

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

1  
2  
3  
4 EAST LANCASTER NEIGHBORHOOD )  
5 ASSOCIATION, FAYE WRIGHT )  
6 NEIGHBORHOOD ASSOCIATION, GRANT )  
7 HIGHLAND NEIGHBORHOOD ASSOCIATION,) )  
8 NORTHEAST NEIGHBORS, NORTH )  
9 LANCASTER NEIGHBORHOOD )  
10 ASSOCIATION, SOUTH CENTRAL )  
11 ASSOCIATION OF NEIGHBORS, )  
12 SOUTHEAST SALEM NEIGHBORHOOD )  
13 ASSOCIATION, TOM BROWNING, )  
14 RICHARD L. MATHEWS and THE LEAGUE )  
15 OF WOMEN VOTERS OF MARION/POLK )  
16 COUNTIES, )  
17 )  
18 Petitioners, )  
19 )  
20 and ) LUBA No. 94-206  
21 )  
22 CITIZENS FOR THE PRESERVATION OF ) FINAL  
23 OPINION )  
24 NEIGHBORHOODS, ALAN BONER, SALLY ) AND  
25 ORDER )  
26 MILLER and JON CHRISTENSON, )  
27 )  
28 Intervenors-Petitioner, )  
29 )  
30 vs. )  
31 )  
32 CITY OF SALEM, )  
33 )  
34 Respondent, )  
35 )  
36 and )  
37 )  
38 SALEM-KEIZER SCHOOL DISTRICT 24-J,) )  
39 )  
40 Intervenor-Respondent. )

41  
42 Appeal from City of Salem.

43  
44 D. Olcott Thompson, Salem filed a petition for review  
45 and argued on behalf of petitioners.

1  
2 Jon Christenson, Salem, filed a petition for review and  
3 argued on his own behalf.

4  
5 Daniel Kearns, Portland, filed a petition for review  
6 and argued on behalf of intervenors-petitioner Citizens for  
7 the Preservation of Neighborhoods, Alan Boner, and Sally  
8 Miller. With him on the brief was Preston Gates & Ellis.

9 Paul A. Lee, Assistant City Attorney, Salem, and Kris  
10 Jon Gorsuch, Salem, filed the response brief on behalf of  
11 respondent and intervenor-respondent. With them on the  
12 brief was Saalfeld, Griggs, Gorsuch, Alexander & Emerick,  
13 P.C. Paul A. Lee argued on behalf of respondent. Kris Jon  
14 Gorsuch argued on behalf of intervenor-respondent.

15  
16 LIVINGSTON, Chief Referee; GUSTAFSON, Referee,  
17 participated in the decision.

18  
19 AFFIRMED 10/31/95

20  
21 You are entitled to judicial review of this Order.  
22 Judicial review is governed by the provisions of ORS  
23 197.850.

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the city council's decision on  
4 remand from this Board's decision in Salem-Keizer School  
5 Dist. 24-J v. City of Salem, 27 Or LUBA 251 (1994) (School  
6 District I), interpreting the Salem Revised Code (SRC) and  
7 the Salem Area Comprehensive Plan (SACP) to allow the  
8 location of a middle school at a site on Pringle Road  
9 (Pringle site).

10 **MOTION TO INTERVENE**

11 Citizens for the Preservation of Neighborhoods, Alan  
12 Boner, and Sally Miller (together, CPN), and Jon Christenson  
13 (Christenson) move to intervene on the side of petitioners.  
14 Salem-Keizer School District 24-J (school district) moves to  
15 intervene on the side of respondent. There is no opposition  
16 to the motions, and they are allowed.

17 **FACTS**

18 The background of School District I is fully explained  
19 in that decision and not repeated at length here. See 27 Or  
20 LUBA at 354-56. Briefly stated, prior to that appeal the  
21 school district considered three potential sites for  
22 replacement of the existing Leslie Middle School facility:  
23 (1) the Leslie Middle School site with the purchase of  
24 adjacent land (hereafter Leslie site); (2) Gilmore Field  
25 (hereafter Gilmore site), and (3) the Pringle site. The  
26 Pringle site is on the periphery of the existing school's

1 attendance area, while the Leslie Middle School site and the  
2 Gilmore site are more centrally located.

3 After the school district selected the Pringle site,  
4 the city planning commission issued a formal code  
5 interpretation under Salem Revised Code (SRC) 110.050 that  
6 determined the proposed middle school is not a lawful use of  
7 the Pringle site. The planning commission specified three  
8 bases for its decision. Upon appeal, the city council  
9 upheld the planning commission on one of the stated bases.  
10 The city council found the school district is required by  
11 SACP Policy K to select a site that is geographically  
12 central to the population to be served or to demonstrate  
13 there is good cause why the centrality requirement has not  
14 been met.<sup>1</sup> The city council concluded the school district  
15 had failed to do so.

---

<sup>1</sup>SACP Policy K (School Location and Development) includes a policy addressing "School Access and Location," which provides, in relevant part, as follows:

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

"\* \* \* \* \*

"b. Secondary Schools

"\* \* \* \* \*

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

"(3) Should be designed, sited and constructed to encourage the use of walkways, bikeways and public transit."

1           The intervenors-petitioner in School District I,  
2 including the Coalition for Rational and Objective School  
3 Siting (CROSS), contended the city's findings were  
4 inadequate concerning the school district's failure to  
5 demonstrate compliance with the "good cause" standard found  
6 in the SACP.<sup>2</sup> The challenged findings stated:

7           "We find the school district has not met its  
8 burden of showing good cause as to why [the SACP  
9 Policy K centrality requirement] cannot be  
10 complied with. In particular, the record shows  
11 that both alternative sites, i.e., Gilmore and  
12 Leslie, are central to the attendance area the  
13 proposed school will serve. We are aware of no  
14 evidence as to any unique or unusual circumstances  
15 which would lead us to believe that use of these  
16 sites is not practicable. Because good cause has  
17 not been shown that [the SACP Policy K centrality  
18 requirement] cannot be met, we find that its  
19 provisions are mandatory, but are not met in the  
20 context of the Pringle [site]." Record A22.<sup>3</sup>

21           We concluded that in view of the amount of evidence in  
22 the record,

---

<sup>2</sup>The "good cause" requirement is found in the SACP definition of the word "should," which is used in SACP Policy K(5)(b)(2). "Should" is defined in the SACP as follows:

**"Should**

"The word 'should' as used in the policy statements, is advisory. However, where used in the context of setting policies applicable to specific development proposals, the developers have the burden of either following the policy directive or showing good cause why they cannot comply."  
(Emphasis added.)

<sup>3</sup>The record created prior to our decision in School District I is called "Record A\_\_\_." The record created after our decision in School District I is called "Record B\_\_\_."

1 "the city was required to adopt more of an  
2 explanation of why it believed the 'good cause'  
3 standard is not satisfied by the Pringle site. A  
4 cursory statement that the city council is not  
5 aware of any such evidence is not sufficient." 27  
6 Or LUBA at 371.

7 In School District I, CPN asserted in a single  
8 assignment of error that a number of other SACP policies and  
9 certain provisions of the Salem Area Transportation Plan  
10 (SATP) are violated by siting the proposed middle school at  
11 the Pringle site. We stated:

12 "[I]f the city concludes on remand that Policy K  
13 is not violated, then it must consider whether the  
14 other SACP policies and provisions of the [SATP]  
15 identified by CPN are applicable and, if  
16 applicable, whether they are violated by locating  
17 the proposed middle school at the Pringle site."  
18 27 Or LUBA at 357.

19 On remand, the city council concluded that locating the  
20 proposed middle school at the Pringle site does not violate  
21 SACP Policy K after all. The city council also determined  
22 that certain policies that CPN had maintained were  
23 applicable to the city's decision were not, in fact,  
24 applicable. These included certain provisions of the SATP  
25 and the SACP Introductory Statement and SACP Policies E  
26 (Residential Development), C (Urban Growth), D (Growth  
27 Management), B (General Development Related to Energy), H  
28 (Industrial Development), and I (Transportation). Record  
29 B50-57.

30 This appeal followed.

31 **FIRST ASSIGNMENT OF ERROR (PETITIONERS)**

1 **FIRST ASSIGNMENT OF ERROR (CHRISTENSON)**

2 Relying on SRC 110.050, petitioners and Christenson  
3 contend the city violated its own procedures when, upon  
4 remand, it failed to refer to the planning commission the  
5 SATP and the SACP policies (other than Policy K) for  
6 interpretation in the first instance. SRC 110.050 states,  
7 in relevant part:

8 **"FORMAL INTERPRETATIONS.**

9 "(a) When, in the administration of this zoning  
10 code, the administrator deems it appropriate  
11 that a question as to its intent be formally  
12 rather than administratively resolved, the  
13 administrator may request an interpretation  
14 of the provision by the [planning] commission  
15 as provided in this section. Alternatively,  
16 any person, upon application, may request  
17 such interpretation. Upon such request \* \* \*  
18 and following notice \* \* \* the [planning]  
19 commission may issue a formal interpretation  
20 if it has determined that such interpretation  
21 is within its ability and is not a  
22 legislative act. The [planning] commission  
23 shall, in the event it does not render an  
24 interpretation, either refer the question to  
25 the [city] council with any explanation it  
26 deems appropriate, or recommend to the [city]  
27 council appropriate revisions to this zoning  
28 code to resolve the question, or to revise or  
29 supplement a policy issue.

30 "(b) The purpose of a formal interpretation is to  
31 clarify the intent of this zoning code and  
32 its application in particular circumstances;  
33 and the [planning] commission shall not, by  
34 interpretation, vary or modify any clear and  
35 unambiguous provision thereof, nor supplement  
36 the provisions thereof by adding new  
37 restrictions, standards, or policies not  
38 apparent or necessarily implied within this  
39 zoning code itself.

1           "\* \* \* \* \*

2           "(d) In rendering interpretations, the [planning]  
3           commission shall always consider the  
4           comprehensive plan where applicable, and  
5           shall render no interpretation inconsistent  
6           with either its provisions or its intent.

7           "\* \* \* \* \*

8           "(f) The [city] council may, upon its own motion  
9           or in response to an interpretation made by  
10          the [planning] commission, render its own  
11          interpretation as to the meaning, intent or  
12          application of any provision of this zoning  
13          code."

14          "(g) Formal interpretations made by the [planning]  
15          commission shall control future  
16          administrative interpretation and enforcement  
17          of this zoning code unless superseded by  
18          subsequent [planning] commission formal  
19          interpretations or vacated or superseded by  
20          the [city] council. The [planning]  
21          commission shall give great weight to prior  
22          formal interpretations when considering any  
23          subsequent issue for interpretation."

24          According to petitioners, the city council should have  
25          become involved in interpreting the SATP and the SACP  
26          policies (other than Policy K) only in the event of either a  
27          referral from the planning commission under SRC 110.050(a),  
28          or a formal motion of the city council itself under SRC  
29          110.050(g).

30          In support of their contention, petitioners rely on a  
31          line of cases that includes Larson v. Wallowa County, 23 Or  
32          LUBA 527, 547 (1992); Scott v. Josephine County, 22 Or LUBA  
33          82, 84-86 (1991); and Downtown Community Ass'n v. Portland,  
34          3 Or LUBA 244, 246-53 (1981). In Downtown Community Ass'n,

1 we held that because the city council had delegated to the  
2 city variance committee, through the city zoning ordinance,  
3 what would otherwise be the city council's power initially  
4 to consider a variance request, and had retained only the  
5 power to review decisions of the variance committee, the  
6 city council could not review variance requests in the first  
7 instance. Similarly, in Scott and Larson, we concluded that  
8 because the county boards of commissioners had delegated to  
9 hearings officers or planning commissions the authority to  
10 act initially on a land use application, the county boards  
11 exceeded their authority if they approved such an  
12 application without it having first been acted on by the  
13 hearings officer or planning commission.

14 In Downtown Community Ass'n, Scott, and Larson, the  
15 delegation of initial review authority in the local codes by  
16 the governing bodies to a "lower" decision maker was  
17 unambiguous and total. SRC 110.050(f), however, states that  
18 the city council may render its own interpretation of the  
19 zoning code upon its own motion, as well as upon referral  
20 from the planning commission.

21 Petitioners do not support with argument or cited  
22 authority their contention that "upon its own motion"  
23 describes a formal procedure that must be followed. The  
24 city itself has not interpreted the phrase "upon its own  
25 motion." Relying on Gage v. City of Portland, 123 Or App  
26 269, 275, 860 P2d 282, adhered to on reconsideration 125 Or

1 App 119, 866 P2d 466 (1993), reversed on other grounds, 319  
2 Or 308, 877 P2d 1187 (1994) and Weeks v. City of Tillamook,  
3 117 Or App 449, 453, 844 P2d 914 (1992), petitioners contend  
4 we must remand for an interpretation.

5 ORS 197.829(2), adopted by the 1995 legislature,  
6 overturns the holdings in Gage and Weeks upon which  
7 petitioners rely.<sup>4</sup> ORS 197.829(2) states:

8 "If a local government fails to interpret a  
9 provision of its comprehensive plan or land use  
10 regulations, or if such interpretation is  
11 inadequate for review, [LUBA] may make its own  
12 determination of whether the local government  
13 decision is correct."

14 We understand the phrase "upon its own motion" to mean "upon  
15 its own initiative." By acting without referring the matter  
16 to the planning commission, the city council evinced its  
17 determination to interpret the SACP itself. Moreover, even  
18 if "upon its own motion" is intended to call for a more  
19 formal procedure than was followed in this case, petitioners  
20 have not shown their substantial rights were prejudiced by  
21 the failure to follow that procedure.

22 We reject these assignments of error for a second  
23 reason. Unless required by LUBA's remand or the local code  
24 itself, when a local government decision is remanded by  
25 LUBA, the local government is not required to repeat the

---

<sup>4</sup>Because ORS 197.829(2) affects procedure and not substantive rights, we apply it immediately. See Antonaci v. Davis, 108 Or App 693, 695, 816 P2d 1202 (1991).

1 procedures applicable to the initial proceedings. See  
2 Sanchez v. Clatsop County, 29 Or LUBA \_\_\_\_ (LUBA No. 94-122,  
3 March 10, 1995), slip op 3; Wentland v. City of Portland, 23  
4 Or LUBA 321, 326-27 (1992). Neither LUBA's decision in  
5 School District I nor the SRC state what procedures the city  
6 should follow on remand.

7 These assignments of error are denied.

8 **SECOND ASSIGNMENT OF ERROR (PETITIONERS)**

9 **SECOND ASSIGNMENT OF ERROR (CHRISTENSON)**

10 Petitioners and Christenson dispute the city's  
11 application of the "good cause" requirement in the SACP  
12 definition of "should," which is critical to the application  
13 of SACP Policy K. In School District I, the city found:

14 "We find the expression 'good cause' is ambiguous,  
15 and we therefore interpret this term in a way  
16 which preserves, to the maximum extent possible,  
17 the overall intent and policy of the SACP. In  
18 doing so, we are mindful of the hazards of  
19 allowing easy relief from what are otherwise  
20 mandatory requirements of the SACP, and seek to  
21 avoid this result. Therefore, to establish 'good  
22 cause,' an applicant must provide substantial  
23 evidence that unique or unusual circumstances  
24 exist which make compliance with the particular  
25 SACP policy at issue not practicable. To sustain  
26 this burden, an applicant must establish the  
27 existence of the unusual or unique circumstance  
28 which makes compliance impracticable and  
29 articulate a substantial reason for not complying  
30 with the SACP policy at issue." Record A21.  
31 (Emphasis added.)

32 The challenged decision again addresses the "good  
33 cause" requirement:

34 "'Good cause' is not a formal variance, nor is our

1 definition meant to impose an unattainable  
2 standard. By use of the definitional term 'not  
3 practicable,' we meant that evidence of good cause  
4 be viewed in a reasonable way. The word  
5 'reasonably' is not included within the Plan  
6 definition but we interpret the 'good cause'  
7 standard in that context. The School Board  
8 concluded, after public hearings, that the Pringle  
9 site best met the educational policies for the new  
10 middle school site. We necessarily interpret  
11 practicability within the context of the  
12 particular industry which proposes the development  
13 -- i.e., in this instance the School District. To  
14 the extent that the School Board's decision was  
15 based on educational policy and the responsibility  
16 to manage School District resources to carry out  
17 those policies, we defer to the School Board on  
18 the question of 'practicability.' The school  
19 policies which define the District's needs are  
20 based on experience and expertise in the provision  
21 of education services in the context of the  
22 planning and development of a tax-supported  
23 physical plant. By use of the term 'defer' we do  
24 not mean to abrogate any responsibility or  
25 authority we may have in interpreting and  
26 implementing our Comprehensive Plan. For the  
27 reasons set forth herein, we too expressly find  
28 that development on the alternative sites is not  
29 practicable." Record B36. (Emphasis added.)

30 The challenged decision further states:

31 "[W]e now find, from the additional evidence  
32 presented, that the School District has proved  
33 good cause exists why the centrality criteria [in  
34 SACP Policy K] should not be applied. Stated  
35 another way, we find that unusual and unique  
36 circumstances exist such that it is impracticable  
37 to build the new middle school at the more  
38 geographically central Gilmore or Leslie Sites.  
39 There is nothing inconsistent in our two  
40 decisions. Based on the additional evidence, we  
41 are now persuaded, where earlier we were not."  
42 Record B42.

43 The "unusual and unique circumstances" mentioned in the

1 decision include unavailability of land, population trends,  
2 cost, the need for condemnation of private residential  
3 property at both the Leslie and Gilmore sites, loss of  
4 athletic fields, steep terrain at the Gilmore site, traffic  
5 considerations, and changes in educational policies  
6 requiring certain physical improvements more readily  
7 attained at the Pringle site.

8 Christenson contends the city should have made clearer  
9 prior to the submission of testimony what "good cause" truly  
10 means and what evidence was required to show or disprove  
11 "good cause." However, as we explained in School District  
12 I, local government interpretations of plan and code  
13 provisions often are not available until the final written  
14 decision and findings are adopted. 27 Or LUBA at 367-68.  
15 We noted that clear and objective standards, while perhaps  
16 desirable, are required in only a limited number of  
17 circumstances. Id. at 370.

18 Petitioners contend the city's interpretation of "good  
19 cause" is a de facto amendment of the SACP. Petitioners  
20 argue that the school district must be viewed as a  
21 developer, and that by deferring to the school district or  
22 school board on the issue of what constitutes  
23 "practicability" within the "industry," the city has  
24 abdicated its role as a decision maker. Finally,  
25 petitioners argue that because SRC 110.050(g) gives formal  
26 interpretations precedential importance, the city's

1 interpretation in this case simply cannot be overlooked.

2 This Board is required to defer to a local governing  
3 body's interpretation of its own enactment, unless that  
4 interpretation is contrary to the express words, purpose or  
5 policy of the local enactment or to a state statute,  
6 statewide planning goal or administrative rule which the  
7 local enactment implements. Gage v. City of Portland, 319  
8 Or 308, 316-17, 877 P2d 1187 (1994); Clark v. Jackson  
9 County, 313 Or 508, 514-15, 836 P2d 710 (1992). This means  
10 we must defer to a local governing body's interpretation of  
11 its own enactments, unless that interpretation is "clearly  
12 wrong" or "so wrong as to be beyond colorable defense."  
13 Zippel v. Josephine County, 128 Or App 458, 461, 876 P2d 854  
14 (1994); Reeves v. Yamhill County, 132 Or App 263, 269, \_\_\_\_  
15 P2d \_\_\_\_ (1995); Goose Hollow Foothills League v. City of  
16 Portland, 117 Or App 211, 217, 843 P2d 992 (1992).

17 When we remanded the city's decision in School District  
18 I, we acknowledged the possibility that evidence submitted  
19 by the proponents of the Pringle site would support a  
20 finding of good cause to overcome the centrality requirement  
21 in SACP Policy K(5)(b)(2). See 27 Or LUBA at 371. That is  
22 what happened. The city's first decision refined the "good  
23 cause" standard by requiring a showing of impracticability.  
24 The city's second decision interprets practicability in  
25 light of the requirements of the particular industry  
26 proposing the development, in this case the school district.

1 We do not find the interpretation and application of the  
2 good cause standard to be beyond a colorable defense.

3       Neither do we accept petitioners' argument that the  
4 city has abdicated its decision making authority to a  
5 developer. During the remand proceeding, both sides of the  
6 school siting dispute submitted additional evidence relating  
7 to good cause. The city council found the evidence and  
8 arguments on the issue of good cause submitted by the  
9 proponents of the Pringle site, including the school  
10 district, to be more persuasive than those of the opponents.  
11 The statements in the challenged decision that "we do not  
12 mean to abrogate any responsibility or authority we may have  
13 in interpreting and implementing our Comprehensive Plan" and  
14 "we too expressly find that development on the alternative  
15 sites is not practicable" create a context in which the  
16 earlier statement that "we defer to the School Board on the  
17 question of 'practicability'" indicates only that the city  
18 council gave considerable weight to the school board's  
19 expertise.

20       Finally, the precedential significance of the city's  
21 decision in this case is limited. First, SRC 110.050(g)  
22 does not of itself appear to prohibit overturning an earlier  
23 precedent when appropriate. Second, the good cause standard  
24 is extremely subjective; how it is applied depends on the  
25 facts of each case.

26       These assignments of error are denied.

1 **THIRD ASSIGNMENT OF ERROR (CHRISTENSON)**  
2 **FIRST THROUGH FIFTH ASSIGNMENTS OF ERROR (CPN)**

3 Under these assignments of error, Christenson and CPN  
4 contend generally the city failed to make adequate findings  
5 with respect to various SACP policies. All of these  
6 contentions are based on the premise that the city should  
7 have made findings to explain why it held these plan  
8 policies did not apply.

9 There is no such requirement. When a petitioner raises  
10 an issue below concerning whether a particular code  
11 provision is an applicable approval standard, and the  
12 challenged decision contains no interpretation explaining  
13 that code provision is either inapplicable or satisfied,  
14 LUBA must remand the challenged decision. Hixson v.  
15 Josephine County, 26 Or LUBA 159 (1993). The failure of  
16 local government findings to address a specific issue raised  
17 by a party below, which is relevant to compliance with  
18 applicable approval standards, also is a basis for remand.  
19 See, e.g., Moore v. Clackamas County, 29 Or LUBA \_\_\_\_ (LUBA  
20 No. 94-252, June 27, 1995), slip op \_\_\_\_\_. However, we have  
21 never stated that findings must be made to address criteria  
22 the local government finds to be inapplicable.

23 The challenged decision clearly interprets each of the  
24 disputed policies as inapplicable. The only question we  
25 must answer is whether the city's interpretations of the  
26 disputed plan provisions and other local regulations, and  
27 the city's subsequent determination that these provisions

1 and regulations are inapplicable to the siting of the middle  
2 school, are sufficient under ORS 197.829(1) and the Clark  
3 line of cases.

4 **A. SACP Policy E**

5 CPN contends the challenged decision misapplied the  
6 applicable law in finding inapplicable SACP Policy E, which  
7 addresses residential development as follows:

8 "To promote and encourage a quality living  
9 environment and a variety of housing opportunities  
10 for all income levels and an adequate supply of  
11 developable land to support such housing."

12 CPN attaches particular importance to Sections 2 and 3:

13 **"Establishing Locational Criteria**

14 "2. Definitive criteria which relate to  
15 residential development and the sewer  
16 capacity, water flow levels, schools,  
17 transportation system capacity will be  
18 developed and specific areas suitable for  
19 increased residential densities will be  
20 identified as studies are completed which  
21 relate to those factors. \* \* \*

22 **"Facilities and Services Location**

23 "3. Residential uses and neighborhood facilities  
24 and services shall be located to:

25 "a. Provide convenient and safe access.

26 "b. Encourage the use of all facilities and  
27 services by residents.

28 "c. Avoid nuisances and hazards to  
29 residents.

30 "d. Produce land use patterns that avoid  
31 unnecessary duplication of facilities."  
32 (Emphasis in original.) SACP 33.

1 CPN argues that the mention of schools in Section 2 and  
2 the use of the word "shall" in Section 3 compel the  
3 conclusion that SACP Policy E must be applied in determining  
4 whether the proposed middle school is a lawful use at the  
5 Pringle site. Although SACP Policy E could possibly be  
6 found to apply, we find reasonable the city's explanation  
7 that SACP Policy E "applies on its face to land use  
8 decisions establishing residential uses and density, and not  
9 to school location decisions." Record B51. The city's  
10 interpretation is certainly not beyond a colorable defense.  
11 See Zippel, supra.

12 CPN's first assignment of error is denied.

13 **B. SACP Policies C (Urban Growth) and D (Growth**  
14 **Management)**

15 CPN contends the city should have applied SACP Policies  
16 C and D when making the challenged decision. CPN relies on  
17 language from the "intent statements" of the SACP, together  
18 with language from SACP Policy D.<sup>5</sup> CPN quotes the intent  
19 statement as follows:

20 **"C. URBAN GROWTH POLICIES:**

21 "The intent of the urban growth policies is:

22 "\* \* \* \* \*

---

<sup>5</sup>In its brief, CPN mislabels this intent statement as SACP Policy C, which actually states the city's urban growth policies. See SACP 13, 28-32. It is unclear whether CPN contends the intent statement should be read together with SACP D, or with both SACP C and D. The challenged decision addresses the intent statement and both SACP C and D.

1 "4. To make more economical use of local tax  
2 dollars in locating facilities and providing  
3 services for the benefit of all citizens  
4 within the urban growth area. Since urban  
5 services are interrelated, coordination is  
6 best achieved by a single general purpose  
7 governmental unit.

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

9 "6. To make it possible for utility extensions,  
10 transportation facilities, and schools to be  
11 designed and located so as to more closely  
12 match population growth.

13 "\* \* \* \* \*" SACP 13.

14 CPN then quotes from SACP D, which addresses growth  
15 management, and states as a goal that it will manage growth  
16 by "[p]lanning and developing a timely, orderly and  
17 efficient arrangement of public facilities and services to  
18 serve as a framework for urban development." SACP 29.

19 The challenged decision interprets the SACP to the  
20 effect that the above-quoted intent statement and Policies C  
21 and D are not approval criteria for siting the middle  
22 school. The interpretation relies on our opinion in Eola-  
23 Glen Neighborhood Assoc. v. City of Salem, 25 Or LUBA 672  
24 (1993).

25 As CPN points out, the arguments made by the  
26 petitioners in Eola-Glen were different from those made  
27 here. Furthermore, the decision in Eola-Glen interpreted an  
28 earlier version of the SACP. We cannot tell exactly what  
29 revisions were made to that version or how extensive they  
30 were, but we note the sections are numbered differently in

1 the two versions, and the language from the SACP quoted in  
2 Eola-Glen has been modified in the present version. The  
3 city's reliance on Eola-Glen is misplaced.

4 Nevertheless, we must affirm the city's interpretation,  
5 notwithstanding its reasoning, unless it is "beyond  
6 colorable defense." Zippel, supra. Mindful of the present  
7 zoning of the Pringle site to allow the proposed middle  
8 school as an outright permitted use, we find the city acted  
9 within its discretion in deciding the above-quoted intent  
10 statement and SACP Policies C and D need not be applied when  
11 individual siting decisions are made. See Shelter  
12 Resources, Inc. v. City of Cannon Beach, 27 Or LUBA 229  
13 (1994). Nothing in the above-quoted portion of the intent  
14 statement, which is cited by CPN in its brief, expressly  
15 states otherwise.

16 CPN's second assignment of error is denied.

17 **C. SACP Policy B**

18 SACP Policy B is titled "General Development." Its  
19 stated purpose is "[t]o insure that future decisions  
20 concerning the use of land within the Salem urban area are  
21 consistent with State Land Use Goals." (Emphasis added.)  
22 SACP 26. SACP Policy B lists 17 items. CPN challenges the  
23 city's application of the fourth item, which addresses  
24 energy:

25 "The City and Counties shall consider and foster  
26 the efficient use of energy in land use and  
27 transportation planning." SACP 26

1 The challenged decision states:

2 "We find that what CPN fails to distinguish is the  
3 prospective land use planning process from the  
4 actual development of a middle school. We  
5 interpret our plan such that the policy cited has  
6 no applicability to this development. It applies  
7 only to long-term planning and not to the  
8 implementation of zoning ordinances or the  
9 issuance of building permits. The subject site is  
10 appropriately zoned and designated for the  
11 proposed use. We interpret our plan and find that  
12 this quoted [energy] policy is not an approval  
13 criteria [sic]." Record B53.

14 CPN argues the emphasized language in the purpose  
15 statement of SACP Policy B expressly requires it be applied  
16 to quasi-judicial, as well as legislative, land use  
17 decisions. CPN contends that in particular, the fourth  
18 item, which addresses energy, must be considered by the city  
19 council in making the school siting decision. However, some  
20 of the other items listed in SACP Policy B clearly address  
21 long-range planning, including items 3 (economic growth), 5  
22 (cooperative growth management, and 9 (service districts).  
23 See SACP 26-27. The reference to "future decisions" in SACP  
24 B clearly does not require the city to address these items  
25 in connection with every development decision. It is  
26 therefore not made express that the mention of future  
27 decisions in the intent statement requires the city to  
28 address, in connection with school siting, the item  
29 addressing energy. The city's interpretation must be  
30 affirmed under ORS 197.829(1) and Clark, supra.

31 CPN's third assignment of error is denied.

1           **D.    SACP Policy H**

2           CPN contends the challenged decision violates SACP  
3 Policy H, which states, in relevant part:

4           "To encourage and promote industrial development  
5 which strengthens the economic base of the  
6 community and minimizes air and water pollution.

7           "\* \* \* \* \*

8           **"Non Supporting Uses Discouraged**

9           "8. Non-industrial land uses should be  
10 discouraged from districts that have been  
11 designated for industrial use, except when a  
12 non-industrial use is primarily in support of  
13 industry or industrial employees."

14          The challenged decision finds this policy inapplicable  
15 for several reasons, including the fact that the Pringle  
16 site is neither zoned nor otherwise designated for  
17 industrial use. The city's interpretation must be affirmed  
18 under ORS 197.829(1) and Clark, supra.

19          CPN's fourth assignment of error is denied.

20           **E.    SACP Policy I, Salem Transportation Plan and**  
21           **Statewide Goal 12 Transportation Planning Rule**

22          CPN contends that the city erred in finding that SACP  
23 Policy I, the Salem Transportation Plan (STP) and the  
24 Statewide Goal 12 Transportation Planning Rule (TPR) are not  
25 applicable to the challenged decision. Both CPN and the  
26 city agree that these documents are intended to coordinate  
27 urban development with the provision of transportation  
28 facilities. However, they disagree over whether SACP Policy  
29 I, the STP and the TPR must be applied in making a quasi-

1 judicial decision that interprets the local plan and  
2 regulations to determine whether it is lawful to locate a  
3 middle school on the Pringle site.

4 **1. SACP Policy I**

5 SACP Policy I states the following goal:

6 "To insure that the coordination and provision of  
7 transportation facilities and services that  
8 reflect desired development patterns are timed to  
9 coincide with community needs and to minimize the  
10 adverse impacts of traffic." SACP 39.

11 The policy then lists 19 items related to the stated goal.  
12 The challenged decision interprets the policy as applying  
13 generally to the preparation of transportation plans, and  
14 plan and land use regulation amendments, and as inapplicable  
15 to quasi-judicial decisions, including the code  
16 interpretation that is the subject of this appeal. However,  
17 the decision does contain a specific finding that SACP  
18 Policy I(11), which mentions schools, will be satisfied  
19 through the permitting process.<sup>6</sup>

20 CPN does not explain in its brief why it finds the  
21 city's interpretation contrary to the express language of  
22 SACP Policy I. We defer to the city's interpretation.  
23 ORS 197.829(1); Clark, supra.

---

<sup>6</sup>SACP Policy I(11) states:

"Transit facilities convenient to the public should be included in the design and construction of public buildings, schools, shopping centers, industrial parks and planned unit developments."

1                   **2. Salem Transportation Plan**

2           The challenged decision states that the STP is a guide  
3 to transportation improvements over the next 20-30 years,  
4 and does not contain criteria applicable to specific  
5 projects. CPN contends that certain requirements of the STP  
6 are specific and, by their terms, are applicable to quasi-  
7 judicial land use decisions such as the city's code  
8 interpretation in this case.

9           The STP itself states that it

10           "is adopted as a detailed plan of the [SACP], and  
11 as such forms the legal policy basis for public  
12 decision making concerning transportation  
13 facilities and programs. The Goals, Policies, and  
14 Objectives of this Plan are to be considered in  
15 all decision making processes that impact or are  
16 impacted by the transportation system." STP 27.

17 However, immediately following the broad statement quoted  
18 above, the STP lists the types of decisions it might affect,  
19 including decisions on location of streets, transportation  
20 programs, funding, development of new street system  
21 elements, and priorities. The challenged decision does not  
22 fall into any of these categories. Furthermore, the STP  
23 states that it is a "master document," which is to be  
24 implemented through "several other plans and documents."<sup>7</sup>  
25 Id. 29.

---

<sup>7</sup>These documents are listed. They include the Salem-Keizer Area Transportation Study Plan, the Public Facility Plan, Neighborhood Plans, Capital Improvement Program, Transportation Improvement Program, State Facility Plans, and Special Plans and Studies. STP 29-30.

1 We do not find beyond a colorable defense the city's  
2 characterization of the STP as a general policy document not  
3 directly applicable to the challenged decision. See Zippel,  
4 supra.

5 **3. Goal 12 Transportation Planning Rule**

6 CPN contends that notwithstanding ORS 227.178(3), the  
7 city should have directly applied the TPR during the city's  
8 proceedings on remand.<sup>8</sup> CPN argues that because the TPR is  
9 a state administrative rule and not a local land use  
10 standard, ORS 227.178(3) does not apply.<sup>9</sup> The city responds  
11 that since the TPR became applicable on May 8, 1994, it was  
12 not applicable on June 22, 1993, when the application for an  
13 interpretation was originally filed. The city contends it  
14 acted properly in refusing to apply the TPR.

---

<sup>8</sup>OAR 660-12-055(3) describes how and when the STP should be applied. It states, in relevant part:

"\* \* \* By May 8, 1994, affected cities and counties within MPO areas shall adopt land use and subdivision ordinances or amendments required by OAR 660-12-045(3), (4)(a)-(e) and (5)(d). Affected cities and counties which do not have acknowledged ordinances addressing the requirements of this section by the deadlines listed above shall apply OAR 660-12-045(3), (4)(a)-(e) and (5)(d) directly to all land use decisions and all limited land use decisions."

The city does not contend that during the relevant period it had an acknowledged ordinance addressing the requirements of OAR 660-12-055(3).

<sup>9</sup>ORS 227.178(3) states, in relevant part:

"\* \* \* [A]pproval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

1           The Court of Appeals has held that the use of  
2 "standards and criteria" in ORS 227.178(3) is to

3           "assure both proponents and opponents of an  
4 application that the substantive factors that are  
5 actually applied and that have a meaningful impact  
6 on the decision permitting or denying an  
7 application will remain constant throughout the  
8 proceedings." Davenport v. City of Tigard, 121 Or  
9 App 135, 854 P2d 483 (1993).

10 See also Sunburst II Homeowners Assn. v. City of West Linn,  
11 101 Or App 458, 790 P2d 1213, rev den 310 Or 243, 796 P2d  
12 360 (1990). This objective would not be attained if  
13 amendments to state regulations had the effect of changing  
14 the criteria affecting an application during the  
15 proceedings.

16           OAR 660-12-055(3), which requires the direct  
17 application of specific sections of the TPR in certain  
18 cities after May 8, 1994, does not override ORS 227.178(3).  
19 When OAR 660-12-045(3), (4)(a)-(e) and (5)(d) are applied  
20 directly, in cities that have not adopted the required  
21 amendments to their comprehensive plans and regulations,  
22 they act as a substitute for such amendments and apply only  
23 to applications submitted after that date.

24           CPN's fifth assignment of error is denied.  
25 Christenson's third assignment of error is denied.

26           The city's decision is affirmed.