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AFFIRMED

09/04/96

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

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a legislative decision to adopt the
4 city's Central City Transportation Management Plan (CCTMP)
5 and corresponding amendments to the city zoning ordinance
6 (PZO).

7 **MOTION TO INTERVENE**

8 Melvin Mark Development Company and Taylor-Pacific
9 Limited Partnership move to intervene on the side of the
10 petitioner.¹ City Center Parking and Downtown Development
11 Group (intervenors) move to intervene on the side of the
12 respondent. There is no opposition to either motion, and
13 both are allowed.

14 **MOTION TO APPEAR AS AMICUS**

15 Pursuant to OAR 661-10-052, Neil E. Goldschmidt
16 (Goldschmidt) moves to appear as an amicus in this
17 proceeding. Intervenors oppose the motion on two grounds:
18 (1) the motion is untimely; and (2) the motion raises new
19 issues and submits additional evidence.

¹In its brief, petitioner adopts intervenor-petitioners' assignments of error and arguments as its own, while suggesting that the challenged decision was motivated by favoritism on the part of the city toward intervenor-respondents City Center Parking and Downtown Development Group. To the extent petitioner makes an argument related to improper bias, see, e.g. 1000 Friends of Oregon v. Wasco Co. Court, 304 Or 76, 742 P2d 39 (1987), the argument is not sufficiently developed to permit review. Deschutes Development v. Deschutes Cty., 5 Or LUBA 218 (1982). We therefore make no further reference to petitioner individually, and refer to both petitioner and intervenor-petitioners as "petitioners."

1 OAR 661-10-052(2) states that amicus briefs "shall be
2 filed * * * within the time required for filing respondent's
3 brief." The last day allowed by our rules for filing a
4 respondent's brief was May 7, 1996. Goldschmidt's motion
5 and an accompanying amicus brief were not filed until June
6 17, 1996, eight days before oral argument on June 25, 1996.
7 Goldschmidt provides no explanation of the late filing.
8 Intervenors contend they were substantially prejudiced by
9 Goldschmidt's failure to comply with our rules, because they
10 were unable to prepare a response to the amicus brief within
11 the limited time available before oral argument.

12 A party that does not follow our rules takes a risk it
13 will be denied the relief it seeks at LUBA. Save Amazon
14 Coalition v. City of Eugene, 30 Or LUBA 448, 452 (1995).
15 Intervenors make a colorable claim that the late filing of
16 Goldschmidt's motion to appear as an amicus substantially
17 prejudiced them by limiting their opportunity to respond,
18 particularly since the amicus brief submitted with the
19 motion contains evidence not found in the record and
20 arguments not found in petitioners' briefs. Without
21 reaching intervenors' second ground, we deny Goldschmidt's
22 motion on the ground it is untimely, and do not consider the
23 amicus brief.

24 **FACTS**

25 The "General Findings" stated in Ordinance 169535,
26 provisions of which are challenged in this appeal, provide a

1 factual background for the city's decision:

2 "1. In March 1988, the City Council adopted the
3 Central City Plan to guide the growth and
4 livability of the Central City area.^[2]
5 Policy 4, Transportation_[,] of the Central
6 City Plan called for an improvement in the
7 Central City's accessibility to the rest of
8 the region and its ability to accommodate
9 growth while maintaining livability.

10 "2. In September 1990, the Portland City Council
11 adopted Resolution 34771 which established a
12 process for developing a Central City
13 Transportation Management Plan (CCTMP). The
14 Plan was developed in several phases with a
15 structure of public and private sector
16 involvement on all levels of planning effort.

17 "3. The purpose of the CCTMP is to maintain air
18 quality, promote economic development,
19 support an efficient transportation system,
20 and encourage the use of alternative modes of
21 travel.

22 "4. The City of Portland adopted its
23 Comprehensive Plan on October 16, 1980
24 (effective date January 1, 1981). The Plan
25 was acknowledged as being in conformance with
26 Statewide Goals for Land Use Planning. The
27 plan complied with State Goal 12. The Land
28 Conservation and Development Commission's
29 Administrative Rule for Goal 12 (660-12),
30 adopted April 1991, subsequently imposed
31 additional requirements on local
32 jurisdictions to achieve compliance with
33 Goal 12.

34 "5. The CCTMP updates the Transportation Goal and

²The Central City Plan includes eight districts. The downtown core is one such district. Record 42. The Central City Plan updated and incorporated the Downtown Plan, which was adopted in 1972 (and first updated in 1980) to revitalize the central business district. The Central City Plan is part of the city's comprehensive plan. Record 44.

1 Policies to comply with State Goal 12 and the
2 Transportation Planning Rule and replaces the
3 Downtown Parking and Circulation Policy.^[3,4]

4 "6. The Commentary in the Planning Commission
5 Recommendation on Amendments to the Zoning
6 Code constitutes the Report of the Planning
7 Commission. It is additional findings in
8 support of the directives of this ordinance
9 and reflects legislative intent." Record 5.

10 Prior to adoption of Ordinance 169535, the city
11 provided diverse and numerous opportunities for public
12 participation and input, including citizen workshops and
13 public hearings before the planning commission. The
14 planning commission then published a recommended draft of
15 the CCTMP and implementing regulations in October 1995. On
16 November 29, 1995, the city council held a public hearing on
17 all elements of the recommended draft. On December 6, 1995,
18 the city council adopted Ordinance No. 169535, which
19 contains the CCTMP and the PZO amendments which implement
20 the CCTMP.

21 This appeal followed.

22 **FIRST ASSIGNMENT OF ERROR**

23 Ordinance 169535 both adopts the CCTMP and amends the
24 PZO. Petitioners contend certain amendments to the PZO are

³The Downtown Parking and Circulation Policy, first adopted in 1975 and updated in 1980, 1986, 1988, 1991 and 1992, implemented the Downtown Plan's transportation goals and guidelines prior to the adoption of Ordinance 169535. Record 42.

⁴Ordinance 169535 incorporates the CCTMP into the city's comprehensive plan transportation element. Record 41.

1 inconsistent with policies and policy objectives of the
2 CCTMP that they are supposed to implement. Petitioners
3 identify the following CCTMP policies and policy objectives
4 as relevant: Policies 2.3, 2.6, 4.10 (including Policy
5 Objectives 4.10.2 4.10.4 and 4.10.5) and 5.1 (including
6 Policy Objective 5.1.3).⁵

⁵Each policy and objective in the CCTMP is accompanied by an "explanation" that provides "further information about the history or derivation of the policy and how it is implemented through zoning regulations." Record 45. The explanations themselves are thus an integral part of the CCTMP.

The policies and objectives specified by petitioners are as follows:

"Policy 2.3 Priority for Transit

"Support transit as the preferred mode of moving people to increase transportation access to the Central City, with light rail and express bus routes providing the link to urban and suburban centers and urban transit routes connecting close-in City neighborhoods.

"Explanation: The Comprehensive Plan designates transit as the preferred form of person trips to and from the downtown and all regional activity centers (Transportation Element 6.7, Transit First). Transit is not to be viewed simply as a method for reducing peak-hour work-trip congestion on the automobile network, but must serve all trip purposes. A reduction in transit travel times on the regional system, and in the Central City area, to levels approaching automobile travel times, is also required to make transit more appealing.

"There is a need to operate the street system in a manner that benefits transit. Transit preference in lane utilization, traffic signal operations, etc. may be appropriate at key access points, in congested corridors, and in districts or areas that have adopted a 'transit/pedestrian first' strategy that provides transit incentives, service commitments, and development that supports transit and pedestrian travel." Record at 64.

"Policy 2.6: Access Management to Increase Safety and Efficiency

"To enhance the street system's overall efficiency and safety for motor vehicles, transit, bicycles and pedestrians, access to newly developed parking shall be restricted by limiting the number and locations of curb cuts.

"Explanation: To enhance development opportunities in the Central City, the street system must be managed to ensure efficient operations and safety for all modes. Driveways, in particular, if in the wrong location or too many in number, can adversely impact this system by decreasing street capacity or increasing safety conflicts between other vehicles and pedestrians and bicycles, and reduce operating speeds for buses. Streets with restricted access are shown on the Parking Access Restricted Streets map in the Zoning Code. Exceptions to these Parking Access Restricted Streets are based on a demonstration that there are no significant adverse traffic, transit, pedestrian, and bicycle impacts. Exceptions to these Parking Access Restricted Streets are based on a demonstration that there are no significant adverse, transit, pedestrian and bicycle impacts on balance, including adjacent streets."
Record 65.

"Policy 4.10: Compatibility of Parking Structures with Central City Character.

"Ensure that the location, size and ground floor activities of parking structures contribute to a lively and attractive pedestrian environment.

"Objectives:

" * * * * *

"4.10.2 Ensure that parking structures contribute to a lively pedestrian environment by including retail or other uses on the ground floor of the structure.

*"Explanation: Areas have been added to the Required Building Line map in the Zoning Code along streets with a strong pedestrian and transit orientation. * * **

" * * * * *

"4.10.4 Restrict the location of parking structures along the Transit Mall between NW Glisan and SW Mill to support high-density development as established by adopted floor area ratios.

"Explanation: Free-standing parking garages are not allowed within 100 feet of the Fifth and Sixth Avenue Mall between NW Glisan and SW Mill. Freestanding parking structures are prohibited between Fifth and Sixth Avenue between NW Glisan and SW Mill. The intent is to attract the highest density development along this spine consistent with established floor area ratios. Garages proposed to be within 100 feet must apply for an exception. Exceptions to the restriction on location must show a public benefit through the inclusion of multiple levels of transit-supportive development in the parking structure. 'Multiple floors' is defined as requiring a minimum of 0.8 FAR active uses, that must include retail, office, hotel, and/or residential development in the structure. A transportation analysis is completed indicating there are no significant adverse traffic, transit, bicycles, and pedestrian impacts. Access is prohibited on the Fifth and Sixth Avenue Transit Mall between NW Glisan and SW Mill.

"4.10.5 Restrict parking access on light rail transit streets.

"Explanation: Free-standing parking garages are allowed along light rail transit rights-of-way. Freestanding parking structures are prohibited between SW Morrison and SW Yamhill Streets from SW First Avenue to SW 18th Avenue. The Zoning Code contains provisions that restrict access to new parking facilities within 75 feet of a light rail alignment (either has LRT in it or is designated as the Locally Preferred light rail alignment, see Policy 5.1). Where access is restricted, adjustments may be allowed if consistent with this policy and the evaluation criteria in the Zoning Code. The intent is to allow exceptions from the side streets only when a transportation analysis is completed indicating there are no significant adverse traffic, transit, bicycles, and pedestrian impacts. The intent for access on light rail streets is to achieve a public benefit by allowing a parking structure only when multiple floors of transit supportive development uses are included as part of the development and minimize impacts on LRT by not crossing rail tracks for garage access. Multiple floor is defined as requiring a minimum of 0.8 FAR non-parking active uses, that must include one or more of the following, retail, office, hotel, and/or residential development in the structure.

1 The challenged decision is legislative. See Strawberry
2 Hill 4-Wheelers v. Benton Co. Bd. of Comm., 287 Or 591, 601
3 P2d 769 (1979).⁶ Petitioners rely on ORS 197.829(1)(a)-(c),

A transportation analysis indicates no significant adverse traffic, transit, bicycle, and pedestrian impacts." Record 82.

"Policy 5.1 Transit Access

"Improve transit access to the Central City to support its full development potential as envisioned in the Central City Plan.

"Objectives:

"* * * * *

"5.1.3 Protect existing and adopted transit priority corridors (light rail and the Fifth and Sixth Avenues Transit Mall) rights-of-ways to maximize public investments by ensuring its primary transit function, support a healthy pedestrian environment, and minimize adverse traffic impacts. Priority corridors will be designated following completion of the Draft Environmental Impact Statement (DEIS) and adoption of the Locally Preferred Alternative.

"Explanation: The City of Portland protects future transitways two different ways. First, the adopted future transit corridors are identified in Metro's Regional Transportation Plan and reinforced in the City's Comprehensive Plan - Transportation Element, Transit Classifications. The City protects these corridors through the review of potential land use development or potential street improvements. Second, the city adopts station area regulation when the Locally Preferred Alternative is selected following the DEIS process.

"The CCTMP uses the street classification maps and classification descriptions to determine what kinds of activities and access are appropriate on each type of street, including LRT rights-of-way." Record 84.

⁶A determination whether a decision is legislative or quasi-judicial must be based upon consideration of the three factors identified by the Oregon Supreme Court in Strawberry Hill 4-Wheelers, and summarized as follows:

1 and cite several LUBA opinions, including DLCD v. Tillamook
2 County, 30 Or LUBA 221 (1995), and Wicks v. City of
3 Reedsport, 29 Or LUBA 8 (1995), in making their argument
4 that amendments to a zoning ordinance must be consistent
5 with the plan policies the zoning ordinance amendments
6 implement. We agree that the zoning ordinance as amended
7 must be consistent with the plan it implements. See Baker
8 v. City of Milwaukie, 271 Or 500, 533 P2d 772 (1975).
9 However, ORS 197.829(1), which states a highly deferential
10 standard of review, does not apply to legislative land use
11 decisions.⁷ ORS 197.829(1), which was enacted in response

-
1. Is the process bound to result in a decision?
 2. Is the decision bound to apply preexisting criteria to concrete facts?
 3. Is the action directed at a closely circumscribed factual situation or a relatively small number of persons?

The more definitely these questions are answered in the negative, the more likely the decision under consideration is a legislative land use decision. Each of the factors must be weighed, and no single factor is determinative. Estate of Paul Gold v. City of Portland, 87 Or App 45, 740 P2d 812, rev den 304 Or 405 (1987).

⁷Under ORS 197.829(1), we must affirm a local government's interpretation of its comprehensive plan and land use regulations, unless we determine that the local government's interpretation:

- "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

1 to the Oregon Supreme Court's opinion in Clark v. Jackson
2 County, 313 Or 508, 514-15, 836 P2d 710 (1992), is expressly
3 limited in its application to interpretations by local
4 governments of comprehensive plan and land use regulations.
5 ORS 197.829(1) does not apply to enactments by local
6 governments of comprehensive plan and land use regulations.

7 Petitioners contend three amendments to the zoning
8 ordinance are inconsistent with the CCTMP.

9 **A. PZO 33.510.263.G.6.**

10 The first amendment identified by petitioners is
11 PZO 33.510.263.G.6, which provides:

12 "6. Parking access

13 "a. Parking access near or on a light rail
14 alignment. Motor vehicle access to any
15 parking area or structure is not allowed
16 within 75 feet of a light rail
17 alignment, unless the access is approved
18 through Central City Parking Review.^[8]

19 "b. Parking access on the Transit Mall.
20 Motor vehicle access to any parking area
21 or structure is prohibited on Fifth and
22 Sixth Avenues between NW Glisan and SW
23 Mill Streets.

24 "c. Parking access on other streets. Motor
25 vehicle access to any parking area or
26 structure is not allowed on the streets

"(d) Is contrary to a state statute, land use goal or rule
that the comprehensive plan provision or land use
regulation implements."

⁸The approval criteria are stated at PCC 33.808.100.J.5, set forth in
note 10, infra.

1 shown on Map 510-9." (Emphasis added.)
2 Record 233.

3 Petitioners contend the emphasized language in
4 PZO 33.510.263.G.6.a, which, upon satisfaction of separate
5 review criteria, allows approval of motor vehicle access to
6 a parking area or structure within 75 feet of a light rail
7 alignment, violates three provisions of the CCTMP: (1)
8 Policy 2.6, which states that "to enhance the street
9 system's overall efficiency and safety * * * access to newly
10 developed parking shall be restricted by limiting the number
11 and locations of curb cuts"; (2) Policy Objective 4.10.5,
12 which states that the city will "[r]estrict parking access
13 on light rail transit streets"; and Policy Objective 5.1.3,
14 which is to

15 "[p]rotect existing and adopted transit priority
16 corridors (light rail and the Fifth and Sixth
17 Avenues Transit Mall) rights-of-ways to maximize
18 public investments by ensuring its primary transit
19 function, support a healthy pedestrian
20 environment, and minimize adverse traffic
21 impacts." Record 65, 82, 84.

22 Petitioners point out that the comparable PZO implementing
23 provision pertaining to transit mall streets,
24 PZO 33.510.263.G.6.b, prohibits direct access to a parking
25 area or parking structure, and argue the city could just as
26 easily have prohibited direct access on light rail transit
27 streets.

28 The city responds that Policy 2.6 is satisfied because
29 the word "restricted" recognizes the possibility of

1 different degrees of restriction, from outright prohibition
2 to less absolute limitations. Moreover, the explanation of
3 Policy 2.6 states that exceptions may be allowed, "based on
4 a demonstration that there are no significant adverse
5 traffic, transit, pedestrian and bicycle impacts." Record
6 65. That demonstration is made by satisfying the criteria
7 in PZO 33.808.100.J.5.⁹

⁹PZO 33.808.100.J.5 provides:

"If the proposal is for new access for motor vehicles within 75 feet of a Light Rail Alignment, but not on the alignment itself, criteria I.5.a through I.5.c, below, apply. If the proposal is for new access for motor vehicles on a Light Rail Alignment, criteria I.5.a through I.5.e, below, apply.

- "a. There will not be a significant adverse impact on transit operations;
- "b. There will not be a significant adverse impact on operation and safety of vehicle and bicycle circulation;
- "c. There will not be a significant adverse impact on the overall pedestrian, bicycle, and transit environment and safety. A driveway is not automatically considered such an impact. On blocks where stations are located, the pedestrian environment on both sides of the streets will be considered and protected;
- "d. Motor vehicles can enter and exit the parking facility without being required to cross the tracks of a light rail alignment;
- "e. The development includes at least 0.8 FAR of retail, office, hotel or residential development in the same structure and on the same block as the parking. The retail, office, hotel or residential development must be on multiple levels. For purposes of this paragraph, net building area will be counted towards this requirement if any portion of the floor to be counted is at or above any adjacent grade." (Emphasis added.) Record 346.

1 The city and intervenors make additional arguments
2 based on evidence found in part of the North-South Transit
3 Corridor Study, which is attached as an exhibit to the
4 city's brief. The study is dated December 21, 1995, five
5 days after the challenged decision. It is not part of the
6 record. OAR 661-10-025. We therefore do not consider the
7 arguments based upon it.

8 We agree with the city that PZO 33.510.263.G.6 is
9 consistent with Policy 2.6. The explanation of Policy 2.6
10 expressly allows exceptions. "Restrict" does not mean
11 "prohibit"; and requiring compliance with the criteria in
12 PZO 33.808.100.J.5 is a form of restriction that satisfies
13 Policy 2.6.¹⁰

14 Next, the city responds that Policy Objective 4.10.5 is
15 satisfied, both because the explanation allows exceptions to
16 the policy under specified circumstances and because, as
17 with Policy 2.6, "restrict" allows a continuum of

¹⁰Webster's Third New International Dictionary 1937 (1981) defines "restrict" as follows:

"1. to set bounds or limits : as **a**: to check free activity, motion, progress, or departure of : RESTRAIN (intellectual snobbery which has tended to ~ men and women from an understanding of religion --A.H. Compton); also : HAMPER, DIMINISH **b**: to check, bound, or decrease the range, scope, or incidence of : set what is to be included or embraced by : bar or carefully govern addition or increment to (countries where literacy was largely ~ed to the upper classes --Helen Sullivan)
2: to place (land) under restrictions as to use (as by zoning ordinances) to place (land) under restrictions as to use (as by zoning ordinances) **syn** see LIMIT

1 limitations, and does not require an absolute prohibition.
2 We agree with the city.

3 Finally, the city responds that PZO 33.510.263.G.6 is
4 consistent with Policy Objective 5.1.3, because the criteria
5 in PZO 33.808.100.J.5, which must be addressed prior to
6 approval of parking access on a light rail transit street,
7 require a determination that certain adverse impacts,
8 including impacts on transit operations, vehicle and bicycle
9 circulation, and overall pedestrian, bicycle and transit
10 environment and safety will not occur. Once again, we agree
11 with the city.

12 **B. PZO 33.808.100.J.5.**

13 PZO 33.808.100.J.6, which governs proposals for parking
14 structures within 100 feet of transit mall streets, states
15 the following requirement:

16 "c. The development includes at least 0.8 FAR of
17 retail, office, hotel or residential
18 development in the same structure and on the
19 same block as the parking. The retail,
20 office, hotel or residential development must
21 be on multiple levels. * * *" Record 159.

22 PZO 33.808.100.J.5 (set forth in note 9, supra), which
23 governs proposals for parking structures along light rail
24 transit streets, states the same requirement, but applies it
25 only to structures with new access for motor vehicles on
26 light rail transit streets.

27 Petitioners contend allowing parking structures to be
28 constructed adjacent to or within 75 feet of a light rail

1 transit street without requiring the property owner to meet
2 the 0.8 FAR requirement violates Policy 4.10 ("Ensure that
3 the location, size and ground floor activities of parking
4 structures contribute to a lively and attractive pedestrian
5 environment") and Policy Objective 4.10.2 ("Ensure that
6 parking structures contribute to a lively pedestrian
7 environment by including retail or other uses on the ground
8 floor of the structure"). Record 81.

9 The city responds that the 0.8 FAR requirement is only
10 one of several ways in which Policy 4.10 and Policy
11 Objective 4.10.2 can be implemented. Other means of
12 implementation, which apply equally to light rail transit
13 streets and transit mall streets, are found in PZO
14 33.510.220 (Ground Floor Windows), PZO 33.510.225 (Retail
15 Opportunity Requirement) and PZO 33.510.215 (Building Lines
16 Requirement). We agree with the city that Policy 4.10 and
17 Policy Objective 4.10.2 may be and are implemented through
18 these other means.

19 **C. PZO 33.808.100.J.5.c.**

20 PZO 33.808.100.J.5.c provides:

21 "There will not be a significant adverse impact on
22 the overall pedestrian, bicycle, and transit
23 environment and safety. A driveway is not
24 automatically considered such an impact. On
25 blocks where stations are located, the pedestrian
26 environment on both sides of the streets will be
27 considered and protected[.]" (Emphasis added.)

28 Petitioners contend the emphasized language is
29 inconsistent with Policy 2.6 and Policy Objectives 4.10.5

1 and 5.1.3, particularly as these restrict curb cuts and
2 parking access and mandate a healthy, safe pedestrian and
3 bicycle environment.

4 The city responds that use of the word "restrict" in
5 Policy 2.6 and Policy Objective 4.10.5 contemplates some
6 driveways will be allowed, and that if driveways were
7 automatically considered a "significant adverse impact,"
8 PZO 33.808.100.J.5.c. would prohibit them absolutely. We
9 agree with the city that the emphasized language is not
10 inconsistent with Policy 2.6 and Policy Objectives 4.10.5
11 and 5.1.3.

12 The first assignment of error is denied.

13 **FOURTH ASSIGNMENT OF ERROR**

14 Petitioners contend that in adopting PZO amendments
15 that provide special privileges to property owners on light
16 rail transit streets and deny the same privileges to
17 property owners on transit mall streets, the city violates
18 the property owners' right to equal privileges and
19 immunities under Article I, section 20 of the Oregon
20 Constitution.¹¹ Petitioners argue that because property in
21 the central city area is not easily transferable, two
22 identifiable classes of property owners exist: first, those

¹¹Article I, section 20, of the Oregon Constitution states:

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

1 with property on light rail transit streets; and second,
2 those with property on transit mall streets. Petitioners
3 contend that membership in the favored class of property
4 owners on light rail transit streets is not open to all on
5 equal terms.

6 Petitioners' contention that property in the central
7 city area is not easily transferable is not supported by
8 citations to the record. Since the law leaves it open to
9 anyone to bring himself or herself within the class of light
10 rail transit street property owners on equal terms, we
11 reject petitioners' attack on the PZO amendments as "class
12 legislation." State v. Clark, 291 Or 231, 240, 630 P2d 810
13 (1981).

14 The fourth assignment of error is denied.

15 **SECOND ASSIGNMENT OF ERROR**

16 Petitioners contend the PZO amendments' different
17 treatment of property owners on transit mall streets and
18 light rail transit streets violates petitioners' right to
19 equal protection of the law under the Fourteenth Amendment
20 to the United States Constitution. The appropriate level of
21 review in this case is the "rational basis test." Under
22 this test, we must ask if a classification bears a rational
23 relationship to an end of government which is not prohibited
24 by the Constitution. Sealey v. Hicks, 309 Or 387, 398, 788
25 P2d 435 (1990).

26 As noted in our discussion of the fourth assignment of

1 error, petitioners have not demonstrated the amendments to
2 the PZO affect separate classes, other than those "classes"
3 created by the amendments themselves. See State v. Clark,
4 supra, at 240. Even if one assumes separate classes exist
5 and are treated differently by the PZO amendments, the
6 difference between modes of transportation on the different
7 streets -- light rail versus bus -- justifies the
8 classification on the ground that it bears a rational
9 relationship to an end of government (i.e., appropriate
10 forms of development) which is not prohibited by the
11 Constitution.

12 The second assignment of error is denied.

13 **THIRD ASSIGNMENT OF ERROR**

14 Petitioners contend the PZO amendments' different
15 treatment of property owners on transit mall streets and
16 light rail transit streets violates petitioners' right to
17 substantive due process under the Fourteenth Amendment to
18 the United States Constitution. Petitioners argue the PZO
19 amendments should be struck down as "clearly arbitrary and
20 unreasonable, having no substantial relation to the public
21 health, safety, morals, or general welfare." Euclid v.
22 Ambler Realty Co., 272 US 365, 395 (1926). See also Village
23 of Belle Terre v. Boraas, 416 US 1, 8 (1974).

24 We do not agree with petitioners that the PZO
25 amendments are arbitrary and unreasonable. The different
26 modes of transportation found on light rail transit streets

1 and transit mall streets justifies the distinctions made in
2 permitting development on the two types of streets.

3 The third assignment of error is denied.

4 **FIFTH ASSIGNMENT OF ERROR**

5 Petitioners contend the city's adoption of the PZO
6 amendments is not supported by an adequate factual base, as
7 required by Goal 2.¹² More specifically, petitioners
8 contend (1) the change from prohibiting direct access to a
9 surface parking area or parking structure to allowing such
10 access under certain conditions; and (2) the different
11 treatment of property owners on the transit mall streets and
12 light rail transit streets is not supported by an adequate
13 factual base.

14 We agree with the city and intervenors that in their
15 discussion of this assignment of error, petitioners have not
16 identified a legal standard that is violated by the PZO
17 amendments. Without a showing by petitioners that an
18 applicable legal criterion has been violated, LUBA cannot
19 grant relief. Schmaltz v. City of Hood River, 22 Or LUBA

¹²Goal 2 is:

"To establish a land use planning process and policy framework as a basis for all decision[s] and actions related to use of land and to assure an adequate factual base for such decisions and actions." (Emphasis added.)

In 1000 Friends of Oregon v. City of North Plains, 27 Or LUBA 372, 377 (1994), we interpreted the "adequate factual base" requirement, as it applies to legislative land use decisions, to be essentially identical to the "substantial evidence" requirement stated in ORS 197.835(7) for quasi-judicial land use decisions.

1 115 (1991).

2 The fifth assignment of error is denied.

3 The city's decision is affirmed.