

1                               BEFORE THE LAND USE BOARD OF APPEALS  
2                               OF THE STATE OF OREGON  
3

4       MERLIN FJARLI,                               )  
5    )  
6                        Petitioner,                )  
7    )  
8                vs.                                    )  
9    )  
10       CITY OF MEDFORD,                            )  
11    )  
12                        Respondent,                )  
13    )  
14                and                                    )  
15    )  
16       FIRST INTERSTATE BANK OF OREGON,            )  
17       Trustee of the ANNA G. BREWER            )  
18       TRUST, and KEVIN GEORGE WALLIS        )  
19       and EDNA FAYE GUY, Trustees of        )  
20       the COSIO FAMILY TRUST #1,                )  
21    )  
22                        Intervenors-Respondent.    )

LUBA No. 96-155  
  
FINAL OPINION  
AND ORDER

23  
24  
25                Appeal from City of Medford.

26  
27                Allan B. deSchweinitz, Medford, filed the petition for  
28 review and argued on behalf of petitioner.

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30                Ronald L. Doyle, City Attorney, Medford, filed a  
31 response brief and argued on behalf of respondent.

32  
33                Gary C. Peterson, Medford, filed a response brief on  
34 behalf of intervenors-respondent. With him on the brief was  
35 Karen C. Allan, and Foster, Purdy, Allan, Peterson & Dahlin.

36  
37                HANNA, Chief Referee; LIVINGSTON, Referee, participated  
38 in the decision.

39  
40                        REMANDED                                08/19/97

41  
42                You are entitled to judicial review of this Order.  
43 Judicial review is governed by the provisions of ORS  
44 197.850.

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the city's enactment of an ordinance  
4 authorizing agreements to annex 90 acres into the city.

5 **MOTION TO INTERVENE**

6 First Interstate Bank of Oregon, Trustee of the Anna G.  
7 Brewer Trust, (Brewer Trust) and Kevin George Wallis and  
8 Edna Faye Guy, Trustees of the Cosio Family Trust  
9 (intervenors), the applicants below, move to intervene in  
10 this proceeding on the side of respondent. There is no  
11 objection to the motion, and it is allowed.

12 **FACTS**

13 On April 29, 1991, the Brewer Trust applied to annex a  
14 71.7 acre parcel to the city for residential purposes. On  
15 September 26, 1991, the planning commission recommended  
16 approval of the proposal. Hearings before the city council  
17 were not held until January 20, 1994, when the applicant  
18 requested a continuance, and subsequently requested an  
19 indefinite postponement. On August 7, 1995 the applicant  
20 added approximately 20 acres to the application for a total  
21 proposal of approximately 91 acres, and requested that the  
22 city proceed with the application. On May 16, 1996, the  
23 city council considered the complete application and  
24 referred it back to the planning commission for a  
25 recommendation on the additional acreage. The planning  
26 commission again recommended approval. On June 20, 1996,

1 the city council resumed consideration of the proposal. On  
2 August 1, 1996, the city adopted the challenged decision,  
3 "authorizing Annexation Agreements providing for future  
4 annexation to the City of Medford of 90 acres \* \* \*." The  
5 decision also states:

6 "The City Council finds and determines that the  
7 facts and conclusion of law stated in Revised  
8 Staff Report and Annexation Impact Analysis dated  
9 March 29, 1996 which includes the applicant's  
10 revised Findings of Fact dated June 2, 1991, and  
11 the Supplemental Findings dated May 17, 1996,  
12 copies of which are attached hereto as Exhibit A  
13 and by this reference incorporated herein, are  
14 true and correct and are hereby adopted as the  
15 finding of the council[.]" Record 21.

16 This appeal followed.

17 **FIRST ASSIGNMENT OF ERROR**

18 Petitioner argues that the city failed to identify the  
19 relevant approval standards: "Specifically, respondent  
20 failed to specify whether language in its annexation  
21 criteria ordinance requiring annexations to have 'no adverse  
22 impact' is a mandatory approval criterion." Petition for  
23 Review 1. Petitioner does not specify at what point in the  
24 proceeding this alleged error occurred. Petitioner contends  
25 that the supplemental findings adopted by the city council  
26 cannot be reconciled with the staff report because the staff  
27 report quoted the introductory language as well as the four  
28 factors in MLDC 10.197 when it set forth the mandatory  
29 criteria, while the supplemental findings specifically

1 exclude the introductory language from the criteria.<sup>1</sup>

2 Intervenor responds that the May 17, 1996 supplemental  
3 findings state, in part, that "[t]he introductory statement  
4 of Section 10.197 does not contain criteria." Record 21.  
5 Additionally, intervenor points out that the staff report  
6 specifically refers to only the four annexation criteria.  
7 Record 24.

8 The requirement to identify criteria is derived from  
9 ORS 197.763(3)(b). The only question that could be before  
10 us is whether the city adequately identified the applicable  
11 criteria as required by ORS 197.763(3)(b).<sup>2</sup> Our case law

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<sup>1</sup>Medford Land Development Code (MLDC) 10.197, the criteria to which petitioner refers, states:

"Requests for annexation should not have an adverse impact on the citizens of Medford, either financially or in relation to the livability of the City or any neighborhoods within the annexation area. Generally it is desirable for the City to annex an area if the annexation meets any of the following criteria:

- "(1) A necessary control for development form and standards of an area adjacent to the city, or
- "(2) A needed solution for existing problems, resulting from insufficient sanitation, water service, or other urban service related problems, or
- "(3) Land for development to meet urban needs, or
- "(4) Needed routes for utility and transportation networks."

<sup>2</sup>ORS 197.763(3) states, in relevant part:

"(3) The notice provided by the jurisdiction shall:

" \* \* \* \* \*

1 establishes the parameters of this discussion:

2 "Where a local government's notice of its first  
3 evidentiary hearing fails to list the applicable  
4 standards, as required by ORS 197.763(3)(b), under  
5 ORS 197.835(2)(a) petitioners may raise issues at  
6 LUBA even though such issues may not have been  
7 raised during the local proceedings. However,  
8 under ORS 197.835(7)(a)(B), such a procedural  
9 error provides no basis for reversal or remand of  
10 the decision unless petitioners establish the  
11 error caused prejudice to their substantial  
12 rights. Shapiro v. City of Talent, 28 Or LUBA  
13 542, 544 (1995); Mazeski v. Wasco County, 26 Or  
14 LUBA 226, 235 (1993)." ONRC v. City of Oregon  
15 City, 29 Or LUBA 90, 97 (1995).

16 In its notice of hearing, the city clearly identified  
17 the requirements of MLDC 10.197 as the applicable criteria,  
18 and attached to its November 15, 1996 notice of hearing, a  
19 copy of MLDC 10.197. Record 208. Petitioner argues that  
20 such a general identification is insufficient, and that the  
21 city should have specified that it did not consider the  
22 introductory language part of the criteria. In prior cases,  
23 we have found that listing an entire zoning ordinance or, in  
24 some instances, entire chapters of the zoning ordinance as  
25 the applicable criteria was a procedural error that  
26 prejudiced the petitioner's substantial rights. Id.  
27 However, in this instance, identification by section number  
28 is clearly sufficient to provide notice of the applicable  
29 criteria. It is not necessary for the city to identify the

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"(b) List the applicable criteria from the ordinance and  
the plan[.]"

1 criteria by subsection number alone or to interpret its  
2 ordinance in the notice of hearing to exclude introductory  
3 language. Petitioner has not established that the city  
4 failed to adequately identify the criteria applicable to the  
5 application.

6 The first assignment of error is denied.

7 **SECOND ASSIGNMENT OF ERROR**

8 Petitioner argues that if the city identified the  
9 relevant approval standards, the city's interpretation of  
10 the "no adverse impact" language of MLDC 10.197 is clearly  
11 wrong. Petitioner contends that the city's interpretation  
12 is contrary to the introductory language of MLDC 10.197 that  
13 states "requests for annexation should not have an adverse  
14 impact on the citizens of Medford." (Emphasis added.)

15 The city relies on ORS 197.829 and the Clark v. Jackson  
16 County, 313 Or 508, 836 P2d 710 (1992), line of cases that  
17 require LUBA to defer to a local government's interpretation  
18 of its code. The city identifies the supplemental findings  
19 as containing its interpretation that the introductory  
20 language of MLDC 10.197 is not a part of the approval  
21 criteria.

22 This Board is required to defer to a local governing  
23 body's interpretation of its own enactment, unless that  
24 interpretation is contrary to the express words, purpose or  
25 policy of the local enactment or to a state statute,  
26 statewide planning goal or administrative rule which the

1 local enactment implements. Gage v. City of Portland, 319  
2 Or 308, 316-17, 877 P2d 1187 (1994); Clark at 514-15. In  
3 deBardelaben v. Tillamook County, 142 Or App 319, 325, 922  
4 P2d 683 (1996) the court limited our inquiry to "whether the  
5 interpretation is indefensible, not whether the  
6 interpretation is 'correct' in the sense that it accords  
7 with the way that LUBA itself might construe the  
8 provisions."

9 Petitioner has not established that the city's  
10 interpretation of MLDC 10.197 is indefensible.

11 The second assignment of error is denied.

12 **THIRD ASSIGNMENT OF ERROR**

13 Petitioner argues that the findings in the challenged  
14 decision demonstrating compliance with the four factors in  
15 MLDC 10.197 are not supported by substantial evidence.

16 Intervenor points out that the proposal must meet only  
17 one of the MLDC 10.197 criteria to qualify for annexation.  
18 Thus, the city is required to support only one criterion by  
19 substantial evidence in the whole record. In its brief,  
20 intervenor discusses several findings that address various  
21 criteria, and concludes "these findings are sufficient to  
22 support the City's conclusion \* \* \*." Intervenor's Brief 5.  
23 The problem with intervenor's argument is that the  
24 assignment of error challenges the substantiality of the  
25 evidence to support the findings, not the sufficiency of the  
26 findings themselves.

1           We have not been directed by intervenor or the city to  
2 any evidence on which the city based its decision. Where  
3 petitioners assert that a local government decision is not  
4 supported by substantial evidence, and no party cites  
5 evidence in the record to support the local government's  
6 decision, LUBA will not search the record to find supporting  
7 evidence. Doob v. Josephine County, 27 Or LUBA 293, 298  
8 (1994). We are unable to determine if there is substantial  
9 evidence to support the city's decision.

10           The third assignment of error is sustained.

11           The city's decision is remanded.