

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

OCT 16 2 46 PM '81

OREGON ENVIRONMENTAL
COUNCIL, PORTLAND AUDUBON
SOCIETY, JOHN FREWING and
ELIZABETH FURSE,

Petitioners,

vs.

CITY COUNCIL OF THE
CITY OF PORTLAND, OREGON,

Respondent,

vs.

ROSS ISLAND SAND and
GRAVEL COMPANY,

Respondent.

LUBA No. 81-060

FINAL OPINION
AND ORDER

Appeal from the City of Portland.

John C. Platt, Portland, filed the Petition for Review and argued the cause on behalf of Petitioners.

Ruth Spetter, Portland, filed the brief and argued the cause on behalf of Respondent City of Portland.

Douglas M. Ragen, Richard A. Cantlin, Jr., Charles Bricken, Portland, filed the brief on behalf of Respondent Ross Island Sand and Gravel Company. With them on the brief were Miller, Nash, Yerke, Wiener & Hager. Douglas Ragen argued the cause on behalf of Respondent.

REYNOLDS, Chief Referee; COX, Referee; BAGG, Referee; participated in this decision.

AFFIRMED

10/16/81

You are entitled to judicial review of this Order.
Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

1 REYNOLDS, Chief Referee.

2 INTRODUCTION

3 Petitioners appeal the City of Portland's grant of a
4 conditional use permit (CU 106-79) to the Ross Island Sand &
5 Gravel Company (RISG) to enable RISG to remove gravel from the
6 upland area of Ross Island. Petitioners contend the city's
7 decision violates Statewide Goals 2, 5 and 15, and chapter
8 33.77 of the Portland City Code. Respondents contend the goal
9 issues are moot in view of LCDC's acknowledgment of the city's
10 comprehensive plan, and that in any event the city complied
11 with the goals. Respondents also contend no violation of the
12 city code occurred as alleged by petitioners. We affirm the
13 city's decision.

14 STATEMENT OF FACTS

15 This appeal involves a conditional use permit for gravel
16 extraction on Ross Island.¹ Ross Island is located within
17 the Willamette River and the City of Portland and has been the
18 site of gravel removal operations conducted by RISG since
19 1926. In 1977, a committee appointed by then Governor Robert
20 Straub developed a plan for the protection and management of
21 Ross Island. This plan was submitted to and approved by the
22 Division of State Lands. In the plan, RISG indicated its
23 desire to continue dredging and agreed to (1) maintain at least
24 an 80 foot wide berm to act as a buffer between excavation and
25 general river uses, (2) revegetate and maintain existing
26 vegetation, (3) restore the lagoon area, and (4) reclaim

1 area, acre for acre, according to the acres excavated.

2 In September of 1979, RISG applied to and received a permit
3 from the US Corp of Engineers to continue its dredging
4 activities on Ross Island. The management plan for the island
5 was used as a basis for granting the permit.

6 On October 1, 1979, RISG applied to the City of Portland
7 for a conditional use permit. The city's hearings officer,
8 following a hearing attended by petitioners and RISG, granted
9 the permit with conditions designed to insure berm protection,
10 revegetation, public access, screening, and protection for a
11 blue heron rookery on the island. Both petitioners and RISG
12 appealed the hearings officer's decision to the city planning
13 commission. The planning commission reviewed the management
14 plan and approved the permit for a six year period. The
15 planning commission's decision was appealed to the city council
16 by both petitioners and RISG.

17 In the summer of 1980, the city council held hearings and
18 approved the conditional use permit for continued gravel
19 operations on Ross Island. The council approved the permit for
20 a period of 35 years but subject to review for compliance with
21 the management plan every six years. The council ordered that
22 the hearings officer conduct additional hearings to determine
23 whether RISG had complied with certain conditions imposed by
24 the council. These conditions involved basically the
25 following: (1) adoption of a revegetation plan for excavated
26 areas; (2) accurate location of and a plan for buffering the

1 blue heron rookery; and (3) development of an annual report
2 form for RISG to submit to the city.

3 In the fall of 1980, the hearings officer held a hearing
4 for the purpose of determining whether the council's conditions
5 had been met. Petitioners objected particularly to the lack of
6 appropriate enforcement tools available to the city to ensure
7 RISG's compliance with the terms of the management plan, and
8 petitioners also objected to inadequate protection for the blue
9 heron rookery on the island. The hearings officer, however,
10 approved the detailed plans for revegetation of excavated
11 areas, protection of the heron rookery and RISG's annual report
12 form. He determined that RISG had fulfilled the required
13 conditions and imposed some additional conditions on RISG not
14 relevant to this appeal.

15 Petitioners appealed the hearings officer's decision to the
16 city council. Petitioners appeared before the city and raised
17 the issues of enforceability of the permit conditions, the need
18 to balance conflicting uses, protection of the blue heron
19 nests, the need for more complete inventories of the wildlife
20 and wildlife habitat on the island, and gravel availability.
21 The city council adopted findings that the permit complied with
22 all applicable statewide planning goals, with the Portland
23 Comprehensive Plan and the Portland Willamette Greenway Plan,
24 and granted the permit to RISG.

25 The city council (hereinafter city) found that Ross Island
26 is zoned M1 on which there is a Willamette Greenway Natural

1 Zone overlay for portions of the island within a certain
2 distance from the Willamette River. No aggregate extraction is
3 proposed within the area subject to the Natural Zone
4 overlay.² The city found the only part of the permit which
5 pertains to the Natural Zone has to do with planting trees,
6 shrubs and grasses for purposes of screening the interior of
7 the island and providing wildlife habitat. The city found that
8 within the area designated as a Natural Zone there was "no
9 intensification, change of use or development involved,
10 therefore, the permit requirements of the Natural Zone
11 [pertaining to development] do not apply."

12 The city found that the use was consistent with and subject
13 to the terms of the Ross Island Management Plan which was
14 incorporated by the city into the conditional use permit and
15 also made applicable by reason of the Willamette River Greenway
16 Plan. The city found:

17 "The long term management plan allows removal of
18 the sand and gravel at Ross Island, and balances that
19 important economic use with protection and
20 enhancement, scenic, recreational and natural values
21 by tying the rate of removal to successful
22 revegetation. The revegetation will be accomplished
23 by native and adapted species beneficial to wildlife
24 and will be monitored by the city on at least an
25 annual basis."

26 The city found that the decision was consistent with the
27 Willamette River Greenway Plan which has, as one of its stated
28 purposes, "to preserve those significant riparian environments
29 and wildlife habitats remaining within the city." The city
30 said:

1 "Granting of this conditional use is in keeping
2 with this policy because the blue heron rookery and
3 its environs are protected. In addition, each acre of
4 upland to be mined must be offset with one acre of
5 land successfully revegetated with species beneficial
6 to wildlife."

7 As set forth in the city's findings, the Ross Island
8 Management Plan is fairly specific in many areas with respect
9 to the scope of any gravel removal operation that may take
10 place on the island. The plan specifies the maintenance of
11 natural vegetation within an 80 foot buffer area between the
12 excavation and the river, establishes minimum standards for
13 depth, slopes and berms resulting from excavation, prohibits
14 excavation of uplands within 300 feet of the blue heron rookery
15 at all times and restricts operation in the lagoon within 300
16 feet of the rookery between February 1 and July 1.

17 The city also found that the conditional use permit would
18 comply with all applicable land use goals. Goals 2, 5 and 15
19 were addressed, among others. Under Goal 5, the city found
20 that conservation of open space and protection of natural and
21 scenic resources would be obtained because:

22 "Issuance of this permit will allow continued
23 mining of this site and will insure the future
24 availability of the aggregate at this site, the single
25 largest reserve of aggregate resource in Portland.
26 Natural and scenic resources will be protected by the
management plan provisions that require protection of
the blue heron rookery at the site, retention of an 80
foot vegetative screen around the perimeter of the
site, and reclamation and revegetation of mined land.

A similar finding was made with respect to Goal 15.

1 OPINION

2 Petitioners believe the conditional use permit violates
3 Goals 2, 5 and 15 because the Ross Island Management Plan does
4 not meet these goals requirements. Petitioners argue that the
5 city's decision violates Goal 2 because the decision "fails to
6 utilize appropriate planning procedures in designing a
7 management plan for...the Ross Island Group, an area of
8 significant importance to the city and the state because of its
9 high natural resource value and its conflicting uses."
10 Petitioners contend Goal 5 has been violated because the city
11 "failed to properly assess the nature of conflicting uses in
12 the Ross Island Group and failed to provide a plan which could
13 balance those conflicting uses." Petitioners contend the
14 decision fails to meet Goal 15's requirements "concerning
15 riparian wildlife protection."

16 The preliminary issue which must be decided in this appeal
17 is whether petitioners may challenge Portland's grant of a
18 conditional use permit on the basis that the decision violates
19 Goals 2, 5 and 15 in view of LCDC's acknowledgment of
20 Portland's comprehensive plan and implementing measures. In
21 summary, we conclude that LCDC has already reviewed the Ross
22 Island Management Plan as part of the acknowledgment process
23 and determined that the plan, as one of the city's implementing
24 measures, complies with the statewide planning goals including
25 Goals 2, 5 and 15. Petitioners cannot now, subsequent to that
26 acknowledgment, contend the Management Plan for Ross Island

1 does not adequately comply with goal requirements.

2 On April 16, 1981, shortly after the city's decision to
3 grant RISG the permit, DLCD staff completed and issued its
4 acknowledgment report and recommendation concerning compliance
5 of the city's comprehensive plan, implementing ordinances and
6 regulations with the statewide goals. The report also,
7 however, noted some technical deficiencies of the plan's
8 implementing ordinances concerning Goal 15 and "some areas
9 where Portland must improve its natural resources program to
10 ensure Goal 5 compliance." Nevertheless, this report
11 recommended that the city's plan be acknowledged by LCDC as in
12 compliance with all applicable goals.

13 Concerning Goal 5, the report noted that, generally
14 speaking, the city uses an open space designation in its plan
15 and four different "overlay" zoning designations in areas
16 identified by the city as having "open space values."³
17 According to the report, Ross Island is recognized by the city
18 as being both a significant natural area and an important
19 mineral and aggregate site. The report stated the following
20 concerning Ross Island.

21 "Aggregate extraction on Ross Island is to be
22 governed by the Ross Island Sand and Gravel Management
Plan." Report, p. 18.

23 "The Ross Island aggregate site is designated
24 Open Space on the plan map, and has a 'Natural Zone'
25 designation on the Willamette Greenway Plan Map. The
city's long-term intent is to acquire Ross Island as
part of the Greenway Acquisition Plan.

26

1 "According to the 'Material Removal and
2 Reclamation Program' approved by the city, aggregate
3 extraction is permitted by Ross Island Sand and Gravel
4 Company or a continuation of a non-conforming use
5 'until all reasonably available material has been
6 removed.' It is recognized in the program that Ross
7 and Hardtack Island have 'considerable value as
8 wildlife habitat' and that it is desirable to protect
9 scenic and recreational qualities of the island to the
10 maximum extent practicable. The program includes a
11 commitment to restore the island 'in accordance with
12 the Ross Island Revegetation Plan.'" Report, p. 20.

13 The report also mentions six stone reserve sites which are
14 owned by the city, designated for Open Space use on the plan
15 map, and where zoning makes aggregate extraction possible as a
16 conditional use.

17 In analyzing the city's approach to the aggregate sites
18 under Goal 5, the report stated the following:

19 "Analysis of Portland's Approach to Aggregate
20 Sites

21 "Portland has resolved conflicts between
22 aggregate extraction, and the fish and wildlife
23 habitat and scenic values associated with Ross
24 Island. Ross Island is the major aggregate resource
25 site remaining in the City.

26 "However, Portland has not evaluated the quality
and quantity of aggregate resources identified in the
six 'stone reserve' sites in Forest Park and southwest
Portland, nor are there any adopted policies
concerning the long-term use of these sites.

"Although aggregate extraction is a conditional
use in the underlying zones applicable to these sites,
the Open Space plan designation does not allow for any
new use other than open space/recreation. In a sense,
the conflict has been resolved: a plan change would
be required prior to aggregate extraction in Open
Space areas. To avoid possible misunderstanding, the
City must evaluate the quality and quantity of
identified aggregate sites, and adopt and implement
policy clarifying its position on their future
exploitation." Report, pp. 20-21

1 The staff report concluded that the city's plan and
2 implementing ordinances complied with Goal 5 but noted "there
3 are, however, areas where Portland must improve its natural
4 resources program to ensure Goal 5 compliance." The report
5 then listed the following three update items to be completed by
6 the city:

7 "1. Amend the Farm and Forest zone to include siting
8 standards, which require the consideration of
9 fish and wildlife habitat in the development
10 process, and which ensure the long-term retention
11 of natural vegetation.

12 "2. Amend Section 33.106 governing the conditional
13 use process to include specific standards for
14 resolving conflicts between:

15 "(a) recreational improvements and resource
16 preservation values; and

17 "(b) aggregate extraction and open
18 space/recreational values;

19 in areas designated for Open Space use on the
20 plan map.

21 "3. Evaluate the quality and quantity of identified
22 'stone reserve' sites, and adopt policy
23 clarifying the City's position with respect to
24 the exploitation of these sites." Report, p. 23.

25 The report suggested that until the update items were completed
26 Goal 5 should continue to apply. The report also noted that
the city had committed itself to complete these update items in
Resolution 32909.⁴

Concerning Goal 15, the report recited several policies
adopted by the city designed to ensure protection and
enhancement of greenway values. The city, according to the
report:

1 "...has chosen the 'Design Plan' approach to
2 comply with the implementing measures requirement of
3 Goal 15. Any development, change of use or
4 intensification of use within the Portland Greenway
5 Boundary requires Greenway River Approval from the
6 Planning Director.***" p. 92.

7 The report noted the city has adopted four overlay zones "each
8 containing standards for Greenway River approval." The four
9 overlay zones are:

- 10 1. Willamette Greenway Industrial
- 11 2. Willamette Greenway Scenic Development
- 12 3. Willamette Greenway Scenic Recreational
- 13 4. Willamette Greenway Natural

14 and contain for each "standards that reflect applicable use
15 management considerations contained in Section C.3. of the goal
16 (e.g., regarding public access, setback, fish and wildlife
17 habitat and vegetative fringe protection, scenic views
18 preservation)." Report, p. 92.

19 Concerning specifically Ross Island, the report stated the
20 following:

21 "The City of Portland has adopted a 'Material
22 Removal and Reclamation Program,' including a 'Ross
23 Island Revegetation Plan' for lands owned by the Ross
24 Island Sand & Gravel Company within the Willamette
25 Greenway. The program sets forth standards for
26 removal of the sand and gravel resources remaining on
27 the site, protection of important wildlife habitat
28 areas such as a Great Blue Heron Rookery, and site
29 reclamation. Provisions in the program are consistent
30 with the Goal requirements (Section C.3.i) to design
31 local regulations 'to minimize adverse effects on
32 water quality, fish and wildlife, vegetation, bank
33 stabilization, streamflow, visual quality, noise,
34 safety and to guarantee necessary reclamation.' The
35 program is intended to govern on-site activities for
36 the next 30 to 35 years." Report, p. 94.

37 The report concluded that the city's plan and implementing

1 ordinances comply with Goal 15. As with Goal 5, however, the
2 report noted the necessity for the city to address three
3 "update" items. These update items were deemed necessary to
4 resolve "three technical deficiencies related to exceptions
5 allowed in Willamette River Greenway Overlay Zones," Report,
6 p. 95, and involve amendments to the overlay zoning
7 designations of industrial, scenic development and scenic
8 recreational.

9 On May 15, 1981, LCDC acknowledged the city's comprehensive
10 plan and implementing measures to be in compliance with the
11 statewide goals. In doing so, LCDC adopted the staff report as
12 its findings in support of acknowledgment. The acknowledgment
13 order specified the following:

14 "Statewide Planning Goals 5 and 15 will continue
15 to apply to land conservation and development actions
16 within the Willamette River Greenway, the Farm and
17 Forest and Open Space plan designations, and
18 identified fish and wildlife habitat and aggregate
resource areas, until 'update items' identified in the
May 1, 1981 Acknowledgment Report are satisfactorily
resolved."

19 It is clear from the acknowledgment report, prepared by the
20 staff of the Department of Land Conservation and Development
21 and used by LCDC as the factual basis for its acknowledgment
22 order, that the Ross Island Management Plan was reviewed by the
23 Department and LCDC and considered to be one of the city's
24 implementing measures subject to acknowledgment under ORS
25 197.251. The Department staff uncovered no Goal 2 violations
26 in the adoption of the Ross Island Management Plan. Had

1 petitioners chosen to, they could have participated in the
2 acknowledgment process and argued before LCDC that the Ross
3 Island Management Plan violated Goal 2. For reasons expressed
4 infra, petitioners' challenge now, after acknowledgment, is
5 simply too late.

6 Whether LCDC's acknowledgment moots petitioners' goal
7 challenge to the Ross Island Management Plan is more difficult
8 to determine. LCDC's acknowledgment order (read in connection
9 with the acknowledgment report) is somewhat ambiguous as to
10 whether LCDC intended for Goals 5 and 15 to continue to apply
11 post acknowledgment to all areas within the Willamette River
12 Greenway, including Ross Island. Some language in the order as
13 well as in the staff acknowledgment report, viewed in
14 isolation, is certainly susceptible to the interpretation that
15 Goals 5 and 15 should apply within the entire Greenway area.
16 We believe, however, that when read as a whole, the intent of
17 LCDC was that Goals 5 and 15 were not to continue to apply to
18 Ross Island because of the existence of the Ross Island
19 Management Plan. No findings in the staff report even suggest
20 any fault with the Ross Island Management Plan in terms of its
21 ability to further the policies of Goals 5 and 15. In the
22 analysis of Goal 5, the acknowledgment report stated that the
23 Ross Island Management Plan resolved conflicts between
24 aggregate extraction and the fish and wildlife habitat and
25 scenic values associated with Ross Island. In the analysis of
26 Goal 15, the report stated that provisions in the Ross Island

1 Management Plan were consistent with the goal's objectives of
2 minimizing adverse effects on water quality, fish and wildlife,
3 vegetation, bank stabilization, stream flow, visual quality,
4 noise, safety and guaranteeing necessary reclamation. In our
5 view, the foregoing constitute statements by LCDC that the Ross
6 Island Management Plan is consistent with the intent and
7 purpose of Goals 5 and 15.

8 The "update items" mentioned in the acknowledgment report
9 do not include items having to do with Ross Island. Under Goal
10 5, Update Items 1 and 3 clearly do not involve Ross Island
11 because Ross Island is not within a "farm and forest zone" to
12 which Update Item 1 refers nor is it an identified "stone
13 reserve" site, referred to in Update Item 3. Update Item 2
14 requires the city to amend Section 33.106 of its code governing
15 its conditional use process to include specific standards for
16 resolving conflicts between recreational improvements and
17 resource preservation values and aggregate extraction and open
18 space/recreational values in areas designated for open space
19 use on the plan map. While this update item might, if viewed
20 in a vacuum, be read to include Ross Island, it should not be
21 so read in view of the acknowledgment report's statement that
22 the city has already resolved conflicts between aggregate
23 extraction, the fish and wildlife habitat and scenic values of
24 Ross Island.

25 The update items under Goal 15 also do not apply to Ross
26 Island. The update items under Goal 15 require (1) adoption of

1 conditional use standards for reviewing exemption applications
2 in the industrial, scenic development and scenic recreational
3 zones, and (2) amending provisions within the scenic
4 recreational and scenic development overlay zones. None of
5 those update items affects the Ross Island Management Plan as
6 it is applied to the conditional use permit in this case. An
7 exemption has not been sought in this case from any
8 requirements of the industrial, scenic development and scenic
9 recreational zones, and no provisions of the scenic development
10 and scenic recreational zones apply. The only overlay zone
11 which affects Ross Island is the Willamette Greenway Natural
12 Zone, a zone not addressed by the report's Goal 15 update items.

13 All of the arguments which petitioners have raised in this
14 appeal concerning the adequacy of the Ross Island Management
15 Plan to meet the objectives of Goals 5 and 15 could have been
16 raised in the acknowledgment review process before LCDC. As
17 the Court of Appeals recently held in the case of Mas Fujimoto
18 v. Land Use Board of Appeals, ___ Or App ___, ___ P2d ___ (CA
19 17625, 1981):

20 "LUBA has no appellate function from LCDC, and it
21 has no advisory function to LCDC except in the narrow
22 context of Section 6 of the 1979 Act. Whether this
23 proceeding was rendered 'moot' by the acknowledgment
24 or whether LUBA was simply ousted of jurisdiction is,
in this instance, an irrelevant matter of semantics.
It simply had no function to perform. The proceeding
was properly dismissed."

25 Our inability to review the Ross Island Management Plan for
26 compliance with the statewide goals is governed by the

1 foregoing statement of the Court of Appeals. See also: Realty
2 Investment v. City of Gresham, 2 Or LUBA 153 (1981). In view
3 of LCDC's review and approval of the Ross Island Management
4 Plan we have no further authority to act with respect to
5 petitioners' goal allegations.

6 The only other issue in this appeal⁵ is whether the
7 city's decision violates the provisions of the city's Natural
8 Zone, the overlay zone covering a portion of Ross Island.
9 While it is not entirely clear, we gather from the record and
10 the briefs submitted in this case that the Natural Overlay Zone
11 covers only a portion of Ross Island and that no aggregate
12 extraction is proposed in any area covered by the Natural Zone
13 designation. The provisions of the Natural Zone are contained
14 in Portland's City Code, Sections 33.77.110 to 33.77.112. A
15 conditional use permit is required for any "development" within
16 this zone with certain exceptions for intensification of public
17 utility transmission facilities and railroad facilities
18 existing on the date of adoption of the ordinance. Section
19 33.77.112(A). Section 33.77.112 also sets forth guidelines to
20 be used in the granting of a conditional use permit.
21 Development or use which will be demonstrably detrimental to
22 the natural environment, wildlife or wildlife habitat is not
23 allowed within the Natural Zone. Development which
24 demonstrably supports the natural environment, wildlife and
25 wildlife habitat or allows for its viewing and interpretation
26 is allowed on a limited basis. Any applicant for a conditional

1 use must submit a statement assessing the construction and long
2 range impacts of any proposed development on the natural
3 environment, wildlife and wildlife habitat. Public access
4 requirements as outlined in the Greenway plan are to be
5 provided "in such a way as to disturb the natural environment
6 and wildlife habitat as little as possible." Finally, any
7 development within the Natural Zone is required to take all
8 practical measures to mitigate impacts on scenic and natural
9 values of the area.

10 Petitioners contend the city failed to provide an adequate
11 inventory of the wildlife and wildlife habitat with the result
12 the city was unable to determine whether any development on
13 Ross Island within the Natural Zone would demonstrably support
14 or be demonstrably detrimental to the natural environment,
15 wildlife or wildlife habitat. In addition, petitioners assert
16 the city failed to consider whether the public access allowed
17 for in the conditional use permit would disturb the natural
18 environment and wildlife habitat as little as possible, a
19 guideline to be used in the granting of a conditional use
20 permit under Section 33.77.112.

21 In its findings approving the conditional use permit, the
22 city concluded that the provisions of the Natural Zone were not
23 applicable to the conditional use permit because the permit
24 authorized no development within the Natural Zone as defined in
25 the Portland City Code. As found by the city:

26

1 "The request includes, for the area designated
2 Willamette Greenway Natural, only planting of trees,
3 shrubs and grasses for purposes of screening the
4 interior of the Island and providing wildlife
5 habitat. No intensification, change of use or
6 development is involved, therefore, the permit
7 requirements of the Natural Zone do not apply."⁶

8 Apparently, the City of Portland construed the provisions
9 of Section 33.77.112 and the necessity for consideration of the
10 guidelines referred to therein as only being applicable to the
11 granting of the conditional use permit if an "intensification,
12 change of use or development" were involved within the Natural
13 Zone. Petitioners do not challenge this interpretation of the
14 city's ordinance. Petitioners also do not challenge directly
15 the city's finding that "only planting of trees, shrubs and
16 grasses for purposes of screening the interior of the Island
17 and providing wildlife habitat" will occur within the Natural
18 Zone. The city made no finding concerning public access, yet
19 petitioners do not indicate what access is provided into the
20 Natural Zone by the conditional use permit or how it is
21 whatever access that may be provided might impinge on the
22 stated policy of Section 33.77.112(B) which is "to disturb the
23 natural environment and wildlife habitat as little as possible."

24 Petitioners have suggested that the revegetation plan for
25 Ross Island authorizes other than merely planting of trees and
26 shrubs in the berm area overlain by a Natural Zone
27 designation.⁷ Petitioners state:

28 "The approved Revegetation Plan for Ross Island
29 specifies in Phase II that the 'area of past breach in
30 dike to receive treatment because of "open" conditions

1 on dike slope.' Phase IV of the Revegetation Plan
2 specifies that the 'bank grade ... be similar to
3 existing grade on Hardtack Island' and indicates rip
rapping and revegetation for the area along the berm
that is overlain by a Natural Zone designation."

4 To the extent petitioners may be arguing the city erred
5 because it failed to determine that "treatment" and "rip
6 rapping" equalled "development" subject to the conditions of
7 the Natural Zone, we disagree. Concerning Phase II of the
8 Revegetation Plan, the plan does not just specify "treatment"
9 (which could be broad enough to include other than vegetative
10 treatment) but specifies "the area of past breach in dike to
11 receive revegetation treatment * * *" (emphasis added). We
12 find, therefore, that the Revegetation Plan qualifies the kind
13 of treatment for the dike slope such that the treatment does
14 not equal "development" defined in the city's code.

15 We have reviewed the Revegetation Plan for Phase IV and can
16 find nothing which "indicates rip rapping * * * for the area
17 along the berm that is overlain by a Natural Zone designation,"
18 as asserted by petitioners. First, the Revegetation Plan does
19 not "indicate" rip rapping anywhere on Ross Island as far as we
20 can tell. Second, the Revegetation Plan does not specify where
21 the Natural Zone applies on the island. The only place we have
22 been able to find any mention of rip rapping at all is in the
23 Management Plan for Ross Island, Condition 7 of which states:

24 "COMPANY will not excavate any uplands within 300 feet
25 of the Blue Heron Rookery and will not operate in the
lagoon within 300 feet of the Blue Heron Rookery
26 between February 1 and July 1. COMPANY will, by
filling or rip-rapping, establish stable banks in this

1 area if more than 10 horizontal feet of the existing
2 bank is lost by slumping or sliding." (emphasis added).

3 We do not know from this record whether "in this area"
4 means an area covered by the Natural Zone such that any
5 rip-rapping would have to meet the conditions for development
6 in that zone. Moreover, even if "in this area" did include
7 land located within the Natural Zone, we do not believe
8 Condition 7 of the Management Plan necessarily authorizes
9 rip-rapping by RISG without the necessity of RISG first
10 applying for a rip-rapping permit and having the permit be
11 scrutinized under the Natural Zone requirements. If such an
12 interpretation of Condition 7 will prevent it from violating
13 the city's code, we believe we have a duty to interpret the
14 condition this way rather than to interpret it in such a manner
15 as to render the condition and perhaps the entire permit in
16 this case in violation of the city's code.

17 Based on the petitioners' assertions with respect to the
18 city's compliance with Section 33.77.112 of its code, we are
19 unable to find any fault with the city's decision. The city
20 concluded that no development or intensification of use would
21 take place within the Natural Zone. We do not see where the
22 city has authorized, by this conditional use permit, any
23 "development" within the Natural Zone as that term is defined
24 in the city code. Moreover, we do not, and the city apparently
25 did not, view the conditional use permit as granting the public
26 a right of access to Ross Island. The only aspect of public

1 access addressed by the conditional use permit is a limitation
2 placed on the ability of Ross Island Sand and Gravel to
3 restrict whatever right of access the public already might have
4 to the island. We can see nothing in Section 33.77.112
5 pertaining to public access that requires the city in granting
6 this conditional use permit to restrict the public's access to
7 Ross Island in such a way "as to disturb the natural
8 environment and wildlife habitat as little as possible."

9 STANDING

10 Respondent City of Portland attacks petitioners' standing
11 to appeal. The city says standing has not been shown by
12 petitioners because sufficient facts have not been alleged
13 showing how the individual petitioners or the members of
14 petitioner Oregon Environmental Council or petitioner Portland
15 Audubon Society have been adversely affected or aggrieved by
16 the city's decision.

17 It is undisputed that petitioners appeared below and
18 appealed the decision of the hearings officer to the Portland
19 City Council. As we stated in 1000 Friends of Oregon v. Benton
20 County, 2 Or LUBA 324 (1981), one who appeals a decision to the
21 governing body is entitled to notice and hearing prior to the
22 decision of the governing body. See also: Clemens v. Lane
23 County, ___ Or LUBA ____ (LUBA No. 81-056, 1981). By appealing
24 the hearings officer's decision to the city council,
25 petitioners established their right to notice and hearing prior
26 to the city council's decision and, therefore, satisfied the

1 standing requirements in Oregon Laws 1979, ch 772, sec 4(3),
2 regardless of whether petitioners also satisfactory alleged in
3 their petition for review that their interests were adversely
4 affected or they were aggrieved by the city's decision.

5 CONCLUSION

6 For the foregoing reasons, we affirm the decision of the
7 City of Portland granting a conditional use permit for
8 aggregate extraction on Ross Island.

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FOOTNOTES

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4 As referred to in this opinion, "Ross Island" includes what
5 is formally known as Hardtack Island, joined to Ross Island by
6 a dike.

7 2

8 Aggregate extraction within the M1 zone requires a
9 conditional use permit. Compliance with the requirements set
10 forth in the city's code for issuance of a conditional use
11 permit within an M1 zone is not at issue in this appeal.

12 3

13 Open Space values, according to the report, include such
14 values as "fish and wildlife habitats, significant natural
15 areas, scenic viewpoints, wetlands and watersheds and
16 recreational trails associated with the city's stream corridors
17 and park system." Also included are mineral and aggregate
18 sites as well as historic sites, structures and districts in
19 the city.

20 4

21 Resolution 32.909 provides, in pertinent part, as follows:

22 "A Resolution stating the intent of the City of
23 Portland to comply with Land Conservation and Development
24 Commission Goal requirements regarding State acknowledgment
25 of the Portland Comprehensive Plan.***

26 "***NOW, THEREFORE, BE IT RESOLVED BY THE CITY OF
27 PORTLAND:***

28 "***The City will continue to apply State Goals 5 and
29 15 to fish and wildlife habitat areas in the Comprehensive
30 Plan Open Space designation, in potential aggregate
31 resource areas and in the Willamette River Greenway until
32 compliance issues are satisfactorily resolved.***"

33 5

34 In their summary of argument section, petitioners assert
35 that the city's Greenway Plan was violated because the Ross
36 Island Management Plan does not adequately protect riparian
37 wildlife. However, we have been unable to find any argument in
38 the body of the petition for review setting forth how it is the

1 Ross Island Management Plan does in fact violate the Willamette
2 Greenway Plan.

3 6

4 Portland City Code Section 33.77.040 quoted in the
5 city's findings provides as follows:

6 "(1) Change of 'use' means making a different use of
7 the land or water than existed on the effective date of
8 this ordinance. It includes a change...which substantially
9 alters or affects the land or water.

10 "(2) 'Development' means the act, process or result
11 of developing.

12 "(3) 'Develop' means to construct or alter a
13 structure, to conduct a mining operation, to make a
14 physical change in the use or appearance of land, to divide
15 land into parcels, or create or terminate rights of access.

16 "(7) 'Intensification' means any additions which
17 increase or expand the area or amount of an existing use or
18 the level of activity."

19 7

20 Compliance with the terms of the Revegetation Plan is
21 mandated in the Ross Island Management Plan, Condition 5 of
22 which provides:

23 "COMPANY will revegetate the reclaimed lands in
24 accordance with the Ross Island Revegetation Plan * *
25 * *"