

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioners appeal a comprehensive plan and zone change.
4 The changes were approved by the Portland City Council and
5 permit the remodeling and expansion of a food market in
6 southwest Portland.

7 FACTS

8 The market, Strohecker's Inc., is located on the north side
9 of Southwest Patton Road, between Old Orchard Road and
10 Southwest Homar Avenue and is bounded on the north, east and
11 south by a residential neighborhood and on the west by a city
12 park (Portland Heights Park). The store has been operated in
13 this location since 1902. It became a non-conforming use in
14 1924. It has expanded twice, the first time in the 1920s and
15 the second time in the 1950s. There have been no structural
16 alterations since the 1950s expansion.

17 In September, 1983, the applicant, Strohecker's, Inc.,
18 filed an application to amend the City of Portland
19 Comprehensive Plan Map designation from High Density Single
20 Family Residential to Local Commercial. Along with the plan
21 change request was a request to change the zoning from R-5, a
22 Single Family Residential Zone, to C-3, the "Local Commercial"
23 Zone. These changes would cover the site of the store and two
24 adjacent lots to the north. The changes would enable the store
25 to remodel and expand.

26 On November 8, 1983, the city hearings officer held a

1 hearing on the matter and on November 16, 1983, he recommended
2 approval of the changes subject to several conditions. This
3 recommendation was appealed to the city council, and on January
4 25, 1984, the city council heard the appeal and voted to uphold
5 the hearings officer's recommendation and grant the changes.
6 Ordinance No. 155609 was adopted on February 16, 1984,
7 formalizing the decision.

8 Petitioners filed a notice of intent to appeal with this
9 Board on March 8, 1984. However, on April 19, 1984, the city
10 council adopted Ordinance No. 155850, amending the previous
11 approval of February 16. This later ordinance was enacted to
12 identify those findings in Ordinance No. 155609 addressing the
13 substantive requirements of the statewide goals. The earlier
14 ordinance, No. 155609, included no findings identifying and
15 stating compliance with applicable statewide land use planning
16 goals.¹ Petitioners were notified in advance of the
17 proceedings to adopt the second ordinance and were present at
18 the hearing on April 19, 1984. At that time, petitioners
19 presented both oral and written testimony opposing this second
20 ordinance.

21 ASSIGNMENTS OF ERROR 1-3

22 "The City Council erred in failing to make any
23 findings that the proposed Plan Amendment to an
24 acknowledged Comprehensive Plan complied with the
25 Statewide Goals and Guidelines, and violated ORS
197.835(4) and Statewide Goals Nos. 1 & 2 and Portland
Goal No. 1.

26 "The City Council erred in attempting to resume
jurisdiction over Ordinance No. 155609 by amending it

1 with the adoption of Ordinance No. 155850 on April 19,
2 1984 without opening the entire matter to public
3 hearing and testimony concerning issues relating to
4 the Statewide Goals and Guidelines.

5 "The City Council's action in amending the findings in
6 this case in accordance with standards not heretofore
7 raised in the record without having a public hearing
8 violated Statewide Goals and Guidelines Nos. 1 and 2."

9 In the first three assignments of error, petitioners claim
10 the city failed to make findings showing compliance with
11 statewide planning goals and certain goals of the City of
12 Portland Comprehensive Plan. Further, petitioners argue
13 adoption of Ordinance No. 155850, supplying missing findings on
14 statewide planning goals is improper and not effective. It is
15 petitioners' position that adoption of the second ordinance
16 would only be appropriate where the matter of compliance with
17 statewide planning goals was open to a full hearing following
18 the same notice formalities as required for any other
19 comprehensive plan and zone change amendment procedure.
20 Because the city did not give such notice and conduct such a
21 hearing, Ordinance No. 155850 is in violation of statewide
22 planning Goals 1 and 2 and is not effective to supply the
23 missing findings to the original approval, according to
24 petitioners.²

25 We are required to reverse or remand a post acknowledgment
26 plan amendment absent (1) findings demonstrating compliance
27 with the purposes of the pertinent goals or, (2) findings
28 demonstrating conformance with specific plan policies

1 controlling the plan amendment. ORS 197.835(2). The city has
2 not cited us to any policies that specifically control this
3 decision; therefore, findings showing compliance with the goals
4 were indeed necessary.

5 In this case, however, the city and the petitioners agreed
6 in a stipulation made June 15, 1984, that the Respondent City
7 could supplement the record on appeal to LUBA by inclusion of
8 Ordinance No. 155850.³ We believe the parties have invited
9 us to consider the city's decision as embodied in the two
10 enactments, Ordinance No. 155609 (the original approval) and
11 Ordinance No. 155850 (the amendatory ordinance).⁴ We will
12 review the two ordinances as one decision.

13 We do not find petitioners' complaints about compliance
14 with statewide planning Goals 1 and 2 requires us to remand
15 this case. Goal 1 and Goal 2 require that the planning process
16 be open and involve citizens. However, we find nothing in this
17 record to suggest that citizens were not invited to participate
18 in this process or were precluded from participation. There is
19 no allegation and no evidence in the record that compliance
20 with statewide planning goals was excluded from the council's
21 consideration during the course of the proceedings leading to
22 the first ordinance, Ordinance No. 155609. Had petitioners (or
23 anyone else) desired to make comment on compliance with
24 statewide planning goals, there is nothing in this record to
25 suggest that they could not have done so during the course of
26 the first hearing. Also, as we noted, supra, at page 3, the

1 amendatory ordinance, for the most part, simply lists those
2 findings made in conjunction with the passage of Ordinance No.
3 155609 which show compliance with particular statewide planning
4 goals. There was no separate goal analysis undertaken in
5 Ordinance No. 155850; and, indeed, it appears that the second
6 ordinance simply serves as a guidepost showing the reader where
7 in the original set of findings to find evidence of the city's
8 compliance with statewide land use planning goals.

9 Further, these petitioners were afforded an opportunity to
10 appear and comment on the question of compliance with statewide
11 planning goals and the question of the adoption of Ordinance
12 No. 155850.⁵

13 Petitioners make an additional argument worth noting.
14 Petitioners allege the city had a duty to announce, at the
15 beginning of its proceedings, that the statewide planning goals
16 were part of the approval criteria applicable to the plan
17 amendment and zone change decision.⁶ The record does not
18 show the city to have announced what criteria applied to the
19 decision. However, we are unaware of a requirement that the
20 city recite the state law and the published portions of its
21 ordinances that apply to the matter under review. It is
22 sufficient that the governing standards are identified in the
23 county zoning code or other official regulations. See Orr v.
24 City of Eugene, 6 Or LUBA 206, 212 (1982).

25 Therefore, petitioners' complaint that the city erred in
26 failing to make findings showing compliance with the statewide

1 planning goals is denied. Petitioners claim the procedure
2 followed by the city violated statewide planning Goals 1 and 2
3 is denied.⁷ Petitioners' complaint the city erred in
4 attempting to adopt an amendatory ordinance without opening the
5 entire matter to public hearing is, similarly, denied.

6 ASSIGNMENTS OF ERROR 4 and 5

7 "The City Council's action in amending the findings of
8 this case in accordance with standards not heretofore
9 raised in the record without having a public hearing
10 and notice and opportunity to be heard, violated
11 Petitioners' right to due process of law as guaranteed
12 under the Fourteenth Amendment to the United States
13 Constitution and Article I, Section 10 of the Oregon
14 Constitution.

15 "The City Council in failing to provide the same
16 procedures to Petitioner in adopting land use
17 Ordinance No. 155890 as provided in all other
18 situations adopting land use ordinances violated the
19 Petitioners' right to equal protection of the law as
20 guaranteed under the Fourteenth Amendment to the
21 United States Constitution and Article I, Section 20,
22 of the Oregon Constitution."

23 In these two assignments of error, petitioners claim
24 violation of rights guaranteed by both the Oregon and the
25 Federal Constitutions. The substance of the claims is the
26 alleged inadequacy of notice and denial of an opportunity to be
27 heard "in proper fashion."

28 Petitioners claim they were treated differently than others
29 seeking comprehensive plan and zone changes and therefore were
30 denied equal protection of the laws.

31 We do not find a violation as alleged. As noted, the
32 petitioners in this case were provided notice and a full
33

1 opportunity to appear and be heard on the matter of statewide
2 goal compliance. Petitioners exercised the opportunity. We do
3 not believe petitioners' constitutional rights were violated by
4 a procedure in which they were allowed full participation.
5 Morrison v. City of Cannon Beach, 6 Or LUBA 74 (1982).

6 ASSIGNMENTS OF ERROR 6 and 7

7 "The City Council erred in making findings that the
8 proposed plan amendment complied with the Statewide
9 Goals and Guidelines as there was no evidence in the
10 record to support such findings.

11 "The City Council erred in finding that 'Since the
12 City's acknowledged comprehensive plan includes
13 Guidelines and policies substantially similar to all
14 relevant statewide goals and guidelines, compliance
15 with the City's plan also indicates compliance with
16 the statewide goals and guidelines.'"

17 In these assignments of error, petitioners claim there is
18 no substantial evidence to support the city's findings on goal
19 compliance. In their argument, however, petitioners allege
20 rather that the city's conclusion its guidelines and policies
21 are substantially similar to statewide planning goals is in
22 error. Petitioners do not explain what findings on statewide
23 goals lack support in the record. Similarly, petitioners do
24 not tell us in what fashion the city's goals do not mirror or
25 reflect statewide planning goals. Without more detailed guide
26 posts for our review, we will not pick at the findings and the
27 record to (1) look for places where findings are not supported
28 by substantial evidence and, (2) determine whether the city's
29 goals and policies reflect statewide planning goals. Deschutes
30 Development Co. v. Deschutes County, 5 Or LUBA 218 (1982).

1 ASSIGNMENT OF ERROR 8

2 "The City erred in not referring this matter to the
3 Planning Commission (the citizens and the affected
4 governmental units) for review proceeding from the
5 general identification of the problems and issues to
6 the specific provisions for dealing with those issues
7 and for interrelation of this proposal to the
8 inventory, elements and policies of the adopted
9 Comprehensive Plan and concomitant resolution of the
10 planning issues raised in this case as mandated by
11 Statewide Goals and Guidelines Nos. 1 and 2 and
12 Portland Plan Goal No. 9 and Policy 9.3 and Goal No.
13 10 and Policy No. 10.3."

14 In this assignment of error, petitioners allege the city
15 was obliged to refer the proposed comprehensive plan change to
16 the planning commission before action by the city council.

17 Petitioners quote the City of Portland Comprehensive Plan Goal
18 10, Policy 10.3 as follows:

19 "10.3 Interim Plan Review and Amendment
20 "Proposed amendments to the Goals, Policies and Map of
21 the Comprehensive Plan and implementing ordinances
22 will be reviewed by the Planning Commission prior to
23 action by the City Council, consistent with citizen
24 involvement procedures and State law. The Planning
25 Commission will also review the Comprehensive Plan for
26 amendments that consider compliance with goals,
27 objectives and plans adopted by the Metropolitan
28 Service District, and make recommendations to the City
29 Council."

30 The city's failure to comply with its own plan requires a
31 remand to direct the city to "follow its own procedure,"
32 according to petitioners.

33 The city directs the Board's attention to Policy 10.4 of
34 the city's plan. That policy provides as follows:

35 "Request for modification of the comprehensive plan
36 map designations will proceed under the regulations,
37 notification requirements and hearing procedures used
38 for zone change requests. The burden of proof for

1 such a change is placed upon the petitioner seeking
2 such an action. The applicant must show that the
3 requested change is (1) consistent and supportive of
4 the appropriate comprehensive plan goals and policies,
5 (2) compatible with the land use pattern established
6 by the comprehensive plan map, (3) in the public
7 interest to grant the petition; the greater the
8 departure from the comprehensive plan map designation,
9 the greater the burden of the applicant, and (4) that
10 the interest is best served by granting the petition
11 at this time and at the requested locations. Rezoning
12 may be considered concurrently with the request for
13 modification of the comprehensive plan map
14 designation."

15 The city argues this case is controlled by Policy 10.4 and not
16 Policy 10.3. The city followed the requirements of Policy 10.4
17 when it processed the comprehensive plan change in the same
18 manner as a zone change request. See PCC §33.114.040(b); PCC
19 §33.102.030(a); 050(d) and 060(e). The city advises the
20 comprehensive plan provision cited by petitioners, Policy 10.3,
21 governs the procedure to be followed when revising the plan
22 pursuant to a city council or a planning commission initiated
23 amendment. Policy 10.3 is simply not applicable in this case,
24 according to the city.

25 The city's reading of its plan is reasonable and not
26 contrary to the express language of the plan. Reading Policy
10.3 and 10.4 together requires adoption of the city's view
lest the proceeding in Policy 10.4 be made surplusage. Each
portion of the plan should be given effect. Therefore, we
adopt the city's construction and deny this assignment of
error.- Alluis v. Marion County, 64 Or App 478, 668 P2d 1242
(1983).

1 ASSIGNMENT OF ERROR 9

2 "The adoption of a Commercial Plan designation
3 benefiting a sole developer in the middle of a
4 residential neighborhood violates Statewide Goals Nos.
5 1, 2, 11 and 12."

6 Petitioners contend the city adopted the ordinance for "the
7 private benefit of the applicant." Petition for Review at 12.
8 Petitioners characterize the city's decision as a "spot plan."
9 Petition for Review at 13. Petitioners further allege the
10 neighborhood is not protected from future commercial
11 development on this property. Part of this allegation includes
12 a claim that the conditions adopted by the city are not
13 affective to limit activity on the property. Petitioners add
14 an allegation that portions of the city's plan, to wit: Goal
15 3, Neighborhoods; Goal 6, Transportation; Goal 7, Energy, are
16 violated. Petitioners do not detail the nature of these
17 violations.

18 We do not agree with petitioners' challenge. The decision
19 includes findings and reasons explaining how it is that the
20 decision complies with the city's plan and, by amendment, the
21 statewide planning goals. There is nothing in the findings or
22 the record to suggest the city has engaged in some sort of
23 contract with the applicant or otherwise breached its duty to
24 act in accordance with adopted standards.⁸ Further, because
25 petitioners do not explain how it is in particular that Goals
26 1, 2, 11 and 14 and certain of the city's goals as noted above
are violated, we will not speculate on the nature of such

1 potential violations. Deschutes Development Co., supra.

2 This assignment of error is denied.⁹

3 ASSIGNMENT OF ERROR 10

4 "The City erred in holding that conditional zoning in
5 conjunction with a commercial plan designation
6 adequately protects an established residential
neighborhood and its action violated City of Portland
Comprehensive Plan Goal Nos. 2 and 3.

7 "The City erred in adopting conditional zoning as a
8 means of granting a zone change."

9 In these two assignments of error, petitioners acknowledge
10 conditional zoning is permissible to protect a neighborhood.
11 However, petitioners here allege the conditions imposed "are so
12 pervasive as to be a legal nullity." Petition for Review at
13 14.¹⁰ We understand petitioners to argue that should the
14 applicant choose, it could use the same economic enterprise
15 argument used before the city in this proceeding to justify
16 future alterations. In other words, as long as the applicant
17 enjoys a commercial plan and zoning designation on this
18 property, any permitted commercial use is possible, no matter
19 how detrimental to the neighborhood.

20 Petitioners do not cite us to any authority explaining why
21 the conditions are legally not effective to limit further
22 development of the property.¹¹ The conditions are claimed by
23 the city to be reasonable. Reasonable conditions will
24 generally be upheld. 1 Rohan Zoning and Land Use Controls,
25 §5.03 (1984); 39 Op Atty Gen, 467 (1979). Further, conditional
26 zoning is authorized by statute. ORS 227.175(4).

1 The city code authorizes conditions. PCC 33.102.010 provides:

2 "In granting a change in zoning classification of any
3 property, the Council may attach such conditions and
4 requirements to the zone change as the Council deems
5 necessary in the public interest."

6 In this case, the conditions perform the following
7 functions: (1) restrict the use of the site to a grocery
8 store, (2) allow no further site or building expansion, (3)
9 require a setback from the north property line, (4) prohibit
10 the creation of accessory buildings, (5) prohibit recycling or
11 refuse containers permanently located outside the building, (6)
12 control deliveries, (7) control the time of deliveries, (8)
13 control the height of the building, (9) control placement of
14 mechanical equipment serving the building, (10) control
15 exterior lighting, (11) control noise, (12) control parking,
16 (13) control access to the property and require improvements in
17 access.

18 While it is correct that at some future time, the city
19 council might remove the conditions or allow changes in the use
20 of the property, we do not believe this potential means the
21 city has violated its comprehensive plan or zoning code. That
22 is, as long as the comprehensive plan change and zone change
23 are enacted in compliance with the plan, the fact there may be
24 some future land use decisions affecting this property, does
25 not require us to find fault with the city's decision.¹²

26 ASSIGNMENT OF ERROR 12

"The City Council erred in finding that the applicant
met its burden under the Portland Comprehensive Plan

1 Goal 10, Policy 10.4"

2 In this assignment of error, petitioners argue an applicant
3 seeking a plan and zone change "should be required to meet a
4 substantial burden akin to the exceptions process under
5 Statewide Goal No. 2 to adequately preserve the neighborhood
6 pursuant to Goal 3 of the Portland Comprehensive Plan."¹³
7 Petitioners say well established neighborhoods, such as the one
8 here, have achieved a balance of compatibility of existing
9 uses. The change proposed is a major change, according to
10 petitioners, and will upset that balance. Petitioners support
11 their claim by arguing that all of the issues present in this
12 case existed at the time of the initial plan adoption, and the
13 only new factor is one of the applicant's creation. Therefore,
14 the propriety of this plan and zone change was decided when the
15 plan was adopted. Any change should be processed with all the
16 formalities and effort required in Policy 10.3 of the plan.
17 That is, this change should be submitted to the planning
18 commission for a complete review. Petitioners argue this
19 change is of such magnitude that the applicant must show some
20 compelling reason for the change.

21 As the city correctly points out, there is nothing in
22 Policy 10.4 that requires an applicant to satisfy the same
23 criteria as an applicant for a goal exception. We therefore
24 reject petitioners' claim that some special or extraordinary
25 burden of proof must be met before a plan change and zone
26 change as enacted here can be granted.

1 As to petitioners' argument that the city's Neighborhoods
2 Goal has been violated (Goal 3 and Policy 2.9 of the Urban
3 Development Goal controlling residential neighborhoods) we must
4 reject the argument.¹⁴ Petitioners have not said which of
5 the policies under the city's Goal 3 have been violated. Also,
6 petitioners have not advised how it is the city's conclusion
7 the stability and diversity of the neighborhood will not be
8 jeopardized is wrong. What the petitioners have done, in sum,
9 is present an argument as to why the city should not have
10 chosen to do what it did. While the argument addresses the
11 city's comprehensive plan, it does not provide us with a basis
12 for reversal or remand. Petitioners have advised how it is
13 that the city made a poor decision (if petitioners' views are
14 accepted), but LUBA may not reverse even if it were to agree
15 that the city made a poor decision. We may only reverse where
16 we find error.¹⁵ Petitioners have not provided us with a
17 clear showing of violation of any applicable standard.

18 The decision of the City of Portland is affirmed.

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FOOTNOTES

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The city's comprehensive plan and implementing ordinances have been acknowledged as being in compliance with statewide land use planning goals. Because the city was amending its comprehensive plan, a showing of compliance with statewide planning goals was necessary. See ORS 197.175; 197.835.

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It is not clear to us what specific portions of Goals 1 and 2 are claimed to be violated. Presumably, petitioners are arguing the Goal 1 requirement that local governments insure an opportunity "for citizens to be involved in all phases of the planning process" has been violated by the city's failure to give notice and a full hearing on the question of goal compliance. Petitioners' complaint about compliance with Goal 2 may rest on a similar requirement as follows:

"Opportunity shall be provided for review and comment by citizens and affected governmental units during preparation, review and revision of plans and implementation ordinances."

3
The agreement was made "...to avoid the requirement and burden of filing two appeals."

4
Had petitioners chosen not to enter into this stipulation, this case would have been remanded for failure to adopt findings showing compliance with statewide planning goals. Also, petitioners could have filed a separate appeal of Ordinance No. 155850. Apparently for the sake of economy and in order to have a full hearing of the merits of the case, the parties agreed that we might review both ordinances. In making this review, we do not wish to suggest that land use decision makers may, absent some sort of stipulation as in this case, make a decision and then only when an appeal is filed decide to reopen the matter for adoption of findings to protect the decision. The finding of facts supporting a decision does not follow the decision, but must precede it. See Heilman v. City of Roseburg, 39 Or App 71, 591 P2d 390 (1979).

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2 We wish to caution, however, that while statewide planning
3 Goals 1 and 2 may not preclude the city's action in this case,
4 our holding is based upon all of the facts in this case
5 including the agreement of the parties for us to review both
6 ordinances. See Footnote 3, supra, and ORS 227.173 and ORS
7 215.416.

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The only exception to showing compliance with statewide
planning goals is where there are "specific" plan policies
controlling the decision. That exception is found in ORS
197.835(6) and is not argued to be applicable in this case.

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Petitioners make a claim that Goal 1 of the City of
Portland Comprehensive Plan was violated. Petitioners fail to
explain the nature of this violation, and we will not speculate
on how the goal is violated. The goal provides:

"The Comprehensive Plan shall be coordinated with
federal and state law and support regional goals,
objectives and plans adopted by the Columbia Region
Association of Governments and its successor, The
Metropolitan Service District (Metro), to promote a
regional planning framework."

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The term "spot zoning" is generally used to refer to an
arbitrary and unreasonable reclassification where the
applicable standards are pushed aside in favor of a kind of
agreement to act to the applicant's benefit. 1 R Anderson
American Law of Zoning, 2d §5.08 (2d ed, 1976).

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We do not know, for example, whether the allegations made
in this assignment of error about Goals 1 and 2 are the same as
those made earlier in Assignments of Error 1 and 3.

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It is not clear to us how it is that the conditions are "so
pervasive" that they go too far to offer protection to the
neighborhood.

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3 We note in particular that petitioners do not present any
4 authority showing the city's restriction on the property to
5 grocery store use only is illegal. We therefore express no
6 opinion as to whether a zone change may be so conditioned as to
7 limit the property to only one of several permitted uses.

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10 Petitioners have not provided us with an explanation of how
11 it is that the unamended portions of the plan have been
12 violated. We therefore decline to remand or reverse this
13 decision because of petitioners' general argument that this
14 change will injure the residential neighborhood adjacent to the
15 store.

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18 Goal 3 of the city's comprehensive plan provides as follows:

19 "Preserve and reinforce the stability and diversity of
20 the city's neighborhoods while allowing for increased
21 density in order to attract and retain long-term
22 residents and businesses and insure the city's
23 residential quality and economic vitality."

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26 The Urban Development Goal states:

"Maintain Portland's role as the major regional
employment, population and cultural center through
public policies that encourage expanded opportunity
for housing and jobs, while retaining the character of
established residential neighborhoods and business
centers."

Policy 2.9 states:

"Residential Neighborhoods
Allow for a range of housing types to accommodate
increased population growth while improving and
protecting the city's residential neighborhoods."

The Neighborhood Goal 3 states:

"Preserve and reinforce the stability and diversity of the
city's neighborhoods while allowing for increased density
in order to attract and retain long-term residents and
businesses and insure the city's residential quality and

1 economic vitality."

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4 See ORS 197.835.

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