

MAY 2 5 00 PM '88

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

3 GORDON VAN MERE,)
)
4 Petitioner,)
) LUBA No. 88-006
5 vs.)
) FINAL OPINION
6 CITY OF TUALATIN,)
) AND ORDER
7 Respondent.)

8 Appeal from the City of Tualatin.

9 Virginia L. Gustafson and Gregory S. Hathaway, Portland,
10 filed a petition for review and Virginia L. Gustafson argued on
11 behalf of petitioner. With them on the brief was Niehaus,
12 Hanna, Murphy, Green, Holloway & Connolly.

13 Mark Pilliod, Tualatin, filed the respondent's brief and
14 argued on behalf of respondent.

15 HOLSTUN, Referee; BAGG, Chief Referee; SHERTON, Referee,
16 participated in the decision.

17 AFFIRMED 05/02/88

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

1 Opinion by Holstun.

2 NATURE OF THE DECISION

3 This is an appeal of a resolution adopted by the city
4 council denying petitioner's application to amend the Tualatin
5 Community Plan Map to change the planning district designation
6 of petitioner's property from Residential Medium-High Density
7 (RMH) to Residential High Density (RH).¹

8 FACTS

9 Petitioner's property includes approximately 10.6 acres
10 located in the city's Hazelbrook Planning Area. The RMH
11 planning designation permits multi-family residential
12 development at a density of five to fifteen units per acre.
13 The RH designation sought by petitioner permits five to
14 twenty-five multifamily units per acre.

15 The property is bounded on the west by Highway 99W, a major
16 state highway. Hazelbrook Road, an east-west road, abuts the
17 property to the north. The portion of Hazelbrook Road abutting
18 petitioner's property is designated in the Code as a
19 residential street. Approximately 600 feet south of the
20 property is Tualatin Road, an east-west collector street
21 connecting the Tualatin City Center with Highway 99W. 116th
22 Avenue is located a short distance to the east of the property
23 and connects Hazelbrook Road and Tualatin Road. 103rd Avenue
24 is located further to the east. Both 116th and 103rd are
25 gravel surface roads. 116th and the portion of Hazelbrook Road
26 east of 116th are designated as collector streets in the

1 Tualatin Development Code (Code).

2 Commercial development exists on the west side of Highway
3 99W across from petitioner's property. South of that
4 commercial development is a parcel, previously designated RMH,
5 that the city redesignated Residential Medium-Low Density (RML)
6 in 1986 to allow development of a mobile home park.

7 Undeveloped RMH designated property is located to the south
8 and east of the subject property. Further south is a 200 acre
9 area designated for industrial development. To the north,
10 across Hazelbrook Road, is an area designated Residential Low
11 Density (RL).

12 MOTION TO EXCLUDE

13 The city submitted an affidavit with supporting
14 documentation to establish that a road easement referred to in
15 the record and petition for review was extinguished by a prior
16 owner of petitioner's property. Petitioner moves to exclude
17 the affidavit, supporting documentation and the argument in the
18 city's brief regarding the affidavit and documentation.
19 Petitioner argues this evidence was not part of the local
20 record.

21 The city does not claim this material was before the city
22 when it rendered its decision. The city does not submit the
23 evidence pursuant to ORS 197.830(11)(c), which specifies
24 situations in which the Board may accept evidence outside the
25 local record. Neither does the city cite any other basis for
26 us to take notice of the evidence. Our review of local

1 government land use decisions otherwise is confined to the
2 record before the local government decisionmaker.
3 ORS 197.830(11); Panner v. Deschutes County, 14 Or LUBA 512
4 (1985); Lamb v. Lane County, 14 Or LUBA 506 (1985). Accordingly,
5 petitioner's motion to exclude the evidence is allowed, and we
6 shall disregard the portion of the city's argument in its brief
7 based on the excluded evidence.

8 INTRODUCTION

9 In denying the petitioner's request, the city applied the
10 following Code criteria:

- 11 "1.032 Burden of Proof. Before granting an amendment
12 to the Plan Text or Plan Map of the Tualatin
Community Plan, the Council shall find that:
- 13 "(1) Granting the amendment is in the public
14 interest.
 - 15 "(2) The public interest is best protected by
16 granting the amendment at this time.
 - 17 "(3) The proposed amendment is in conformity
with the applicable objectives of the
Tualatin Community Plan.
 - 18 "(4) The following factors were consciously
19 considered: the various characteristics
of the areas in the City; the
20 suitability of the areas for particular
land uses and improvements in the areas;
21 trends in land improvement and
development; property values; the needs
of economic enterprises and the future
22 development of the area; needed
right-of-way and access for and to
23 particular sites in the area; natural
resources of the City and the protection
24 and conservation of said resources;
prospective requirements for the
25 development of natural resources in the
City; and the public need for healthful,
26 safe, aesthetic surroundings and

1 conditions. Proof of change in a
2 neighborhood or area, or a mistake in
3 the Plan Text or Plan Map for the
property under consideration are
additional relevant factors to consider."

4 In addressing the above criteria, the city adopted a number
5 of findings in support of its conclusion that petitioner's
6 application did not comply with Code Sections 1.032(1)-(3) and
7 portions of Code Section 1.032(4). We turn now to the
8 petitioner's challenges, which are directed at specific
9 findings.

10 FIRST ASSIGNMENT OF ERROR

11 "The City misconstrued the law applicable to the
12 petitioner's application for a zone change on
petitioner's property."

13 Petitioner argues in three subassignments of error that the
14 city misinterpreted applicable standards in reviewing
15 petitioner's application, leading the city to improperly deny
16 the application. Petitioner further states the record
17 demonstrates that the applicable criteria are in fact met and
18 urges the Board to reverse the city's decision.²

19 A. Rejustification of RMH Plan Designation.

20 "The City applied improper criteria in evaluating
21 petitioner's zone change application and improperly
22 denied the application based on findings that the
petitioner did not adequately justify the RMH zone
currently applied to the property."

23 Under this subassignment of error, petitioner argues the
24 city improperly forced him to reestablish facts that were
25 already established under the current RMH plan designation
26 applied by the city. Petitioner calls our attention to Code

1 Section 5.030 which provides in part:

2 "General Objectives. The following are general
3 objectives used to guide development of the
4 residential housing element of the plan. They
5 describe the plan's intent to:

6 * * * * *

7 "(4) Locate higher density development where it is
8 convenient to the city's commercial core, near
9 schools, adjacent to arterial and collector
10 streets and, as much as possible, in areas with
11 existing multi-family housing.

12 * * * * *

13 Petitioner argues that when the property was designated RMH as
14 part of the Hazelbrook Planning Area, the city thereby
15 acknowledged the property complied with the above requirements.

16 Petitioner notes the general description of the Hazelbrook
17 Planning Area, Code Section 9.043, recognizes proximity of the
18 area to employment centers and "excellent transportation
19 access."³ Petitioner says the Planning Director, in
20 recommending approval of the proposed plan designation change,
21 correctly recognized the existing RMH designation resulted in a
22 reduced burden of proof. Petitioner contends the city council
23 "failed to recognize either the petitioner's reduced burden or
24 the property's current zoning designation." Petition for
25 Review 15. In particular, petitioner objects to the city's
26 findings that petitioner did not explain the relationship of
the property to employment and shopping facilities, proximity
to the commercial core or how satisfactory access to Hazelbrook
Road would be accomplished.

1 As we understand petitioner's argument, he contends the
2 city is bound by the factors described in the Code relating to
3 higher density planning areas generally and to the Hazelbrook
4 Planning Area in particular.

5 The city notes the Code language petitioner cites applies
6 to the entire planning area. In short, the city argues it
7 simply refused to assume the plan language generally describing
8 the characteristics of the larger planning area applies with
9 equal force to petitioner's 10.6 acres. The city says it
10 simply required petitioner to justify how his requested change
11 in plan designation -- a change that would substantially
12 increase the allowed residential density -- would comply with
13 the standards in Code Section 1.032, quoted supra.

14 While there is some logic to petitioner's argument, we are
15 aware of nothing in the plan nor other legal authority
16 requiring the city to find that general descriptions in the
17 Code of large planning areas also apply to isolated portions of
18 those areas, as petitioner suggests. Also, even if we agreed
19 with petitioner's argument regarding applicability of the
20 planning area descriptions, it is not clear how reliance on
21 those general area descriptions would result in a lower burden
22 of proof in this case, or that the city council imposed an
23 improper burden of proof on petitioner.

24 We find no basis in petitioner's arguments to overturn the
25 city's findings. The city points out, for example, that
26 petitioner's property has particular access limitations that

1 are not shared by the larger area as a whole. Also the city
2 cites testimony that development of the property would "overtax
3 existing and planned street systems, especially the
4 intersection of Hazelbrook at 99W * * *." Record 12. We find
5 no basis upon which to conclude the city imposed an improper
6 burden of proof.

7 This subassignment of error is denied.

8 B. Requirement for Development Details.

9 "The City improperly applied criteria not relevant
10 until such time as a development proposal for the
11 property is submitted and denied the application based
12 on petitioner's failure to provide such development
13 details."

14 The Code does not require a development proposal to be
15 submitted as part of a request for a plan designation change.
16 Code Section 1.030. As petitioner notes, in applying the
17 standards applicable to a requested plan designation change,
18 the city may grant approval if it concludes reasonable
19 solutions exist to assure compliance with applicable
20 standards. Meyer v. City of Portland, 67 Or App 274, 281-282,
21 678 P2d 741, rev. den 297 Or 82 (1984). As long as the city
22 finds such solutions exist, determination of the precise
23 details of such solutions may be deferred until the time of
24 actual development. Id.; See Lousignont v. Union County, ___
25 Or LUBA ___ (LUBA No. 87-065; December 9, 1987).

26 Petitioner argues, notwithstanding the city's express
recognition and acceptance of its ability to defer specific
development details, "the city's denial was based, in large

1 part, on the petitioner's failure to explain development
2 details." Petition for Review 19.⁴

3 We have several problems with petitioner's argument under
4 this subassignment of error. It is true a city may grant a
5 land use approval and defer resolution of technical details, as
6 long as it finds applicable approval criteria are met and
7 provided it is reasonably certain that feasible solutions
8 exist. Meyer v. City of Portland supra; Margulis v. City of
9 Portland, 4 Or LUBA 89, 98 (1981). However, the city did not
10 adopt such an approach in this case; it denied the
11 application. Petitioner asks this Board to (1) speculate that
12 the types of detail the city asks for will be satisfied at a
13 later stage and (2) find the city committed legal error by
14 insisting on production of details at this stage.⁵ In short,
15 petitioner argues the city must do what this Board and the
16 Court of Appeals have said a local government may do in Meyer
17 and Margulis.

18 Petitioner argues Code Chapter 73 provides "separate and
19 very detailed design review analysis requirements for all
20 development proposals." Petition for Review 18. However, even
21 if Code Chapter 73 would require petitioner to produce
22 development details for approval, we find nothing in Code
23 Chapter 73 that requires the city to defer to these later
24 stages the concerns expressed in its findings.⁶ In other
25 words, we find nothing in Code Chapter 73 that precludes the
26 city from requiring additional details now regarding road and

1 land use impacts on nearby properties, in conjunction with
2 application of its criteria to petitioner's request.

3 This subassignment of error is denied.

4 C. Density Gradient Approach.

5 "The City improperly construed the requirements of the
6 City's density gradient approach in finding that the
7 requested zone change was not consistent with that
8 approach."

9 The Code provides a requirement for density gradients in
10 the Hazelbrook Planning Area and the Roamer's Rest Area located
11 to the west of petitioner's property. The density gradient
12 Code provisions discussed by the parties state in relevant part:

13 "Area 12 - Roamer's Rest.

14 * * * * *

15 "A 'density gradient' approach is used in the Roamer's
16 Rest area, with RML used on the west adjacent to the
17 agricultural lands, RMH in the center portion, and RH
18 in the west adjacent to the commercial area. This
19 pattern allows for a transition from light to intense
20 land uses on the north side of the highway.

21 * * * * *. Code Section 9.042

22 "Area 13 - Hazelbrook Planning Area.

23 * * * * *

24 "A 'density gradient' approach is used with the RMH
25 and RML planning districts in order to provide for a
26 transition from the commercial uses to the single
27 family areas.

28 * * * * *." Code Section 9.043

29 Petitioner says the city improperly construed the reference
30 to RMH in the Hazelbrook Planning Area density gradient
31 provision to impose an absolute limit of 15 dwelling units per
32

1 acre (the maximum density allowed in the RMH district). Under
2 the city's interpretation, RH density would not be allowed
3 because it would violate the 15 dwelling unit per acre density
4 requirement. Under the city's interpretation, RH densities
5 would be allowed in the Roamer's Rest Area because Code
6 Section 9.042 expressly refers to the RH district.

7 Petitioner argues the city's interpretation of the density
8 gradient language to impose an absolute density cap is contrary
9 to the clear language of the density gradient provisions. The
10 city responds the density gradient language is not clear and
11 unambiguous. According to the city, it is not unreasonable to
12 interpret the reference to "upper and lower residential
13 planning districts in connection with the term" to express a
14 "fixed range of density." Respondent's Brief 20.

15 It is the Board's duty to determine whether the
16 construction a local government places on its own land use
17 regulations is correct. McCoy v. Linn County, ___ Or
18 App ___, ___ P2d ___ (April 6, 1988). We are not certain there
19 necessarily is one "correct" interpretation of the disputed
20 language. However, the city's interpretation is reasonable and
21 it is at least as "correct" as the construction petitioner
22 would apply. We therefore conclude the city correctly
23 construed the above-quoted code section.

24 This subassignment of error is denied.

25 The First Assignment of Error is denied.

26 / / /

1 SECOND ASSIGNMENT OF ERROR

2 "The City's findings, on which it based its denial of
3 petitioner's application, are conclusions which are
4 not based on substantial evidence in the whole record
5 and which are contradicted by substantial evidence in
6 the record which demonstrates petitioner's compliance
7 with the applicable criteria."

8 Under the second assignment of error, petitioner asserts
9 four subassignments of error which we address separately below.

10 A. Development Pressures in the Area.

11 "The City's finding that there are no development
12 pressures in the area to justify increasing
13 residential densities is not supported by substantial
14 evidence in the Record and is countered by substantial
15 evidence in the Record that the petitioner have [sic]
16 satisfied this requirement."

17 Petitioner argues the Code states an objective of providing
18 a variety of living and working environments. Code
19 Section 4.050(9). Petitioner also cites code provisions
20 indicating the city's land available for multifamily housing is
21 "becoming depleted" and that regional figures show an
22 increasing need for multifamily housing units. Code Section
23 5.010(3)(b). Petitioner argues the city incorrectly concluded
24 that his request was not in the public interest.

25 The city found petitioner failed to document demand for
26 additional multifamily housing in the immediate area. The city
27 concluded there "are no development pressures in the area which
28 would justify increasing the residential density on the subject
29 property or general area at this time." Record 12.

30 As petitioner recognizes, the city also noted the existence
31 of RH designated property southwest of petitioner's property on

1 the west side of Highway 99W. The city said

2 "Given that the plan currently provides for an
3 adequate variety of living environments, the applicant
4 did not adequately show why the subject property
5 should be changed to RH at this particular time."
6 Record 13.

7 The petitioner argues the city's conclusions are not based
8 on substantial evidence. According to petitioner, the
9 existence of RH designated property does not, in and of itself,
10 explain why there is an adequate variety of housing
11 alternatives in the area. Neither, according to petitioner,
12 does the city's reliance on petitioner's failure to provide
13 specific information about the development in the area around
14 petitioner's property show there is no such demand. In
15 addition, petitioner argues he did present supplemental
16 statistical information showing a stable vacancy rate of
17 approximately 6-7% in this area since March 1986.

18 In sum, petitioner argues the city's conclusion of
19 noncompliance with Code Section 1.032(2) is an unsupported
20 conclusion that is contradicted by language in the Code and the
21 evidence submitted by petitioner.

22 The city, in its brief, responds the Code Section
23 5.010(3)(b) language cited by petitioner is clearly based on
24 "regional figures" and "national trends." Respondent's Brief
25 22. The city points to the petitioner's lack of success in
26 marketing his property, although it is currently designated for
27 multifamily housing. According to the city, while the studies
28 and statistics provided by petitioner may show a general need

1 for multifamily housing, they do not support petitioner's
2 request to redesignate his property to increase the allowable
3 multifamily density.

4 The city found that the petitioner failed to show the
5 requested plan change is needed to provide additional
6 multifamily housing opportunities at this time. While the city
7 does not dispute a general need for such housing opportunities,
8 it bases its denial on the fact petitioner's property is
9 currently zoned for multifamily dwellings, albeit at a lower
10 density than petitioner desires. In addition, property already
11 designated RH presently exists in the area, and petitioner
12 failed to show why there is a particular demand in the area of
13 his property that would support the requested change to
14 designate his property RH.

15 While it is almost always the case that a local
16 government's findings could be more detailed or complete, the
17 city is required to adopt adequate findings, not perfect ones.
18 See South of Sunnyside v. Clackamas County Comm., 280 Or 3,
19 21-23, 569 P2d 1063 (1977). The city found the plan provides
20 adequate living environment variety and that petitioner failed
21 to show why a change to RH at this time best protects the
22 public interest, as required by Code Section 1.032(2). The
23 city apparently does not dispute there is a regional or
24 national need for multifamily housing, but does not believe
25 such demand means there is a demand for higher density
26 multifamily dwellings on petitioner's property. The city based

1 its conclusion on the existence of undeveloped RH designated
2 property near petitioner's property and the fact petitioner's
3 property has not been developed for medium high density
4 multifamily dwellings notwithstanding its current plan
5 designation allowing such development. This approach is a
6 reasonable response to the Code criterion. Further, we believe
7 the evidence the city cites is evidence a reasonable person
8 could rely on to conclude as the city did. Home Builders v.
9 Metro Service Dist., 54 Or App 60, 62, 633 P2d 1320 (1981);
10 Braidwood v. City of Portland, 24 Or App 477, 480, 546 P2d 777
11 (1976); Christian Retreat Center v. Comm. for Wash. Co., 28 Or
12 App 673, 679 560 P2d 1100 (1977).

13 This subassignment of error is denied.

14 B. Energy Consequences

15 "The City's finding that the petitioner did not
16 adequately explain the energy consequences of the
17 proposal is not supported by substantial evidence in
18 the Record and is countered by substantial evidence in
19 the Record that the petitioner has satisfied this
20 requirement."

19 Code Section 4.050(16) states as a plan objective

20 "Encourage energy conservation by arranging land uses in a
21 manner compatible with public transportation objectives."⁷

22 Petitioner argues the city simply concluded he failed to
23 explain the relationship between the property's distance from
24 shopping and employment centers and how energy would be
25 conserved. Petitioner says the city ignored his property's
26 location next to Highway 99W and proximity to public

1 transportation. Petitioner says he established public
2 transportation objectives would be furthered because the higher
3 density would more completely utilize adjacent Tri-Met
4 service. Petitioner says he also explained to the city how
5 higher density development along 99W would result in shorter
6 driving time to nearby activity centers. Petitioner argues he
7 called the city's attention to a new shopping center one-half
8 mile north and "the property's convenient proximity to King
9 City, Tigard, Sherwood and Tualatin commercial cores."
10 Petition for Review 37.

11 The finding petitioner challenges is as follows:

12 " * * * The applicant did not explain the relationship
13 between the property and its distance from shopping
14 facilities or major employment centers and how energy
would be conserved by increasing the density. * * *"
Record 13.

15 We understand petitioner's frustration with the brevity of
16 the above-quoted finding. The record shows that the disputed
17 property is next to Highway 99W and that urban areas are
18 nearby. However, we understand the city to say it requires
19 more than these unexplained facts to show compliance with the
20 generally worded code section cited above. As we read the
21 city's finding, it concluded the petitioner needs to address
22 more specifically the energy and public transportation
23 consequences of higher density development at this particular
24 property, located away from nearby commercial areas. In other
25 words, the city found the evidence in the record did not
26 support a conclusion the energy conservation criteria were

1 met. See Chemeketa Industries Corp. v. City of Salem, supra;
2 Weyerhauser v. Lane County, supra. The evidence petitioner
3 cites us to does not demonstrate the generally worded code
4 standards are met as a matter of law.

5 This subassignment of error is denied.

6 C. Trends in Land Improvement and Development.

7 "The City's finding that the petitioner did not
8 satisfy the 'trends in land improvement and
9 development' criterion is not supported by substantial
evidence and is countered by substantial evidence that
the petitioner have [sic] satisfied this requirement."

10 Under Code Section 1.032(4) the city is required to find
11 that "trends in land improvement and development" were
12 consciously considered. To comply with this requirement, the
13 petitioner provided information showing an increasing demand
14 for multifamily housing in Washington County and the City of
15 Tualatin. In addition, petitioner cited Code
16 Section 5.010(3)(b) which recognizes a demand for such
17 housing.⁸

18 The city's finding addressing this criterion is as follows:

19 "The application states that trends in land
20 development show an increase in multi-family
development and cite Washington County development and
Stone's Throw Apartments as an example in Tualatin.
21 Although the 'Trends in Development' factor does not
22 give a geographic guideline, it is appropriate in this
case to question if a single project on the east side
of Tualatin is adequate to show a trend that can be
23 applied to the extreme western side of town where
virtually not [sic] residential, commercial or
24 industrial development has occurred in recent years.
The subject property is surrounded on the north, east,
25 south and partially on the west by properties outside
the City Limits. Urban levels of development will not
26 receive approval until properties in the area are

1 annexed. The property is developable given its
current RMH District designation." Record 13-14.

2 Petitioner admits that the trends in land development
3 criterion "is vague and subject to more than one
4 interpretation." Petition for Review 39. Petitioner argues,
5 however, the city's interpretation of this criterion is
6 illogical:

7 "Until you show development, you can't show a trend in
8 development; and until you show a trend in
9 development, you will not be allowed to develop. This
10 guarantees no development -- regardless of the zoning
11 designation -- will occur on the property, a result
the city plan does not contemplate." Petition for
Review 39.

12 The city again argues the petitioner may not simply rely on
13 a general demand for multifamily housing in the county, or even
14 on a specific multifamily demand in a different area of the
15 city, in support of its position that this property should be
16 designated for higher density residential development. The
17 city also points out that the trend information does not
18 distinguish between medium high density residential development
19 and high density residential development. We understand the
20 city to argue that, absent such a distinction, the data cited
21 by petitioner may only support the current plan designation.

22 The city argues the "trends in land improvement and
23 development" criterion requires petitioner to demonstrate a
24 trend towards RH development in the area of his property. The
25 city argues the denial of petitioner's request does not mean he
26 cannot develop his property. It simply means the multifamily

1 development allowed on the property will occur at medium high
2 density rather than high density. The city finally responds
3 that the absence of multifamily development in the area of
4 petitioner's property "supports the [city's] conclusion there
5 is no trend in development towards high density residential."
6 Respondent's Brief 25.

7 We agree with petitioner that the criterion is vague and
8 subject to more than one interpretation. Although the parties
9 seem to assume the "consciously considered factors" establish
10 approval criteria, it is not clear what obligation is imposed
11 by Code Section 1.032(4). The city's findings, Record 13-14,
12 suggest the city interprets the section to require the
13 applicant either to consider the listed factors adequately or
14 to submit sufficient information for the city to consider the
15 factors adequately. That interpretation is reasonable and
16 correct. See Grindstaff v. Curry County, 15 Or LUBA 100, 104
17 (1986). We understand the city's findings to say the
18 petitioner did neither.

19 Thus, we cannot say the city's decision incorrectly
20 interprets its code requirement that petitioner's proposal
21 consciously consider "trends in land improvement and
22 development" in the immediate area of petitioner's property.
23 Because the record shows petitioner failed to submit the more
24 specific information the city interprets its code to require,
25 the findings petitioner challenges under this assignment of
26 error are supported by substantial evidence in the record.

1 This subassignment of error is denied.

2 D. Public Interest.

3 "The City's finding that this proposal is not in the
4 public interest at this time despite the City's
5 acknowledged violation of the Metro Housing Rule is
6 not supported by substantial evidence and is countered
7 by substantial evidence that complying with the Rule
8 through increasing the density on this property is in
9 the public interest at this time."

10 Under this subassignment of error, petitioner argues that
11 prior decisions by the city have reduced opportunities for
12 multifamily housing and reduced the average residential density
13 below the eight or more dwelling units per acre required under
14 the Metro Housing Rule. OAR 660-07-000 et seq.

15 Petitioner argues that increasing the density on his
16 property would be in the public interest because it would
17 assist the city in reaching compliance with the Metro
18 Housing Rule. We understand petitioner's complaint to be that
19 the city did not explain why his proposal was rejected in favor
20 of unspecified action at a latter date to reach compliance
21 with the Metro Housing Rule. The city rejected petitioner's
22 arguments and found:

23 " * * * The applicant does not contend that the city's
24 current level below the required [density] figure must
25 be adjusted upward immediately. Rather, it is noted
26 that the need for increased density is a planning
27 issue that can be considered now or it may be
28 addressed in the future. * * *

* * * * *

29 " * * * the issue of city wide density need not be
30 resolved at this time. Criterion [1.032(1)] has not
31 been met.

* * * * *

1 "The need to address the regional density requirement
2 is countered by the State's policy of allowing
3 jurisdictions to address density at the time of
4 periodic review. There is no external force requiring
5 the City to gain the lost density at this time.

6 * * * * *

7 ** * * it cannot be concluded the public interest is
8 best protected by granting the request at this time.
9 Criterion 1.032(2) has not been met." Record 11-12.

10 We understand the city's conclusion to be that regaining
11 lost density by changing the plan designation for petitioner's
12 property is not in the public interest and that petitioner has
13 not shown that the public intent is best protected by approving
14 the change at this time, as required under Code Section
15 1.032(1) and (2).

16 The city argues it is under no obligation to correct a
17 technical violation of the Metro Housing Rule at this time.⁹
18 The city also argues "whether a violation of the Metro Housing
19 Rule [will exist] at the time of periodic review or will
20 require any Plan Map amendments by the City is purely
21 speculative." Respondent's Brief 27.

22 Like the city, we find no basis in the Metro Housing Rule
23 for concluding it requires the city to approve higher density
24 residential development designations in advance of periodic
25 review. OAR 660-07-060 specifically provides:

26 "(1) The new construction mix and minimum residential
density standards of OAR 660-07-030 through
660-07-037 shall be applicable at each periodic
review. During each periodic review local
government shall prepare findings regarding the
cumulative effects of all plan and zone changes
affecting residential use. * * *"

1 However, that the city is not legally required to approve
2 petitioner's proposal under OAR 660-07-000 et seq., is not
3 sufficient justification to conclude it is not in the "public
4 interest" to do so by approving petitioner's application "at
5 this time" as provided Code Section 1.032(1) and (2). We
6 therefore sustain this subassignment of error.¹⁰

7 However, the city adopted other findings in support of its
8 conclusion that Code Section 1.032(1) and (2) were not
9 satisfied by petitioner's application. Petitioner's attacks on
10 those findings have been rejected, supra. Therefore, our
11 decision sustaining this subassignment of error does not
12 require remand or reversal of the city's decision.

13 This subassignment of error is sustained.

14 The Second Assignment of Error is upheld, in part.

15 The city's decision is affirmed.

1 FOOTNOTES

2
3 1
4 The city advises the Board that it has adopted a
5 combined plan and zoning map. The plan map establishes
6 "planning district" designations, but no separate zoning
7 districts. The Tualatin Development Code (Code) includes
8 the Plan and sets out regulations applicable to each
9 "planning district". The Code makes no mention of "zones"
10 or "zoning districts." Therefore, petitioner's references
11 in his brief to zone changes or zones are technically
12 incorrect. The references should be to plan designation
13 changes or plan designations.

14 2
15 We have noted on numerous occasions that a petitioner
16 bears a heavy burden in obtaining reversal of a local
17 government's denial of land use approval. The petitioner
18 must establish that none of the applicable approval
19 criteria are violated and that the denial was erroneous as
20 a matter of law. See e.g. McCoy v. Marion County, ___ Or
21 LUBA ___ (LUBA No. 87-063, December 15, 1987); Weyerhaeuser
22 v. Lane County, 7 Or LUBA 42, 46 (1982). One or more
23 erroneous findings, or findings not supported by
24 substantial evidence, will not result in reversal or
25 remand if there remains at least one sufficient finding of
26 noncompliance with a mandatory standard. See Chemeketa
Industries Corp. v. City of Salem, 14 Or LUBA 159, 163-164
(1985).

17 3
18 Code Section 9.043 provides as follows:

19 "Area 13 - Hazelbrook Planning Area. The Hazelbrook
20 area has three main components: the higher density
21 residential area, the single family area, and the
22 commercial facilities.

23 "(1) The higher density residential area is
24 located along the north side of Tualatin
25 Road extending from the commercial area at
26 the highway intersection to approximately
the east end of the manufacturing park area
to the south. This area is designated for
higher residential densities due to its
proximity to the major employment center and
its excellent transportation access. A
density gradient approach is used with the

1 RMH and RML Planning Districts in order to
2 provide for a transition from the commercial
3 uses to the single family areas. This area
4 works well to help meet the City's overall
5 housing objectives, as can be seen in [Table
6 9-1].

7
8 "(2) North and east of the higher density
9 development is a large area slated for the
10 RL district. Much of the land north of
11 Hazelbrook Road is in the 100-year
12 floodplain. Development will be limited due
13 to this physical limitation and the
14 regulations of the City's Floodplain
15 District. Along and south of the road,
16 however, the lands will be available for low
17 density residential development involving
18 traditional single family subdivisions, and,
19 through the conditional use process,
20 clustered housing styles.

21
22 "(3) A Neighborhood Commercial node is planned
23 for the northeast corner of 115th Avenue and
24 Tualatin Road. This two acre parcel is
25 ideally suited for this type of convenience
26 commercial use. It is on the intersection
of an arterial and a collector. It has a
relatively square shape and flat
topography. Most importantly, it is located
at the center of the proposed higher density
area and immediately across from a major
employment center."

18 4

19 For instance, petitioner objects to the city's
20 findings that there might be access directly onto Highway
21 99W (See Record 10), because petitioner does not propose
22 such access. Petitioner also challenges the city's
23 finding that Hazelbrook Road, 116th Avenue and 103rd
24 Avenue would be adversely impacted by the proposal. Id.
25 Petitioner claims the city totally ignored his property's
26 access south to Tualatin Road over a 60 foot road easement.

27
28 Also, Code Section 4.050(6) requires land uses to be
29 arranged "so as to minimize land use conflicts and
30 maximize the use of public facilities." Petitioner argues
31 that because no specific development is currently
32 proposed, all he must do is show feasible alternatives
33 exist. Petitioner argues he offered evidence of a variety
34 of design techniques that would minimize impacts from

1 development of his property on the RL district to the
2 north.

3 5

4 Even if we were to follow the course petitioner asks,
5 petitioner has not identified the applicable criteria he
6 believes the city misapplied. We would have to speculate
7 as to which approval criteria petitioner believes the city
8 had in mind when it adopted findings pointing out the lack
9 of detail in petitioner's request.

7

6

8 The city argues the petitioner cannot simply dismiss
9 legitimate road and traffic concerns by citing general
10 plan language applicable to the Hazelbrook Planning Area
11 as a whole and by saying roads would have to be upgraded
12 at the time of development in any event. The city argues
13 that it legitimately identified potential problems with
14 traffic from petitioner's site utilizing Hazelbrook Road
15 and 116th and 103rd Avenues for access to the Tualatin
16 City Center in view of the current substandard condition
17 of those roads. The city also notes the Code expressly
18 recognizes the potential for "serious traffic conflicts
19 from development of properties abutting Highway 99W."
20 Code Section 11.090(10)(b). Regarding the 60 foot
21 easement south to Tualatin Road which could partially
22 eliminate impacts on Hazelbrook Road and 116th and 103rd
23 Avenues, the city states there is no substantial evidence
24 in the record that such an easement exists.

17 The city also says the petitioner was required to do
18 more than suggest that impacts of ultimate development can
19 be rendered acceptable to the RL designated property to
20 the north by using particular design techniques. The city
21 points out that the record shows this is a generally rural
22 undeveloped area. According to the city, the petitioner
23 failed to adequately address likely land use impacts from
24 the proposed 67% increase in density. Most importantly,
25 the city notes the petitioner is relying in large part on
26 the claimed easement to avoid impacts on Hazelbrook Road
27 and 116th and 103rd Avenues and the properties adjoining
28 those roads.

23

24 7

25 Although the city's decision only expressly refers to
26 Code Section 4.050(16), its findings and some of
27 petitioner's arguments appear more relevant to
28 Code Section 4.050(15) which provides as follows:

1 "Arrange the various land uses in a manner that is
2 energy efficient."

3
4 8

Code Section 5.010(3)(b) provides as follows:

5 "It is clearly shown in the above numbers that the
6 City is more than accommodating the region's
7 share of multi-family housing. The long-term
8 objective of the Plan is to produce housing units
9 that meet the regional projections as well as the
10 community's desire for multi-family units that
11 minimize any adverse impacts within the City's
12 single-family neighborhoods. This has been
13 accomplished by reviewing various housing density
14 alternatives and other technical data that are
15 defined in the Phase I - Technical Memoranda.
16 This analysis indicated that the amount of land
17 available for multi-family housing is nearing
18 depletion, and the present amount of land planned
19 and zoned for this type of housing is minimal
20 compared to demand. As evidenced by the regional
21 figures, there will be an increasing need for
22 multi-family residential units because of the
23 national trend toward smaller families, more
24 single-parent families, and the sharply rising
25 costs of new single-family residential
26 construction."

17 9

18 The city does not dispute that it is technically in
19 violation of the average residential density requirements
20 stated in the rule.

20 10

21 We express no position on whether it is in the public
22 interest or best serves the public interest at this time
23 to approve petitioner's request. That is a decision for
24 the city to make, subject to review. We simply hold a
25 lack of legal compulsion to approve petitioner's request
26 under OAR 660-07-000 et seq., does not necessarily mean it
is not in the public interest to do so at this time.