**BEFORE THE LAND USE BOARD OF APPEALS**

**FOR THE STATE OF OREGON**

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|  Karon V. Johnson, Sara Moss, Susi Gaylord and James Christo, Petitioners, v.CITY OF Bend, Respondent, andColvin Oil I, LLC, Intervenor-Respondent. | **LUBA No. 2023-024** |
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| **PETITION FOR REVIEW AND PETITIONERS’ BRIEF** |
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**STANDING OF PETITIONERS**

Petitioners have standing to appeal pursuant to ORS 197.830(2) because they participated throughout the application process (Rec 453, 475, 1001, 1168, 1181, 1240, 1528, 1543), before the Hearings Officer and the Bend City Council, and timely filed a Notice of Appeal within 21 days of the City Council’s final action. Petitioners have exhausted the available local remedies.

**STATEMENT OF THE CASE**

**A. Nature of the Land Use Decision and Requested Relief.**

Petitioners appeal a Bend City Council decision adopting a hearings officer’s findings, recommendations and approval of conditional use permits for a gas station and a drive-through food service (drive-thru) in a Convenience Commercial zone. Petitioners seek reversal and remand of the City’s decision.

**B. Summary of Petitioners’ Arguments.** Petitioners raise the following arguments in this appeal:

 **1.** **First Assignment of Error.** The Respondent (City) approved conditional use permits for a gas station and a drive-thru as part of a larger development in a Convenience Commercial zone. Petitioners and Intervenor-Respondent (Colvin) addressed whether “appropriate” is a site-specific criterion for conditional uses. The City approved the permits without addressing this issue. The City’s decision is inadequate for review. It is also error: “appropriate” is an approval standard which should have been applied to these applications.

**2. Second Assignment of Error.** The Convenience Commercial zone is limited to developments designed for small and medium businesses which provide for the frequent shopping and service needs of nearby residents. Gas stations and drive-thrus are allowed as conditional uses. The City erred by finding that “need” is not an approval criterion or standard for uses conditionally allowed in Convenience Commercial zones.

**3. Third Assignment of Error.** Colvin failed to provide substantial evidence to prove that the negative impacts of the gas station and drive-thru on adjacent properties in terms of safety, noise, vibrations, exhaust/emissions and odor could be mitigated, or that any conditions of approval could sufficiently minimize these impacts to ensure that these uses could be compatible with surrounding uses and public facilities.

**C. Summary of Material Facts.**

1) The Proposed Development.

Intervenor-Respondent Colvin Oil I, LLC (Colvin) proposed a commercial development on 2.69 (Rec 1638) acres of vacant property at the southwest corner of Murphy and Brosterhous Roads in Bend. The property is zoned Commercial Convenience (CC) and designated CC on the Bend Comprehensive Plan map. The proposed uses include a convenience store, gas station, food cart plaza, mixed-use commercial/residential building, one retail/food building and a drive-thru (Rec 2300). Both the gas station and drive-thru require conditional use permits. BDC Table 2.2.300. The proposed gas station would have 12 pumps (Rec 1651). The drive-through is designed for a queue of 13+ vehicles (Rec 1517).

 The Convenience Commercial zone is designed to serve people who live within ¼ to ½ miles of the development to promote walking and bicycling (Rec 424).

2) Surrounding Areas.

There are seven retail gas stations within 1.4 miles of the property (see AppII-1). The nearest commercial businesses are a mile or more away on 3rd Street or Reed Market Road (Rec 1289). Ingress/egress for the surrounding neighborhoods is limited to Murphy and Brosterhous (Rec 1289, 2306). Accordingly, a resident must pass at least one gas station and drive-thru within a mile of leaving home.

The area is entirely residential/public facilities for a one-mile radius around the site and includes Jewell Elementary School (Rec 1292, 1293), Alpenglow Park, Caldera High School and a planned middle school (Rec 1202). (See AppII-2, -3, & -4.) The adjacent uses are an RV trailer park, two residential developments and a city-owned lot (Rec 1835-36).

The Murphy Road project, completed in 2021, extended Murphy to 15th Street by a bridge over the BNSF railroad tracks. Other than the west side of Brosterhous, every street has city-standard sidewalks, bike lanes and marked pedestrian crossings. A new pedestrian bridge east of Brosterhous spans the BNSF railroad tracks (Rec 2321).

SE Murphy and SE Brosterhous are two-lane, minor arterial streets (Rec 2306). Both are part of the City’s *Bicycle Low Stress Network* (Rec 2313).

More than 2,000 neighbors objected to approval of conditional use permits for these two auto-intensive uses (Rec 1181, 1290). The other businesses are welcomed.

3) Traffic Analysis, BDC Chapter 4.7.

The Transportation Facilities Report (TFR) and Transportation Impact Analysis (TIA) required by BDC Chapter 4.7 established there is adequate road capacity to support whatever vehicle trips are generated by the new commercial center (Rec 1780).

However, the TRF and TIA data was limited to Institute for Traffic Engineers (ITE) surveys of commercial areas where most patrons were in cars and driving to gas station/convenience stores and drive-thru/coffee shops (Rec 1781). ITE survey data for stand-alone convenience stores and drive-thrus were omitted. No evidence was presented for the present and future numbers of people using the sidewalks and bicycle lanes at this intersection.

4) The Proposed Development Will Serve Only Nearby Neighborhoods.

Colvin’s gas station and drive-thru customers will be people already transiting Murphy and Brosterhous and neighbors refueling or buying food as they leave or return home.

“[O]ur proposed fuel retailer is not anticipated to create new fuel

consumers that otherwise did not exist, thereby not adding additional

vapor, emissions, etc. to the general area. Instead, the proposed fuel retailer is anticipated to re-direct significant business from more distant fuel retailer such as Fred Meyer, Arco, Town Pump, etc.” Rec 591.

* “The proposed plan with the fuel canopy on the interior of the site will primarily cater to neighbors knowledgeable to the area who are aware of the fuel facility. Other than the two monument signs proposed in the concurrent master sign proposal, there will be very little visibility of the fuel services that will be offered on the subject property.” Rec 1733, 1924.
* “The new site arrangement will cater to neighbors knowledgeable to the area and are aware of the drive thru facility but other than the two monument signs proposed in the concurrent master sign proposal there will be very little visibility of the Drive-thru service.” R 1732, 1928.

The gas station will not increase overall automobile pollution in Bend. Rather, it will decrease the amount of pollution in other areas of Bend by redirecting some of it to this neighborhood (Rec 591).

**D. LUBA’S Jurisdiction.**

LUBA has exclusive jurisdiction to hear this appeal because it challenges a final “land use decision” of the Bend City Council approving conditional use permits for a gas station and a drive-thru food service. ORS 197.825(1). Petitioners participated in the local process and exhausted all remedies available. ORS 197.825(2).

**FIRST ASSIGNMENT OF ERROR**

**The City approved conditional use permits for a gas station and a drive-through food service as part of a larger development in a Convenience Commercial zone. Both parties briefed whether BDC 4.4.100 requires that a proposed use be both “appropriate to the site” and satisfy “other appropriate conditions of approval.” The City approved the permits without comment. This decision is inadequate for review. It is also error: “appropriate” is an approval standard which should have been applied to these applications.**

**Standard of Review:**  A governing body’s interpretations of its own land use law are subject to a highly deferential standard. *Siporen v. The City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010). LUBA will affirm the City’s interpretation of its code unless it is inconsistent with the express language of the regulation, inconsistent with the purpose of the comprehensive plan, inconsistent with the underlying policy that provides the plan or land use regulation, or is contrary to a state statute, land use goal or rule that the provision or land use regulation implements. ORS 197.829.

If a local government fails to interpret a provision of its land use regulations, or if such interpretation is inadequate for review, LUBA may make its own determination of whether the government decision is correct. ORS 197.829(b); OAR 661-010-0071(2).

**First Sub-Assignment of Error – The Hearings Officer refused to take judicial notice of the Bend Comprehensive Plan and Bend Transportation System Plan.**

Opponents argued that the gas station and drive-thru failed to satisfy the purposes and goals of the Bend Comprehensive Plan or the Bend Transportation System Plan. The Hearings Officer refused to take judicial notice of them (Rec 269).

Evidence “includes an ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom.” ORS 40.090(7). The Bend Comprehensive Plan and the Transportation System Plan are enactments of the City of Bend. It was error to decline to recognize them.

**Second Sub-Assignment of Error – If the City’s approval of the conditional use permits constitutes a finding, it is not adequate for review.**

 BDC 4.4.100 provides:

“There are certain uses, which, due to the nature of their impacts on surrounding land uses and public facilities, require a case-by-case review and analysis. These are identified as “Conditional Uses” in this code. The purpose of this chapter is to provide standards and procedures under which a conditional use may be permitted, enlarged or altered if the site is appropriate and if other appropriate conditions of approval can be met.” (Emphasis added.)

Petitioners argued that a use cannot satisfy the requirements for a conditional use permit unless it is appropriate for the location where it is proposed (Rec 1241).

When a petitioner raises an issue concerning interpretation of a code provision, a local government is obliged to explain the extent to which the provision applies to the decision. *Doob v. Josephine County*, 47 Or LUBA 147 (2004); *Heller v. Josephine County*, 23 Or LUBA 551, 556 (1992).

It need not make a direct interpretation of the code, however, if its interpretation can be inferred from the way in which it applied the code provisions to the decision. *Alliance for Responsible Land Use in Deschutes County v. Deschutes County*, 149 Or App 259, 942 P2d 836 (1997).

By inference, the City’s approval may constitute a finding that “appropriate” is not an approval criterion. But there are two possible, equally plausible meanings: either 1) “appropriate” is not an approval standard; or 2) “appropriate” is an approval standard and the gas station and drive-thru satisfy this criterion. *Weeks v. The City of Tillamook*, 117 Or App 449, 452-53 n3, 844 P2d 914 (1994). *Green v. Douglas County*, 245 Or App 430, 429, 263 P3d 355 (2011).

It is unclear whether the City considered this issue at all.

**Third Sub-Assignment of Error** **– “Appropriate” is an approval criterion which should have been applied to these applications.**

**Preservation:** Rec 341, 1248, 1309, 1390.

**A. PLAIN TEXT**

1) Plain text of BDC 4.4.400(B).

The plain text of an ordinance will control if it is obvious. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143, 1146 (1993).

“BDC 4.4.400 Criteria, Standards and Conditions of Approval.

The City shall approve, approve with conditions, or deny an application for a conditional use or to enlarge or alter a conditional use based on findings with respect to each of the following standards and criteria:

(A) The site size, dimensions, location, topography and access are adequate or the needs of the proposed use considering the building mass, parking, traffic, noise, vibration, exhaust/emissions, light, glare, erosion, odor, dust, visibility, safety and aesthetic considerations.

 (B) *Site Design Standards*.

 “Where appropriate, the criteria for Site Development Review approval

 listed in BDC 4.2.500(D), Site Plan Review Approval Criteria, shall

 be met.” (Emphasis added.) …

 “Appropriate” is used as a criterion in BDC 4.4.400. Accordingly, it is

intended to be a criterion for purposes of BDC 4.4.100.

2) Whether BDC 4.4.100 sets approval standards.

Depending on the text of the code, a zoning district purpose statement can operate as a mandatory approval standard. *Mariposa Townhomes v. The City of Medford*, 68 Or LUBA 479 (2013); *Andersen v. Peden*, 284 Or 313, 587 P2d 59 (1978). But a purpose statement is not an approval criterion if it is worded as a general expression of the goals and objectives of a code. *Renaissance Development v. City of Lake Oswego*, 45 Or LUBA 312 (2003).

The specificity of the text of BDC 4.4.100 demonstrates that it is more than a general expression of City goals.

a) “Case-by-case.” The Hearings Officer acknowledged that BDC 4.4.100 requires the criteria for a conditional use be applied on a case-by-case basis.

 “The Hearings Officer finds that designating a particular use

On a site as a conditional use simply means that the City of

Bend policy makers considered “auto-dependent uses” to

potentially have impacts on surrounding properties that should

be looked at on a case-by-case basis. …” Rec 268.

 Yet the mandate for a “case-by-case” analysis is in the purpose statement.

It follows that other terms in BDC 4.4.100 are also mandatory.

b) “Appropriate.” Colvin argued that BDC 1.1.900 precludes any

interpretation that would allow approval criteria in purpose statements (Rec

341).

BDC 1.1.900(B) provides:

“B. Purpose statements for each chapter are descriptive of the chapter’s

 characteristics and intent and are drawn from the Bend Comprehensive

 Plan and/or the Bend Development Code. Purpose statements are

 informational and not standards or approval criteria.”

If the City did not intend to make “appropriate” an approval standard, the text of BDC 4.4.100 would have ended at “enlarged or altered.” But the code adds “if” and two qualifying phrases. “If” is a conjunction, a conditional clause meaning: “provided that;” “on condition that;” or “in the event that.” It means that for one part of the statute to take effect, a precondition or requirement must be satisfied.[[1]](#footnote-1)

If “appropriate” is not an approval standard this section of text is redundant. BDC 4.4.100 should be interpreted so as give effect to every clause and word of the code. ORS 174.010

As well, BDC 1.1.900(B) is a broad, general policy statement directed at the entire Development Code, while “appropriate” is a specific, restrictive term used twice in BDC 4.4.100 as well in BDC 4.4.400(B). The more restrictive terms should apply. BDC 1.1.200(C).

There is nothing unreasonable about requiring a business to be an appropriate use of the land. Such a requirement “is not only unobjectionable, it is self-evident to the point of redundancy.” *Andersen v. Peden* at 65.

c) “Adequate.” Colvin argued that BDC 4.4.100 only meant that the site

must be adequate for the proposed needs (Rec 338).

But BDC 4.4.400(A) already uses adequate: “the site size, dimensions,

location, topography and access be adequate for the needs of the proposed

use.” (Emphasis added.) The City chose “appropriate” for BDC 4.4.100.

Where there are “several provisions or particulars” the interpretation of a code should be adopted “as will give effect to all.” ORS 174.010. The choice of “appropriate” rather than “adequate” in BDC 4.4.100 demonstrates the City intended a wider examination of the impact of conditional uses on adjacent and surrounding properties, in conformance City’s goals and policies.

**B. ORS 227.173.**

Conditional use permits are discretionary. The approval criteria for discretionary permits are guided by ORS 227.173(1):

“Approval or denial of a discretionary permit application shall be based

on standards and criteria, which shall be set forth in the development

ordinance and which shall relate approval or denial of a discretionary

permit application to the development ordinance and to the comprehensive plan for the area in which the development would occur and to the development ordinance and comprehensive plan for the City as a whole.”

ORS 227.173(1) required the City to consider many factors in determining whether “appropriate” is a standard or criterion for a discretionary permit. The caveat is that the standards and criteria must already exist in the plan and ordinance. *Buel-McIntire v. The City of Yachats*, 63 Or LUBA 452 (2011); *Waveseer v. Deschutes County*, 308 Or App 494, 482 P2d 212 (2021).

An approval standard can be inferred from the entirety of a city’s code. It is sufficient if an ordinance contains provisions that can be reasonably interpreted and explained as embodying the standards and criteria applicable in the particular decision. *BCT Partnership v. The City of Portland*, 130 Or App 271, 881 P2d 176, 179 (1994)*.* The meaning of “standards and criteria” is a question of state law, and not necessarily limited to the jurisdiction’s interpretation. *Davenport v. The City of Tigard*, 121 Or App 135, 854 P2d 483 (1993).

 The provisions of the Bend Development Code and Bend Comprehensive Plan, taken as a whole, demonstrate that “appropriate” is intended to be an approval criterion for conditional use permits.

1) BDC 2.2.100 sets forth 13 purposes for commercial development; three are pertinent.

* “Develop commercial and mixed-use areas that are safe, comfortable and attractive to pedestrians; …
* Reinforce streets as public places that encourage pedestrian and bicycle travel;
* Provide appropriate locations and design standards for automobile-and truck-dependent uses.” (Emphasis added.)

The gas station and drive-thru will have a negative impact on the safety of pedestrians, because they will encourage vehicles to leave the road, necessarily crossing bike lanes and sidewalks on the way in and the way out. The result is that vehicles which would ordinarily have stayed on the road will detour for gas or coffee instead of purchasing those items a mile further on.

2) The Bend Comprehensive Plan also contains guidance for discretionary

permits. The City will:

* “[P]romote a vital, diverse and sustainable economy, while enhancing the communities’ overall livability.” BCP Chapter 6 Economy, Goals p. 9.
* “Encourage more small neighborhood commercial developments and convenience commercial centers to reduce the number and length of single occupancy (SOV) trips.” BCP Chapter 6 Economy, Goals p. 9.
* “Encourage the development of Neighborhood Commercial centers. Such centers should be scaled to serve the frequent needs of the residents of the neighborhoods.” BCP Chapter 6 Economy Policy 6-33, p. 12.
* “Private and public nonresidential uses are necessary and will be encouraged within residential areas for the convenience and safety of the residents. Such facilities shall be compatible with surrounding developments, and their appearance should enhance the area.” Chapter 5, Policy 5-22 p. 1.

The gas station and drive-thru will not reduce the number and length of single occupancy trips because almost everyone who would buy gas or coffee there is already leaving the neighborhood on other errands.

CONCLUSION

BDC 4.4.100 is intended to be the standard for measuring whether a proposed conditional use will meet the City’s development goals, policies and plans. The proposed use must promote those goals, policies and plans to qualify for a conditional use permit.

LUBA should exercise its discretion and remand this case to the City to address whether “appropriate” is a site-specific approval criterion for conditional use permits.

**SECOND ASSIGNMENT OF ERROR: NEED**

**The Convenience Commercial zone is limited to developments designed for small and medium businesses which provide for the frequent shopping and service needs of nearby residents. Gas stations and drive-thru food services are allowed as conditional uses. The City erred by finding that “need” is not a criterion or standard for uses conditionally allowed in the Convenience Commercial zone, and further erred by approving conditional use permits for businesses without proof that they are needed by the surrounding neighborhoods.**

**Preservation.** Rec 1240, 1543.

**Standard of Review.** See First Assignment of Error.

**First Sub-Assignment of Error: BDC 2.2.200 & 2.2.300 – The City erred in finding that the descriptions of uses permitted in the Convenience Commercial zone do not constitute standards which the gas station and drive-thru must meet for conditional use permits at this location.**

BDC 2.2.200 defines the Convenience Commercial (CC) district as

follows:

“This is adjacent and connected to the Residential District(s) it is intended to serve. Convenience Commercial uses are larger in scale

and area than neighborhood commercial areas and provide for frequent shopping and service needs of nearby residents. The zone is intended to provide locations for a wide range of small and medium sized businesses and services as a convenience to the neighboring residential areas. New convenience commercial nodes shall develop as commercial centers rather than a commercial strip and be limited in size up to 5 acres.”

Petitioners argued that BDC 2.2.200 set approval standards which the

gas station and drive-thru had to satisfy at this specific location on

Murphy/Brosterhous. The Hearings Officer held:

“The Hearings Officer finds that designating a particular use

on a site as conditional use simply means that the City of Bend

policy makers considered ‘auto-dependent’ uses to potentially

have impacts on surrounding properties that should be looked

at on a case-by-case basis. The Hearings Officer finds there is

no ‘need’ demonstration required by relevant conditional use

approval criteria.” Rec 268.

1) The finding was inadequate. This finding begs the question: should the impacts being “looked at” include whether the use is needed at this site? This finding is inadequate because it lacks any explanation or analysis to support its conclusion. *Elenes v. Deschutes County*, 78 Or LUBA 483 (2018).

2) The finding failed to apply the plain text of BDC 1.0.100, BDC 2.0.100,

BDC 2.2.200 and BDC Table 2.2.300. BDC 1.0.100 regulates and limits the types of uses allowed in each zone and the standards which apply to each type of use.

“The use of every lot, parcel and tract of land is limited to the uses permitted by the applicable zone.” BDC 2.0.100. Table 2.0.100 defines four types of commercial uses. BDC 2.2.200, “Zoning Districts and Characteristic” defines Convenience Commercial as set forth above. “Characteristic” means a distinguishing quality,[[2]](#footnote-2) a “quality or feature that is typical of someone or something.[[3]](#footnote-3) It follows that the desciptions of the types of uses permitted in a CC zone are characterists, standards for the permitted uses in that zone.

Thus, for a CC zone, providing convenience commercial uses is a standard, providing such uses to nearby residents is a standard, being a small or medium sized business is a standard, and serving the needs of nearby residents is a standard. A use cannot be permitted at the site where it is proposed to be built unless is satisfies all these standards.

Generally, the designation of a particular use in a zoning ordinance is sufficient proof of public need for that use. *Kristensen v. The City of Eugene Planning Commission,* 24 Or App 131, 544 P2d 591, 593 (1976). The City has determined that gas stations and drive-thru food services are the type of businesses needed in Convenience Commercial zones because they can serve the convenient shopping needs of residential neighborhoods.

As noted above, the CC zone is designed to encourage walking and bicycling by offering common services to nearby residents (Rec 424). The permitted businesses in Table 2.2.300 share one common trait: people do not need a vehicle to purchase their services. Accordingly, the City expects that a higher proportion of people will be on the ground, both in and surrounding this development, than for a typical commercial area.

But vehicle-intensive uses defeat the purpose of the CC zone by adding businesses for which the patron must be in a vehicle. For that reason, more is required: uses which are conditionally permitted must also “reasonably meet the need recognized by the zoning ordinance.” *Kristensen* at 593.

The City’s interpretation of BDC 2.2.200 and 2.2.300 is not plausible because it treats the terms of BDC 2.2.200 as suggestions when in fact they are standards for permitted and conditional uses in the CC zone. The City’s interpretation is inconsistent with the express language and the underlying policy of BDC 2.2.200. ORS 197.829(1)(a) - (c).

**Second Sub-Assignment of Error: BDC 4.4.400(B) & 4.3.500(D)(4)** – **The plain text of BDC 4.4.400(B) and BDC 4.2.500(D)(4) demonstrate that “need” is an approval standard for the Convenience Commercial zone.**

BDC 4.4.400, Criteria, Standards and Conditions of Approval, provides

in pertinent part:

“The City shall approve, approve with conditions, or deny an application

 for a conditional use or to enlarge or alter a conditional use based on

findings with respect to each of the following standards and criteria: ….

 B. *Site Design Standards*. Where appropriate, the criteria for Site

 Development Review approval listed in BDC 4.2.500(D), Site Plan

 Review Approval Criteria, shall be met.”

 BDC 4.2.500(D), the Site Plan Review Approval Criteria, provides in

pertinent part:

“D. Site Plan Review Approval Criteria. The City shall approve,

 approve with conditions or deny the proposed Site Plan Review

 Application based on the following criteria:

 1. The proposed land use is a permitted or conditional use in the

 zoning district;

2. Conditionally permitted uses require approval of a Conditional

 Use Permit and shall meet the criteria in BDC 4.4.400;

 3. The land use, building/yard setback, lot area, lot dimensions,

 density, lot coverage, building height, design review standards

 and other applicable standards of the applicable zoning district

 are met;

 4. The proposal complies with the standards of the zoning district

 that implements the Bend Comprehensive Plan designation of

 the subject property. (Emphasis added.)

 5. The applicable standards in BDC Title 3 are met.” …

 Colvin claimed the standards of Criterion # 4 were satisfied without identifying them or explaining how they were met (R 1715, 1910). The City concurred:

“The Hearings Officer finds that the modified plans comply

with the standards of the CC zone that implements the Bend

Comprehensive Plan designation of the Subject Property.”

Rec 286.

 Criterion # 1 is obviously met by BDC Table 2.2.300: the gas station and drive-thru are conditionally permitted uses. But Criterion # 4 requires something more, that the gas station and drive-thru meet the standards of the CC zone as defined by the Bend Comprehensive Plan, which is identical to BDC 2.2.200. Chapter 6 Economy, Table 6-1.

It is not plausible to believe that Criterion # 4 merely means that the proposed uses satisfy BDC Table 2.2.300 because it would be redundant. ORS 174.010. Standards are “rules for measuring or as a model.”[[4]](#footnote-4) The only plausible interpretation is that the descriptions of uses allowed in the CC zone are criteria which must be satisfied before the use can be permitted.

Thus, for a CC zone, providing convenience commercial uses is a standard, providing such uses to nearby residents is a standard, being a small or medium sized business is a standard, and serving the needs of nearby residents is a standard. The gas station and drive-thru cannot be permitted at this site unless they satisfy all these standards.

**Third Sub-Assignment of Error – Failure to apply the analysis required by ORS 227.173(1).**

The City erred by failing to apply ORS 227.173(1) in considering whether the characteristics of the CC zone set standards which apply to conditional use permits.

The neighborhoods which a Convenience Commercial zone serves must be within walking distance because the purpose of this zone is to reduce the number of vehicle miles traveled. This is accomplished by offering everyday

services which people can satisfy without having to get into their cars.

This concept is confirmed in the Bend Comprehensive Plan:

* “Encourage more small neighborhood commercial developments and convenience commercial centers to reduce the number and length of single occupancy vehicle (SOV) trips.” Chapter 6, Goals, p. 9
* The City will encourage the development of Neighborhood Commercial centers. Such centers should be scaled to serve the frequent needs of the residents of the neighborhoods.” Chapter 6, Goal 6-33, p. 13.

 The permitted businesses in this development will reduce SOV trips and vehicle miles traveled (VMT) because people will walk or bike there to buy a loaf of bread, meet friends for a beer or get a meal at the restaurant.

But the use of the gas station or drive-thru can only occur when the purchaser is already in a car. Given the limited ingress/egress of surrounding neighborhoods, the gas station and drive-thru will not reduce SOV or VMT because after people stop to get gas and/or coffee they will keep driving.[[5]](#footnote-5)

CONCLUSION

LUBA should exercise its discretion and remand this case to the City to address whether “need” is a site-specific approval criterion for conditional use permits in the CC zone.

**PETITIONERS’ THIRD ASSIGNMENT OF ERROR**

**The City erred in finding that Colvin met its burden of proof for conditional use permits for the gas station and drive-thru at this site because its findings were not supported by substantial evidence.**

**Standard of Review.**

 LUBA shall reverse or remand a land use decision if the Board finds that the local government made a decision not supported by substantial evidence in the whole record. ORS 197.835(9)(C). *Younger v. The City of* Portland, 305 Or 346, 356, 752 P2d 262 (1988). Substantial evidence is evidence a reasonable person would rely upon to make a decision, considering the whole record. *Dodd v. Hood River* County, 317 Or 172, 855 P2d 262 (1993). Conclusory statements are not sufficient to support a finding that the applicable

criteria have been satisfied. *Hammack Associates v. Washington County*, 16 Or LUBA 75 (1987).

**First Sub-Assignment of Error –Colvin failed to address the safety risks to pedestrians and bicyclists caused by vehicular traffic using the gas station and drive-thru.**

**Preservation**. Rec 338, 482.

For purposes of this argument “vehicular traffic” refers to vehicles which cross bike lanes and sidewalks as they enter and leave the development to patronize the gas station and/or drive-thru; it excludes vehicles destined for the permitted uses.

1) The City’s failure to segregate the impact of vehicles using the gas station and drive-thru resulted in inaccurate and incomplete data.

Colvin’s estimate of 1001 net new vehicle trips is wrong (Rec 1780). The Hearings Officer erred in accepting its analysis, which treated the gas station and convenience store as one single use and the drive-through and restaurant as another single use:

 “The market/convenience store and the fuel and the drive

through food use are auto-dependent uses that require

Conditional Use approval in addition to Site Plan Review

and Design Review.” Rec 277.

 But this is incorrect. A stand-alone market/convenience store is permitted as “Retail Sales and Service (non-automobile dependent/oriented) with a building footprint of less than 50,000 sf.” [[6]](#footnote-6) A stand-alone retail/food use is permitted as “Restaurant/Food and Beverage Services - without drive-through.” BDC 2.2.300.

Colvin’s figure was based on the International Traffic Engineer (ITE) manual survey data for combined businesses: a “Convenience Store/Gas Station” and a “Coffee/Donut Shop with Drive Through Window.” ITE survey data was available for “stand-alone” gas stations and drive-through restaurants, but was not provided. Instead, the ITE data was based on “nearly all person-trips through the automobile mode.” Rec 1781.

 BDC 4.4.400 requires a comparison between the traffic generated by the permitted uses and that caused by the gas station and drive-thru. For example, if a stand-alone convenience store at this location generates 300 vehicle trips/day and a gas station/convenience store generates 600, the effect of the gas station is to cause 300 more vehicles to turn into the complex, vehicles which otherwise would have stayed on the road.

2) Other uses will not generate a similar amount of traffic (Rec 338).

Colvin did not dispute that vehicles driving into and leaving a commercial area pose a greater risk of safety to people on the ground than vehicles which remain on the road. Its response:

“These same cars would, however, cross sidewalks if they

 patronize other Bend gas stations. Furthermore, Mr. Bessman

 has provided expert evidence that other uses allowed outright

 by the CC zone would generate a similar amount of traffic.”

 Rec 338.

The Hearings Officer adopted this argument:

 “The Hearings Officer finds that opponents did not provide

any credible substantial evidence that the traffic generated

by a fuel/gas station and/or convenience store would create

more severe safety risks to students walking along and/or

across Murphy Road and/or Brosterhous Road other than

the commercial uses that could (by right or conditional use)

be approved on the Subject Property.” Rec 264.

There is no evidence to support this finding. The opposite is true: the development will generate far less vehicular traffic if the gas station and drive-thru are not allowed.

A CC zone will inevitably attract some vehicular traffic, both from passers-by and from residents who don’t want to walk ¼ mile through the snow for a quart of milk. Thus, the addition of any uses on what is presently a vacant lot will create additional risks to people on the ground. The City resolved this tension between convenience and pedestrians/cyclists safety by building sidewalks, bike lanes and crossings to make the area as reasonably safe as practically possible for people on foot or on bicycles. The code requires nothing more for the permitted uses (Rec 1803).

 But adding vehicle-intensive uses raises the risks because everyone entering or leaving the complex will be in a car. Accordingly, BDC Chapter 4.4 requires an analysis of how much the risks to pedestrians/cyclists will increase. This, Colvin failed to do.

3) Whether gas station patrons cross sidewalks and bike lanes at other locations is irrelevant (Rec 338).

 Colvin was required to focus on the pedestrian/cyclist safety impacts at this particular CC site. The safety of pedestrians/cyclists as cars enter and leave gas stations on 3rd Street is irrelevant: it is a major arterial street, zoned Commercial and lined entirely by commercial businesses.

4) The City’s Murphy Corridor improvements are not evidence that relieve Colvin of addressing the impact of the gas station and drive-thru on pedestrian/cyclist safety.

Colvin’s only direct proof concerning pedestrian/cyclist safety for both

the gas station and drive-thru concerned visibility:

“Please see the Traffic Impact Analysis, the TIA, attached

for the traffic and Pedestrian safety review. The site’s flat

topography and straight primary frontages create a very safe

environment for pedestrians and cyclists.” R 1723, 1929; and

There would be good visibility “from inside and outside to

inside” the buildings (Rec 1729, 1735).

But the TIA only addressed the impact of vehicles on the roads. BDC 4.7.500. It states that “the site is well connected with area attractions” (Rec 1800), but does not address the expected volume or pattern of pedestrian/cyclist traffic.

BDC 4.7.400(8)(a) & (b) required Colvin to analyze[[7]](#footnote-7) the walking, biking and transit facilities within one mile of the elementary school, one-half mile of the park, and 1.5 miles of the high school. Instead, Colvin merely listed the existing infrastructure (Rec 2325) without identifying the negative impact of the gas station and drive-thru, separate and apart from the other uses in the development (Rec 338, 513).

**Second Sub-Assignment of Error – Colvin failed to produce substantial evidence to prove that the negative impacts caused by the exhaust and emissions of idling vehicles at the gas station could be mitigated or made compatible with adjacent or surrounding uses.**

**Preservation:** Rec 484, 1326, 1528.

 The City mischaracterized some opponents’ objections:

 “The Hearings Officer finds that opponents ‘environmental

issues’ related to the gas station can reasonably be considered

‘safety issues’ under BDC 4.4.400(A)(1). The Hearings Officer

notes that no participant raising ‘environmental issues’ referenced

any other relevant approval criteria in his/her ‘environmental

issues’ comments.” (Rec 275)

 But many opponents specifically referenced the impacts of the

“exhaust/emissions” caused by idling vehicles.

**A. Colvin’s evidence concerning exhaust/emissions caused by idling vehicles at the gas station was insufficient and conclusory.**

 Colvin does not deny that the vehicles idling at the gas station or drive-

thru will create air pollution through emissions of their exhausts. Initially,

Colvin’s evidence was:

1) Its emissions are insignificant compared to other polluters in the area.

“The emissions of vehicles arriving and departing from the

site and turning their vehicles off and back-on will be minimal

compared to exhaust and emissions generated by vehicles using

the two major roadways adjacent to the site. Diesel locomotives

idle and switch cars at the BNSF switchyard to the east producing

exhaust, emissions, noise and odors. Some local large septic

systems also contribute odors that are more impactful than the

nearly unmeasurable impacts of the fueling station use.” Rec

1732, 1921.

 First, there is no evidence that turning a vehicle off and on produces less exhaust and emissions than the same vehicle cruising down Murphy at 30 mph. Second, whether and to what degree other uses are polluting the air does not relieve Colvin of its burden of proof concerning the polluting sources it proposes to introduce.

2) Everyone else is doing it.

 “Numerous other gas stations have been built and are currently

 being built throughout the City that are within similar distances

to ‘sensitive land uses’ such as schools and residences.” Rec

346.

 BDC 4.1.100 and BDC 4.4.400 require a case-by-case review of the

negative impacts at this specific location, not elsewhere in the city.

3) The exhaust/emissions of its gas station won’t be as bad as bigger operations.

Opponents referenced the USEPA School Siting Guidelines (Rec 690) and the Air Quality and Land Use Handbook: A Community Health Perspective, published by the California Air Resources Board (CARB) (Rec 842) concerning criteria for siting gas stations near sensitive areas. These reports focused on gas stations pumping 3.4 million gallons or more per year. Colvin argued these criteria should not apply to its gas station because it could never be that big: “the design of the facility will prevent fuel sales significantly beyond approximately 200,000 gallons per month.”[[8]](#footnote-8) Rec 592.

Mr. Hayes never explained how its infrastructure limits the gas station’s capacity. If sales prove unexpectedly good, what is to prevent Colvin from refilling its tanks more often?

**B.** **The City’s finding concerning exhaust/emissions from idling vehicles is inadequate for review and is not based on substantial evidence.**

The USEPA and CARB reports were not submitted by opponents as “substantial evidence for determining safe ‘exhaust/emissions and odor’ under BDC 4.4.400(A)” (Rec 345). But Colvin, not the opponents, had the burden of proof. The reports are relevant to demonstrate that exhaust and emissions from idling vehicles are harmful and consequently that siting gas stations near sensitive areas should be limited.

In its Final Argument, as an afterthought, Colvin offered the USEPA and CARB reports as substantial evidence that any negative impacts from idling vehicles at the gas station are not of concern because the station will be at least 50’ from other uses (Rec 999):

“For the foregoing reasons, the Hearings Officer should

conclude that the EPA and the CARB recommendations

that were actually placed in the record represent the substantial

evidence in the record demonstrating ‘safe siting’ distances when

it comes to gas stations emissions, and opponents hyperlinks to

studies from around the world where environmental regulations

differ do not alter the weighing of that substantial evidence.”

Rec 346.

Although the Hearings Officer adopted Colvin’s Final Argument

concerning “environmental issues” (Rec 272), his only finding was:

 “Exhaust and Emissions: There are no direct exhaust and

Emission impacts from the market convenience store other

than the exhaust and emissions of typical heating and cooling

units. The fuel equipment will be required to meet or exceed

all DEQ and EPA standards with double wall lined tanks, etc.,

all of which are monitored 27/5 with sensor in the interstitial

space.” Rec 315.

But the “DEQ and EPA standards” refer only to vapor release from the infrastructure and vehicle gas tanks, not to exhaust/emissions from idling vehicles (Rec 592).

1. If this statement constitutes is a finding, it is inadequate for review.

 Arguably, by inference the City has ruled that special conditions are not needed to mitigate the negative impacts of exhaust/emissions caused by idling vehicles if they are waiting at a gas station with a throughput of less than 3.6M gallons/year and the facility is at least 50’ away from sensitive uses.

The USEPA report is a 152-page analysis published in 2011, which recommends a “screening perimeter” for siting large gas stations within 1,000 feet of a school (Rec 756). The CARB report is a 109-page treatise published in 2005, with a comprehensive analysis of the effects of emissions from many polluting sources.

 If this is a finding, it is impossible to review: it raises many issues, none of which were addressed. For example:

* Colvin offered four reasons that it satisfied its burden of proof concerning exhaust/missions. Which one(s) did the City rely upon?
* Was the CARB report the basis for approval? If so, why was the USEPA report disregarded?
* What is the correlation between vehicular exhaust at a gas station and the size of the gas station? If the concern is exhaust/emissions from idling vehicles waiting for gas, isn’t the number and speed of the pumps a more important factor than size of the station?
* Why should the City rely on a 2005 California report to making siting decisions in Bend in 2023?
* Are the characteristics of the proposed site and surrounding uses irrelevant?

2. A reasonable person would not rely upon the CARB report. A reasonable person would ask, for example, why the City is basing its decision on an 18-year old, out-of-state report. Is no more recent data available?

 Automobile emissions are measurable. It is not unreasonable to expect Colvin to run some tests measuring 2023 vehicular emissions levels at various distances from local gas stations—in Oregon.

3. The City has enacted legislation without following required procedures. Other than 10 feet for landscapes, Bend has no specific setback requirements for gas stations. BDC 3.6.300(A).

If the City’s approval of these conditional use permits was based on the CARB report, without any consideration of its impact on adjacent or surrounding properties, the same rule must apply to every gas station with a throughput of less than 3.6M gallons/year. This *de facto* adoption of a new ordinance fails to comply with the procedures for new legislation. Bend City Code Section 1.10.010, *et seq.*

**Third Sub-Assignment of Error – Colvin failed to produce substantial evidence to prove that the negative impacts caused by the exhaust and emissions of idling vehicles at the drive-thru could be mitigated or made compatible with adjacent or surrounding uses.**

**Preservation:** Rec 1248, 1528.

The only evidence Colvin presented concerning exhaust and emissions

from the drive-thru was a conclusory statement:

 “The trade-off of moving the drive thru lane to the south side

of the site is that it moves the drive thru lane along the south

boundary. The Drive thru lane is set back 10’ north of a 6-8-foot-

high block wall and extensive planting. The closest RV to the

D/T lane is 50’to the south. There will be some remnant

emissions from the drive/thru lane to the two RV spots to the

south and the RS zoned land to the west at the 180-degree turn.”

Rec 1732.

 Colvin failed to explain the nature of these “remnant emissions from the drive-thru lane” or how a wall and bushes on the south side of the property makes them compatible with the residential RV area to the south or with the surrounding residential areas, schools and parks.

**Fourth Sub-Assignment of Error: Colvin failed to offer substantial evidence concerning odors produced by the gas station or drive-thru.**

**Preservation:** Rec 1390, 1554, 1568.

 Colvin’s proof concerning the negative effects of odor was a personal

antidote concerning a gas station in Portland:

 “I can attest to my 7-year experience living in SE Portland.

Please see the image below (red line added between my house

and Arco station). In the 7 years living in a house with 5 doors

and 350’ ± away from Portland’s biggest streets and an Arco

station, I never noticed an odor from this older Fuel Station. …”

(Rec 1727, 1922) …

 “There should not be odor issues associated with the proposed

 uses. The closest residence to this plaza is plus/minus 138’

 North.” Rec 1733.

 “Should” is speculative and conclusory. A reasonable person would not conclude that the lack of odors 350’ from an Arco station in Portland is substantial evidence of negative impacts from gasoline or other emissions odors at this proposed site.

**Fifth Sub-Assignment of Error: Colvin failed to offer substantial evidence concerning the negative impact of the traffic and noise caused by the gas station and drive-thru.**

**Preservation:** Rec 1228, 1341.

 Colvin only evidence was a conclusory statement which ignored the

actual conditions at the intersection:

“Traffic will enter and exit the site at already designated

locations. Traffic and noise from these entries will be

minimal and not directly adjacent to residential development.

The subdivisions across both streets already have privacy walls

around them. The traffic circle creates less noise than a

Signalized 4-way intersection.[[9]](#footnote-9) The full stop braking and then

reacceleration required at signalized intersections concentrate

that continuous noise generation at each light cycle. Traffic

circle roundabouts require less braking and less acceleration

and an easier flow.” Rec 1725.

The negative impact Colvin was required to address is not the noise

caused by traffic at the roundabout but rather the “braking” and “acceleration” of vehicles as they turn into the development to use the gas station and/or drive-thru.

 Noise is measurable. See Bend Municipal Code Section 5.5.020(A). Colvin failed to produce any evidence on this issue.

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1. 2017, The Writing Center at GULC, A Guide To Reading, Interpreting and Applying Statues, P. 4. [↑](#footnote-ref-1)
2. Vocabulary.com [↑](#footnote-ref-2)
3. Collinsdictionary.com [↑](#footnote-ref-3)
4. Mirriam-Webster [↑](#footnote-ref-4)
5. This assumes that virtually no one is going to leave home, drive ¼ mile for gas, then return home. [↑](#footnote-ref-5)
6. The convenience store is 4,270 sf. (Rec 281). [↑](#footnote-ref-6)
7. Analyze means to examine critically, to examine carefully and in detail so as to identify causes, key factors, possible results, etc. *Dictionary.com.* [↑](#footnote-ref-7)
8. 2.4 million gallons/year [↑](#footnote-ref-8)
9. Until 2021, Murphy ended at Brosterhous; there were never any signalized traffic controls at this location. [↑](#footnote-ref-9)