

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SALEM-KEIZER SCHOOL DISTRICT 24-J, )

Petitioner, )

and )

RICHARD C. STEIN, JAMES NASS, and )

COALITION FOR RATIONAL AND )

OBJECTIVE SCHOOL SITING, )

Intervenors-Petitioner, )

vs. )

CITY OF SALEM, )

Respondent, )

and )

CITIZENS FOR THE PRESERVATION )

OF NEIGHBORHOODS, SALLY MILLER, )

ALAN BONER, and D. OLCOTT )

THOMPSON, )

Intervenors-Respondent. )

OPINION

\_\_\_\_\_ )

CITIZENS FOR THE PRESERVATION )

OF NEIGHBORHOODS, SALLY MILLER, )

and ALAN BONER, )

Petitioners, )

vs. )

CITY OF SALEM, )

Respondent, )

and )

LUBA No. 94-022

FINAL

AND ORDER

LUBA No. 94-025

1 )  
2 SALEM-KEIZER SCHOOL DISTRICT 24-J, )  
3 RICHARD C. STEIN, JAMES NASS, and )  
4 COALITION FOR RATIONAL AND )  
5 OBJECTIVE SCHOOL SITING, )  
6 )  
7 Intervenors-Respondent. )

8  
9  
10 Appeal from City of Salem.

11  
12 Kris Jon Gorsuch, Salem, filed a petition for review in  
13 LUBA No. 94-022 and a response brief in LUBA No. 94-025 and  
14 argued on behalf of Salem-Keizer School District 24-J. With  
15 him on the briefs was Saafeld, Griggs, Gorsuch, Alexander &  
16 Emerick, P.C.

17  
18 Richard C. Stein, Salem, filed a petition for review in  
19 LUBA No. 94-022 and argued on behalf of Richard C. Stein,  
20 James Nass and the Coalition for Rational and Objective  
21 School Siting.

22  
23 Daniel Kearns, Portland, filed a petition for review in  
24 LUBA No. 94-025 and a response brief in LUBA No. 94-022 and  
25 argued on behalf of Citizens for the Preservation of  
26 Neighborhoods, Sally Miller and Alan Boner.

27  
28 D. Olcott Thompson, Salem, represented himself.

29  
30 Paul Lee, Assistant City Attorney, Salem, filed a  
31 response brief and argued on behalf of respondent.

32  
33 HOLSTUN, Referee; KELLINGTON, Chief Referee; SHERTON,  
34 Referee, participated in the decision.

35  
36 REMANDED 06/17/94

37  
38 You are entitled to judicial review of this Order.  
39 Judicial review is governed by the provisions of ORS  
40 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city council decision determining  
4 that a proposed middle school site violates a Salem Area  
5 Comprehensive Plan (SACP) policy.

6 **MOTIONS TO INTERVENE**

7 Richard C. Stein, James Nass and Coalition for Rational  
8 and Objective School Siting (CROSS) move to intervene on the  
9 side of petitioner in LUBA No. 94-022 and on the side of  
10 respondent in LUBA No. 94-025. There is no opposition to  
11 the motions, and they are allowed.<sup>1</sup>

12 Citizens for the Preservation of Neighborhoods (CPN),  
13 Sally Miller, Alan Boner and D. Olcott Thompson move to  
14 intervene on the side of respondent in LUBA No. 94-022.  
15 There is no opposition to the motions, and they are  
16 allowed.<sup>2</sup>

17 Salem-Keizer School District 24-J (school district)  
18 moves to intervene on the side of respondent in LUBA No. 94-  
19 025. There is no opposition to the motion, and it is  
20 allowed.

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<sup>1</sup>A single petition for review was filed on behalf of these parties. We refer to these parties collectively as CROSS.

<sup>2</sup>A single petition for review and a single intervenors-respondent's brief were filed on behalf of CPN, Sally Miller and Alan Boner. We refer to these parties collectively as CPN. D. Olcott Thompson did not file a brief.

1 **FACTS**

2 The SACP map designates the subject property as  
3 "Community Services," a designation that permits education  
4 facilities. The subject property is zoned Public and  
5 Private Health Services District (PH). The PH district is  
6 one of a number of public use districts included in Salem  
7 Revised Code (SRC) chapter 160. Among the outright  
8 permitted uses in the PH district are Educational Services.  
9 SRC 160.060(b)(2). The SRC defines Educational Services as  
10 including elementary and secondary schools. The central  
11 question presented in this appeal is whether development of  
12 the proposed middle school, an outright permitted use under  
13 the plan and zoning map designations for the subject  
14 property, must, nevertheless, be based on a demonstration of  
15 compliance with certain SACP policies.

16 A school district bond levy to construct four new  
17 middle schools, replace the existing Leslie Middle School  
18 and improve other existing middle schools was approved in  
19 1992. The school district thereafter established a site  
20 selection process and site selection criteria. Three  
21 potential sites were identified for replacement of the  
22 existing Leslie Middle School facility: (1) the Leslie  
23 Middle School site with the purchase of adjacent land  
24 (hereafter Leslie site), (2) Gilmore Field (hereafter  
25 Gilmore site), and (3) the Pringle Road site (hereafter  
26 Pringle site).

1           After opposition was voiced concerning the sites, the  
2 school district formed a Site Review Team. The Site Review  
3 Team identified a number of factors for evaluating the  
4 sites. One of the identified factors was the SACP. The  
5 Site Review Team identified advantages and disadvantages of  
6 the three sites and recommended "Guiding Principles" for the  
7 school district to use in making a final site selection  
8 decision. Record 1280. One of the guiding principles  
9 recommended by the Site Review Team is conformance with city  
10 and county comprehensive plans.

11           On March 8, 1993, the school district held a public  
12 hearing to receive the Site Review Team report and accept  
13 testimony from interested citizens. On March 9, 1993, the  
14 school district selected the Pringle site. On March 15,  
15 1993, a CPN member asked the city council to review the  
16 school district's process and determine whether the Pringle  
17 site complies with the SACP. The request was referred to  
18 city staff. In an April 5, 1993 staff report, staff  
19 concluded the Pringle site complies with the SACP. On April  
20 5, 1993, the city council voted to accept the staff report  
21 and determined it would not conduct a public hearing to  
22 consider whether use of the Pringle site as a middle school  
23 complies with the SACP.<sup>3</sup>

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<sup>3</sup>In May 1993, the school district purchased the Pringle site for \$347,000.

1           On May 14, 1993, CPN filed a notice of intent to appeal  
2 the city council's April 5, 1993 decision with LUBA. That  
3 appeal was later dismissed at CPN's request, on October 17,  
4 1993. Citizens for Preservation of Neighborhoods v. City of  
5 Salem, \_\_\_ Or LUBA \_\_\_ (LUBA No. 93-075, October 17, 1993).

6           On June 22, 1993, while CPN's appeal of the city's  
7 April 5, 1993 action was pending at LUBA, CPN submitted a  
8 formal request for a city interpretation under SRC 110.050  
9 concerning whether use of the Pringle site for a middle  
10 school is lawful under the SACP. The planning commission  
11 held public hearings and, on October 5, 1993, determined  
12 that the proposed middle school is not a lawful use of the  
13 Pringle site. The planning commission specified three bases  
14 for its decision.

15           The School District and CROSS appealed the planning  
16 commission's decision to the city council. The city council  
17 held a public hearing on December 13, 1993 and voted to  
18 uphold the planning commission's decision.

19           In its written decision, the city council upholds the  
20 planning commission's decision, but does so on only one of  
21 the three bases specified by the planning commission. The  
22 city council found the school district is required by SACP  
23 Policy K to select a site that is geographically central to  
24 the population to be served or to demonstrate there is good  
25 cause why the requirement for centrality has not been met.

1 The city council concluded the school district failed to do  
2 so.

3 **CPN'S ASSIGNMENTS OF ERROR**

4 As explained above, the city council's decision  
5 concluding the Pringle site violated the SACP was based on  
6 SACP Policy K. CPN asserts in a single assignment of error  
7 that a number of other SACP policies, as well as certain  
8 provisions of the Salem Area Transportation Plan, are  
9 violated by siting the proposed middle school at the Pringle  
10 site. The challenged decision does not address the SACP or  
11 Salem Area Transportation Plan provisions cited by CPN.

12 For the reasons explained below, we remand the city  
13 council's decision for additional proceedings concerning  
14 Policy K. If on remand the city again concludes that Policy  
15 K is violated by the Pringle site, that will be a sufficient  
16 basis for its decision that locating the proposed middle  
17 school at the Pringle site violates the SACP. In that  
18 instance the city council need not consider whether other  
19 SACP policies are also violated, because only one legally  
20 sufficient basis for denying a request for land use approval  
21 is required. Decuman v. Clackamas County, 25 Or LUBA 152,  
22 157 (1993); Reeder v. Clackamas County, 583, 591 (1992);  
23 McCoy v. Marion County, 16 Or LUBA 284, 286 (1987).  
24 However, if the city concludes on remand that Policy K is  
25 not violated, then it must consider whether the other SACP  
26 policies and provisions of the Salem Area Transportation

1 Plan identified by CPN are applicable and, if applicable,  
2 whether they are violated by locating the proposed middle  
3 school at the Pringle site.

4 Review of CPN's assignment of error is premature and,  
5 for that reason, we do not consider the assignment of error.

6  
7 **FIRST ASSIGNMENT OF ERROR (SCHOOL DISTRICT); FIRST**  
8 **ASSIGNMENT OF ERROR (CROSS)**

9 Petitioners contend the school district's March 9, 1993  
10 decision and the city's April 5, 1993 decision (and CPN's  
11 subsequent LUBA appeal of that decision) had the legal  
12 effect of depriving the city council of jurisdiction to  
13 render the formal interpretation requested by CPN on June  
14 22, 1993.

15 **A. School District March 9, 1993 Decision**

16 CROSS contends the school district's March 9, 1993  
17 decision applied the SACP and, therefore, was a "land use  
18 decision," as that term is defined by ORS 197.015(10)(a).<sup>4</sup>

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<sup>4</sup>ORS 197.015(19) defines "special district" as including "school districts." ORS 197.015(10)(a)(A) defines "land use decision" as including:

"A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

"(i) The goals;

"(ii) A comprehensive plan provision;

"(iii) A land use regulation; or

"(iv) A new land use regulation[.]" (Emphasis added.)

1 CROSS argues the city decision challenged in this appeal is  
2 an improper attempt to invalidate the school district's  
3 earlier decision, which was not appealed to LUBA.

4 The school district is a unit of government capable of  
5 rendering a land use decision, as that term is defined in  
6 ORS 197.015(10). Assuming petitioner is correct that the  
7 school district's March 9, 1993 decision was a land use  
8 decision, we do not agree with petitioner's characterization  
9 of the city decision challenged in this appeal as an  
10 improper collateral challenge of the school district's  
11 decision.

12 We are aware of no authority for the proposition that a  
13 school district decision selecting a particular school site,  
14 and concluding as part of that decision that the site  
15 complies with an applicable city comprehensive plan,  
16 thereafter binds the city to reach the same conclusion  
17 concerning compliance with the city's comprehensive plan.  
18 To the contrary, where the question of whether the proposed  
19 school site complies with the city's comprehensive plan is  
20 properly presented to the city in its capacity as a land use  
21 decision maker, the city is required to make an independent  
22 decision on the merits and cannot simply defer to an earlier  
23 decision by the school district. As CPN correctly notes, it  
24 is the school district's decision that must comply with the  
25 city's comprehensive plan, not the other way around. See  
26 Jackson County v. Bear Creek Authority, 53 Or App 823, 829,

1 632 P2d 1349 (1981), aff'd 293 Or 121 (1982). It is one  
2 thing to say the city should be able to anticipate and  
3 express during the school district proceedings its views  
4 concerning the Pringle site's compliance with the SACP and  
5 later adhere to that view in a city land use proceeding. It  
6 is something quite different to say the city is legally  
7 required to do so.

8 By involving the city in its decision making process,  
9 the school district gave the city an opportunity to voice  
10 any concerns it might have, and the school district  
11 understandably argues the city should have done so.  
12 However, the school district at no point in its  
13 deliberations submitted a request to the city that it render  
14 a binding interpretation under SRC 110.050 concerning the  
15 applicability of the SACP to the Pringle site. The school  
16 district's decision selecting the Pringle site does not bar  
17 the city from considering that question in a subsequent city  
18 land use proceeding where the issue is properly presented.

19 **B. City Council April 5, 1993 Decision**

20 The city council's April 5, 1993 decision was initiated  
21 by a March 10, 1993 letter from a member of CPN to city  
22 planning staff. The author of that letter argued that use  
23 of the Pringle site for the proposed middle school would  
24 violate certain SACP policies. That letter was discussed at  
25 the March 22, 1993 city council meeting. The city council  
26 voted "to refer this item to staff." Record 578. Staff

1 prepared a report outlining the process followed by the  
2 school district and explaining the planning staff's  
3 involvement in that process. At the April 5, 1993 city  
4 council meeting, a motion was made "to set a public hearing  
5 on the school siting issue and whether it complies with the  
6 [SACP]." Record 611. The city attorney explained that  
7 scheduling a public hearing "will have potential impact on  
8 the status of the case by changing it from an information  
9 item to a land use decision." Id. The city attorney went  
10 on to explain that land use hearing procedures would need to  
11 be followed. The motion failed. A second motion was made  
12 "to accept the staff report as information only." Id. That  
13 vote passed.

14 We agree with the city and CPN that the city council's  
15 decision to receive a staff report as information only and  
16 not to proceed with a public hearing on the matter of the  
17 Pringle site is not a land use decision. Rather, the city  
18 council's action on April 5, 1993 was specifically not to  
19 make a land use decision. See Owen Development Group v.  
20 City of Gearhart, 111 Or App 476, 826 P2d 1016 (1992) (city  
21 refusal to make a decision concerning uses allowed in a  
22 shopping center until center is built and an occupancy  
23 permit requested is not a land use decision).

24 Because the city council's April 5, 1993 decision did  
25 not determine whether the Pringle site complies with the  
26 SACP and was not a land use decision, it does not have the

1 preclusive effect the school district and CROSS argue it has  
2 in this appeal.

3 **C. LUBA No. 93-075**

4 The school district alleges CPN's notice of intent to  
5 appeal in LUBA No. 93-075 constitutes a judicial admission  
6 that the April 5, 1993 city council decision was a land use  
7 decision. The school district contends CPN's dismissal of  
8 that appeal, where the issues CPN seeks to assert here could  
9 have and should have been raised, bars CPN from asserting  
10 those issues in this appeal.

11 We have already concluded that the April 5, 1993  
12 decision was a decision not to make a land use decision.  
13 Therefore, CPN could not have presented the issues in LUBA  
14 No. 93-075 that it seeks to present in this appeal. The  
15 pendency of LUBA No. 93-075 at the time of CPN's June 22,  
16 1993 formal request for interpretation had no legal effect  
17 on the city's authority to accept that request and render  
18 the requested interpretations. Moreover, we do not agree  
19 CPN's legal allegations in its notice of intent to appeal in  
20 LUBA No. 93-075, that the challenged decision was a land use  
21 decision, were binding on CPN in LUBA No. 93-075, much less  
22 in a different LUBA appeal challenging a different city  
23 decision. As CPN correctly notes, there is nothing  
24 impermissible about alleging inconsistent legal theories in  
25 an appeal at LUBA. In fact, jurisdictional uncertainties  
26 may require alleging inconsistent legal theories. See

1 Forman v. Clatsop County, 297 Or 129, 681 P2d 786 (1984)  
2 (county decision concerning vested rights challenged in  
3 declaratory judgment proceeding in circuit court held to be  
4 a land use decision subject to review by LUBA); Forman v.  
5 Clatsop County, 5 Or LUBA 307 (1982) (county decision  
6 concerning vested rights appealed to LUBA held not to be a  
7 land use decision).

8 CROSS's and the school district's first assignments of  
9 error are denied.

10

11 **SECOND, THIRD AND FIFTH ASSIGNMENTS OF ERROR (CROSS); SECOND**  
12 **ASSIGNMENT OF ERROR (SCHOOL DISTRICT)<sup>5</sup>**

13 The decision challenged in this appeal was rendered  
14 pursuant to SRC 110.050, which provides in pertinent part,  
15 as follows:

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<sup>5</sup>We only address subassignment of error "e" of the school district's second assignment of error here. The balance of the school district's second assignment of error is addressed infra.

1           **"FORMAL INTERPRETATIONS**

2           "(a) When in the administration of this zoning  
3           code, the administrator deems it appropriate  
4           that a question as to its intent be formally  
5           rather than administratively resolved, the  
6           administrator may request an interpretation  
7           of the provision by the [planning] commission  
8           as provided in this section. Alternatively,  
9           any prson [sic], upon application, may  
10          request such interpretation. \* \* \*

11          "(b) The purpose of a formal interpretation is to  
12          clarify the intent of this zoning code and  
13          its application in particular circumstances;  
14          and the [planning] commission shall not, by  
15          interpretation, vary or modify any clear and  
16          unambiguous provision thereof, nor supplement  
17          the provisions thereof by adding new  
18          restrictions, standards, or policies not  
19          apparent or necessarily implied within this  
20          zoning code itself.

21          "\* \* \* \* \*

22          "(d) In rendering interpretations, the [planning]  
23          commission shall always consider the  
24          comprehensive plan where applicable, and  
25          shall render no interpretation inconsistent  
26          with either its provisions or its intent.

27          "\* \* \* \* \*

28          "(f) The [city] council may, upon its own motion  
29          or in response to an interpretation made by  
30          the [planning] commission, render its own  
31          interpretation as to the meaning, intent or  
32          application of any provision of this zoning  
33          code.

34          "\* \* \* \* \*" (Emphases added.)

35          CROSS first argues the city's procedures for formal  
36          interpretations set forth above only apply to

1 interpretations of the "zoning code." SRC 110.010 provides  
2 as follows:

3       **"SHORT TITLE.** Chapters 110 to 159 of this Code  
4 shall be known and may be cited as the 'Salem  
5 Zoning Code,' and are referred to therein as such  
6 or as 'this zoning code.'"

7 CROSS argues that because the applicable zoning district  
8 appears in chapter 160 of the SRC, it is not part of the  
9 Salem Zoning Code and not subject to formal interpretations  
10 under SRC 110.050.

11       The city explained in its decision "that the exclusion  
12 of chapter 160 from the definition of 'Salem Zoning Code'  
13 was merely a scrivener's error, and not binding."<sup>6</sup> Record  
14 20.

15       As an initial point, all parties to this appeal, and  
16 the city in its decision, mistakenly refer to the above  
17 quoted provisions of SRC 110.010 as a "definition" of the  
18 Salem Zoning Code. It is not a definition; it is the "Short  
19 Title." SRC Chapter 111 sets out definitions and does not  
20 include a definition of "Salem Zoning Code."

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<sup>6</sup>A December 13, 1993 planning staff report explains as follows:

"The \* \* \* 'Salem Zoning Code' is defined as chapters 110 to 159. This definition was proposed and adopted in 1983, back when the Public Use District was contained in SRC chapter 159. \* \* \* However, the table of zone chapters was renumbered by adding [sic] chapter 160 to accommodate an extra zone (IBC), and by oversight, the definition of zone code was not amended to refer to chapter 160." Record 359.

1           There is no serious dispute that the zoning districts  
2 included in the Public Use chapter of the SRC are the last  
3 of a number of zoning districts included in the SRC. We  
4 have no reason to question the city planning staff's  
5 explanation that what is now SRC chapter 160 was codified at  
6 SRC chapter 159 at the time the short title at SRC 110.010  
7 was adopted. There also is no dispute that what is now  
8 codified at SRC chapter 160 is, as a matter of substance,  
9 part of the preceding 49 chapters of the SRC which,  
10 according to the short title, make up the Salem Zoning Code.

11           We conclude that the "zoning code" SRC 110.050(a)  
12 refers to in authorizing formal interpretations of the  
13 "zoning code" includes SRC Chapter 160, notwithstanding the  
14 contrary suggestion in SRC 110.010. The mistaken reference  
15 in SRC 110.010 arguably renders the scope of the term "Salem  
16 Zoning Code" somewhat ambiguous. However, reading the Salem  
17 Zoning Code as a whole, and viewed in the context of the  
18 legislative history explained in the staff report, see n 6  
19 supra, the city's resolution of the question is correct.

20           CROSS and the school district next argue the scope of  
21 permissible zoning code interpretations is limited to the  
22 zoning code itself. Here, they argue, the city has  
23 impermissibly rendered an interpretation of the SACP in the  
24 guise of interpreting the SRC chapter 160 provisions  
25 governing the PH District.

1           As previously noted, the central issue presented in  
2 this appeal is whether, in developing a use permitted  
3 outright in the PH district, demonstrating compliance with  
4 any applicable policies of the SACP is required or whether  
5 such compliance is presumed by virtue of the status of the  
6 use as an outright permitted use. We address the city's  
7 resolution of that question below. However, the nature of  
8 the issue presented requires that the city consider the  
9 meaning of the SACP; its inquiry cannot be limited to the  
10 Salem Zoning Code, as CROSS and the school district suggest  
11 it must. Moreover, SRC 110.050(d), quoted supra, not only  
12 authorizes the city to consider the SACP in interpreting the  
13 Salem Zoning Code, it requires that it do so.

14           The school district's second assignment of error is  
15 denied in part. CROSS's second, third and fifth assignments  
16 of error are denied.<sup>7</sup>

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<sup>7</sup>CPN and the city alternatively argue that even if SRC 110.050 does not properly apply in this case, the city does not need to adopt provisions explicitly authorizing it to adopt formal or binding interpretations of the SRC or SACP. CPN further suggests that formal or binding interpretations of the SRC or SACP rendered without first adopting such provisions would have to be affirmed by LUBA, so long as no party's substantial rights were violated by adopting such interpretations without formal procedures and explicit authority for doing so. In the challenged decision, the city cites general SACP and statutory provisions that CPN and the city argue are sufficient to allow the city to render formal or binding interpretations of the SACP and SRC without explicit authority to do so.

Because we conclude the city's formal interpretation provisions at SRC 110.050 apply in this case, we do not reach the issues posed by CPN's and the city's alternative arguments.

1  
2 **SECOND ASSIGNMENT OF ERROR (SCHOOL DISTRICT); FOURTH**  
3 **ASSIGNMENT OF ERROR (CROSS)**

4 SACP Policy K (School Location and Development)  
5 includes a policy concerning "School Access and Location,"  
6 which provides, in relevant part, as follows:

7 "5. Each school should be located to provide the  
8 best possible access to the student  
9 population served.

10 \* \* \* \* \*

11 "b. Secondary Schools

12 \* \* \* \* \*

13 "(2) Should be in locations which are  
14 geographically central to the  
15 population served.

16 \* \* \* \* \*

17 The SACP includes general definitions and defines the word  
18 "should" as follows:

19 **"Should**

20 "The word 'should' as used in the policy  
21 statements, is advisory. However, where used in  
22 the context of setting policies applicable to  
23 specific development proposals, the developers  
24 have the burden of either following the policy  
25 directive or showing good cause why they cannot  
26 comply."

27 The city explained the basis for its determination that  
28 the school district must demonstrate that development of a  
29 middle school at the Pringle site complies with the above  
30 quoted portion of Policy K as follows:

1            "We interpret [the definition of the word  
2            'should'] as drawing a distinction between the use  
3            of the word 'should' in the context of legislative  
4            or policy decisions and use of the word in quasi-  
5            judicial decisions. When policies using the word  
6            'should' are interpreted in the context of  
7            specific development proposals, the proponent of  
8            the development proposal bears the burden of  
9            either adhering to the policy's requirements or  
10           showing good cause as to why the policies cannot  
11           be adhered to.

12           "We find the school district's proposal to site a  
13           middle school at the Pringle Road property to be a  
14           'development proposal' as that expression is used  
15           in the definition of the word 'should.' We also  
16           find that the school district, as the proponent of  
17           that development proposal, is the 'developer' as  
18           that expression is used in the definition of the  
19           word 'should.' Consequently, we find that the  
20           school district bears the burden of complying with  
21           all applicable SACP policies or showing good cause  
22           as to why the policies cannot be complied with."  
23           Record 21.

24           CROSS and the school district advance a number of  
25           arguments in support of their position. That position  
26           essentially is that the plan map and zoning map designations  
27           of the subject property allowing its use for a middle school  
28           as an outright permitted use ends the inquiry, and that the  
29           city's contrary interpretation of the SACP and SRC is wrong.  
30           To the extent SACP Policy K or other policies might apply to  
31           the siting and construction of middle schools, CROSS and the  
32           school district contend those policies were applied and  
33           satisfied when the existing plan and zoning map designations  
34           were applied to the subject property.

1           The school district contends that when the city  
2 intended SACP policies to be applied to specific uses, it  
3 made those uses "conditional uses" or "special uses."<sup>8</sup> The  
4 school district further contends the city has no formal  
5 procedures in place for applying SACP policies to uses  
6 permitted outright in the PH zone and that SRC 160.060 says  
7 nothing about having to apply plan policies to outright  
8 permitted uses in the PH district.

9           CROSS and the school district also contend that LUBA  
10 has often found plan and land use regulation criteria using  
11 "should" language to be merely aspirational. See e.g. McCoy  
12 v. Tillamook County, 14 Or LUBA 108, 118 (1985) (plan policy  
13 expressed in "shoulds" not a regulatory requirement).  
14 Moreover, they contend the planning staff construed this  
15 policy as aspirational and nonbinding, and argue the city  
16 should not be permitted to apply it arbitrarily as a  
17 mandatory requirement here. Alexanderson v. Clackamas  
18 County, 126 Or App 549, 552, \_\_\_ P2d \_\_\_ (1994).

19           Finally, the school district contends the city's  
20 construction and application of Policy K impermissibly

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<sup>8</sup>SRC 160.100 lists "[m]obile home as a dwelling for a caretaker" as an allowable "special use" in the PH zone. A number of standards are imposed on such mobile homes, although compliance with the SACP is not specifically listed. SRC 119.800. SRC chapter 160 does not specifically list any conditional uses for the PH district or the other districts in chapter 160, although zoning districts in other chapters of the SRC do make provisions for conditional uses. Approval of a conditional use requires a finding that the conditional use "[c]onforms to all criteria imposed by applicable goals and policies of the [SACP.]" SRC 117.030(b)(1).

1 involves the city in the school site selection process that  
2 the school district, not the city, is charged with carrying  
3 out under ORS 332.155(1).

4 Our standard of review in considering the city's  
5 construction of the SRC and SACP is set out at ORS 197.829,  
6 which provides as follows:

7 "[LUBA] shall affirm a local government's  
8 interpretation of its comprehensive plan and land  
9 use regulations, unless [LUBA] determines that the  
10 local government's interpretation:

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

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

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

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

22 ORS 197.829(1), (2) and (3) essentially codify the  
23 standard of review imposed by Clark v. Jackson County, 313  
24 Or 508, 515, 836 P2d 710 (1992) ("\* \* \* LUBA is to affirm  
25 the county's interpretation of its own ordinance unless the  
26 interpretation is inconsistent with the express language of  
27 the ordinance or its apparent purpose or policy."). Testa  
28 v. Clackamas County, 26 Or LUBA 357, 366, aff'd 127 Or App  
29 138, rev den 319 Or 81 (1994). The court of appeals, in  
30 construing the standard of review first enunciated in Clark,

1 held that LUBA is required to affirm the local government's  
2 interpretation unless it concludes the interpretation is  
3 "clearly wrong." Goose Hollow Foothills League v. City of  
4 Portland, 117 Or App 211, 843 P2d 992 (1992); West v.  
5 Clackamas County, 116 Or App 89, 840 P2d 1354 (1992); Cope  
6 v. City of Cannon Beach, 115 Or App 11, 836 P2d 775 (1992),  
7 aff'd 317 Or 339 (1993); see Friends of the Metolius v.  
8 Jefferson County, 123 Or App 256, 860 P2d 278, on  
9 reconsideration 125 Or App 122 (1993), rev den 318 Or 582  
10 (1994).

11 The SRC and SACP do not explicitly state how the SACP  
12 policies apply to the different kinds of city land use  
13 decisions that are subject to the city's acknowledged plan  
14 and land use regulations. At least they do not  
15 unambiguously do so. Where the applicability of local plan  
16 or land use regulation provisions is at issue, the city is  
17 entitled to considerable deference. Cf. Langford v. City of  
18 Eugene, 126 Or App 52, 867 P2d 535 (1994) ("where the local  
19 interpretation consists of a decision about which of two or  
20 more arguably applicable approval criteria in its  
21 legislation applies to a particular use, the local  
22 interpretation will seldom be reversible under the Clark  
23 standard").

24 The arguments advanced by CROSS and the school  
25 district, taken together, may well provide a sufficient  
26 basis for the city to have concluded only those development

1 proposals requiring approval as a special use or conditional  
2 use remain subject to SACP policies and that approval of  
3 outright permitted uses does not require direct application  
4 of SACP policies. However, the city did not adopt that  
5 construction of the SACP and SRC. The city exercised its  
6 interpretive discretion under ORS 197.829 to conclude, to  
7 the contrary, that developing the proposed middle school at  
8 the Pringle site, although a secondary school is an outright  
9 permitted use in the PH zone, remains subject to SACP Policy  
10 K. Even if we agree that CROSS and the school district have  
11 the better interpretive argument, we cannot say the city's  
12 contrary construction of the SACP and SRC is so wrong as to  
13 be reversible under ORS 197.829. Langford v. City of  
14 Eugene, supra.

15 Finally, we reject the school district's contention  
16 that the city's interpretation and application of Policy K  
17 as a decision making criterion for its siting of a middle  
18 school at the Pringle site improperly intrudes on the school  
19 district's statutory authority to site and develop schools.  
20 That statutory authority is qualified by the statutory  
21 requirement that the school district's school siting  
22 decisions comply with the city's comprehensive plan.<sup>9</sup>

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<sup>9</sup>ORS 195.020 requires that special districts "exercise their planning duties, powers and responsibilities and take actions that are authorized by law with respect to programs affecting land use \* \* \*" consistently with the statewide planning goals. Statewide Planning Goal 2 (Land Use Planning) requires that the school district's "plans and actions related to

1 Jackson County v. Bear Creek Authority, supra. Although  
2 there is certainly the possibility of disagreement where two  
3 governmental bodies have legitimate but overlapping  
4 responsibilities, we do not agree the city's action here  
5 improperly intrudes on the school district's statutory  
6 authority and responsibilities.

7 The school district's second assignment of error is  
8 denied. CROSS's fourth assignment of error is denied.

9 **THIRD ASSIGNMENT OF ERROR (SCHOOL DISTRICT)**

10 As set out in our discussion of the preceding  
11 assignments of error, the city interpreted Policy K and the  
12 SACP definition of "should" together, to require that the  
13 school district demonstrate that development of the proposed  
14 middle school at the Pringle site satisfies Policy K's  
15 centrality requirement or that there is "good cause" for the  
16 school district to site the proposed middle school at the  
17 Pringle site even though it is not "geographically central  
18 to the population to be served."

19 The city found the Pringle site is not centrally  
20 located relative to the present or likely future middle  
21 school attendance area. Before concluding the school  
22 district had failed to demonstrate there is "good cause" to  
23 site the proposed middle school at the Pringle site, despite

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land use shall be consistent with the comprehensive plans of cities and  
counties \* \* \*."

1 its lack of centrality, the city council articulated the  
2 following interpretation of the "good cause" requirement:

3 "We find the expression 'good cause' is ambiguous,  
4 and we therefore interpret this term in a way  
5 which preserves, to the maximum extent possible,  
6 the overall intent and policy of the SACP. In  
7 doing so, we are mindful of the hazards of  
8 allowing easy relief from what are otherwise  
9 mandatory requirements of the SACP, and seek to  
10 avoid this result. Therefore, to establish 'good  
11 cause,' an applicant must provide substantial  
12 evidence that unique or unusual circumstances  
13 exist which make compliance with the particular  
14 SACP policy at issue not practicable. To sustain  
15 this burden, an applicant must establish the  
16 existence of the unusual or unique circumstance  
17 which makes compliance impracticable and  
18 articulate a substantial reason for not complying  
19 with the SACP policy at issue." Record 21.

20 The school district complains that the first time the  
21 above interpretation was explained to anyone was when the  
22 final version of the findings was adopted, and that occurred  
23 long after the evidentiary hearing and opportunities for  
24 argument had closed.

25 As an initial point, we note the standard at issue,  
26 "good cause," admittedly is a subjective standard. However,  
27 subjective standards are common in land use proceedings, and  
28 the "good cause" standard contained in the SACP is not  
29 impermissibly vague. See Oswego Properties, Inc. v. City of  
30 Lake Oswego, 108 Or App 113, 119, 814 P2d 539 (1991); Lee v.  
31 City of Portland, 57 Or App 798, 802, 646 P2d 662 (1982).

32 In applying such subjective standards in particular  
33 factual contexts, it reasonable to expect that the local

1 government will include interpretive findings as part of its  
2 decision. With knowledge of this possibility and the  
3 interpretive discretion local governments possess under ORS  
4 197.829, parties to local quasi-judicial land use  
5 proceedings know or should know that their arguments should  
6 include arguments about the meaning of relevant plan and  
7 land use regulation standards.

8 As a practical matter, a local government's  
9 articulation of required plan and code interpretations often  
10 will not be available in the exact form in which those  
11 interpretations are ultimately adopted until the final  
12 written decision and findings are adopted. This almost  
13 always occurs after the close of the evidentiary record.

14 We explained in Heceta Water District v. Lane County,  
15 24 Or LUBA 402, 419 (1993), that announcing an  
16 interpretation for the first time after the close of the  
17 evidentiary record does not provide a basis for reversal or  
18 remand where (1) there was no existing established  
19 interpretation, (2) the interpretation does not make a new  
20 type of evidence relevant, and (3) the complaining party  
21 does not identify any evidence it would submit if the  
22 hearing were reopened.

23 Applying our reasoning in Heceta Water District here,  
24 petitioner does not contend there was an existing, different  
25 interpretation of "good cause." Moreover, the definition  
26 adopted by the city does not appear to make any new kind of

1 evidence relevant and it is not clear to us precisely what  
2 additional evidence the school district, CROSS or their  
3 supporters would have submitted if they had been given an  
4 opportunity to do so.

5 The school district's third assignment of error is  
6 denied.

7

8 **FOURTH ASSIGNMENT OF ERROR (SCHOOL DISTRICT); SIXTH**  
9 **ASSIGNMENT OF ERROR (CROSS)**

10 At the beginning of the city council's December 13,  
11 1993 evidentiary hearing, the mayor explained the testimony  
12 at that hearing would be limited:

13 "[The mayor] explained that the only issue to be  
14 considered is the legal question with respect to  
15 whether or not the proposed middle school site  
16 meets or does not meet the requirements of the  
17 comprehensive plan, or does not have to meet it  
18 because of previous planning; that there will be  
19 no discussion of other possible sites." Record  
20 334.

21 While the city council ultimately allowed persons  
22 testifying on December 13, 1993 to present both oral and  
23 written testimony concerning the suitability of the other  
24 two sites, the school district and CROSS contend a number  
25 persons who testified early at the December 13, 1993 hearing  
26 were not permitted to testify concerning the comparative  
27 suitability of the other two sites. CROSS contends  
28 petitioner Nass was among the persons whose testimony was  
29 improperly limited.

30 We agree with CROSS that testimony concerning the  
31 suitability of the other two sites, as compared to the

1 Pringle site, is clearly relevant to the "good cause"  
2 standard. Such testimony was relevant to that standard even  
3 before the city interpreted that standard as it did. Such  
4 testimony is clearly relevant to the question of the  
5 question of "unique or unusual circumstances."

6 The city council ultimately allowed persons testifying  
7 later in the hearing to testify concerning the suitability  
8 of other sites. The city council also apparently allowed  
9 written testimony without imposing limits. However, we are  
10 uncertain whether these actions were sufficient to correct  
11 the city's initial error in limiting testimony at the  
12 December 13, 1993 hearing. Because we remand the city  
13 council's decision on other grounds, we remand on this basis  
14 as well. On remand, the city council shall open the  
15 evidentiary record at least for the limited purpose of  
16 allowing testimony concerning the suitability of the other  
17 two sites for the proposed middle school.

18 The school district's fourth assignment of error is  
19 sustained. CROSS's sixth assignment of error is sustained.

20 **SEVENTH ASSIGNMENT OF ERROR (CROSS)**

21 CROSS contends there is no way for the school district  
22 to know what the city means by requiring a demonstration of  
23 "unique or unusual circumstances" to establish "good cause"  
24 for not complying with the Policy K centrality requirement.

25 We agree the words the city used in its interpretation,  
26 "unique or unusual circumstances," are almost as subjective

1 as the "good cause" standard itself. However, as we have  
2 already explained, if all land use decisions involving  
3 subjective standards had to be remanded on that basis alone,  
4 few land use decisions would survive review. While clear  
5 and objective standards may be desirable, they are legally  
6 required in only a limited number of circumstances. See  
7 e.g. OAR 660-07-015 (needed housing); 660-16-010(3) (Goal 5  
8 resource protection program). The subjective interpretation  
9 of a subjective standard challenged in this appeal provides  
10 no basis, in and of itself, for reversal or remand.

11 CROSS's seventh assignment of error is denied.

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13 **FIFTH ASSIGNMENT OF ERROR (SCHOOL DISTRICT); EIGHTH**  
14 **ASSIGNMENT OF ERROR (CROSS)**

15 CROSS contends the city's findings concerning the  
16 school district's failure to demonstrate compliance with the  
17 "good cause" standard are inadequate. The school district  
18 contends those findings are not supported by substantial  
19 evidence.

20 As relevant, those findings are as follows:

21 "We find the school district has not met its  
22 burden of showing good cause as to why [the Policy  
23 K centrality requirement] cannot be complied with.  
24 In particular, the record shows that both  
25 alternative sites, i.e., Gilmore and Leslie, are  
26 central to the attendance area the proposed school  
27 will serve. We are aware of no evidence as to any  
28 unique or unusual circumstances which would lead  
29 us to believe that use of these sites is not  
30 practicable. Because good cause has not been  
31 shown that [the Policy K centrality requirement]  
32 cannot be met, we find that its provisions are

1 mandatory, but are not met in the context of the  
2 Pringle [site]." Record 22.

3 While it may be that findings of noncompliance with a  
4 relevant approval standard need not be as exhaustive or  
5 detailed as those necessary to establish compliance with  
6 that approval standard, the city is obligated to offer an  
7 explanation for its conclusion that the standard is not met.  
8 See Hill v. Union County Court, 42 Or App 883, 601 P2d 905  
9 (1979); Commonwealth Properties v. Washington County, 35 Or  
10 App 387, 400, 582 P2d 1384 (1978) (findings supporting  
11 denial of tentative subdivision approval "must be  
12 articulated in manner sufficiently detailed to give a  
13 subdivider reasonably definite guides as what it must do to  
14 obtain final approval, or inform the subdivider that it is  
15 unlikely that a subdivision will be approved").

16 As the school district and CROSS point out, there is  
17 evidence in the record that while the Pringle site is less  
18 central to the likely student population to be served by the  
19 proposed middle school than the other two sites, it likely  
20 will become a more central location over time as vacant land  
21 within the attendance area is developed. The school  
22 district and CROSS cite a significant amount of evidence in  
23 the record that persuaded the school district to select the  
24 Pringle site despite its lack of centrality.<sup>10</sup> In view of

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<sup>10</sup>Among the factors cited by CROSS are the relative sizes, costs and suitability for expansion of the three sites and development constraints at the other two sites.

1 the amount of evidence in the record concerning the  
2 comparative merits of the three sites, we conclude the city  
3 was required to adopt more of an explanation for why it  
4 believed the "good cause" standard is not satisfied by the  
5 Pringle site. A cursory statement that the city council is  
6 not aware of any such evidence is not sufficient.

7 The school district's fifth assignment of error is  
8 sustained. CROSS's eighth assignment of error is sustained.

9 The city's decision is remanded.