

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

BEN BENJAMIN,	)	
	)	
Petitioner,	)	LUBA No. 90-065
	)	
vs.	)	FINAL OPINION
	)	AND ORDER
CITY OF ASHLAND,	)	
	)	
Respondent.	)	

Appeal from City of Ashland.

Ben Benjamin, Ashland, filed the petition for review and argued on his own behalf.

Ron Salter, Ashland, filed the response brief and argued on behalf of respondent.

SHERTON, Referee; KELLINGTON, Chief Referee; HOLSTUN, Referee, participated in the decision.

REMANDED

11/13/90

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

Opinion by Sherton.

**NATURE OF THE DECISION**

Petitioner appeals an Ashland City Council order approving a conditional use permit and site review for four medical office buildings.

**FACTS**

The proposed medical office buildings are one story high, contain 2,700 sq. ft. apiece, and would surround a new 36-space surface parking lot. The proposed development would be located on a vacant, grass covered portion of a parcel containing the Ashland Community Hospital. The subject parcel is jointly owned by the Ashland Community Hospital and the City of Ashland (city). Record 48. It is designated Public Facilities on the Ashland Comprehensive Plan (plan) map, and is zoned Low Density Multiple-Family Residential (R-2). The surrounding properties are also zoned R-2. Surrounding uses include other medical offices, the hospital building, multi-family residences and some single family residences. Record 32. The vacant portion of the subject parcel is used as a recreation area by neighborhood residents, and "has been under some review recently as a neighborhood park for this area of the City." Record 31.

On January 3, 1990, the Ashland Community Hospital applied for a conditional use permit and site review approval for the four medical office buildings. After a

public hearing, the city planning commission approved the conditional use permit and site review, and its decision was appealed to the city council. On April 24, 1990, after an additional public hearing, the city council adopted its order approving the conditional use permit and site review. This appeal followed.

**FIRST ASSIGNMENT OF ERROR**

"The proposed development is not in conformance with the Comp. Plan."

Petitioner contends that plan Chapter VIII (Aesthetic Resources) stresses the importance of parks and recognizes there is a lack of park land in the city. Plan, p. VIII-1. Petitioner cites plan policy VIII-5, which provides:

"Encourage the creation of pocket parks and special areas, especially in areas of intense urban development."

Petitioner further contends that both a city planning department staff report and a letter from the Ashland Parks and Recreation Commission recognize that there is a need for a park in the subject neighborhood. Record 32, 42. Petitioner argues that the vacant portion of the subject parcel is used as a "de facto park" by neighborhood residents. Record 32. According to petitioner, removal of the subject area from "the city's inventory of land for park use" violates the plan.

The only plan provision which petitioner cites under this assignment of error as being violated by the challenged

decision is policy VIII-5. However, a "plan provision that certain uses or activities be encouraged states general objectives, not permit approval criteria." Miller v. City of Ashland, 17 Or LUBA 147, 167-168 (1988) (Miller); see Bennett v. City of Dallas, \_\_\_ Or LUBA \_\_\_ (LUBA No.88-078, February 7, 1989), slip op 8-9, aff'd 96 Or App 645 (1989); Urquhart v. LCOG and City of Eugene, 14 Or LUBA 335, 347, rev'd other grounds 80 Or App 176 (1986); McCoy v. Tillamook County, 14 Or LUBA 108, 118 (1985). Therefore, policy VIII-5 is not an approval standard for the challenged conditional use permit or site review, and petitioner's argument provides no basis for reversal or remand of the city's decision.

The first assignment of error is denied.

#### **SECOND ASSIGNMENT OF ERROR**

"The location, size, design, and operating characteristics of the proposed development are incompatible with and would have a major impact on the livability of the surrounding neighborhood."

#### **THIRD ASSIGNMENT OF ERROR**

"The findings of the City are inadequate to demonstrate compliance with LUO 18.104.040(B)."

Ashland Land Use Ordinance (ALUO) 18.104.040(B) provides the following approval criterion for conditional use permits:

"The location, size, design and operating characteristics of the proposed development are such that the development will be reasonably compatible with and have minimal impact on the livability and appropriate development of abutting

properties and the surrounding neighborhood."

Petitioner's arguments under the second and third assignments of error contend the city's decision fails in several respects to demonstrate that the proposed office building complex complies with ALUO 18.104.040(B). We address petitioner's contentions separately below.

**A. Identification of Livability**

Petitioner points out that in McCoy v. Linn County, 16 Or LUBA 295, 301-302 (1987), aff'd 90 Or App 271 (1988), this Board interpreted a standard very similar to ALUO 18.104.040(B), and stated:

"\* \* \* to show that a proposed conditional use will not adversely affect the livability and appropriate development of abutting properties and the surrounding neighborhood, the county must (1) identify the qualities or characteristics constituting the 'livability' of abutting properties and the surrounding neighborhood; and (2) establish that the proposed use will have no adverse effects on those qualities or characteristics."

Petitioner contends that the only difference between ALUO 18.104.040(B) and the Linn County standard interpreted above is its use of the term "will have minimal impact on" rather than "will not adversely affect." Petitioner argues that this Board previously determined that ALUO 18.104.040(B) should be interpreted similarly to the Linn County standard. Murphey v. City of Ashland, \_\_\_ Or LUBA \_\_\_ (LUBA No. 89-123, May 16, 1990) (Murphey).

Petitioner further argues that the city's decision does

not identify what constitutes the livability of the neighborhood surrounding the subject site. Petitioner argues that the qualities of livability must be identified, and the impacts of the proposed development on that livability determined, in order to decide whether those impacts will be minimal, as required by ALUO 18.104.040(B).

The city argues that the factors listed in ALUO 18.104.040(C), which must be considered in determining compliance with the approval standard in ALUO 18.104.040(B), "express the city's legislative determination of what constitutes livability and appropriate development." Respondent's Brief 13. The city contends that its findings demonstrate these factors were considered and, therefore, are adequate to determine the components of the livability of the surrounding neighborhood and to demonstrate compliance with ALUO 18.104.040(B).<sup>1</sup>

In Murphey, supra, slip op at 28, we stated that compliance with ALUO 18.104.040(B) requires adoption of findings which:

"\* \* \* identify the qualities constituting the livability and appropriate development of the abutting properties and the surrounding neighborhood, and \* \* \* determine whether the proposed use will have more than a minimal impact on those identified qualities."

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<sup>1</sup>The city contends that its findings include proposed findings submitted by the applicant which, according to the city, "are referenced and adopted in the Findings, Conclusions and Orders as 'Proponent's Exhibits.'" Respondent's Brief 13-14.

ALUO 18.104.040(C) requires the following factors be considered in determining whether a proposed conditional use complies with ALUO 18.104.040(B):

- "(1) Harmony in scale, bulk, coverage and density.
- "(2) The availability and capacity of public facilities and utilities.
- "(3) The generation of traffic and the capacity of surrounding streets.
- "(4) Public safety and protection.
- "(5) Architectural and aesthetic compatibility with the surrounding area." ALUO 18.104.040(C).

We agree with the city that in ALUO 18.104.040(C), it has legislatively determined factors which are qualities or characteristics of livability. We further agree with the city that its findings are required to demonstrate consideration of the above quoted factors in making a determination of compliance with ALUO 18.104.040(B). See Murphey, supra, slip op at 30; Miller, 17 Or LUBA at 178-179.

However, we disagree with the city that findings which demonstrate only consideration of the factors of ALUO 18.104.040(C) are in themselves adequate to establish the components of livability of the surrounding neighborhood and compliance with ALUO 18.104.040(B). ALUO 18.104.040(B) and (C) do not state that the factors listed in ALUO 18.104.040(C) are the only factors which may be considered in determining compliance with ALUO 18.104.040(B).

Where issues relevant to compliance with applicable approval criteria are raised in local government proceedings, the local government is required to address those issues in its findings. Norvell v. Portland Metro Area LGBC, 43 Or App 849, 853, 604 P2d 896 (1979); Highway 213 Coalition v. Clackamas County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 88-060, December 15, 1988), slip op 5; Grovers Beaver Electric Plumbing v. Klamath Falls, 12 Or LUBA 61, 66 (1984). In this case, if there was testimony in the proceedings below which focussed on an issue arguably relevant to the qualities of livability and appropriate development in the neighborhood surrounding the proposed medical office complex, the city is required to address that issue in its findings. In addressing such an issue, the city must either (1) explain why the issue is not relevant to the qualities of livability and appropriate development in the surrounding neighborhood, or (2) identify the issue as relevant to determining the livability and appropriate development in the surrounding neighborhood and assess the impacts of the proposed development with regard to the issue.

The following appear to be the only findings of fact adopted by the city which are relevant to demonstrating



compliance with ALUO 18.104.040(B):<sup>2</sup>

"The Council finds that the construction of medical office space will have a minimal impact on surrounding properties. Parking concerns have been mitigated through the design of a centralized parking area between the buildings. The hospital is surrounded by fully improved City streets with adequate capacity to serve the proposed use. Total traffic generation by the completed offices is expected to be 364 vehicle trips per day. The Council believes this may be reduced, however, by the proximity to the hospital and other offices, and the opportunities for combining visits and trips.

"The Council believes that the site plan is in compliance with Ashland's Site Design and Use Guidelines. The open layout and modest size of the buildings is in keeping with the residential character of the neighborhood. The primary orientation of the buildings is towards the street, while parking will be accommodated to the side and rear of the structures. Pedestrian access from the street to each building will be provided." Record 2-3.

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<sup>2</sup>We do not agree with the city that its decision incorporates by reference the applicant's proposed findings. The alleged incorporation by reference is in a section of the order entitled "Exhibits," which states:

"For the purposes of reference to these Findings, the attached index of exhibits, data, and testimony will be used.

"Staff Exhibits, lettered with an 'S.'

"Proponent's Exhibits, lettered with a 'P.'

"Opponent's Exhibits, lettered with an 'O.'

"Hearing Minutes, Notices, Miscellaneous Exhibits lettered with an 'M.'" Record 2.

This provision simply establishes a notation system for referring to exhibits in the record. It does not purport to adopt the identified exhibits as part of the city's findings.

Other than a conclusion that the proposed medical offices will have minimal impact on surrounding properties, and a statement that the neighborhood is residential in character, the above findings do nothing to describe the abutting properties and surrounding neighborhood or to identify the qualities constituting livability and appropriate development of the abutting properties and surrounding neighborhood. Without such identification, the city cannot determine the impacts of the proposed development on those qualities or whether the impacts are minimal. We agree with petitioner that the city's findings are inadequate to demonstrate compliance with ALUO 18.104.040(B).

This subassignment of error is sustained.<sup>3</sup>

**B. Size, Design and Parking**

Petitioner argues the size and design of the proposed medical office buildings, and the accompanying parking facilities, would have a major negative impact on the livability of the surrounding neighborhood. Petitioner contends he argued below that two two-story buildings, rather than four one-story buildings, could be employed on the site with less negative impacts on the neighborhood.

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<sup>3</sup>Sustaining this subassignment of error requires that we remand the city's decision. However, in the following subassignments we address other arguments made by petitioner concerning the sufficiency of the findings to demonstrate compliance with ALUO 18.104.040(B) which are not resolved by our discussion of this subassignment. ORS 197.835(9)(a).

Petitioner argues the city failed to adequately consider the alternatives he offered. Petitioner further contends that several alternative parking arrangements which would have less negative impact on the neighborhood were suggested in the proceedings below, but the city failed to consider or address any of these alternatives.

ALUO 18.104.040(B) requires the city to demonstrate that the proposed "development will be reasonably compatible with and have minimal impact on the livability \* \* \* of abutting properties and the surrounding neighborhood." It does not require the city to consider whether alternative proposals or designs will be more compatible with or have less impact on the surrounding neighborhood, and petitioner identifies no other approval standard which imposes such a requirement. Accordingly, petitioner's arguments with regard to size, design and parking do not provide a basis for reversal or remand of the city's decision.

This subassignment of error is denied.

### **C. Traffic**

Petitioner contends the city improperly failed to address the impacts of the proposed development with regard to increased traffic flow and altered traffic patterns on the livability of the surrounding neighborhood. According to petitioner, the findings state only that city streets have adequate capacity to serve the proposed use, but do not address livability concerns.

Petitioner contends the primary access to the proposed development will be from N. Main Street, at its intersection with Maple Street. Petitioner points out that the plan refers to this intersection as a "problem" and "high accident frequency" intersection. Plan p. X-10, Map X-4. Petitioner contends it was argued before the city that the addition of 364 vehicle trips per day, concentrated during business hours, in a densely populated neighborhood and using a known dangerous intersection, will seriously impact accessibility to and pedestrian and bicyclist safety in the surrounding neighborhood.

The city argues that the evidence in the record simply indicates that the proposed development will produce approximately 364 vehicle trips per day. The city contends there is no evidence in the record that the intersection of N. Main and Maple Streets is incapable of accommodating this additional traffic, or that other streets adjacent to the subject site will be overburdened. The city contends this subassignment must be denied because "[p]etitioner cannot affirmatively establish \* \* \* that the conditional use permit will result in traffic impacts which exceed the capacity of streets in the area or [cause] other impermissible impacts on the neighborhood." Respondent's Brief 12.

As stated above, where relevant issues are raised in the city's proceedings, the city is required to address

those issues in its findings. We understand petitioner to argue that the issue of impacts of traffic generated by the proposed development on the livability of the surrounding neighborhood was raised below, is relevant to determining compliance with ALUO 18.104.040(B), and is not addressed by the city's findings.

The city does not dispute that the traffic impacts issues were raised below. Furthermore, the factors which must be considered in determining compliance with ALUO 18.104.040(B) include "[t]he generation of traffic and the capacity of surrounding streets" and "[p]ublic safety and protection." ALUO 18.104.040(C)(3) and (4). We, therefore, agree with petitioner that the traffic impacts issues he raises are relevant to determining compliance with ALUO 18.104.040(B).

With regard to traffic impacts, the city's findings, quoted infra, contain only a projection of total vehicle trips per day generated by the proposed development, a statement that the streets surrounding the site have "adequate capacity to serve" the proposed development, and a conclusory statement that the proposed development will have "a minimal impact on surrounding properties." We agree with petitioner that determining streets have "adequate capacity" is not the same as addressing the impacts of additional traffic on the livability of the surrounding neighborhood. To demonstrate compliance with ALUO 18.104.040(B), the

city's findings must describe the characteristics of the surrounding neighborhood with regard to traffic and public safety, describe the effects of the proposed development on those characteristics and explain why those effects constitute no more than a minimal impact on the livability of the neighborhood. The findings do not do this.<sup>4</sup>

This subassignment of error is sustained.

**D. Open Space**

Petitioner argues that the loss of the open space presently found at the subject site and used by neighborhood residents for recreational purposes would have a major negative impact on the surrounding neighborhood. Petitioner contends the loss of this open space would be incompatible with the mental health benefits to the community that parks provide.

We understand petitioner to argue that the use of the subject site by neighborhood residents as a de facto park

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<sup>4</sup>Under ORS 197.830(9)(b), even if local government findings are inadequate, we must affirm the local government's decision if "the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision \* \* \*." In this case, petitioner cites testimony in the record that additional traffic due to the proposed development will adversely affect the surrounding neighborhood. Record 16, 41, 43. The only evidence cited by the city consists of proposed findings submitted by the applicant. Record 37. Even if these proposed findings could be considered "evidence," which is doubtful, they merely support the city's daily vehicle trip projection and list certain available or planned public safety features. They do not identify the existing traffic characteristics in the neighborhood or describe the impacts of the proposed development on those characteristics. Thus, they do not "clearly support" a determination of compliance with ALUO 18.104.040(B) with regard to traffic impacts on the livability of the surrounding neighborhood.

contributes significantly to the livability of the surrounding neighborhood, and that the city therefore erred by not considering whether loss of the de facto park due to the proposed development would have more than a minimal impact on the neighborhood's livability.

The city contends petitioner erroneously claims that the subject site should be treated like a park when, in fact, it has not been designated by the city as a park.<sup>5</sup> The city argues it properly found that the Public Facilities plan map designation of the site indicates it is intended "to be used for future expansion of public facilities." Record 2.

We agree with petitioner that open space may be considered one of the qualities contributing to the livability of a neighborhood. However, we agree with the city that the open space which can be considered a part of the neighborhood livability protected by ALUO 18.104.040(B) is limited to officially designated open space and de facto open space which is incidental to appropriate development of property in the neighborhood.<sup>6</sup> To hold otherwise would

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<sup>5</sup>The city points out that the Ashland Parks and Recreation Commission merely recommended to the planning commission that the site be included in the city's Open Space Park Program, but the site is not on the current city Open Space Plan. Record 32.

<sup>6</sup>With regard to incidental de facto open space (e.g., yards, courts, setback areas) as a characteristic of neighborhood livability, we note that the city must consider impacts on this quality of neighborhood livability in any case as part of its required consideration of "harmony of scale, bulk, coverage and density." ALUO 18.104.040(C)(1).

essentially mean that any vacant land currently constituting de facto open space could not be developed through the conditional use process for the purposes for which it is designated.

Accordingly, because the site proposed for development is not designated by the city plan as open space, current use of the entire site as de facto open space need not be considered one of the characteristics of neighborhood livability, and ALUO 18.104.040(B) does not require the city to demonstrate that loss of this open space due to the proposed development will not have more than a minimal impact on neighborhood livability.

This subassignment of error is denied.

The second and third assignments of error are sustained in part.

#### **FOURTH ASSIGNMENT OF ERROR**

"The findings of the City are not supported by substantial evidence in the whole record."

##### **A. ALUO 18.104.040(B)**

Petitioner argues that the city's findings of compliance with ALUO 18.104.040(B), in general, are not supported by substantial evidence in the whole record. Petitioner specifically challenges the evidentiary support for portions of three findings concerning parking, street capacity and traffic generation.

Under the second and third assignments of error, supra, we determined that the city's findings are inadequate to



comply with ALUO 18.104.040(B). Because the findings are inadequate, no purpose would be served by determining whether they are supported by substantial evidence. DLCD v. Columbia County, 16 Or LUBA 467 (1988); McNulty v. City of Lake Oswego, 14 Or LUBA 366, 373 (1986).

**B. Plan Policies**

Petitioner argues there is no evidence in the record that the proposed development complies with plan policies IV-45, VIII-5, X-2(b), X-4(c), X-5(b) and (c), and X-6(c), (d) and (e).

The city argues that plan Chapter XIII ("Policies and Implementation") indicates that none of the plan policies cited by petitioner are implemented by direct application to land use actions. Therefore, according to the city, these policies are not approval standards for the challenged decision and cannot be the basis for an allegation of error in the decision. Consequently, the city does not identify evidence in the record demonstrating compliance with the cited plan policies.

We are authorized to reverse or remand a challenged decision only if the decision is not supported by substantial evidence in the whole record. ORS 197.835(7)(a)(C); Sellwood Harbor Condo Assoc. v. City of Portland, 16 Or LUBA 505, 514 (1988). If a plan policy is not an approval standard for the challenged decision, it is of no consequence that there is not substantial evidence

in the record to support a determination of compliance with that policy.

Under the first assignment of error, we decided that plan policy VIII-5 is not an approval standard for the challenged decision. The city contends plan Chapter XIII establishes that none of the other policies cited by petitioner are approval standards for the appealed decision. Plan Chapter XIII sets out each policy in the plan and the means by which it is implemented. The plan explains the list as follows:

"The following is a listing of all the policies that are included in the Comprehensive Plan, along with a description of which ordinances are used to implement the policies. Some policies, by their nature, are not implemented, but represent ideas the City feels are important enough to warrant a policy statement. Other policies will require future action by the City. Some policies are not implemented by law, but represent guidance for Council and Planning Commission decisions." Plan [p.] XIII-1.

Chapter XIII lists policy X-2(b) as implemented by "Traffic Assessment Districts." Plan p. XIII-31. It lists policy X-5(b) as implemented through "Capital Improvement Program" and policy X-5(c) as "[p]lan update policy." Plan p. XIII-33. Accordingly, we do not believe that these policies are directly applicable as approval standards for a decision granting conditional use permit and site review approval.

Although Chapter XIII does list policies IV-45, X-4(c) and X-6(c), (d) and (e) as implemented by ALUO "Chapter

18.72 (Site Review)," it does not identify any of these policies as implemented through "Plan Policy."<sup>7</sup> Plan pp. XIII-10, 33, 34. As we explained in Murphey, supra, slip op at 21, only if Chapter XIII lists a policy as implemented through "Plan Policy" does the policy apply as an independent approval criterion for individual land use decisions. We also concluded in Murphey that under the city's plan, "plan policies which the plan states are specifically implemented [only] through particular provisions of the [A]LUO, do not constitute independent approval standards for land use actions." Id., slip op at 24. We, therefore, agree with the city that policies IV-45, X-4(c) and X-6(c), (d) and (e) are not approval standards for the challenged decision.<sup>8</sup>

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<sup>7</sup>Chapter XIII lists policy X-4(c) as being implemented also by ALUO "Chapters 18.80 (Subdivisions); 18.88 (Performance Standards)." Plan p. XIII-32. Chapter XIII lists policy X-6(d) and (e) also as implemented by ALUO "Chapters \* \* \* 18.92 (Parking); 18.88 (Performance Standards)," and policy X-6(c) as also implemented by those ALUO chapters plus "Chapter 18.80 (Subdivisions)." Plan p. XIII-34.

<sup>8</sup>In Miller, 17 Or LUBA at 162, we considered whether policy IV-45, concerning air pollution, was applicable to a city decision approving a conditional use permit, and concluded it was not, because "the plan requires policy IV-45 to be applied to the city's decision on a site review permit \* \* \*." We also stated in a footnote:

"\* \* \* the provisions of [A]LUO Chapter 18.72 do not expressly require that impacts on air pollution be determined and mitigated as part of the site review process. However, one of the purposes of [A]LUO Chapter 18.72 is 'to minimize adverse effects on surrounding property owners or the general public.' [A]LUO 18.72.020. Furthermore, [A]LUO 18.72.050.A provides that compliance with applicable city ordinances (which include

The fourth assignment of error is denied.

The city's decision is remanded.

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the plan) is a criterion for site plan approval." Miller, 17  
Or LUBA at 162 n 12.

The issue required to be decided in Miller was whether policy IV-45, a policy which plan Chapter XIII lists as implemented through ALUO "Chapter 18.72 (Site Review)," is an approval standard applicable to decisions on conditional use permits. We properly decided it is not. To the extent our discussion in Miller implies that policy IV-45 could be directly applicable as an approval standard for a site review decision, even though plan Chapter XIII does not identify it as implemented through "Plan Policy," such an implication is dicta and is disapproved.