

1 Opinion by Kellington.

2 NATURE OF THE DECISION

3 Petitioner appeals City of Molalla Ordinance No. 1989-4
4 approving an amendment to the city's comprehensive plan map and
5 a zone change for the subject property from Light Industrial/M1
6 to Single Family Residential/R1.

7 MOTION TO INTERVENE

8 Loren McLeod moves to intervene on the side of the
9 respondent. There is no opposition to the motion and it is
10 allowed.

11 FACTS

12 The subject property is unimproved and consists of 19.32
13 acres. In 1986 it was annexed to the city and in 1987 it was
14 replanned and rezoned from Single Family Residential/R1 (R1) to
15 Light Industrial/M1 (M1). Adequate water and sewer are
16 available to the subject property to serve either light
17 industrial or single family residential uses.

18 Petitioner and his family own 55.42 acres planned and zoned
19 for single family residential use within the City of Molalla and
20 an additional 98.43 acres planned and zoned for single family
21 residential use within the urban growth boundary (UGB).

22 Intervenor-respondent (intervenor) applied to the City of
23 Molalla (respondent) to change the plan and zone designations
24 for the subject property from M1 to R1. A public hearing on
25 intervenor's application was held before the city hearings
26 officer. The hearings officer denied intervenor's application.

1 Intervenor appealed the decision of the hearings officer to the
2 city council. The city council reversed the decision of the
3 hearings officer and approved intervenor's application. This
4 appeal followed.

5 FIRST ASSIGNMENT OF ERROR

6 "The findings of the city do not support the city's
7 determination that the proposed change was a Minor
Plan amendment."

8 SECOND ASSIGNMENT OF ERROR

9 "There was not substantial evidence to support the
10 city's determination that the proposed ordinance was a
Minor Plan amendment."

11 Petitioner argues that the city erred by characterizing the
12 proposed amendment as a "minor plan amendment," rather than as a
13 "major plan amendment."

14 Intervenor responds that even if the city incorrectly
15 designated the subject plan amendment as minor, this is a
16 procedural error and petitioner has not alleged that such error
17 caused any prejudice to petitioner's substantial rights.
18 Intervenor contends that the only difference between a minor and
19 a major amendment is that a major amendment is first heard by
20 the planning commission, which makes a recommendation to the
21 city council. A minor amendment is first heard by the hearings
22 officer and then by the city council, on the record of the
23 hearings officer, unless the city desires to receive further
24 evidence. Intervenor argues that the city received new evidence
25 from both "proponents and opponents." Intervenor-Respondent's
26 Brief 4. Intervenor maintains that that although termed a minor

1 amendment, the subject amendment was adopted in substantially
2 the same manner as a major amendment.

3 The City of Molalla Comprehensive Plan (plan) section
4 entitled "Plan Review and Revision" provides:

5 "(6) Major Plan and Implementing Ordinance
6 Amendments:

7 "Major amendments shall be considered at
8 separate public hearings of the Planning
9 Commission and City Council. The Planning
10 Commission shall hear the amendment within forty
11 (40) days of the receipt of the application. At
12 least thirty (30) days notice of the public
13 hearing shall be provided. Within thirty (30)
14 days notice of the close of the public hearing,
15 the Planning Commission shall make a
16 recommendation to the City Council to approve,
17 approve with conditions, or deny the proposed
18 amendments.

19 "The City Council shall conduct a public hearing
20 on the amendment upon receipt of the Planning
21 Commission recommendation. At least thirty (30)
22 days notice of the public hearing shall be
23 provided. Within (30) days of the hearing, the
24 City Council shall make findings of fact and
25 adopt, adopt with changes, or deny the proposed
26 amendment. The proponent of the amendment must
show:

"a. There is a public need for the amendment,
and the amendment best meets the public
interest.

"b. In the case of a change of designation,
that the need will be best served by
changing the designation of the property in
question as compared with other available
property.

"Adoption of major plan amendments shall be by
ordinance. Adoption of major plan amendments
shall consider LCDC Goals, be approved and
adopted by Clackamas County, where applicable."

25 "(7) Minor Plan and Implementing Ordinance
26 Amendments:

1 "An application for a minor plan or ordinance
2 amendment shall be submitted to the hearings
3 officer for public hearing. At least ten (10)
4 days notice of such hearing shall be provided.
At such hearing the applicant must show the
following:

5 "a. There is a public need for the amendment
6 and that such amendment best meets the
public interest.

7 "b. In the case of a change in designation,
8 that the need will be best served by
9 changing the designation of the property in
question as compared to other available
property.

10 "c. The proposed amendment is a minor
amendment.

11 "The hearings officer shall prepare within ten
12 (10) days of such hearing written findings with
13 regard to each of the above issues and submit
14 such, along with a recommendation, to the City
15 Council. The City Council shall make its own
16 determinations based upon the record of the
17 proceedings before the hearings officer, unless
the City Council shall decide to hold further
public hearings. Adoption of minor plan
amendments shall consider LCDC Goals, be
approved and adopted by Clackamas County and
LCDC when applicable."

18 ORS 197.835(8)(a)(B) authorizes this board to reverse or
19 remand a decision of a local government due to a procedural
20 error where such error causes prejudice to petitioner's
21 substantial rights. Accordingly, we first decide whether the
22 city's determination that the proposed amendment is a minor
23 amendment, if incorrect, is a procedural error.¹

24 The approval criteria for a major and a minor amendment are

25
26 ¹All parties characterize the city's determination regarding whether the
proposed amendment is "minor" or "major" as a procedural issue.

1 identical, except that a minor amendment requires a finding that
2 the proposed amendment is "minor." The difference between a
3 minor and a major amendment is in the procedure that is
4 followed. In the case of a minor amendment, initial review is
5 by the hearings officer rather than the planning commission.
6 The notice and other time requirements are generally shorter for
7 a minor amendment.² Furthermore, for a minor amendment, the
8 council may elect to act on the recommendation of the hearings
9 officer, based upon the record developed before the hearings
10 officer, as opposed to taking new evidence. Finally, a minor
11 amendment is not required to be adopted by ordinance. We
12 conclude that these distinctions are distinctions of procedure,
13 and that if the city erred in determining that the proposed
14 amendment was a minor rather than a major amendment, this error
15 is procedural. See Clark v. Jackson County, ___ Or LUBA ___
16 (LUBA No. 88-114, March 31, 1989), slip op 5-9.

17 Thus, if the city's characterization of the amendment as
18 minor were incorrect, such error would provide a basis for
19 reversal or remand of the city's decision only if it prejudiced
20 petitioner's substantial rights. There is no dispute regarding
21 adequacy of notice to petitioner or whether petitioner had a
22 reasonable period of time to prepare and present his case before
23

24
25 ²We note that for a minor amendment, there may be actually greater
26 opportunities for public review because there is no limitation on how long
the city council may take to review a recommendation on a proposed minor
amendment.

1 the hearings officer and the city council. In this case the
2 city council elected to supplement the record developed before
3 the hearings officer and petitioner had the opportunity to
4 present new evidence at the city council hearing. Furthermore,
5 while termed a minor amendment, this amendment was adopted by
6 ordinance. Petitioner does not contend that the procedure
7 employed by the city caused prejudice to petitioner's
8 substantial rights and we do not understand that it did.

9 Because we determine that even if the city's
10 characterization of the proposed plan amendment as minor were
11 erroneous, it would not provide a basis for reversal or remand
12 of the decision appealed in this case, it would serve no purpose
13 to consider whether the city's findings are adequate or whether
14 there is substantial evidence in the record to support the
15 city's determination that the proposed amendment is minor.

16 Accordingly, the first and second assignments of error are
17 denied.

18 THIRD ASSIGNMENT OF ERROR

19 "There was no substantial evidence supporting the
20 city's finding that there was public need for the
21 change, and that the change best meets the public
22 interest."

23 FOURTH ASSIGNMENT OF ERROR

24 "There was no substantial evidence supporting the
25 city's finding that, if there was a need for the
26 change, that the need would be best served by changing
the designation of the subject property."

The plan requires the city to make the following findings
before approving a plan amendment:

1 "a. There is a public need for the amendment and
2 that such amendment best meets the public
interest,

3 "b. In the case of a change in designation, that the
4 need will be best served by changing the
5 designation of the property in question as
compared to other available property."

6 The city's findings concerning these approval criteria are
7 as follows:

8 "Item #1 in the criteria indicates that there must be
9 a public need for the change, and the change must best
10 meet the public interest. The Council finds that the
11 applicant intends to develop the property as a mobile
12 home park. There are, at present, three mobile home
13 parks in the city. There are no current vacancies in
14 any of these three existing mobile home parks. In the
15 past twelve months, residential vacancy rates within
16 the city have averaged 4.25% in mobile home parks and
17 only 5.38% in all multiple housing. The Council
18 concludes there is a need within the city for low-cost
19 housing and that based upon existing vacancy rates,
20 there is a need for additional mobile home parks.
21 Providing such housing when there is such a
demonstrated need best serves the public interest.

22 "The second criterion specifies the public need will
23 best be served by changing the designation of the
24 property in question as compared to other available
25 property. The Council finds that there are at most,
26 two other parcels currently zoned residential and of
sufficient size to accommodate a mobile home park
within the city. One of these lots is approximately
9 acres and the other is approximately 12 acres. The
9 acre lot is not preferred because of its limited
size and because of its long narrow configuration.
The 12 acre lot, while larger, does not have water or
sewer service.

27 "The property in question is preferable for the
28 proposed use because it will provide a buffer between
29 existing light industrial designated property on the
30 south, and single family residential property on the
31 north and east. Additionally, the property in
32 question is vacant and available to development, and
33 is owned by the applicant who desires to develop it at
34 this time. Therefore, the Council finds that the
35 immediate need for additional low cost-housing will

1 best be served by changing the designation of the
2 property in question as compared with other available
3 property." Record 2-3.

4 Petitioner argues that the city erroneously determined
5 there was a public need for the proposed plan amendment.
6 Petitioner contends that the city applied an incorrect and
7 improperly narrow standard for determining public need for the
8 proposed plan amendment.³ According to petitioner, because
9 intervenor planned to create a mobile home park rather than a
10 collection of conventional homes, the city examined only whether
11 there was a need for mobile home housing, ignoring whether there
12 is a need for more land planned and zoned R1. Petitioner
13 contends that the city's findings are inadequate because they do
14 not address whether there is a need for additional R1 planned
15 and zoned land.⁴

16 Petitioner also contends that the city's finding of need is
17 not supported by substantial evidence in the whole record.
18 Petitioner argues that no evidence was presented to address need
19 for additional single family residential land within the city,
20 and whether the need is best served by changing the plan
21 designation for the subject property. Specifically, petitioner

22 ³Although in the caption of these assignments of error petitioner
23 challenges only the substantiality of the evidence to support the city's
24 determinations regarding need, in the argument that follows, petitioner
25 also challenges the adequacy of the findings the city made regarding need.
Under these circumstances we will review the adequacy of the findings and
the substantiality of the evidence to support the city's findings regarding
need.

26 ⁴Mobile home parks are a conditional use in the city's R1 plan and zone
designation.

1 argues that the city failed to consider the 55.42 acres of
2 residentially zoned land he and his family own within the city
3 and whether that land could serve the need the city identified.
4 Petitioner points out that the city's plan contains findings
5 that there is an adequate supply of residential land, and argues
6 the city fails to explain why the plan's findings are
7 erroneous.⁵

8 Finally, petitioner cites the following testimony of the
9 city manager as evidence upon which the city relied to reach its
10 conclusion that there is a need for the plan amendment.
11 Petitioner claims that this testimony is inadequate to support
12 the city's conclusion that there is a need for the plan
13 amendment and that it demonstrates the city was aware of
14 petitioner's residentially zoned land, but failed to consider
15 this land in its determination of need:

16 "Out side (sic) of the property that Mr. Burghardt
17 owns, which is under a Conditional Use hearing right
18 now, I think the largest residential zone vacant piece
19 of property is 9 acres and that's coming off of North
20 Molalla Avenue, the acreage is in behind, running
21 parallel with Toliver. The city has 3 acres of R-3
22 property. I believe, inside the city limits, that's
23 about the largest parcels. Well there is a large
24 parcel just south of Buckeroo Grounds that could be
25 available. I guess. It's owned by Bohlander, I'm not

23 ⁵The city's plan states:

24 "h. Anticipated Future Housing Need

25 "Mollala's Planning area has sufficient land designated single
26 family residential under the existing plan to meet the needs
projected to the year 2005." Plan 53.

1 sure how large that one is."⁶ Record 11.

2 Respondent argues that the proposed use for the property, a
3 mobile home park, is a residential use and that it is
4 appropriate, when determining public need for a plan amendment,
5 to examine the nature of the specific use proposed to ascertain
6 whether a need exists for that use.⁷

7 Respondent claims that petitioner had the burden of
8 establishing that his 55 acres was suitable for the proposed
9 use, before the city would be required to consider the 55 acres
10 in determining whether there is a public need for the proposed
11 plan amendment. Specifically, respondent claims:

12 "* * * The record reveals a discussion of the parcel
13 at issue, a discussion of the 9- and 12- acre parcels
14 which were rejected for the reasons stated above, and
15 simply a mention of petitioner's property. If there
16 had been evidence in the record about the attributes
of petitioner's property, and if that evidence had
clearly showed petitioner's property to be superior,
then petitioner's argument would have merit. However,
the record is all but silent about petitioner's
property.* * *" Respondent's Brief 8.

17 Intervenor contends that there is substantial evidence in
18 the record to support the city's decision that there is a need
19 for additional low-cost housing, which the plan amendment will
20 provide for. Intervenor cites testimony regarding mobile home

21
22 ⁶Petitioner's application for a conditional use permit for a mobile home
park was pending at the time intervenor's application was considered.

23
24 ⁷Respondent also contends that at the time the plan was adopted, the
subject land was zoned for residential use, and that "[c]hanging the
25 designation back to residential simply restores the status quo at the time
the plan language was drafted." Respondent's Brief 7. We do not
26 understand, however, how this argument is relevant to determining whether
there is a public need best served by changing the plan designation of the
subject property.

1 vacancy rates and testimony supporting the city's decision that
2 9 and 12 acre parcels already planned for residential use are
3 inadequate to serve the need the city identified for more
4 low-cost housing.

5 The city's plan requires both that the city establish that
6 there is a need for the plan amendment and that the need is best
7 served by changing the plan designation for the subject
8 property. We address these requirements separately below.

9 A. Plan Section (7)(a)

10 With respect to the requirement that a public need to
11 redesignate the subject property from M1 to R1 be established,
12 we agree with petitioner that the city's findings are inadequate
13 to comply with plan section (7)(a).

14 In this case, the city determined that there is a public
15 need for low-cost housing. However, this determination alone
16 does not satisfy the requirement in the city's plan that there
17 be a public need for the proposed plan amendment. Compliance
18 with plan section (7)(a) requires that the city determine that
19 there is a need for additional single family residential planned
20 land. If the city does not determine that there is a general
21 need for additional land planned for single family residential
22 use, plan section (7)(a) can be met another way as follows. The
23 city must find (1) that there is a public need for more low-cost
24 housing, (in this case, housing in a mobile home park), and (2)
25 other land already planned to accommodate low-cost housing is
26 not available or suitable to fill the specific need the city

1 identifies, and (3) the use of the subject property will be
2 limited to the specific use identified as needed.

3 The city's findings in this case are silent regarding
4 whether additional land planned for R1 uses is needed.
5 Furthermore, the city's findings are inadequate to show public
6 need for low-cost housing in general, or a mobile home park
7 particularly. The city has not shown whether population trends
8 show anticipated population growth or an increased demand for
9 more mobile home housing. The city does not identify industry
10 or other standards to explain whether the yearly vacancy rates
11 for mobile home parks and multifamily dwellings are low, high or
12 average. The city's findings show only that in the past twelve
13 months there have been certain vacancy rates in mobile home
14 parks and multifamily housing, and that there are currently no
15 vacancies in the city's three existing mobile home parks.
16 Additionally, the city has done nothing to ensure that a mobile
17 home park, rather than some other residential use, will be
18 established on the property once the property is redesignated
19 R1. The city did not show a public need under plan section
20 7(a). See Leonard v. Union County, 15 Or LUBA 135,146 (1986);
21 see also DLCD v. Clatsop County, 14 Or LUBA 358 (1986).

22 Finally, the city has not adequately addressed whether
23 vacant land already planned R1 is available for a mobile home
24 park (or low income housing) in view of petitioner's claim that
25 he owns 55 acres of single family residential planned land which
26

1 the city did not consider.⁸ Once petitioner furnished evidence
2 of the existence of his 55 acre parcel of residentially zoned
3 land and other residential parcels, the city was required to
4 explain why those parcels could not satisfy any identified need
5 for additional residentially zoned land for a mobile home park.
6 Norvell v. Portland Area LGBC, 43 Or App 849, 604 P2d 896
7 (1979). The city's failure to address the issue of availability
8 of additional residentially planned and zoned land is error.⁹

9 The third assignment of error is sustained.

10 B. Plan Section (7) (b)

11 Next we examine the requirement of plan section (7) (b) that
12 the need shown will be best satisfied by changing the plan
13 designation of the subject parcel rather than that of other
14 parcels.¹⁰

15 The city does not explain whether or why the need it
16 identifies is best met by changing the plan designation of this
17 particular parcel rather than through changing the plan
18

19
20 ⁸The city misunderstands the nature of petitioner's burden in the local
21 land use proceeding. The burden of establishing that the application meets
22 relevant plan approval criteria is the applicant's. Sunnyside Neighborhood
23 v. Clackamas Co. Comm, 280 Or 3, 18, 569 P2d 1063 (1977).

24 ⁹Furthermore, on remand, the city must explain why the plan finding that
25 there is adequate residentially zoned land to meet the needs of the city
26 into the 21st century, is no longer valid. The city must explain in what
way circumstances have changed to justify amending the plan to increase the
city's base of single family residentially zoned land.

¹⁰While we must remand this case based upon our resolution of the third
assignment of error, we address the fourth assignment of error as if the
city's determination of need had been adequate in an effort to offer
assistance to the parties on remand. ORS 197.835(10) (a).

1 designation of other available property.¹¹ The city's
2 determination that amending the plan designation for this
3 particular parcel is "preferable," for various reasons, is not
4 equivalent to a determination that this particular parcel best
5 serves the identified need. Specifically, we note the fact that
6 the subject parcel is owned by the intervenor may show a need
7 personal to the developer, but says nothing about whether the
8 public need is best served by redesignating this particular
9 parcel, as the plan requires.

10 We conclude that the city has not established that the
11 identified need is best served by changing the plan designation
12 for this parcel.¹²

13 The fourth assignment of error is sustained.

14 FIFTH ASSIGNMENT OF ERROR

15 "The city's decision does not indicate compliance with
16 the applicable comprehensive plan policies, and
17 therefore violates ORS 197.175(2) and Statewide
18 Planning Goal 2."¹³

19 Petitioner contends that under ORS 197.835(4)(b), the city

20 ¹¹For example, it is not discussed whether a surplus of land planned M1
21 exists and, therefore, it is best to satisfy the identified need from the
22 subject parcel as opposed to others. The city finds only that after the
23 redesignation of the subject property, the supply of M1 planned land will
24 not be reduced to an unacceptable level. Record 3. This says nothing
25 about why this parcel is best suited for redesignation to R1 to satisfy the
26 need that the city has identified.

27 ¹²In view of our determination that the city's findings are inadequate,
28 there would be no purpose in determining the substantiality of the evidence
29 to support the findings.

30 ¹³While the assignment of error in itself alleges a general violation of
31 Goal 2, the substance of the argument which follows is that the city
32 violated Goals 9 and 10.

1 was required to apply the Statewide Planning Goals to the
2 subject plan amendment and that the city failed to do so.
3 Petitioner argues that the city's decision, to amend the M1 plan
4 designation for the subject property in favor of a R1 plan
5 designation, violates Goal 9, Economy of the State and Goal 10,
6 Housing.¹⁴

7 Petitioner also argues generally that the city's decision
8 violates the city's plan and specifically that the city's
9 decision violates plan policy 1.0, which provides:

10 "To encourage the location and development of new
11 industrial firms as the top priority in the economic
development program."

12 Respondent and intervenor concede that there are no goal
13 findings in the city's order. However, they argue that the
14 following findings satisfy Goal 9:

15 "The Council has considered the fact that a change in
16 designation will reduce the city's inventory of
17 available industrial land. However, there are
18 presently sixty-five undeveloped acres within the city
19 designated as light industrial and an additional
20 nineteen acres so designated which are outside the
21 city limits but within the city's urban growth
boundary. Additionally, there has not been a large
demand for industrial property. The Council therefore
finds that the removal of the subject property from
the light industrial designation will not reduce the
inventory of undeveloped property available for light
industrial purposes to an unacceptable level."
Record 3.

24 ¹⁴Petitioner contends that Goal 9 is violated because the city's
25 decision takes "needed" industrial land from the industrial land base.
26 Petitioner contends that Goal 10 is violated because "the decision adds to
the city's housing inventory despite the fact more residentially zoned land
in the city's housing inventory is not needed." Petition for Review 13.

1 Respondent contends that the following finding is adequate
2 to satisfy Goal 10:

3 "The Council concludes that there is a need within the
4 city for low-cost housing and that based upon existing
5 vacancy rates, there is a need for additional mobile
6 home parks. Providing such housing when there is such
a demonstrated need best serves the public
interest." Record 2.

7 Without question, the Statewide Planning Goals apply to a
8 comprehensive plan amendment. 1000 Friends of Oregon v. Jackson
9 County, 79 Or App 93, 97, 718 P2d 753 (1986). In this case,
10 there are no findings which specifically determine or address
11 goal compliance. The city's findings respondent and intervenor
12 cite regarding Goal 9 and 10 are inadequate to address those
13 Goals.¹⁵ See Peyton v. Washington County, 95 Or App 37, 39, 769
14 P2d 470 (1989). In addition, when adopting a plan amendment,
15 the city is required to determine which goals apply and whether
16 the goals are satisfied by the proposed amendment and if not, to

17
18 ¹⁵Specifically, the cited findings regarding Goal 9 are inadequate
19 because they do not address whether the parcel sizes of the remaining M1
20 designated land are adequate to serve the current and projected M1 needs of
21 the city; whether the remaining parcels can be, or are, served with
22 adequate water and sewer to accommodate current and projected light
23 industrial uses; or what particular level of M1 planned land is
24 "acceptable" to have within the city and why. Furthermore, the findings
25 claimed to address Goal 10 are not adequate. The city's findings state
26 that the need identified is for low-cost housing. Assuming that the city
were to adequately establish that there was such a need, no nexus is
established between the need for low-cost housing and the proposed
amendment creating additional R1 designated land. As noted in our
discussion under the third assignment of error, there is no limitation in
the ordinance that the subject property, once redesignated, must be
utilized to satisfy the need identified for low-cost housing. Goal 10
requires that there be an adequate supply of land for persons at all income
levels. If a low income housing need is identified, under Goal 10, the
city must examine the various factors contained in the Goal and determine
that the plan amendment meets the identified need. The city has not done
so here.

1 take an exception to such goal(s). The city failed to do so.

2 With respect to petitioner's general claim that the city
3 did not comply with its comprehensive plan, the city did find

4 "All three criteria listed in the Comprehensive Plan
5 for a minor plan amendment are met, and therefore an
6 amendment is appropriate." Record 3.

7 Accordingly, we understand that the city applied the plan
8 provisions that it determined were mandatory approval criteria.
9 Petitioner does not identify what other provisions in the city's
10 plan are mandatory provisions with which the city must show
11 compliance. We note that plan policy 1, which petitioner cites
12 in this assignment, does not contain mandatory language. See
13 Miller v. City of Ashland, ____ Or LUBA ____ (LUBA No. 88-038,
14 November 22, 1988), slip op 24. Furthermore, we do not
15 understand that the city's decision in this case necessarily
16 does not "encourage" the industrial development the policy
17 promotes. It is petitioner's responsibility to explain the
18 grounds upon which we might grant relief, and petitioner has not
19 done so here. Deschutes Development v. Deschutes County, 5 Or
20 App 218, 220 (1982).

21 The fifth assignment of error is sustained, in part.

22 The city's decision is remanded.
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26