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

BETH GERL, BARRY KLUSMAN and )  
ELIZA CROCKETT, )  
 )  
Petitioners, )  
 )  
vs. )  
 )  
CITY OF LINCOLN CITY, )  
 )  
Respondent, )  
 )  
and )  
 )  
MICHAEL R. GIVENS, )  
 )  
Intervenor-Respondent. )

LUBA No. 91-135  
FINAL OPINION  
AND ORDER

Appeal from City of Lincoln City.

Richard W. Scholl, Newport, filed the petition for review and argued on behalf of petitioners. With him on the brief was Pridgeon, Stimac & Associates.

Joan M. Chambers, Lincoln City, filed the response brief and argued on behalf of respondent.

Michael R. Givens, Tacoma, Washington, represented himself.

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

REMANDED 01/03/92

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision granting preliminary  
4 master plan approval for an 80 unit residential planned unit  
5 development (PUD).

6 **MOTION TO INTERVENE**

7 Michael R. Givens moves to intervene on the side of  
8 respondent in this appeal. There is no opposition to the  
9 motion, and it is allowed.

10 **FACTS**

11 The subject property includes approximately 16.5 acres  
12 and is zoned Medium Density Residential (R-7.5). Adjoining  
13 properties are also zoned R-7.5. Under the Lincoln City  
14 Zoning Ordinance (LCZO), PUDs are permitted in all  
15 residential and commercial zones, subject to review and  
16 approval by the city planning commission pursuant to LCZO  
17 4.210.

18 The proposed development includes eight residential  
19 buildings consisting of ten residential units each. The  
20 proposed buildings will include one, two and three bedroom  
21 units and will be three stories tall. A community building  
22 is also proposed. The properties adjoining the subject  
23 property include a single-family residential development to  
24 the west, undeveloped property to the north and east and a  
25 high school and playing field to the south.

1 **FIRST ASSIGNMENT OF ERROR**

2 "Respondent Lincoln City improperly construed the  
3 applicable law in failing to require an  
4 environmental assessment as mandated under [LCZO]  
5 3.120 for developments greater than five acres."

6 The question presented under this assignment of error  
7 is whether the city erred by failing to require that the  
8 applicant file an environmental assessment for the proposed  
9 project, prior to granting the challenged PUD preliminary  
10 master plan approval. The city does not dispute that an  
11 environmental assessment will be required for the proposed  
12 PUD.<sup>1</sup> However, the city argues the filing of an  
13 environmental assessment need not precede, nor be  
14 contemporaneous with, a request for PUD preliminary master  
15 plan approval.

16 Neither LCZO 4.210, which governs approval of PUDs, nor  
17 LCZO 3.120, which establishes the requirements for  
18 environmental assessments, explicitly refers to the other.  
19 However, LCZO 3.120(3)(e) provides as follows:

20 "When review is necessary to determine  
21 environmental consequences, a written  
22 Environmental Assessment will be filed prior to  
23 the issuance of any development permit. The  
24 assessment will require information necessary to  
25 evaluate the environmental, scientific, or  
26 aesthetic resources of the site and the impact the

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<sup>1</sup>LCZO 3.120(3)(d) requires an environmental assessment for all development in excess of 5 acres.

1 development may have to surrounding properties."<sup>2</sup>  
2 (Emphasis added.)

3 The term "development permit" is not defined in the  
4 LCZO. Petitioners rely on the definitions of "development"  
5 and "permit" in ORS 227.160(2)<sup>3</sup> and 227.215,<sup>4</sup> which govern

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<sup>2</sup>After an environmental assessment is filed, the planning director must "determine if significant adverse impacts will result from the proposed project." LCZO 3.120(4)(a). Within 10 days after the environmental assessment is filed, the planning director must issue "findings authorizing, denying, or conditionally approving the project." Id. Written notice of the planning director's decision must be given to, among others, "affected property owners within 100 feet of the exterior boundary of the proposed project." LCZO 3.120(4)(b). The planning director's decision concerning an environmental assessment may be appealed to the planning commission. LCZO 3.120(5).

<sup>3</sup>ORS 227.160(2) provides, in relevant part, as follows:

"'Permit' means discretionary approval of a proposed development of land under ORS 227.215 or city legislation or regulation. \* \* \*

"\* \* \* \* \*."

<sup>4</sup>ORS 227.215 provides, in pertinent part, as follows:

"(1) \* \* \* '[D]evelopment' means \* \* \* making a material change in the use or appearance of a structure or land, [and] dividing land into two or more parcels, including partitions and subdivisions as provided in ORS 92.010 to 92.285 \* \* \*.

"\* \* \* \* \*

"(3) A development ordinance may provide for:

"(a) Development for which a permit [as defined by ORS 227.160(2)] is granted as of right on compliance with the terms of the ordinance;

"(b) Development for which a permit is granted discretionarily in accordance and consistent with the requirements of ORS 227.173;

1 city planning and zoning. Petitioners contend the  
2 challenged PUD preliminary master plan approval is clearly  
3 within these statutory definitions and that the city  
4 committed error by not requiring an environmental  
5 assessment.

6 The city argues the term "development permit"  
7 encompasses only permits "that authorize the act of  
8 development," and, in the present case, the city contends  
9 the PUD final master plan approval will constitute the  
10 "development permit." The city contends the term  
11 "development permit," as used in LCZO 3.120(3)(e) does not  
12 include discretionary permits such as the PUD preliminary  
13 master plan approval at issue in this appeal.<sup>5</sup>

14 The difficulty with the city's argument is that there  
15 is nothing in LCZO 3.120(3)(e) to suggest that it does not  
16 encompass both discretionary and nondiscretionary

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"(c) Development which need not be under a development  
permit but shall comply with the ordinance; and

"(d) Development which is exempt from the ordinance."

<sup>5</sup>The city also contends that under petitioners' interpretation an environmental assessment would never be required for nondiscretionary building permits and other nondiscretionary permits. According to the city, such an interpretation would eliminate environmental assessment review in a large number of cases where such review is now required by the city.

We do not understand petitioners to argue the environmental assessment requirement is limited to discretionary permits. Rather, petitioners argue that all development permits (whether discretionary or nondiscretionary) are potentially subject to LCZO 3.120(3)(e).

1 development permits.<sup>6</sup> LCZO 3.120(3)(e) refers to "any  
2 development permit." Furthermore, in at least one other  
3 section of the LCZO where the term "development permit" is  
4 used, it clearly encompasses discretionary permits.<sup>7</sup>

5 As LCZO 3.120(3)(e) is presently written, we agree with  
6 petitioners that "any development permit" encompasses  
7 discretionary permits such as the PUD preliminary master  
8 plan approval challenged in this decision. Therefore, an  
9 environmental assessment must be filed prior to a decision  
10 granting PUD preliminary master plan approval.<sup>8</sup> There is  
11 simply nothing in the language of LCZO 3.120(3)(e) or  
12 elsewhere in the LCZO that supports the limited meaning the

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<sup>6</sup>Under ORS 227.215(3), see n 4, supra, development permits may be either discretionary or nondiscretionary.

<sup>7</sup>LCZO 9.010(4) provides:

"Where a proposed development requires more than one development permit or zone change request from the City, the applicant may request that the City consider all necessary permit and zone change requests in a consolidated manner. If the applicant requests that the City consolidate its review of the development proposal, all necessary public hearings before the Planning Commission shall be held on the same date."

The above quoted section of the LCZO parallels and apparently implements the provisions of ORS 227.175(2) which require that cities provide an opportunity for consolidated review where a development proposal requires multiple permits.

<sup>8</sup>Presumably where an environmental assessment is prepared in conjunction with a discretionary permit approval for a development proposal, additional environmental assessments might not be required for subsequent nondiscretionary permits for that development proposal because an environmental assessment would already have been filed for the development proposal in accordance with LCZO 3.120(3)(e).

1 city argues in its brief was intended. If the city intends  
2 that the environmental assessment requirement shall apply  
3 only to decisions approving final plats or final building or  
4 other permits, it must amend its zoning ordinance to express  
5 that intent.

6 Although we need not address the various policy  
7 arguments advanced by the parties for their respective  
8 positions concerning when the environmental assessment ought  
9 to occur, we note that delaying the environmental assessment  
10 until the time of PUD final master plan approval could  
11 easily require that the PUD approval process be repeated to  
12 accommodate changes required under the environmental  
13 assessment review process. Finally, the city correctly  
14 notes that the initial decision maker in the environmental  
15 assessment process is the planning director with a right of  
16 appeal to the planning commission, whereas the initial  
17 decision maker in granting PUD preliminary master plan  
18 approval is the planning commission. However, this  
19 difference in procedure neither presents insurmountable  
20 difficulties nor overcomes the clear requirement of LCZO  
21 3.120(3)(e) that the environmental assessment be filed  
22 before PUD preliminary master plan approval is granted.  
23 LCZO 9.010(4), see n 6 supra, provides a procedure whereby  
24 the environmental assessment and PUD preliminary master plan

1 approval processes could proceed contemporaneously.<sup>9</sup>

2 The first assignment of error is sustained.<sup>10</sup>

3 **SECOND ASSIGNMENT OF ERROR**

4 "The decision of the planning commission to  
5 approve the PUD and its subsequent affirmation on  
6 appeal improperly construes LCZO 4.210, is not  
7 supported by adequate findings, and is not  
8 supported by substantial evidence in the whole  
9 record."

10 Under LCZO 4.210(2), the planning commission is  
11 empowered to approve PUDs in any residential or commercial  
12 zoning district.<sup>11</sup> LCZO 4.210(3) sets out detailed

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<sup>9</sup>We also note that before submitting a PUD preliminary master plan, the applicant is required to review the PUD preliminary master plan with the city manager or the city manager's designated representative at a preapplication conference. We see no reason why the environmental assessment process could not occur at the same time the preapplication conference requirement is satisfied.

<sup>10</sup>The Lincoln City Comprehensive Plan includes the following "Overall Environmental Policy:"

"Where the environmental impact of a proposal is significant, the City shall require the preparation of an environmental assessment. The assessment will be prepared [for] any development which is greater than five acres in size. The assessment will be prepared in accordance with the City's Environmental Impact Ordinance." (Emphasis added.)

The city's failure to require that an environmental assessment be filed in accordance with LCZO 3.120(3)(e) also violates the above quoted plan policy. ORS 227.175(4) (land use decisions must comply with comprehensive plan).

<sup>11</sup>LCZO 4.210(1) provides in part as follows:

"\* \* \* It is the purpose of this section to allow planned developments \* \* \*, and in so doing, allow a more flexible approach to land development than that which is normally accomplished through the subdivision and zoning ordinances of the City. The planned development approach is intended to provide more desirable environments by encouraging creative



1 informational requirements for PUD preliminary master plans  
2 and establishes formulas for calculating residential,  
3 commercial and industrial densities. LCZO 4.210(4)(c)  
4 governs planning commission decisions concerning whether to  
5 grant tentative approval for a PUD preliminary master plan,  
6 and provides in pertinent part as follows:

7 "The Planning Commission \* \* \* shall review the  
8 entire plan and shall seek to determine whether:

9 "(i) There are special physical conditions or  
10 objectives of the development which warrant  
11 a departure from the standard ordinance  
12 requirement.

13 "(ii) Resulting development will be consistent  
14 with overall planning and zoning objectives  
15 of the City.

16 "(iii) The area around the development can be  
17 planned to be in substantial harmony with  
18 the proposed plan.

19 "\* \* \* \* \*"

20 Petitioners argue the city failed to demonstrate the  
21 PUD preliminary master plan approved in this case is  
22 consistent with the above requirements of LCZO  
23 4.210(4)(c)(i) to (iii).

24 **A. Departure from the Standard Ordinance Requirement**  
25 **(LCZO 4.210(4)(c)(i))**

26 Citing Southwood Homeowners Assoc. v. City of  
27 Philomath, \_\_\_ Or LUBA \_\_\_, (LUBA No. 90-103, June 12,

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site planning and building designs; to make possible greater  
diversification between buildings and open spaces; and to  
conserve land and minimize development costs."

1 1991); Bartles v. City of Portland, \_\_\_ Or LUBA \_\_\_ (LUBA  
2 No. 90-111, December 3, 1990); and Margulis v. City of  
3 Portland, 4 Or LUBA 89, 98 (1981), petitioners argue the  
4 city violated LCZO 4.210(4)(c)(i) by failing to demonstrate  
5 that the proposed PUD is feasible. Petitioners contend that  
6 the city erred by failing to require geologic and other site  
7 studies to assure that engineering solutions to site  
8 limitations are feasible. Furthermore, petitioners contend  
9 the city erred by not addressing in its findings various  
10 potential development problems identified by petitioners  
11 below.<sup>12</sup>

12 Petitioners misread LCZO 4.210(4)(c)(i) to impose a  
13 substantive development approval standard such as those  
14 discussed in the cases they cite.<sup>13</sup> Although other sections  
15 of the LCZO may impose a substantive requirement that the  
16 PUD avoid environmentally sensitive or difficult to develop  
17 areas or demonstrate the feasibility of development in such  
18 areas, LCZO 4.210(4)(c)(i) does not. As relevant in this  
19 appeal, LCZO 4.210(4)(c)(i) simply requires that the

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<sup>12</sup>There is no dispute that the site includes sensitive areas such as steep slopes and wetlands, and that the site includes unstable soils and high groundwater.

<sup>13</sup>For example in Margulis v. City of Portland applicable plan goals required that new development "retain the 'character of established residential neighborhoods' and preserve 'the stability and diversity' of the city's neighborhoods." Margulis v. City of Portland, supra, 4 Or LUBA at 93. Additionally a relevant conditional use standard stated a conditional use approval could be granted if the proposal is "not detrimental or injurious to the public health, peace or safety or to the character and value of the surrounding properties." Id.

1 planning commission find that there are "special physical  
2 conditions" which justify proceeding under a PUD approach,  
3 where there is more flexibility in siting and designing  
4 structures and improvements to accommodate or avoid such  
5 conditions.

6 Because petitioners' challenge is to the adequacy of  
7 this particular PUD to address such physical conditions, not  
8 to the existence of such special physical conditions, this  
9 subassignment of error is denied.

10 **B. Consistency with Overall Planning and Zoning**  
11 **Objectives (LCZO 4.210(4)(c)(ii))**

12 As an initial point, we have some question whether LCZO  
13 4.210(4)(c)(ii) is properly interpreted to impose a  
14 requirement that the city demonstrate that a particular  
15 development proposal is consistent with each relevant plan  
16 policy. However, even if such a requirement is imposed,  
17 petitioners only identify plan housing policy 4 under this  
18 subassignment of error as being violated. Plan housing  
19 policy 4 requires that "[t]he city shall work to stabilize  
20 and protect existing residential areas from deterioration  
21 and incompatible development."

22 The thrust of petitioners' argument is that the  
23 proposed multi-family development is inherently incompatible  
24 with the existing single-family development. The proposed  
25 PUD is a residential development at approximately the same  
26 overall density that would be allowed were the subject  
27 property developed as a single-family residential

1 development. Although the city did not adopt findings  
2 specifically addressing plan housing policy 4, it did adopt  
3 findings that the proposal furthers several other plan  
4 housing policies favoring multi-family and lower cost  
5 housing. In addition, the city adopted the following  
6 findings in addressing LCZO 4.210(4)(c)(iii), discussed  
7 infra:

8       "\* \* \* [P]roposed buffer areas, the centralization  
9       of parking areas, and landscape plans are intended  
10       to provide harmony with the surrounding property \*  
11       \* \* .

12       "Appellants' concern again centers on building  
13       styles and the undesirability of apartment houses  
14       in the neighborhood. There was a great deal of  
15       effort in the planning process by Applicant and  
16       staff to create a minimum buffer area of 40 feet  
17       between any single-family detached residence and  
18       the proposed units. There is substantial evidence  
19       in the record \* \* \* that the area around the  
20       development can be planned to be in substantial  
21       harmony with the proposed plan." Record 36-37.

22       To the extent the city was required to assure the PUD  
23       preliminary master plan is consistent with plan housing  
24       policy 4, we believe the city's findings are adequate to  
25       demonstrate that such is the case. The city and petitioners  
26       clearly have a different opinion concerning the  
27       compatibility of single-family and multi-family residential  
28       development. However, the plan's requirement for  
29       compatibility is a somewhat subjective one, and we have no  
30       basis for questioning the city's judgment that, as designed  
31       and conditioned, the proposed PUD will be compatible with

1 the existing single-family residences.<sup>14</sup> See Bright v. City  
2 of Yachats, 16 Or LUBA 161, 171 (1987) (determining what is  
3 or is not compatible requires the exercise of considerable  
4 judgment).

5 Finally, petitioners also fault the city for not  
6 adopting findings specifically addressing every issue  
7 relevant to compatibility which they raised below. However,  
8 the only issues petitioners identify are the alleged  
9 inherent inconsistency of single-family and multi-family  
10 housing and an expression of concern that the proposed  
11 multi-family dwellings would be taller than the existing  
12 single-family dwellings and therefore interfere with  
13 existing residents' privacy.

14 We believe the above quoted findings are adequate to  
15 respond to the alleged inherent inconsistency of single-  
16 family and multi-family housing. We also believe it is  
17 sufficiently clear from the decision that the city believed  
18 the proposed buffering, design and landscaping are  
19 sufficient to render the proposed PUD compatible with  
20 existing residential areas, and that findings specifically  
21 addressing concerns that the proposed multi-family dwellings  
22 would be taller than the existing single-family dwellings  
23 and therefore interfere with existing residents' privacy are

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<sup>14</sup>Although the findings use the term "harmony" rather than "compatibility," we conclude the concepts are essentially identical in the factual context in which those terms must be applied in this case.

1 not required in these circumstances.

2 This subassignment of error is denied.

3 **C. Substantial Harmony (LCZO 4.210(4)(c)(iii))**

4 LCZO 4.210(4)(c)(iii) requires that the planning  
5 commission find that "[t]he area around the [proposed PUD]  
6 can be planned to be in substantial harmony with the  
7 proposed plan." (Emphasis added.) Petitioners' arguments  
8 that LCZO 4.210(4)(c)(iii) is violated essentially repeat  
9 their arguments under the previous subassignment of error,  
10 i.e., that the existing single-family development is  
11 inherently out of harmony with multi-family development.

12 The city suggests that LCZO 4.210(4)(c)(iii) is  
13 directed to existing undeveloped land and petitioners'  
14 arguments are all directed to the adjoining properties  
15 already developed with single-family dwellings. The city  
16 suggests that because there is no argument that adjoining  
17 undeveloped lands cannot be planned to be in substantial  
18 harmony with the proposed PUD, this subassignment of error  
19 should be denied.

20 There is some support for the city's suggestion that  
21 LCZO 4.210(4)(c)(iii) does not apply to developed properties  
22 adjoining a proposed development. However, even if  
23 adjoining developed properties must be in "substantial  
24 harmony with the proposed plan," for the reasons expressed  
25 in our discussion of the previous subassignment of error, we  
26 conclude the city's findings are adequate to demonstrate

1 that the standard is met in this case.

2 This subassignment of error is denied.

3 The second assignment of error is denied.

4 **THIRD ASSIGNMENT OF ERROR**

5 "The city misconstrued the applicable law and  
6 failed to make findings that the proposed PUD  
7 would be consistent with the goals and policies of  
8 the comprehensive plan, and the record did not  
9 contain substantial evidence showing that such  
10 goals and policies have been satisfied."

11 In approving an application for a permit to allow  
12 development of land, the city must find that the proposed  
13 development is "in compliance with the comprehensive plan  
14 for the city." ORS 227.175(4). Petitioners contend the  
15 city failed to demonstrate compliance with the following  
16 plan policies:

17 "The City shall request comments from the [Lincoln  
18 County] School District concerning land use plans,  
19 programs, or actions that might affect facilities  
20 and services." School Policy 5.

21 "The Planning Commission shall consider the  
22 impacts proposed developments will have on police  
23 and fire protection." Police and Fire Service  
24 Policy 2.

25 "The City shall consider the impact of proposed  
26 development on the proposed routes outlined in the  
27 City Street Inventory where development is  
28 proposed." Transportation Policy 1.<sup>15</sup>

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<sup>15</sup>Petitioners also allege the city failed to adequately address the plan's overall environmental policy and plan housing policy 4. We address petitioners' allegations concerning these plan policies under the first two assignments of error, supra.

1           Petitioners first argue the city failed to request  
2 comments from the school district regarding the proposed  
3 PUD, as required by plan school policy 5.

4           The record shows the school district was provided  
5 notice of the proposed PUD. Although the school district  
6 apparently did not submit comments, petitioners make no  
7 attempt to explain why the notice provided the school  
8 district was inadequate to "request comments." Neither do  
9 petitioners argue other plan school policies are applicable  
10 to or violated by the challenged decision.<sup>16</sup> We conclude  
11 petitioners' allegations concerning plan school policy 5  
12 provide no basis for reversal or remand.

13           Regarding plan police and fire service policy 2,  
14 petitioners argue the city simply pointed out that  
15 "emergency service providers were 'invited' to attend  
16 discussions, but did not." Petition for Review 17.  
17 Petitioners also argue the record contains no facts upon  
18 which to consider plan police and fire service policy 2 or  
19 transportation policy 1.

20           The city first argues that these plan policies are not  
21 mandatory approval criteria. If the city means by this  
22 argument that the cited policies could never constitute  
23 mandatory approval criteria, we do not agree.

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<sup>16</sup>The plan includes a number of school policies, but petitioners do not contend any of those policies are violated by the city's decision in this matter.



1           We agree with petitioners that the city may not assume  
2 a proposed development will have no transportation facility  
3 or police or fire service impacts, simply because the  
4 relevant service provider offers no comments. It is the  
5 city's obligation under the cited plan policies to consider  
6 such impacts, whether or not the relevant service provider  
7 chooses to participate.

8           However, in this case the record clearly shows such  
9 impacts were considered. The record shows that there were  
10 concerns expressed about accommodating fire and other  
11 emergency vehicles within the proposed PUD's parking lot,  
12 and that the applicant's consultant responded to those  
13 concerns. Record 128. Thereafter, the planning director  
14 pointed out the police and fire service providers were  
15 invited to comment on the proposal, but did not. Id. This  
16 evidence clearly shows fire and other emergency vehicle  
17 access impacts were considered, and that is all the cited  
18 plan fire and police policy requires.<sup>17</sup>

19           With regard to plan traffic policy 1, the city  
20 identifies findings addressing traffic issues and the  
21 findings cite the evidence in the record upon which the

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<sup>17</sup>We do not mean to suggest that a plan policy requiring that impacts on certain public facilities or services be considered, necessarily would be satisfied, no matter how slight or superficial the consideration. For example, such a policy may appear in a context with other policies that make it clear a finding of some minimal or specific level of service is required. In this case, however, petitioners make no attempt to argue the city was required under the cited plan policy to find a particular level of police and fire service can be provided to the proposed development.

1 findings are based. Record 26-28, 140-41. Petitioners do  
2 not challenge the adequacy of these traffic related  
3 findings, and we conclude there is substantial evidence in  
4 the record to support those findings.

5 For the above reasons, petitioners' contentions  
6 regarding the plan school, police and fire service, and  
7 transportation policies are rejected.

- 1 The third assignment of error is denied.
- 2 The city's decision is remanded.