BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRIENDS OF NEABEACK HILL and JOHN P. BOLTE, Petitioners, vs. CITY OF PHILOMATH, Respondent, and SCHNEIDER HOMES, INC., Intervenor-Respondent.	LUBA No. 95-027 FINAL OPINION AND ORDER

Appeal from City of Philomath.

Douglas M. DuPriest, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Hutchinson, Anderson, Cox & Coons.

Scott A. Fewel, Philomath City Attorney, Corvallis, and George B. Heilig, Corvallis, filed the response brief on behalf of respondent and intervenor-respondent. With them on the brief was Eickelberg & Fewel, and Cable, Huston, Benedict & Haagensen. Scott Fewel argued on behalf of respondent. George Heilig argued on behalf of intervenor-respondent.

GUSTAFSON, Referee; LIVINGSTON, Chief Referee; HANNA, Referee, participated in the decision.

REMANDED 10/02/95

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

Opinion by Gustafson.

NATURE OF THE DECISION

Petitioners appeal a decision of the Philomath city council approving a planned unit development (PUD) subdivision.

MOTION TO INTERVENE

Schneider Homes, Inc. (intervenor) moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

FACTS

Intervenor applied to the City of Philomath (the city) for limited land use approval of a 100-lot planned unit development (PUD) subdivision on a 37.2-acre parcel in an area known as "Neabeack Hill." Thirty-four acres of the proposed development are not yet within the city limits. Rather, they are subject to a delayed annexation agreement between the property owner and the city under an urban fringe management agreement (UFMA) between the city and Benton County (the county). The UFMA establishes that properties outside the city limits, but within the city's urban fringe, are subject to city zoning upon execution of a delayed annexation agreement.

City zoning for the parcel is low density residential (R-1), which allows 7,000 square foot minimum lot size. County zoning is Urban Residential-5 (UR-5), which requires 5-acre minimum lot size.

Significant portions of the subject parcel are heavily wooded. The site is listed in the city's Goal 5 resource inventory as "2A," which states "[i]f no conflicting uses are identified, the resource must be managed so as to preserve its original character." The city classified the site 2A based on the following analysis:

> "This area is covered in primarily oak forest, and is visible from most of Philomath. It is one of the few oak covered hillsides visible from Philomath. The current Comprehensive Plan Designation is Low Density Residential, the County zoning is Urban Residential - 5 acre minimum; City zoning upon annexation will be Low Density Residential (R-1). Due to the low density plan and zone designations, the site can be developed in a way that will preserve the existing vegetation. Based on this information, the site is designated '2-A'.
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> "Proposed Plan Policy: The natural vegetation located on Neabeack Hill shall be preserved to the maximum extent possible by limiting clearing for housing roads, and utilities." Record 49-50.

The proposed plan policy was adopted as Philomath Comprehensive Plan (PCP) Resources and Hazards Policy 6 (Policy 6), which states:

> "The natural vegetation located on Neabeack Hill shall be preserved to the maximum extent possible by limiting clearing to that which is necessary for housing, roads, and utilities."

The 7,000 square foot minimum lot size allowed in the city's R-1 zone would permit a nominal density within the subdivision of 6.24 lots per acre. The net density of the proposed 100-lot PUD subdivision is 2.7 lots per acre. The

proposal is designed to concentrate development in the western, unwooded portion of the site. Twelve lots along the western border are less than the minimum 7,000 square feet, ten of those being 6,800 square feet, and two being 5,760 and 6,540 square feet, respectively. Lots in the center and eastern, more heavily wooded portions of the site average 11,800 square feet. The PUD also incorporates 2.93 acres of open space, and a bike path connecting the site to an existing community bike path.

After public hearings, the planning commission approved the application.[1] Petitioners appealed to the city council. After additional public hearings, the city council denied the appeal and adopted the staff report findings, subject to conditions. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners challenge the city's premise that the city's low density residential (R-1) designation applies to the entire site. Petitioners argue that the county's urban residential (UR-5) zone applies to the 34 acres of the site outside the city limits.[2]

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[1]Under Philomath Subdivision Ordinance (PSO) 2.110, the public hearing process for a limited land use decision is identical to the public hearing process for a land use decision.

[2]Petitioners further object that references in the decision to the UFMA and the consent to annexation, authorized in the UFMA, are not relevant and cannot be considered in this case because those documents were not part of the record below. Petitioners' objections are without merit. The UFMA is

The city and intervenor (respondents) answer that petitioners did not raise any issue before the city with regard to the applicability of the UFMA and the consent to annexation as the means to establish the appropriate zoning. Respondents argue that petitioners cannot raise an issue regarding the applicable zoning for the first time through this appeal. Respondents further argue that, even if petitioners did raise an issue regarding the applicability of the UFMA or the annexation agreement, the city was within its authority to rely upon the UFMA, and the procedures established in it, to determine that city zoning applies in this case.

ORS 197.835(1) requires that, in order to raise an issue on appeal, the issue must be raised during the local proceedings as provided in ORS 197.763.[3] ORS 197.763(1) requires that "an issue which may be the basis for an appeal to the board * * * shall be raised with sufficient specificity as to afford the governing body * * * and the parties an adequate opportunity to respond to each issue."[4]

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an official enactment of the city, of which we take notice. See Jackman v. City of Tillamook, 27 Or LUBA 704 (1994).

[3]The subject application is for limited land use approval, over which ORS 197.763 ordinarily does not apply. However, because the city treats limited land use decisions in the same manner as land use decisions, with identical procedural requirements, we apply the statutory and case law applicable to land use decisions to our review of this application.

[4]ORS 197.763(1) was amended during the 1995 legislative session. The city's review of this application, however, is subject to the unamended version of the statute, since it was the law in effect when the notice was given.

Petitioners cite to several points in the record where they claim the issue of the applicability of the UFMA was raised. The most direct reference to which petitioners point is a letter from a citizen who expressed his concern that development of the parcel would require changing the zone from the county's UR-5 zone to "some other designation." Record 229. That letter contains no reference to the UFMA, nor does it express any concern regarding the manner in which the city could determine the applicable zoning. The other references to which petitioners point are more obscure, and generally express concern regarding the density of the proposed development.

The record includes numerous references to the UFMA, and the consent to annexation executed pursuant to the UFMA, as the means through which city zoning applies to the site's 34 acres outside the city limits. Petitioners' references to the appropriate zoning during the local hearings were not sufficiently specific to allow the decision maker to determine that anyone was questioning the validity or applicability of the UFMA or the consent to annexation procedure. General references to the density or even the potential need to rezone portions of the site are not specific enough to put the governing body on notice that petitioners object to either the applicability or the validity of the UFMA, and its procedures, as applied in this

case.[5] See Craven v. Jackson County, ___ Or LUBA ___ (LUBA No. 94-244, March 27, 1995), slip op 10; ODOT v. Clackamas County, 23 Or LUBA 370, 375 (1992).

Moreover, the city correctly determined in its findings that city zoning applies to the proposed development. The UFMA clearly establishes that city zoning applies to this proposed development, pursuant to a consent to annexation executed between the land owner and the city. The city's process is authorized by and in accordance with ORS 92.042(1), which provides that cities and counties may adopt procedures for regulating land outside city limits and within urban growth boundaries. Petitioners do not argue, nor is there any evidence, that the city violated the procedures established in the UFMA with respect to this proposed development. Nor is there any indication that the city's delayed annexation agreement, which is provided for in the UFMA, and permitted under ORS 222.115, was defective or otherwise inapplicable as applied to the proposed development.

The first assignment of error is denied.

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[5]Petitioners also argue they may raise new issues on appeal under ORS 197.830(10)(a) and ORS 197.835(2) because the city did not satisfy the notice requirements of ORS 197.763 in that the city failed to identify the county UR-5 zoning as an approval criteria in its public notice or decision. ORS 197.763 does not require that the public notice and decision must list criteria that the city does not consider applicable, that no party raises as applicable criteria during the course of the local proceedings, and upon which the city does not rely in its decision. ORS 197.763(3)(b); see BCT Partnership v. City of Portland, 27 Or LUBA 278, 289 (1994).

SECOND AND THIRD ASSIGNMENTS OF ERROR

Petitioners contend that the city's decision misconstrues and violates the applicable law and that the findings are inadequate and not supported by substantial evidence, because the decision does not preserve the natural vegetation on one of the city's few designated Goal 5 resource sites and does not comply with relevant comprehensive plan policies.

A. Goal 5, 2A Designation

As petitioners note, the city's Goal 5, 2A designation is a means of preserving the site's natural resources and character. According to petitioners, developing the site for 100 residential lots is inconsistent with that designation. As petitioners' state, "[t]he remaining tree canopy would not be the oak forest it is now, which the plan states is to be preserved." Petition for Review 19.

However, the language of the city's Goal 5 periodic review order, which establishes the 2A designation, recognizes not only the site's resource values, but also its residential zoning. The site is designated for residential development with a minimum lot size of 7,000 square feet. The city's Goal 5 inventory reflects that the city designated the site 2A because adequate preservation could be achieved with development at the density allowed by the R-1 zone. The proposed development does not change the zone and, in fact, proposes an average lot size significantly

larger than allowed in the R-1 zone.

Petitioners' argument that the proposed development violates the 2A designation is, in effect, a challenge to the city's decision to zone the site for residential development, rather than open space. That decision is not subject to review during this process, and petitioners cannot collaterally attack that decision by arguing that residential development is inconsistent with the 2A designation. Sahagian v. Columbia County, 27 Or LUBA 341, 344 (1994). Nor must the city address Goal 5 compliance through this PUD approval proceeding. City of Barlow v. Clackamas County, 26 Or LUBA 375, 379 (1994).

B. PCP Resources and Hazards Policy 6

Petitioners contend the city's findings of compliance with Policy 6 are inadequate and not supported by substantial evidence.

Petitioners argue that the record contains substantial evidence that the property could be developed in a manner which would preserve a significantly greater percentage of the existing natural vegetation, by reducing the density. The essence of petitioners' argument is that a significantly lower density is necessary in order to comply with Policy 6.

Petitioners misconstrue the requirements of Policy 6. As with the 2A designation, Policy 6 recognizes the site's R-1 residential zoning. It does not require that the city reduce the permitted density to preserve more natural

vegetation than necessary for development consistent with the R-1 zone. So long as the proposed development provides for an average lot size of no less than 7,000 square feet, Policy 6 requires only that disturbances of natural vegetation be limited to that which is necessary for housing, roads, and utilities.

The city determined that the proposed development satisfies Policy 6, based on findings that the orientation of the roads and utilities horizontal to the site's moderate slope will minimize the necessary disturbance on the site's natural vegetation. It also determined that the configuration of the lots, with smaller lots concentrated in the unwooded portion of the site, and larger lots in the wooded areas, would allow maximum preservation of the existing oak forest. It further recognized that the average lot size is close to 12,000 square feet, significantly larger than the 7,000 square foot average permitted in the R-1 zone. The city conditioned approval upon submission of a vegetation management plan (Condition 24), which specifically requires that clearing be limited to that which is necessary for housing, roads and utilities.[6] Additional

[6]Condition 24 states:

> "Vegetation management plan. Natural vegetation shall be preserved to the greatest extent possible by limiting clearing to that which is necessary for housing, roads, and utilities. A vegetation management plan, prepared by a certified arborist, shall be submitted to the City and approved by the Planning Official prior to approval of the final plat. The plan shall

conditions require special measures for protection of trees during construction of dwellings and establishment of covenants, conditions and restrictions (CC&R's) that require maintenance of vegetation in the designated open spaces and residential areas.

Policy 6 does not, by its terms, limit the amount of clearing necessary for housing, roads and utilities. Nonetheless, the city's application of Policy 6 to this subdivision does reflect an interpretation that Policy 6 also requires a demonstration that the proposed development is designed in a manner that will preserve the site's natural vegetation and thereby limit the amount of clearing necessary for housing, roads and utilities. The city's interpretation actually ensures more preservation than the express language of the policy requires.

Petitioners do not contest the evidence upon which the city's findings are based. Rather, their substantial evidence argument is based upon either their disagreement with the density allowed by the R-1 zone, or upon an

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> identify significant natural vegetation, outside of but adjacent to rights-of-way, that is to be preserved during construction of roads and utilities and specify the methods that will be used to protect significant vegetation. Significant vegetation that is within the areas designed to contain roads, utilities and other improvements may be removed.
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> "Significant vegetation means all vegetation (trees) of 12 inches in diameter, or greater, that substantially contributes to the overall canopy of the site. This condition does require an inventory and map of all significant vegetation on the site."

interpretation that Policy 6 imposes additional restrictions on the density allowed in the R-1 zone.

Petitioners have not established that the city's interpretation of Policy 6 is clearly wrong. We affirm the city's interpretation. Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992); ORS 197.829.

C. PCP Resources and Hazards Policies 8 & 9

Petitioners allege the intensity of the proposed development is inconsistent with the PCP Resources and Hazards Policies 8 and 9 (Policies 8 and 9), which petitioners contend were "adopted to protect scenic views from the Mt. Union Cemetery." Petition for Review 20. According to petitioners, Neabeack Hill is one of the "important scenic views" these policies were intended to protect.

PCP Policy 8 states:

> "Access to scenic views from the Mount Union Cemetery shall be protected from encroachments."

PCP Policy 9 states:

> "Philomath encourages Benton County to protect the Mount Union Cemetery from relocation and development that would encroach on the scenic views from the cemetery."

Neither of these policies precludes the city from approving residential development of the subject parcel in accordance with its designation and zone. Policy 8 protects the cemetery from access encroachments in order to preserve access to the scenic views. The proposed development will

not in any way encroach on the access to the cemetery. Policy 9 is addressed to the county. Since the proposed development is not subject to Benton County jurisdiction, Policy 9 does not apply.

The second assignment of error is denied.[7]

THIRD, FOURTH, AND FIFTH ASSIGNMENTS OF ERROR

Petitioners contend the city has not shown that the proposed subdivision complies with several of the PUD requirements.

The purpose of the PUD provisions is stated in PZO 16.010, as follows:

> "The Planned Unit Development Overlay District is intended to promote efficient land use by allowing flexibility in site design and the location of buildings. It is also intended to allow land development to adapt to the geographical features and vegetation of a particular piece of land."

As applied to the proposed subdivision, the PUD process allows larger lot sizes in the heavily wooded areas of the site in exchange for smaller lot sizes in the unwooded portions.

A. PZO 16.040(a)

Petitioners contend the city violated PZO 16.040(a) by allowing intervenors to provide a vegetation plan as a condition of approval, rather than as part of the

[7]Under this assignment of error, petitioners also argue the city's findings violate PZO 16.040(a). We address this contention in our discussion of the third through fifth assignments of error.

application.

Under the city's PUD process, an applicant must first submit a general "preliminary plan" to the planning commission for administrative review. Upon administrative approval, PZO 16.040(a) requires that the applicant submit a "general development plan" prepared by a professional design team. While petitioners argue the city's findings violate PZO 16.040(a), it appears their objection is to the city's compliance with PZO 16.040(b)(16), one of the 23 elements of the general development plan.

PZO 16.040(b)(16) requires submission of "[a] preliminary tree planting and landscaping plan. Existing vegetation shall be shown." Petitioners contend the narrative, aerial photographs and diagrams provided by intervenor to comply with this general application requirement "do not enable one to identify which trees will be removed, which trees will remain and what new trees are proposed to be planted, except in the most gross and large scale manner." Petition for Review 19. Petitioners argue the vegetation plan required through Condition 24 should have been required to satisfy PZO 16.050(b)(16), but that even that vegetation plan would be insufficient to satisfy PZO 16.050(b)(16) because the density of the proposed development is too high to adequately protect the existing vegetation.

Petitioners have not established PZO 16.040(b)(16)

requires the level of detail they would like to see in the preliminary tree planting and landscaping plan, or any protection of existing vegetation. The plan required by PZO 16.050(16) is, by definition, a "preliminary" plan.

Moreover, Condition 24 ensures compliance with Policy 6, not PZO 16.050(b)(16). Petitioners' contention that Condition 24 is insufficient because the allowed density does not adequately protect existing vegetation is irrelevant to compliance with either PZO 16.050(b)(16) or Policy 6.

B. PZO 16.050(a)(4)

Petitioners contend the city's decision does not establish a suitable means to preserve and maintain open space as required by PZO 16.050(a)(4). Petitioners argue the conditions imposed pursuant to this requirement are "too little, too late" because, due to the roads and building sites occupying so much of the land, too few trees and too little open space will be protected.

PZO 16.050(a)(4) requires:

> "The system of ownership and the means of developing, preserving and maintaining open spaces is suitable to the proposed development, to the neighborhood and to the City as a whole."

The city determined that retaining the open space in private ownership through a homeowners' association and use of CC&Rs to regulate tree removal and maintenance of open space within the development was a "suitable" system of

ownership, and means of developing, preserving and maintaining open spaces. The establishment of a homeowners' association, and the adoption of CC&R's were made a condition of approval.

Petitioners have misconstrued this criterion. Petitioners' view that these findings and conditions are not "suitable" is based not on the systems or means by which the preservation is to be achieved, but rather on petitioners' belief that the density of the development is too great to preserve a "suitable" amount of vegetation. Petitioners have not established the city's findings are inadequate or lack substantial evidence to demonstrate suitability as required by PZO 16.050(a)(4).

C. PZO 16.050(a)(5)

PZO 16.050(a)(5) states, in full:

> "The approval will have a beneficial effect on the area which could not otherwise be achieved."

The city determined the proposed development will have a beneficial effect because it will reserve 2.9 acres as open space; will provide a bike way that connects the south side of Neabeack Hill with an existing community bicycle path system; and will provide additional housing choices for the community. Petitioners contend these benefits are not ones which could not otherwise be achieved.

Petitioners contend Goal 5 requires that this area be left in open space, so the 2.9 acres of open space provided by the development is not a benefit "which could not

otherwise be achieved." Petitioners do not, however, cite to any authority to support their claim. The property's 2A status does not mandate any specific amount of open space. If this property were developed as a traditional subdivision, the open space provided through this PUD could not be required. In addition, the development would not be afforded the flexibility to incorporate smaller lots in the site's unwooded sections, in exchange for larger lots, and greater tree preservation, in the more heavily wooded areas. Thus, not only would concentrated open space be lost, but preservation of the site's natural vegetation would be compromised to a much greater degree than with the proposed development.

Petitioners next contend the bike path is inadequate because it will be located on a steep slope and not easily accessible, and that under Philomath Subdivision Ordinance (PSO) 5.120(3)(c), the city could require the bike path even without the PUD.

The city did not respond to this contention and PSO 5.120(3)(c) does not, on its face, clearly establish whether the city could require the configuration and connection to the community system as required in the proposed PUD. However, even if the bike path could be required without the PUD, the city cites other bases of compliance with this criterion. Therefore, the finding regarding the bike path is not critical to the decision. See Bonner v. City of

Portland, 11 Or LUBA 40, 52 (1984).

Finally, petitioners contend additional housing would be provide in any housing development, including those which do not seek exceptions to normal development standards. Petitioners are correct that any subdivision would provided additional housing. However, the city found that the proposed subdivision would provide greater choice in housing within the community because of the variety of lot sizes afforded through the PUD. PZO 16.050(a)(4) is a general criterion that does not specify a quantity or quality of the required beneficial effect. The city made findings, based upon evidence in the record, that the proposed PUD will provide benefits which would not otherwise be achieved on this property through a traditional subdivision. Notwithstanding petitioners' desire for additional or different benefits from the proposed development, the city determined PZO 16.050(a)(4) does not require more. We affirm the city's interpretation of its ordinance. Clark v. Jackson County, 313 Or at 518; ORS 197.829.

D. PZO 16.050(a)(2)

PZO 16.050(a)(2) requires that:

> "Exceptions from the standards of the underlying zone are warranted by the design and amenities incorporated in the development plan and program."

The proposed development includes exceptions to the 7,000 square foot minimum lot size for 12 lots: 6,800-square foot lots are approved for 10 lots, and two other

lots are approved at 6,540 square feet and 5,760 square feet. The record reflects that these lot sizes have been reduced in order to concentrate development on the unwooded portion of the site. Lot sizes in the eastern portion of the site average 11,800 square feet.

According to petitioners, the design and amenities of the project do not warrant the exceptions. Petitioners argue that, given the 2A designation, lot sizes should be greater, not less, than the minimum required.

The city determined that the small exceptions to the 7,000 square foot lot sizes are warranted by "[t]he topographical features of the site, balanced with the desire to retain open space and develop bicycle paths." Record 24. Petitioners state no legal authority that the 2A designation requires all lots to be larger than the minimum lot size allowed in the R-1 zone.

The third, fourth and fifth assignments of error are denied.

SIXTH ASSIGNMENT OF ERROR

Petitioners contend the city misconstrued PZO 16.050(a)(3) and failed to make findings supported by substantial evidence establishing that the proposed development is in harmony with the area's potential future uses. Petitioners further contend the city violated Benton County Code (BCC) 99.315 by allowing development with less than a 300-foot setback from adjacent EFU zoned land.

PZO 16.050(a)(3) requires that:

> "The proposal is in harmony with the surrounding area and its potential future use."

BCC 99.315 generally requires a 300 foot setback between EFU-zoned land and residential development. The UFMA requires the city to request a recommendation from the county regarding the proposed development.[8]

The county requested that the city apply the 300 foot setback between county EFU property to the east of the proposed development, and the ten lots that abut the EFU land. The city determined, however, that given the topography of the land, and with six foot high sight obscuring fences along the property lines of the ten houses that abut the EFU land, the 15 foot rear yard setback required by PZO Article III, would be sufficient to ensure harmony between the uses. Therefore, as permitted under the UFMA, the city rejected the county's recommendation.

The city concluded that the proposed development will be in harmony with surrounding residential uses. Respondents' brief explains in some detail how the proposed

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[8]Section 4(c) of the UFMA states:

> "Whichever jurisdiction, City or County, that [sic] has authority for making a decision with regard to a specific development proposal, implementing ordinance or program, shall formally request the other jurisdiction to review and recommend action for consistency with its comprehensive plan. * * * If the positions of the two jurisdictions differ, the jurisdiction having responsibility shall make the final determination."

development will provide harmony with existing and potential uses of the surrounding area. However, other than evaluating the setback between the proposed development on the EFU-zoned land east of the property, the city's findings of compliance with PZO 16.050(a)(3), address uses on only one other border of the site. The city determined that lots along the west border have been designed to align with the back yards of an adjoining residential subdivision.

Contrary to petitioners' assertions, the city is not required to adopt the county's recommended 300 foot setback. It is, however, required to adopt findings explaining how the proposed development is in harmony with surrounding land uses. A conclusion that "harmony" does not require the county's 300-foot setback along a portion of the eastern border, does not explain how either the 15-foot setback along the eastern border will provide harmony along that portion of the development. Nor does a finding that back yards along a portion of the western border align with adjoining backyards explain how the other borders, or the development as a whole, is in harmony with the surrounding area.

An explanation in respondents' brief as to how PZO 16.050(a)(3) is satisfied is insufficient. The findings must be made in the city's decision. BCT Partnership v. City of Portland, 27 Or LUBA 278, 292 (1994); Eskandarian v. City of Portland, 26 Or LUBA 98, 109 (1993). The city has

neither explained its interpretation of this criterion, nor explained how it reached its conclusion that the entire development is in harmony with the surrounding area and its potential future use.[9]

The sixth assignment of error is sustained.

SEVENTH AND EIGHTH ASSIGNMENTS OF ERROR

Petitioners contend the city misconstrued PZO 16.050(a)(9) and failed to make adequate findings supported by substantial evidence by failing to consider the impact of the proposed development on public schools in evaluating the impact of the proposed development on public facilities.

PZO 16.050(a)(9) states:

> "The density in the proposed development will not result in any substantial negative impact on any public facility or utility."

Petitioners acknowledge that the Philomath Comprehensive Plan excludes public schools from public facilities over which the city has responsibility.[10] They

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[9]We reject, however, petitioners' allegation that the proposed development cannot be found to be in harmony with the surrounding development on the basis that the surrounding areas were intended to benefit from the 2A designation on the subject property.

[10]PCP Section V begins:

> "In order to accommodate future growth and development in Philomath, public facilities and services will need to be provided. Some of these facilities and services are the responsibility of the City; others, such as schools, postal service, electric power, telephone service, natural gas, and garbage collection are the responsibilities of other public or private entities.

further acknowledge that, if the proposed development was for a traditional subdivision, "public facilities" would not include public schools. Nonetheless, petitioners argue that because the proposal is for a PUD subdivision, PZO 16.050(a)(9) requires schools be included in the public facilities over which the city has responsibility.

In the absence of some specific indication of a contrary intent, terms should be read consistently throughout the city's plan and implementing development code. See Columbia Steel Castings Co. v. City of Portland, 314 Or 424, 430 (1992); Zippel v. Josephine County, 27 Or LUBA 11 (1994). Petitioners offer no reason why "public facilities" should be evaluated differently when applied to PUD subdivisions.

The city has determined, in both legislative and quasi-judicial forums, that public schools are not within the scope of public facilities over which the city has responsibility. See Williams v. City of Philomath, ___ Or LUBA ___, LUBA No. 95-039 (September 7, 1995). The city reiterated that determination in its findings here. Neither PZO 16.050(a)(9) nor any other provision in the city's comprehensive plan or implementing ordinances, requires the city to evaluate adequacy or capacity of public schools in

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"This plan element is intended to provide policy direction for the provision of public facilities and services by the City, as well as to encourage City cooperation with other providers of facilities and services."

evaluating the impacts of the proposed development.

Petitioners also allege the city's findings are inadequate to establish compliance with PZO 16.050(a)(9) and PCP Public Facilities and Services Policy 3 because the findings are based on written comments of the public works director.[11] Petitioners object that they were not given an opportunity to rebut those comments since they were not stated publicly.

Petitioners cite no authority that requires all evidence to be orally presented during a public hearing. So long as the city relies on evidence in the record in making its findings, the evidence upon which it relies can be either oral or written.

Nor is there any prohibition upon the city relying on the analysis of its public works director in adopting findings regarding public facilities.

Petitioners argue the city's findings are not based on substantial evidence but have not explained how the evidence is inadequate, providing no basis for further review. McGowan v. City of Eugene, 24 Or LUBA 540, 546, (1993).

The seventh and eighth assignments of error are denied.

NINTH ASSIGNMENT OF ERROR

Petitioners contend the city misconstrued PZO

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[11]PCP Public Facilities and Services Policy 3 states:

"Long-term maintenance costs shall be considered when public facilities are being planned, designed, and constructed."

16.050(a)(7), and made inadequate findings not supported by substantial evidence because the proposed subdivision will overload streets outside the planned area.

PZO 16.050(a)(7) requires that:

> "Streets are adequate to support anticipated traffic and development will not overload the streets outside the planned area."

Petitioners object to the city's findings of compliance with PZO 16.050(a)(7) on several bases. First, petitioners object that the Oregon Department of Transportation (ODOT) may not approve of the conditions of approval the city imposed to mitigate impacts of the development. Petitioners apparently assume that, if ODOT does not approve of the conditions, those conditions will somehow be invalidated. To the contrary, the city is authorized to impose conditions to ensure compliance with approval criteria. If a condition is not satisfied, neither is the approval criterion upon which it is based.

The city concluded, based on substantial evidence, that PZO 16.050(a)(7) is satisfied, subject to conditions. If ODOT ultimately does not approve of one or more of the conditions required for this development to proceed, the development cannot proceed. The applicant would be required to seek a modification of the condition, which would include a new public hearing process.

Second, petitioners object to the city's Finding 12, requiring that channelization onto an adjacent highway and

certain intersection improvements "must be constructed prior to completion of the proposed development." Record 28. Condition 37 implements Finding 12 and requires that the improvements "be built prior to or concurrent with the development." Record 8. According to petitioners, to be consistent with each other the finding and conclusion must be read to allow postponement of the improvements until completion of the development, which could be years in the future. Petitioners contend this delay would violate PZO 16.050(a)(7) because streets would become overloaded pending completion of the improvements.

The city's subdivision code provides requirements for the installation of public improvements. PSO 5.010-5.040 generally require that all public improvements must be completed prior to final plat approval. Condition 6 reiterates the requirement that all public improvements comply with the provisions of PSO 5.010 through 5.040. Street improvements are, by definition, public improvements. Nothing in the language of Finding 12 or Condition 37 suggests any deviation from the general requirement of Condition 6 or the requirements of PSO 5.010 through 5.040.

Third, petitioners object to the city's findings regarding proposed improvements to Benton View Drive. Petitioners contend the city's findings violate PSO 5.100(7), because they fail to require full city improvements to that street. PSO 5.100(7) applies only to

improvements to streets adjacent to the development. Benton View Drive is not adjacent to the development, except where it intersects with Neabeack Hill Drive. At that point, the decision requires full city improvements.

Fourth, petitioners contend the city's findings violate PSO 5.100(11) regarding street grade, as applied to Benton View Drive. PSO 5.100 applies to design standards within and adjacent to the development. It does not require off-site grading improvements.

Finally, petitioners object to the city's evaluation of conflicting evidence regarding traffic impacts from the proposed development on surrounding streets. Petitioners' disagreement with the city's evaluation is not a basis for remand. Where different reasonable conclusions could be drawn from the evidence in the record, the local government may choose the evidence upon which it will rely. Bottum v. Union County, 26 Or LUBA 407 (1994); McInnis v. City of Portland, 25 Or LUBA 376 (1993).

The ninth assignment of error is denied.

The city's decision is remanded.