

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

3
4 CRAIG REALTY GROUP-WOODBURN, LLC,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF WOODBURN,
10 *Respondent.*

11
12 LUBA No. 99-131

13
14 OREGON DEPARTMENT OF TRANSPORTATION and
15 DEPARTMENT OF LAND CONSERVATION AND
16 DEVELOPMENT,
17 *Petitioners,*

18
19 vs.

20
21 CITY OF WOODBURN,
22 *Respondent.*

23
24 LUBA No. 99-135

25
26 FINAL OPINION
27 AND ORDER

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29 Appeal from City of Woodburn.

30
31 Michael C. Robinson, Portland, filed a petition for review and a response brief, and
32 argued on behalf of petitioner Craig Realty Group-Woodburn, LLC. With him on brief was
33 Stoel Rives LLP.

34
35 Kathryn A. Lincoln, Assistant Attorney General, Salem and Lynne A. Perry,
36 Assistant Attorney General, Salem, filed a petition for review and argued on behalf of
37 petitioners Oregon Department of Transportation and Department of Land Conservation and
38 Development.

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40 N. Robert Shields, City Attorney, Woodburn, filed a response brief and argued on
41 behalf of respondent.

42
43 BRIGGS, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member,
44 participated in the decision.

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REMANDED

02/02/01

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

NATURE OF THE DECISION

In LUBA No. 99-135, petitioners challenge a city decision that approves an expansion of a factory outlet center. In LUBA No. 99-131, petitioner appeals a condition of approval that is contained in the decision appealed in LUBA No. 99-135.

FACTS

Petitioner Craig Realty Group-Woodburn, LLC (Craig Realty) first began developing a factory outlet center near the State Highway 214 (Highway 214) and Interstate Highway 5 (I-5) interchange in 1992. The outlet center, as first proposed, included 250,000 square feet of retail space, to be developed in three phases. At that time, petitioner Oregon Department of Transportation (ODOT) requested that certain conditions be included in the decision that approved the factory outlet center, including a condition that limited access to I-5. Petitioner Department of Land Conservation and Development (DLCD) also requested that the city include conditions requiring that the city adopt a Transportation System Plan (TSP) before it approved the final phase of the factory outlet center and that the city rezone 27 acres of developable land for high-density residential use. The rezoned 27 acres would replace high-density residential land that was rezoned to commercial uses to accommodate the factory outlet center. The city adopted petitioners' recommendations as conditions of approval for the development.

Since the time the original concept was approved, the city has added 30.6 acres of high-density residential zoned land to its buildable land inventory. In addition, in 1996, the city adopted a TSP as part of its comprehensive plan. The area of the I-5/Highway 214 interchange (Woodburn Interchange) is identified in the TSP as a major city and regional transportation facility. The TSP recognizes that the traffic using the interchange will exceed its design capacity in the relatively near future, and proposes three different, mutually exclusive alternatives to address the problem. The TSP also notes that the Woodburn

1 Interchange will be the subject of a future refinement plan to identify the chosen alternative
2 to address the interchange transportation problem.

3 In 1998, Craig Realty proposed to annex the subject eight acres to the city and
4 develop the final phase of the factory outlet center. Petitioner's 1998 proposal included the
5 annexation request, a comprehensive plan map amendment from High Density Residential to
6 Commercial and a corresponding zone change from Urban Transition Farm to Commercial
7 Retail. At the hearings on the applications, ODOT personnel testified that the proposed
8 addition violates Transportation Planning Rule (TPR) requirements. DLCD personnel
9 testified that the proposed amendments and annexation were inconsistent with Statewide
10 Land Use Planning Goals 9 (Economic Development), 10 (Housing) and 12 (Transportation)
11 and failed to address the impact that approval of the application would have on the city's
12 periodic review work program.

13 The city approved the applications, and these appeals followed.

14 **LUBA NO. 99-131**

15 In its appeal, Craig Realty has a single, two-sentence assignment of error:

16 "The City's decision imposes a condition of approval requiring an additional
17 traffic study. Petitioner disagrees with this condition of approval." Petition for
18 Review 2.

19 The city's decision does not impose an additional traffic study as a condition of
20 approval. Petitioner's argument provides no basis for reversal or remand.

21 Craig Realty's assignment of error is denied.

1 **LUBA NO. 99-135**

2 Petitioners ODOT and DLCD submitted a joint petition for review in LUBA No. 99-
3 135. The city and Craig Realty each submitted a response brief.¹ Where it is appropriate we
4 refer to the city and Craig Realty jointly as respondents.

5 **FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR**

6 In the first three assignments of error, petitioners challenge the city’s conclusions that
7 the proposed expansion will not “significantly affect” a transportation facility, as that term is
8 used in OAR 660-012-0060(1) and (2).² According to petitioners, the rule requires that the

¹Because no party questions whether petitioner Craig Realty may properly file a response brief in LUBA No. 99-135, without filing a motion to intervene in the appeal on the side of respondent, we do not consider that question.

²OAR 660-012-0060(1)(1998) provides:

“Amendments to functional plans, acknowledged comprehensive plans, and land use regulations which significantly affect a transportation facility shall assure that allowed land uses are consistent with the identified function, capacity, and level of service of the facility. This shall be accomplished by either:

- “(a) Limiting allowed land uses to be consistent with the planned function, capacity and level of service of the transportation facility;
- “(b) Amending the TSP to provide transportation facilities adequate to support the proposed land uses consistent with the requirements of this division; or
- “(c) Altering land use designations, densities, or design requirements to reduce demand for automobile travel and meet travel needs through other modes.”

OAR 660-012-0060(2)(1998) provides:

“A plan or land use regulation amendment significantly affects a transportation facility if it:

- “(a) Changes the functional classification of an existing or planned transportation facility;
- “(b) Changes standards implementing a functional classification system;
- “(c) Allows types or levels of land uses which would result in levels of travel or access which are inconsistent with the functional classification of a transportation facility; or
- “(d) Would reduce the level of service of the facility below the minimum acceptable level identified in the TSP.”

1 city analyze the impact of the proposed amendments over the planning period of the TSP,
2 and if the impacts are analyzed in that manner, the challenged decision will significantly
3 affect the Woodburn Interchange. Petitioners also argue that the city cannot rely on its TSP
4 to approve the expansion, because the TSP defers to an unadopted refinement plan to select
5 the solution to the transportation problems associated with the Woodburn Interchange.

6 **A. Introduction**

7 Under the TPR, the TSP is the city's plan for ensuring that its existing transportation
8 facilities will be improved or supplemented to allow them to operate at an acceptable level of
9 service throughout a 20-year planning period. OAR 660-012-0015(3) and (4); OAR 660-012-
10 0030(3). For the City of Woodburn, the TSP is based on the comprehensive planning and
11 zoning that was in effect in 1995, when the TSP was first developed, and is intended to
12 address transportation needs to 2015. City of Woodburn Transportation System Plan 1.
13 Where a local government changes the planning and zoning upon which the TSP was based,
14 it must ensure that the amendments comply with OAR 660-012-0060. An amendment
15 complies with OAR 660-012-0060 where it does not "significantly affect" a transportation
16 facility in any of the ways described in OAR 660-012-0060(2) or, if it does significantly
17 affect a facility, where the local government takes one or more of the steps prescribed in
18 OAR 660-012-0060(1).

19 In the present case, the relevant inquiry under OAR 660-012-0060(2) is whether the
20 proposed amendment "would reduce the level of service of the facility below the minimum
21 acceptable level identified in the TSP." The city must first determine whether the city's
22 existing transportation facilities are adequate to handle, throughout the relevant planning
23 period, any additional traffic that the proposed amendment will generate. If the answer to that
24 question is yes, then the proposed amendment will not significantly affect a transportation
25 facility for the purposes of OAR 660-012-0060(1), and no further analysis is necessary. If the
26 answer is no, then the city must consider whether any new and improved facilities

1 anticipated by the TSP will generate sufficient additional capacity, and will be built or
2 improved on a schedule that will accommodate the additional traffic that will be generated by
3 the proposed amendment. If the answer to that question is yes, then, again, the proposal will
4 not significantly affect a transportation facility. If, however, the answer is no, then the city
5 must adopt one or more of the strategies set out in OAR 660-012-0060(1) to make the
6 proposed amendment consistent with “the identified function, capacity and level of service of
7 the [affected] facility.”

8 **B. The City’s Decision**

9 **1. Effect of the Proposed Amendment Over the Planning Period**

10 The city’s decision takes the position that OAR 660-012-0060(2) does not require
11 more than a determination that the proposal *currently* does not significantly affect a
12 transportation facility. As we explained above, this position is inconsistent with the
13 framework for transportation planning set out in the TPR. Under respondents’ reading of
14 OAR 660-012-0060, the facilities that are identified in the TSP and intended to be adequate
15 to ensure that desired service levels will be maintained throughout the planning period could
16 quickly be rendered inadequate by a series of amendments that, viewed individually, might
17 not have the immediate effect of making any existing facilities fail. Requiring that the
18 questions posed by OAR 660-012-0060(2) be asked and answered for the TSP planning
19 period avoids that result and is consistent with the language of the rule.

20 **2. The City’s Determination of “No Significant Effect”**

21 In their third assignment of error, petitioners argue that the city failed to determine
22 whether the proposed expansion would significantly affect a transportation facility.
23 According to petitioners, the city relies on unspecified mitigation measures to conclude that
24 the proposal will not significantly affect a transportation facility. In doing so, petitioners
25 contend, the city failed to follow the process set out in OAR 660-012-0060(1) and (2), which

1 requires a determination of significance prior to the consideration of mitigation measures
2 outlined in OAR 660-012-0060(1) to address those impacts. *See* n 2.

3 As we stated in *DLCD v. City of Warrenton*, 37 Or LUBA 933, 941-42 (2000):

4 “* * * OAR 660-012-0060(1) and (2) contemplate that mitigation necessary to
5 ensure that land uses allowed by amendments remain consistent with a
6 facility’s function, capacity and performance standards is considered once the
7 local government has determined that the amendment significantly affects that
8 facility. It is inconsistent with that scheme to consider such mitigation as a
9 means of avoiding the conclusion that an amendment significantly affects a
10 transportation facility.”

11 In the present case, the city’s findings state:

12 “The City Council finds that the applicant’s [Transportation Impact Study
13 (TIS)] demonstrates that the application will not have a significant [e]ffect on
14 the transportation facility identified as the I-5/Highway 214/[Highway] 219
15 Interchange. Table 4 of the TIS prepared by Kittelson and Associates * * *
16 shows that in the year 2001, I-5 will operate during a Friday p.m. peak hour at
17 level of service (‘LOS’) ‘C’ or better, with minor improvements. * * * TIS
18 Table 5 shows that in the year 2003, the interchange will operate at LOS ‘D’
19 or better. * * * In order to determine whether the application has a present
20 significant [e]ffect * * * the City Council finds that Tables 4 and 5
21 demonstrate that the application will cause the interchange to operate at
22 acceptable LOS through at least the next four (4) years.” Record 21.

23 “The City Council declined to impose a condition, which was recommended
24 by the Planning Commission, that traffic impact be determined based upon an
25 additional [TIS] to be paid for and obtained by the applicant. Instead, the City
26 Council imposed a condition that the City address the issue of required traffic
27 impact mitigation at the time of site plan review.” Record 23.

28 We cannot tell from the city’s findings whether the city determined that (1) the
29 proposed development will not have a significant impact on transportation facilities; (2) the
30 proposed development will have a significant impact, but that impact will be minimized by
31 mitigation measures to be imposed on the development; or (3) it is appropriate to defer its
32 determination of traffic impact to the site plan review stage.

33 3. Design Alternatives and Refinement Plans

34 Contrary to petitioners’ arguments, we believe the city may use its existing TSP to
35 determine whether the proposed expansion will significantly affect a transportation facility,

1 and may rely on the anticipated increase in capacity at the Woodburn Interchange to
2 accommodate additional trips generated by the proposal. OAR 660-012-0025(3) permits a
3 local government to defer decisions regarding “function, general location and mode [to] a
4 refinement plan,” provided the city adopts findings which:

5 “(a) Identify the transportation need for which decisions regarding
6 function, general location or mode are being deferred;

7 “(b) Demonstrate why information required to make final determinations
8 regarding function, general location, or mode cannot reasonably be
9 made available within the time allowed for preparation of the TSP;

10 “(c) Explain how deferral does not invalidate the assumptions upon which
11 the TSP is based or preclude implementation of the remainder of the
12 TSP;

13 “(d) Describe the nature of the findings which will be needed to resolve
14 issues deferred to a refinement plan; and

15 “(e) Demonstrate that the refinement effort will be completed within three
16 years or prior to initiation of the periodic review following adoption of
17 the TSP.”

18 The city adopted the required findings in its ordinance approving the TSP. Those
19 findings specify four alternative improvements, any one of which will solve *anticipated*
20 capacity problems at the Woodburn Interchange. Presumably, at the time the city’s TSP was
21 established, the city had the requisite information to identify the problems that were likely to
22 occur at the intersection over the 20-year planning period, including projected vehicle trips,
23 and used that information to develop alternatives that would address those problems. If that
24 is the case, then nothing precludes the city from considering whether one of the four TSP
25 alternatives will be sufficient to accommodate the unanticipated additional vehicle trips that
26 will be generated by the challenged decision without causing a decrease in the applicable
27 level of service. If, however, the four alternatives identified in the TSP will not provide
28 sufficient capacity to accommodate those additional vehicle trips, then the city must adopt
29 one or more of the measures prescribed in OAR 660-012-0060(1).

1 Neither party points to evidence in the record to show whether the city reviewed the
2 TIS and the TSP to determine whether the proposed amendment will generate additional
3 traffic that, when viewed with additional traffic that is expected during the TSP planning
4 period, will exceed the capacity that the alternatives contemplated in the TSP will provide.

5 As explained above, the city failed to address the correct planning period in applying
6 OAR 660-012-0060. In addition, it is not clear to us whether the city is improperly relying on
7 unspecified future mitigation to avoid applying OAR 660-012-0060(1).

8 The first assignment of error is sustained, in part. The second and third assignments
9 of error are sustained.

10 **FIFTH ASSIGNMENT OF ERROR**

11 Petitioners challenge the city’s conclusion that the proposal will satisfy Goal 10 and
12 the administrative rules implementing Goal 10.³

13 **A. Consistency with Goal 10**

14 In their first subassignment of error, petitioners argue the city’s housing inventory is
15 outdated and should not be used to evaluate whether the proposed amendments are consistent
16 with Goal 10. Petitioners contend that the housing inventory in the city’s comprehensive plan
17 fails to provide an adequate projection of housing needs based on the anticipated financial
18 capabilities of its citizens. Petitioners further contend that the city’s findings rely on a
19 definition of “redevelopment” contained in the city’s plan that is substantially broader than
20 that found in the Goal 10 rules, and therefore the city cannot rely on projections for
21 redevelopment densities to establish that the proposed amendments will not affect the city’s
22 compliance with Goal 10.⁴ According to petitioners, there is no evidence in the record to

³Goal 10 requires that local governments adopt plans that “provide for the housing needs of citizens of the state.”

⁴Respondents argue that petitioners failed to raise arguments below regarding compliance with the Goal 10 rule. At Record 136, DLCDC staff provided testimony that questions whether the city’s existing plan sufficiently complied with Goal 10. In that testimony, DLCDC opined that the city would have to adopt a buildable lands

1 demonstrate that the land the city assumes will be developed at multi-family densities is
2 actually likely to be so developed.⁵ Petitioners also argue that the city fails to demonstrate
3 that it will continue to comply with Goal 10 after the challenged decision, because the
4 decision fails to consider any post-acknowledgement plan amendments that may have
5 already affected the supply of developable multi-family residential land. Petitioners contend
6 that it is error to rely on an outdated document, without assessing the impact subsequent
7 decisions may have on the inventory.

8 We disagree with petitioners that the city cannot rely on assumptions and data
9 provided for in its acknowledged plan in order to determine that the proposed amendments
10 are consistent with goal provisions. Indeed, it must do so. In *D.S. Parklane Development,*
11 *Inc. v. Metro*, 165 Or App 1, 22, 994 P2d 1205 (2000), the Court of Appeals interpreted
12 Statewide Planning Goal 2 (Land Use Planning) to require that land use actions be consistent
13 with comprehensive plans and that those comprehensive plans be the basis for specific
14 implementation measures. The court concluded that Metro could not rely on a draft report
15 that calculated land needed to be included in urban reserves because that draft report was not
16 related to or incorporated into an applicable planning document. As a result, Metro was
17 required to either use population and land need projections included in its acknowledged
18 planning documents, or amend its acknowledged planning documents to incorporate the draft
19 report before relying on that report as a basis for designating urban reserve areas.

20 We believe a similar principle applies here. Based on the population projections and
21 the supply of buildable land designated for multi-family development in its acknowledged

inventory that complies with Goal 10. Since the requirements for a buildable lands inventory are contained in the Goal 10 rule, we believe the issue was raised with sufficient specificity to afford the city an opportunity to respond.

⁵OAR 660-008-0005(12), the administrative rule in question, defines “redevelopable land” as

“land zoned for residential use on which development has already occurred but on which, due to present or expected market forces, there exists the strong likelihood that existing development will be converted to more intensive residential uses during the planning period.”

1 comprehensive plan, the city found that rezoning the subject property to allow for
2 commercial uses would not result in a violation of Goal 10. That conclusion is based on the
3 city’s finding that the supply of land designated for multi-family residential use is more than
4 adequate to meet projected needs.⁶

5 With respect to petitioners’ argument that the city should have considered plan
6 amendments that affected the amount of land designated for multi-family housing,
7 respondents explain that the only post-1994 rezoning decision involving the city’s multi-

⁶The city’s findings regarding Goal 10 state:

“The City of Woodburn has provided for a variety of housing types and densities in its [Comprehensive] Plan and implementing ordinances, consistent with the Guidelines for implementing Goal [10]. The available inventory of residential land within the [urban growth boundary (UGB)] exceeds the amount needed to serve future population needs.

“As documented on Page 39 of the Plan, there is sufficient land designated for residential use in the Plan to accommodate a population of 28,000, plus a surplus that includes approximately 100 acres of both the Low Density and High Density Plan designations. This analysis is based on the carrying capacity of the two (2) residential categories in the plan in relation to the densities permitted in the underlying zoning. The capacity of the Low Density Residential designation is six (6) dwelling units per gross acre. The capacity of the High Density designation is conservatively indexed at a density of twelve (12) units per gross acre, where the corresponding zoning allows densities ranging up to twenty-five (25) dwelling units per gross acre.” Record 39-40.

“This application is subject to compliance with the Goals and the acknowledged Plan. ORS 197.175(2). Goal 10 simply requires the City to provide for housing needs. The City has done this. The findings at the outset of this decision state the housing needs of the City of Woodburn have been satisfied through the year 2014. The acknowledged Plan states that there are 688 acres of high density residential designation. Of this, 57 acres are undeveloped and 188 acres are underdeveloped. (Plan at pages 15 and 16.)

“The Plan further notes that the City has 238 surplus acres designated for multi-family land uses. (Plan at page 38.) This allows, at 12 dwelling units per acre, an additional 2,353 dwelling units. (*Id.*) Table 9 of the Plan at page 39 shows that the City has a surplus of 1,305 multi-family dwelling units through the year 2014. * * *

“Moreover, assuming that [these] eight (8.0) acres can accommodate twice the 12 dwelling units per acre figure, this area would accommodate 192 dwelling units. Removal of this site from the High Density Residential designation would still leave 1,013 surplus multi-family dwelling units by the year 2014.

“The City Council finds that the acknowledged Plan’s determination of a surplus of multi-family housing units is a sufficient basis for it to determine that this application will allow the City to continue to meet the housing needs of its citizens. * * * ” Record 55.

1 family housing inventory was the city's decision to rezone 30.6 acres of land *to* multi-family
2 use, as a result of the city's 1992 approval of the first phase of the factory outlet center
3 development.

4 We agree with respondents that the evidence in the record is adequate to show that
5 recent amendments have not decreased the multi-family land supply so as to implicate the
6 city's compliance with Goal 10. Petitioners' first subassignment of error is denied.

7 **B. Inadequate Findings and Lack of Substantial Evidence**

8 Petitioners' remaining two subassignments of error are premised on their belief that
9 the city may not use the provisions of its acknowledged plan to determine that the challenged
10 decision is consistent with Goal 10 and that no reasonable person would use outdated
11 information when a new inventory is being developed. For the reasons explained in our
12 discussion of the first subassignment of error, we disagree with that premise. The findings
13 adequately describe the relevant provisions of the comprehensive plan, and explain why the
14 city believes it has an adequate inventory of multi-family designated land, and those findings
15 are supported by substantial evidence.

16 The second and third subassignments of error are denied.

17 The fifth assignment of error is denied.

18 The city's decision is remanded.⁷

⁷At oral argument, petitioners withdrew their fourth assignment of error. Therefore, we do not address it.