



1 Opinion by Sherton.

2 NATURE OF THE DECISION

3 Petitioner appeals a City of Beaverton (city) order  
4 adopting additional findings in support of its previous  
5 approval of the preliminary plat for a 114-lot subdivision.

6 MOTION TO INTERVENE

7 Beaverton School District 48J moves to intervene on the  
8 side of respondent in this proceeding. There is no opposition  
9 to the motion, and it is allowed.

10 FACTS

11 On September 14, 1987, the city council adopted an order  
12 approving the preliminary plat of MacArthur Park, a 114-lot  
13 residential subdivision. The subdivision is located on an  
14 approximately 27 acre portion of a 38 acre parcel owned by  
15 intervenor-respondent Beaverton School District 48J  
16 (district). The Beaverton Area General Plan (plan) map  
17 designation for the vacant 38 acre parcel is Public  
18 Facilities. The parcel is zoned Single Family (Standard)  
19 Density, 7,000 Sq.Ft. (R-7).

20 Petitioner appealed the city's decision to this Board. We  
21 remanded the city's decision for failure to comply with  
22 Beaverton Development Code (code) 130.5.C and 101.2.C,<sup>1</sup> which  
23 require adequate school facilities to serve the proposed  
24 subdivision. Dickas v. City of Beaverton, \_\_\_ Or LUBA \_\_\_  
25 (LUBA No. 87-086, April 11, 1988) (Dickas I). In Dickas I we  
26 stated:

1 "We note the district's enrollment projection includes  
2 85 kindergarten students. If kindergarten students  
3 are included in the projected enrollment, Greenway  
Elementary School would be 56 students over capacity,  
as petitioner complains.

4 " \* \* \* Additional students generated by the  
5 development would place the schools even more over  
6 capacity. Neither the city's findings nor the school  
7 district's comments offer an explanation as to how the  
8 excess of 56 students at the Greenway Elementary  
9 School will be accommodated by the school district.

10 "It is not at all clear what the capacity figures  
11 mean. We are not advised as to whether the capacity  
12 figure is simply a desirable figure or whether it is a  
13 standard which, if exceeded, means the school cannot  
14 provide adequate service.

15 "In sum, the record simply does not support the city's  
16 finding that adequate public facilities exist. While  
17 it may be that the city may approve this development  
18 notwithstanding an elementary school where enrollment  
19 is over capacity, some explanation of the effect of  
20 exceeding the school's capacity is needed to  
21 demonstrate compliance with Code Sections 130.5.C and  
22 201.2.C." (Footnotes omitted.) Dickas I, slip op 6.

23 Petitioner appealed Dickas I to the Court of Appeals, and the  
24 city cross-appealed. The Court of Appeals affirmed our  
25 decision. Dickas v. City of Beaverton, 92 Or App 168, 757 P2d  
26 451 (1988). The court did not discuss the adequacy of school  
facilities issue in its opinion.

27 On remand, the city council held an evidentiary hearing on  
28 September 12, 1988. On September 26, 1988, the city council  
29 adopted the appealed order approving the preliminary plat for  
30 MacArthur Park, "subject to all the conditions of order number  
31 549, dated September 14, 1987, which order remains in full  
32 force and effect," and adopting additional findings in support  
33 of its approval. Record 2. This appeal followed.

1 FIRST ASSIGNMENT OF ERROR<sup>2</sup>

2 "The City's order conflicts with the Public School  
3 Facilities provisions of the Beaverton General Plan  
\* \* \* "

4 The Beaverton Area General Plan (plan) is the city's  
5 comprehensive plan. The school section of the plan's public  
6 facilities chapter contains the following policy (School  
7 Policy 1):

8 "1. Schools in the planning area should be developed  
9 according to the policies of School District  
No. 48 and the Oregon State Standards which are:

10 "Elementary Schools - Enrollment 500 students

11 " \* \* \* \* \* " Plan 63.

12 Petitioner argues that School Policy 1 precludes the city  
13 from concluding that an elementary school facility is adequate  
14 for a proposed development if the enrollment at the elementary  
15 school would exceed 500. Petitioner contends the city's  
16 decision misinterpreted this policy to be only a suggestion  
17 concerning desirable enrollment levels. Petitioner argues  
18 that the city misinterpreted the policy because it erroneously  
19 believed that current administrative rules of the Oregon  
20 Department of Education, which do not include enrollment  
21 guidelines and were adopted after this policy was adopted by  
22 the city, had the effect of amending this policy.

23 The city argues School Policy 1 provides a non-mandatory  
24 guideline of 500 for enrollment in elementary schools.  
25 According to the city, because the policy is not phrased in  
26 mandatory terms, it is permissible for the city to approve a

1 subdivision even though evidence in the record indicates that  
2 enrollment at the local elementary school will likely exceed  
3 500.<sup>3</sup> The city relies on decisions by this Board and the  
4 Court of Appeals interpreting certain plan provisions as  
5 non-mandatory guidelines, citing Downtown Community Association  
6 v. City of Portland, 80 Or App 336, 722 P2d 1258, rev den 302  
7 Or 86 (1986) and Cornell Park Associates v. Washington  
8 County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 88-032, August 24, 1988).

9 School Policy 1 states that elementary schools "should" be  
10 developed with an enrollment of 500 students. A policy worded  
11 in this manner encourages the attainment of an enrollment of  
12 500, but is not a mandatory limitation on the city's ability to  
13 approve development if enrollment at the local elementary  
14 school would exceed 500. See Cornell Park Associates v.  
15 Washington County, supra, slip op at 11; Foster v. City of  
16 Astoria, \_\_\_ Or LUBA \_\_\_ (LUBA Nos. 88-030 and 88-031, August  
17 15, 1988); McCoy v. Tillamook County, 14 Or LUBA 108, 118  
18 (1986). Therefore, the city's determination that there are  
19 adequate school facilities to serve the proposed subdivision,  
20 even though enrollment at the local elementary school is  
21 projected to exceed 500, does not violate School Policy 1.

22 The first assignment of error is denied.

23 SECOND ASSIGNMENT OF ERROR

24 "The City approval is not based upon and accompanied  
25 by a brief statement explaining the standards and  
26 criteria relevant to the decision, nor does the order  
state the facts relied upon, nor does it justify the  
decision - all in violation of ORS 227.173(2)."

1 ORS 227.173(2) provides:

2 "Approval or denial of a permit application shall be  
3 based upon and accompanied by a brief statement that  
4 explains the criteria and standards considered  
5 relevant to the decision, states the facts relied upon  
6 in rendering the decision and explains the  
7 justification for the decision based on the criteria,  
8 standards and facts set forth."

9 Petitioner argues that if the city's interpretation of  
10 School Policy 1 is correct, the city has no standard applicable  
11 to determining the adequacy of school facilities. Petitioner  
12 contends the city's decision does not identify, in a brief  
13 statement or otherwise, the standards and criteria applicable  
14 to its decision.<sup>4</sup>

15 The city argues that the criteria and standards applicable  
16 to its approval of the proposed subdivision were identified in  
17 its original September 14, 1987 decision approving the  
18 subdivision. The city contends the criteria and standards are  
19 sufficiently detailed and were made known to all parties  
20 throughout the city's proceedings. The city also claims  
21 petitioner's arguments concerning compliance with ORS 227.173  
22 were not raised in Dickas I and, therefore, have been waived.

23 Finally, the city argues that if petitioner contends the  
24 standards in the plan and code are inadequate or not  
25 sufficiently detailed, such an argument is an impermissible  
26 collateral attack on the city's acknowledged plan and code.

27 We understand petitioner to argue that under the city's  
28 interpretation of School Policy 1, which we upheld in denying  
29 the first assignment of error, the city does not have adequate

1 criteria in its plan and code, with regard to provision of  
2 school facilities, for approval of a subdivision. Petitioner  
3 contends this failure to have adequate criteria set out in the  
4 plan and code violates ORS 227.173.<sup>5</sup>

5 A party may not raise legal issues which were decided in  
6 earlier appeals to LUBA or which could have been raised in  
7 earlier appeals to LUBA, but were not. Mill Creek Glen  
8 Protection Assoc. v. Umatilla Co., 88 Or App 522, 526, 736 P2d  
9 728 (1987); Hearne v. Baker County, \_\_\_ Or LUBA \_\_\_ (LUBA  
10 No. 87-030, October 21, 1987), slip op 4, aff'd 89 Or App 282,  
11 748 P2d 1016, rev den 305 Or 576 (1988). We agree with the  
12 city that petitioner could have raised the issue of compliance  
13 of the city's approval criteria and standards with ORS 227.173  
14 in Dickas I, but failed to do so. Petitioner is, therefore,  
15 precluded from raising this issue for the first time in this  
16 appeal proceeding.

17 However, we understand petitioner also to argue that the  
18 appealed decision does not adequately identify the standards  
19 applicable to the decision made on remand, as required by  
20 ORS 227.173(2). This is not an issue which could have been  
21 raised in petitioner's previous appeal.

22 The appealed order includes the following section:

23 "CRITERION APPLICABLE TO THIS REQUEST

24 " The Development Code, Ordinance No. 2050,  
25 provides at section 201.2C that adequate public  
26 facilities must be available to serve a proposed  
development. Schools are a public facility included  
in this requirement." Record 1.

1       Petitioner does not explain why this portion of the city's  
2 order is inadequate to comply with the requirement of  
3 ORS 227.173(2) that the city's decision be "accompanied by a  
4 brief statement that explains the criteria and standards  
5 considered relevant to the decision \* \* \* ." It is  
6 petitioner's responsibility to explain the basis on which we  
7 might grant relief. McCoy v. Linn County, \_\_\_ Or LUBA \_\_\_  
8 (LUBA No. 87-046, December 15, 1987), slip op 14-15, aff'd 90  
9 Or App 271, 752 P2d 323 (1988); Deschutes Development v.  
10 Deschutes County, 5 Or LUBA 218, 220 (1982).

11       The second assignment of error is denied.

12       THIRD ASSIGNMENT OF ERROR

13       "The record before the City does not contain  
14 sufficient evidence to support the conclusion that  
15 adequate school facilities are available to serve  
16 MacArthur Park."

16       We address under this assignment of error petitioner's  
17 challenges to the adequacy of both the city's findings and the  
18 evidence in support of the city's decision because in this case  
19 a single document, the Pflug report, constitutes both the  
20 findings and the evidence. See n 3, supra. Furthermore, as  
21 petitioner's arguments attack the findings and evidence only  
22 with regard to the adequacy of elementary school facilities, we  
23 limit our discussion to elementary school facilities.

24       With regard to the district's plans for long-term,  
25 district-wide accommodation of enrollment growth, the Pflug  
26 report states:

1 "In March 1988, District voters approved a 13.8  
2 million bond fund. This bond issue includes the  
3 construction of a new elementary school in the  
4 southwest area and 24 classrooms which will be added  
to existing elementary facilities across the 57 square  
mile School District.

5 "Enrollment projections \* \* \* indicate the District  
6 will need to house in excess of 25,000 students by  
7 1996-1997 [up from an enrollment of 21,913 on  
September 30, 1987]. It is anticipated the District  
will need to seek community approval for additional  
capital funds to accommodate this growth.

8 " \* \* \* \* \*

9 "District-wide, long-term enrollment growth will be  
10 accomodated by the construction of additional  
11 facilities -- new schools and/or classroom additions  
to existing facilities." Record 3-4.

12 The report also states that the present bonded indebtedness of  
13 the district is approximately \$30.7 million, whereas the  
14 maximum bonded indebtedness allowed by law is \$426.2 million.  
15 Record 4.

16 The Pflug report also addresses the provision of elementary  
17 school facilities to the proposed MacArthur Park subdivision.  
18 MacArthur Park is within the service boundary of Greenway  
19 Elementary School (Greenway). The report states:

20 "The rated capacity at Greenway is 528 students. This  
21 is considered an 'ideal' capacity based on 24 students  
22 per classroom. In reality, each classroom can, and  
23 often does, accommodate additional children. For  
24 example Hiteon and Errol Hassell [elementary schools]  
are each rated at 528 capacity yet housed 584 and 555  
students respectively this past school year, without  
the use of portable classrooms." Id.

25 The Pflug report states the current (August, 1988)  
26 enrollment at Greenway is effectively 503 students.<sup>6</sup>

1 Record 5. The report projects that the enrollment at Greenway  
2 in September 1988 will be 517 students. This projection does  
3 not include any students from MacArthur Park, because no homes  
4 in the subdivision would be built and occupied by  
5 September, 1988. Id.

6 The Pflug report projects that MacArthur Park's 112  
7 single-family dwellings will generate 32 elementary students.  
8 The report states the children from 40 of the 112 MacArthur  
9 Park homes were phased into the district's 1989-90 enrollment  
10 projection for Greenway, and the children from another 40 of  
11 the 112 MacArthur Park homes were phased into the district's  
12 1990-91 enrollment projection. The enrollment projected for  
13 Greenway in the 1990-91 school year is 558-580 students. Id.  
14 The report does not contain enrollment projections for Greenway  
15 in 1989-90 or in years subsequent to 1990-91.

16 When enrollment at Greenway exceeds the school's rated  
17 capacity, as it is projected to do in 1990-91,<sup>7</sup> the report  
18 states:

19 "When Greenway does go over capacity, options for  
20 housing students include:

21 "1. Housing students within existing facility - This  
may require some interior remodeling.

22 "2. Using portable classrooms until permanent  
23 facilities become available - Over the next two  
24 years, twenty portables will become available due  
to new construction and boundary changes.

25 "3. Boundary changes - In September 1989 two adjacent  
26 schools, Hiteon and McKay, will feed students  
into the new elementary school located in the  
southwest area. It may then become possible to

1 make a boundary adjustment with one or both of  
2 these schools.

3 "4. Reopen a former elementary school. The District  
4 owns three facilities that once served as  
5 elementary schools and could be made ready for  
6 occupancy." Record 5.

7 The report's conclusion quotes an opinion of the Oregon  
8 Attorney General stating that other options available to a  
9 school district could include "double shifts, extended school  
10 periods, busing to under used facilities, year-around schools,  
11 construction of new facilities, or a combination of these or  
12 other alternatives." Record 6. The Report concludes with the  
13 following statement:

14 "The Beaverton School District has explored or  
15 currently utilizes the above mentioned options to  
16 provide the facilities necessary for educating all the  
17 children who reside within Beaverton School District.  
18 The District will take whatever steps are necessary to  
19 house the students generated from the MacArthur park  
20 subdivision." Record 7.

21 Petitioner asserts the Pflug report concedes that in  
22 1990-91, when MacArthur Park is projected to be only 70%  
23 occupied, the enrollment at Greenway (558-580) will exceed the  
24 school's capacity. Petitioner argues nowhere does the Pflug  
25 report say Greenway "is 'adequate' to cope with the overload."  
26 Petition for Review 9. Petitioner points out that although the  
report states that classrooms generally can accommodate more  
than the "ideal" number of 24 children, the report

" \* \* \* nowhere explains how many additional children  
a single classroom or an entire school can  
'adequately' accommodate [or] at what level an  
overcrowded school becomes an inadequate facility."  
Petition for Review 7.

1       Petitioner also argues that the Pflug report's list of  
2 "options for housing students" when enrollment at Greenway  
3 exceeds capacity is inadequate because there is no factual  
4 basis for concluding that any of these options will result in  
5 adequate facilities, or that it is feasible to carry out any of  
6 the options. Specifically, with regard to use of the existing  
7 facility, petitioner argues there is no factual basis to  
8 support a conclusion Greenway can adequately serve more than  
9 580 students through interior remodeling.

10       With regard to use of portable classrooms, petitioner  
11 argues there is no basis for concluding this will provide  
12 adequate facilities. According to petitioner, code 76.9  
13 prohibits the use of more than two portable classrooms at a  
14 school, and restricts their use to one year. Petitioner also  
15 contends that another report by the district in the record  
16 explains that portable classrooms cannot be used to accommodate  
17 the rapid growth taking place in some locations because "their  
18 use on an extensive scale would overburden cafeterias, gyms,  
19 playgrounds, lavatories, hallways and libraries." Record 118.

20       With regard to the boundary change option, petitioner  
21 argues that a technique which "may \* \* \* become possible" is  
22 not an adequate solution. Petitioner also contends the report  
23 is inadequate because it does not state that adequate  
24 facilities are available to adjust the school boundaries to  
25 reduce the overcrowding of Greenway.

26       With regard to the reopening of a closed school option,

1 petitioner argues "once again the report does not say this  
2 would create an adequate solution to the Greenway  
3 overcrowding." Petition for Review 11. Petitioner argues the  
4 other district report in the record shows the contrary since it  
5 explains the schools were closed because the enrollment in  
6 their attendance areas had declined and their older buildings  
7 "needed major remodeling, making it fiscally unwise to continue  
8 their operation," saving the district \$350,000 to \$400,000  
9 annually. Record 132.

10 Finally, with regard to other options mentioned in the  
11 report's quote from the attorney general's opinion, petitioner  
12 argues that the other district report in the record says double  
13 shifting is not a feasible option for handling the district's  
14 enrollment growth problems, and the district has decided  
15 against adopting a year-round school program. Record 118.  
16 Petitioner also argues that the author of the Pflug report  
17 testified at the city council's hearing that the district has  
18 decided not to use year-round schools or busing of elementary  
19 school students. Record 92.

20 The city argues the requirement of code 201.2.C that there  
21 be "adequate" public facilities to serve the proposed  
22 subdivision does not "contemplate public facilities which are  
23 utopian or visionary; it contemplates a bare meeting of public  
24 needs, consistent with state law." Respondent's Brief 9. The  
25 city asserts that the term "adequate" is not defined in the  
26 code. However, the city cites Webster's Seventh New Collegiate

1 Dictionary, 1971, where "adequate" is defined as "barely  
2 sufficient \* \* \* lawfully and reasonably sufficient," and  
3 "sufficient" is defined as "enough to meet the needs of a  
4 situation or a proposed end \* \* \* ." Respondent's Brief 8.

5 The city further argues that its findings and the evidence  
6 in the record are sufficient to explain and support the city's  
7 determination that there are adequate school facilities to  
8 serve the proposed development. The city argues that the Pflug  
9 report "outlines many alternatives available to house the  
10 additional students generated by the subject subdivision  
11 \* \* \* ." Respondent's Brief 6. The city also argues that the  
12 record is replete with evidence supporting the district's  
13 ability to house the students generated by the subdivision and  
14 explaining methods which the district may use to address  
15 enrollments exceeding "ideal" school capacities. With regard  
16 to use of portable classrooms, the city and the district  
17 contend that code 76.9 allows an unlimited number of portables  
18 to be used at a school for a total of three years under a  
19 conditional use permit.

20 The district argues that the Pflug report is expert  
21 testimony, and great weight should be given to its  
22 conclusions. The city contends no evidence contrary to the  
23 Pflug report was presented to the city council by petitioner or  
24 others. The city maintains that based on the whole record,  
25 there is substantial evidence to support the city's  
26 determination of adequate school facilities, since the evidence

1 is such that reasonable minds would accept as adequate.  
2 According to the city, because the evidence presented to the  
3 city council by the district was credible, and there was no  
4 contrary evidence presented to undermine it, the evidence is  
5 substantial evidence as defined in Younger v. City of Portland,  
6 305 Or 346, 752 P2d 262 (1988).<sup>8</sup>

7 We agree with the city that it does not have to find that  
8 there will be "ideal" school facilities to serve the proposed  
9 subdivision. The city may properly interpret the required  
10 "adequate" facilities to be facilities barely sufficient to  
11 meet the need.

12 However, what the city must find, and what there must be  
13 substantial evidence in the record to support, is that there  
14 will be adequate facilities available to serve the proposed  
15 subdivision. In this case, the city projects that the  
16 elementary school designated to serve the proposed development  
17 will exceed its rated enrollment capacity by 1990-91.  
18 Therefore, the city must find, and there must be substantial  
19 evidence to support, (1) use of one or more of the options  
20 identified in the Pflug report is feasible to deal with the  
21 over-capacity situation at Greenway; and (2) use of one or more  
22 of the techniques which are feasible will result in an  
23 "adequate" elementary school facility being available to serve  
24 the proposed subdivision.

25 We agree with the district that testimony from its staff  
26 concerning matters pertaining to the adequacy of school

1 facilities may be considered expert testimony. However, it is  
2 possible for such expert testimony to be undermined by  
3 conflicting facts in other statements by district staff which  
4 are submitted into the record.

5 With this standard of review in mind, we examine whether  
6 the city's findings (i.e., the Pflug report) and the evidence  
7 to which we are cited in the record demonstrates that adequate  
8 elementary school facilities will be available to the proposed  
9 subdivision through any of the options, or a combination of the  
10 options, identified in the Pflug report.

11 Use of Existing Facilities. The report says that "each  
12 classroom can, and often does, accommodate additional  
13 children." Record 4. This statement indicates it is feasible  
14 to use this technique to address an over-capacity situation at  
15 Greenway. However, it is obvious that at some point  
16 accommodating increased numbers of children over the "ideal" of  
17 24 per classroom will result in an inadequate facility. What  
18 the report does not say is that the existing Greenway school  
19 facility will be an "adequate" facility to accommodate the  
20 projected enrollment, including the additional number of  
21 children generated by MacArthur Park, through increasing the  
22 number of children in each classroom.<sup>9</sup>

23 Use of Portable Classrooms. The report states that 20  
24 portable classrooms will become available over the next two  
25 years. We agree with the city and the district that under  
26 code 76.9 any number of portable classrooms may be used for a

1 period of three years through a conditional use permit.  
2 However, petitioner has pointed to credible evidence from the  
3 district that at some point the use of portables in a given  
4 situation can overburden cafeterias, gyms, lavatories,  
5 playgrounds and libraries (core facilities), thus resulting in  
6 an inadequate facility. The findings and evidence with regard  
7 to use of this technique are inadequate because they do not  
8 establish that use of the number of portable classrooms  
9 necessary to accommodate the projected enrollment at Greenway  
10 is feasible, and will not result in an inadequate facility by  
11 overloading the school's core facilities.

12 Boundary Changes. The report states that once a new  
13 elementary school opens in 1989, two schools adjacent to  
14 Greenway will feed students into the new school, and "it may  
15 then become possible to make a boundary adjustment."  
16 Record 5. We agree with petitioner that saying a technique for  
17 dealing with a problem "may become possible" does not  
18 constitute a finding that there is a feasible solution for the  
19 problem.

20 Reopening of Closed School. The report states that three  
21 closed elementary schools could be made ready for occupancy.  
22 However, petitioner points to conflicting district statements  
23 that it is not financially feasible to operate these schools.  
24 Record 132. Also, the report does not state where these  
25 schools are located. Petitioner also points to testimony by  
26 the author of the Pflug report indicating that the district is

1 unwilling to use busing for elementary students. Record 92.  
2 The findings and evidence with regard to this option need to  
3 establish that it is feasible to accommodate students in excess  
4 of capacity at Greenway by reopening one of the closed  
5 schools. In doing so, the identified economic and  
6 transportation issues must be addressed.

7 Busing. This option was referred to in the report only by  
8 reference in the quote from the attorney general's opinion.  
9 However, as mentioned in the preceeding paragraph, petitioner  
10 points to credible evidence that the district does not consider  
11 busing a feasible solution.

12 Double-shifting. This option is also mentioned only in the  
13 quote of the attorney general's opinion. Petitioner cites  
14 credible evidence from the district that it does not consider  
15 use of this option feasible. Record 118.

16 Year-round Schools. This option is also mentioned only in  
17 the quote of the attorney general's opinion. Petitioner cites  
18 evidence in a district publication and testimony by Pflug that  
19 the district decided against using this option. Record 92, 118.

20 New Construction. The report states that district voters  
21 approved a bond measure in 1988 which will allow construction  
22 of one new elementary school in the southwest area and 24  
23 classrooms to be added to existing district elementary school  
24 facilities. The effect of construction of the new elementary  
25 school was already discussed under "boundary changes," supra.  
26 With regard to the 24 additional classrooms to be added to

1 existing elementary facilities, the report nowhere states that  
2 it would be feasible for the district to construct additional  
3 classrooms at Greenway, or that such construction of new  
4 classrooms would produce a facility "adequate" for the  
5 projected enrollment.

6 The report also states that long-term enrollment growth  
7 will be accommodated through the construction of additional  
8 facilities, and that the district is capable of increasing its  
9 bonded indebtedness by close to \$400 million. However, the  
10 report does not state that the district will attempt to provide  
11 for students in excess of capacity at Greenway through passage  
12 of a new bond measure for new construction, or that such a  
13 solution feasibly could produce results by the time enrollment  
14 is projected to exceed capacity at Greenway.

15 We conclude that the city's findings and the evidence in  
16 the record are inadequate to support a determination that there  
17 are adequate elementary school facilities available to serve  
18 the proposed subdivision, as required by code 201.2.C.

19 The third assignment of error is sustained.

20 The city's decision is remanded.

21  
22  
23  
24  
25  
26

1 FOOTNOTES

2  
3 1

4 Code 130.5.C provides that the applicant has the burden of  
5 proof on all criteria, and code 201.2.C requires a finding that  
6 "[a]dequate public facilities are available to serve the  
7 proposal \* \* \*."

8  
9 2

10 The petition for review contains three assignments of error  
11 with combined argument in support of all three assignments. We  
12 have reordered the assignments for convenience in addressing  
13 the issues raised.

14  
15 3

16 We do not understand the city to argue that none of its  
17 plan policies are mandatory approval criteria. See Downtown  
18 Community Association v. City of Portland, 80 Or App at 341.  
19 Rather, the city contends School Policy 1 is not a mandatory  
20 approval criterion because it is not written in mandatory terms.

21  
22 4

23 The second assignment of error also alleges that the city's  
24 order does not state the facts relied on or adequately justify  
25 the city's decision. We interpret this aspect of the  
26 assignment to be an attack on the adequacy of the city's  
27 findings. In petitioner's third assignment of error, set out  
28 infra, he attacks the sufficiency of the evidence in the record  
29 to support the city's decision.

30 The city adopted, as the findings in support of its order,  
31 an August 19, 1988 report to the city council from Jerry Pflug,  
32 District Director Facilities/Transportation, including the  
33 attachments accompanying the report (Pflug report).  
34 Record 1-20. With the exception of the minutes of the city  
35 council's September 12, 1988 hearing, the Pflug report is the  
36 only evidence in the record cited by the city or the district  
37 in support of the city's decision. Thus, the Pflug report  
38 effectively constitutes both the findings and the evidence in  
39 support of the appealed decision.

40 In petitioner's combined argument under his assignments of  
41 error, he simply attacks the adequacy of the "Pflug report,"  
42 without making it clear whether he attacks the adequacy of the  
43 Pflug report as findings or as evidence. Under these  
44 circumstances, we find it more logical to address the adequacy  
45 of the findings aspect of petitioner's second assignment of

1 error together with the adequacy of the evidence issue, under  
2 the third assignment of error, infra.

3 

---

5

4 We note that although petitioner cites subsection (2) of  
5 ORS 227.173, he appears in this aspect of his argument to be  
6 alleging a violation of subsection (1), which provides:

7 "Approval or denial of a discretionary permit  
8 application shall be based on standards and criteria,  
9 which shall be set forth in the development ordinance  
10 and which shall relate approval or denial of a  
11 discretionary permit application to the development  
12 ordinance and to the comprehensive plan \* \* \* ."

13 

---

6

14 The district counts kindergarten students as 1/2 students  
15 for facility/housing purposes, since kindergarten classrooms  
16 are used by both morning and afternoon groups of kindergarten  
17 students each day.

18 

---

7

19 Since no projection of enrollment at Greenway in 1989-1990  
20 is given in the report, it is not known whether enrollment is  
21 projected to exceed rated capacity in that school year.

22 

---

8

23 The district also argues that it would be improper, based  
24 on the facts in the record, for the city to deny the proposed  
25 subdivision based on inadequate school facilities, citing First  
26 National Bank of Skokie v. Village of Skokie, 85 Ill App2d 326,  
27 229 NE2d 378 (1967). This case involved an action by a  
28 property owner to restrain a local government from enforcing  
29 its zoning ordinance so as to prevent the owner from using the  
30 property for apartment buildings. The court held that while  
31 the local school situation might be a factor to be considered  
32 in this kind of case, it cannot be conclusive. 229 NE2d at  
33 385. The lower courts had found that the existing single  
34 family or two family dwelling zoning of the property was  
35 unsustainable because it was not "the highest and best use for  
36 the subject property." 229 NE2d at 383. The court noted that  
37 additional burdens on entities such as the local school  
38 district could not justify an otherwise unreasonable, arbitrary  
39 and discriminatory restriction on the use of private property.  
40 The district does not present any argument as to why such a  
41 decision by an Illinois court has application to this case,  
42 where the city's acknowledged code requires it to find that

1 there are adequate facilities to serve a proposed development.  
2 We note that in Dickas I our remand of the city's decision was  
3 based solely on the failure to satisfy this code requirement  
4 with regard to adequate school facilities, and that decision  
5 was affirmed on the city's cross-appeal by the Court of  
6 Appeals. Dickas v. City of Beaverton, 92 Or App at 170.

7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

---

9

The report does say that Hiteon and Errol Hassell schools  
have rated capacities of 528, as does Greenway, yet "housed"  
584 and 555 students, respectively. Record 4. This statement  
is not the equivalent of saying that Greenway is an adequate  
facility for its projected enrollment of 558-580 students. For  
one thing, "housing" students is not necessarily the same thing  
as providing an adequate facility. For another, although these  
schools have the same rated capacity, there is no factual basis  
for concluding they have the same capability for adequately  
accommodating enrollments over their rated capacities.