

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a city decision which grants approval for Pfeifer Farms, a 46 lot planned development, and approves several modifications to the Residential High Density (R-5) zone requirements for Pfeifer Farms.

MOTION TO INTERVENE

Raintree Development Company moves to intervene on the side of respondent in this proceeding. There is no objection to the motion, and it is allowed.

FACTS

The subject property includes 13.10 acres. The current R-5 zoning would permit a maximum of 92 lots. Following hearings to consider the proposed 46 lot planned development, the Lake Oswego Development Review Board (DRB) initially reached an oral decision to deny the proposal based on a determination that the elementary school that would serve the proposed development lacked adequate capacity. However, before a written decision was adopted by the DRB, the city council issued a memorandum explaining its interpretation of Lake Oswego Comprehensive Plan (plan) provisions concerning school capacity and review of individual development proposals.

Following receipt of the city council's memorandum, the DRB conducted additional public hearings, concluded that Pfeifer Farms met all applicable approval standards and

approved the application. In reaching its decision to approve Pfeifer Farms the DRB found that adequate school capacity existed and would exist in the future to serve the development. The DRB's finding of adequate school capacity was based in large part upon a July 5, 1989 memorandum from Bill Korach, the superintendent of the Lake Oswego School District.

The DRB's decision was appealed to the city council, which affirmed the DRB's decision. In affirming the DRB's decision the city council adopted findings stating that applicable plan policies do not require that an applicant for development approval demonstrate adequate school capacity exists to serve the proposed development. In the alternative, the city council found that even if such a demonstration is required under the plan, adequate school capacity exists to serve Pfeifer Farms. This appeal followed.

FIRST ASSIGNMENT OF ERROR

"The city erred in concluding that the specific policies in the plan are merely advisory and not regulatory."

SECOND ASSIGNMENT OF ERROR

"The city erred in concluding that no plan provisions pertaining to 'public facilities' or 'public services' require an assessment of the adequacy of school facilities in the context of a quasi-judicial hearing."

The development approval at issue in this appeal must comply with applicable provisions of the city's acknowledged

comprehensive plan and land use regulations. ORS 197.175(2)(d); 197.835(6). During proceedings before the city council, petitioner cited twelve general and specific plan policies which he contends are violated by the proposal, because, petitioner alleged, there is inadequate school capacity to serve the proposed development.

The city first contends that none of the plan policies cited by petitioner, nor any other plan policies, require that an applicant for development approval demonstrate that adequate school capacity exists to serve the proposed development or that an applicant pay for such capacity as a condition of approval if such capacity is lacking. In reaching this conclusion, the city explains that in its view only the general policies in the plan are "regulatory," in the sense that they establish approval criteria potentially applicable to individual development applications.¹ According to the city, specific policies are merely advisory

¹The plan is divided into twelve policy elements, many of which are further divided into sub-elements. For each of these plan elements and sub-elements the plan states "objectives." The plan explains:

"The adopted plan contains OBJECTIVES, which are short statements of the purpose of the policies, GENERAL POLICIES, which are the major methods of achieving objectives, SPECIFIC POLICIES, which are more detailed steps to carry out General Policies, and MAPS, which show the location and type of land uses and public facilities.

"In addition, STRATEGIES to carry out the Specific Policies are contained in the second volume [of the plan]. Strategies are not adopted as policies, rather, they are intended to provide specific suggestions to be used as practical and feasible." (Capitalization in original). Plan at v.

and are not mandatory approval criteria applicable to individual development approvals. The city goes on to offer reasons why even if the cited general and specific plan policies are potentially applicable as approval standards for individual development approval applications, it believes none of the general or specific plan policies cited by petitioners apply or impose the type of obligation concerning adequacy of schools that petitioner contends must be satisfied.

Before considering the specific and general plan policies cited by petitioner, we first consider the city's interpretation that no specific plan policies impose regulatory or mandatory approval standards.

A. Specific Policies as Mandatory Approval Standards

The city explains in its findings that for many years it has interpreted the plan as imposing regulatory requirements on individual development proposals only through its general policies. See n 1, supra. The city goes on to explain that this view of the plan is consistent with the statutory definition of "comprehensive plan" at ORS 197.015(5), which provides, in part, that a comprehensive plan is "a generalized * * * policy statement of the governing body of a local government * * *." The city contends in its decision that the plan's specific policies are too detailed to be the "generalized policy statements" envisioned by the definition of comprehensive plan in ORS

197.015(5). Finally, the city points out that the statutory definitions of "Goals" and "Guidelines" explicitly recognize the distinction the city applies to the general and specific policies of its plan.²

The city explains that under its interpretation and application of its plan general and specific policies, a specific development project must comply with applicable general policies but may be inconsistent with a specific policy adopted to implement an applicable general policy. The city explains that such a development application could be approved, as long as an explanation is provided showing "why, notwithstanding that inconsistency with the specific policy, the [proposed development] is nonetheless consistent with the applicable general policy." Record 7.

The city is correct that the statutory definitions of "Goals" and "Guidelines" recognize a distinction between mandatory and advisory planning measures. See Downtown Community Assoc. v. City of Portland 80 Or App 336, 722 P2d 1258, rev den 302 Or 86 (1986). A similar distinction is recognized in comprehensive plans, and this Board is frequently called upon to determine whether a comprehensive plan provision is a mandatory approval criterion or merely an advisory statement. See Bennett v. City of Dallas, 96 Or

²The statewide planning goals are defined as "mandatory statewide planning standards," while planning "guidelines" are advisory and are only "suggested approaches." ORS 197.015(8) and (9).

App 645, 773 P2d 1340 (1989); Pardee v. City of Astoria, ___ Or LUBA ___ (LUBA Nos. 88-049, 88-050, 88-051, December 14, 1988); McCoy v. Tillamook County, 14 Or LUBA 108, 118 (1986). Further, even if a plan provision is a mandatory approval standard, it may not apply to all types of land use decisions. For example, some plan policies may be directed solely to the local government's ongoing plan or land use regulation adoption and amendment actions and not individual permit decisions. Stotter v. City of Eugene, ___ Or LUBA ___ (LUBA No. 89-037, October 10, 1989), slip op 41-43.

We have no dispute with the city's understanding that a comprehensive plan may include both regulatory/mandatory provisions and provisions that are merely advisory and which are not to be applied as approval standards. However, we do not agree with the city that its plan makes a distinction between general policies and specific policies on this basis. To the contrary, the city's plan makes that distinction between "strategies" and "policies" and makes no such distinction between general and specific policies. See n 1, supra.

If the city wishes to make all plan specific policies nonregulatory or advisory, it must amend the plan to state that position. There is no support in the plan for the city's interpretation that no specific policies are regulatory standards potentially applicable to individual development proposals. Of course this does not mean that

all specific policies are regulatory standards. It simply means that a determination must be made for each relevant specific policy, based on the language and context of that specific policy. Bennett v. City of Dallas, supra.

B. Plan Policies Cited by Petitioner

1. Urban Service Boundary Specific Policy 4

The plan includes four general policies under the Urban Service Boundary Policies section of the plan. General Policy III provides as follows:

"The City will manage and phase urban growth within the Urban Services Boundary, with a logical planned extension of basic services:

"To establish priorities for the phased extension of services, the City will identify areas within the Urban Services Boundary as follows:

"(1) Lands suitable for near future development. (IMMEDIATE GROWTH)

"(2) Lands in long range growth areas. (FUTURE URBANIZABLE).

"The city will schedule public facilities through a capital improvements program and financing plan." Plan 15.

The plan includes six specific policies to carry out General Policy III. Specific Policy 4 provides:

"New development shall be served by an urban level of service of the following:

"a. Water

"b. Sanitary sewer

- "c. Adequate streets, including collectors
- "d. Transportation facilities
- "e. Open space and trails, as per Open Space Element
- "f. City police protection
- "g. City fire protection
- "h. Parks and recreation facilities, as per Parks and Recreation Element
- "i. Adequate drainage
- "j. Schools * * *

"Services shall be available or committed prior to approval of development. Such facilities or services may be provided concurrently with the land development for which they are necessary if part of an adopted annual capital budget at the time of approval of the development, or if provided by the developer with adequate provisions assuring completion, such as performance bonds."
(Emphasis added.) Plan 15.

Respondent contends that Urban Services Boundary Specific Policy 4 is inconsistent with Urban Services Boundary General Policy III because the last paragraph of the specific policy is "much too specific for reasonable application." Record 17. Respondent contends that because the general policy does not require that school capacity be "available or committed prior to approval of development," Urban Services Boundary Specific Policy 4 may not be applied to impose that requirement and "must be considered superseded." Record 19.

In reaching this conclusion the city explains in its

decision that for some facilities, such as transportation, water, sewerage and drainage, it is logical to require that the required facilities be available or provided concurrently with development. However, the city explains that other public facilities, such as schools, police and fire services, are responsive and are logically provided after the development that justifies such facilities.

The possible logic of the city's distinction between the required timing of different types of public facilities notwithstanding, Urban Services Boundary Specific Policy 4 is quite clear. It requires that "schools" be "available or committed prior to development." (Emphasis added.) We have already rejected the city's position that no specific policies are regulatory standards applicable to individual development proposals, and we conclude Urban Services Boundary Specific Policy 4 is such a mandatory approval standard. Its terms and context permit no other interpretation. Bennett v. City of Dallas, supra.

If the city does not wish to require that an urban level of schools or certain other services be "available or committed prior to approval of development," it may amend its plan to provide otherwise, provided it does so consistently with Statewide Planning Goal 11 (Public Facilities and Services). ORS 197.175(2)(a). Having included that requirement in its comprehensive plan, the city may not ignore it. See Sunburst II Homeowners Assoc.

v. City of West Linn, ___ Or LUBA ___ (LUBA No. 88-092, January 26, 1989).

2. The Remaining General and Specific Plan Policies

Impact Management Policy General Policy II, Specific Policy 6 simply requires that the city "[e]ncourage the Lake Oswego School District to provide specific information on school capacity to be taken into consideration in development review." There is no dispute among the parties that the city was provided extensive information by the school district and considered that information in reaching its decision.

The remaining general and specific policies cited by petitioners, with one exception, add nothing of substance to the requirement of Urban Service Boundary General Policy III, Specific Policy 4, which we have already determined is applicable to the challenged decision. Several of the cited policies state that where public facilities or services are inadequate to serve proposed development, the city may nevertheless approve the request if the developer agrees to pay the cost of expanding those public facilities or services.³

³Plan Impact Management Policy V, Specific Policy 3 is representative of the policies petitioner cites, and it provides in part:

"The city will:

"* * * * *

The city explains in its findings that it does not interpret its plan policies to require that developers pay the cost of increased public facilities and services where those public facilities and services are not provided by the city. Because schools are planned, funded and constructed by the Lake Oswego School District, not the City of Lake Oswego, the city found the cited plan policies did not require the developer to pay the cost of school facilities that might ultimately be necessary for students from Pfeifer Farms. We agree with that interpretation of the cited plan policies.

In summary, we agree with petitioner that the city erroneously determined that none of its specific policies are mandatory approval standards. This requires that we sustain the first assignment of error. We also sustain the portion of petitioner's second assignment of error alleging that the city erroneously determined that Urban Service Boundary General Policy III, Specific Policy 4 is not an applicable approval criterion.

However, although the city found that Urban Service Boundary General Policy III, Specific Policy 4 does not require the city to determine that an urban level of school

"(3) Prohibit land uses or intensities which tax or exceed the normal capacity of public services except in instances where the developer pays all costs of providing additional required capacity, subject to City Council approval."

service to serve Pfeifer Farms is available or committed, the city also found, in the alternative, that Pfeifer Farms complies with Urban Service Boundary General Policy III, Specific Policy 4. Therefore, although we sustain the first assignment of error and part of the second assignment of error, they provide no basis for reversal or remand, if the city's determination of compliance with Urban Service Boundary General Policy III, Specific Policy 4 is adequate. We consider the adequacy of the city's determination of compliance with Urban Service Boundary General Policy III, Specific Policy 4 below.

THIRD ASSIGNMENT OF ERROR

"The city erred in restricting its analysis of school capacity to a district-wide analysis."

FOURTH ASSIGNMENT OF ERROR

"The city's decision does not contain adequate findings as to each applicable specific and general policy under the plan, nor does the decision contain adequate findings as to the school district's own criteria."

FIFTH ASSIGNMENT OF ERROR

"The city erred in refusing to consider the impacts of the Pfeifer Farms development on school capacity, and it erred further by not rendering adequate findings concerning Pfeifer Farms' impact."

Although petitioner's assignments of error do not appear to include an evidentiary challenge, the city's findings rely heavily on the July 5, 1989 Lake Oswego School District Superintendent's memorandum and incorporate

reasoning from the memorandum. While the memorandum is most properly viewed as evidentiary support for the city's findings, the distinction between findings and evidence is not always easy to make in this case. Therefore, in resolving these assignments of error we address both the city's findings and the July 5, 1989 memorandum that provides both reasoning and evidentiary support for those findings. Below, we review the city's findings and the July 5, 1989 memorandum upon which the city relied before addressing petitioners specific challenges.

A. The City's Findings

The parties do not dispute that the Lake Oswego School District, if it is viewed on a system-wide basis, has adequate elementary and secondary school capacity. However, at least one elementary school in the northern part of the city, Lake Grove Elementary School, exceeds its ideal capacity. Petitioner disputes whether the city adequately demonstrates that an urban level of service of elementary schools is available or committed at Uplands Elementary School, the elementary school that will serve Pfeifer Farms.

The city found that Urban Services Boundary General Policy III, Specific Policy 4, when viewed with the other policies cited by petitioner, effectively requires the city to find:

"(1) The City and school district have logical plans for providing an acceptable [i.e. urban] level of school facilities and

services;

"(2) Those plans are capable of accommodating present demand and anticipate future demand; and

"(3) The anticipated impacts of the individual development have been accounted for and/or can be accommodated by the plans." Record 20-21.

The city found that the impact from Pfeifer Farms on Uplands Elementary School would be "negligible" and that the school district had demonstrated that in both the short and long term it was prepared to provide the required "urban" level of service for elementary school students at Uplands Elementary School.⁴ Record 28.

Although the plan does not define "urban level of service," the city accepted the explanation offered in the superintendent's July 5, 1989 memorandum of what constitutes an "urban" level of schools. The city's findings, which quote with approval portions of the superintendent's explanation, are as follows:

"* * * The school district has determined that it is 'responsible for providing physical facilities which are appropriate to instructional and support program activities.' Coupled with that goal, the

⁴The record shows that it is estimated that Pfeifer Farms will generate a total of approximately 19 elementary school students. It is estimated that approximately 11 elementary school students could be anticipated from Pfeifer Farms as early as December 1990. However, as respondent and intervenor point out, the expectation of 11 students as soon as December 1990 was based on an assumption that 28 homes would be constructed by December 1990. By virtue of this appeal, the first homes will not be constructed by that date.

school district is committed to providing 'essentially the same instructional program, equipment, supplies, facilities and transportation for all children of comparable grade levels. One of our most fundamental commitments is that the school district must provide the opportunity for all students within the district to receive the same quality of education.' To implement those goals and thereby maintain an acceptable level of service, the district has established certain statistical targets for its teacher/student ratio and classroom and school sizes. For example, the school district seeks to maintain a 1:23 teacher/student ratio, classroom sizes of 28 students, and elementary school sizes of 350 to 500 students. It is recognized that these are targets to strive for, but they are not mandatory standards. The evidence shows that despite going above some of these target levels, the district nonetheless has maintained its standards for providing acceptable levels of school services and facilities. (Emphasis added.) Record 21.

The portion of the superintendent's July 5, 1989 memorandum, quoted in the city's findings above, states five considerations the school district applies in providing an urban level service for elementary schools in Lake Oswego.⁵

⁵The five considerations discussed in the superintendent's memorandum are as follows:

"1. FACILITIES APPROPRIATE TO PROGRAM

"* * * * *

"2. EQUAL OPPORTUNITY

"* * * * *

"3. TEACHER-STUDENT RATIO

"* * * * *

"4. ELEMENTARY SCHOOL SIZE

The July 5, 1989 memorandum explains that under the "Equal Opportunity" consideration, the school district is committed "to provide the opportunity for all students within the district to receive the same quality of education. Under the "Teacher-Student Ratio" consideration, the school district establishes a 1:23 teacher student ratio as desirable and usually provides an instructional aide when class size reaches 28 students. Under the "Elementary School Size" consideration, the district has established a range of 350 to 500 students as the ideal elementary school size. Finally, under the "Neighborhood Schools" consideration, the memorandum explains that the district attempts to maintain neighborhood schools, so that

"no student walks or is transported past one school to attend another * * * however, when the neighborhood school concept conflicts with the concept of equal educational opportunity, the district * * * give[s] priority to providing 'essentially the same instructional program * * * for all children of comparable grade levels.'" Record 1023

The city found that the school district has plans to assure that Uplands Elementary School will provide an adequate level of service in the short term. The city found:

** * * * *

"5. NEIGHBORHOOD SCHOOLS

** * * * *" Record 1022-1023.

"The evidence demonstrates that the solutions will be in place for the 1989-90 and 1990-91 school years and that they will be an effective mechanism for providing adequate levels of school services at all elementary schools, including * * * Uplands." Record 23.

The July 5, 1989 memorandum states that Uplands Elementary has 19 regular classrooms and 4 portable classrooms for an ideal capacity of 575. The fall 1989 projected enrollment was 545 students, or 30 students less than the ideal capacity. Respondent points out that although the superintendent testified on July 5, 1989 that expected enrollment increases at Uplands Elementary would push enrollment beyond acceptable levels by the 90-91 school year, an additional two portable classrooms were approved on October 16, 1989 raising the ideal capacity to 611. Respondent and intervenor-respondent (respondents) contend Uplands is therefore capable of accommodating the number of students expected from Pfeifer Farms without bussing.⁶

⁶The superintendent testified that if enrollment at Uplands were to exceed acceptable levels, students would be bussed to an adjoining school with excess capacity.

"Because enrollments at Lake Grove and Uplands Elementary Schools are projected to be beyond acceptable limits for the '90-'91 school year, * * * the district will then have no choice but to use those facilities which are available in order to provide equal educational opportunities to all the children within the district. For example, the bussing of Lake Grove and Uplands students to Halinan on a temporary basis would be considered highly undesirable. I won't get standing ovations when I go out and talk to the community about it. But * * * if enrollment growth continues as projected, we will have to use our available space and that's where our available space will be. The district will make whatever adjustments are

Even if bussing were required at Uplands Elementary in the short term, the July 5, 1989 memorandum makes it clear that the school district views bussing of students from overcrowded schools to utilize unused classroom space in other schools and boundary changes to shift school populations as options it will implement to maintain educational equality and maintain urban levels of school service. Although it is less clear in the July 5, 1989 memorandum, we also understand the superintendent to take the position that it is quality and equality of educational service that is critical in providing an urban level of service, and where students must be bussed they do not thereby fail to receive an urban level of service. In the emphasized portion of the above quoted city findings, the city council embraces this view.

Addressing longer term concerns regarding enrollment at Uplands Elementary, the city found that passage of a school district facility improvement bond measure in November 1989 will provide assurance that "school services will be available to serve long-term needs, including the impacts of Pfeifer Farms." Record 26-27. The bond measure will fund

necessary to provide a high quality educational experience that is essentially the same for all students in the district." Supplemental Record 375.

We understand the above quoted testimony to state a position that if bussing is required to maintain an urban level of school services at Uplands Elementary School, the school district would do so, even though such action is viewed as undesirable by the school district.

construction of three additional classrooms at Uplands Elementary School, as well as a new elementary school with a capacity of approximately 500 students on the north side of the city, where Uplands Elementary School is located. The city asserts that based on passage of the bond measure, "the school district has adequate plans in place to assure that it will be capable of providing adequate capacity and service in its elementary schools, beginning with and beyond the 1991-92 school year." Record 27-28.

Petitioner argues the city's findings are flawed in five ways. We address each of the alleged flaws separately below.

B. Finding that Pfeifer Farm's Impact on Uplands Elementary School Would be Negligible

Petitioner contends the city erred in finding the impact on Uplands Elementary School from Pfeifer Farms would be negligible.

The city's characterization of the magnitude of the impact on Uplands Elementary School is unimportant. As noted above, see n 4, the record clearly identifies the number of students expected from Pfeifer Farms and when they are expected to impact the school system. The city's findings explain in detail how the existing and projected enrollment at Uplands Elementary School will be accommodated in a manner consistent with Urban Service Boundary General Policy III, Specific Policy 4. Therefore, the correctness of the city's characterization of the impact on Uplands

Elementary School is not important.

C. The Superintendent's Five Considerations

Petitioner contends under his fifth assignment of error that the five considerations discussed in the superintendent's July 5, 1989 memorandum are mandatory standards which the city was required to address and demonstrate are satisfied in its findings. Respondents contend the five considerations are not regulatory standards the city is required to specifically address in its findings. We agree with respondents.

Admittedly, the plan standard requiring an "urban level of service" of schools is a very subjective standard because the city has adopted no definition of that term. The city clearly has not itself adopted as "standards" the considerations discussed in the superintendent's July 5, 1989 memorandum. Without a definition of "urban level of service" in the plan, we see nothing wrong with the city applying that term in a way that coincides with the school district's considerations for providing adequate school facilities. The school district's considerations are in some respects objective (i.e. 1:23 teacher/student ratio; ideal school size of 350 to 500 students) and in other respects more subjective (i.e. provide same quality of education at all elementary schools). However, it is clear from the July 5, 1989 memorandum that none of the considerations are "standards" in the sense that each must

be satisfied to provide an "urban level of service." The superintendent's considerations place the greatest overall emphasis on equality of schools, with teacher student ratio and school size important considerations in maintaining equality, and maintenance of neighborhood schools of less importance when relocation of students between schools is required to maintain educational equality.

Because the five considerations discussed by the superintendent have not been adopted by the city as standards to be applied in considering Urban Services Boundary General Policy III, Specific Policy 4, and because those considerations are written in a manner that suggests they are to be applied as interpretative aides, rather than approval standards, the city committed no error by failing to adopt findings specifically addressing each of the five considerations.

D. Improper Reliance on System-wide School System Capacity

Petitioner argues the city improperly relied on the excess elementary school capacity system-wide and ignored the existing and projected overcrowding at Uplands Elementary School. We disagree. The city's findings and the July 5, 1989 memorandum, both discussed above, clearly address the manner in which increased enrollment will be accommodated in a way that provides an urban level of service at Uplands Elementary School.

E. Plan Policies Other Than Urban Service Boundary

General Policy III, Specific Policy 4

Petitioner asserts the city erred by not specifically addressing policies other than Urban Service Boundary General Policy III, Specific Policy 4. For the reasons explained under our discussion of the first two assignments of error, we disagree.

F. Reliance on School District Plans

Petitioner contends the city erred in that it simply relied on the short and long term "plans" of the school district. Petitioner contends that the school district's expression of what it plans to do or might do in the future is not adequate to constitute a commitment to take such steps, as required by the language of Urban Service Boundary General Policy III, Specific Policy 4.

As we explained in Dickas v. City of Beaverton, ___ Or LUBA ___ (LUBA 88-091, March 31, 1989), in applying a plan standard requiring that development be served by "adequate" school facilities, it is not sufficient for a local government simply to rely on a general assurance from the school district that it will utilize potential options to provide adequate facilities in the event of overcrowding at a particular school. Rather, it is necessary to find that available options are feasible solutions for the anticipated facility problems.

In Dickas, there was evidence that suggested the available options would not or could not be implemented by

the school district, or would not result in adequate school facilities if they were. Here, in contrast, the evidence supplied by the school district supports the city's finding that (1) Uplands Elementary School provides an urban level of service, (2) will continue to do so in the short term with portable classrooms or bussing if necessary, and (3) will provide an urban level of service in the long term by virtue of capital facility expansion at Uplands and elsewhere and through construction of a new school, funded by a 1989 bond measure, which will relieve student enrollment pressures at Uplands.

Reliance on abstract "plans," or even concrete plans for which there is no reasonable expectation that those plans can or will be brought to fruition, might not be adequate to demonstrate that needed school facilities are "committed," as Urban Service Boundary General Policy III, Specific Policy 4 requires. However, as the findings and evidence discussed above demonstrate, the school district has identified and has demonstrated the capability to implement plans to provide a continued urban level of school service at Uplands Elementary School.

The third, fourth and fifth assignments of error are denied.⁷

⁷Under the sixth assignment of error, petitioner challenges an alternative basis offered by the city in its findings for its decision that Pfeifer Farms complies with Urban Service Boundary General Policy III, Specific Policy 4. In view of our rejection of the third through fifth

SEVENTH ASSIGNMENT OF ERROR

"The city's decision does not contain adequate findings with respect to the basis for reducing the 'open space' requirement and permitting an 'in lieu' payment."

EIGHTH ASSIGNMENT OF ERROR

"There exists no evidence that supports the city's implicit conclusion that there is no open space that qualifies under the 'others' category of § 8.035(4) of the Park and Open Space standard."

The plan requires that individual development proposals dedicate land for open space or park purposes or pay fees in lieu of such dedication for acquisition of open space and park lands. The city also imposes a fee for development of acquired and dedicated open space and park lands.

Lake Oswego Development Standards (LODS) § 8.020(1) provides in relevant part:

"All major residential development * * * shall provide open space or park land approved by the city in an aggregate amount equal to at least 20 percent of the gross land area of the development.
* * *"

LODS § 8.035(4) states "[l]ands shall be selected by the City for reservation as open space areas or parks in accordance with the following priorities * * * [.]" Ten separate priorities are listed; the fifth priority is "[s]pecimen trees," and the final priority is entitled "[o]thers."

assignments of error, we need not consider the findings challenged under the sixth assignment of error.

LODS § 8.035(6) lists five "Options for Meeting Park and Open Space Requirements." The options allow the requirement of LODS § 8.020(1) to be met by approval of developed or undeveloped open space and park lands, or payment of fees in lieu of such lands or by combinations of approved developed and undeveloped open space and park lands and payment of acquisition and development fees.

Although the applicant originally proposed to satisfy the requirement of LODS § 8.020(1) solely through payment of fees, the city's decision identified 1.19 acres around the existing house as falling within the category "specimen trees" and requires dedication of that area as open space. A fee is imposed to satisfy the remaining obligation under LODS §§ 8.020(1) and 8.035(4).

Petitioner contends there are historic resources on the property. Petitioner argues that under the LODS § 8.035(4) priority "others," the city should have either required additional land be dedicated to protect the alleged historic resources or adopted findings explaining why it elects not to do so.

We disagree with petitioner's assumption that LODS § 8.035(4) establishes a list of priority areas which the city is required to address and, if it finds areas within a proposed development falling within a priority area, require land dedication rather than payment of the fee. Under petitioner's interpretation, the city would be required to

exhaust a potentially infinite list of priorities under the "others" category before it could accept fees in lieu of dedication. LODS § 8.035(6) expresses no preference between land dedication and payment of fees, and we will not interpret LODS § 8.035(4) to impose such an obligation absent some basis in the code language for doing so.

We read LODS § 8.035 to make land dedication or payment of fees in lieu equally available options to be selected in whole or in part as the city wishes.⁸ The priorities in LODS § 8.035(4) are simply priorities the city must apply if it requires that land be dedicated. It may be that the language in LODS § 8.035(4) requiring that land be selected according to the priorities stated in that subsection would preclude the city from selecting lands falling within a lower priority where higher priority lands are present. However, even if LODS § 8.035(4) imposes such a limitation, it has no impact on the city's discretion to require payment of fees rather than dedication of land.

The seventh and eighth assignments of error are denied.

The city's decision is affirmed.

⁸We also note that apparently not all lands required under LODS § 8.020(1) are publicly maintained and controlled. Under LODS § 8.035(5), the city manager is delegated sole discretion whether to accept required open space or park land for public control or maintenance.