

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

3  
4                   JERRY MUMPER,  
5                   *Petitioner,*

6  
7                   vs.

8  
9                   CITY OF SALEM,  
10                  *Respondent,*

11  
12                  and

13  
14                  OLSEN DESIGN & DEVELOPMENT, INC.,  
15                  *Intervenor-Respondent.*

16  
17                  LUBA No. 2019-106

18  
19                  FINAL OPINION  
20                  AND ORDER

21  
22                  Appeal from City of Salem.

23  
24                  Sean T. Malone, Eugene, filed the petition for review and a reply brief, and  
25                  argued on behalf of petitioner.

26  
27                  Natasha A. Zimmerman, Deputy City Attorney, Salem, filed a joint  
28                  response brief on behalf of respondent. With her on the brief was Daniel B.  
29                  Atchison.

30  
31                  Alan M. Sorem, Salem, filed a joint response brief and argued on behalf of  
32                  intervenor-respondent. With him on the brief was Saalfeld Griggs PC.

33  
34                  RUDD, Board Chair Member; RYAN, Board Member, participated in the  
35                  decision.

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37                  ZAMUDIO, Board Member, did not participate in the decision.  
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REVERSED

02/24/2020

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

**NATURE OF THE DECISION**

Petitioner appeals a city council decision approving an application for a modification of refinement plan standards, a refinement plan, and the subdivision of a 14-acre property.

**MOTION TO INTERVENE**

The applicant below, Olsen Design & Development, Inc. (intervenor), moves to intervene on the side of respondent. There is no opposition to the motion, and it is granted.

**FACTS**

In 2003, the city council added a mixed-use (MU) comprehensive plan designation to the Salem Area Comprehensive Plan (the comprehensive plan) and amended the Salem Revised Code (SRC) to establish the “Fairview Mixed Use” (FMU) zone. The city council applied both designations to a 275-acre property formerly known as the Fairview Training Center (FTC). The SRC explains that the purpose of the FMU zone:

*“is to implement the mixed-use designation of the Salem Area Comprehensive Plan by establishing a master planning process through which allowed uses are identified and development standards are established that:*

“(a) Encourage innovative planning resulting in mixed-use development, improved protection of open spaces and natural features, and greater housing and transportation options;

“(b) Encourage the innovative integration of park and school uses;

- 1           “(c) Encourage developments that recognize the relationship  
2           between buildings, their use, open space, and infrastructure;  
3           providing varied opportunities for innovative and diversified  
4           living environments in line with the principles of sustainable  
5           development and sustainable business practices;
- 6           “(d) Support affordable housing options and mixed-income  
7           neighborhoods;
- 8           “(e) Facilitate the resourceful use of land through the arrangement  
9           of land uses, buildings, circulation systems, open space, and  
10          infrastructure;
- 11          “(f) Encourage economic opportunity;
- 12          “(g) Preserve, to the greatest extent possible, existing natural areas  
13          and open space that may not otherwise be protected through  
14          conventional development;
- 15          “(h) Recognize and preserve the historical and archeological  
16          significance of buildings, structures, and sites, and encourage  
17          historic resource designation of those buildings, structures,  
18          and sites that merit official recognition; and
- 19          “(i) Encourage energy conservation and improved air and water  
20          quality.” SRC 530.001 (emphasis added).

21 SRC 530.005 describes a master plan as “a comprehensive long-range plan  
22 intended to guide the growth and development of a region [that]\* \* \* includes  
23 analysis, recommendations, and proposals for the region’s population, economy,  
24 housing transportation, community facilities, natural resources and land use.” In  
25 2005, city council adopted the Fairview Master Plan (FMP) into the  
26 comprehensive plan, establishing goals and policies for the redevelopment of the  
27 FTC.

1           The SRC does not require the redevelopment of the entire 275-acres of the  
2   FTC in one fell swoop but rather requires adoption of detailed regulatory plans  
3   consistent with the FMP (refinement plans) for areas not less than 40 acres in  
4   size. SRC 530.030. Refinement plans previously approved within the FMU zone  
5   include the Pringle (approved 2005), Simpson Hills (approved 2012), Fairview  
6   Refinement Plan II/Lindberg Green (approved 2009 and amended 2016) and  
7   Fairview Addition West (approved 2014) refinement plans.

8           The subject property is an approximately 14-acre site located within the  
9   FMU zone. The subject property contains two groves of mature trees and is  
10  labeled The Woods in the FMP. The Woods is bordered by the Fairview Addition  
11  West refinement plan area, which, as noted above, was approved in 2014, on  
12  three sides. Pringle Road SE and Battle Creek Road SE border the western  
13  boundary of The Woods.

14          The FMP adopted in 2005 applied a Mixed Intensity (MI) zoning overlay  
15  to 10.75 acres of The Woods and a Low Intensity (LI) zoning overlay to the  
16  remaining 3.31 acres. The SRC describes the MI area as comprising:

17           “primarily residential uses, along with a mix of small-scale  
18   neighborhood commercial, employment, and public services uses.  
19   Buildings will be a mix of one-story to three-story detached,  
20   attached, or stacked housing types sited on smaller individually  
21   owned lots with private yards and street and/or alley access, or larger  
22   lots under multiple or separate ownership with shared street and/or  
23   alley access. Townhouse development is appropriate at the higher  
24   density range.” SRC 530.010(b).

1 The SRC describes the LI overlay area as characterized by “single family  
2 activities in detached housing types sited on separate lots with private yards and  
3 street and/or alley access. Nonresidential uses, except for a few limited  
4 exceptions, are prohibited.” SRC 530.010(a). Single family uses as well as  
5 accessory dwelling units (ADUs), parks and open space are permitted uses in the  
6 MI and LI zones. SRC 530.040.

7 Intervenor sought to subdivide The Woods into 16 lots and open space.  
8 The 16 lots range in size from approximately one third of an acre (13,000 square  
9 feet) to an acre (44,000 square feet) in size. Intervenor also sought approval of a  
10 refinement plan for The Woods. Because the FMP requires that implementing  
11 refinement plans be applied to areas at least 40 acres in size, intervenor sought a  
12 class 2 adjustment authorizing the reduced refinement plan area size of 14 acres.

13 On July 26, 2019, the planning commission issued its decision approving  
14 intervenor’s application. Petitioner filed an appeal. On September 9, 2019, the  
15 city council held a *de novo* hearing and voted to deny the appeal and approve the  
16 application. The city council adopted the planning commission findings of fact  
17 and conclusions of law along with supplemental findings. Record 16–17.

18 This appeal followed.

## 19 **FIRST ASSIGNMENT OF ERROR**

### 20 **A. SRC 530.030(e)(1)**

21 SRC 530.030(e)(1) provides that a refinement plan for property within the  
22 FMU zone must be consistent with the FMP. In his first assignment of error,

1 petitioner argues that the city council misconstrued SRC 530.030(e)(1) and that  
2 the refinement plan is not consistent with the FMP. In subassignments of error,  
3 petitioner argues that the city council’s findings fail to establish that existing tree  
4 stands, steep slopes, wetlands, and watersheds will be protected and enhanced as  
5 petitioner argues is required by the FMP, and that the refinement plan does not  
6 contain the level and type of street connectivity that petitioner argues is required  
7 by the FMP. Petition for Review 9. Petitioner also argues that the city council’s  
8 findings are not supported by substantial evidence.

9       ORS 197.835(3) provides “Issues shall be limited to those raised by any  
10 participant before the local hearings body as provided by ORS 197.195 or  
11 197.763, whichever is applicable.” As a preliminary matter, city and intervenor  
12 (collectively respondents) agree that petitioner preserved the issue of refinement  
13 plan consistency with the FMP, but argue that petitioner failed to preserve his  
14 arguments that the refinement plan is inconsistent with certain illustrations in the  
15 FMP. We conclude that the issue of consistency with illustrations, including  
16 maps and drawings contained in the FMP, was preserved.

17       In the “Preservation of Error” section of the petition for review, petitioner  
18 identifies Record 254, 267–77, 983–85, 254, 877–78, 1520–22, and 1536–37. In  
19 the reply brief, petitioner repeats his citation to these pages. At Record 983,  
20 petitioner argued:

21       “Because representations and maps associated with the Fairview  
22 plan do not show the refinement plan area subject to development,  
23 not subject to roads, and set aside for protection, [SRC provisions

1 for amendment of the FMP are] implicated. The applicant could  
2 avoid this problem by simply pursuing the process contemplated for  
3 refinement plans that are inconsistent with the master plan by  
4 amending the master plan first.”

5 In addition, the city council’s findings acknowledge that “Comments received  
6 explain that the [FMP] did not contemplate the development of The Woods area  
7 as is depicted by the ‘Illustrative Plan’ and other maps and drawings included in  
8 the [FMP] which show the area as an open area without development and  
9 interconnected streets, sidewalks, and paths.” Record 22. The city council’s  
10 findings respond to these comments by concluding that the “corresponding off-  
11 street pathway and open space plan (Attachment G), mobility plan, and street  
12 network plan are all conceptual in nature and not intended to prescribe exactly  
13 how property within the [FTC] would be developed.” Record 23. The issue of  
14 consistency with the illustrations was preserved. We proceed to the substance of  
15 each assignment of error.

16 **B. Construction of Law**

17 The FMP contains an executive summary, a listing and description of  
18 principles, a discussion of site features and infrastructure strategy and a variety  
19 of graphics. Record 278–300. In the challenged decision, the city council  
20 identified thirteen FMP “principles” with which the refinement plan must be  
21 consistent.<sup>1</sup>

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<sup>1</sup> The principles identified in the FMP are:

1. Build in Economic and Social Diversity

1           The city council held that satisfying SRC 530.030 requires establishing  
2 that “on balance,” the proposed refinement plan is consistent with and conforms  
3 to the principles set forth in the FMP, explaining:

4           “[T]he applicant must demonstrate that, on balance, the proposed  
5 refinement plan is consistent with and conforms to [] the Principles  
6 set forth in the Fairview Plan. Because there is tension inherent in  
7 the principles of the plan, strict compliance with one principle may  
8 be in conflict with compliance with another principle. For example,  
9 compact residential development within the Fairview Addition and  
10 Pringle Creek Community Refinement Plans in conformance with  
11 Principle 1 at times may be in conflict with, but also provide  
12 opportunity for, wide swaths of open space in the remainder of the  
13 development including the pocket parks in Fairview Addition West

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2.     Create a Center
  3.     Re-use, Retrofit
  4.     Create Local Employment
  5.     Build Innovative Green Buildings
  6.     Respect the Landscape
  7.     Zero Impact to the Regional Watershed
  8.     Layer the Systems
  9.     Close the Cycle of Energy and Material Flows
  10.    Green Corridors for People and Other Living Things
  11.    Transit Close at Hand
  12.    An Interconnected Street System
  13.    Walk Every Day. Record 35–43.

1 and the Village Center in Pringle Creek Community.” Record 558.  
2 First, we observe that balancing is not appropriate when all of the standards can  
3 be applied. In *Lennar Northwest, Inc. v. Clackamas County*, 280 Or App 456,  
4 464, 380 P3d 1237 (2016), *rev den*, 360 Or 752 (2017), the applicant sought to  
5 rezone property. Applicable approval criteria required establishing consistency  
6 with applicable comprehensive plan goals and policies. The hearings officer  
7 applied a balancing test to evaluate the rezone request and discounted the  
8 relevance of two of seven factors identified in the comprehensive plan. The court  
9 affirmed our decision concluding that balancing was not appropriate, stating:

10 “It is true, as we observed in *Waker Associates [Inc. v. Clackamas*  
11 *County*, 111 Or App 189, 826 P 2d 20 (1992)], that a locality may  
12 need to reconcile facially inconsistent provisions of its land use  
13 regulations in making a land use decision. 111 Or App at 193–94,  
14 826 P2d 20. But decisional standards are facially inconsistent in  
15 application when two or more provisions *require* different and  
16 incompatible results. Reconciliation of those types of inconsistent  
17 policies can sometimes be made by application of less directory  
18 standards through a ‘balancing’ of each of the directives with the  
19 remaining criteria to determine the cumulative effect of all of those  
20 standards. But that type of balancing, at least in the sense of ignoring  
21 the effect of one standard in favor of the remaining criteria, is not  
22 necessary when *all* of the standards can be applied or considered.”<sup>2</sup>

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<sup>2</sup> We held:

“The [factors set out in the comprehensive plan as required considerations when evaluating a request for a zone change] are not competing plan policies of the type at issue in *Waker*, [111 Or App 189], and do not otherwise work at cross purposes or present competing choices of the type at issue in cases in which balancing

1           *Id.* at 469–70 (emphases in original).

2           The city council did not identify anything in the FMP principles, applied  
3 to redevelopment of The Woods through the refinement plan, that requires  
4 different and incompatible results. Further, although the city council found that  
5 the majority of the FMP is conceptual and that the refinement plan need only be,  
6 “on balance,” consistent with the FMP principles, the city council did not actually  
7 engage in a balancing exercise.<sup>3</sup> Record 558. Rather than engaging in a balancing  
8 exercise, the city council focused on the 13 principles and determined that the  
9 refinement plan was consistent with the FMP because, as designed, the  
10 refinement plan furthered the FMP principles. For the reasons explained below,  
11 we agree with petitioner that the text and context of the FMP and SRC do not

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several conflicting comprehensive plan polices may be required. In other words, the Factors are not ‘incompatible in operation[.]’ See *Columbia Riverkeeper v. Clatsop County*, 238 Or App 439, 457–58, 243 P3d 82 (2010) (‘[i]t is only when the standards themselves are incompatible in operation—by requiring both approval and disapproval of any generic application—that an overarching reconciliation of clashing standards is necessary’). Policy 4.R.2 directs the county to consider the Factors to ‘guide the determination of the most appropriate zone.’ Nothing in the language of Policy 4.R.2 or any of the Factors suggests that some factors should be given greater weight than others.” *Lennar*, 280 Or App at 465.

<sup>3</sup> The city council did not determine, for instance, that on balance, the “Respecting the Landscape” principle should give way to the “Creating Employment Opportunities” principle. Rather, the city council determined that the refinement plan furthered the Respecting the Landscape principle of the FMP, even if it varied from implementation measures identified in the FMP as the mechanism for achieving that principle.

1 support the city council’s conclusion that evaluating consistency with the FMP  
2 by balancing principles is appropriate here or that merely furthering the principles  
3 is sufficient to establish consistency with the FMP. We conclude that the city  
4 council misconstrued SRC 530.030(e) and failed to address provisions of the  
5 FMP dictating the strategies development is required to use in order to actualize  
6 the FMP principles related to “Respect the Landscape” and “Walk Every Day.”  
7 Record 522, 525.

8 ORS 197.829 provides in relevant part:

9 “(1) The Land Use Board of Appeals shall affirm a local  
10 government’s interpretation of its comprehensive plan and  
11 land use regulations, unless the board determines that the  
12 local government’s interpretation:

13 “(a) Is inconsistent with the express language of the  
14 comprehensive plan or land use regulation;

15 “(b) Is inconsistent with the purpose for the comprehensive  
16 plan or land use regulation;

17 “(c) Is inconsistent with the underlying policy that provides  
18 the basis for the comprehensive plan or land use  
19 regulation; or

20 “(d) Is contrary to a state statute, land use goal or rule that  
21 the comprehensive plan provision or land use  
22 regulation implements.”

23 We will review a city council’s interpretation of its own regulations under  
24 ORS 197.829(1) and affirm it, so long as that interpretation is not inconsistent  
25 with the express language of the regulation or its underlying purposes and  
26 policies.

1            “[T]o the extent that the interpretation is directed at multiple  
2 statements that may be in conflict, the inconsistency determination  
3 is a function of two inquiries: (1) whether the interpretation in fact  
4 is an interpretation, *i.e.*, a considered determination of what was  
5 intended that plausibly harmonizes the conflicting provisions or  
6 identifies which ones are to be given full effect; and (2) the extent  
7 to which the interpretation comports with the ‘express language’ of  
8 the relevant provisions (including, necessarily, those provisions  
9 that, according to the interpretation at issue, are to be given full  
10 effect).” *Siporen v. City of Medford*, 349 Or 247, 262, 243 P3d 776  
11 (2010).

12        In construing the law, we will consider the text, context and legislative history of  
13 the law at issue in order to determine the intent of the enacting legislature. *PGE*  
14 *v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1999); *State*  
15 *v. Gaines*, 346 Or 160, 171–72, 206 P3d 1042 (2009).

16        The city council’s conclusion that the refinement plan need only be  
17 consistent with the principles as summarized by their headings is inconsistent  
18 with the text of the FMP principles themselves, and with context provided by the  
19 SRC 530.025 provisions governing minor and major amendments of the FMP. A  
20 minor amendment of the FMP is required if the amendment does not result in a

1 substantial change to the FMP.<sup>4</sup> SRC 530.025(b)(1). A major amendment is  
2 required if the change to the FMP is substantial.<sup>5</sup> SRC 530.025(b)(2).

3 SRC 530.025(b)(2) provides in relevant part:

4 “(2) A substantial change to the [FMP] includes, but is not limited  
5 to, one that:

6 “(A) Varies or changes a [FMP] policy;

7 “(B) Increases or decreases the number of proposed  
8 residential units per acre by more than 20 percent or  
9 exceeds the maximum number of dwelling units  
10 permitted within the FMU zone;

11 “(C) Changes designated buffers, perimeter landscaping, or  
12 significant natural resource areas delineated in the  
13 [FMP] that were established to adapt the FMU zone to  
14 specific site characteristics or mitigate development  
15 impacts on the site and surrounding area;

16 “(D) Varies the building height, FAR, lot coverage, or  
17 building setbacks by more than 20 percent of that  
18 delineated in the adopted [FMP];

19 “(E) Results in a significant change in the purpose, scope,  
20 main concepts, goals, policies, or general development  
21 guidelines of the [FMP];

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<sup>4</sup> A minor amendment is processed as a Type II decision with notice of the application, a written decision by the review authority, written notice of the decision and an opportunity to appeal. SRC 300.520.

<sup>5</sup> A major amendment is processed as a Type III decision and requires notice, a public hearing before the review body, written notice of decision and an opportunity to appeal. SRC 300.620.

1           “(F) Cumulatively results in a significant change in the purpose,  
2           scope, main concepts, goals, policies, or general development  
3           guidelines of the [FMP] as a consequence of more than one  
4           non-substantial change submitted concurrently; or

5           “(G) Results in a significant change in pedestrian or vehicular  
6           traffic circulation within the FMU zone or in the surrounding  
7           area.”

8       Sections (A), (C), (E), (F) and (G) establish the need to amend the plan based on  
9       changes to goals, policies, general development guidelines and vehicle and  
10      pedestrian circulation. These provisions support the conclusion that in evaluating  
11      whether a proposal is consistent with the existing FMP, the city council must look  
12      at the discussion section in the FMP to explain the guiding principles, as opposed  
13      to just the basic text of the guiding principles.

14           The intent of the FMP is to identify “the goals and policies, and serve as  
15      the guiding document[] for development within the FMU zone.” SRC 530.020.  
16      This statement of intent provides additional context for interpreting SRC  
17      530.030(e)(1) as requiring consideration of more than just the concepts put forth  
18      in the principles when determining consistency with the FMP. SRC 111.001(b)  
19      provides:

20           “Where a term is not defined within the [SRC], the term shall have  
21      its ordinary accepted meaning within the context in which it is used.  
22      Webster’s Third New Int’l Dictionary (unabridged ed. 2002) shall  
23      be the standard reference to ordinary accepted meanings.”

24      The SRC does not define “principle,” “goal,” or “policy.” A principle is “1 a :  
25      \* \* \* a comprehensive and fundamental law, doctrine, or assumption on which  
26      others are based or from which others are derived[.]” *Webster’s Third New Int’l*

1 *Dictionary* 1803 (unabridged ed 2002). A goal is “2 : \* \* \* a condition or state to  
2 be brought about through a course of action[.]” *Id.* at 972. In the context of the  
3 FMP, a goal and a principle could be the same thing, reflecting a fundamental  
4 doctrine or desired condition. A policy, however, is “5 : a definite course or  
5 method of action selected \* \* \* from among alternatives and in the light of given  
6 conditions to guide and usu[ally] determine present and future conditions[.]” *Id.*  
7 at 1754. The SRC 530.020 text suggests that goals and policies are different  
8 things, and we conclude that policies reflect a choice as to how goals will be met.  
9 Both are relevant to evaluating consistency with the FMP. We agree with  
10 petitioner and conclude that city council’s focus on guiding principles  
11 misconstrued SRC 530.005(3)(e), as we explain further below.

12 This subassignment of error is sustained.

13 **C. Consistency of Refinement Plan with Natural Resource**  
14 **Protection Provisions in FMP**

15 Our discussion above concerning the proper construction of SRC  
16 530.003(e) provides the context for our discussion of petitioner’s following  
17 subassignments of error.

18 The FMP includes a discussion section after each principle. Under  
19 Principle 6, “Respect the Landscape,” the FMP states:

20 “[The redevelopment] plan works with, not against, the existing  
21 landscape. The natural slopes on the site are preserved for  
22 recreational use, for habitat, and for storm water flow. These slopes  
23 lead to the Village Green, which is both the ecological and social  
24 heart of the community. *Large existing forest blocks and wetland*

1           *are preserved, and, will be expanded over time.*” Record 522  
2           (emphases added).

3       Later in the FMP, under the heading “Open Space,” the FMP provides additional  
4       detail relevant to the landscape under the heading “Forested Habitat and Wildlife  
5       Corridors.” Record 527. Here, the FMP states in part:

6           “A mature grove of fir trees along Pringle Creek creates a park-like  
7           environment that will be protected and enhanced as either  
8           neighborhood park or community open space. Another mature grove  
9           of fir trees is located along the northwestern edge of the site. It also  
10          will be protected and enhanced as neighborhood park or community  
11          open space. *Scrub oak and native plants at the southwestern edge of*  
12          *the property will be protected for their ability to serve as wildlife*  
13          *habitat and as an ecological buffer.* A small mature oak grove on  
14          the eastern edge of the property will frame the ‘front door’ entrance  
15          to [the redevelopment area] from the south.” Record 527 (emphases  
16          added).

17          The FMP’s Executive Summary, under the heading “Open Space,”  
18          provides:

19           “[Fairview Training Center Redevelopment] will maximize  
20           common open spaces, parks, and nature preserves. Natural areas will  
21           be linked together throughout the development. *Existing steep*  
22           *slopes, wetlands, and watersheds will be protected and enhanced.*”  
23           Record 282 (emphases added).

24       As shown above, in both the text provided underneath Principle 6 “Respect the  
25       Landscape” and later in the FMP under the heading “Open Space” and  
26       subheading “Forested Habitat and Wildlife Corridors,” as well as the Executive  
27       Summary, the FMP provides that areas within The Woods will be preserved,  
28       enhanced and protected. “Will” does not connote a discretionary action and  
29       petitioner argues:

1           “Taken together, the Fairview plan contemplates that The Woods’  
2           significant natural resources (including steep slopes, the largest tree  
3           stand on the 275-acre Fairview property, areas B and C, other tree  
4           stands/groves, wildlife habitat, ecological buffer) would be  
5           ‘protected,’ ‘preserved,’ ‘enhanced,’ and ‘expanded’ for  
6           recreational use, community open space, wildlife habitat, and an  
7           ecological buffer.” Petition for Review 15.

8           The approved refinement plan authorizes the development of single-family  
9           residences and accessory dwelling units in The Woods and allows roadways  
10          within The Woods despite the FMP language calling for the protection and  
11          enhancement of certain features on the subject property. Petitioner argues that the  
12          findings fail to address the plain meaning of provisions in the FMP stating that  
13          certain resources would be “protected,” “preserved,” “enhanced,” and  
14          “expanded.” “Expand” is to “2 : increase the extent, size, number, volume, or  
15          scope[.]” *Webster’s* at 798. “Enhance” is to “2 : \* \* \* augment, elevate, heighten,  
16          increase[.]” *Id.* at 753. “Protect” is “1 : to cover or shield from that which would  
17          injure, destroy or detrimentally affect[.]” *Id.* at 1822. “Preserve” is “1 : to keep  
18          safe from injury, harm, or destruction[.]” *Id.* at 1794. As petitioner explains, the  
19          refinement plan reduces the number of trees and the size of the largest tree grove  
20          in the FMU, rather than protecting and preserving or enhancing and expanding  
21          it. Similarly, petitioner argues that the refinement plan fails to enhance steep  
22          slopes, wetlands and watersheds. Record 520–22. We agree.

23          The city council concluded that the refinement plan is consistent with the  
24          “Respect the Landscape” principle and protects the:

25          “natural, ecological, habitat, and recreational benefits and

1 opportunities afforded by the two existing identified tree groves by  
2 allowing reasonable economic use of the property while at the same  
3 time preserving its natural character, habitat, and trees by providing  
4 large lots served by sensitively sited narrow private streets, trails,  
5 and open space areas that provide benefit to not only the residents  
6 within the proposed refinement plan but the Fairview Training  
7 Center site as a whole.

8 “The refinement plan includes open areas and trails that will connect  
9 to the surrounding Fairview Addition West refinement plan; and the  
10 narrow private streets proposed within the development will help to  
11 minimize impacts to site topography due to grading and allow for  
12 more trees to be preserved.

13 “The proposed refinement plan also includes increased standards for  
14 tree preservation beyond the requirements of the City’s tree  
15 preservation ordinance (SRC Chapter 808).” Record 38.

16 The refinement plan includes a cap on the amount of enclosed yard space allowed  
17 on a lot, and requires openings in fences and walls to promote habitat preservation  
18 and wildlife passage. Record 23. However, the findings do not address the  
19 language in the FMP that requires enhancement and expansion of the forested  
20 area, or explain how mitigation of impacts equates to protection, preservation and  
21 enhancement.

22 The findings note that tree preservation provisions in the refinement plan  
23 exceed the requirements of the city’s tree preservation ordinance and refinement  
24 plan standards for habitat preservation and wildlife passage go beyond any  
25 standard included in the SRC. Record 23. Respondents argue that petitioner’s  
26 challenge fails because petitioner did not challenge findings addressing related

1 code standards.<sup>6</sup> The city council’s conclusion that SRC standards are met does  
2 not, however, establish consistency with the FMP. Compliance with standards  
3 related to tree preservation, street connectivity, etc., does not establish that groves  
4 are enhanced, that streets are excluded from areas to be preserved, or that  
5 sidewalks are provided on both sides of streets, as set forth in the FMP. In fact,  
6 SRC 530.001 states that one of the purposes of the FMU zone is to “[p]reserve  
7 existing natural areas and open space that may not otherwise be protected through  
8 conventional development.” The decision lacks the necessary findings (and the

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<sup>6</sup> The SRC contains criteria addressing natural resource guidelines (SRC 530.065), preservation of trees (SRC 808), wetlands (SRC 809), landslide hazards (SRC 810) and maintenance of natural slopes on property and transportation planning (SRC 530.070). The city council’s findings observe that the FMP shows 25 structures, likely single-family dwellings, clustered on the eastern third of The Woods, and the refinement plan distributed the dwellings throughout the site on large lots intermingled with open space. The city council concluded:

“The proposed development focuses on making reasonable economic use of the subject property through large tract residential development, which is a permitted use in the FMU zone and promotes social and economic diversity (Principle 1) by a model of housing that does not currently exist within the zone. The proposed large lots are designed to emphasize the wooded nature of the area, maintaining existing habitat for native species through the provision of wildlife passages, exceeding the City’s general requirements for tree preservation, and providing trails and open space for the use of residents of the development as well as Fairview Training Center as a whole. The proposed refinement plan exceeds the standards set forth in the [SRC] for the preservation of trees, greatly exceeding the 25 percent required \* \* \* in SRC Chapter 808.” Record 558.

1 record lacks the necessary evidence) to conclude that the refinement plan is  
2 consistent with the FMP. The city council must determine how the refinement  
3 plan will protect scrub oak and native plants at the southwestern edge of the  
4 property for their ability to serve as wildlife habitat and as an ecological buffer  
5 and preserve and expand large existing forest blocks, steep slopes, watersheds  
6 and wetland over time. The findings are inadequate to explain that.

7 This subassignment of error is sustained.

8 **D. Consistency of Refinement Plan with FMP Walkability**  
9 **Principle**

10 The text following Principle 13, “Walk Every Day Principle” includes the  
11 statement: “The design promotes walking at all levels, from walkways on both  
12 sides of all streets \* \* \*.” Record 287. The FMP Mobility Plan provides:  
13 “Sidewalks will line both sides of each street.”<sup>7</sup> Record 1122. In addressing  
14 Principle 13, “Walk Every Day,” the city council found that the refinement plan:  
15 “is designed to promote many walking options, including  
16 meandering sidewalks along Pringle/Battle Creek road and Braden  
17 Woods Lane in order to facilitate additional tree preservation, a  
18 mixed pedestrian/vehicle woonerf design on Long Loop, designated  
19 paths between lots to connect open space areas, and existing alleys

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<sup>7</sup> The findings explain that the FMP consists of “the main Fairview Training Center Redevelopment Master Plan \* \* \* which identifies the overall vision, goals, and policies for development of the [FTC] site and several other exhibits and attachments that inventory existing on-site resources and illustrate the conceptual redevelopment of the site.” Record 128. A Mobility Plan is one of the attachments and a recognized part of the FMP.

1 on the perimeter of the refinement plan shared with the Fairview  
2 Addition west subdivision. This promotes easy access to  
3 neighborhood recreational areas, to work/school, to commercial  
4 areas, and to mass transit systems as available. The walkability of  
5 the neighborhood will promote a healthy lifestyle for residents and  
6 non-residents alike. The proposed refinement plan is consistent with  
7 this principle.” Record 43.

8 We agree with petitioner that the proposed development is inconsistent with the  
9 Walk Every Day principle as well as the FMP Mobility Plan because the  
10 proposed development lacks sidewalks on both sides of all streets. In addition,  
11 we agree with petitioner that the findings are inadequate, where the findings  
12 conclude that the refinement plan is consistent with the FMP because it promotes  
13 walking options including meandering sidewalks, designated paths between lots,  
14 existing alleys and a mixed pedestrian/vehicle design on Long Loop. Record 43.  
15 Both the Walk Every Day principle and the FMP Mobility Plan require sidewalks  
16 on both sides of all streets.

17 This subassignment of error is sustained.

18 **E. Consistency of Refinement Plan with FMP Mobility Plan**

19 The city council found that:

20 “The street network plan included with the [FMP] \*\*\* like the other  
21 attachments of the plan depicting the layout of development within  
22 the FMU zone, provides an illustrative example of how the goals,  
23 policies, and development concepts embodied in the [FMP] can be  
24 achieved. However, because these layouts were done without  
25 specific detailed engineering studies and analysis to determine their  
26 feasibility, they are conceptual in nature and do not identify exactly  
27 where streets within the site will be provided.” Record 559.

1 Petitioner argues, and we agree, that the city council’s interpretation of the FMP  
2 street plan as being purely conceptual, which we understand to mean non-  
3 binding, cannot be reconciled with the provisions in SRC 530.025(b)(2)(G)  
4 discussed earlier in this opinion and providing that a substantial change to the  
5 FMP includes a change that “[r]esults in a significant change in pedestrian or  
6 vehicular traffic circulation within the FMU zone or in the surrounding area.”  
7 ORS 174.010 requires “where there are several provisions or particulars such  
8 [statutory] construction is, if possible, to be adopted as will give effect to all.” If  
9 the FMP street plan is non-binding or conceptual, approving a refinement plan  
10 with a different circulation plan could never be a substantial change, and the code  
11 language would be surplusage. The findings approving streets where streets are  
12 not shown on the FMP street plan are inadequate.

13 This subassignment of error is sustained.

14 **F. Substantial Evidence**

15 Findings must be based on substantial evidence, that is evidence a  
16 reasonable person would rely on to reach a decision. *Dodd v. Hood River County*,  
17 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346,  
18 752 P2d 262 (1998). Petitioner argues that there is not substantial evidence in the  
19 record that identified resources within The Woods will be protected, enhanced  
20 and expanded. For example, the Open Space portion of the FMP states that  
21 wetlands near Pringle Creek and in the southeastern center area of the property  
22 “will be protected, enhanced, and managed to facilitate storm water runoff,

1 provide water filtration, create wildlife habitat, and protect native species.”  
2 Record 289. For the reasons explained above, intervenor’s proposed refinement  
3 plan does not “protect[], enhance[], and manage[]” “the wetlands \* \* \* near  
4 Pringle Creek and in the southeastern center area of the property.” Instead, the  
5 refinement plan allows development of The Woods.

6 The FMP principle Walk Every Day provides:

7 “FTCR will be a walkable community with plenty of places to  
8 explore. The design promotes walking at all levels, from walkways  
9 on both sides of all streets, to neighborhood parks, to broad  
10 greenways leading to village center shops, to bus stops easily  
11 accessible from all homes. SFA [Sustainable Fairview Associates]  
12 hopes that by integrating walking into the routine of residents, they  
13 will enjoy robust health and an improved quality of life.” Record  
14 1009.

15 The FMP Mobility Plan states: “Sidewalks will line both sides of each street.”  
16 Record 1122. The FMP provides that sidewalks are required on all streets except  
17 alleys. Record 1105. The Woods refinement plan does not include sidewalks next  
18 to all streets. The FMP also includes a street network plan which shows limited  
19 pathways within portions of The Woods identified in the FMP as areas for  
20 enhancement and expansion of the area as an ecological buffer. Record 990. The  
21 refinement plan, however, shows streets, not walkways or an ecological buffer,  
22 within this area. Substantial evidence does not support the finding that the  
23 refinement plan is consistent with the FMP.

24 This assignment of error is sustained.

1 **SECOND ASSIGNMENT OF ERROR**

2 SRC 530.030(e)(3) provides that the refinement plan must be “compatible  
3 with adjoining land uses.” Petitioner argues that the refinement plan is not  
4 compatible with adjoining land uses “because the natural slopes, community  
5 open space, park, wildlife habitat, and ecological buffer contemplated in the  
6 master plan to offset more dense development in other refinement plan[s] has  
7 been lost.” Petition for Review 24. Petitioner argued below that:

8 “The proposed refinement plan is not compatible with adjoining  
9 land uses because the community open space, park, wildlife habitat,  
10 and ecological buffer were contemplated in the master plan to  
11 provide for these uses to offset more dense development elsewhere.  
12 SRC 530.030(e)(3).” Record 270.

13 The city council held:

14 “The proposed development of 16 larger lots with a residential  
15 density less than that of the surrounding Fairview Addition West  
16 subdivision and residential property located outside the FMU zone  
17 to the west, together with a prohibition on further division of the  
18 lots, increased tree preservation and provision of common open  
19 space and tails, ensures a development pattern that is less intense  
20 than that of the surrounding area and therefore compatible with  
21 adjoining lands. The proposed refinement plan satisfies SRC  
22 530.030(e)(3).” Record 562.

23 We agree with petitioner that the findings do not respond to petitioner’s argument  
24 that the refinement plan is not compatible with adjoining areas because the  
25 density in other areas relied upon the low level of development in The Woods  
26 shown in the FMP. Findings must respond to specific issues raised in the  
27 proceedings below concerning compliance with approval standards. *Norvell v.*

1 *Portland Metro. Area Local Government Boundary Com.*, 43 Or App 849, 853,  
2 604 P2d 896 (1979). The city council’s findings fail to do so.

3 This assignment of error is sustained.

4 **THIRD ASSIGNMENT OF ERROR**

5 **A. SRC 530.025**

6 SRC 530.025(b)(2) provides in relevant part:

7 “(2) A substantial change to the [FMP] includes, but is not limited  
8 to, one that:

9 “(A) Varies or changes a [FMP] policy;

10 “(B) Increases or decreases the number of proposed  
11 residential units per acre by more than 20 percent or  
12 exceeds the maximum number of dwelling units  
13 permitted within the FMU zone;

14 “(C) Changes designated buffers, perimeter landscaping, or  
15 significant natural resource areas delineated in the  
16 [FMP] that were established to adapt the FMU zone to  
17 specific site characteristics or mitigate development  
18 impacts on the site and surrounding area;

19 “(D) Varies the building height, FAR, lot coverage, or  
20 building setbacks by more than 20 percent of that  
21 delineated in the adopted [FMP];

22 “(E) Results in a significant change in the purpose, scope,  
23 main concepts, goals, policies, or general development  
24 guidelines of the [FMP];

25 “(F) Cumulatively results in a significant change in the  
26 purpose, scope, main concepts, goals, policies, or  
27 general development guidelines of the [FMP] as a  
28 consequence of more than one non-substantial change  
29 submitted concurrently; or

1                   “(G) Results in a significant change in pedestrian or  
2                   vehicular traffic circulation within the FMU zone or in  
3                   the surrounding area.” (Emphases added.)

4   Petitioner argues that city council misconstrued and made inadequate findings  
5   regarding SRC 530.025 because the city did not require amendment of the FMP.

6   With respect to SRC 530.025, the city council found in part:

7                   “The appellant’s appeal indicates that the applicant must first amend  
8                   the Fairview Plan, pursuant to SRC 530.025, due to the significant  
9                   changes to the plan included in the proposed development. It is  
10                  explained that because of the significant changes proposed with the  
11                  development which are inconsistent with the basic objectives of the  
12                  master plan, the applicant cannot implement the proposed  
13                  development until the master plan has been amended. The appellant  
14                  indicates that amendments are necessary in many instances,  
15                  including under SRC 530.025(b)(2), SRC 530.025(c), SRC  
16                  530.025(b)(2)(B), and SRC 530.025(b)(2)(F).

17                  “As identified in the Planning Commission’s July 26, 2019 decision,  
18                  the proposed refinement plan satisfies the applicable refinement  
19                  plan approval criteria under SRC 530.030(e) and therefore an  
20                  amendment to the Fairview Plan is not required prior to the approval  
21                  of the proposed refinement plan.” Record 560.

22   Petitioner’s third assignment of error includes five subassignments of error. We  
23   discussed the standards for minor and major amendments of the FMP in our  
24   resolution of the first assignment of error, and concluded that the text of the FMP  
25   amendment criteria in SRC 530.025 supported a conclusion that city council  
26   must evaluate the discussion in the FMP relating to natural resource protection  
27   and street and pedestrian connectivity. Given that the city council must adopt new  
28   findings concerning the consistency of the refinement plan and the FMP, and the  
29   refinement plan may be amended, it is generally premature for us to address the

1 question of whether the FMP must be amended based on changes to designated  
2 buffers, perimeter landscaping or significant natural resource areas (second  
3 subassignment of error), significant changes in purpose, scope, main concepts,  
4 goals, policies or general development guidelines (third and fourth  
5 subassignments of error) or significant changes to pedestrian or vehicle  
6 circulation (fifth subassignment of error.)

7 We will, however, address the first subassignment of error, because it is  
8 dispositive. SRC 530.025(b)(2)(B) provides that a major master plan amendment  
9 is required if the number of proposed residential units per acre (1) will be  
10 increased or decreased by more than 20 percent, or (2) exceeds the maximum  
11 number of dwelling units permitted within the FMU zone. Regarding the second  
12 part of SRC 530.025(b)(2)(B), the city council found that the FMP states that  
13 there is sufficient land to accommodate 2,000 residential units in the FMU and  
14 that the maximum number of residential units within the FMP is 2000. The 16  
15 residential lots with single-family dwellings and potentially accessory dwelling  
16 units will not result in the maximum 2,000 dwelling units being exceeded. Record  
17 560. The city council concluded that the refinement plan will not cause the FMU  
18 to exceed 2000 residences.

19 Regarding the first part of SRC 530.025(b)(2)(B), the city council found  
20 that refinement plans, and not the FMP, set the density standard:

21 “This is evidenced from the submittal requirements for refinement  
22 plans under SRC 530.030(d) which include, but are not limited to,  
23 ‘Detailed standards governing development within the refinement

1 plan area, such as performance standards and standards for  
2 development densities, building and accessory structure height,  
3 floor area and FAR, open space, lot area and lot coverage, parking,  
4 landscaping, and other site improvements.” Record 560 (boldface  
5 omitted).

6 SRC 530.050(b) sets forth the development standards for household living uses  
7 and activities. The dwelling unit density standard within the LI overlay area is a  
8 minimum of 5 dwelling units per acre and a maximum of 8 dwelling units per  
9 acre. The dwelling units per acre standard in the MI overlay is a minimum density  
10 of 7 dwelling units per acre and a maximum of 35 dwelling units per acre.  
11 Although SRC 530.050(b) sets forth residential densities in order to provide clear  
12 and objective standards for residential development within the FMU, the city  
13 council concluded that it was not the intent of the FMU zone to apply the  
14 residential densities in SRC 530.050 to all refinement plans with residential uses.  
15 The city council relied on the language of SRC 530.050 that provides:

16 “When uses and activities falling under household living are  
17 proposed within a refinement plan, such uses and activities shall be  
18 subject to either the development standards set forth in this section  
19 *or the development standards established in the refinement plan. If*  
20 *development standards for uses and activities falling under*  
21 *household living are established in a refinement plan, approval of*  
22 *such standards shall be reviewed and approved as ‘alternative*  
23 *approval criteria’ under ORS 197.307. Such standards shall apply*  
24 *in lieu of the standards set forth in this section and shall govern all*  
25 *development of uses and activities falling under household living*  
26 *within the refinement plan area.” (Emphasis added.)*

27 The city council concluded that the refinement plan proposed its own density  
28 standards and those apply in lieu of the density standards set out in SRC 530.050.

1 We agree with petitioner that the city council’s interpretation is  
2 inconsistent with the text of the code, and the second prong of SRC 530.025(2)(b)  
3 is not met. SRC 530.025(2)(b) refers to a change *to the FMP* in the form of an  
4 increase or decrease in the number of proposed dwelling units per acre (*i.e.*,  
5 density) of more than 20 percent. This necessarily requires a determination about  
6 whether the refinement plan proposes an increase or a decrease to the density  
7 established in the FMP. The city council applied the LI and MI zoning overlays  
8 to The Woods. As petitioner explains, as a result of the proposed project, density  
9 will change in the LI overlay area from 5 to 8 dwelling units per acre to .5 to 2  
10 dwelling units per acre, and in the MI overlay area from 7 to 35 dwelling units  
11 per acre to 1 to 3 dwelling units per acre. Petition for Review 28–29. This reflects  
12 a residential density reduction of more than 20 percent in The Woods. Under the  
13 city council’s interpretation of its code, the FMP would never need to be amended  
14 due to a reduction in density provided in a refinement plan because the refinement  
15 plan would always be allowed to set density without amending the FMP. Such a  
16 reading of the code is inconsistent with the instruction in SRC 110.080(d) and  
17 ORS 174.010 that where there are several related provisions, construction is, if  
18 possible, to be adopted as will give effect to all.

19 This subassignment of error is sustained.

20 **FOURTH ASSIGNMENT OF ERROR**

21 SRC 530.045(b) provides: “*Open space*. A minimum of 20 acres of land  
22 within the FMU zone shall be reserved as natural open space.” (Emphasis in

1 original.) The city council found that there was sufficient natural open space in  
2 the existing refinement plans and the areas not yet subject to a refinement plan.  
3 Petitioner argues that the city’s finding failed to distinguish between open space  
4 and natural open space, and that the finding was not supported by substantial  
5 evidence. In support of his position, petitioner argues that in the context of the  
6 Fairview Hills Refinement Plan, natural open space and open space were  
7 described as follows:

8       “Natural Open Space with wetlands and drainages. Native  
9       vegetation is encouraged within these areas.

10       Open Space includes multi-use path and trail areas where active and  
11       passive recreational activities are provided.” Record 1307  
12       (underscoring in original).

13 The city council found:

14       “As staff presented at the July 23, 2019, continued hearing, the  
15       amount of natural open space areas currently identified in existing  
16       approved refinement plans, together with those natural areas that  
17       will be required in conjunction with refinement plans for the  
18       remaining areas of the Fairview site, will ensure that a minimum of  
19       20 acres of natural open space area is provided within the FMU zone  
20       as required by this standard.” Record 26.

21 The record includes an exhibit that staff explained showed 21.88 acres of  
22 qualifying open space area outside The Woods, based on a presumption that trails  
23 are not deemed inconsistent with defining an area as natural open space. Audio  
24 Recording, City Council Meeting, Sept 9, 2019 at 2:32 (statement of city  
25 planner); Record 2099. The staff exhibit cited by respondents does not identify

1 the character of the open space areas identified on the exhibit. We agree with  
2 petitioner and conclude that the finding fails to explain the distinction between  
3 natural and open space and that there is not substantial evidence in the record that  
4 the required type of open space is preserved.

5 This assignment of error is sustained.

6 **FIFTH ASSIGNMENT OF ERROR**

7 Petitioner argues that the city council misconstrued SRC 250.005(2),  
8 adjustment approval. SRC 250.005(d)(2) provides in part that an adjustment may  
9 be approved if:

10 “(A) The purpose underlying the specific development standard  
11 proposed for adjustment is:

12 “(i) Clearly inapplicable to the proposed development; or

13 “(ii) Equally or better met by the proposed development.”

14 Although the Fairview Additions West refinement plan, approved in 2014  
15 adjacent to the subject property, states that The Woods would be developed by  
16 others, intervenor is the developer for both areas. Record 1210, 1241. When  
17 evaluating the requested adjustment, the city council considered The Woods to  
18 be integrated into Fairview Additions West. Record 26. The city council  
19 determined that the purpose of the 40 acres size standard is “to ensure that future  
20 detailed planning for development of the Fairview site occurs in a coordinated  
21 fashion involving land areas large enough to discourage a piecemeal approach.”  
22 Record 53. The city council concluded that a piecemeal approach is not a risk

1 because The Woods Fairview Addition West have a common developer and as  
2 designed, there is physical integration between The Woods and Fairview  
3 Addition West.

4 “The 14.07-acre property subject to the proposed refinement plan  
5 and this adjustment request is completely surrounded by the  
6 previously approved Fairview Addition West refinement plan.  
7 Within the Fairview Mixed-Use (FMU) zone all property included  
8 as part of the former Fairview Training Center site is intended to be  
9 included within a refinement plan. Because the subject property is  
10 entirely surrounded by land which is already included in a  
11 refinement plan, the only way for it to be included within a  
12 refinement plan, as envisioned and intended under the FMU zone, is  
13 for an adjustment to minimum required refinement plan size to be  
14 approved or for the Fairview Addition West refinement plan to be  
15 amended to include the subject property.” Record 53.

16 The city council recognized that intervenor could have amended the Fairview  
17 Addition West refinement plan to add the subject property, but decided instead  
18 to request the adjustment. The city council concluded that the two areas are in  
19 many ways integrated and apply the same principles, and concluded that the two  
20 areas considered together effectively “equally or better” meet the 40-acre  
21 requirement. SRC 250.005(d)(2)(A)(ii).

22 Petitioner argues that the city council wrongly concluded that the 40-acre  
23 development standard is “equally or better met” by the 14-acre development.  
24 Petitioner argues that the city council’s finding that the two refinement areas have  
25 the same underlying development principles and concepts and are physically

1 integrated is meaningless, given that the two areas must both meet the same FMP  
2 principles.

3 We agree with respondents that the city council could conclude, based on  
4 the evidence in the record, that the adjustment to allow a 14-acre refinement plan  
5 “equally or better meets” the 40-acre standard. As the city council explained, the  
6 40-acre standard is intended to avoid piecemeal development. It is true that both  
7 refinement areas must be consistent with the FMP. It is equally true, however,  
8 that common ownership and physically connected elements can avoid piecemeal  
9 development, and the city could reasonably conclude that the adjustment meets  
10 SRC 250.005(d).

11 This assignment of error is denied.

## 12 **DISPOSITION**

13 We will reverse a land use decision when the decision “violates a provision  
14 of applicable law and is prohibited as a matter of law.” OAR 661-010-0071(1)(c).  
15 We will remand a land use decision when the decision “improperly construes the  
16 applicable law, but is not prohibited as a matter of law.” OAR 661-010-  
17 0071(2)(d). We believe reversal is the appropriate remedy in this case. First, we  
18 sustained petitioner’s assignments of error that argued that the proposed  
19 refinement plan is inconsistent with the FMP. Compliance with the FMP  
20 “Respect the Landscape” and “Walk Every Day” principles and the FMP  
21 language that elaborates on those principles will require, at a minimum, more  
22 than insignificant changes to the existing application. *Richmond Neighbors v.*

1 *City of Portland*, 67 Or LUBA 115, 129 (2013). Second, and more importantly,  
2 we sustained petitioner's assignment of error that argued that an amendment to  
3 the FMP is required. Because an amendment to the FMP will be required in order  
4 for the city council to approve a refinement plan that proposes a reduction in  
5 residential density of more than 20 percent, the city's approval of intervenor's  
6 refinement plan without a prior or concurrent approved FMP amendment to allow  
7 a reduction in residential density of more than 20 percent is prohibited as a matter  
8 of law. We conclude that the appropriate disposition is reversal.

9 The city's decision is reversed.