

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

3  
4 BRENT BURTON,  
5 *Petitioner,*

6  
7 vs.

8  
9 CITY OF CANNON BEACH,  
10 *Respondent.*

11  
12 LUBA No. 2023-060

13  
14 FINAL OPINION  
15 AND ORDER

16  
17 Appeal from City of Cannon Beach.

18  
19 Brent Burton filed the petition for review and argued on behalf of  
20 themselves.

21  
22 William K. Kabeiseman filed the respondent's brief and argued on behalf  
23 of respondent. Also on the brief were Carrie A. Richter and Bateman Seidel  
24 Miner Blomgren Chellis & Gram, P.C.

25  
26 RYAN, Board Chair; RUDD, Board Member, participated in the decision.

27  
28 ZAMUDIO, Board Member, did not participate in the decision.

29  
30 AFFIRMED 01/22/2024

31  
32 You are entitled to judicial review of this Order. Judicial review is  
33 governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner appeals a city council decision denying an application for a setback reduction for a single-family residence in the Residential Lower Density (RL) zone.

**FACTS**

The subject property is zoned RL, is located near the intersection of South Hemlock Street and Center Street, and is approximately 9,674 square feet. The subject property has an average slope in excess of 30 degrees with a small portion that is relatively flat. Petitioner proposes to construct a single-family home on the flat portion of the property. On March 21, 2023, petitioner submitted an application for a 10-foot setback reduction to reduce the front yard of their property from 15 feet to five feet. The city’s planning staff recommended approval of the application.

The planning commission held a public hearing on the application on April 27, 2023, and, at its conclusion, closed the public hearing and issued a decision denying petitioner’s application. Petitioner appealed the planning commission’s decision to the city council. On July 11, 2023, the city council held an on the record public hearing and, at the conclusion of that hearing, denied petitioner’s appeal and upheld the planning commission’s decision to deny petitioner’s application. This appeal followed.

1 **ASSIGNMENTS OF ERROR**

2 **A. Preservation of Issues**

3 LUBA is an administrative agency, part of the executive branch, and  
4 entirely a creation of statute. Our review authority is prescribed, and limited, by  
5 those statutes, particularly the scope of review set out in ORS 197.835. The  
6 legislature has prescribed that LUBA's review of issues on appeal shall be limited  
7 to those "raised by any participant before the local hearings body as provided by  
8 \* \* \* [ORS] 197.797[.]" ORS 197.835(3). In turn, ORS 197.797 states, in part:

9 "The following procedures shall govern the conduct of quasi-  
10 judicial land use hearings conducted before a local governing body,  
11 planning commission, hearings body or hearings officer on  
12 application for a land use decision and shall be incorporated into the  
13 comprehensive plan and land use regulations:

14 "(1) An issue which may be the basis for an appeal to [LUBA]  
15 shall be raised not later than the close of the record at or  
16 following the final evidentiary hearing on the proposal before  
17 the local government. Such issues shall be raised and  
18 accompanied by statements or evidence sufficient to afford  
19 the governing body, planning commission, hearings body or  
20 hearings officer, and the parties an adequate opportunity to  
21 respond to each issue."

22 Pursuant to the authority granted by the legislature in ORS 197.820(4), and in  
23 part to achieve the purpose of ORS 197.835(3), LUBA has adopted rules  
24 governing petitions for review. OAR 661-010-0030(4)(d) in particular requires  
25 that the petition for review shall set forth each assignment of error, and for each  
26 assignment of error "demonstrate that the issue raised in the assignment of error

1 was preserved during the proceedings below.”<sup>1</sup> It is therefore a petitioner’s  
2 obligation to demonstrate that an issue was raised below. “Failure to comply with  
3 that affirmative obligation results in a prejudice to the responding parties where  
4 the failure improperly shifts the burden to the responding parties to determine  
5 whether the preservation obligation applies and whether the issues raised in an  
6 assignment of error were preserved.” *Rosewood Neighborhood Association v.*  
7 *City of Lake Oswego*, \_\_\_ Or LUBA \_\_\_, \_\_\_ (LUBA No 2023-035, Nov 1,  
8 2023) (slip op at 7).

9 **B. Assignments of Error**

10 The petition for review includes a single section entitled “Assignments of  
11 Error” that in turn includes eight separate sections of text immediately below  
12 bolded, quoted provisions of the Cannon Beach Municipal Code (CBMC), and  
13 one separate section below a bolded heading called “City Council Hearing.”  
14 Petition for Review 2-8. We assume for purposes of this opinion that the nine  
15 separate sections of text are either assignments of error or subassignments of  
16 error.

17 The city’s brief argues, initially, that the assignments of error are not  
18 within our scope of review because petitioner has not met their burden to  
19 demonstrate in the petition for review that the issues raised in the assignments of

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<sup>1</sup> OAR 661-010-0030(4)(d) also requires that “[e]ach assignment of error must state the applicable standard of review.”

1 error were raised during the proceedings below. Respondent's Brief 6-7. We  
2 agree with the city. Petitioner's petition for review contains no demonstration  
3 that the issues raised in the assignments of error were raised below. Petitioner has  
4 also has not taken the position that "preservation is not required[.]" OAR 661-  
5 010-0030(4)(d). Accordingly, we agree with the city that the petition for review  
6 provides no basis on which we can reverse or remand the challenged decision.  
7 *Keudell v. Union County*, 19 Or LUBA 394, 400-01(1990).

8       Petitioner's assignments of error are denied.

9       The city's decision is affirmed.