from the site,
23 separated only by Oregon Way, would have little buffer from an
24 intensive gas station and commercial use[.]” Record 13.

1 Petitioners argue that substantial evidence does not support the conclusion
2 that Oregon Way is the only separation between the gas station and single-family
3 residences because petitioners also propose a building and associated parking lot
4 between the gas station and Oregon Way. *See* Record 102. Petitioners also argue
5 that the findings are incorrect in describing the surrounding area because

6 “the fueling station lies in the northerly portion of Tax Lot 3700, and
7 that location is bordered by CG zoned properties to the west (Dairy
8 Queen and Dutch Bros); the remainder of that Tax Lot to the south
9 which is proposed to be an office building which is allowed outright
10 in that CG zone; the convenience store to the east, also an outright
11 permitted use in the CG zone; and the [OR] 214 right of way to the
12 north, across from which is a shopping center also zoned CG. The
13 residential zone is over 150 [feet] to the southeast and is not
14 adjacent.” Petition for Review 15.

15 We agree with the city and intervenors that the findings are adequate and
16 supported by substantial evidence. Petitioners argue the findings are wrong
17 because they consider other gas stations and residential uses nearby, arguing that
18 “[t]hose considerations are not part of the suitability criteria, as they involve an
19 off-site analysis.” Petition for Review 16. As we explained in resolving the prior
20 subassignment of error, the city council was within its discretion to consider
21 activity outside the subject property lines in evaluating site suitability.⁴

⁴ Petitioners in fact look at the surrounding area as well stating “The findings make it clear that the property is vacant, relatively flat, and located on a state highway *near the I-5*, and is therefore suitable for the proposed use.” Petition for Review 16 (emphasis added).

1 The city council concluded that “the suitability of the site remains
2 problematic due to the adjacent residentially zoned properties *and* uses.” Record
3 13 (emphasis added). The city could consider the proximity of residential uses;
4 immediate adjacency of the residential uses to the gas station is not required by
5 the code. In evaluating adjacency of *residential uses*, the city could also consider
6 the residential condominium located to the west and south of the subject property
7 on land zoned CG, as well as the residential community located across Oregon
8 Way. Petitioners also argue that the findings do not explain the relevance of the
9 secondary access being along a local residentially classified street, but the city
10 council addressed traffic concerns in more detail elsewhere in the findings, as we
11 discuss below.

12 This subassignment of error is denied.

13 **2. Traffic**

14 Petitioners argue that the city council’s findings with respect to the traffic
15 factor in WDO 5.03.01(B)(c)(6) “are not clear or adequate to explain what the
16 evidence is that is being relied on, or how such evidence relates to the approval
17 criteria.” Petition for Review 17. We agree with the city and intervenors that the
18 findings are adequate and supported by substantial evidence.

19 The city council concluded that “the potentially hazardous vehicular
20 conditions that would be created or exacerbated if this particular project is
21 approved is of legitimate concern as it would negatively impact the surrounding
22 neighborhood and all residents of Woodburn that travel through the OR

1 214/Oregon Way intersection.” Record 13. The city council received testimony
2 from neighbors about “regularly using Oregon Way (which does not have
3 sidewalks) for walking and to travel by golf cart to and from their club house for
4 recreational activities,” and referenced the testimony in its decision. Record 12.
5 The city council cited testimony from the Woodburn Estates and Panor 360
6 Condominium Communities as well as conclusions from intervenors’ traffic
7 engineer. Record 13. The city council found

8 “The OR 214/Oregon Way intersection already has an elevated
9 crash rate that exceeds ODOT’s 90th percentile crash rate for these
10 types of intersections under existing conditions While the proposed
11 gas station use would only contribute an additional 10 vehicles to
12 the PM peak hour, the overall impact would have a daily increase in
13 overall trip counts * * * to and from the site, likely exacerbating the
14 crash rate condition. It is also reasonable to believe that a gas station,
15 more so than a bank, will attract an increased number of drivers from
16 Interstate-5 that will be unfamiliar with the road configuration and
17 elevated crash risk at the subject intersection.

18 “Drivers exiting the proposed gas station using the driveway along
19 OR 214 would likely engage in a multi-lane weave maneuver across
20 eastbound OR 214 when desiring to return to Interstate-5 or
21 generally head west on OR 214, which could increase the risk of
22 collisions at the OR 214/Oregon Way intersection due to such a
23 maneuver.” Record 14.

24 The TIA submitted by petitioners analyzed traffic generated by two categories of
25 uses, gas stations with convenience stores and office buildings. The gas station is
26 located on tax lot 3700 and ODOT access restrictions make the driveway from
27 OR 214 onto tax lot 3700 right in and right out only. Substantial evidence
28 supports the conclusion that traffic associated with the gas station will involve a

1 maneuver across several lanes of traffic to get to the intersection of OR 214 and
2 Oregon Way, to then make a u-turn to return to I-5. Record 11, 12, 135.

3 ODOT recently changed the signalization at the OR 214 and Oregon Way
4 intersection. The city council decision reflects testimony that, after those
5 changes, traffic problems at that intersection continued and that there had recently
6 been a roll-over vehicle collision at that intersection. Record 12. The intervenors'
7 traffic engineer testified that the volume and nature of the traffic to the site would
8 increase the likelihood of crashes. The traffic engineer stated:

9 "First, there's a documented history of elevated crash rates on O[R]
10 214 between the freeway and Oregon Way. This is an existing
11 condition that's been well documented by the applicant's traffic
12 engineer. Second, drivers leaving the site from the O[R] 214 access,
13 who want to return to the freeway are going to need to weave across
14 the bike lane and two through lanes in less than 200 feet so as to be
15 able to make a u-turn from the left turn lane at the Oregon Way
16 intersection. That's just the facts of the sort of physical condition.
17 This is a severe weaving maneuver that maximizes the driver's
18 exposure to vehicle conflict and is therefore prone to increasing
19 crash frequency in this section of roadway. Third, the proposed
20 development will increase the number of daily trips generated by the
21 site relative to what was there before. The peak hour volumes will
22 be reduced as the applicant has indicated, but the volume over the
23 course of the day will be higher. * * *

24 "Now, let me turn to this question about how this return to freeway
25 movement might affect traffic safety in the context of this proposed
26 development. So again, due to the proximity to the freeway, it's
27 likely that a higher percentage of the gas station's customers will
28 want to return to the freeway than occurred with the customers of
29 the banks that were previously on that same site. In other words, the
30 gas station is likely to draw a higher percentage of its customers
31 from the freeway than the banks did. Because a lot of the gas

1 station's customers are coming from the freeway, it's reasonable to
2 expect that many of them are going to be unfamiliar with the
3 corridor's traffic volumes and not aware of the elevated crash
4 history in this road segment.

5 "You probably already know this, but as a traffic engineer, I can
6 confirm that there is a direct relationship between how close the
7 volume is to the capacity of the roadway and the crash rating. The
8 higher, the closer the volume gets to the capacity of a roadway, the
9 higher the crash rate is likely to go." Respondent's Brief App B,
10 Hearing Transcript at 2-3.

11 The evidence supporting the conclusion that the area between the OR 214
12 driveway from the property to the intersection will be hazardous includes: (1)
13 testimony of the residents as to a recent crash; and (2) testimony of intervenors'
14 traffic engineer as to likely vehicle maneuvers crossing multiple lanes within a
15 short distance, made by gas station customers less likely to be familiar with the
16 area than existing drivers. This is evidence upon which a reasonable person
17 would rely to determine that collisions are likely to be exacerbated by the increase
18 in number of daily trips by people unfamiliar with local traffic patterns.

19 Intervenors argue that the denial of the CUP should be affirmed because

20 "When multiple criteria apply to a land use decision, a denial will
21 be upheld so long as the decision adequately establishes that at least
22 one criterion is not met. *Kangas v. City of Oregon City*, 26 Or LUBA
23 177, 179 (1993). Here, the Order adequately states the City's finding
24 that the proposal is incompatible with surrounding properties,
25 explains, the City's conclusions supporting that finding in an
26 understandable format and bases those conclusions on substantial
27 evidence in the record. As such the Order should be upheld."
28 Intervenors' Response Brief 12.

1 We agree with intervenors that the city council’s conclusion that the gas station
2 development was not compatible with the surrounding properties due to traffic
3 concerns is sufficient to support the denial of the CUP application. We therefore
4 do not address the city council’s findings with respect to other compatibility
5 factors including noise, odor, and illumination.

6 This subassignment of error is denied.

7 **SECOND ASSIGNMENT OF ERROR**

8 Petitioners’ second assignment of error is that the city erred in not adopting
9 findings addressing the Phasing Plan, Street Exception, and Design Review
10 applications and instead denied all of the applications because it denied the CUP.
11 In the petition for review, petitioners argue that preservation was not required
12 because the error in the findings did not become clear until the final decision was
13 issued.

14 The city argues that petitioners were required to and failed to preserve this
15 issue. Respondent’s Brief 30. We agree with the city that petitioners structured
16 their application so that it was all one project and that petitioners did not preserve
17 the argument, or submit alternative plans, that would allow consideration of the
18 other applications if the CUP was denied. For example, the design review
19 drawings show all elements of the development. With respect to the phasing plan,
20 petitioners responded to staff comments as follows, referencing the design as
21 “one project”:

22 “Ensure that access, circulation, and public utilities are sized for

1 future development of the remainder of the site and adjacent
2 undeveloped sites.

3 “RESPONSE: All access, circulation, utilities, and other items have
4 been designed as one project and will be constructed so that
5 additional phases will fit seamlessly into the project as a whole.”
6 Record 1272.

7 With respect to the street exception, petitioners did not segregate project elements
8 and responded to staff’s comment by referencing “the site plan.”

9 “The street frontage lacks a parallel parking lane, planter strip 5½ ft
10 wide (excluding curb width), with street trees per 3.06.03A.1 & 2b,
11 and sidewalk that isn’t curb-tight. The street telescopes at the
12 highway intersection to accommodate the left turn lane. Illustrate
13 and provide dedication of ROW and construction of ‘half-street’
14 improvements that accommodate the turn lane and upgrade the west
15 half-street to conform to the standard cross section. Either confirm
16 a 5-ft streetside public utility easement (PUE) exists or dedicate one.

17 “RESPONSE: Regarding Oregon Way, they say the improvements
18 lack a parking lane and the 5.5’ planter strip with property line
19 sidewalk and a 5’ PUE (on our plans), again probably done by
20 ODOT under the old standard. We question the need to reconstruct
21 fairly new improvements that are more than functional for the site
22 improvements and surrounding area, and the same basic effect of
23 street landscaping will be accomplished by installation of the
24 landscaping areas proposed in the site plan. I would estimate that the
25 quantitative impact to remove and replaced existing infrastructure
26 to the current standard would be on the order of \$150/lf over the
27 approximately 425 feet of frontage is around \$65,000 not including
28 engineering, permitting and survey work which may add another
29 \$25,000 when dealing with ODOT. The addition of a parking lane
30 on Oregon Way would require ROW dedication, additional paving,
31 adjustment of utilities, etc... to potentially gain 1 or 2 parking spaces
32 since we have a driveway on the south end and you can’t park too
33 close to the intersection. The additional cost for that might be
34 \$50,000 or more.

1 “See also street improvements p. 4 of courtesy review 2 response.”
2 Record 1274-75.

3 Petitioners did not segregate the elements of the development, the city council’s
4 denial of the CUP resulted in the inability of the remainder of the proposal to
5 proceed, and the city was not required to adopt findings addressing the remaining
6 applications.

7 The second assignment of error is denied.

8 The decision is affirmed.