BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

EOLA-GLEN NEIGHBORHOOD ASSOCIATION, INC., E.M. EASTERLY, LENARD EVANS, IRMGARD FORSYTHE, JOHN HORNER, RICHARD MATHER, and DON SNOWDON, Petitioners,	
vs.	LUBA No. 93-042
CITY OF SALEM, Respondent,	FINAL OPINION AND ORDER
and	
LAWRENCE T. EPPING, and GRANADA LAND CO., Intervenors-Respondent.	

Appeal from City of Salem.

Wallace W. Lien, Salem, filed the petition for review and argued on behalf of petitioners.

Stephanie Smythe, City Attorney; Paul A. Lee, Assistant City Attorney; Daniel A. Ritter, Heather O. Gilmore, and Kenneth Sherman, Jr., Salem, filed a response brief. With them on the brief were Daniel A. Ritter, P.C. and Sherman, Bryan, Sherman & Murch. Paul A. Lee argued on behalf of respondent. Ken Sherman, Jr., argued on behalf of intervenor-respondent.

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

AFFIRMED 08/04/93

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

Petitioners appeal a city decision granting variances and subdivision tentative plan approval for Deer Ridge Estates Subdivision (hereafter Deer Ridge), a single family residential subdivision.

MOTION TO INTERVENE

Lawrence T. Epping and Granada Land Co., the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

As approved, Deer Ridge includes 436 single family residential lots on 91.8 acres. The challenged decision grants subdivision tentative plan approval, with a number of conditions. The decision also approves variances to allow the street grades on portions of two interior subdivision streets, Sunwood Drive and Drive 11, to exceed the grade that would otherwise be allowed by the Salem Revised Code (SRC).

FIRST ASSIGNMENT OF ERROR

The challenged decision incorporates numerous documents by reference. Petitioners contend it is impossible to find all of those documents in the record. However, petitioners nevertheless identify most of the documents they believe the city intended to adopt as part of its decision. Petitioners further contend the documents the city probably intended to

adopt as its decision are inconsistent, making it impossible to determine what the city believes are the relevant facts.

A. The Decision

An initial problem is that the city did not include the entire decision in one place in the record. Our rules require that the record submitted by the city include "[t]he final decision including any findings of fact and conclusions of law." OAR 661-10-025(1). While our rules do not specifically require that the final decision and its supporting findings and conclusions be arranged in the record in a way that allows the parties and this Board to find the decision, that requirement is implicit.[1]

More important than the city's failure to compile the record it submitted to this Board so that the decision can be located easily, is the failure of the challenged decision itself to clearly identify the documents that the city intended to adopt as part of the decision and supporting findings. As we explained in Gonzalez v. Lane County, 24 Or LUBA 251, 259 (1992):

> "[I]f a local government decision maker chooses to incorporate all or portions of another document by reference into its findings, it must clearly

[1]Our rules require that documents be arranged in inverse chronological order. OAR 661-10-025(4)(a)(E). Therefore, if exhibits are physically attached to the final decision when adopted, the entire decision (including any attached exhibits) should be included together at the beginning of the record, even if this means that exhibits are duplicated elsewhere in the record. If this is not done, some other means of clearly identifying the location in the record of the decision and any exhibits must be employed.

> (1) indicate its intent to do so, and (2) identify the document or portions of the document so incorporated. A local government decision will satisfy these requirements if a reasonable person reading the decision would realize that another document is incorporated into the findings and, based on the decision itself, would be able both to identify and to request the opportunity to review the specific document thus incorporated."

It is not clear what documents the city intended to adopt as part of its decision and findings and what documents are simply included in the record as evidentiary support for the decision. However, as explained below, with one exception the parties apparently agree concerning the documents that comprise the challenged decision and supporting findings.[2]

The challenged decision states that it is comprised of Resolution 93-14 and Exhibits A and B. Record 5. The decision further explains that Exhibits A and B are "supplemented and, where in conflict, superseded by that document entitled 'Deer Ridge Estates, Subdivision Plat No. 92-21S - Findings, Conclusions and Order,' attached as Exhibit C." Record 5-6.

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[2]Respondent attaches to its brief an affidavit, signed by the city recorder, identifying the pages in the record where the decision is located. Following oral argument, respondent moved to supplement the record with a complete copy of the challenged decision. The affidavit is not part of the record submitted by the city in this matter, and petitioner's motion to strike the affidavit is allowed. Respondent's motion to supplement the record comes too late in this appeal proceeding, and the motion is denied.

Petitioners identify the location in the record of Resolution 93-14 and Exhibits B and C, and there does not appear to be any dispute concerning identity or location of these portions of the decision.[3]

Regarding Exhibit A, with one exception, the parties also agree concerning its composition and location in the record.[4] According to Exhibit A itself, Attachment B to Exhibit A includes "Materials Submitted During the Subdivision Review Process." Record 12. Petitioners contend it is not clear what the city means by "the Subdivision Review Process" and that this reference is insufficient to identify the materials the city intended to incorporate as part of its decision.[5]

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[3]Resolution 93-14 appears at Record 5-6. Exhibit B is a February 1, 1993 staff report which appears at Record 85-89 and a second time, without the final page, at Record 13-16. Exhibit C appears at Record 17-44.

[4]Exhibit A is a January 25, 1993 staff report, and it includes what is referred to as Attachment B. The staff report is located at Record 10-12. Attachment B is scattered throughout the record and is comprised of a number of different documents. The parties agree that Attachment B includes at least the following:

1. A December 17, 1992 planning commission decision. Record 45-47.

2. A December 8, 1992 staff report. Record 562-90.

3. Certain attachments to the December 8, 1992 staff report. Record 351-53, 365-88 and 591-658.

[5]Respondent contends the reference is to the planning commission's review, and that the materials submitted during that review appear at Record 258-402.

We agree with petitioners. Such a general reference is insufficient to "identify the document or portions of the document" the city intended to incorporate. Gonzalez, supra. We conclude the challenged decision is limited to Resolution 93-14, Exhibits B and C and the portions of Exhibit A concerning which there is no dispute. See n 4, supra.

B. Inconsistent and Confusing Findings

In the balance of this assignment of error, petitioners identify findings addressing requirements for a National Pollutant Discharge Elimination System (NPDES) permit, school attendance areas, traffic count and safety information, development density, compatibility with the surrounding neighborhood, parkland requirements and wetlands. Petitioners contend the findings they identify contain inconsistencies and, for that reason, the challenged decision must be remanded.

We have explained on numerous occasions that inadequate findings provide no basis for reversal or remand of a challenged decision unless the findings are shown to be critical to the challenged decision. See e.g., Bonner v. City of Portland, 11 Or LUBA 40 (1984). Under the first assignment of error, petitioners make no specific attempt to explain why, as a consequence of adopting the allegedly

inconsistent findings, the city failed to demonstrate compliance with one or more approval standards.[6]

Respondents make no attempt to explain the inconsistent findings beyond arguing, as noted above, that the decision explicitly makes the findings appearing in Exhibit C (Record 17-44) the controlling findings in the case of conflict. In other words, respondents contend that to the extent findings elsewhere in the decision conflict with findings contained at Record 17-44, the findings at Record 17-44 supersede those conflicting findings.

Petitioners' more specific challenges to findings of compliance with particular approval criteria, under the second through fourth assignments of error, are addressed below. Some of those challenges under the second through fourth assignments of error concern the same subject matter as the findings petitioners argue are inconsistent under the first assignment of error. However, in view of petitioners' failures under the first assignment of error to explain (1) why the challenged findings are inadequate to demonstrate

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[6]With regard to the potential requirement for a NPDES permit, petitioners cite a finding at Record 577 that "[p]lans will not be accepted for review without a valid NPDES permit." A second finding cited by petitioners which appears at Record 628 states that construction permits will not be issued until a NPDES permit is secured. Petitioners assume, without explaining why, that the "plans" referred to in the finding on Record 577 include tentative subdivision plans, and petitioners contend the city erred by considering the challenged tentative subdivision plan without first requiring that the applicant secure a NPDES permit. However, petitioners do not cite any SRC provision imposing a requirement that a NPDES permit be secured prior to accepting a tentative subdivision plan for review.

compliance with particular approval criteria, or (2) why the inconsistencies in the findings they identify are not resolved by the superseding findings appearing at Record 17-44, we do not consider petitioners' arguments under this assignment further.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners contend under their second assignment of error that the variances granted by the challenged decision improperly construe the applicable law and are not supported by substantial evidence. The decision grants two variances. The first is a variance from SRC 63.225(b) for a 325 foot portion of Drive 11.[7] With the variance, affected portion of Drive 11 may be constructed at a grade of 15%. The second grants a variance from both SRC 63.225(b) and the Salem Transportation Plan (STP) street standards applicable to basic collectors, to allow a 550 foot portion of Sunwood Drive to be constructed with a 15% grade, rather than the maximum grade of 8% that would otherwise be allowed.[8]

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[7]SRC 63.225(b) provides as follows:

> "Grade. All streets shall be designed with grades in accordance with the City of Salem Street Design Standards. No street grade shall exceed 12 percent without a variance."

[8]With regard to Basic Collector streets, the STP street standards include the following limitation:

> "10. Maximum Grade: 8 percent, may be modified due to terrain." STP Appendix 215.

SRC 63.332 sets out the standards that must be satisfied to grant variances under the SRC. Those standards are discussed separately below.

A. Unreasonable Hardship, Deprivation of a Valuable Natural Resource or Adverse Effect on the Public Health, Safety and Welfare

SRC 63.332(1) provides as follows:

> "There are special conditions inherent in the property (such as topography, location, configuration, physical difficulties in providing municipal services, relationship to existing or planned streets and highways, soil conditions, vegetation, etc.) which would make strict compliance with a requirement of SRC 63.115 to 63.295 an unreasonable hardship, deprive the property of a valuable natural resource, or have an adverse effect on the public health, safety and welfare[.]"

Petitioners' arguments under this subassignment of error fail to recognize that SRC 63.332(1) actually imposes three alternative standards. SRC 63.332(1) is met if special conditions make compliance with SRC requirements (1) "an unreasonable hardship," (2) "deprive the property of a valuable natural resource," or (3) "have an adverse effect on the public health, safety and welfare." Petitioners focus exclusively on the first of these three standards. Petitioners make essentially two arguments that the city has failed to demonstrate the existence of an unreasonable hardship. First, petitioners argue that if the city does not require that the internal streets be designed to accommodate the possibility of a future collector connection

through Deer Ridge, between Glen Creek Road to the north and Eola Drive to the south, the lots could be served by shorter cul-de-sacs that avoid the steeper terrain. Petitioners contend that if this steeper terrain is avoided, there is no need for extensive cut and fill or granting the disputed variances. Secondly, petitioners argue the variances are based solely on the applicants' desire to avoid the costs associated with redesigning the subdivision or cutting and filling to construct the internal roadways within the required grade limitations.

We might agree with petitioners that the reasons given in the findings for concluding that the variances are needed to avoid an "unreasonable hardship" are insufficient to demonstrate compliance with SRC 63.332(1).[9] However,

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[9]As petitioners correctly note, in Faye Wright Neighborhood Planning Council v. Salem, 3 Or LUBA 17, 21 (1981) (Faye Wright), we explained the "unreasonable hardship" portion of SRC 63.332(1) imposes an exacting standard:

> "The word 'hardship' has taken on special meaning in land use law. The term has been held to exclude a financial burden, unless the burden robs the developer of a return on his investment. See 3 Anderson, American Law of Zoning, section 185.1 (2nd Edition, 1977). * * * We are mindful that the city uses the term 'unreasonable hardship,' but we do not find 'unreasonable hardship' as used by the city to impose any less a standard than the term 'unnecessary hardship.' This latter term has been construed strictly in Oregon to exclude conditions that would simply favor a more profitable use. See Lovell v. Independence Planning Commission, 37 Or App 3, 586 P2d 99 (1978)."

We have reached similar conclusions concerning "hardship" variance standards in a number of other cases. See e.g. Thomas v. City of Rockaway Beach, ___ Or LUBA ___ (LUBA No. 92-199, February 17, 1993); Hawkins v. City of Portland, 22 Or LUBA 65, 69 (1991); Wentland v. City of Portland,

respondent's findings are detailed and they address more than the "unreasonable hardship" portion of SRC 63.332(1). The findings also explain that providing for a future collector connection between Glen Creek Road to the north and Eola Drive to the south is required for the proposed development to be compatible with the STP. The findings explain that due to existing development, it is not possible to avoid the steeper terrain on the property in constructing that connection. The findings further set out a variety of reasons why constructing the roadways necessary to allow that through connection within required grade limitations would result in undesirable consequences. Moreover, in addition to finding the variances are justified to avoid an "unnecessary hardship," the findings explain that unless these undesirable consequences are avoided by granting the variances, the property will be "deprived of a valuable natural resource" and there will be "an adverse effect on the public health, safety and welfare."[10]

Because petitioners do not specifically challenge the findings concerning the second and third alternative bases for complying with SRC 63.332(1), the first subassignment of error is denied.

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22 Or LUBA 15, 24 (1991); Corbett/Terwilliger Neigh. Assoc. v. City of Portland, 16 Or LUBA 49, 60 (1987).

[10]The pertinent findings appear at Record 21-23.

B. Proper Development and Preservation of Property Rights and Values

SRC 63.332(2) provides as follows:

> "The variance is necessary for the proper development of the subdivision and the preservation of property rights and values[.]"

The findings adopted by respondent addressing this criterion include findings that the variances will avoid the need for excessive cutting and filling, eliminate the need for steep driveways and avoid safety problems due to decreased visibility. The findings also explain that lots next to the cuts and fills that would otherwise be required would lose siting flexibility. According to the city's findings, the variances are needed to avoid these consequences and are therefore necessary for proper development of the subdivision and preservation of property rights and values.

Petitioners do not specifically challenge these findings or their evidentiary support. We conclude the findings are adequate. This subassignment of error is denied.

C. Reasonably Practical Alternatives

SRC 63.332(3) provides as follows:

> "There are no reasonably practical means whereby the considerations found under [SRC 63.332] (1) or (2) above can be satisfied without the granting of the variance[.]"

Petitioners' arguments under this subassignment of error are predicated on their assumption that respondent need only allow the subdivision to be developed without requiring that the internal roadways be designed so as to accommodate a through collector connection between Glen Creek Road and Eola Drive at some future date. Respondent found that such a connection is necessary for compliance with the STP. As noted above, petitioners do not challenge that finding. Therefore, respondents' point that there are a variety of lot and internal roadway layouts that would avoid both excessive cut and fill and the need for the disputed variances does not provide a basis for concluding SRC 63.332(3) is violated. The findings are adequate to explain why "[t]here are no reasonably practical means whereby the considerations found under [SRC 63.332] (1) or (2) above can be satisfied without the granting of the variance."

D. Adverse Effect on the Public Health, Safety, and Welfare

SRC 63.332(4) provides as follows:

> "It is unlikely that the variance will have adverse effects on the public health, safety, and welfare, or on the comfort and convenience of owners and occupants of land within and surrounding the proposed subdivision or partition[.]" (Emphasis added.)

The findings explain that deeper cuts and fills would make driveways less safe, installation of utilities more expensive and maintenance of those utilities more expensive

and less convenient. The findings also address petitioners' main concern that the steeper grades will be dangerous in inclement weather.

> "While steep grades do have an impact on public safety and welfare as vehicles negotiate these grades in adverse weather, the difference between the impact of negotiating a 12% grade (the standard under the code) and the 15% grade (that allowed by the variance) is minimal and has almost no apparent distinctions [sic]. Both grades carry similar risks. The benefits accruing to the property and adjoining properties from allowing the variance results in an overall higher positive impact than imposition of the standard grade required by the code. * * *" Record 25.

In Faye Wright, supra, 3 Or LUBA at 17, the majority interpreted SRC 63.332(4) as imposing a very strict standard that "no adverse effect on the comfort and convenience of surrounding land owners be likely from the variance." (Emphasis in original.) The city does not offer a different interpretation of SRC 63.332(4) in the decision challenged in this appeal. We therefore have no less strict interpretation to which we must defer. See Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992); Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 843 P2d 992 (1992); West v. Clackamas County, 116 Or App 89, 840 P2d 1354 (1992); Cope v. City of Cannon Beach, 115 Or App 11, 836 P2d 775 (1992), rev allowed 315 Or 643 (1993).

However, even as we construed SRC 63.332(4) in Faye Wright, the standard is not violated where all adverse

effects are "unlikely." The challenged decision is adequate to explain why any adverse effects are unlikely.

This subassignment of error is denied.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Under this assignment of error, petitioners allege respondent erred by approving the disputed subdivision, despite the lack of sufficient public facilities to serve the residents of the subdivision. Petitioners contend the schools and road system that serve the disputed subdivision are inadequate.

A. Adequacy of Schools

Respondent adopted the following finding:

> "The [SRC] does not define public facilities to include schools, thus the schools are exempt from the requirements imposed under the subdivision code for public facilities." Record 42.

Petitioners argue "it is impossible to comprehend how respondent can conclude that a school is not a public facility." Petition for Review 34. Petitioners advance a number of reasons why they believe respondent's finding misconstrues the SRC.[11]

We are aware of no generally applicable legal requirement that approval of subdivisions must include a

[11]Respondent also adopted alternative findings, based on evidence supplied by the school district, that the elementary, middle and high schools serving Deer Ridge will be adequate. Petitioners challenge the evidentiary support for these findings in their fourth assignment of error.

determination that the schools serving the subdivision are adequate or can be made adequate. This Board has construed Statewide Planning Goal 11 (Public Facilities and Services) as requiring that local government comprehensive planning include schools in the "'public facilities and services' that Goal 11 requires be included in a land use plan." Home Builders v. Portland, 4 Or LUBA 245, 249 (1981); see Neuharth v. City of Salem, ___ Or LUBA ___ (LUBA No. 92-211, May 5, 1993), slip op 8-9; Holmstrom v. Marion County, 3 Or LUBA 309, 313-14 (1981). However, respondent's comprehensive plan and land use regulations are acknowledged and, for that reason, respondent's acknowledged comprehensive plan and land use regulations establish the applicable approval standards. The statewide planning goals do not apply directly to the challenged decision.[12] Byrd v. Stringer, 295 Or 311, 666 P2d 1332 (1982). Therefore, 39 Op Atty Gen 734 (1979), cited by petitioners in support of their argument that respondent is required to establish that schools are adequate, has no bearing on this appeal because that opinion is based on the requirements of Goal 11, not the requirements of an acknowledged comprehensive plan and land use regulations.

[12]Petitioners do not identify any new or amended goals, Land Conservation and Development Commission rules or land use statutes that might apply directly and impose a requirement that adequacy of schools be addressed in the challenged decision. See ORS 197.646.

Similarly, petitioners' reliance on Axon v. City of Lake Oswego, 20 Or LUBA 108 (1990), and Dickas v. City of Beaverton, 16 Or LUBA 574, aff'd 92 Or App 168 (1988), as imposing a requirement that school adequacy be addressed in the challenged decision, is misplaced. In both of those cases, the requirement that the challenged decision establish that schools are adequate was based on specific language in the acknowledged comprehensive plan and land use regulations imposing the requirement. Axon v. City of Lake Oswego, supra, 20 Or LUBA at 113-14; Dickas v. City of Beaverton, supra, 16 Or LUBA at 582 n1. Respondent's comprehensive plan and land use regulations contain no such specific language.

SRC 63.046(c)(3) requires that the disputed tentative subdivision plan must comply "with all applicable provisions of * * * the Salem Area Comprehensive Plan [SACP]." Petitioners identify a number of plan provisions they interpret as requiring that respondent demonstrate the adequacy of schools to serve the proposed subdivision.

1. SACP Map Designations

Petitioners cite portions of the "Definitions and Intent Statements" section of the SACP which provide descriptions of plan map designations. Those provisions generally express a purpose of encouraging residential development where appropriate levels of public services and facilities exist.

The cited plan provisions refer to public services and facilities and make no reference to schools. Therefore, those provisions themselves provide no basis for questioning the above quoted finding that public facilities, as that term is used in the SRC, does not include schools. Moreover, we agree with respondents that while the cited plan provisions may provide guidance in applying or amending map designations, they have no bearing on the tentative subdivision plan approval decision challenged in this appeal.

2. SACP General Development Policy 5

SACP General Development Policy 5 concerns cooperative growth management and provides as follows:

> "Growth in the Salem Area shall be managed through cooperative efforts of the City of Salem, Marion and Polk Counties, and shall be in accordance with plans for the timing, phasing and financing of public facilities and services." SACP 32.

Petitioners contend the challenged decision violates the above policy because there is no plan for accommodating the school children who will live in the disputed subdivision.

Respondents contend the cited policy simply calls for city/county cooperation in the management of growth in accordance with public facility plans. It does not mention schools, it does not mention the school district, and it does not assist petitioners in their contention that public facilities include schools. We agree with respondents.

3. SACP Residential Development and School Location and Development Goals and Policies

The Residential Development and School Location and Development Goals and Policies cited by petitioners provide no support for their argument that public facilities include schools.[13]

4. SACP Growth Management Goal and Policies

The SACP Growth Management Goal and Policies generally call for orderly and economic extension of public facilities. Despite petitioners' suggestion to the contrary, the goal and policies do not establish that public facilities include schools or that respondent is required to

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[13]SACP Residential Development Policy 1 provides as follows:

> "In establishing intensity of residential uses, the following shall be considered:
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> "a. The capacity of land resources, public facilities and services.
>
> "b. The public and private costs of providing necessary urban facilities and services.
>
> "c. The character of existing neighborhoods.
>
> "d. The need to accommodate increasing population within the Salem urban growth boundary."

Petitioners do not cite any of the SACP School Location and Development Policies, but concede that they are directed at the siting of new schools. Petitioners suggest they may be relevant to consideration of new subdivisions, but do not explain how they are relevant. We will not speculate as to how they might be relevant. Deschutes Development v. Deschutes County, 5 Or LUBA 218 (1982).

find that adequate school facilities exist to serve the proposed subdivision.[14]

As respondents point out, SACP Growth Management Policy 3 directs that the city's growth management program include certain facilities and services, but that policy does not specifically mention schools. Neither are schools mentioned in the city's Growth Management Plan definition of "public facility." SRC 66.020(j). Respondent contends that it acted well within its interpretive discretion in concluding that "public facilities and services," as those concepts are used in the SRC, do not include school facilities or services. See Clark v. Jackson County, supra; Goose Hollow Foothills League v. City of Portland, supra; West v. Clackamas County, supra; Cope v. Cannon Beach, supra. We agree with respondent.

We reject petitioners' contention that respondent erred in concluding that it need not include a determination concerning the adequacy of schools serving Deer Ridge in its findings concerning public facilities. None of the plan provisions cited by petitioners impose such an obligation.

This subassignment of error is denied.

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[14]SACP Growth Management Policy 7 requires that "[n]ew development shall * * * be located and designed to minimize such public costs as extension of sewer and water services, schools, parks, and transportation facilities." Petitioners do not argue this policy is violated, except to the extent it imposes a requirement for findings that the schools serving the disputed subdivision are adequate. SACP Growth Management Policy 7 is a public facility cost minimization standard, it does not require a finding that schools are adequate.

B. Traffic Impacts

Petitioners contend the challenged subdivision will have adverse off-site traffic impacts. Petitioners contend respondent erroneously found that it could not impose a condition requiring construction off-site roadway improvements.

SACP General Development Policy 15 provides as follows:

> "Improvements of streets in addition to those in or abutting a development may be required as a condition of approval of subdivisions and other intensifications of land use." (Emphasis added.)

SACP Growth Management Policy 11 provides as follows:

> "New development creates a demand for new facilities and services, and because of widespread public reluctance to accept continual increases in the cost of local government, an increased share of the costs of new growth should be borne by new growth itself." (Emphasis added.)

Petitioners do not identify where in the findings respondent determined it could not condition approval on providing off-site roadway improvements. Petitioners recognize that the findings also explain that, although respondent has authority to require off-site improvements, respondent does not believe requiring such off-site improvements is warranted. Record 35. Petitioners complain the findings regarding authority to require off-site improvements are contradictory.

As noted earlier under the first assignment of error, the findings appearing at Record 17 through 44 control in the case of inconsistent findings. The findings at Record

35 provide reasons why respondent does not believe requiring off-site improvements is warranted. The findings interpret the quoted SACP Policies as being permissive rather than mandatory. That interpretation is consistent with the words of the policies.

The findings also explain that traffic impacts from the subdivision will not occur immediately, but rather as development occurs over time, in phases, and that much of the traffic will not utilize the Glen Creek Road and Wallace Road intersection. The findings go on to explain that problems associated with the Glen Creek Road and Wallace Road intersection are a regional problem that the city intends to address through its capital improvement program.

Petitioners do not explain why the above described findings are inadequate to address traffic impact concerns. We therefore reject petitioners' arguments that respondent erroneously construed SACP General Development Policy 15 and SACP Growth Management Policy 11.

This subassignment of error is denied.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue several different aspects of the challenged decision are not supported by adequate findings or substantial evidence.[15]

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[15]The challenged decision is a limited land use decision. ORS 197.015(12)(a). ORS 197.828(2) provides as follows:

A. School Capacity

We have already determined that under applicable standards in the SACP and SRC, respondent was not required to find adequate school facilities are available to serve the disputed subdivision. However, respondent nevertheless adopted alternative findings that the disputed subdivision will be provided adequate school facilities. Petitioners do not challenge the adequacy of those findings, but do challenge their evidentiary support.

The school district facilities coordinator submitted a letter in which he stated as follows:

> "I am the Facilities Coordinator for School District 24-J. As part of my duties, I review the needs of the school system and the ability of the school system to provide adequate educational facilities * * *. I reviewed the proposed subdivision for Deer Ridge Estates and the other subdivisions approved in the West Salem area. We believe that adequate school capacity exists for the proposed Deer Ridge Estates subdivision.
>
> "School District 24-J passed a 96 million dollar bond issue in March of 1992. We are currently designing projects that will meet our anticipated growth for the next five years at the elementary and middle schools. These projects include the addition of six classrooms at the Meyers

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"[LUBA] shall reverse or remand a limited land use decision if:

"(a) The decision is not supported by substantial evidence in the record. The existence of evidence in the record supporting a different decision shall not be grounds for reversal or remand if there is evidence in the record to support the final decision;

"* * * * *"

> Elementary School which will serve the Deer Ridge Estates Subdivision. These new classrooms will be available for use in September of 1994. The plan also includes an addition to the Walker Middle School which will increase the capacity by 400 students. The plan calls for moving eight 6th grade classes to Walker Middle School, which is now 7th and 8th grades, to provide an increase of fourteen classrooms at the elementary level in the west Salem planning zone. Growth at the high school level is being accommodated by providing portable classrooms plus additions. We believe that this combination of activities will accommodate anticipated growth * * *.
>
> "In addition to the increased capacity provided by construction, the District has other feasible options available to deal with growth and imbalances at individual facilities. These include, adding of temporary classrooms, boundary changes, rental of space, and modification to schedules. * * *
>
> "* * * * *
>
> "The scheduled development of the proposed subdivision and the scheduled increase in District capacity indicate that space will be available for the anticipated students.
>
> "* * * * *" Record 92-93.

The above is evidence upon which a reasonable person would rely to conclude that Deer Ridge will be provided adequate school facilities. See Douglas v. Multnomah County, 18 Or LUBA 607, 617 (1990)(and cases cited therein).

This subassignment of error is denied.

B. Street Capacity

Petitioners challenge respondent's findings that the streets serving the proposed subdivision have adequate capacity. Petitioners contend the challenged subdivision

will put the intersection of Wallace Road and Glen Creek Road "into total gridlock." Petition for Review 47.

The record contains conflicting information concerning the adequacy of the Wallace Road and Glen Creek Road intersection. The challenged decision relies in large part on the representation by the applicants' traffic engineering firm that intersections along Glen Creek Road operate at acceptable levels of service. The findings explain, and the evidentiary record supports, that the intersection of Wallace Road and Glen Creek Road is a regional problem, but that efforts are underway that will address intersection capacity problems. We conclude the evidence cited by respondents is evidence upon which a reasonable person would rely in concluding that the streets serving the proposed subdivision will have adequate capacity.

This subassignment of error is denied.

C. Complete Application

Petitioners contend the evidentiary record in this matter does not include the complete application for subdivision tentative plan approval. However, petitioners do not develop an argument that failure to include a complete application in the record provides a basis for reversal or remand.

This subassignment of error is denied.

D. Property Ownership

The challenged decision includes a finding that the entire property is owned by intervenor-respondent Lawrence T. Epping. Petitioners contend this finding is necessary to comply with a mandatory approval standard and that the finding is not supported by substantial evidence in the record.

Petitioners do not identify the mandatory approval criterion. However, respondents point out that intervenor Epping testified that he is "the managing partner of Granada Land Company, the owner of the subject parcel and applicant for subdivision approval." Record 430. Respondents contend this uncontroverted testimony is substantial evidence that intervenor Epping owns the subject property. We agree. See Wentland v. City of Portland, supra, 22 Or LUBA at 21 (uncontroverted testimony by applicant regarding existence of agreements constitutes substantial evidence).

This subassignment of error is denied.

E. Zoning Designation

The decision states at Record 44 that portions of the property are zoned Single Family Residential (RS) and portions are zoned Residential Agriculture (RA). Without explaining why, petitioners contend the zoning of the property is critical and argue there is no evidence to support the finding that any of the property is zoned RS. Petitioners argue the entire property is zoned RA.

Both the RA and RS zones permit single-family dwellings. SRC 145.020(a); 146.020(a). Both zones impose the same minimum lot area requirements. SRC 145.070(a); 146.070(a). SRC 113.160 provides as follows:

> "Any land which is within an RA District and which is [the] subject of a subdivision plat approved and recorded with the county clerk * * * shall be classified automatically as an RS District on the date of such recording."

In view of the above, we cannot determine why it is important whether the subject property is zoned RA or RS. Because petitioners offer no explanation for why it is important, any lack of evidence that the property is zoned both RS and RA provides no basis for reversal or remand.

This subassignment of error is denied.

F. Density Compatibility

SACP Residential Development Policy 1, quoted supra at n 13, lists four considerations to be applied when "establishing intensities of residential uses." Petitioners contend the evidentiary record does not include substantial evidence that the challenged subdivision is "compatible with the density of surrounding properties." Petitioners contend the proposed subdivision's density is 4.75 dwelling units per acre and, therefore, the subdivision is denser than the surrounding neighborhoods "that are only 3.5 lots per acre, with the average lot size well over 12,000 sq. ft." Petition for Review 48.

However, compatibility with the density of surrounding properties is not a criterion applicable to subdivision tentative plan approval.[16] The challenged decision addresses the SACP Residential Development Policy 1 considerations and other plan requirements, including a policy that would require even higher density, and concludes that the proposed density is justified. Petitioner does not challenge the adequacy of these findings or their evidentiary support.

This subassignment of error is denied.

G. Capital Improvement Plan (CIP) Linkage

Petitioners contend that, contrary to the city's findings at Record 31 and 35, concerning the CIP, the Wallace Road and Glen Creek Road intersection improvements are neither planned nor funded.

Respondents answer that the record includes evidence that the Wallace Road and Glen Creek Road intersection is on the capital improvements project list. Record 66. Respondents contend the city council has authority to move particular improvements, such as the Wallace Road and Glen Creek Road intersection, up on the priority list. The findings explain the city intends to assign that intersection a higher priority.

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[16]The third of the listed considerations in SACP Residential Development Policy 1 is "[t]he character of the existing neighborhoods."

Without more of an argument from petitioners, we discern no inadequacy in the findings or their evidentiary support.

This subassignment of error is denied.

H. Wetlands

Petitioners contend there is conflicting evidence concerning the presence of wetlands on the subject property. Petitioners contend the evidence appearing at Record 326, 369 and 523 is more credible than the evidence relied upon by respondent. Record 418-27.

The choice between conflicting believable evidence is for respondent, not this Board. Younger v. City of Portland, 16 Or LUBA 828, 843 (1988). The evidence relied upon by respondent is believable.

This subassignment of error is denied.

The fourth assignment of error is denied.

The city's decision is affirmed.