

1                                   BEFORE THE LAND USE BOARD OF APPEALS

2                                   OF THE STATE OF OREGON

3                                   LARRY KINE,  
4   *Petitioner,*

5  
6   vs.

7  
8                                   CITY OF BEND,  
9   *Respondent.*

10  
11                                   LUBA No. 2015-068

12  
13                                   FINAL OPINION  
14                                   AND ORDER

15  
16                    Appeal from City of Bend.

17  
18                    Christopher P. Koback, Portland, filed the petition for review and argued  
19 on behalf of petitioner. With him on the brief was Hathaway Koback Connors  
20 LLP.

21  
22                    Mary A. Winters, Gary Firestone, and Ian M. Leitheiser, Legal Counsel,  
23 Bend, filed the response brief. Ian M. Leitheiser argued on behalf of  
24 respondent.

25  
26                    BASSHAM, Board Chair; HOLSTUN, Board Member; RYAN Board  
27 Member, participated in the decision.

28  
29                                   REMANDED

  12/24/2015

30  
31                    You are entitled to judicial review of this Order. Judicial review is  
32 governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner appeals an ordinance that approves comprehensive plan and zoning map amendments to allow medium-density residential development.

**MOTION TO FILE REPLY BRIEF**

Petitioner moves to file a reply brief to address waiver and scope of review issues raised in the response brief. The city opposes the motion, arguing that the reply brief was untimely filed. OAR 661-010-0039 provides that the reply brief must be filed within seven days of the date the response brief is filed. Here, the response brief was filed November 19, 2015, and the reply brief filed November 30, 2015, 11 days later. Oral argument was held December 3, 2015.

Petitioner responds that the reply brief was timely filed, if the seven day deadline is computed according to OAR 661-010-0075(8), which provides:

“Computation of Time: Time deadlines in these rules shall be computed by excluding the first day and including the last day. If the last day is Saturday, Sunday or other state or federal legal holiday, the act must be performed on the next working day.”

The last day of the seven-day deadline was Thursday, November 25, Thanksgiving. The following day, November 26, all state offices were closed, including LUBA’s. Petitioner contends that the “next working day” was

1 Monday, November 30, 2015, and therefore the reply brief was timely filed on  
2 that date. We agree with petitioner. In addition, OAR 661-010-0005 provides  
3 that “[t]echnical violations not affecting the substantial rights of parties shall  
4 not interfere with the review of a land use decision[.]” Even if the reply brief  
5 had been filed in violation of our rules, the city does not allege any prejudice to  
6 its substantial rights. The reply brief is allowed.

7 **FACTS**

8 The subject property is a vacant 5.36-acre triangle-shaped parcel zoned  
9 Residential Standard Density (RS) and designated Public Facilities (PF) on the  
10 city’s comprehensive plan. In 2006, the city acquired the property from the  
11 city parks department, as surplus land. In 2015 city staff filed an application to  
12 re-designate the property from PF to Residential Medium Density (RM), and to  
13 rezone the property from RS to the corresponding medium-density residential  
14 zone, also called RM.

15 The subject property is generally surrounded by RS-zoned land. Access  
16 to the property is to the east, via a stub at Thornhill Lane, a local street, through  
17 an adjoining residential subdivision with 80 lots, to Deschutes Market Road.  
18 North of the property, outside the urban growth boundary, are an irrigation  
19 canal and a public park. South of the property is land developed with a church,  
20 which adjoins Butler Market Road, a minor arterial. A small commercial area,

1 zoned Convenience Commercial, is located at the nearby intersection of Butler  
2 Market Road and 27<sup>th</sup> Street. The city has future, unfunded plans to extend 27<sup>th</sup>  
3 Street as a major arterial north and west along the western border of the subject  
4 property, which would potentially allow a second access point to the property.  
5 Further west are vacant RS zoned lands.

6 Petitioner appeared orally and in writing during the proceedings below.  
7 The hearings officer held a hearing, and recommended approval, based on  
8 findings addressing the applicable plan and zone change standards. On  
9 September 2, 2015, the city council voted to adopt the challenged ordinance  
10 approving the city application. The city council adopted without changes the  
11 hearings officer's findings as its decision on the application. This appeal  
12 followed.

13 **FIRST ASSIGNMENT OF ERROR**

14 Bend Development Code (BDC) 4.6.300.B sets out four standards for  
15 quasi-judicial comprehensive plan and zoning amendments. The second  
16 standard, BDC 4.6.300.B.2, requires a finding that “[a]pproval of the request is  
17 consistent with the relevant policies of the Comprehensive Plan that are  
18 designated by the Planning Director or designee.” The planning director  
19 identified a number of relevant comprehensive plan policies in the Bend  
20 General Plan (BGP), which are addressed in the findings adopted by the

1 hearings officer and board of commissioners. Under the first assignment of  
2 error, petitioner challenges the adequacy and evidentiary support for the  
3 findings adopted to address five comprehensive plan policies.

4 As a preliminary matter, the city responds that no party raised issues  
5 below regarding any of the five comprehensive plan policies with the  
6 specificity required by ORS 197.763(1), and therefore the right to challenge the  
7 adequacy of the city’s findings regarding those plan policies has been waived.<sup>1</sup>  
8 We disagree with the city’s waiver challenge.

9 In *Lucier v. City of Medford*, 26 Or LUBA 213, 216 (1993), we held:

10 “In order to preserve the right to challenge at LUBA the adequacy  
11 of the adopted findings to address a relevant criterion or the  
12 evidentiary support for such findings, a petitioner must challenge  
13 the proposal’s compliance with that criterion during the local  
14 proceedings. Once that is done, the petitioner may challenge the  
15 adequacy of the findings and the supporting evidence to  
16 demonstrate the proposal complies with the criterion. The  
17 particular findings ultimately adopted or evidence ultimately relied

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<sup>1</sup> ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

1 on by the decision maker need not be anticipated and specifically  
2 challenged during the local proceedings.”

3 Generally, to be adequate for review, findings must (1) address the  
4 applicable standards, (2) set out the facts relied upon, and (3) explain how  
5 those facts lead to the conclusion that the standards are met. *Heiller v.*  
6 *Josephine County*, 23 Or LUBA 551, 556 (1992). To preserve the ability to  
7 challenge the adequacy of findings to satisfy one or more of the above  
8 requirements, a petitioner need not anticipate and challenge such basic  
9 inadequacies in the findings ultimately adopted in the final decision. Instead, a  
10 petitioner must demonstrate only that the petitioner or another party challenged  
11 the proposal’s compliance with the relevant approval standard. If so, then  
12 before LUBA the petitioner may challenge the basic adequacy of the findings  
13 addressing that standard.

14 In the present case, petitioner testified with respect to BDC 4.6.300.B.2,  
15 which as noted requires consistency with comprehensive plan policies  
16 identified by the planning director:

17 “The proposal is not consistent with the General Plan. Typically  
18 RM is located in locations that are buffers to commercial lands.  
19 This property is located in a sea of RS property. The closest RM  
20 property is  $\frac{3}{4}$  of a mile away to the West, which already has vacant  
21 land for development that is closer to commerce and  
22 employment.” Record 43.

1 Although this general compliance challenge does not cite or discuss specific  
2 comprehensive plan policies, it argues that the RM designation/zone is  
3 inappropriate because the site is not close to commercial areas and  
4 employment, which are relevant considerations under several BGP policies that  
5 the planning director identified as applicable, and which are discussed below.  
6 Petitioner and others also raised compliance issues with reference to specific  
7 plan policies. E.g. Record 43, 69, 146. In our view, the foregoing is sufficient  
8 to allow petitioner, on appeal to LUBA, to challenge the adequacy of the  
9 findings the city ultimately adopted to demonstrate compliance with BDC  
10 4.6.300.B.2, at least with respect to plan policies that petitioner or others cited  
11 to or referenced or cited the operative language of the plan policies. With  
12 respect to such policies, petitioner may argue that the findings are inadequate  
13 because they fail to (1) address the applicable standards, (2) set out the facts  
14 relied upon, and (3) explain how those facts lead to the conclusion that the  
15 standards are met. We therefore turn to petitioner's challenges to the adequacy  
16 of the findings the city adopted regarding five applicable BGP policies.

17 **A. BGP Chapter 5, Policy 31, and Chapter 7, Policy 6.9.1**

18 BGP Chapter 5, Policy 31 is part of a plan section devoted to  
19 transportation connectivity, and provides:

1 “Medium and high density developments shall be located where  
2 they have good access to arterial streets and be near commercial  
3 services, employment and public open space to provide the  
4 maximum convenience to the highest concentrations of  
5 populations.”

6 Chapter 7, Policy 6.9.1 provides nearly identical language. The city’s findings  
7 addressing both policies are also almost identical. We quote the findings  
8 addressing Policy 31:

9 “The subject property is situated near a minor arterial and a  
10 planned princip[al] arterial, and is adjacent to a commercial node  
11 and a public park. Pursuant to this section, the property is  
12 therefore located in an area where RM zoned properties should be  
13 located. The proposed amendment will therefore be consistent  
14 with this policy.” Record 25.

15 **1. Located Near Commercial Services and Employment**

16 Petitioner first argues that the above-quoted finding fails to adequately  
17 address whether the proposed site for medium density development is located  
18 near “commercial services” and “employment.” Petitioner contends that there  
19 are no findings whatsoever about proximity to employment. With respect to  
20 commercial services, petitioner argues that the reference to a “commercial  
21 node” is apparently a reference to the small site located south of Butler Market  
22 Road zoned convenience commercial, or CC. However, petitioner argues that  
23 the CC zoning allows only limited commercial uses, such as a convenience  
24 store, and the site is too small to provide either “commercial services” or

1 “employment” within the meaning of Policy 31. Petitioner argues that the  
2 finding that the site is “adjacent to a commercial node” is not supported by the  
3 record and fails to demonstrate that the subject property is located near  
4 “commercial services” and “employment.”

5 The city responds, initially, that the hearings officer’s findings adopted  
6 by the city council embody an implied interpretation of Policy 31, to the effect  
7 that “good access” is satisfied by mere physical proximity to an arterial,  
8 regardless of the ease of access, and further that the requirement to be “near”  
9 commercial services and employment is satisfied by physical proximity to any  
10 commercial areas or employment, regardless of the type or quantity of services  
11 and employment. The city contends that LUBA must defer to a governing  
12 body’s implied interpretation of a local plan or code provision pursuant to ORS  
13 197.829(1),<sup>2</sup> and that the hearings officer’s findings addressing Policy 31 are  
14 adequate under that implied interpretation.

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<sup>2</sup> ORS 197.829 provides, in relevant part:

“(1) [LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

“(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

1           However, the city had not demonstrated that the hearings officer’s  
2 findings adopted by the city council embody any express or implied  
3 interpretations of any code or plan language, at least any interpretation that is  
4 adequate for review. For an implied interpretation to be adequate for review  
5 under ORS 197.829(1), the findings embodying that interpretation must “carry  
6 with it only one possible meaning of the ordinance provision and an easily  
7 inferred explanation of that meaning.” *Green v. Douglas County*, 245 Or App  
8 430, 439, 263 P3d 355 (2011). The city has not demonstrated that the above-  
9 quoted finding embodies an implicit interpretation that carries with it only one  
10 possible meaning and an easily inferred explanation of that meaning, or that it  
11 embodies any interpretation at all. We see no implied interpretation of the  
12 language of Policy 31 in the above-quoted finding or any other finding.

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“(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation; [or]

“(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]

“(2) If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct.”

1           With respect to the lack of findings addressing proximity to employment,  
2 the city notes that in a separate finding addressing BGP chapter 1, Policy 5,  
3 which concerns compact development to reduce vehicle trips, the hearings  
4 officer responded to an argument that it is inconsistent with Policy 5 to locate  
5 medium density housing in a suburban area far away from services and  
6 employment, finding that “this property is not suburban in that it is near  
7 services and employment.” Record 22. The city argues that the finding under  
8 Policy 5 that the site is near “employment” is sufficient to overcome the failure  
9 to address proximity to employment in the finding addressing Policy 31.

10           In the abstract, the above-quoted finding under Policy 5 that the site is  
11 near “employment” might render the failure to address proximity to  
12 employment for purposes of Policy 31 harmless. However, the city identifies  
13 no evidence in the record indicating that the site is near any employment. If the  
14 city is relying entirely on the proximity to the small area zoned CC that is south  
15 of Butler Market Road to demonstrate that the site is “near \* \* \* employment”  
16 for purposes of Policy 31, we agree with petitioner that the findings are  
17 inadequate to explain why. There are no findings or evidence regarding how  
18 many or what kinds of jobs are provided in the CC-zoned area. As noted  
19 above, the decision includes no interpretations that would provide a basis to  
20 conclude that the number or type of jobs provided in the CC-zoned area are

1 irrelevant to consistency with Policy 31, and the findings identify no other  
2 employment areas in the vicinity. The city’s findings must give meaning to the  
3 requirement that medium density development be located near employment,  
4 and provide an explanation, supported by substantial evidence, for the  
5 conclusion that the subject property is located near employment within the  
6 meaning of Policy 31. The city’s findings regarding proximity to employment  
7 are, at best, conclusory and inadequate.

8 Similarly, with respect to proximity to “commercial services,” the  
9 findings appear to rely on the small area zoned CC to satisfy that element of  
10 Policy 31. However, the findings and the record do not include a description of  
11 what services that small CC-zoned area provides or is capable of providing.  
12 Again, the city’s finding regarding proximity to commercial services is  
13 conclusory, and fails to explain why proximity to a small convenience  
14 commercial area is sufficient to constitute the proximity to “commercial  
15 services” necessary to locate medium density development under Policy 31.  
16 Remand is necessary for more adequate findings.

17 **2. Good Access to Arterial Streets**

18 Policy 31 and Policy 6.9.1 also provide that “Medium and high density  
19 developments shall be located where they have good access to arterial  
20 streets[.]” Petitioner and others raised issues below regarding access from the

1 property to nearby existing and future arterials. Record 42, 137. The city found  
2 that the proposed RM zoning is consistent with this element of Policy 31 and  
3 Policy 6.9.1 because the subject property “is situated near a minor arterial and a  
4 planned princip[al] arterial[.]” Record 60-61.

5 The referenced “minor arterial” is Butler Market Road, the minor arterial  
6 south of the property. The subject property has no direct access to Butler  
7 Market Road. The only indirect access is via three local streets through the  
8 neighboring subdivision to Deschutes Market Road, then south to connect with  
9 Butler Market Road. Petitioner argues that finding that the property is “situated  
10 near a minor arterial” is not responsive to the language of Policy 31, which  
11 requires a finding that the property has “good” access to an arterial.

12 Petitioner also argues that the city’s findings fail to explain how the  
13 possibility of future access to a planned, but unfunded extension of 27<sup>th</sup> Street  
14 constitutes “good access” to an arterial. Petitioner notes that the city adopted  
15 no condition of approval requiring access to a future extension of 27<sup>th</sup> Street.  
16 Further, petitioner argues that it is not clear that access to such a future  
17 extension would be feasible, given the major arterial status of the extension,  
18 and in any case, the city adopted no findings addressing feasibility of access.

1           The city responds that the hearings officer and city council implicitly  
2 interpreted Policy 31 to the effect that “good access” is satisfied by physical  
3 proximity to an existing or planned arterial. However, again, we perceive no  
4 implied interpretation of the “good access” language, or at least any  
5 interpretation that adequate for review. To the extent the city argues in its brief  
6 that LUBA should exercise its discretion to interpret the Policy 31 “good  
7 access” standard to be satisfied by proximity measured as the crow flies from  
8 the property to the nearest arterial, whether or not there is in fact reasonably  
9 convenient access to that arterial, we reject that interpretation. ORS  
10 197.829(2).<sup>3</sup>

11           We agree with petitioner that the county’s findings regarding the “good  
12 access” language are inadequate. The findings make no evaluation and adopt  
13 no explanation whatsoever regarding whether the property has “good” access to  
14 Butler Market Road. Similarly, the findings fail to explain why the possibility  
15 of future access to a planned, but unfunded major arterial is sufficient to  
16 provide “good access.” Policy 31 is phrased in the present tense (“Medium and  
17 high density developments shall be located where they *have* good access to  
18 arterial streets”), suggesting that an arterial is a candidate for “good access”

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<sup>3</sup> See n 2.

1 only if the arterial presently exists or at least will exist contemporaneously with  
2 medium and high density development. If the 27<sup>th</sup> Street extension is never  
3 funded or built, then it cannot provide access. Even if the record is such that  
4 the city can reasonably assume that the arterial will be built someday, there is  
5 no condition or limitation that ensures it will be in place when medium density  
6 development is constructed, which Policy 31 appears to contemplate.

7 In sum, for the foregoing reasons, we agree with petitioner that the city's  
8 findings addressing consistency with Policy 31 are inadequate and not  
9 supported by substantial evidence.

10 The first sub-assignment of error is sustained.

11 **B. BGP Chapter 1, Policy 5**

12 BGP Chapter 1, Policy 5 provides that it is city policy to:

13 “[E]ncourage compact development and the integration of land  
14 uses within the Urban Growth Boundary to reduce trips, vehicle  
15 miles traveled and facilitate non-automobile travel.”

16 Participants argued below that placing higher density residential uses in  
17 a low-density suburban area at the edge of the urban growth boundary would  
18 cause greater traffic than if the higher density uses were located closer to  
19 services, highways and employment. Record 69. The hearings officer rejected  
20 that argument:

1           “The hearings officer finds that this property is not suburban in  
2           that it is near services and employment. Moreover, with the  
3           extension of 27<sup>th</sup> Street, bus service may be available nearby in the  
4           future as well. The amendments are being proposed to entitle the  
5           land for future medium residential uses. Furthermore, the higher  
6           density residential development may enhance the vitality of the  
7           adjacent commercial node, making development of that site more  
8           economically vibrant. Based upon the foregoing reasons, the  
9           proposal will be consistent with [Policy 5].” Record 22.

10          Petitioner argues, and we agree, that this finding suffers from many of the same  
11          flaws as the finding addressing Policy 31. If the city is relying on proximity to  
12          the small CC-zoned area to provide “services and employment” for purposes of  
13          demonstrating that the proposed development is consistent with Policy 5,  
14          additional explanation is necessary, as described above. Moreover, the apparent  
15          purpose of Policy 5 is to promote development patterns that will “reduce trips,  
16          vehicle miles traveled and facilitate non-automobile travel.” The only finding  
17          that purports to address this language is the finding that if 27<sup>th</sup> Street is  
18          extended, “bus service may be available nearby in the future as well.” *Id.*  
19          However, as petitioner notes, even assuming the 27<sup>th</sup> Street extension is built  
20          someday, the findings can only speculate that bus service “may be” provided  
21          along that arterial. There is no apparently no evidence in the record that bus  
22          service is planned anywhere in the area in the foreseeable future. Similarly, the  
23          city speculates that medium density development of the subject property “may  
24          enhance the vitality of the adjacent commercial node,” presumably suggesting

1 that if this occurs it would reduce vehicular trips to more distant commercial  
2 areas. However, the city cites no evidence in the record supporting this  
3 speculation.

4 In sum, we agree with petitioner that the city’s findings addressing  
5 Policy 5 are inadequate and not supported by substantial evidence. The second  
6 sub-assignment of error is sustained.

7 **C. BGP Chapter 5, Policy 21**

8 BGP Chapter 5, Policy 21 provides that the city:

9 “Densities recommended on the Plan in order to maintain proper  
10 relationships between proposed public facilities and services and  
11 population distribution.”

12 The city’s findings address Policy 21 as follows:

13 “The proposal will result in 5.36 additional acres of RM zoned  
14 property in the City of Bend. The RM zoning district has a density  
15 range of 7.3-21.7 units per acres. Future development will be  
16 required to meet the established density requirements, meeting the  
17 policy of this section and providing much needed housing in our  
18 community. BDC requirements applied to subsequent  
19 development will ensure consistency with this policy.” Record 25.

20 Petitioner argues, and we agree, that the above finding does not attempt  
21 to address the actual language of Policy 21. The finding observes, correctly but  
22 rather obviously, that future medium density development will meet the density  
23 standards applicable in the RM zone. However, there is no explanation why re-  
24 zoning the subject property to RM is consistent with the obligation to

1 “[d]ensities recommended on the plan,” or to “maintain proper relationships  
2 between proposed public facilities and services and population distribution.”  
3 There is no discussion whatsoever regarding the relationship between proposed  
4 public facilities and services and population distributions.

5 The city’s only response to petitioner’s arguments regarding the  
6 adequacy of the findings addressing Policy 21 is to argue that the planning  
7 director did not identify Policy 21 as an applicable comprehensive plan policy  
8 for purposes of BDC 4.6.300.B.2, and therefore the city was not required to  
9 adopt findings of consistency with Policy 21. Response Brief 9. However, the  
10 planning director did identify Policy 21 as an applicable policy, and the city’s  
11 findings do address that policy. Record 157, 24-25. The city does not cite any  
12 other basis to conclude that an adequate findings challenge to the findings  
13 addressing Policy 21 were waived.

14 The third sub-assignment of error is sustained.

15 **D. BCP Chapter 5, Policy 1**

16 BCP Chapter 5, Policy 1 provides that “[f]uture development and local  
17 development standards shall recognize and respect the character of the existing  
18 areas.” Petitioner and others raised issues regarding compliance with Policy 1  
19 during the proceedings below. Record 43, 146. The city’s findings address  
20 Policy 1 as follows:

1 “These amendments are proposed in response to a growing need in  
2 our community for quality affordable housing. *The character of*  
3 *the area surrounding the property is generally residential.* Many  
4 of the concerns raised by the opponents argue that medium density  
5 residential development is not appropriate in this location. The  
6 neighbors in the single family residential neighborhood argue that  
7 RM density is not appropriate. Opponents also argued that there is  
8 not any higher density residential development along 27<sup>th</sup> or Butler  
9 Market.

10 “The hearings officer finds that this location is nearby single  
11 family development as well as commercial development across  
12 Butler Market and adjacent to a large church and school. The City  
13 typically follows a development pattern of higher density  
14 residential or commercial development along arterials and  
15 collectors, with lower density areas further away from the primary  
16 corridors. The subject property is just north of an existing arterial  
17 street and adjacent to a planned arterial street, thus is well suited  
18 for a more dense residential use. *The medium density use is*  
19 *compatible with the neighborhood as a whole now and as it will*  
20 *develop with the future extension of 27<sup>th</sup> [S]treet.* The proposed  
21 amendments will therefore address a need in our community, *while*  
22 *respecting the existing conditions in the surrounding area.*  
23 Conformance to Development Code compatibility standards will  
24 further ensure consistency with this policy.” Record 24 (emphasis  
25 added).

26 Petitioner argues that the foregoing finding is inadequate, because it does  
27 not attempt to describe the character of the existing area other than to state that  
28 it is “generally residential.” According to petitioner, that limited description  
29 fails to recognize that the subject property is surrounded by property zoned RS,  
30 and the current and likely future character of the area is standard density  
31 residential, *i.e.*, single family dwellings on relatively large lots. Petitioner

1 contends that the findings fail to explain why placing an island of medium  
2 density residential uses in the middle of an area planned and zoned for single-  
3 family residential recognizes and respects the character of the existing area.

4 Further, petitioner argues that the main support for the conclusion that  
5 RM zoning is “compatible” with the character of the area and respects the  
6 “existing conditions” of the area is not compatibility with the surrounding RS  
7 zoned lands, but rather the presence of the “commercial node” south of Butler  
8 Market Road, and the fact that the property is located near a minor arterial  
9 (Butler Market Road) and will be adjacent to a planned arterial street (27<sup>th</sup>  
10 Street), when and if that street is built. Petitioner notes that the finding states  
11 that the city’s typical development pattern is to locate higher density residential  
12 “along” arterials, but argues that the subject property is not located “along” the  
13 nearest arterial, Butler Market Road. Finally, petitioner repeats his arguments  
14 that the city cannot rely on the possibility that the unfunded 27<sup>th</sup> Street arterial  
15 will someday be constructed.

16 The city responds that the above-quoted finding embodies an implied  
17 interpretation, to the effect that (1) Policy 1 does not require new zoning to  
18 produce the exact same type of development as the zoning on surrounding  
19 lands, and that (2) Policy 1 is prospective, concerned not only with respect for  
20 the existing character of the area, but also with respect for the future character

1 of the area after future street extensions are constructed. Again, the city reads  
2 far too much into the finding. We see no express or implied interpretations of  
3 the language of Policy 1 in the above-quoted finding, at least any that are  
4 adequate for review. In the finding, the hearings officer simply recites facts  
5 and intermediate conclusions that she believes leads to the ultimate conclusion  
6 that the proposed rezoning is consistent with Policy 1. Such a finding does not  
7 “carry with it only one possible meaning of the ordinance provision and an  
8 easily inferred explanation of that meaning.” *Green*, 245 Or App at 439.

9 The city does not offer any other defense of the adequacy of the above-  
10 quoted finding. We generally agree with petitioner that the finding  
11 inadequately describes the “character” of the “existing area,” and that  
12 additional explanation is necessary for why placing medium density residential  
13 development in the middle of an area predominantly zoned and developed with  
14 low density residential development is consistent with recognition and respect  
15 for the “character of the existing area.” Further, if a relevant consideration  
16 under Policy 1 is the city’s typical development pattern to locate higher density  
17 development only “along” arterials and collectors, some explanation is  
18 necessary to justify locating higher density development on the subject  
19 property, which is not located along an arterial. Finally, because Policy 1  
20 expressly requires the city to evaluate respect for the character of the “existing”

1 area, the city will need to adopt some explanation or interpretation to justify  
2 giving weight to the *future* character of the area.

3 The first assignment of error is sustained.

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

5 BDC 4.6.300.B.3 is a plan and zoning amendment standard requiring a  
6 finding that:

7 “The property and affected area is presently provided with  
8 adequate public facilities, services and transportation networks to  
9 support the use, or such facilities, services and transportation  
10 networks are planned to be provided concurrently with the  
11 development of the property[.]”

12 The record includes a traffic study concluding that development of the  
13 subject property with a medium density residential requirement will require a  
14 second access point for safety reasons, presumably via a connection with the  
15 future 27<sup>th</sup> Street extension. Record 195. However, the decision makes no  
16 finding that secondary access to the property will be “provided concurrently  
17 with the development of the property” and imposed no conditions regarding  
18 secondary access.

19 Instead, the city’s findings rely solely on application of future  
20 subdivision or site plan development approval standards to ensure compliance

1 with BDC 4.5.300.B.3.<sup>4</sup> Although the findings do not explain further, the city  
2 takes the position in its brief that any development of the subject property will  
3 involve application of either subdivision or site design review standards, both  
4 of which require a demonstration that public facilities have “adequate  
5 capacity.” See BDC 4.3.300.E.4 (subdivision standard requiring that “[a]ll  
6 required public facilities have adequate capacity”) and BDC 4.2.500.D.7 (site  
7 plan review standard requiring the same).

8 Petitioner argues that the city erred in relying solely on the possibility of  
9 applying subdivision or site design review standards to establish compliance  
10 with BDC 4.6.300.B. We agree with petitioner. Again, BDC 4.6.300.B  
11 requires that, where public facilities are not presently provided, the city must  
12 find that adequate public facilities are “planned to be provided concurrently  
13 with the development of the property.” The city made no such finding, and the

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<sup>4</sup> The city’s findings of compliance with BDC 4.6.300.B state:

“\* \* \* The BDC ensures conformance with this criterion by requiring land division and/or site development approval for any development on the site other than a single-family or two-family dwelling. The approval criteria in BDC Chapter 4.3, *Subdivisions, Partitions, Replats and Property Line Adjustments*, and BDC Chapter 4.2 *Site Plan and Design Review* require that adequate public facilities, services and transportation networks to support the use will be provided with development of the property.”  
Record 30.

1 findings and record do not identify any basis to conclude that secondary access  
2 is planned to be provided concurrently with development of the property.

3 With respect to BDC 4.3.300.E.4 and BDC 4.2.500.D.7, which the city’s  
4 brief identifies as the specific standards the hearings officer relied upon to  
5 establish compliance with BDC 4.6.300.B, petitioner argues that it is possible  
6 that the subject property could be developed without application of either the  
7 subdivision standards at BDC 4.3.300.E.4 or the site design review standards at  
8 BDC 4.2.500.D.7. The city contends that one or both standards will apply to  
9 any development of the subject property, and ensure that public facilities will  
10 have “adequate capacity” to accommodate development of the subject property.  
11 We understand the city to argue that if adequate capacity is not available when  
12 development is proposed, the application will be denied for noncompliance  
13 with BDC 4.3.300.E.4 or BDC 4.2.500.D.7, whichever applies.

14 It is not clear to us whether the city or petitioner is correct regarding the  
15 applicability of BDC 4.3.300.E.4 or BDC 4.2.500.D.7 to all development of the  
16 property. But even if the city is correct on that point, we agree with petitioner  
17 that the findings fail to explain how reliance on future application of BDC  
18 4.3.300.E.4 or BDC 4.2.500.D.7 is sufficient to establish compliance with BDC  
19 4.6.300.B. A future evaluation of whether required public facilities have  
20 “adequate capacity” to support proposed development of the subject property,

1 and the possibility that such development will be denied if there is inadequate  
2 capacity, is not equivalent to a finding that adequate public facilities are  
3 “planned to be provided concurrently with the development of the property.”  
4 Further, BDC 4.3.300.E.4 or BDC 4.2.500.D.7 are both focused on “adequate  
5 capacity.” It is not clear that providing secondary access to the subject  
6 property, something which is apparently required for safety rather than  
7 capacity, would trigger evaluation under BDC 4.3.300.E.4 or BDC 4.2.500.D.7.  
8 Remand is necessary for more adequate findings of compliance with BDC  
9 4.6.300(B), and at a minimum the adoption of conditions necessary to ensure  
10 that secondary access is “planned to be provided concurrently with the  
11 development of the property.”

12 The second assignment of error is sustained.

13 **THIRD ASSIGNMENT OF ERROR**

14 BDC 4.6.300.B.4 is a plan and zoning amendment standard requiring a  
15 finding there is:

16 “Evidence of change in the neighborhood or community or a  
17 mistake or inconsistency in the Comprehensive Plan or Land Use  
18 District Map regarding the property that is the subject of the  
19 application[.]”

20 The city’s decision identifies two “change[s] in the neighborhood or  
21 community” as the basis for compliance with BDC 4.5.300.B.4, specifically a

1 change in the need for park land, and a change in the need for affordable  
2 housing.<sup>5</sup>

3 Petitioner argues that the findings regarding the community need for  
4 more affordable housing are misdirected and not supported by substantial  
5 evidence. According to petitioner, the pertinent question is not the general

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<sup>5</sup> The city's findings addressing BDC 4.6.300(B)(4) state, in full:

“The General Plan Map and Zoning Map amendments are proposed to address a change in the community, specifically the change in the need for a park or public use on the subject property, and the increased demand for affordable housing in our community.

“Prior to 2006, the subject property was owned by the Bend Park and Recreation District (BPRD) as a site for a potential future park. With the plans for development of the Pine Nursery Park in 2006, the Park District realized that they no longer needed the subject site for a park land. In May of 2006, the Park District conveyed the property to the City of Bend. Currently, the City of Bend does not have a need for the property and does not intend on using the property under the PF plan designation. Additionally, the City has a pressing need for affordable housing, and the Council has identified this property as one which would be suitable for providing this housing type.

“Given the need for housing at a variety of price points in the community, the City would like to entitle the property to address this current need and change in our community. Given that the City and other public entities do not need this property, and given its location adjacent to arterial streets, a commercial node, parks, churches, and other residential uses, it is well suited for residential development at RM district density.” Record 30.

1 need for more affordable housing in the city, but rather the need for more RM-  
2 zoned land in the city. Petitioner contends that the city’s comprehensive plan  
3 inventory of residential lands in fact shows a surplus of RM-zoned land.  
4 Further, petitioner argues that the findings fail to acknowledge that the subject  
5 property cannot meet any *immediate* need for more affordable housing, because  
6 unless and until the 27<sup>th</sup> Street extension is constructed, and secondary access  
7 to the property is provided, the subject property cannot be developed with  
8 medium density dwelling units.

9       The city responds, and we agree, that petitioner has not established error  
10 in the city’s findings addressing BDC 4.6.300.B.4. First, the city identified two  
11 “change[s] in the neighborhood or community,” (need for parks and need for  
12 affordable housing) and petitioner challenges only one (affordable housing),  
13 without attempting to establish that any inadequacy or lack of evidentiary  
14 support for one basis is more than harmless error, given the unchallenged  
15 second basis. Second, petitioner has not demonstrated that the cited need for  
16 additional affordable housing in the city must be reframed as a need for  
17 additional RM-zoned land, or that the amount of RM-zoned land in the city’s  
18 inventory of buildable lands undermines the identified need for additional  
19 affordable housing. Finally, petitioner has also not established that the subject  
20 property must be immediately available for development, in order to play some

1 role in meeting the identified need for more affordable housing, for purposes of  
2 justifying the plan and zoning change under BDC 4.6.300.B.4. The “change in  
3 the neighborhood or community” standard is a very subjective standard, and  
4 petitioner has not established that the city’s findings addressing that standard  
5 are inadequate or not supported by substantial evidence.

6 The third assignment of error is denied.

7 The city’s decision is remanded.