

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

3  
4   PHYLLIS R. LUCIER,                           )  
5    )  
6                    Petitioner,                    )           LUBA No. 93-124  
7    )  
8            vs.                                    )           FINAL OPINION  
9    )           AND ORDER  
10   CITY OF MEDFORD,                           )  
11    )  
12                    Respondent.                    )

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14  
15            Appeal from City of Medford.

16  
17            Joel B. Reeder, Medford, filed the petition for review  
18 and argued on behalf of petitioner.

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20            Ronald L. Doyle, Medford, filed the response brief and  
21 argued on behalf of respondent.

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23            HOLSTUN, Referee; KELLINGTON, Chief Referee; SHERTON,  
24 Referee, participated in the decision.

25  
26                    REMANDED   11/16/93

27  
28            You are entitled to judicial review of this Order.  
29 Judicial review is governed by the provisions of ORS  
30 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city ordinance changing the  
4 comprehensive plan map designation for a .33 acre lot from  
5 Urban Residential to Urban High Density Residential.

6 **FIRST ASSIGNMENT OF ERROR**

7 In her first assignment of error, petitioner contends  
8 the city failed to adopt findings in support of its  
9 decision. Petitioner concedes the applicant submitted  
10 proposed findings and the staff report includes findings  
11 supporting the challenged decision. However, petitioner  
12 contends the city council's decision does not adopt those  
13 findings in support of the challenged ordinance.

14 In Gonzalez v. Lane County, 24 Or LUBA 251, 259 (1992),  
15 we explained as follows;

16 "[I]f a local government decision maker chooses to  
17 incorporate all or portions of another document by  
18 reference into its findings, it must clearly (1)  
19 indicate its intent to do so, and (2) identify the  
20 document or portions of the document so  
21 incorporated. A local government decision will  
22 satisfy these requirements if a reasonable person  
23 reading the decision would realize that another  
24 document is incorporated into the findings and,  
25 based on the decision itself, would be able both  
26 to identify and to request the opportunity to  
27 review the specific document thus incorporated."  
28 (Footnote omitted.)

29 In the omitted footnote we explained "[s]tating that a  
30 particular document is 'incorporated by reference as  
31 findings' is certainly the clearest way of expressing" an

1 intent to adopt a separate document as findings.

2 In the decision challenged in this appeal, the city  
3 council provides as follows:

4 "[T]he [City] Council has determined that the  
5 proposed map change satisfies the applicable  
6 criteria as demonstrated by the Staff Report and  
7 applicant's findings, attached hereto, marked  
8 Exhibit A, and incorporated herein by reference \*  
9 \* \*." Record 10.

10 Petitioner argues that because the city council uses  
11 the words "as demonstrated" and does not explicitly say it  
12 adopts the referenced staff report and applicant's findings  
13 as its own, the challenged decision does not adopt the staff  
14 report and applicant's findings as findings in support of  
15 the challenged decision.

16 We reject petitioner's argument. Under Gonzalez,  
17 supra, the above quoted language in the decision is  
18 sufficient to adopt and incorporate the attached staff  
19 report and applicant's findings as findings in support of  
20 the challenged decision. As the Oregon Supreme Court  
21 explained in Sunnyside Neighborhood v. Clackamas Co. Comm.,  
22 280 Or 1, 20-21, 569 P2d 1063 (1977), "[n]o particular form  
23 is required [for adequate findings] and no magic words need  
24 be employed."

25 The first assignment of error is denied.

26 **SECOND ASSIGNMENT OF ERROR**

27 Under this assignment of error, petitioner challenges  
28 the adequacy of the city's findings to address comprehensive

1 plan criteria for plan map amendments. We first address  
2 respondent's contention that petitioner waived her right to  
3 challenge the city's findings and the evidentiary support  
4 for those findings.

5 **A. Waiver**

6 Respondent contends petitioner waived her right to  
7 challenge the adequacy of the city's findings by failing to  
8 challenged the adequacy of the applicant's proposed findings  
9 or the findings in the staff report during the local  
10 proceedings. Respondent also contends petitioner similarly  
11 waived her right to challenge the evidentiary support for  
12 the city's findings by failing to challenge the evidentiary  
13 support for those findings during the local proceedings.  
14 See ORS 197.763(1) and 197.835(2); Boldt v. Clackamas  
15 County, 107 Or App 619, 813 P2d 1078 (1991).<sup>1</sup>

16 The references in ORS 197.763(1) and 197.835(2) to  
17 "issues" are references to issues concerning the substantive  
18 and procedural requirements that must be satisfied in  
19 rendering the challenged decision. Therefore, if a  
20 petitioner wishes to argue that a particular approval  
21 criterion or procedural requirement is not satisfied by a  
22 proposed land use action, the petitioner must raise the

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<sup>1</sup>ORS 197.835(2) requires that issues raised at LUBA have been "raised by any participant before the local hearings body as provided by ORS 197.763." ORS 197.763(1) provides, in part, that issues raised at LUBA must "be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government."

1 "issue" of compliance with that criterion below. However,  
2 contrary to respondent's suggestion, a petitioner is not  
3 required to anticipate the actual findings a local  
4 government ultimately adopts in support of its final  
5 decision or question the adequacy of the evidence accepted  
6 into the record to support such findings.

7 In order to preserve the right to challenge at LUBA the  
8 adequacy of the adopted findings to address a relevant  
9 criterion or the evidentiary support for such findings, a  
10 petitioner must challenge the proposal's compliance with  
11 that criterion during the local proceedings. Once that is  
12 done, the petitioner may challenge the adequacy of the  
13 findings and the supporting evidence to demonstrate the  
14 proposal complies with the criterion. The particular  
15 findings ultimately adopted or evidence ultimately relied on  
16 by the decision maker need not be anticipated and  
17 specifically challenged during the local proceedings.

18 **B. Compliance with Plan Amendment Criteria**

19 The portions of petitioner's findings challenge that  
20 are sufficiently developed for review are discussed below.<sup>2</sup>  
21 Petitioner challenges the adequacy of the findings included  
22 in the staff report and the applicant's findings to address  
23 the City of Medford Comprehensive Plan Criteria for Plan

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<sup>2</sup>Petitioner's other arguments under this assignment of error concerning the adequacy of the city's findings are inadequately developed for review. For that reason, they are rejected.

1 Amendments (hereafter plan amendment criteria). As  
2 relevant, those plan amendment criteria provide as follows:

3 "[T]he criteria [listed below] must be considered  
4 when evaluating proposed amendments to [the] Plan  
5 \* \* \*. While all of the criteria may not apply to  
6 each proposed amendment, all must be considered  
7 when developing substantive findings supporting  
8 final action on the amendment, and those criteria  
9 which are applicable must be identified and  
10 distinguished from those which are not.

11 \* \* \* \* \*

12 "Map Designations - Amendments shall be based on  
13 the following:

14 "1. A significant change in one or more Goal,  
15 Policy, or Implementation strategy.

16 "2. Demonstrated need for the change to  
17 accommodate unpredicted population trends, to  
18 satisfy urban housing needs, or to assure  
19 adequate employment opportunities.

20 "3. The orderly and economic provision of key  
21 public facilities.

22 "4. Maximum efficiency of land uses within the  
23 current urbanizable area.

24 "5. Environmental, energy, economic and social  
25 consequences.

26 "6. Compatibility of the proposed change with  
27 other elements of the City Comprehensive  
28 Plan.

29 "7. All applicable Statewide Planning Goals.

30 "\* \* \* \* \*." City of Medford Comprehensive Plan,  
31 Review and Amendments 2-3.

32 **1. Staff Report**

33 Petitioner contends the staff report fails to satisfy

1 the above requirement that the applicable plan amendment  
2 criteria be distinguished from the criteria that are not  
3 applicable. Petitioner contends the findings either dismiss  
4 the criteria as irrelevant, without explaining why that may  
5 be so, or conclude the criteria are not offended because the  
6 subject property is relatively small. Petitioner contends  
7 the city's findings are required to provide an explanation  
8 concerning the applicability of the plan amendment criteria  
9 and the proposal's compliance with any applicable criteria.

10 We agree with petitioner that the findings in the staff  
11 report are inadequate to identify which plan amendment  
12 criteria are applicable and why the proposal satisfies the  
13 applicable criteria. The comparatively small size of the  
14 property, and the limitations that size may impose on the  
15 scope of possible development and likely impacts from that  
16 development, may well provide bases for findings  
17 demonstrating compliance with one or more of the applicable  
18 criteria. For example, the "economic and social  
19 consequences" clearly could be affected by the size of the  
20 property. However, the city must develop such explanatory  
21 findings; it may not simply cite the small size of the  
22 property and conclude the standard is met.<sup>3</sup>

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<sup>3</sup>The findings in the staff report on the economic and social consequences of the proposal under plan amendment criterion 5 are as follows:

"Economic & Social

1                   **2. Applicant's Findings**

2           Petitioner faults the applicant's findings because in  
3 most cases those findings are worded as assertions of fact  
4 the city council "can find." Petitioner contends that just  
5 because the city "can find" a particular fact, it does not  
6 follow that the city found such a fact. With regard to the  
7 seven plan amendment criteria, petitioner apparently  
8 concedes the applicant's findings address the requirements  
9 set out in criteria 1, 2, 4, 6 and 7, but petitioner  
10 contends those findings do not address criteria 3 and 5 at  
11 all.

12           For essentially the same reasons given in our  
13 discussion under the first assignment of error, we believe  
14 it is sufficiently clear from the city's findings that the  
15 city council adopted the applicant's proposed assertions of  
16 fact as its own findings of fact. Without a more developed  
17 argument concerning the adequacy of the findings to address  
18 criteria 1, 2, 4, 6 and 7, and in view of petitioner's  
19 concession that the findings identify and address those  
20 criteria, we do not further consider the adequacy of the  
21 city's findings concerning criteria 1, 2, 4, 6 and 7.

22           Respondent makes no attempt to identify findings in  
23 either the staff report or applicant's findings addressing

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"Given the small size of the overall area (0.33 acres), the economic and social considerations of the proposal are insignificant." Record 13.

1 criteria 3 and 5. While the staff report does include some  
2 findings addressing criteria 3 and 5, in its brief  
3 respondent relies entirely on its waiver argument and does  
4 not attempt to defend the adequacy of the staff report  
5 findings addressing criteria 3 and 5. In any case, we have  
6 already concluded the staff report findings are inadequate  
7 to address the plan amendment criteria, including criteria 3  
8 and 5.

9 The second assignment of error is sustained, in part,  
10 with regard to inadequacy of the findings to address plan  
11 amendment criteria 3 and 5.

12 **THIRD ASSIGNMENT OF ERROR**

13 Under this assignment of error, petitioner challenges  
14 the adequacy of the evidence to support the city's findings  
15 of compliance with plan amendment criterion 5, with regard  
16 to economic and social consequences.<sup>4</sup> Petitioner identifies  
17 evidence in the record which she contends shows that the  
18 economic and social consequences of the proposal will not be  
19 "insignificant." Petitioner contends the city's finding  
20 that those consequences will be insignificant is not  
21 supported by substantial evidence in the record.

22 Respondent identifies no evidence supporting the  
23 challenged finding and relies entirely on its waiver  
24 argument. We have rejected the waiver argument and will not

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<sup>4</sup>See n 3, supra.

1 search the record for evidence supporting the challenged  
2 finding without assistance. See Eckis v. Linn County, 110  
3 Or App 309, 313, 821 P2d 1127 (1991).

4 The third assignment of error is sustained.

5 The city's decision is remanded.