

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

CANDACE E. SCHRYVER and DOUGLAS )  
J. SCHRYVER, )  
 )  
Petitioners, )  
 )  
vs. )  
 ) LUBA No. 90-097  
CITY OF HILLSBORO, )  
 ) FINAL OPINION  
Respondent, ) AND ORDER  
 )  
and )  
 )  
GLEN McCURDY, )  
 )  
Intervenor-Respondent. )

Appeal from City of Hillsboro.

Peggy Hennessy, Portland, filed the petition for review and argued on behalf of petitioners. With her on the brief was Preston, Thorgrimson, Shidler, Gates & Ellis.

No appearance by respondent.

Gregory S. Hathaway and Virginia L. Gustafson, Portland, filed the response brief and argued on behalf of intervenor-respondent. With them on the brief was Garvey, Schubert & Barer.

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

REMANDED

10/12/90

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioners appeal Ordinance No. 3923, which approves a preliminary plan for a planned unit development and amends the Hillsboro Zoning Ordinance (HZO) map to add a Planned Unit Development (PUD) overlay zone to the subject property.

MOTION TO INTERVENE

Glen McCurdy moves to intervene on the side of the respondent. There is no objection to the motion and it is allowed.

FACTS

The subject property consists of approximately 21 acres zoned Single Family Residential (R-7). The property is described in the challenged ordinance as follows:

"\* \* \* The southern portion of the site is predominantly flat, but the central and northern portions slope gently northward toward the Reedville swale, located approximately 600 feet north of the site. The flatter southern portion is sparsely covered with brush and some trees. The central portion of the site is thickly forested with mature fir and oak trees, smaller hazelnut and red alder trees and brush and a variety of ground cover species. The northern portion is less densely forested with slightly smaller oaks, a few firs, a brushy understory of hawthorn and hazelnut, and a wide variety of groundcover species. \* \* \*" Record 398.

The northern portion of the property is in Washington County's Statewide Planning Goal 5 inventory of natural resources and is designated in the Washington County Comprehensive Plan as "Significant Natural

Resources/Wildlife Habitat: Sensitive Habitat identified by the Oregon Department of Fish and Wildlife, Audubon Society, Urban Wildlife Habitat Map and forested areas coincidental with water areas and wetlands." Record 397. The City of Hillsboro Comprehensive Plan (plan) requires that development within an area designated in the Washington County Comprehensive Plan as a "significant natural resource area," occur only through the city's planned unit development (PUD) process.<sup>1</sup> The city's PUD process requires, among other things, imposition of the PUD overlay zone on property designated as a significant natural resource area and that development proposals in these areas address preservation of wildlife habitat and natural vegetation.

Intervenor-respondent (intervenor) applied for approval to place a 93 lot PUD on the subject property. The planning commission recommended approval of the proposed development. Petitioners appealed the planning commission's recommendation to the city council. The city council affirmed the decision of the planning commission. This appeal followed.

FIRST ASSIGNMENT OF ERROR

"Respondent misconstrued the natural resource protection requirements of its comprehensive plan

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<sup>1</sup>It is undisputed that the county's comprehensive plan designates the property as a "significant natural resource area."

in approving a 93-lot PUD without adequate conditions to protect property designated as a significant natural resource area and its decision violates ORS 227.173(2)."

SECOND ASSIGNMENT OF ERROR

"Respondent misconstrued the natural resource protection requirements of its zoning ordinance in approving a 93-lot PUD without adequate conditions to protect property designated as a significant natural resource area, and its decision violates ORS 227.173(2)."

In these assignments of error, petitioners argue the proposed PUD does not comply with several provisions in the city's plan and zoning ordinance.<sup>2</sup> Petitioners focus on whether the city's decision satisfies open space requirements and addresses preservation of wildlife habitat and natural vegetation, especially preservation of existing trees. Petitioners also argue the city erred by failing to require intervenor to submit a landscaping plan at the time of PUD approval. We address these arguments separately below.

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<sup>2</sup>HZO section 11-6.127(A) provides:

"Standards and Criteria. The following standards and criteria shall govern the application for a PUD within the City:

"(A) The use (or uses) proposed is (are) consistent with the goals, policies, and land use designations of the Hillsboro Comprehensive Plan.

"\* \* \* \* \*"

A. Open Space, Wildlife Habitat, Natural Vegetation, and Trees

Petitioners contend the city's decision is not in compliance with several plan and HZO provisions establishing standards relating to "open space" and wildlife habitat.<sup>3</sup>

Petitioners maintain that the proposed PUD violates

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<sup>3</sup>Petitioners' contentions include that the proposal violates the following plan provisions:

"[It is the goal of the city] to conserve forested lands and significant trees in the planning area, and to provide open space, buffers from noise, separation of conflicting uses, watershed protection, maintenance of clean air and water and outdoor recreation activities." Plan section 11-11.5(I).

"Because trees are an asset to a neighborhood and to the community, the city shall encourage and promote the retention of trees on lands proposed for development or redevelopment." Plan section 11-11.5(III)(A).

"Preserve, protect, and maintain for present and future residents of Hillsboro and [the] surrounding community open space, historic sites and structures." Plan section 11-11.6(I)(A).

"[It is the goal of the city to] promote and encourage development in character with the natural features of the land." Plan section 11-11.6(I)(C).

"The city shall promote and encourage development patterns and other techniques which preserve open space within the planning area." Plan section 11-11.6(III)(A)(3).

Plan sections 11-11.6(I)(A) and 11-11.5(I) are not expressed as mandatory approval criteria, and petitioners do not explain how they are properly considered as mandatory approval standards. Additionally, plan provisions which simply encourage particular activities, such as plan sections 11-11.5(III)(A), 11-11.6(I)(C) and 11-11.6(III)(A)(3), state general objectives and are not mandatory approval standards. Bennett v. City of Dallas, \_\_\_ Or LUBA \_\_\_ (LUBA No. 88-078, February 7, 1989), aff'd 96 Or App 645 (1989); Miller v. City of Ashland, 17 Or LUBA 147, 167 (1988); Urquhart v. LCOG and City of Eugene, 14 Or LUBA 335, 347, rev'd on other grounds 80 Or App 176 (1986). Therefore, petitioners' arguments that the city's decision is inconsistent with these plan provisions provides no basis for reversal or remand.

plan section 11-11.3(III)(E), which provides:

"In order to promote home ownership and to increase efficient land use, developments with lots less than 7,000 square feet may be considered or might be allowed. Because the social and aesthetic impact of poorly designed residential developments increases with increases in density, such developments shall be of a quality and design which effectively offsets increases in density and/or smaller lots through provision of useable open space and/or other amenities." (Emphasis supplied.)

Petitioners contend plan section 11-11.3(III)(E) requires that a proposed PUD in the R-7 zone provide "useable open space" or amenities, or a combination of both, in exchange for having lots with less than the 7,000 square foot minimum lot size. Petitioners state that in the subject PUD one half of the proposed 93 lots are less than the 7,000 square foot minimum lot size, but that no useable open space or other amenities for use of the PUD occupants or for wildlife habitat is provided. In this regard, petitioners challenge the city's decision based on the following findings:

"\* \* \* the minimum lot size is 6,000 square feet for approximately 50% of the lots which increases efficient use of land. Since large lots are proposed in the areas with the highest concentration of trees, the aesthetics of the development will be increased and useable open space will be created. \* \* \* [T]he creation of large lots on individual properties in exchange for 6,000 sq. ft. lots is an appropriate mechanism to provide protection of existing trees and vegetation." Record 392.

Petitioners argue that these findings demonstrate the

PUD will not have any "useable open space" within the meaning of plan section 11-11.3(III)(E). According to petitioners, that some of the lot sizes are greater than 7,000 square feet is not the equivalent of providing "useable open space" for the PUD under plan section 11-11.3(III)(E). Petitioners also contend the city's findings fail to establish that "amenities" will be provided by the proposed PUD in exchange for having lot sizes less than the 7,000 square foot minimum for nearly half of the PUD lots.

Petitioners next argue the proposal violates plan section 11-11.3(III)(M) which provides, in part:

"The development of housing shall allow for the retention of lands for open space and recreation within the planning area \* \* \*"

Petitioners also argue the proposal violates HZO section 11-6.127(III)(G) which provides:

"At least fifteen percent (15%) of the net development area shall be utilized as Open Space. Open Space, covered or uncovered, is the land area to be used for scenic, cultural, landscaping or recreational purposes within the PUD. Open Space does not include proposed drives, streets, or rights-of-way, parking areas and their accessory uses. A performance bond in the amount of up to 120% of the total estimated open space improvement costs may be required by the City to insure that these improvements are installed.

"Maintenance of such open space and other PUD facilities, such as private streets, shall be the responsibility of the Homeowners' Association created in accordance with Oregon Revised Statutes."

Petitioners argue the city's findings regarding these standards indicate the city applied an incorrect interpretation of the term "open space." Petitioners specifically challenge the following findings:

"The Planning Commission finds that approximately fifty-one percent (51%) of the net developable area in this development is designated as open space, which exceeds the 15% requirement of the PUD Ordinance. This open area utilizes front and rear yards and excludes public right-of-ways, houses and driveways." Record 403.

Petitioners reassert that the open space requirements of the plan and the HZO are not satisfied by finding that the PUD will include some privately owned residential lots with front and rear yards larger than the minimum size required in the R-7 zone.

Petitioners further argue the city's findings do not establish that preservation of wildlife habitat and natural vegetation has been addressed, as required by plan policy 11-11.6(III)(A)(8), which provides:

"Areas identified by Washington County in their [sic] plan for the East Hillsboro area as significant natural resource areas shall be developed through the PUD process. Development proposals shall address preservation of wildlife habitat and natural vegetation."

Petitioners contend that there is evidence in the record that deer, foxes, birds and small mammals live on the site, and that fenced private yards do not amount to wildlife habitat for these animals. Petitioners point out that the reason the subject property is subject to PUD



approval is because of its designation as significant wildlife habitat, and it is because of that designation that the "applicable PUD requirements, including the open space requirements, must focus on protection of the wildlife habitat/wildlife corridor responsible for that designation." Petition for Review 7. Petitioners state the corridor of trees on the northern portion of the subject property is primarily responsible for the significant wildlife habitat designation. Under these circumstances, petitioners contend the city must address how that corridor of trees will be preserved. Petitioners argue the findings do not meaningfully address preservation of the tree corridor.

Petitioners admit the findings contemplate the recording of a "Declaration of Restrictive Covenants, Conditions and Restrictions for Glendale Woods" (CCR's) which provides for the education of property owners and establishes certain limitations regarding post-construction removal of trees.<sup>4</sup> Petitioners argue, however, that the

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<sup>4</sup>The proposed CCR's provide, in part:

"No tree more than eight inches in diameter as measured 48 inches from the ground, may be killed or cut down from any lot without the prior written approval of the Design Review Committee. Trees may be removed upon approval of the Design Review Committee, as required for construction of Houses if unsafe, diseased or damaged by natural causes or for other good cause. Owners may maintain and prune trees as necessary for healthy growth. If the Design Review Committee fails to respond in writing to a written request for tree removal, within two weeks of receipt of the request, the request will be considered granted.

"Design Review Committee," which under the CCR's is to review and decide post-construction requests for tree removal, is not required to have:

"\* \* \* [any] particular expertise on wildlife habitat and is not a public body applying clear and objective standards. \* \* \* There are no standards governing the removal decision."  
Petition for Review 9-10.

Petitioners argue that these deficiencies establish that:

"The [CCR's] do not contain mandatory standards for tree or wildlife habitat preservation. There are no enforceable standards or objective criteria to protect the significant natural resource area."  
Petition for Review 9-10.

Petitioners also argue there is no provision in the CCR's for notice to anyone other than owners of PUD property adjacent to areas affected by proposals for tree removal. Petitioners conclude the CCR's provide little or no

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"If after original construction of a House on a Lot, the Design Review Committee approves removal of a tree on a Lot, then before removal the Owner of the Lot shall give written notice of that approval, to the Owners of all Lots which touch the Lot on which the tree is located, at any point. Those Owners shall have seven days after delivery or mailing of that notice, to object in writing delivered to one member of the Design Review Committee, to removal of the tree. If a member of the Design Review Committee receives such a written objection within that seven day period, the Design Review Committee shall schedule a meeting with the Owners or Owner objecting and the Owner of the Lot on which the tree is located. The meeting shall be held within five days of receipt of the objection. The Design Review Committee shall give the Owner of the Lot on which the Tree is located, and all Owners who made timely written objection, reasonable opportunity at the meeting, to present their respective positions. The Design Review Committee shall deliver or mail its decision to all owners participating in the meeting, at the meeting or within two days thereafter."  
Record 242-243.

protection to the wildlife habitat and natural vegetation on the subject property.

Intervenor argues the city's findings establish that the city has properly interpreted the applicable HZO and plan provisions, and that petitioners are improperly attempting to amend the applicable standards rather than apply them.

Regarding plan section 11-11.3(III)(E), intervenor contends nothing in that section requires provision of both open space and amenities when lots sizes are smaller than 7,000 square feet. According to intervenor, the city's findings demonstrate a more than adequate provision of amenities and that provision of open space is, therefore, unnecessary. Intervenor argues the PUD amenities will consist of the preservation of a significant number of trees within the PUD and a street design which preserves views.<sup>5</sup> Intervenor also argues nothing in the plan requires that the amenities provided for a PUD consist of improvements or areas commonly owned or available to the PUD as a whole.

Intervenor further argues that the city's findings are adequate, in any event, to establish the proposed development will include both "open space" and "amenities" in exchange for having about half of the PUD homes located

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<sup>5</sup>Intervenor contends trees and natural areas will be preserved through (1) the large lot size of the northern contiguous lots, (2) the efforts of the Design Review Committee established by the recorded CCR's, and (3) the PUD community education regarding retaining trees required by the CCR's.

on lots smaller than the 7,000 square feet lot size otherwise required by the R-7 zone. Intervenor argues the PUD "open space" will consist of the large front and rear yards of the lots on the northern edge of the subject property. According to intervenor, there is nothing in the plan which requires that the "useable open space" referred to in plan section 11-11.3(III)(E) be open space commonly owned or available. Intervenor cites the following findings to establish that the proposed PUD provides for "useable" open space:

"[S]ince large lots are proposed in areas with the highest concentration of trees, the aesthetics of the development will be increased and useable open space will be created." Record 392.

With regard to HZO section 11-6.127(III)(G), intervenor argues the city's finding that 51% of the net developable area in the PUD is designated as open space is adequate to establish that at least 15% of the net developable area of the PUD will be utilized as open space. Intervenor argues:

"By creating large lots on the northern portion of the property, the PUD creates a natural greenbelt buffer along the northeast property line where the largest and most significant trees on the site can be preserved. The applicant also has designed the PUD with streets planned at 90 degree angles with contours in order to reduce the amount of grading necessary and provide greater preservation of trees. Additionally, as a condition of approval, the lot lines will be adjusted to provide maximum tree preservation. The CCR's also contain restrictions on tree removal and provide education on maintaining natural vegetation." (Record citations omitted.) Intervenor-Respondent's Brief 11.

Intervenor reasserts that nothing in the plan or HZO mandates that the 15% of net developable area required to be "utilized as open space," be commonly owned or otherwise available to all PUD residents.

Intervenor suggests plan section 11-11.6(III)(A)(8) is not an approval standard at all, or if it is an approval standard, it is not a demanding one. Intervenor maintains that preservation of wildlife habitat and natural vegetation were adequately addressed by the city's decision. Intervenor states:

"\* \* \* the proposed PUD concentrates development at the southern end of the site, with larger lots to the north. The northern lots are configured to provide a continuous band of large backyards in areas with the highest concentration of trees in order to preserve the natural areas. This band creates a 75 feet to 100 feet natural vegetation buffer ('greenbelt') along the northeast portion of the site." (Record citations omitted.)  
Intervenor-Respondent's Brief 5-6.

Moreover, intervenor contends the only wildlife which exists on the subject property are birds and squirrels and, according to intervenor, large private fenced yards are adequate habitat for such wildlife so as long as the northern trees in those yards are retained. Intervenor contends the city's findings regarding the oversize front and rear yards for the northern PUD lots, the provisions in the CCR's for Design Review Committee approval prior to removal of trees, and the CCR provisions regarding the education of property owners concerning the preservation of

trees, establish that the city adequately addressed preservation of wildlife habitat and natural vegetation.

We are required to determine whether the city's interpretation that the open space and amenities referred to in plan sections 11-11.3(III)(E), 11-11.3(III)(M), and HZO section 11-6.127(III)(G), neither need be commonly owned or available, nor consist of improvements for the PUD community, is correct. McCoy v. Linn County, 90 Or App 271, 275-276, 752 P2d 323 (1988). We are also required to determine whether the city's decision adequately addresses preservation of wildlife habitat and natural vegetation, as required by plan section 11-11.6(III)(A)(8). Specifically, we must determine whether the provision for (1) oversize front and rear yards for the northern PUD lots, (2) CCR's requiring approval of the homeowner composed Design Review Committee before trees may be removed, and (3) education of property owners are adequate measures to establish the city has adequately addressed preservation of wildlife habitat and natural vegetation.

The plan defines the term "open space" in terms of the function of such land, as follows:

"\* \* \* lands used for agricultural or forest uses, and any land that would, if preserved and continued in its present use:

"(a) Conserve and enhance natural or scenic resources.

"(b) Protect the air and water.

"(c) Conserve landscaped areas, such as golf courses, that reduce air pollution and enhance the value of abutting and neighboring properties.

"(d) Enhance recreation opportunities.

"(e) Preserve historic sites.

"(f) Promote orderly and efficient urban development.

"(g) Protect bird rookeries, spawning beds and wildlife habitat areas."

HZO section 11-6.127(III)(G) provides further definition of the term open space. The definition of the term open space in HZO section 11-6.127(III)(G), like the definition contained in the plan, is in terms of the function open space serves, and is as follows:

"At least fifteen percent (15%) of the net development area shall be utilized as Open Space. Open Space, covered or uncovered, is the land area to be used for scenic, cultural, landscaping or recreational purposes within the PUD. Open Space does not include proposed drives, streets, or rights-of-way, parking areas and their accessory uses. \* \* \*" (Emphasis supplied.)

In determining whether the city has correctly interpreted and applied the term "open space," we apply the definitions of that term contained in the plan and HZO section 11-6.127(III)(G). Although the plan definition of "open space" quoted above is very broad, plan section 11-11.3(III)(E) requires provision of "useable open space" where lots are proposed to be less than 7,000 square feet in size

"[b]ecause the social and aesthetic impact of poorly designed residential developments increases with increases in density, such developments shall be of a quality and design which effectively offsets increases in density and/or smaller lots through provision of useable open space and/or other amenities."

We believe that the useable open space required by plan section 11-11.3(III)(E) must benefit the entire PUD, including the residents of the undersized lots. It is hard to imagine what "use" the occupants of the PUD could make of "open space" in a neighbor's oversize front and rear yard. As far as we can tell, the proposed larger front and rear yards on some of the northern lots will do little, if anything, to compensate for the small lot size of nearly half the other PUD lots.

Additionally, while a street design intended to retain views may provide some amenity to the PUD, we believe that street design, standing alone, is inadequate to offset or compensate for the reduced lot sizes of nearly half the PUD lots as required by plan section 11-11.3(III)(E).<sup>6</sup> Further, we believe that an aesthetic street design does not relieve

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<sup>6</sup>We disagree with intervenor's assertion that there is adequate provision in the proposal for amenities such that there is no need for any open space to compensate for the smaller lot size of some of the lots under plan section 11-11.3(III)(E). The terms open space, and "amenities" are both prefaced by the term "useable." While the term "amenities" is not defined in the HZO or plan, we interpret the term "useable amenities" to require use and enjoyment by the entire PUD. We do not believe provision of aesthetically designed streets or large privately owned lots on a portion of the property constitutes a "useable amenity" for the PUD community as a whole.



the city of the responsibility under HZO section 11-6.127(III)(G) to utilize at least 15% of the net developable PUD area as open space. HZO section 11-6.127(III)(G) specifically states that open space does not include streets.

Additionally, we believe plan section 11-11.3(III)(M) and HZO section 11-6.127(III)(G) contemplate open space in the nature of a common "facility" which the PUD occupants can use or which is otherwise reasonably available for the utilization of the PUD occupants. HZO section 11-6.127(III)(G) requires that 15% of the "net developable area" of the PUD be "utilized" as open space, and that such open space and "other facilities" "shall" be "maintain[ed by the] Homeowners' Association created in accordance with Oregon Revised Statutes." We believe it to be a more consistent and correct interpretation of HZO section 11-6.127(III)(G), that commonly owned and maintained (or at least commonly available) PUD open space is required, rather than provision of only a segment of the PUD property consisting of privately owned lots with oversized, potentially fenced front and rear yards which are unavailable to anyone but the owner of the lot.

Similarly, it is difficult to understand what function listed in the plan or HZO definition of open space is served by oversized private fenced front and rear yards on some of the northern lots. None of the oversized yards can

reasonably be assumed to serve as either (1) an open natural or otherwise specially landscaped area which may be utilized for some common cultural or other purpose, (2) a preserve for wildlife, or (3) space available for the PUD residents' recreational use. Similarly, we do not believe the proposed large northern front and rear yards will conserve and enhance natural or scenic resources or promote orderly and efficient urban development of the PUD as a whole, within the meaning of the definition of open space. In sum, we conclude the plan and HZO provisions requiring provision of open space are not satisfied by privately owned front and rear yards.

Additionally, while we disagree with petitioners' suggestion that all of the open space provided must be useable as wildlife habitat, the plan and PUD provisions read as a whole do contemplate the preservation of wildlife habitat and also contemplate a balance between such habitat preservation and PUD development. However, as we stated above, the city has not made adequate provision for open space for wildlife habitat or for any other function served by the open space definition in the plan.<sup>7</sup>

Plan section 11-11.6(III)(A)(8) requires the city to address preservation of wildlife habitat and natural vegetation. We do not agree with with intervenor's

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<sup>7</sup>No party disputes that open space may provide wildlife habitat.

suggestion that plan section 11-11.6(III)(A)(8) is not an approval standard, or that it is an undemanding standard. As petitioners point out, the only reason the PUD process is required at all is because the northern portion of the property is designated as a significant natural area in Washington County's Goal 5 inventory of significant natural resources. As we understand it, plan section 11-11.6(III)(A)(8) reflects a determination by the city to treat identified natural resources within any "significant natural area" as though under Goal 5 and OAR 660-16-010(3)(c) a decision had been made regarding those resources to limit the conflicting allowed residential uses.<sup>8</sup> Plan section 11-11.6(III)(A)(8) limits those conflicting potential residential uses by requiring

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<sup>8</sup>OAR 660-16-010(3)(c) provides:

"Limit Conflicting Uses: Based on the analysis of ESEE consequences, a jurisdiction may determine that both the resource site and the conflicting use are important relative to each other, and that the ESEE consequences should be balanced so as to allow the conflicting use but in a limited way so as to protect the resource site to some desired extent. To implement this decision, the jurisdiction must designate with certainty what uses and activities are allowed fully, what uses and activities are not allowed at all and which uses are allowed conditionally, and what specific standards or limitations are placed on the permitted and conditional uses and activities for each resource site. Whatever mechanisms are used, they must be specific enough so that affected property owners are able to determine what uses and activities are allowed, not allowed, or allowed conditionally, and under what clear and objective conditions or standards. Reasons which support this decision must be presented in the comprehensive plan, and plan zone designations must be consistent with this decision."

development proposals to address methods for preservation of natural areas and wildlife habitat. Consequently, we agree with petitioners that plan section 11-11.6(III)(A)(8) requires the city's findings to demonstrate in what way wildlife habitat and natural vegetation will be preserved.

It is important that plan section 11-11.6(III)(A)(8) does not require that the city address whether wildlife habitat and natural vegetation will be preserved. Rather, that plan standard requires the city to address the ways in which wildlife habitat and natural vegetation will be preserved. This approval standard assumes that PUD development, in areas designated as "sensitive natural areas," will preserve to some extent wildlife habitat and natural vegetation, although it also recognizes that some of the those qualities may be lost to accommodate development. We do not believe, however, that the provision of certain privately owned oversized front and rear yards in the PUD adequately addresses preservation of wildlife habitat or natural vegetation. Similarly, we do not believe that CCR's (addressing post-construction tree removal) which depend on a homeowner Design Review Committee having no expertise or standards to follow regarding removal of trees or other natural vegetation, address how wildlife habitat and natural vegetation within the PUD will be preserved. Moreover, we do not believe CCR's specifying some education for PUD property owners adequately address how wildlife habitat and

natural vegetation will be preserved.<sup>9</sup>

Accordingly, the city's decision does not comply with HZO section 11-6.127(III)(G) and the cited portions of plan sections 11-11.6(III)(A)(8), 11-11.3(III)(E) and 11-11.3(III)(M). In addition, because the decision does not comply with the comprehensive plan, the decision also does not satisfy HZO section 11-6.127(III)(A), which requires the PUD to comply with the comprehensive plan.

This subassignment of error is sustained, in part.

B. Landscaping Plan

HZO section 11-6.127(IV)(B)(7) provides:

"An application \* \* \* for preliminary plan approval shall be made by the owner's authorized agent, on a form prescribed by and submitted to the Planning Department. The applicant shall submit ten copies and, for each drawing submitted, also a sepia or other reproducible of each item listed below:

\* \* \* \* \*

"7. A landscape plan, drawn at the same scale as the site plan, which on one or more sheets shows:

\* \* \* \* \*

"d. The location, size and variety of the trees to be removed." (Emphasis supplied.)

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<sup>9</sup>Additionally, as discussed infra, the city made no determination regarding what natural vegetation and trees will be removed in the pre-construction and construction phases of the PUD. It is not possible to ascertain whether any trees or natural vegetation will be retained upon which the CCR's could impose any further removal limitations.

Petitioners contend HZO section 11-6.127(IV)(B)(7) requires submission of a landscape plan demonstrating which trees are proposed to be removed at the time the preliminary PUD plan is submitted, and that provision of such a landscaping plan is a prerequisite for preliminary plan approval. Petitioners argue the city erred by approving the preliminary plan without a landscape plan showing which trees are to be removed having first been submitted and approved.

Intervenor suggests that HZO section 11-6.127(IV)(B)(7) is not an approval criterion. Intervenor also argues that HZO section 11-6.127(IV)(B)(7) is satisfied by the aerial photographs submitted by the applicant which establish the location of all of the trees on the property, as well as by:

"\* \* \* colored slides of the property which included an aerial view, as well as the interior and exterior of the site, which showed the location of all trees with maps to scale. In addition, the development plan depicts the potential houses to indicate the number of trees to be saved and removed. Because of the intent to preserve at least 50% and as many as 70% of the trees on the site, the exact trees to be removed have not been designated. \* \* \*" (Record citations omitted.) Respondent's Brief 30.

Intervenor also cites the following condition of approval imposed by the city as satisfying HZO section 11-6.127(IV)(B)(7):

"Prior to construction of streets and utilities within the project, the developer shall submit a tree removal plan prepared with the advice of a professional landscape architect or arborist. The

tree removal plan shall minimize the impact on existing trees 8 inches in diameter, four feet above the ground and on other native vegetation outside the street improvements." Record 388.

Intervenor contends that to the extent a landscaping plan establishing which trees are going to be removed is required to be submitted at the time of preliminary plan approval, the failure to provide such a landscaping plan is a harmless or a procedural error, and petitioners have alleged no resulting prejudice.

HZO section 11-6.127(IV)(B)(7) is couched in mandatory terms. It requires, prior to preliminary plan approval, submission of a landscaping plan identifying trees to be removed. There is no dispute that a landscaping plan which identifies the trees to be removed had not been submitted by the time of preliminary plan approval.

In determining that the PUD proposal is in compliance with several approval criteria, the city relied on intervenor's assertion that many trees were going to be preserved. However, the stated intentions of the developer to retain 50-70% of the trees on the site are not the equivalent of a landscape plan identifying the trees to be removed within the PUD as required by HZO 11-6.127(IV)(B)(7).

Furthermore, under Section A of this opinion, we determined the city's decision does not comply with relevant approval criteria regarding PUD amenities and wildlife habitat. The parties' arguments addressed in Section A

focused on the effectiveness of the proposed CCR's to control post-construction tree removal. However, in order to adequately address preservation of wildlife habitat under plan section 11-11.6(III)(A)(8), the city must also be aware of the trees contemplated for removal in the PUD's pre-construction and construction phases. Absent the landscaping plan establishing the location of the trees proposed to be removed in the pre-construction and construction phases, the city has no basis for determining that any trees will be retained in those phases of the PUD's development or for evaluating the effects of the PUD on wildlife habitat.

The omission of required information may be harmless error if the required information is located elsewhere in the record. McConnell v. City of West Linn, \_\_\_ Or LUBA \_\_\_ (LUBA No. 88-111, March 14, 1989), slip op 28. However, where the required information is not available elsewhere in the record, and is required for determining compliance with an applicable approval standard, then the failure to provide the required information is not properly considered harmless. See McConnell v. City of West Linn, supra, slip op at 26-28; Hopper v. Clackamas County, 15 Or LUBA 413, 418 (1987). Because the required landscaping plan is is not available anywhere in the record, and is required for the city to adequately address preservation of wildlife habitat, the omission of the plan is not harmless or procedural



error. Petitioners are not required to establish prejudice to their substantial rights by the city's failure to comply with HZO 11-6.127(IV)(B). See McConnell, supra.

This subassignment of error is sustained.

The first assignment of error is sustained, in part.

### THIRD ASSIGNMENT OF ERROR

"Even if respondent's findings were sufficient to satisfy the necessary standards under 11-6.127, there is not substantial evidence in the record to support the findings."

Petitioners assert that the challenged findings are not supported by substantial evidence. However, we determined under the first and second assignments of error that the city's findings are inadequate to establish compliance with relevant approval standards.<sup>10</sup> No purpose is served by determining whether inadequate findings are supported by substantial evidence. DLCD v. Columbia County, 16 Or LUBA 467, 471 (1988).

The third assignment of error is denied.

The city's decision is remanded.

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<sup>10</sup>We, however, disagreed with petitioners that all of the plan provisions cited in the petition for review are mandatory approval standards. The city's findings in support of plan provisions determined not to be mandatory approval standards are surplusage, and need not be supported by substantial evidence.