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

DAYLE LEE, )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
CITY OF OREGON CITY, )  
 )  
Respondent, )  
 )  
and )  
 )  
TRACY A. HAMBLET, )  
 )  
Intervenor-Respondent. )

LUBA No. 97-256  
FINAL OPINION  
AND ORDER

Appeal from Oregon City.

Christopher P. Thomas, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Moskowitz & Thomas.

Daniel H. Kearns and Marnie Allen, Portland, filed a response brief. With them on the brief was Preston, Gates & Ellis. Marnie Allen argued on behalf of respondent.

Kristine M. Pizzuti, Oregon City, filed a response brief and argued on behalf of intervenor-respondent. With her on the brief was Hibbard, Caldwell & Schultz.

HANNA, Board Member; GUSTAFSON, Board Chair; participated in the decision.

AFFIRMED 07/28/98

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

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city commission decision denying his  
4 request for a comprehensive plan map and zoning map amendment.

5 **MOTION TO INTERVENE**

6 Tracy A. Hamblet moves to intervene on the side of  
7 respondent. There is no opposition to the motion and it is  
8 allowed.

9 **FACTS**

10 The subject 1.3 acre parcel is designated LR (low density  
11 residential) on the comprehensive plan map and zoned R-10  
12 (single family dwelling). As currently planned and zoned, the  
13 property could be developed with five dwelling units.<sup>1</sup>  
14 Petitioner requested that the comprehensive plan map  
15 designation be changed to MR (medium density residential) and  
16 that the zoning map designation be changed to RD-4 (two family  
17 dwelling district). With the requested plan and zoning map  
18 changes, the subject property could be developed with up to 14  
19 dwelling units.

20 The subject property is located north of the intersection  
21 of Brookside Road and Warner Parrott Road. Brookside Road  
22 would be improved and would provide access from the subject  
23 property to Warner Parrott Road. The planning commission

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<sup>1</sup>Petitioner contends that with planned development approval, the maximum number of dwelling units allowable under current plan and zone designations could increase by 30% to seven dwelling units.

1 recommended that the request be approved, but the city  
2 commission denied the request. The city commission found that  
3 four criteria for comprehensive plan amendments were not  
4 satisfied and that two of the four criteria that must be met  
5 to amend the zoning map were not satisfied.

6 **INTRODUCTION**

7 Because the challenged decision is a denial, the city  
8 need only adopt a single adequate basis for denying  
9 petitioner's request for a comprehensive plan and zoning map  
10 amendment. Gionet v. City of Tualatin, 30 Or LUBA 96, 98  
11 (1995); Duck Delivery Produce v. Deschutes County, 28 Or LUBA  
12 614, 616 (1995). If petitioner fails to assign error to each  
13 of the adopted bases for denial of the application, the  
14 challenged decision must be affirmed. Garre v. Clackamas  
15 County, 18 Or LUBA 877, aff'd 102 Or App 123 (1990). The city  
16 contends petitioner fails to assign error to all of the city's  
17 adopted bases for denial.

18 It is difficult to determine whether petitioner has  
19 assigned error to all the city's bases for denial. Our rules  
20 require that petitions for review set forth separate  
21 assignments of error. OAR 661-10-030(4)(d). Although our  
22 rules concerning the requirements for assignments of error are  
23 not as detailed as those contained at ORAP 5.45, the  
24 assignments of error included in a petition for review at LUBA  
25 must be stated with sufficient precision for this Board to  
26 identify which portions of the disputed land use decision are

1 being challenged and why. See Heiller v. Josephine County, 23  
2 Or LUBA 551 (1992); Schoonover v. Klamath County, 16 Or LUBA  
3 846, 848 n4 (1988); Standard Insurance Co. v. Washington  
4 County, 16 Or LUBA 30, 32-33 (1987). Once error has been  
5 assigned, the argument in support of the assignment of error  
6 must supply the legal reasoning for sustaining the assignment.  
7 Dougherty v. Tillamook County, 12 Or LUBA 20, 33 (1984);  
8 Deschutes Development v. Deschutes County, 5 Or LUBA 218, 220  
9 (1982).

10 The city contends the petition for review does not assign  
11 error to the city's findings that the applicant failed to  
12 demonstrate the proposal complies with Statewide Planning Goal  
13 12 (Transportation) (plan amendment criterion 1) or with plan  
14 amendment criteria 3 and 4.<sup>2</sup> Petitioner did not expressly  
15 dispute respondent's contention at oral argument or in a reply  
16 brief.

17 Neither petitioner's five assignments of error nor the  
18 argument presented under those assignments of error expressly  
19 challenge the city's findings of noncompliance with Goal 12 or  
20 comprehensive plan amendment criteria 3 and 4. Some of  
21 petitioner's assignments of error that challenge the city's  
22 findings of noncompliance with other criteria do address the  
23 same subject matter that is addressed under Goal 12 and plan  
24 amendment criteria 3 and 4. However, in this case, we find

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<sup>2</sup>These comprehensive plan amendment criteria are set out at n3 below under our discussion of the second assignment of error.

1 the overlap in subject matter an insufficient basis for  
2 reading those assignments of error to also challenge the  
3 city's conclusions concerning Goal 12 and plan amendment  
4 criteria 3 and 4. For this reason alone, the challenged  
5 decision must be affirmed.

6 Because the question of petitioner's failure to assign  
7 error to all of the city's bases for denial is not without  
8 doubt and because the city articulated other clearly  
9 sustainable bases for denial we address several of those other  
10 bases for denial below, under the second through fifth  
11 assignments of error. However, before turning to those bases  
12 for denial, we first consider petitioner's general evidentiary  
13 challenge under the first assignment of error.

14 **FIRST ASSIGNMENT OF ERROR**

15 Under this assignment of error, petitioner appears to  
16 contend the challenged quasi-judicial land use decision should  
17 be remanded because petitioner submitted substantial evidence  
18 that would support approval rather than denial of the  
19 application. In the challenged decision, the city commission  
20 concluded that petitioner failed to carry his burden of proof  
21 concerning several of the approval criteria. In challenging  
22 such decisions, it is not sufficient to demonstrate the  
23 evidence would also support approval of the application.  
24 Rather, petitioner must demonstrate that the evidence is such  
25 that he "sustained his burden of proof as a matter of law."  
26 Jurgenson v. Union County Court, 42 Or App 505, 510, 600 P2d

1 1241 (1979); Main Auto Body v. City of Salem, 30 Or LUBA 194  
2 (1995); Horizon Construction v. City of Newberg, 28 Or LUBA  
3 632, aff'd 134 Or App 414 (1995); Consolidated Rock Products  
4 v. Clackamas County, 17 Or LUBA 609, 619 (1989).

5 As already explained, petitioner's evidentiary challenge  
6 must fail in any event, because he does not challenge all the  
7 city's bases for denial. Moreover, as explained below, even  
8 with regard to the bases for denial that petitioner does  
9 address under his assignments of error, the evidence in the  
10 record does not demonstrate compliance with all of the  
11 relevant criteria as a matter of law.

12 The first assignment of error is denied.

13 **SECOND ASSIGNMENT OF ERROR**

14 Turning to the bases for denial of the application that  
15 petitioner challenges, petitioner identifies three: 1)  
16 housing, 2) storm drainage capacity, and 3) traffic.  
17 Petitioner argues these bases for denial are not supported by  
18 substantial evidence in the whole record.<sup>3</sup>

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<sup>3</sup>The city's criteria for a comprehensive plan amendment are set forth at comprehensive Plan Chapter 0 as follows:

- "(1) Does the proposed change conform with State Planning Goals and local goals and policies?
- "(2) Is there a public need to be fulfilled by the change?
- "(3) Is the public need best satisfied by the particular change being proposed?
- "(4) Will the change adversely affect the public health, safety and welfare?
- "(5) Does the factual information base in the comprehensive plan support the change?"

1           **A.    Housing<sup>4</sup>**

2           Petitioner argues the evidence concerning the need for  
3 townhouses and duplexes in the \$160,000 price range was  
4 "authoritative." Petition for Review 43. Petitioner faults  
5 the city for finding that the study submitted by the applicant  
6 was not credible and for finding that there is no way to  
7 ensure the houses would be owner-occupied.

8           Petitioner's arguments ignore other reasons the city gave  
9 for finding petitioner failed to demonstrate a public need for  
10 the proposed housing:

11           "The Commission defines public need more as a  
12 community need, as reflecting community desires,  
13 attitudes and welfare. Strong population growth and  
14 finite supply of land within the UGB is not  
15 sufficient reason to grant the request. While we  
16 recognize that community development does not unfold

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The relevant zoning map amendment criteria are as follows:

- "A. The proposal shall be consistent with the goals and policies of the comprehensive plan.
- "B. That public facilities and services (water, sewer, storm drainage, transportation, schools, police and fire protection) are presently capable of supporting the uses allowed by the zone or can be made available prior to issuing a certificate of occupancy. Service shall be sufficient to support the range of uses and development allowed by the zone.
- "C. The land uses authorized by the proposal are consistent with the existing or planned function, capacity and level of service of the transportation system serving the proposed zoning district."
- "D. Statewide planning goals shall be addressed if the comprehensive plan does not contain specific policies or provisions which control the amendment."

<sup>4</sup>The challenged decision addresses the subject of "housing" in its findings under plan amendment criterion 1 which address Statewide Planning Goal 10 (Housing). The challenged decision also addresses housing in its findings addressing criterion 2, quoted in n3 above.

1 quite as envisioned in the comprehensive plan and  
2 that periodic review of problems and progress is  
3 essential, we find that changing the comprehensive  
4 plan on an incremental basis requires a more global,  
5 citywide view. With this, the applicant has not  
6 provided any analysis or inventory on existing  
7 vacant versus existing developed Medium Density  
8 Residential property or Two Family Dwelling zones,  
9 and therefore we do not see any compelling public  
10 need or desire to change the [zoning map designation  
11 for] this particular piece of property." Record 7.

12 These findings explain that the study failed to  
13 demonstrate public need because it did not address "vacant  
14 \* \* \* Medium Density Residential property or Two Family  
15 Dwelling zones \* \* \*." The findings explain that without such  
16 an analysis the city finds that a public need for the proposed  
17 change in plan and zoning designations has not been shown.  
18 Petitioner offers no basis for us to reject the city's  
19 criticism of the evidence concerning a public need for the  
20 proposal.

21 **B. Traffic**

22 Petitioner contends there is "no evidence" supporting the  
23 city's findings that the applicant failed to demonstrate the  
24 proposal would not have an adverse impact on Warner Parrot  
25 Road, which provides access to the subject property.

26 The city adopted findings addressing traffic under plan  
27 amendment criterion 1 to address Statewide Planning Goal 12  
28 (Transportation). The city also addressed traffic in its  
29 findings addressing zoning map change criterion C. See n3.

30 As an initial point, contrary to petitioner's contention,  
31 there is some testimonial evidence attacking the applicant's

1 study methodology and expressing concerns about traffic safety  
2 on Warner Parrott Road. Record 19-21; 44-46.<sup>5</sup> More  
3 importantly, the city adopted the following findings  
4 addressing Goal 12, which explain why the city found the  
5 traffic evidence submitted by the applicant unconvincing:

6 "We find that the increase in allowable density of  
7 housing units can significantly affect the City's  
8 transportation facilities. There are two schools  
9 located at each end of Warner Parrott Road. The  
10 applicant prepared a traffic study based on one day  
11 during July, 1997, not incorporating any of the  
12 school trips that [pass] by the site. The report  
13 did not accurately reflect the traffic situation  
14 during the 9 month school year, whereby many parents  
15 drive their children to the schools. We therefore  
16 find that the traffic study is not representative of  
17 the actual traffic situation on Warner Parrott Road.  
18 Furthermore, we find Chapin Park and the two  
19 churches on Warner Parrott add to the existing  
20 traffic situation, [and] have not been included in  
21 the applicant's analysis." Record 6.

22 Similar findings are included in the portion of the  
23 decision finding the applicant failed to demonstrate  
24 compliance with zone change criterion C. These findings  
25 identify a flaw in the applicant's evidence and provide a  
26 basis for concluding the evidence is not reliable.

27 At page 25 of the petition for review, petitioner states  
28 the applicant's expert responded to this concern about the  
29 traffic study:

30 "Mr. Faconi commented on the traffic issues talked  
31 about since he did the traffic study in question.  
32 They realized that doing the study in July was not  
33 getting the right amount of traffic on the road

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<sup>5</sup>The traffic safety concerns are also detailed in a written document included in the record. Record 106-11.

1 according to traffic counts. So to compensate for  
2 that he added a 3% growth rate into the report plus  
3 the level of growth for the planned development.  
4 This gave the level of traffic an A rating.

5 "Commissioner Mattsson asked if the time of the year  
6 the study was done, would schools have a significant  
7 impact on the type of analysis done on this  
8 property. Mr. Faconi said the Warner Parrott Rd. is  
9 a minor arterial. It has the capacity to absorb a  
10 lot of traffic." Record 47.

11 To the extent petitioner suggests that the city was  
12 compelled as a matter of law to accept this statement as an  
13 adequate response to the concerns expressed about the timing  
14 of the traffic counts that formed the basis for the traffic  
15 study, we do not agree.

16 Petitioner has not carried his burden as a matter of law.  
17 We conclude the city's findings that petitioner failed to  
18 carry his burden of proof concerning traffic under plan  
19 amendment criterion 1 (Statewide Planning Goal 12) and zone  
20 change criterion C are supported by substantial evidence. We  
21 do not address petitioner's other arguments under this  
22 assignment of error concerning storm drainage capacity. Even  
23 if we agreed with those arguments, they would not provide a  
24 basis for reversing or remanding the challenged decision in  
25 view of the other bases for denial that we find are supported  
26 by substantial evidence

27 The second assignment of error is denied.

28 **THIRD ASSIGNMENT OF ERROR**

29 Under this assignment of error petitioner alleges the  
30 city misconstrued Statewide Planning Goals 6, 10, 11 and

1 comprehensive plan amendment criterion 2. In the argument  
2 under this assignment of error, petitioner also challenges a  
3 finding adopted by the city under the portion of its decision  
4 addressing comprehensive plan amendment criterion 4.

5 **A. Comprehensive Plan Amendment Criterion 2**

6 Petitioner's entire argument under this subassignment of  
7 error is as follows:

8 "The City Commission decided that the need for  
9 housing was not a 'public need to be fulfilled by  
10 the change.' The rejection of the need for housing  
11 as a public need, in the face of State Planning Goal  
12 10 and the housing elements of the comprehensive  
13 Plan, is not only incorrect, it is absurd."  
14 Petition for Review 45.

15 This argument is not sufficiently developed to allow  
16 review. Dougherty v. Tillamook County, 12 Or LUBA 33;  
17 Deschutes Development v. Deschutes County, 5 Or LUBA 220.  
18 Moreover, as we have already explained, the city adopted  
19 findings addressing public need which are quoted in part  
20 above. Those findings explain that the city concludes the  
21 applicant's failure to analyze vacant land that is already  
22 zoned for two-family dwellings results in a failure to  
23 demonstrate public need. These findings express an  
24 interpretation and application of comprehensive plan criterion  
25 2 that is clearly within the city's interpretive discretion  
26 under Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992).

27 **B. Comprehensive Plan Amendment Criterion 4**

28 This criterion requires that the city find the proposal  
29 will not "adversely affect the public health safety and

1 welfare." The city discusses concerns about the inadequate  
2 storm drainage system and traffic impacts on Warner Parrott  
3 Road. The first sentence of that discussion is as follows:

4 "We emphasize again that changes to the  
5 comprehensive plan map brought by an applicant and  
6 not part of a full citywide study must be held to  
7 the highest level of scrutiny." Record 7.

8 Petitioner contends that this sentence shows the city  
9 imposed a higher standard of review in considering his  
10 application than it would have imposed on an application that  
11 was submitted as part of a citywide study. Petitioner argues  
12 the city's comprehensive plan and land use regulations provide  
13 no basis for applying such a higher standard of review.

14 Petitioner does not contend the higher burden of proof  
15 the city may have imposed under this criterion or elsewhere in  
16 the decision violates the "privileges and immunities"  
17 provisions of Article I, Section 20 of the Oregon Constitution  
18 or the Equal Protection Clause of the 14th Amendment of the  
19 United States Constitution. Neither does the petitioner claim  
20 any other constitutional or statutory requirement is violated.  
21 Under the fifth assignment of error, petitioner does argue the  
22 city was biased and did not review the application  
23 impartially, but we reject that assignment of error below.

24 We do not believe the above-quoted statement demonstrates  
25 the city in fact applied a higher burden of proof in this case  
26 than it would have applied in a case that was "part of a full  
27 citywide study." Even if it did, petitioner has not  
28 demonstrated that such a higher burden of proof is due to some

1 impermissible bias or other legally improper reason. Absent  
2 such a demonstration, we see no reason why the city commission  
3 may not review particular types of applications for land use  
4 approval more carefully or stringently than it reviews  
5 others.<sup>6</sup>

6 We need not consider petitioner's remaining contentions  
7 under the third assignment of error. The third assignment of  
8 error is denied.

9 **FOURTH ASSIGNMENT OF ERROR**

10 Under this assignment of error, petitioner complains the  
11 city rejected his evidence without explanation. For the  
12 reasons already explained above, the city did give reasons for  
13 rejecting the applicant's evidence concerning traffic and  
14 housing need. We also do not agree that the other evidence  
15 was rejected without explanation. Petitioner disagrees with  
16 the reasons the city gave for rejecting that evidence.  
17 However, such disagreement does not provide this Board with a  
18 basis for remand. See Sandgren v. Clackamas County, 29 Or  
19 LUBA 454, 460-61 (1995); Calkins v. City of Eugene, 16 Or LUBA  
20 247, 250 (1987).

21 The fourth assignment of error is denied.

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<sup>6</sup>Of course, the city's decision must, on review by this Board, be found to be supported by substantial evidence. ORS 197.835(9)(a)(C). However, the city commission enjoys a great deal of latitude in determining how rigorously it will scrutinize the evidence in a particular case. Younger v. City of Portland, 305 Or 346, 360, 752 P2d 262 (1988); City of Portland v. Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Bay v. State Board of Education, 233 Or 601, 605, 378 P2d 558 (1974). We have already concluded that challenged portions of the city's decision are supported by substantial evidence, i.e. evidence a reasonable person would believe.

1 **FIFTH ASSIGNMENT OF ERROR**

2 Under this assignment of error, petitioner contends the  
3 city did not apply the criteria in a fair and impartial  
4 manner. In support of this contention, petitioner cites the  
5 city's rejection of his study showing a need for two-family  
6 housing and the city's rejection of other unspecified evidence  
7 that was submitted by staff and the applicant.

8 The city adopted a decision supported by findings. We  
9 have already concluded that the findings that certain  
10 applicable criteria were not satisfied are adequate and  
11 supported by the evidence in the whole record. Petitioner's  
12 arguments under this assignment of error do not demonstrate  
13 that the city's decision was a product of bias and partiality  
14 rather than the reasons given in the written decision.

15 The fifth assignment of error is denied.

16 The city's decision is affirmed.