09/25/19 AM11:45 LUBA

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

ROY CARROLL,
Petitioner,

vs.

CITY OF MALIN,
Respondent.

LUBA No. 2018-131

FINAL OPINION
AND ORDER

Appeal from City of Malin.

Roy Carroll, Rancho Cucamonga, California, filed the petition for review and argued on his own behalf.

Nathan J. Ratliff, Klamath Falls, filed the response brief and argued on behalf of respondent. With him on the brief was Parks and Ratliff, P.C.

RYAN, Board Member; ZAMUDIO, Board Chair; RUDD, Board Member, participated in the decision.

AFFIRMED 09/25/2019

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a city decision denying his application for a zone change.

REPLY BRIEF

On August 31, 2019, petitioner filed a reply brief to respond to the response brief.[1] The city does not object to the reply brief. However, the reply brief includes Appendix A, which appears to be documents related to annexation of property by the city in 2005, and photos of a memorial located in the city. The documents are not marked as pages from the record, and it is not clear that the documents are from the record. Review of a land use decision is confined to the record. ORS 197.835(2)(a).

The reply brief is allowed, but LUBA will not consider or rely on any documents attached to the reply brief as Appendix A.

FACTS

Petitioner owns 12 city lots located on the corner of 5th Street and Front Street, consisting of approximately one acre in total. Each lot is approximately 54 feet by 151 feet. Record 12. In 2018, petitioner applied to change the zoning of eight of those lots from Commercial to Residential. Petitioner's application included evidence that there are no commercially zoned lots for sale in the city.

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[1] The present appeal is subject to LUBA's 2017 rules for reply briefs at OAR 661-010-0039 (2017).

Petitioner presented evidence that no "large" parcels are currently for sale in the city, and no homes are currently for sale or rent in the city, in order to establish that the city is experiencing a housing shortage, which rezoning petitioner's property to Residential could help alleviate. Record 81. Petitioner also presented evidence of the city's 1999 approval of an application to rezone a property adjacent to petitioner's property (owned by neighbor Mr. Woodley) from Commercial to Residential. Record 15, 20.

The planning commission held two hearings on the application and voted to deny the application. Petitioner appealed the decision to the city council. The city council held a *de novo* hearing on the appeal and at the conclusion of the hearing, allowed petitioner an additional seven days to submit his final written argument. At its next meeting, the city council voted to deny the application.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

In his first assignment of error, we understand petitioner to argue that the city committed several procedural errors that prejudiced his substantial rights. ORS 197.935(9)(a)(B). First, we understand petitioner to argue that two city councilors, two members of the planning commission and two persons who are relatives of those persons improperly failed to disclose *ex parte* contacts. Second, we understand petitioner to argue that the city committed a procedural error that prejudiced his substantial right to a fair decision-making process because the city allowed biased persons to participate in the decision-making process. Petition for

1 Review 28-30; ORS 197.835(9)(a)(B). We understand petitioner to argue that
2 one city councilor should not have participated in the decision due to bias.[2]
3 Finally, petitioner argues that the same city councilor has an "[a]ctual conflict of
4 interest" as defined in ORS 244.020(1) that should have precluded her from
5 voting on petitioner's application. Petition for Review 30-31.

6 In an order denying petitioner's previously submitted Motion to Take
7 Evidence Not in the Record, we explained that where a person alleged to have
8 engaged in undisclosed *ex parte* contacts is not a member of the city council, and
9 the city council made the final decision, that person accordingly is not "a member
10 of the decision-making body" for purposes of ORS 227.180(3), which requires
11 "a member of the decision-making body" to disclose *ex parte* contacts. We also
12 explained that "there can be no legally significant or reversable bias on the part
13 of a person who is not a member of the decision-making body." *Carroll v. City*
14 *of Malin*, __ Or LUBA __ (LUBA No. 2018-131, Order, July 26, 2019) (slip op
15 5-6) (footnote omitted). For the same reasons, to the extent petitioner's arguments
16 alleging improper bias and undisclosed *ex parte* contact regard persons who are

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[2] Petitioner also argues that the city's actions in allowing an allegedly biased decision maker to participate in the proceeding "violated Petitioner's Fourteenth Amendment right to Due Process – specifically, by ex parte contacts resulting in bias, which defeated any and all impartiality Petitioner is Constitutionally entitled to." Petition for Review 29. Petitioner does not develop his constitutional violation argument, and we will not develop it for him. *Joyce v. Multnomah County*, 23 Or LUBA 116, 118, *aff'd*, 114 Or App 244, 835 P2d 127 (1992).

1 not members of the decision-making body, those arguments provide no basis for
2 reversal or remand.

3 Agnes Turner-Wise (Turner-Wise) is a member of the city council.[3] We
4 understand petitioner to allege that Turner-Wise engaged in *ex parte*
5 communications resulting in bias and should have abstained from voting because
6 the persons who live across the street from petitioner's property are Turner-
7 Wise's family and friends, and because Turner-Wise's daughter is the City
8 Recorder in charge of keeping meeting minutes. Petitioner argues that "[b]ecause
9 Agnes Turner-Wise did not abstain from voting, she violated Petitioner's
10 Fourteenth Amendment Right to Due Process — specifically, by ex parte contacts
11 resulting in bias, which defeated any and all impartiality Petitioner is
12 Constitutionally entitled to." Petition for Review 29. Petitioner also argues that
13 city councilor John Hughto engaged in undisclosed *ex parte* contacts. Petition for
14 Review 24-25. Petitioner speculates that the city council members engaged in
15 undisclosed *ex parte* communications but does not support that claim with
16 evidence. Petition for Review 30. Accordingly, petitioner's argument provides
17 no basis for reversal or remand of the decision.

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[3] The city council voted 4 to 2 to deny petitioner's application to rezone his property.

1 The bar for bias disqualification is high, as the court of appeals explained
2 in *Columbia Riverkeeper v. Clatsop County*, 267 Or App 578, 602, 341 P3d 790
3 (2014):

4 "An elected local official's 'intense involvement in the affairs of the
5 community' or 'political predisposition' is not grounds for
6 disqualification. Involvement with other governmental
7 organizations that may have an interest in the decision does not
8 require disqualification. An elected local official is not expected to
9 have no appearance of having views on matters of community
10 interest when a decision on the matter is to be made by an
11 adjudicatory procedure.

12 "In addition to those general observations, there are three salient
13 principles from the case law that define and drive our analysis in this
14 case. *First*, the scope of the 'matter' and 'question at issue' is
15 narrowly limited to the specific decision that is before the tribunal.
16 *Second*, because of the nature of elected local officials making
17 decisions in quasi-judicial proceedings, the bias must be actual, not
18 merely apparent. And *third*, the substantive standard for actual bias
19 is that the decision maker has so prejudged the particular matter as
20 to be incapable of determining its merits on the basis of the evidence
21 and arguments presented."

22 Petitioner has not established that simply because councilor Turner-Wise is
23 related to individuals who own property close to petitioner's property and/or
24 serve the city in paid or unpaid volunteer capacities, and who according to
25 petitioner oppose his project, Turner-Wise's vote denying petitioner's rezone
26 application was motivated by improper bias.

27 Petitioner also alleges that Turner-Wise has a "conflict of interest" as
28 defined in ORS 244.020(1) that should have prevented her from voting. ORS
29 244.020(1) defines "[a]ctual conflict of interest" as "any action or any decision

1 or recommendation by a person acting in a capacity as a public official, the effect
2 of which would be *to the private pecuniary benefit or detriment* of the person or
3 the person's relative or any business with which the person or a relative of the
4 person is associated." (Emphasis added.) Petitioner argues that Turner-Wise has
5 a conflict of interest because a vote to approve his application would have
6 resulted in a detriment to Turner-Wise in harmed familial and personal
7 relationships. Petition for Review 30.

8 Petitioner's partial summary of the statute, and his argument at Petition for
9 Review 30, significantly omit of the word "pecuniary," before "benefit."
10 Petitioner does not argue that Turner-Wise or her relatives have any financial or
11 pecuniary interest in the outcome of his application and accordingly, his
12 argument provides no basis for reversal or remand.

13 Finally, petitioner does not develop any cognizable argument regarding the
14 other city councilor, John Hughto, that is mentioned in the petition for review or
15 otherwise explain why he is biased. Mr. Hughto's motion years ago to rezone
16 property owned by Mr. Woodley does not establish bias. Petition for Review 24.
17 Similarly, petitioner does not develop his argument, raised for the first time in his
18 reply brief, that the city mayor was biased.

19 The first assignment of error is denied.

1 **SECOND ASSIGNMENT OF ERROR**

2 In his second assignment of error, petitioner alleges the city's denial of his
3 application amounts to a violation of Article I, section 20 of the Oregon
4 Constitution, which provides:

5 "No law shall be passed granting to any citizen or class of citizens
6 privileges, or immunities, which, upon the same terms, shall not
7 equally belong to all citizens."

8 In support of his argument, petitioner argues that because he is a resident of
9 California the city treated him differently, and imposed a higher burden of proof
10 on his application than a similar application that the city approved in 1999.

11 The city responds that petitioner failed to raise the issue during the
12 proceedings below and is therefore precluded from raising the issue for the first
13 time at LUBA. ORS 197.835(3) ("Issues shall be limited to those raised by any
14 participant before the local hearings body as provided by ORS 197.195 or
15 197.763, whichever is applicable.") In his reply brief, petitioner responds by
16 citing Record 14-15. We have reviewed Record 14-15, and we conclude that
17 petitioner did not raise the issue raised in his second assignment of error at Record
18 14-15.

19 However, even if we assume for purposes of this opinion that petitioner is
20 not precluded by ORS 197.835(3) from raising the issue raised in the second
21 assignment of error, we reject petitioner's argument. First, petitioner does not
22 attempt to explain how the decision that is before us in this appeal – the city's

1 decision denying his zone change application – could possibly be viewed as a
2 "law" that grants "privileges or immunities."

3 Second, while the Oregon Supreme Court has held that arbitrary
4 application of facially neutral laws could implicate Article I, section 20, *In re*
5 *Gatti*, 330 Or 517, 534, 8 P3d 966 (2000) (*citing State v. Clark*, 291 Or 231, 239,
6 630 P2d 810 (1981)), an argument that the city denied petitioner's zone change
7 application while (1) in 1999 approving a zone change application from
8 Commercial to Residential for property adjacent to his property and (2) in 2018
9 approving a zone change from Public to Residential for property also located
10 within the city, falls far short of establishing a meritorious Article I, section 20
11 claim. That is particularly the case where petitioner has failed to establish that the
12 other approved applications are factually identical to his application and that
13 there are not factual differences in those applications that could explain the
14 different results.

15 The second assignment of error is denied.

16 **THIRD, FOURTH, AND FIFTH ASSIGNMENTS OF ERROR**

17 **A. Background**

18 ORS 227.178(3) provides that the city's approval or denial of an
19 application for a zone change "shall be based upon the standards and criteria that
20 were applicable at the time the application was first submitted." ORS
21 197.175(2)(d) similarly requires the city to make land use decisions "in
22 compliance with the acknowledged plan and land use regulations." Malin Land

1 Use and Development Ordinance (LUDO) 152.087(2) sets out the criteria that
2 apply to an application for a zone change:

3 "The requested zone change * * * must be justified by proof that:

4 "(a) The change is in conformance with the comprehensive plan
5 and also the goals and policies of the plan. [Criterion 1]

6 "(b) The showing of public need for the rezoning and whether that
7 public need is best served by changing the zoning
8 classification on that property under consideration. [Criterion
9 2]

10 "(c) The public need is best served by changing the classification
11 of the subject site in question as compared with other
12 available property. [Criterion 3]

13 "(d) The potential impact upon the area resulting from the change
14 has been considered." [Criterion 4].

15 The city council found that petitioner failed to satisfy his burden to
16 establish that any of LUDO 152.087(2)'s criteria were met. Record 2-4. Where a
17 local government denies a land use application on multiple grounds, LUBA will
18 affirm the decision on appeal if at least one basis for denial survives all
19 challenges. *Wal-Mart Stores, Inc. v. Hood River County*, 47 Or LUBA 256, 266,
20 *aff'd*, 195 Or App 762, 100 P3d 218 (2004). In that circumstance, the Board
21 typically does not address challenges directed at other, alternate, bases for denial.
22 Addressing alternate bases for denial once LUBA has affirmed at least one valid
23 basis for denial would result in rendering what are essentially advisory
24 adjudications, which is not consistent with the statutory mandate that LUBA's

1 review should be conducted pursuant to sound principles of judicial review. ORS
2 197.805.

3 We sustain below the city's conclusion that petitioner failed to demonstrate
4 that Criterion 2 is satisfied and reject petitioner's evidentiary and findings
5 challenges to that conclusion. However, to the extent petitioner's assignments of
6 error contain overlapping arguments that relate to Criterion 2, we address them
7 below.

8 **B. Third, Fourth, and Fifth Assignments of Error**

9 Petitioner's third, fourth, and fifth assignments of error include
10 overlapping arguments challenging the city's decision that none of Criterion 1
11 through 4 were met, and we address those assignments of error here together.

12 In his third and fifth assignments of error, we understand petitioner to
13 argue that substantial evidence in the record supports a conclusion that Criterion
14 1 through 4 are satisfied, and that in considering whether Criterion 4 was met, the
15 city applied an incorrect standard to its consideration of the evidence submitted
16 by petitioner to support his application. ORS 197.835(9)(a)(C).

17 In his third assignment of error, and a portion of his fifth assignment of
18 error, we also understand petitioner to argue that the city improperly construed
19 Criterion 1 when the city council relied, in part, on the purpose of the Malin
20 Comprehensive Plan (MCP) commercial plan map designation to conclude that
21 petitioner had failed to demonstrate that the application satisfied Criterion 1 by
22 addressing that purpose. ORS 197.835(9)(a)(D). According to petitioner, the

1 purpose of the commercial plan designation is not relevant to his application for
2 a zone change from Commercial to Residential, and the city therefore was not
3 entitled to rely on it to find that petitioner's application failed to meet Criterion
4 1.[4] In a portion of his fifth assignment of error, we also understand petitioner to
5 argue that the city failed to adopt findings addressing the sections of the MCP
6 that petitioner did rely on to support his application, which are mainly the sections
7 of the MCP that relate to the provision of housing. Petition for Review 59.[5]
8 In his fourth assignment of error, we understand petitioner to argue that all
9 of the city's findings are inadequate and fail to explain the basis for the city's
10 denial of his application. Petition for Review 54-56. Finally, in a portion of his
11 fourth assignment of error, we also understand petitioner to argue that the staff
12 report at Record 70 is not substantial evidence to support the city council's
13 decision that Criterion 2 is not met, because the staff report's conclusion that the
14 city has enough residential land but a shortage of commercial land fails to
15 distinguish between what petitioner labels "vacant" residential land and
16 "undeveloped" residential land. Petition for Review 56.

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[4] The MCP provides that the purpose of the Commercial plan designation is "[t]o provide areas suitable and desirable for those retail, service, tourist and other similar commercial activities which are needed in the community."

[5] These include MCP Goal XIV, "Urbanization," Policy 2; Goal X, "Housing," statement, and Chapter II, "Land Use Planning Process," Policy 10. Petition for Review 60-61.

1. Substantial Evidence

LUBA is authorized to reverse or remand a local government's land use decision if the local government "[m]ade a decision not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C). In support of his challenge to the city's conclusion that Criterion 2 was not met, the petition for review cites and relies on evidence submitted by petitioner that the city is experiencing a housing shortage and that rezoning a portion of his property to residential would alleviate that shortage because petitioner intends to build housing on his property if it is rezoned. The petition for review also cites and relies on arguments from petitioner, made below, that provisions of the MCP that address the city's housing needs support a determination that petitioner has met his burden of showing that there is "a public need for the rezoning * * *" under Criterion 2.

The staff report that the city council cited and relied on its decision addressed the availability of commercially and residentially-zoned land at the time of petitioner's application. The staff report concluded that, at the time of petitioner's application, approximately 26 percent of the 10.5 acres zoned Commercial were vacant, and that approximately 34 percent of the 178 acres zoned Residential were vacant. The staff report concluded that the city currently

1 has more residential land available than it needs, but less commercial land
2 available than it needs.[6] Record 2-4, 70.

3 Petitioner challenges the reliability of the staff report and argues that it
4 fails to distinguish between what petitioner labels "vacant available" residential
5 land and "undeveloped" residential land, and argues that there is not any "vacant"
6 residentially zoned land in the city. Petition for Review 56. Petitioner also cites
7 evidence that in 2005 the city annexed approximately 40 acres located within the
8 city's urban growth boundary, and we understand petitioner to argue, the city has
9 in part with that annexation created a surplus of available land. Petition for
10 Review 60. As we explained above in the section addressing the reply brief, we
11 review the city's decision based on evidence in the record, and we do not consider
12 the appendix to the reply brief or petitioner's argument that relies on that
13 evidence.

14 Substantial evidence is evidence in the whole record that a reasonable
15 person would rely upon to conclude that applicable approval criteria have been
16 met. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger*
17 *v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988). A reasonable person
18 could conclude, based on the staff report, that the city possesses more
19 residentially zoned land than it needs to meet current demand for housing, and

[6] Petitioner does not argue that the city was required to rely on the city's current, acknowledged comprehensive plan, the MCP, which was adopted in 1980 and has not been updated since that time.

1 that therefore there is not a public need for more residentially zoned land.
2 Petitioner's arguments challenging the staff report do not undercut its credibility
3 or demonstrate that the city council erred in relying on it to support its conclusion
4 that petitioner did not demonstrate a "public need" for the zone change, where
5 the city has more residentially zoned land to meet demand than it needs.

6 The city council's finding regarding Criterion 4 concludes that "[n]o
7 *significant* evidence was presented by the Applicant regarding the impact upon
8 the area, and certainly nothing indicating that the impact would be minimal or
9 positive." Record 3 (emphasis added). Petitioner argues that in that finding, the
10 city council improperly applied a deferential evaluation of the evidence submitted
11 by petitioner to support his application. Petition for Review 49-50. The city
12 responds, and we agree, that the city council's findings are merely an expression
13 of its evaluation of the evidence submitted by petitioner as lacking in both
14 sufficient qualitative and quantitative substance to demonstrate compliance with
15 Criterion 4, rather than the application of a higher burden of proof or persuasion
16 than otherwise required.

17 We have held that the decision maker's task is not to determine whether
18 the applicant has provided "substantial evidence" to support compliance with
19 approval standards, but to weigh all of the evidence to determine whether the
20 applicant has met its burden of proof to demonstrate that the approval standards
21 are satisfied. *Warren v. Washington County*, __ Or LUBA __ (LUBA No. 2018-
22 045, August 20, 2018) (slip op at 12), *aff'd*, 296 Or App 595, 439 P3d 581 (2019);

1 *see also Morgan v. Jackson County*, __ Or LUBA __ (LUBA No 2017-053, Sept
2 13, 2018) (the fact-finder's role in determining whether to approve an application
3 for a permit or zone change is to determine whether, based on the whole record,
4 the applicant has met its burden of proof and persuasion in establishing that the
5 applicable standards are met; that determination is fundamentally non-deferential
6 in nature). We agree with the city that the city did not impermissibly shift the
7 burden of persuasion to petitioner, because petitioner has the ultimate burden of
8 establishing that his application complies with applicable criteria. LUDO
9 152.087(A)(1) provides that "[t]he burden in all land use proceedings is upon the
10 applicant, whether a zone change, conditional use or variance is the subject of the
11 hearing." We also agree with the city that the city's findings do not impermissibly
12 apply a deferential standard to evaluate the evidence, particularly in light of the
13 absence of any evidence in the record that petitioner points to that demonstrates
14 compliance with Criterion 4.

15 **2. Improper Construction**

16 LUBA is authorized to reverse or remand a decision if the local
17 government "[i]mproperly construed the applicable law." ORS 197.835(9)(a)(D).
18 In his third assignment of error and a portion of his fifth assignment of error, we
19 also understand petitioner to argue that the city improperly construed Criterion 1
20 when the city council relied in part on the purpose of the MCP commercial plan
21 map designation to conclude that petitioner had failed to demonstrate that the

1 application satisfied Criterion 1.[7] ORS 197.835(9)(a)(D). According to
2 petitioner, the purpose of the commercial plan designation is not relevant to his
3 application for a zone change from Commercial to Residential, and the city
4 therefore was not entitled to rely on it to find that petitioner's application failed
5 to meet Criterion 1. The city responds, and we agree, that the city council properly
6 construed Criterion 1 to require an application to rezone property from
7 commercial to residential to demonstrate how the application complies with the
8 purpose of the commercial designation, and to require petitioner to address the
9 city's limited amount of commercially zoned property identified in the staff
10 report. Petitioner has not established that the city council's interpretation of
11 Criterion 1 as requiring petitioner to address how his application to rezone
12 property from Commercial to Residential satisfies the purpose of the commercial
13 plan designation is inconsistent with the express language of the LUDO or the
14 MCP, or with the underlying purpose or policy for the provision. Accordingly,
15 we affirm that interpretation. ORS 197.829(1)(a)-(c); *Siporen v. City of Medford*,
16 349 Or 247, 259, 243 P3d 776 (2010).

17 **3. Adequate Findings**

18 Generally, findings must: (1) identify the relevant approval standards, (2)
19 set out the facts which are believed and relied upon, and (3) explain how those

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[7] The purpose of the commercial plan map designation is, in part, "[t]o provide areas suitable and desirable for those retail, service, tourist and other similar commercial activities which are needed in the community."

1 facts lead to the decision on compliance with the approval standards. *Heiller v.*
2 *Josephine County*, 23 Or LUBA 551, 556 (1992). Adequate findings must
3 generally address legitimate issues raised below regarding compliance with
4 approval criteria. *Norvell v. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d
5 896 (1979).

6 Petitioner does not address or challenge any specific findings that the city
7 council adopted, or otherwise explain why the findings the city council did adopt
8 are inadequate. Although the city's findings are not lengthy, the findings
9 regarding each criterion explain the basis for the city's decision in a manner that
10 satisfies the obligation to adopt adequate findings.

11 However, citing *OnTrack, Inc. v. City of Medford*, 37 Or LUBA 472
12 (2000), petitioner argues that "a city's findings of noncompliance with an
13 approval criterion must suffice to explain to the applicant what steps need to be
14 taken to demonstrate compliance, or why the application cannot gain approval
15 under that criterion."[8] Petition for Review 53.

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[8] In *OnTrack*, we held in the context of a zone change from single-family residential to multi-family residential that the city's findings were insufficient to explain why the city concluded that an intersection not adjacent to, and located some distance from, the subject property "serve[d] the property" within the meaning of an applicable approval criterion, where the city denied the application on the basis that that intersection was failing and the requested zone change would cause more severe failure. We remanded for the city council to interpret the relevant approval criterion in the first instance because the city's decision did not include an interpretation that was adequate for our review. *Id.* at 477-79.

For the reasons that follow, we conclude that the city's findings are adequate to explain why the application cannot gain approval under Criterion 2. The city's findings regarding Criterion 2 cite the staff report in support of the city's conclusion that petitioner failed to demonstrate a "public need" for the zone change because "there is a scarcity of commercial property within the City and that scarcity is greater than the availability of other property zoned residential." Record 3. As noted above, the staff report concluded that, at the time of petitioner's application, approximately 26 percent of the 10.5 acres zoned Commercial were vacant, and that approximately 34 percent of the 178 acres zoned residential were vacant. Essentially, the city concluded that the application cannot satisfy Criterion 2 as long as there is an undersupply of commercially zoned land and enough residentially zoned land in the city.

Moreover, while the city's findings fail to address the MCP housing policies that petitioner cited and relied on in support of his application, the city is not obligated to address every argument made during the proceedings below. Petitioner also does not explain why the MCP housing policies have any bearing on the evidence in the record that the city has more residential land than needed and proportionally less commercial land than residential land. It is reasonably clear that the city found the housing policies cited by petitioner to be not particularly relevant in light of that evidence. Accordingly, petitioner's argument that the city erred in failing to address the MCP housing policies that petitioner

1 relied on in support of his application provides no basis for reversal or remand of
2 the decision
3 The third, fourth, and fifth assignments of error are denied.
4 The city's decision is affirmed.