

1                                   BEFORE THE LAND USE BOARD OF APPEALS

2                                   OF THE STATE OF OREGON

3  
4 SHELTER RESOURCES, INC., JOHN )

5 LAPE, and LAURA COOMES, )

6 )

7                   Petitioners, )

8 )

9                   and )

10 )

11 OREGONIANS IN ACTION and HARLEY )

12 MISHLER, )

13 )

14                   Intervenors-Petitioner, )

15 )

16                   vs. )                   LUBA No. 93-225

17 )

18 CITY OF CANNON BEACH, )

19 )

20                   Respondent. )

21 \_\_\_\_\_ )

22 )                   FINAL OPINION

23 PAUL VISCHER, )                   AND ORDER

24 )

25                   Petitioner, )

26 )

27                   vs. )

28 )                   LUBA No. 93-229

29 CITY OF CANNON BEACH, )

30 )

31                   Respondent, )

32 )

33                   and )

34 )

35 SHELTER RESOURCES, INC., JOHN )

36 LAPE, LAURA COOMES, OREGONIANS IN )

37 ACTION and HARLEY MISHLER )

38 )

39                   Intervenors-Respondent. )

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42                   Appeal from City of Cannon Beach.

43

44                   Steven L. Pfeiffer and Michael R. Campbell, Portland,

45                   filed a petition for review and response brief on behalf of

1 Shelter Resources, Inc., John Lape and Laura Coomes. With  
2 them on the brief was Stoel Rives Boley Jones & Grey.  
3 Michael R. Campbell argued on behalf of Shelter Resources,  
4 Inc., John Lape and Laura Coomes.

1  
2 Paul Visher, Cannon Beach, filed a petition for review  
3 and argued on his own behalf.

4  
5 David B. Smith and Dorothy S. Cofield, Tigard, filed a  
6 petition for review and David B. Smith argued on behalf of  
7 Oregonians in Action and Harley Mishler.

8  
9 Daniel Kearns and Edward J. Sullivan, Portland, filed a  
10 response brief. With them on the brief was Preston Gates &  
11 Ellis. Daniel Kearns argued on behalf of respondent.

12  
13 KELLINGTON, Chief Referee; HOLSTUN, Referee; SHERTON,  
14 Referee, participated in the decision.

15  
16 AFFIRMED 05/16/94

17  
18 You are entitled to judicial review of this Order.  
19 Judicial review is governed by the provisions of ORS  
20 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city decision denying approval of  
4 a tentative subdivision plat.

5 **MOTIONS TO INTERVENE**

6 Oregonians In Action (OIA) and Harley Mishler move to  
7 intervene on the side of petitioners in LUBA No. 93-225.  
8 Shelter Resources, Inc., John Lape, Laura Coomes, Oregonians  
9 In Action and Harley Mishler move to intervene on the side  
10 of respondent in LUBA No. 93-229. There is no objection to  
11 the motions, and they are allowed.

12 **FACTS**

13 The subject property consists of 3.53 acres and is  
14 zoned Residential Medium Density (R-2). Petitioner Shelter  
15 Resources, Inc. (SRI) is the managing general partner of a  
16 development partnership.<sup>1</sup> SRI proposes to develop the  
17 subject property with a 17 lot, 34 duplex, residential  
18 subdivision, a 3,297 square foot children's play area and a  
19 24,625 square foot open space area. The proposed  
20 subdivision will be for "low-income residents, provided that  
21 financing from the U.S. Farmers Home Administration [is]  
22 available for the development." SRI Petition for Review 2.

23 The planning commission denied the proposal, and the

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<sup>1</sup>Although the partnership submitted the disputed development application, for simplicity we refer to SRI as the applicant in this opinion.

1 applicant appealed that decision to the city council. The  
2 city council remanded the application to the planning  
3 commission to consider information concerning trees,  
4 sidewalk location and street paving. Thereafter, the  
5 planning commission again denied the proposal, and the  
6 applicant appealed to the city council. After a public  
7 hearing, the city council affirmed the decision of the  
8 planning commission and denied the application. This appeal  
9 followed.

10 **PRELIMINARY ISSUE**

11 Petitioners argue the challenged decision is a limited  
12 land use decision, and the city argues it is not.  
13 ORS 197.015(12) provides the following definition of limited  
14 land use decision:

15 "Limited land use decision' is a final decision  
16 or determination made by a local government  
17 pertaining to a site within an urban growth  
18 boundary which concerns:

19 "(a) The approval or denial of a subdivision \* \*  
20 \*.

21 "\* \* \* \* \*"

22 The city argues the challenged decision is a land use  
23 decision, not a limited land use decision, because the city  
24 has not yet complied with ORS 197.195(1), which provides as  
25 follows:

26 "A 'limited land use decision' shall be consistent  
27 with applicable provisions of city \* \* \*  
28 comprehensive plans and land use regulations.  
29 Such a decision may include conditions authorized

1 by law. Within two years of September 29, 1991,  
2 cities \* \* \* shall incorporate all comprehensive  
3 plan standards applicable to limited land use  
4 decisions into their land use regulations. A  
5 decision to incorporate all, some or none of the  
6 applicable comprehensive plan standards into land  
7 use regulations shall be undertaken as a  
8 post-acknowledgment amendment under ORS 197.610 to  
9 197.625. Until a city or county has undertaken  
10 the post-acknowledgment process, all applicable  
11 comprehensive plan standards shall continue to  
12 apply to limited land use decisions." (Emphases  
13 supplied.)

14 The city's failure to incorporate plan provisions  
15 applicable to limited land use decisions into its land use  
16 regulations means only that applicable comprehensive plan  
17 provisions continue to apply to limited land use decisions.  
18 The failure to incorporate such plan provisions into city  
19 land use regulations has no bearing on whether a development  
20 proposal meets the ORS 197.015(12) definition of "limited  
21 land use decision."

22 The challenged decision denies approval for a proposed  
23 subdivision within an urban growth boundary and, therefore,  
24 is a limited land use decision.

25 **SECOND ASSIGNMENT OF ERROR (OIA)**

26 ORS 197.195(3)(c)(C) requires the city to provide  
27 notice of "the applicable criteria for the decision."  
28 Petitioners argue the city erroneously failed to provide in  
29 its notices that it considers city comprehensive plan  
30 housing policies 9, 13 and 20 to be applicable approval  
31 standards. Petitioners contend the city's failure to

1 provide such notice means the city lacked authority to apply  
2 the disputed housing policies.

3 We agree with petitioners that under ORS  
4 197.195(3)(c)(C), the city is required to list applicable  
5 criteria for the decision, and that the city erred by  
6 failing to do so. Nevertheless, we do not believe the  
7 city's failure to do so here requires that we reverse or  
8 remand the challenged decision.

9 During the local proceedings, the parties disputed  
10 whether various plan policies apply to the proposal.  
11 Specifically, the challenged decision states the following  
12 concerning that dispute:

13 "There was some debate before the planning  
14 commission and this council as to the  
15 applicability of comprehensive plan housing  
16 policies 5, 9, 12, 13 and 20. The city attorney  
17 opined that these policies were not approval  
18 criteria applicable to this matter, but merely  
19 aspirational and general in nature. Nevertheless,  
20 much public testimony in this matter was focused  
21 on these housing policies.

22 "\* \* \* \* \*" Record 6.

23 The planning commission denied the proposal on the  
24 basis of comprehensive plan housing policies 5, 9, 12, 13  
25 and 20. Record 62. Petitioners had opportunities to  
26 present argument concerning the applicability of these plan  
27 policies to the proposal and, in fact, presented such  
28 argument to both the planning commission and city council.  
29 Under these circumstances, we believe the city's failure to  
30 list plan housing policies as applicable approval standards

1 is harmless, and provides no basis for reversal or remand of  
2 the challenged decision.

3 This assignment of error is denied.

4 **FIRST AND SECOND ASSIGNMENTS OF ERROR (SRI)**

5 **FIRST ASSIGNMENT OF ERROR (OIA)**

6 Petitioners contend a subdivision in the R-2 zone is a  
7 permitted use and that the city erred by applying  
8 comprehensive plan housing policies 5, 9, 12, 13 and 20 as  
9 approval standards. Petitioners argue the express language  
10 of the plan makes it clear that the plan is implemented  
11 through legislative decisions adopting implementing city  
12 legislative regulations, and does not apply to individual  
13 development applications. Petitioners maintain the only  
14 standards applicable to the proposed subdivision are the  
15 Cannon Beach Subdivision Ordinance (CBSO) standards  
16 applicable to tentative plats. Petitioners also argue the  
17 findings fail to explain why the plan housing policies apply  
18 directly to the disputed application, in view of the  
19 statement in the plan emphasized below that plan housing  
20 policies are to be implemented through legislative acts.  
21 Finally, petitioners argue it is inconsistent with ORS  
22 197.307(6) and Statewide Planning Goal 10 (Housing) to  
23 interpret the plan housing policies to allow the city to  
24 deny the subject application.<sup>2</sup>

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<sup>2</sup>ORS 197.307(6) relates to "needed housing."



1           The city argues ORS 197.175(2)(d)<sup>3</sup> requires land use  
2 decisions and limited land use decisions be made in  
3 compliance with the comprehensive plan. The city also  
4 contends the CBSO requires that the proposed tentative  
5 subdivision plat comply with the comprehensive plan.

6           **A.    ORS 197.175(2)(d)**

7           ORS 197.175(2)(d) requires that the city's land use  
8 decisions and limited land use decisions comply with its  
9 acknowledged comprehensive plan. However, that a land use  
10 decision or limited land use decision must comply with the  
11 plan, does not necessarily mean that all plan provisions  
12 apply directly to individual development applications.

13           There are essentially three possibilities. First, a  
14 plan policy may apply directly to a development application.  
15 Second, a particular plan policy may not apply to a  
16 particular development application, because the standard  
17 expressed in the plan policy is irrelevant.<sup>4</sup> Third, even if  
18 the standard expressed in a plan policy is relevant, the  
19 plan policy may not apply directly to a development

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<sup>3</sup>ORS 197.175(2)(d) provides:

"If [the city's] comprehensive plan and land use regulations have been acknowledged by [the Land Conservation and Development Commission, the city shall] make land use decisions and limited land use decisions in compliance with the acknowledged plan and land use regulations."

<sup>4</sup>For example a plan policy requiring protection of inventoried wetlands would be irrelevant to a development application for property that does not include inventoried wetlands.

1 application because the plan policy is implemented by land  
2 use regulation standards which do apply directly to the  
3 development application.<sup>5</sup> In the third circumstance, the  
4 statutory requirement that land use decisions and limited  
5 land use decisions comply with the acknowledged  
6 comprehensive plan is achieved by demonstrating compliance  
7 with the acknowledged land use regulations which do apply  
8 directly.

9 The disputed plan housing policies appear to impose  
10 relevant planning standards. The question is whether those  
11 plan housing policies apply directly to the subdivision  
12 application or apply indirectly through the implementing  
13 land use regulations. The starting point for answering this  
14 question is the city's interpretation of its plan and land  
15 use regulations. Clark v. Jackson County, 313 Or 508, 836  
16 P2d 710 (1992).

17 **B. General Applicability of Plan Housing Policies**

18 The city's comprehensive plan states the following:

19 "The Comprehensive Plan can be viewed as a  
20 constitution for the development of the City. All  
21 actions such as zoning, subdivision, construction,  
22 sewer and water extensions, or annexation must be  
23 in conformance with the Plan. The Plan is  
24 intended to guide the growth of the City for the  
25 foreseeable future, with review or updating every  
26 two years.

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<sup>5</sup>It is clear this is exactly what is intended by the legislature ultimately to be the case for limited land use decisions. ORS 197.195; ORS 197.828(2)(b).

1           "\* \* \* \* \*

2           "Policies have the force of law and are definite  
3 statements of intent on the part of the City.  
4 They are to be implemented by the Planning  
5 Commission or by the City through its legislative  
6 acts. Policies, guidelines and recommendations  
7 must be interpreted by the Planning Commission and  
8 City Council to be effective. The views of  
9 citizens in planning matters of the City are  
10 essential for the Comprehensive Plan to work."  
11 (Emphasis supplied.) Plan 2-3.

12           CBSO 16.04.020 provides as follows:

13           "In their interpretation and application, the  
14 provisions of this chapter are to be the minimum  
15 requirements adopted for the protection of the  
16 public health, safety and welfare. To protect the  
17 public, among other purposes, such provisions are  
18 intended to provide for a permanently wholesome  
19 community environment, adequate municipal services  
20 and orderly and safe street design and  
21 construction in conformance with the Comprehensive  
22 Plan."<sup>6</sup> (Emphasis supplied.)

23           The challenged decision interprets CBSO 16.04.020 as  
24 follows:

25           "We note that [CBSO] 16.04.020 (purpose and  
26 interpretation) \* \* \* requires us to render a  
27 decision 'in conformance with the Comprehensive  
28 Plan.' We interpret this to mean our focus shall  
29 not be limited to the subdivision criteria, but

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<sup>6</sup>CBSO 16.04.150 requires:

"The proposed subdivision shall conform to the comprehensive  
plan and official maps of the city which are in effect at the  
time of the application for subdivision approval." (Emphasis  
supplied.)

The challenged decision neither applies CBSO 16.04.150 nor interprets  
it. However, it arguably supports the city's interpretation of the  
applicability of the plan.

1 shall include consideration of the proposed  
2 development as a whole, in the context of the  
3 applicable comprehensive plan provisions. We  
4 interpret [CBSO] 16.04.020 as requiring us to  
5 address the development which is a necessary  
6 implication of this subdivision application."  
7 Record 5-6.

8 We are required to defer to a local government's  
9 interpretation of its own enactments, unless the local  
10 interpretation is contrary to the express words, purpose or  
11 policy of the enactment, or is inconsistent with a statute,  
12 goal or rule that the enactment implements. ORS 197.829;<sup>7</sup>  
13 Clark v. Jackson County, supra.

14 With regard to consistency with goal or statutory  
15 provisions implemented by plan provisions, both Goal 10 and  
16 ORS 197.307(6) establish requirements related to "needed  
17 housing." However, "needed housing" is defined in both

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<sup>7</sup>ORS 197.829 provides:

"The Land Use Board of Appeals 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:

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

"(2) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

"(3) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

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

1 Goal 10 and ORS 197.303 in a manner that specifically  
2 excludes cities with a population of less than 2,500 people.  
3 There is no dispute the population of the City of Cannon  
4 Beach is less than 2,500 people. Therefore, for purposes of  
5 our scope of review under ORS 197.829(4), the city's plan  
6 and land use regulations do not implement either  
7 ORS 197.307(6) or the "needed housing" provisions of Goal  
8 10.<sup>8</sup> Accordingly, the city's interpretation of its plan and  
9 land use regulations is not subject to reversal or remand on  
10 the basis of inconsistency with statutory and goal standards  
11 relating to "needed housing."

12 We next consider whether the city's interpretation of  
13 CBSO 16.04.020 that plan housing policies apply to the  
14 proposal, is contrary to the express words, purpose or  
15 policy of CBSO 16.04.020 and the plan. We conclude it is  
16 not. While one part of the plan states it is implemented by  
17 "the Planning Commission or by the City through its  
18 legislative acts," another part states that "subdivision \* \*  
19 \* must be in conformance with the Plan." In addition,  
20 CBSO 16.04.150 expressly states all subdivision decisions  
21 must be consistent with the plan. Further, CBSO 16.04.020  
22 states the CBSO expresses only minimum requirements, and

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<sup>8</sup>The challenged decision states the plan housing policies implement Goal 10. As a matter of policy, that may be true. However, as a matter of law, the "needed housing" provisions of Goal 10 and ORS 197.307 do not apply to the city. Therefore, that the city's interpretation may not be consistent with "needed housing" regulations provides no basis for reversal or remand of the challenged decision under ORS 197.829(4).

1 that the CBSO is to be interpreted and applied in a manner  
2 that conforms to the plan. We believe it is not contrary to  
3 the express words, purpose or policy of either the CBSO or  
4 the plan for the city to apply plan housing policies to the  
5 proposal as applicable approval standards.<sup>9</sup>

6 In addition, we believe the city's interpretation  
7 provides a sufficiently detailed explanation of what it  
8 believes its plan requires. Therefore, that the city did  
9 not specifically juxtapose the emphasized plan language  
10 (regarding plan implementation through legislative acts),  
11 with its interpretation that the plan provides approval  
12 standards directly applicable to the proposal at issue here,  
13 is not error. As the court of appeals stated in West v.  
14 Clackamas County, 116 Or App 89, 94, 840 P2d 1354 (1992):

15 "[T]he ordinance contains a grab bag of provisions  
16 that, arguably, are equally relevant and that  
17 equally support the various meaning for which the  
18 parties contend and that the decision-maker found.  
19 Where that state of absolute or near equipoise  
20 exists, the selection from the grab bag is for the  
21 local deciding entity to make."

22 The city was within its interpretative discretion in  
23 adopting the challenged interpretation of its plan and land  
24 use regulations. Cf Langford v. City of Eugene, 126 Or App  
25 52, 57, \_\_\_\_\_ P2d \_\_\_\_ (1994) ("[W]here the local  
26 interpretation consists of a decision about which of two or

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<sup>9</sup>The plan provision upon which petitioners rely does not state plan policies are implemented exclusively through legislative acts.

1 more arguably applicable approval criteria in its  
2 legislation applies to a particular use, the local  
3 interpretation will seldom be reversible under the Clark [v.  
4 Jackson County] standard.")

5 **C. Interpretation of Plan Housing Policies**

6 The city denied the subject application on the basis of  
7 plan housing policies 5, 9, 12 and 20, among others.<sup>10</sup> With  
8 regard to the proposal's compliance with these policies, the  
9 challenged decision states:

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<sup>10</sup>The evidentiary support for the city's determination that the proposal violates Housing Policy 13 is challenged in a subsequent assignment of error. We consider here only the challenges to the city's findings concerning the proposal's compliance with Housing Policies 5, 9, 12 and 20. Plan Housing Policies 5, 9, 12 and 20 provide as follows:

"5. To the extent possible, the City shall endeavor to accommodate affordable housing in a manner that disperses it throughout the community rather than concentrating it at specific locations.

\*\* \* \* \* \*

"9. In order to maintain the City's village character, the City shall encourage the development of housing which meets the needs of a variety of age and income groups.

\*\* \* \* \* \*

"12. The City recognizes the importance of its existing residential neighborhoods in defining the character of the community and will strive to accommodate new residential development in a manner that is sensitive to the scale, character and density of the existing residential development pattern.

\*\* \* \* \* \*

"20. To encourage site planning which provides a variety of housing types." Plan 20-21.

1            "[W]e interpret our acknowledged housing policies  
2 as retaining to the city the prerogative of  
3 determining where and when to allocate different  
4 types of housing densities, price levels, etc. at  
5 least to the extent that the comprehensive plan  
6 and zoning ordinance do not otherwise deny us such  
7 discretion. Consequently, we believe that the  
8 decision of where and when to allocate housing  
9 density, type and price levels is a policy  
10 decision within our authority to make and which  
11 cannot be dictated by a particular applicant.  
12 This is especially so where the code and plan do  
13 not explicitly deny us such policy discretion or  
14 otherwise dictate these allocation issues for us.

15            "\* \* \* \* \*

16            "[Housing Policy 5 is violated] not because [the  
17 proposal] may be the only low income housing  
18 project in the city, but because 34 low income  
19 duplex units at one single site constitutes an  
20 abnormally dense concentration of this single type  
21 of housing at one place. Were this application  
22 for a smaller number of units, a less dense  
23 configuration, for a mix of housing types, or if  
24 it were dispersed among two or more separate  
25 locations around the city it would come closer to  
26 achieving the objectives of Housing Policy 5. As  
27 proposed, however, this application represents a  
28 major concentration of a single housing type at a  
29 single location which is found nowhere else in the  
30 city. Accordingly, the application violates this  
31 housing policy and for that reason we deny it.

32            "\* \* \* \* \*

33            "[Housing Policy 9 is violated] because [the  
34 proposal] presents an unusually dense  
35 concentration of duplex units designed for low  
36 income residents. While we recognize that  
37 duplexes are scattered here and there throughout  
38 the [neighborhood] in which the subject site is  
39 located, nowhere within that area is there a  
40 similar concentration of housing designed for  
41 people of a single specific income level. In  
42 fact, nowhere in the city is there such a  
43 concentration of housing designed for residents of



1 a single income level. We find that such a  
2 concentration disrupts the 'village character' of  
3 the immediate area as proscribed by Housing  
4 Policy 9.

5 \* \* \* \* \*

6 "[Housing Policy 12 is violated because] the  
7 proposed development presents a scale, character  
8 and density different than what presently exists  
9 in the neighborhood. The density of dwelling  
10 units would be disproportionately higher than that  
11 of the surrounding neighborhood. The scale of the  
12 proposed development is not in keeping with that  
13 of the [neighborhood] because of this inordinate  
14 concentration of duplex units. \* \* \*

15 \* \* \* \* \*

16 We note that the subject development proposes 34  
17 units of a single type of housing, i.e., low  
18 income duplexes. We interpret Housing Policy 20  
19 as requiring us to encourage a variety of housing  
20 types. We find that denying this application will  
21 encourage this or other applicants to propose  
22 developments which, in fact, present a variety of  
23 housing types designed to meet the needs of a  
24 diversity of age groups and income levels. For  
25 that reason, we deny this application." Record  
26 6-9.

27 Petitioners argue that even if the city is allowed to  
28 apply these plan housing policies to the proposal, the  
29 challenged decision is inadequate to demonstrate why the  
30 city chose to apply the particular plan policies applied  
31 here or to demonstrate why other housing policies also do  
32 not apply to the proposal.

33 The challenged decision states the following:

34 \* \* \* We read the comprehensive plan's housing  
35 policies as establishing criteria which must be  
36 considered in any decision involving housing. In

1 particular, the housing policies we address in  
2 these findings establish locational criteria for  
3 housing types, housing density and, in the case of  
4 Housing Policy 5, locational criteria specifically  
5 for low income housing, Accordingly, we base this  
6 decision on the housing policies which we deem to  
7 be approval criteria." Record 6.

8 We believe these findings are adequate to explain that  
9 the city believed the housing policies it applied in  
10 subsequent portions of the challenged decision are the only  
11 applicable plan provisions. Petitioners cite certain plan  
12 housing policies and ask why they were not also applied to  
13 the proposal by the city. However, petitioners fail to  
14 establish how the city's failure to apply other plan housing  
15 policies undermines the city's decision to deny the proposal  
16 based on noncompliance with the plan housing polices it did  
17 apply.

18 We conclude the city's interpretation of plan housing  
19 policies 5, 9, 12 and 20 is not contrary to the express  
20 words, purpose or policy of the CBSO or plan housing  
21 policies 5, 9, 12 and 20. Further, we determine that the  
22 city's findings applying those standards are adequate.

23 These assignments of error are denied.

24 **FOURTH ASSIGNMENT OF ERROR (SRI)**

25 Petitioners argue because the proposal is listed as a  
26 permitted use, the city should have conditionally approved  
27 the proposal rather than denying it.

28 The city is entitled to approve or deny the application  
29 submitted by SRI. Although the city certainly may impose

1 conditions and rely on such conditions to determine a permit  
2 application meets applicable approval standards, there is no  
3 general requirement that the city must apply conditions to  
4 modify a proposal so that applicable standards are met.  
5 Simonson v. Marion County, 21 Or LUBA 313, 325 (1991).

6 This assignment of error is denied.

7 **ASSIGNMENT OF ERROR (VISHER)**

8 **THIRD ASSIGNMENT OF ERROR (SRI)**

9 These assignments of error challenge other bases relied  
10 on by the city in support of the challenged decision denying  
11 the proposed development. Under previous assignments of  
12 error, we sustain the challenged decision to deny the  
13 proposal on the basis of noncompliance with plan housing  
14 policies 5, 9, 12 and 20. It is well established that so  
15 long as there is a single adequate basis for denial, it does  
16 not matter that other bases for denial might be erroneous in  
17 some respect. Garre v. Clackamas County, 18 Or LUBA 877,  
18 aff'd 102 Or App 123 (1990). Therefore, we do not consider  
19 the adequacy of other bases for denial.

20 The city's decision is affirmed.

21