BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

J.K. Land Corporation,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
City of Gresham,	)	LUBA No. 89-147
	)	
Respondent,	)	FINAL OPINION
	)	AND ORDER
and	)	
	)	
RICHARD D. SCHUNK,	)	
	)	
Intervenor-Respondent.	)	

Appeal from City of Gresham.

James S. Smith, Portland, filed the petition for review, and argued on behalf of petitioner. With him on the brief was Davis Wright Tremaine.

Thomas Sponsler and Matthew R. Baines, Gresham, filed the response brief, and Matthew R. Baines argued on behalf of respondent City of Gresham.

Richard D. Schunk, Gresham, represented himself.

HOLSTUN, Referee; and Sherton, Chief Referee, participated in the decision.

AFFIRMED 03/23/90

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals an order of the Gresham City Council denying its request for site design review approval to construct 148 attached dwelling units.

MOTION TO INTERVENE

Richard D. Schunk moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The 8.5 acre site petitioner proposes to develop is designated Medium Density Residential on the city comprehensive plan map and is designated "established" on the city code map.[1] Portions of the property are also included in the flood plain physical constraint district, the hillside physical constraint district - 15%-35% slope, and the hillside physical constraint district - greater than 35% slope.[2]

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[1]The Gresham Community Development Plan is composed of four separate volumes as follows:

1. Plan Findings - Volume 1.

2. Plan Policies and Plan Map - Volume 2.

3. Code and Code Map - Volume 3.

4. Plan Standards - Volume 4.

[2]The city code map designates all property in the city in one of three ways: (1) established, (2) developing or (3) redeveloping. In addition, the code map includes three overlay special purpose districts for areas

Code § 10.5202 provides that site design review approval is granted administratively following a "Type I procedure," without public hearings or notice to adjoining property owners. Nevertheless, the city, based on other code sections, followed a "Type III" procedure, which requires a public hearing before the planning commission and provides for a right of appeal of the planning commission's decision to the city council.[3]

Petitioner's application was submitted on December 14, 1988, and was deemed complete on June 6, 1989. The planning commission held a public hearing on September 11, 1989 and denied the request. Petitioner appealed the planning commission's decision and, following an October 17, 1989 public hearing before the city council, the city council also denied the proposal, entering its final order on November 7, 1989. This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The city erred by not considering the petitioner's application under its Type I procedure, pursuant to Code § 10.5202."

SECOND ASSIGNMENT OF ERROR

"The city erred by considering the petitioner's

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with special physical constraints: (1) floodplains, (2) areas with slopes between 15 and 35% and (3) areas with slopes in excess of 35%.

[3]The city initially determined it would follow a Type II procedure, but later determined a Type III procedure was warranted under the code. We address the different types of procedures for development review provided in the Gresham Development Code under our discussion of the first three assignments of error.

proposal as a Type III review."

THIRD ASSIGNMENT OF ERROR

"Gresham Development Code § 10.2120 is without adequate standards to determine the applicable criteria for transfer to Type III review, and is therefore vague."

Petitioner contends under the first three assignments of error that the city erroneously subjected its application to Type III procedures, rather than the Type I procedures required by the code.[4] Code § 10.5202 provides that site

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[4]The code provides four different types of procedures for review of development permit applications such as the site design review approval sought by petitioner. Types I through III are relevant to this appeal. Type I procedures allow review by the city manager without a public hearing or notice to other potentially interested parties. An affected party may appeal the city manager's Type I decision to the planning commission. Code §§ 10.2110(2); 10.7500(1). Review of a Type I decision by the planning commission is limited to the record supporting the city manager's decision, supplemented by relevant oral commentary by the parties. Code § 10.2110(2).

Type II procedures provide the city manager may render a decision without a public hearing, but require notice of the proposed decision to affected persons as provided in the code, and require that such persons be provided an opportunity to comment. Code § 10.2120(1). The city manager is also empowered under Type II procedures to give notice and to conduct a public hearing. Code § 10.2120(2). The city manager gives notice of his decision in a Type II proceeding, and the applicant or interested parties may appeal the decision to the planning commission. Code § 10.2120(3). Alternatively, the city manager may refer his decision to the planning commission "if the comprehensive plan does not adequately address the issues, problems or facts associated with the development." Id. The code provides that review of appeals of Type II decisions by the planning commission shall be limited to the record supporting the city manager's decision, supplemented by relevant oral commentary from the parties. Code § 10.2120(3).

Under Type III procedures, the application is scheduled for a public hearing before the planning commission, and the planning commission's decision may be appealed to the city council. Code § 10.2130(1).

design review shall be conducted following Type I procedures. However, as noted above, the subject property is designated "established" on the code map. Code § 10.3100 provides in part:

> "* * * In an established district, a parcel of land may be developed in a manner similar to and compatible with existing development. * * * [D]evelopment within an established district shall be processed under the Type I procedure unless the development is not similar to or compatible with existing development. A proposed development is similar to and compatible with existing development if it meets the requirements of sections 10.3120 to 10.3160 [sic 10.3102 to 10.3106]." (Emphasis added.)

The city interprets Code § 10.3100 to require that an application for development approval be reviewed under a higher numbered procedure type, notwithstanding Code § 10.5202, if "the development is not similar to or compatible with existing development." The determination concerning compatibility, required by Code § 10.3100, is governed by Code §§ 10.3102 to 10.3106.

Development of the same type as that on adjoining properties is deemed consistent under Code § 10.3106(1). However, as defined by the code, the attached multi-story dwellings proposed by the applicant are not of the same type as the detached dwellings on adjoining properties. Code § 10.3106(1); Plan Standards § 4.0110. Where proposed development is not of the same type, Code § 10.3106(2) provides the development nevertheless is consistent (and therefore compatible under Code § 10.3100) if it is

determined, following a Type II procedure, that the proposed development will "be arranged to protect those adjacent developments which are of a different type from detrimental effects due to noise, odor, fumes, dust, glare, heat, reflection and traffic vibration."

The code also includes a section which provides that where more than one type of procedure is required, the city manager may process the application "collectively under the highest numbered procedure required for any part of the application * * *." Code § 10.2010(2). Because the determination concerning compatibility required by Code §§ 10.3100 and 10.3106(2) requires a Type II procedure, the city initially determined the entire application would be subject to Type II procedures. Record 10.

As noted above, see n 4, the Type II procedures provide the city manager "may refer his decision [to the planning commission] if the comprehensive plan does not adequately address the issues, problems or facts associated with the development." In this case, the city's community development director[5] utilized this section to determine the application should be forwarded to the planning commission for a public hearing, in accordance with Type III procedures. Record 10.

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[5]Although the code sections refer to the city manager, the city manager apparently has delegated to the community development director and his staff the responsibilities assigned to the city manager under Code Chapter 10.

Petitioner's argument that the city was required under the code to follow Type I procedures, as opposed to Type II or Type III procedures, is not supported by the language in the code. As explained above, Code § 10.3106(2) requires that Type II procedures be followed to make the compatibility determination required by Code § 10.3100. Code § 10.2010(2) specifically allows the city to require the entire development application to be processed collectively under the highest numbered procedure required for any part of the application. Therefore, the city's initial decision to require that the application follow Type II procedures, rather than Type I procedures, was correct.

The first assignment of error is denied.[6]

Petitioner's second and third assignments of error challenge the city's subsequent decision to process petitioner's application under Type III procedures, rather than Type II procedures. The city points out that the only real difference between the two procedures is that the initial decision is rendered by the community development director under Type II procedures, subject to appeal to the planning commission, whereas under the Type III procedures followed by the city in this case, the planning commission is the initial decision maker. In any event, the city

[6]Petitioner suggested at oral argument that it was never given notice that the city planned to proceed under Type II procedures. The record shows petitioner was given notice that Type II procedures would be followed on August 24, 1988. Record 639-640.

contends the community development director properly applied Code § 10.2120(3), quoted above, to refer the application to the planning commission for a decision under Type III procedures.

Under Code § 10.2120(3), it is not entirely clear that it is the application, as opposed to the community development director's decision, that is referred to the planning commission. The city apparently interprets this code section to require that the application be forwarded to the planning commission in accordance with Type III procedures, without a decision by the community development director, where the director concludes the specific plan and code standards applicable to the property are not sufficiently detailed to "adequately address the issues, problems or facts associated with the development." Code § 10.2120(3). There is nothing in the language of Code § 10.2120(3) that conflicts with that interpretation, and it is a reasonable interpretation in that the reason for such a transferral is a determination that the community development director believes the applicable plan standards are inadequate to evaluate the use proposed. We conclude that the city's interpretation of Code § 10.2120(3) is correct. McCoy v. Linn County, 90 Or App 271, 752 P2d 323 (1988).

Petitioner's final argument under these assignments of error is that Code § 10.2120(3) is improperly vague and does

not provide sufficient guidance to the city in deciding whether to follow Type III procedures rather than Type II procedures.

Admittedly, the standard specified in Code § 10.2120(3) for following Type III rather than Type II procedures is subjective. However, petitioner does not explain why a subjective standard for determining whether to follow a Type II or Type III procedure violates statutory, constitutional or any other applicable requirements. As the city points out, the only difference between Type II and Type III procedures is that under Type II the community development director renders an initial decision (with or without a public hearing), which may be appealed to the planning commission, whereas under Type III the first step is a public hearing before the planning commission, with a recommendation from the community development director. Under either type of procedure, the decision may be appealed to the city council, as occurred in this case.

That the standard for determining whether to proceed under Type II or Type III procedures is subjective provides no basis for reversal or remand of the city's decision.

The second and third assignments of error are denied.[7]

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[7]Petitioner also suggests it did not receive notice of the decision to proceed under Type III procedures. However, petitioner does not contend it failed to receive notice of the planning commission public hearing or other documents in the record making it clear that the city intended to follow Type III procedures in this matter. Neither did petitioner at any point object to the city's decision to follow Type III procedures. Under the

FOURTH ASSIGNMENT OF ERROR

> "The city's findings concerning the applicant's soils report are unsupported by substantial evidence."

FIFTH ASSIGNMENT OF ERROR

> "The Hillside Constraint District provisions regarding hydrology and geology reports are without adequate standards to determine the approval criteria, and are therefore vague."

The city's plan includes the following relevant policies and implementation measures:

> "It is the city's policy to limit or prohibit development in areas exhibiting characteristics of physical constraints." Plan Policies 9.
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> "It is the city's policy to minimize or prevent development in areas where geologic conditions create conditions which are hazardous to life and/or property." (Emphasis added.) Plan Policies 10.
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> "It is the city's policy to minimize development on soil conditions which may be hazardous."[8]

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reasoning in our decision in Downtown Community Ass'n v. Portland 3 Or LUBA 244 (1981), it is not clear whether the petitioner's failure to object to the procedure selected by the city necessarily would bar its second and third assignments of error. We note that in Downtown Community Ass'n v. Portland, supra, an expert review panel (the city's variance committee) was entirely bypassed by the procedure followed by the city, whereas here the initial decision maker in the Type II procedure did provide a recommendation, one which in this case was followed by the planning commission. However, in view of our conclusion that the procedures followed by the city were proper, we need not determine whether petitioner's failure to object to the city's decision to follow Type III procedures also requires denial of its second and third assignments of error.

[8]One of the implementation strategies following the soil conditions policy provides:

> "The Community Development Standards Document shall require that all development or alterations of hillsides with severe

(Emphasis added.) Plan Policies 11.

"It is the city's policy to minimize or prevent development on steep slopes which are hazardous to life and property." (Emphasis added.) Plan Policies 12.

Plan Standards § 2.0514 provides in part:

"In order to prevent or mitigate possible hazards to life and property, adverse effects to safety, * * * and adverse impacts on the natural environment, specific reports will be provided by the applicant who proposes to develop land within the Hillside Physical Constraint District. The following identifies the reports which will be required:

"Soils Report. This report shall include data regarding the nature, distribution, and strength of existing soils, conclusions and recommendations for grading procedures design criteria for corrective measures, and opinions and recommendations concerning the carrying capabilities of the sites to be developed in a manner imposing the minimum variance from the natural conditions. The investigation and report shall be prepared by a professional civil engineer registered in the State of Oregon.

"Geology Report. This report shall include an adequate description, as defined by the City Manager, of the geology of the site, conclusions and recommendations regarding the effect of geologic conditions in the proposed development and options and recommendations as to the carrying capabilities of the sites to be developed. The investigation and report shall be prepared by a professional geologist.

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constraints upon urban uses (slopes between 15%-35%) employ the most responsible construction, design, and management techniques possible to minimize hazaradous [sic] conditions. This may include clustering of housing on gentler slopes, density reductions, etc." Plan Policies 11.

"Hydrology Report. This report shall include an adequate description, as defined by the City Manager, of the hydrology of the site, conclusions, and recommendations regarding the effect of hydrologic conditions on the proposed development, and options and recommendations covering the carrying capabilities of the sites to be developed. The Hydrology Report shall include but not be limited to the requirements of Section 3.1023 [sic 3.1013] of these standards. The investigation and report shall be prepared by a professional civil engineer registered in the State of Oregon.

"* * * * *"

The city's findings provide in relevant part:

"Taken together, these policies and strategies [quoted in part above] have the effect of imposing severe limitations on development proposed in steep slope areas. Such development is intended to occur with minimal disturbance of existing conditions, and only when thoroughly detailed documentation is provided to indicate that hazards within the development site and to adjacent properties will not result.

"This proposal has not been designed in a manner which would minimize disturbance of the steep slopes in this area. The applicant's development plan indicates extensive areas within the site where existing slopes exceed 35%. Removal of the natural vegetative cover and extensive cuts and fills are proposed in these areas of slopes greater than 35% in order to accommodate proposed apartment buildings, carports, and parking areas. Most of the areas shown with a slope of over 35% are not minor depressions, but are parts of major topographical features. These are the ravines which run through the site and a portion of the northerly bank which borders the Johnson Creek floodplain. A more sensitive design technique would have clustered the units and other site improvements in areas of the site which have the most modest slopes so that the ravines and more

severe slopes would be subject to much less disturbance.

"* * * this proposal indicates numerous attached dwelling units, parking areas, and carports in areas where slopes exceed 35%.

"Standards contained in Section 2.0510 require the submittal of detailed soils, geology, and hydrology reports as a means of ensuring compliance with the intent of the policies and strategies cited above. These studies as submitted by the applicant are attached. Comments from the City Engineering Division, also attached, indicate that these reports are deficient in terms of justifying conclusions reached in support of the applicant' proposal. These comments are based in part on an independent review of the applicant's soils and foundation investigation conducted by Northwest Geotechnical Consultants. * * *

"As stated in Section 2.0514, the soils, geology, and hydrology reports required for development sites in the Hillside Physical Constraint District must include data which demonstrate clearly that the proposed development will prevent or mitigate possible hazards to life and property, adverse effects to safety, and adverse impacts on the natural environment. Specifically, the soils report must 'include data regarding the nature distribution, and strength of existing soils, conclusions and recommendations for grading procedures, design criteria for corrective measures, and opinions and recommendations covering the carrying capacities of the site to be developed in a manner imposing the minimum variance from the natural condition.' Similarly, the geology report must 'include an adequate description, as defined by the City Manager, of the geology of the site, conclusions and recommendations regarding the effect of geologic conditions in the proposed development, and opinions and recommendations as to the carrying capabilities of the site to be developed.' Finally, the hydrology report must 'include an adequate description, as defined by the City

Manager, of the hydrology of the site, conclusions and recommendations regarding the effect of hydrologic conditions on the proposed development, and options and recommendations covering the carrying capabilities of the site to be developed.'

"While some soils, geology, and hydrology information has been submitted by the applicant, adequate data have not been included in these reports to satisfy the requirements of Section 2.0514. As discussed in the * * * comments of the City Engineering Division, these reports failed to include sufficient test data to verify recommendations or to provide quantified information to support conclusions made in the reports. The applicant's soils and foundation investigation indicates that the site is stable without providing soil shear strengths, moisture-density data, or specific slope stability analysis. Many of the test pits evaluated on the site were found to have soft to moderately-soft clay; however, the report recommends that a bearing value of 2,000 p.s.i. can be obtained at a depth of 18 inches below the surface. No field tests or laboratory tests were performed to verify field soil classifications. Similarly, the soils report failed to recommend slope gradients for the proposed dams which would create detention ponds as part of the project, and the permeability of the proposed pond liner materials has not been determined.

"* * * It is the opinion of the City Engineering Division that with present soil conditions found on the site, the applicant's soils engineer should have performed specific tests to verify his conclusions and recommendations. Without these test data, reports submitted by the applicant dealing with the soils, geology, and hydrology of the site are inadequate and do not conform with provisions of Section 2.0514." Record 12-14.

Petitioner does not directly challenge the above quoted findings, which conclude that the report submitted by

petitioner to satisfy the requirements of Plan Standards § 2.0514 for a soils, geology, and hydrology report is inadequate. Rather, petitioner contends the city improperly construed its plan to allow it to qualitatively review the adequacy of petitioner's submittal to satisfy the requirement in Plan Standards § 2.0514 for a soils report. According to petitioner, as long as the report addresses the soils report subject matter identified in Plan Standards § 2.0514 and is signed by a registered civil engineer, the relevant plan policies are fully implemented, and there is no authority under Plan Standards § 2.0514 for the city to qualitatively review the adequacy of the soils report submitted.

We reject petitioner's literal and narrow reading of the soils report portion of Plan Standards § 2.0514. The initial paragraph of that section makes it clear that the purpose of the report is to "prevent or mitigate possible hazards to life and property, adverse effects to safety, * * * and adverse impacts on the natural environment." The fact that Plan Standards § 2.0514 goes further and (1) requires submittal of a soils report, (2) identifies the required content of that report, and (3) requires that the report be signed by a registered civil engineer, does not mean a report must be accepted without question if it contains all required subject matter.

Although it could be stated more clearly in the Plan

Standards document, we conclude the city's reading of Plan Standards § 2.0514 to allow it to evaluate the reports required by that section to determine whether the concerns stated in the initial paragraph of that section, and the related plan policies which are intended to be implemented by the reports in the first place, are adequately addressed is reasonable, correct and consistent with the plan language quoted above. Fifth Avenue Corp. v. Washington County, 282 Or 591, 581 P2d 50 (1978); McCoy v. Linn County, 90 Or App at 275-276; Gordon v. Clackamas County, 73 Or App 16, 20-21, 698 P2d 49 (1985).

The fourth assignment of error is denied.

Petitioner's challenge to the city's conclusion that the geology and hydrology report requirements of Plan Standards § 2.0514 are not met is based entirely on its view that the language in that standard requiring those reports to "include an adequate description, as defined by the City Manager," is improperly vague and improperly grants unbridled discretion to the city manager. See ORS 227.173(1) (requiring that approval criteria and standards be set forth in the city's development ordinances); Lee v. City of Portland, 57 Or App 798, 646 P2d 662 (1982) (Lee).

The city argues that petitioner simply reads the language in Code § 2.0514 incorrectly. We understand the city to argue the language to which petitioner objects simply recognizes that it is the city manager, or the

planning staff as his delegate, who work with an applicant to determine the appropriate level of detail necessary in the reports required by that section, in view of the particular nature of the project proposed and the soil, geologic, and hydrologic conditions at a particular site. We do not understand the city to contend the city manager has unbridled discretion to make decisions on the adequacy of the information submitted. Ultimately, it is the city manager, the planning commission, or the city council which must determine whether the information submitted under Plan Standards § 2.0514 is adequate to address the concerns expressed in the initial paragraph of the section and related plan policies. Neither ORS 227.173(1) nor Lee requires the kind of precision in land use approval standards which petitioner argues is required.

In this case, the city did not simply find, without explanation, that the information submitted by petitioner is inadequate. Had the city done so, petitioner might well have a meritorious complaint under ORS 227.173(2). See Commonwealth Properties v. Washington County, 35 Or App 387, 582 P2d 1384 (1978). However in this case, as the findings quoted above show, the city obtained an independent expert assessment of the site and provided in its findings detailed reasons why it found petitioner's report inadequate.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

> "The site design criteria requiring the preservation of 'as many trees as possible' is wholly lacking in standards."

SEVENTH ASSIGNMENT OF ERROR

> "The city's findings which stated that the development was not designed in a manner to preserve as many trees as possible is unsupported by substantial evidence."

One of the city's site design review criteria, Plan Standards § 3.1120(A)(9), requires as follows:

> "The development [shall be] designed in such a manner that as many trees as possible can be preserved. Preserved trees and shrubs shall be protected during construction."

The city found that Plan Standards § 3.1120(A)(9) was not satisfied by the site design submitted by petitioner for the following reasons:

> "* * * [T]his development has not been designed in such a manner that as many trees as possible can be preserved. By proposing substantial cuts and fills in densely wooded, steep slope areas, this development would require the removal of a large number of existing trees which could be preserved if a more sensitive design had been proposed. A development scheme which called for the clustering of dwellings on portions of the site with the most moderate slopes would result in less disturbance to steeper, more sensitive areas, and in preservation of a substantially greater number of trees." Record 17.

Petitioner argues Plan Standards § 3.1120(A)(9) is so subjective and discretionary that it does not satisfy ORS 227.173(1), which, as the Court of Appeals explained in Lee, requires that land use standards be "clear enough for an

applicant to know what he must show during the application process." Lee, 57 Or App at 802.

Respondent contends that the criterion in Plan Standards § 3.1120(A)(9) is no more subjective or unclear than the standard requiring a "use at a particular location is desirable to the public convenience and welfare and not detrimental or injurious to the public health, peace or safety, or to the character and value of the surrounding properties * * *," which the Court of Appeals found to be acceptable to comply with ORS 227.173(1). Lee, 57 Or App at 802.

We agree with the city that Plan Standards § 3.1120(A)(9) is sufficient to comply with ORS 227.173(1). Many land use planning standards are subjective and imprecise.[9] The approval standard contained in Plan Standards § 3.1120(A)(9) is no more imprecise or subjective than the standard the Court of Appeals held to be adequate

[9]For example, the statutory standards for an irrevocably committed exception to statewide planning goals includes a criterion requiring that the land for which an exception is sought be "irrevocably committed * * * to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable * * *." ORS 197.732(1)(b). Among the criteria applicable to reasons exceptions is a criterion requiring that "[t]he proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts. ORS 197.732(1)(c)(D). However, in some circumstances the Land Conservation and Development Commission requires that approval standards be clear and objective. See OAR 660-16-010(3) (requiring clear and objective standards for limiting uses that conflict with Goal 5 resource sites) and OAR 660-07-015 (requiring clear and objective standards for regulations affecting needed housing).

in Lee.

In addition, the city did not, as petitioner suggests in the petition for review, simply reject petitioner's proposal "due to 'insensitivity.'" Petition for Review 25. Rather, the city explained in its findings why the standard was not met (substantial cuts and fills in steeply sloped, densely wooded areas of the site) and suggested how the site design might be changed to comply with Plan Standards § 3.1120(A)(9) (clustering dwellings on moderately sloped, less sensitive areas).[10]

The sixth and seventh assignments of error are denied.

EIGHTH ASSIGNMENT OF ERROR

> "The city's finding that the applicant has failed to preserve significant wildlife habitat is unsupported by substantial evidence."

Plan Standards § 3.1120(A)(12) requires that "[a]ttempts to preserve significant wildlife habitat have been made." Petitioner argues the finding adopted by the city in this proceeding that "meaningful attempts to preserve significant wildlife habitat have not been made * * *," is not supported by substantial evidence.

The map of significant fish and wildlife habitat included in the plan does not designate the subject property

[10]At the planning commission hearing petitioner suggested it could modify the proposal to reduce the amount of development on steep slopes, thus reducing the number of trees that would be lost. However, the application was not modified.

as including significant wildlife habitat. Respondent cites other parts of the Plan Findings which it claims identify the property as containing significant wildlife habitat, but we cannot tell from the cited pages whether respondent is correct. Unless the property includes significant wildlife habitat, as designated in the plan, petitioner has no obligation under Plan Standards § 3.1120(A)(12) to make a meaningful attempt to protect significant wildlife habitat.

We do not agree with the city that it may, on a case by case basis under Plan Standards § 3.1120(A)(12), determine that a site includes significant wildlife habitat even though the site is not included on the maps or inventories of significant wildlife habitat in the acknowledged city plan. Because we cannot determine from the findings and portions of the plan cited by the city that the plan includes the subject property in its inventory of significant wildlife habitat, we sustain the eighth assignment of error.[11]

NINTH ASSIGNMENT OF ERROR

> "The city's finding of an inability to provide adequate public facilities because of increased traffic is not supported by substantial evidence."

Plan Standards § 6.0410 provides in part that "[n]o

[11]However, because we have already rejected petitioner's challenges to other bases for the city's decision denying the requested site design review approval, sustaining the eighth assignment of error is not a sufficient basis for reversal or remand of the city's decision.

development will be permitted where it will cause traffic generation beyond the street's current carrying capacity * * *." Plan Standards § 6.0435.1 provides in part "[l]ocal streets typically carry less than 1000 vehicles per day." (Emphasis added.) Petitioner contends the city improperly denied its request because the development proposed will increase traffic on an adjoining local street to more than 1000 vehicles per day.

The relevant city findings are as follows:

> "Traffic generated by this proposal would access directly to SW 10th Dr., which is classified as a local street with an improved width of 44 ft. * * * [T]his proposed development would generate approximately 1,000 vehicle trips per average weekday. This would more than double the existing volume of trips, resulting in a total of approximately 1,700 trips on this portion of SW 10th. * * * Section 6.0435.1 * * * indicates that local streets typically carry fewer than 1,000 vehicle trips per day. These comments also state the undesirability of permitting traffic volumes on a local street in excess of 1,000 trips per day. * * *" Record 18-19.

Although the above-quoted findings do state that the traffic on the adjoining local street will exceed 1000 vehicles per day if the development is allowed, the city did not conclude that Plan Standards § 6.0410 was therefore violated.[12] We conclude that violation of Plan Standards

[12]The conclusion section of the city's findings includes no mention of Plan Standards § 6.0410 at all. We note that just because Plan Standards § 6.435.2 provides that local street typically carry less than 1000 vehicles per day, it does not necessarily follow that any development

§ 6.0410 was not one of the bases for the city's denial.

The ninth assignment of error is denied.

TENTH ASSIGNMENT OF ERROR

> "The sum total of the city's actions in considering this application denied the applicant due process."

In its final assignment of error, petitioner alleges that the local proceedings, viewed as a whole, show that it did not receive the hearing before an impartial tribunal that it is entitled to under Fasano v. Washington Co. Comm., 264 Or 574, 507 P2d 23 (1973).[13] Petitioner contends that because the decision maker was biased, its constitutional right to due process was violated.

Petitioner concedes that it can point to no single action by the city that supports its contention that its due process rights were violated by the city. However, petitioner contends the city proceedings, viewed in their entirety, show it was denied due process.

Although the city applied the regulatory requirements in effect when the application was submitted, as required by

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that will result in that figure being exceeded violates Plan Standards § 6.0410.

[13]Citing Campbell v. Board of Medical Examiners, 16 Or App 381, 518 P2d 1042 (1972), petitioner also argues, incorrectly, that "quasi judicial proceedings must be cloaked with outward indicia of fairness as well as actually being fair." Petition for Review 30. As the Oregon Supreme Court made clear in 1000 Friends of Oregon v. Wasco County, 304 Or 76, 84, 742 P2d 39 (1987), although an applicant for land use approval is entitled to an unbiased decision maker, the appearance of fairness doctrine does not apply to quasi-judicial land use proceedings in Oregon.

ORS 227.178(3), petitioner speculates the city did not want to approve its application because the property was rezoned shortly after the application was submitted, and the proposed multi-family residential use would not be allowed under current city land use regulations. Petitioner contends the staff improperly advocated before the planning commission and city council that its request be denied.[14] Petitioner further argues the planning commission's refusal to allow petitioner to revise its application and submit additional material in support of its application shows the planning commission was biased.[15] Finally, petitioner contends, as it did under the assignments of error discussed above, that the city's misconstruction of substantive and procedural plan requirements show the city was biased.

We have already concluded that with the possible exception of the Plan Standard concerning protection of wildlife habitat, the city correctly interpreted and applied its plan provisions. As the city correctly notes, there is nothing improper about planning staff recommending that the planning commission take a particular action on a permit application. The city actions petitioner complains of under

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[14]Petitioner also suggests the city staff was uncooperative and slow in processing information it submitted. The record does not support petitioner's suggestion.

[15]Petitioner does not allege the planning commission violated applicable statutory, plan or code provisions by refusing to allow an amended application or to accept evidence in support of its application. Rather, petitioner contends the refusal shows the planning commission was biased.

this assignment of error, viewed individually or collectively, do not support its argument that it was denied due process or a decision by an impartial tribunal.

The tenth assignment of error is denied.

The city's decision is affirmed.