

LAND USE
BOARD OF APPEALS

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

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FRED CONSTANT, ED and JOAN)
HART, CARL P. NELSON, GEORGE)
MACKIN, CLARA OWENS, CAROLYN)
R. and RUSSELL JONES, DONALD)
PINSON and SAMUEL E. TRUEBLOOD,)
Petitioners,)
v.)
CITY OF LAKE OSWEGO,)
Respondent.)

LUBA NO. 81-130

FINAL OPINION
AND ORDER

Appeal from City of Lake Oswego.

Edward J. Sullivan, Portland, filed a petition for review and argued the cause for petitioners. With him on the brief were O'Donnell, Sullivan & Ramis.

James M. Coleman, Lake Oswego, filed a brief and argued the cause for respondent.

Cox, Referee; Reynolds, Chief Referee; Bagg, Referee; participated in the decision.

Affirmed in part, remanded in part. 5/28/82

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 COX, Referee.

2 NATURE OF PROCEEDING

3 Petitioners seek review of respondent's Ordinance No. 1815
4 adopted November 17, 1981. Ordinance No. 1815 rezones certain
5 property from R-20 (a Clackamas County zone which was on the
6 property from the time it had been annexed to Lake Oswego) to
7 City Residential R-7.5. The property is generally located
8 south and east of Burnham Road, east of Highway 43 in the City
9 of Lake Oswego.

10 ALLEGATIONS OF ERROR

11 Petitioners set forth four assignments of error as follows:

- 12 1. "There are no substantive criteria governing the
13 subject rezoning in the Lake Oswego Development
14 Ordinance, in violation of ORS 227.173(1) and
15 Statewide Planning Goal 2."
- 16 2. "The challenged ordinance is based upon an order
17 which does not comply with ORS 227.173(2)."
- 18 3. "The findings made by the council do not
19 sufficiently demonstrate compliance with
20 applicable state-wide planning goals, in
21 violation of Goal 2, ORS 197.175(1) and (2)(c),
22 and ORS 227.173(2)."
- 23 4. "The city erred in refusing petitioners the right
24 to rebuttal in violation of the due process
25 clause of the Fourteenth Amendment to the United
26 States Constitution and Section 6(A)(1)(d) of
Resolution R-80-24 of the Lake Oswego City
Council."

23 FACTS

24 In June, 1981, Oregon Management Group and W. A. and E. S.
25 Headlee applied for a zone change on the subject property. The
26 Lake Oswego Planning Commission held a public hearing on

1 this request on July 13, 1981. The planning commission
2 recommended approval of the zone change request based upon
3 adopted findings and conclusions. The oral and written
4 testimony of the opponents attempted to focus the attention of
5 the planning commission on what the opponents (petitioners
6 herein) felt were the relevant issues.

7 Petitioners then requested the city council review the
8 planning commission recommendation. In preparation for the
9 review, the city council received a council report dated August
10 10, 1981, which included exhibits, minutes of the July 13, 1981
11 planning commission meeting, a copy of the planning commission
12 recommendation and two planning staff prepared documents dated
13 August 10, 1981. On October 6, 1981, the council heard oral
14 testimony from proponents and opponents and received a planning
15 staff report. Upon closing the hearing, the city council voted
16 to adopt the planning commission's July 13, 1981
17 recommendation. The council on November 17, 1981 adopted
18 findings, conclusions and an order as well as an implementing
19 ordinance.

20 DECISION

21 Assignment of Error No. 1

22 Petitioners first assert that there are no substantive
23 criteria governing the subject rezoning in the "Lake Oswego
24 development ordinance," in violation of ORS 227.173(1) and
25 Statewide Planning Goal 2. The main thrust of petitioners'
26 argument under this assignment of error relates to the

1 applicability of ORS 227.173(1) to the decision under review.
2 As an adjunct of petitioners' arguments regarding ORS
3 227.173(1) they also allege Statewide Planning Goal 2 requires
4 that implementing measures must be consistent with and adequate
5 to carry out local comprehensive plans. They reason ORS
6 227.173(1) has not been followed and since there are no
7 implementing measures consistent with or adequate to carry out
8 local comprehensive plans, then Goal 2 has been violated. The
9 City of Lake Oswego responds by arguing ORS 227.173(1) does not
10 apply to the subject zone change proceeding and that Goal 2
11 does not impose the requirements petitioners allege.

12 ORS 227.173(1) states

13 "Basis for decision on permit applications; statement
14 of reasons for grant or denial. (1) Approval or
15 denial of a discretionary permit application shall be
16 based on standards and criteria, which shall be set
17 forth in the development ordinance and which shall
18 relate approval or denial of a discretionary permit
19 application to the development ordinance and to the
20 comprehensive plan for the area in which the
21 development would occur and to the development
22 ordinance and comprehensive plan for the city as a
23 whole." (Emphasis added).

19 ORS 227.160 defines "permit" as:

20 "discretionary approval of a proposed development of
21 land, under ORS 227.215 or city legislation or
22 regulation."

22 Development as defined under ORS 227.215(1) means

23 "a building or mining operation, making a material
24 change in the use or appearance of a structure or
25 land, dividing land into two or more parcels,
26 including partitions and subdivisions as provided in
ORS 92.010 to 92.285, and creating or terminating a
right of access."

1 Pointing to the terms of ORS 227.173(1) and the definitions
2 used therein, respondent takes the position the statute does
3 not apply to this request. The city argues that a zone change
4 request is not a permit application and the term "development"
5 as set forth above in ORS 227.215(1) does not include zone
6 changes. Respondent supports this argument not only by its
7 position that an objective reading of ORS 227.173 and the
8 definitions contained thereunder does not support the position
9 taken by petitioners, it also points to two other factors.
10 First it argues that throughout ORS 227.160 to 227.180, a
11 series of provisions grouped under the heading "Planning and
12 Zoning Hearings and Review," the term "zone change" appears in
13 addition to the term "permit," and it is clear from its
14 separate use the legislature intended a "zone change" to be
15 distinguished from a "permit." For example, ORS 227.165, in
16 describing the duties and powers of a hearings officer states
17 "such an officer shall conduct hearings on applications for
18 such classes of permits and zone changes as the council
19 designates." (Emphasis added). Again, ORS 227.170 requires
20 the city council to prescribe procedures for hearings on
21 "permits" and "zone changes." Furthermore, ORS 227.175(1) and
22 227.180(1)(b) and 227.180(2) use the descriptive terms "permit"
23 and "zone change." The term "zone change" does not appear in
24 any subsection of ORS 227.173. From this the respondent
25 reasons that a plain reading of these provisions indicates the
26 legislature specifically chose not to impose the requirements

1 of 227.173(1) on zone change applications. Respondents argue
2 if the legislature had chosen to impose the requirements of ORS
3 227.173 on zone changes, it would have either defined permit to
4 include a zone change or have used both terms in ORS 227.173 as
5 it did in other portions of ORS 227.

6 To further bolster its position, the City of Lake Oswego
7 points to its "development ordinance" contained in Lake Oswego
8 Code Chapter 49. It is this ordinance, respondent argues, that
9 is contemplated and authorized by ORS 227.215. Under Chapter
10 49 of the code, any proposal to develop a parcel of land in
11 Lake Oswego will receive review unless specifically exempt. It
12 is not a coincidence, argues respondent, that the definition of
13 the term "development" which applies to the Lake Oswego Code
14 Chapter 49¹ is very similar to the definition of that term in
15 ORS 227.215(1)² as well as to the definition of the term
16 "develop" as adopted as a part of the Statewide Planning
17 Goals.³ Under Chapter 49 any development which could occur
18 on the subject land would first require either a major or minor
19 development permit argues the city.⁴ Respondent points out
20 that a zone change is not defined as a "development" in chapter
21 49 of its code but rather the zoning code provisions are found
22 in Lake Oswego Code Chapters 50-53. Chapters 50-53 were
23 originally adopted in 1961 and have been amended from time to
24 time. It is those chapters, argues respondent that are
25 applicable to this action. Respondent acknowledges that the
26 city's comprehensive plan recognizes the need to adopt a new

1 zoning code in order to fully implement the plan. We agree
2 with respondent's position regarding ORS 227.173(1). After
3 analyzing the provisions of that statute and the definitions
4 used therein, it is apparent to us zone changes were not
5 intended to be governed by the dictates of that statute.

6 With reference to the petitioners' argument that Goal 2 has
7 been violated, their position is apparently based on the
8 portion of Statewide Goal 2 which states:

9 "The plans, supporting documents and implementation of
10 ordinances shall be filed in the public office or
11 other place easily assessible to the public. The plan
12 shall be the basis for specific implementation
13 measures. These measures shall be consistent with and
14 adequate to carry out the plans." (Emphasis added).

15 On this issue we also agree with the Respondent City of Lake
16 Oswego. Petitioners rely on Lake Oswego Code Chapter 50 for
17 their argument that there are insufficient implementation
18 measures existing to carry out the comprehensive plan.
19 Specifically, petitioners point to LOC 50.610 to 50.650 and
20 argue those provisions can not be said to be adequate to
21 carry out the Lake Oswego Comprehensive Plan as required by
22 Statewide Planning Goal 2. Petitioners position is not
23 convincing. The sections referred to by petitioners set
24 forth procedural requirements and the information
25 necessary to process a zone change request. Lake Oswego
26 Chapter 50 is not the entire zoning code which will
implement the Lake Oswego Comprehensive Plan. The zoning
code in effect at the time of this decision was adopted

1 originally in 1961 and has been amended thereafter. The city's
2 comprehensive plan was adopted in 1979 and the zone change
3 approved by the action under review brings the city's zoning on
4 the property into general compliance with the comprehensive
5 plan map designation. While the plan recognizes the need for a
6 new zoning code and directs that one be prepared, there is
7 nothing in Goal 2 which prevents the city from considering zone
8 changes prior to the time the new zoning code is adopted. The
9 primary error the petitioners seem to have made in developing
10 this argument is that they consider Chapter 50 to be the city's
11 "development ordinance" which we find that it is not. See
12 discussion supra. Consequently, we find petitioners' argument
13 relating to Statewide Goal 2 under this assignment of error to
14 also be unconvincing and deny their assignment of error.

15 Assignment of Error No. 2

16 Petitioners next assert that the challenged ordinance is
17 based upon an order which does not comply with ORS 227.173(2).
18 ORS 227.173(2) provides:

19 "Approval or denial of a permit application shall be
20 based upon and accompanied by a brief statement that
21 explains the criteria and standards considered
22 relevant to the decision, states the facts relied upon
23 in rendering the decision and explains the
24 justification for the decision based on the criteria,
25 standards and facts set forth." (Emphasis added).

26 The thrust of petitioners' second assignment of error
relates to their belief that ORS 227.173(2) is applicable to a
zone change proceeding. Respondent argues, however, ORS
227.173(2) does not apply to the decision being appealed and,

1 therefore, the assignment of error should be denied. We agree
2 with the respondent's position for the reasons expressed in our
3 discussion of petitioners' first assignment of error. ORS
4 227.173(2) does not govern zone changes. Petitioners' second
5 assignment of error is denied.

6 Assignment of Error No. 3

7 Petitioners next assert that the findings made by the
8 council do not sufficiently demonstrate compliance with
9 applicable statewide planning goals, in violation of Goal 2,
10 ORS 197.175(1) and (2)(c), and ORS 227.173(2). Petitioners'
11 argument based upon ORS 227.173(2) has already been denied in
12 the second assignment of error. The root of petitioners'
13 remaining arguments under this third assignment of error is ORS
14 197.175(2)(c) which states:

15 "(2) Pursuant to ORS 197.005 to 197.430 and
16 197.605 to 197.650, each city and county in this state
shall:

17 * * *

18 "(c) except as provided in ORS 197.605(6), if its
19 comprehensive plan and land use regulations have not
20 been acknowledged by the commission, make land use
decisions in compliance with the goals; and"

21 Petitioners basically argue the city failed to comply with the
22 obligation it has to apply the statewide planning goals to this
23 zone change since its comprehensive plan has not been
24 acknowledged. Petitioners specifically allege the City of Lake
25 Oswego violated Goals 2, 4, 5, 7, 11 and 12.

26 Citing this Board's holding in Gustafson v. City of Grants

1 Pass, 3 Or LUBA 189 (1981), the city responds that pursuant to
2 Lake Oswego Code Chapter 49, an indepth scrutiny of each
3 development application will take place and that before any
4 approval will be granted it must be established, among other
5 things, that the proposal conforms to "the applicable statutory
6 and code requirements and regulations LOC 49.615." Respondent
7 reasons that because of Chapter 49 requirements, if the Lake
8 Oswego Plan has not been acknowledged prior to a specific
9 development proposal being submitted, the goals will then have
10 to be applied. If the plan has been acknowledged, then the
11 comprehensive plan itself must be met so either way compliance
12 with the statewide goals will be assured at a later date. In
13 the alternative, the respondent argues that the council did
14 address the goals which were applicable to the request by
15 adopting a document entitled "Council report, August 10,
16 1981." A portion of that document is a report from the
17 planning staff which states the following in relation to the
18 goals alleged to be violated by the petitioner:

19 "Addendum to Council Report of August 10, 1981 (ZC
20 6-81).

21 "The Planning Commission determined that the LCDC
22 goals had been adequately addressed in the
23 deliberations on Zone Change 6-81 regarding a zone
24 change from County R-20 to City R-7.5 for property
25 located east of Highway 43 and south and east of
26 Burnham Road. The Council may wish to consider a more
specific review of LCDC goals, since the City is
required to address the goals for each land use action
until the Comprehensive Plan is acknowledged by the
State.

"* * * *

1 "Goal 2 Land Use Planning

2 "This goal is met through adoption of a
3 Comprehensive Plan and review of State goals.

4 "Goals 3 and 4 Agricultural and Forest Lands

5 "This goal does not apply. The property is
6 within the City Limits and is not in farm or
forest use.

7 "Goal 5 to 7 Open Space, Natural Resources and
8 Hazards, Historic Resources, etc.

9 "These goals will be reviewed at the time a
10 development proposal is considered. The
11 review identified steep slopes, a
drainageway and existing mature vegetation
on the site. The reiver was recognized as a
view benefit and a noise source."

12 "Goal 11 and 12 Public Facilities and Services,
13 Transportation

14 "Review has determined that public
15 facilities are available at the site or can
be readily extended and have capacity to
serve the additional density."

16 We do not agree with respondent's reliance on Gustafson,
17 supra. In Gustafson the decision to allow a specific
18 development on property already zoned for the proposed use was
19 made contingent upon compliance with its subdivision
20 ordinance. The subdivision ordinance specifically stated that
21 all statewide goals must be applied at each of several
22 subdivision stages. In the present case, the petitioners are
23 contending the zone placed on the subject property was made
24 without proper regard for the statewide goals. Unlike the
25 Gustafson case, the determination of density via a zone change
26 proceeding can not be litigated during the development stage.

1 If the goals were not properly applied in designating the
2 property R-7.5, that issue must be raised by the petitioners at
3 this point or forever lost. Therefore, we will review
4 respondents' findings on each of the goals petitioners allege
5 to have been violated.

6 Goal 2

7 Petitioners' main argument under this goal is that there
8 are insufficient findings to indicate the basis for zoning the
9 property R-7.5 (one unit per 7500 square feet) as a means of
10 implementing the comprehensive plan. The comprehensive plan
11 map designates the property for a "D-4" density which is
12 defined as permitting 4.4 to 5.7 units per net residential acre
13 with a minimum net area per unit of between 7500 and 9975
14 square feet.

15 Petitioners are essentially arguing two theories here.
16 First, they allege in essence that the R-7.5 zone has not been
17 shown to implement the comprehensive plan because the city has
18 failed to address in its findings each of the comprehensive
19 plan's objectives and policies. Second, the petitioners are
20 basically contending there is no explanation of why the R-7.5
21 density was chosen over some lesser density which would have
22 also implemented the D-4 plan map designation. Under neither
23 theory do the petitioners contest the D-4 density designation
24 itself, however.

25 In response to petitioners' first theory we find it was
26 unnecessary for the city to address each of the plan objectives

1 and policies when zoning the subject property R-7.5. The
2 petitioners are not contesting the plans' density designation
3 of D-4 for this property. Since the D-4 designation is not at
4 issue the city was not obligated to explain how such a
5 designation implements plan objectives and policies. The D-4
6 density designation allows the R-7.5 zone. Therefore, the city
7 need only explain how the R-7.5 zone implements the D-4 density
8 designation. As such the city need only address itself to
9 those plan policies which operate when the zoning on the
10 property is being altered, and need not justify its
11 determination that the D-4 density designation carries out the
12 plan's objectives and policies and thus implements the
13 comprehensive plan. See generally, Miller v. City of Portland,
14 2 Or LUBA 363, 1981, aff'd, ____ Or App ____ (1981).

15 . The petitioners' second theory, that the city failed to
16 properly explain why the R-7.5 density was chosen to implement
17 the D-4 plan map designation, is based on the Lake Oswego
18 Comprehensive Plan provision which states:

19 "The residential density designations represent
20 maximums allowed for zoning and new development
21 approvals. Actual developable density on a specific
22 parcel will be determined by actual site conditions
when zone changes and design review applications are
evaluated by City staff, Planning Commission and the
Design Review Board." Lake Oswego Comp Plan, pg. 54.

23 Petitioners claim they raised many issues regarding the site
24 conditions on the subject property. Citing the above quoted
25 comprehensive plan provision and City of Wood Village v.
26 Metropolitan Area Local Government Boundary Commission, 48 Or

1 App 79, 616 P2d 528 (1980), petitioners allege they properly
2 focused attention on problems with the site, and the city was
3 required to address those problems before it decided on the
4 appropriate density for the property. Petitioners allege this
5 requirement was not satisfactorily met, and as a result, Goal 2
6 was violated.

7 While we agree that the plan policy requires consideration
8 of site conditions during a zone change proceeding, we do not
9 agree that the city failed to meet its obligation. The facts
10 stated in the staff report adopted as findings by the city
11 council address the "site conditions" of the subject property.
12 The facilities such as sewers, water, streets and drainage are
13 discussed. In addition, land suitability in terms of slope,
14 capacity of soils to support foundations, floodplains, and
15 landslide potential are addressed. The city's adopted findings
16 then conclude:

- 17 "1. The site is presently zoned County R-20 based on
18 LOC 50.360 which authorizes retention of County
19 zoning upon annexation.
- 20 "2. The Comprehensive Plan Map designates the site as
21 Residential D-4 density which allows 7500 square
22 foot lot minimums and a density range of 4.4 -
23 5.7 dwelling units per net residential acre.
- 24 "3. The Plan states that residential densities will
25 be allocated within Plan density ranges according
26 to land suitability and facilities capacity.
- "4. Analysis of land suitability shows limiting
factors of steep slopes and Greenway designation
on approximately the easterly 200' of the site.
The remainder of the site contains only one
constraint - potential for weak foundation soils.

1 "5. A soils study will be required as part of a
2 development application to determine actual weak
3 foundation hazards.

4 "6. Analysis of facilities capacity shows that water,
5 sewer, streets, storm drainage, fire and police
6 protection and recreational facilities have
7 capacity and are available at the site or can be
8 provided by the developer during development."

9 By granting the zone change and adopting the staff report, the
10 city adopted the staff's recommendation which states:

11 "Staff recommends approval of the requested zone
12 change from County R-20 To City R 7.5 based on the
13 conclusions above and the supporting documentation in
14 the report."

15 We find the above discussed "findings" to be sufficient to
16 address the city's comprehensive plan provision that
17 "development density on a specific parcel will be determined by
18 actual site conditions when zone changes and design review are
19 evaluated * * * *" Therefore, we do not agree with petitioner
20 that the implementation portions of Statewide Goal 2 have been
21 violated.⁵

22 Goal 4.

23 Petitioners argue the findings regarding Goal 4 are
24 insufficient to address the fourth listed definition of forest
25 lands found in Statewide Goal No. 4. That definition is as
26 follows:

"Forest Lands -- * * * * (4) other forested lands in
urban and agricultural areas which provide urban
buffers, wind breaks, wildlife, and fisheries habitat,
livestock habitat, scenic corridors and recreational
use."

Petitioners argue the record indicates there is "first growth"

1 forest on the property and the property provides an urban
2 buffer and wind break between the subject property, the river,
3 the unincorporated area to the west and the city to the east.
4 Petitioners claim they sufficiently focused a discussion on
5 these matters and consequently the city was required to make
6 findings thereon.

7 Respondent takes the position there is no requirement which
8 forces an application of Goal 4 to a small parcel of fully
9 serviced urban land. The mere fact, argues respondent, that
10 trees exist on the site, does not make the site an "urban
11 forest." The city points to and relies on the inventory
12 generated in the comprehensive planning process required by
13 Goal 4 which concluded the site did not contain a significant
14 tree stand. It was based on its review of these plan
15 designations that the council concluded Goal 4 is, therefore,
16 not applicable.

17 While the city may very well be right that the property is
18 not by definition forest land, the "finding" upon which the
19 city based its decision is merely a conclusion the goal does
20 not apply. The city concluded "the property is within the city
21 limits and is not in farm or forest use." The fact the
22 property is not presently in a forest use does not support the
23 conclusion that the goal does not apply. The goal requires
24 forest land to be "retained" regardless of whether they are
25 presently in forest uses. A mere conclusion that an arguably
26 relevant goal does not apply, without explanation, is not

1 sufficient. See generally Twin Rocks v. Rockaway, 2 Or LUBA
2 36, 42 (1980). The Lake Oswego staff report of June 23, 1981,
3 which was adopted by the city as part of its findings, states
4 "the eastern and southern boundaries have tree cover, both
5 deciduous and evergreen." Since the city's comprehensive plan
6 has not been acknowledged, before we could accept respondent's
7 argument that it can rely on its comprehensive plan inventory
8 which resulted in a plan designation for the property other
9 than forest lands, we would need to see the findings and
10 support for such a designation. Those materials were not
11 included in the record and, hence, are not before this Board.
12 See generally Metro v. Clackamas County, 2 Or LUBA 139 (1980).

13 The mere fact the property is within the city limits does
14 not, as respondent seems to indicate by the wording of its
15 conclusion, control. There is nothing in Statewide Goal 4
16 which indicates that the fact the property is within a city
17 limit eliminates the necessity to apply, prior to plan
18 acknowledgment, Statewide Goal No. 4. See generally 1000
19 Friends of Oregon v. LCDC, ___ Or ___ (1981) SC27956 March
20 30, 1982 and Willamette University v. LCDC, 45 Or App 355
21 (1980). Petitioners' assignment of error regarding Statewide
22 Goal No. 4 is sustained.

23 Goal 5.

24 The thrust of petitioners' argument under this statewide
25 goal is that the goal has not been properly applied to this
26 property. Petitioners allege this property would fall within

1 the city's own definition of a "distinctive natural" area as
2 well as within the portions of Statewide Goal 5 referring to
3 fish and wildlife areas and habitats and open space.
4 Petitioners argue these factors should have triggered a review
5 by the City to deal with identification or rejection of the
6 site as part of the city's Goal 5 inventory or the use of the
7 Goal 5 conflict resolution provision if the property were to
8 ultimately be recognized as a resource. Petitioners argue this
9 property abuts the Willamette River which is a fish and
10 wildlife resource area. The petitioners claim this is a
11 forested woodland which they reason gives rise to the necessity
12 to deal with evidence introduced into the record that ducks,
13 fox, geese, deer and other wildlife inhabit such woodlands.
14 Petitioners allege they sufficiently focused the attention of
15 the respondent on the issue of compliance with Goal 5 but the
16 resulting finding was inadequate since it failed to address the
17 goal and merely set over consideration until a development
18 proposal was submitted for the property. See finding supra.
19 Once again the city responds by saying many of these decisions
20 concerning the property were made at the time the comprehensive
21 plan was adopted and the property is not designated
22 "distinctive natural area" except for a portion of the site
23 which is on the Willamette River bank. It argues the portion
24 on the Willamette River bank is protected by Goal 15 and the
25 petitioners do not raise an allegation of error regarding Goal
26 15.

1 We can not accept respondent's position for the very
2 reasons set forth in our discussion of Goal 4. There is
3 nothing before this Board to indicate the reasons why the
4 property was not dealt with as a distinctive natural area, a
5 fish and wildlife area and habitat or an open space as
6 petitioners argue. Petitioners made a record about their
7 concerns on these matters and it was incumbent upon the city to
8 adopt findings addressing those concerns prior to the
9 acknowledgment of its plan. Petitioners' allegations regarding
10 Goal 5 are sustained.

11 Goal 7.

12 Petitioners attack the City of Lake Oswego's findings
13 regarding Goal 7. Petitioners argue that "[b]efore one can
14 determine whether the whole site should be rezoned, one must
15 know the hazards of the site and undertake a balance of whether
16 adequate safeguards can be provided." Petitioners claim there
17 is evidence in the record indicating an unspecified part of the
18 site is within the 100 year floodplain. In addition, they
19 argue there is evidence in the record the slope and soils on
20 the property could cause development problems both in terms of
21 landslide prone soils and steep slopes.

22 Respondent points out that its Chapter 49 contains specific
23 development standards addressing the floodplain soils and
24 geological issues raised by petitioners. It argues the council
25 found, based on adoption of the staff report as findings that:

1 "the facts in the record do disclose physical
2 characteristics of the site which may present
3 limitations on the extent to which the property may be
4 developed. Those issues were raised by opponents.
5 The appropriate time to address the issues of weak
6 foundation soils, stream corridors, Goal 15 greenway
7 considerations, floodplain issues, preservation of
8 trees and wildlife, drainage and traffic impacts is at
9 the time of development review pursuant to LOC Chapter
10 49."

11 In addition, the council adopted as findings the staff
12 report which indicates that, among other things,

13 "potential landslide hazard is shown on the steeply
14 sloped easterly portion only. Moderate to severe
15 potential for weak foundation soils exists and
16 requires completion of soil study by a certified soil
17 geologist prior to development. No essential wetlands
18 are shown. 100 year floodplain exists on the portion
19 of the property abutting old River Road. The easterly
20 portion of the property is within the Willamette
21 Greenway line. (150' from ordinary low water line).
22 Existing native vegetation is located on the east and
23 south boundaries of the property. A development plan
24 application would require a tree survey locating all
25 trees over 5" in diameter, 24" above the ground so
26 that the siting of units can be related to
preservation of significant vegetation.

"In summarizing land suitability, it has been shown
that the site, except for the easterly + 200 feet is
buildable land with weak foundation soils as the major
development constraint. The soil study required as
part of a development application would direct unit
placement to mitigate this potential hazard."

We find the city's findings regarding Goal 7 are
sufficient. The Court of Appeals' statements regarding a
boundary commission's obligation in situations similar to the
one the City of Lake Oswego finds itself in this case are
appropriate and control in the fact situation before this
Board. In the case of Norvell v. Portland Area LGBC, 43 Or App
849, 855, 604 P2d 896 (1979), the Court of Appeals stated

1 "A further question is raised by petitioner's
2 contention that the Boundary Commission's deferral to
3 the City of Portland concerning the evaluation of the
4 safety of the development is impermissible. Although
5 the reference to the city is not a 'finding of fact'
6 we find no error. The Boundary Commission is merely
7 recognizing that, whatever its own preliminary
8 determination of feasibility may be, the city has a
9 separate and further responsibility to investigate and
10 satisfy itself concerning the safety of the proposed
11 development. The Boundary Commission was merely
12 obligated to find that neither the soil nor any other
13 known condition made all development unsafe. Cf.
14 Rivergate Residents Assn. v. LCDC, 38 Or App 149, 590
15 P2d 1233 (1979). * * * * (Emphasis added).

9 The City of Lake Oswego in the case before us has found in
10 effect not all development is unsafe after looking at the soil
11 and other known conditions on the property. It further
12 obligated the developer to proceed under its Chapter 49
13 development code which will provide the safety net which
14 apparently concerns the petitioners. Chapter 49 requires that
15 prior to approval the proposed development must go through a
16 public hearing process. See also Footnote 5. We find no error
17 in the city's finding regarding Goal 7 and, therefore, deny
18 petitioners' assignment of error regarding that goal.

19 Goal 11.

20 Petitioners claim that even though they raised the concerns
21 regarding the adequacy of the drainage facilities for the site,
22 they received no answer. Citing Wood Village, supra, the lack
23 of response to their concerns petitioners claim is error.
24 Petitioners argue they raised the issue of drainage
25 specifically and noted that a CH2M Hill Report on storm sewers
26 and drainage contained information identifying the area, scope

1 of services provided, the natural drainage patterns followed by
2 man-made facilities in the same places and noting that where
3 development occurs in the middle or lower reaches of the
4 natural drainage areas, storm sewers are usually inadequate.
5 Petitioners argue there is no indication what drainage
6 facilities exist in the area, drainage facilities required by
7 the zone change, or indicating the level of services necessary
8 to be provided in conjunction with development. Petitioners
9 further argue that there are a number of factors to be
10 considered here, including the design for rainfall, runoff
11 coefficients depending on land use, storm frequency and pipe
12 design.

13 Respondent points out the city's conclusion with regard to
14 Goal 11 was that public facilities are available at the site or
15 can readily be extended and have the capacity to serve the
16 density allowed by the zone change. Respondent also argues the
17 council found, with regard to the drainage issue, that site
18 drainage is presently carried from the property by the ravine
19 at the southwest boundary of the site or by sheet action to the
20 river. Further, the council found that at the time of
21 development of the site, a storm water management plan will be
22 required which addresses the needs of the particular
23 development request. Specifically, the city adopted as part of
24 its findings, a portion of the staff report entitled storm
25 drainage which states:

1 "Storm drainage is presently carried by the ravine at
2 the southeast boundary of the site to the Willamette
3 River or by sheet action to the river. The
4 development of the site will increase runoff by about
5 5 cfs. At the time of development, a stormwater
6 management plan will be required and may include use
7 of the ravine as a natural drainage channel, dry
8 wells, underground detention or other measures either
9 separately or in combination. Sheet drainage from the
10 site will not be allowed to increase over that
11 presently occurring and may be decreased by the
12 drainage which would be approved. The City's plan for
13 this area includes future upgrading of the channel to
14 handle additional flows as necessary and to decrease
15 erosion."

9 We find no error on the part of the city regarding Goal
10 11. It found that facility capacity is available to accept the
11 proposed density. Specifically, as stated supra, the city
12 concluded "review has determined that public facilities are
13 available at the site or can be readily extended and have
14 capacity to serve the additional density." In addition to
15 finding the services necessary to accommodate development at
16 the proposed density exist in the area of the subject site, the
17 city also specifically pointed out some problems with the site
18 and required the developer to comply with the dictates of its
19 development code. Petitioners do not claim the findings are
20 not supported by substantial evidence. We find no error of the
21 type petitioners allege. Therefore, petitioners' allegation
22 regarding Goal 11 is denied.

23 Goal 12.

24 Petitioners' allegations concerning Statewide Goal 12 are
25 that not only did the city not properly address the problems
26 petitioners pointed out regarding the average daily trip

1 capacity of the street system serving the site, the public
2 transportation, pedestrian safety and traffic flow issues
3 raised by petitioners were not addressed in the findings.

4 Statewide Goal 12 provides:

5 "Transportation

6 "GOAL: To provide and encourage a safe, convenient
and economic transportation system.

7
8 "A transportation plan shall (1) consider all
9 modes of transportation including mass transit, air,
10 water, pipeline, rail, highway, bicycle and pedestrian;
11 (2) be based upon an inventory of local, regional and
12 state transportation needs; (3) consider the
13 differences in social consequences that would result
14 from utilizing differing combinations of
15 transportation modes; (4) avoid principal reliance
16 upon any one mode of transportation; (5) minimize
adverse social, economic and environmental impacts
and costs; (6) conserve energy; (7) meet the needs of
the transportation disadvantaged by improving
transportation services; (8) facilitate the flow of
goods and services so as to strengthen the local and
regional economy; and (9) conform with local and
regional comprehensive land use plans. Each plan
shall include a provision for transportation as a key
facility."

17 ADT Capacity

18 Petitioners introduced evidence that the then present
19 average daily trip count (ADT) for the major street system
20 serving the site was 14,800. The petitioners argue that the
21 present street system capacity of 15,000 ADT will be exceeded
22 when the 340 expected ADTs resulting from development of the
23 site are added to the 14,800 ADT count petitioners determined
24 to exist at the time of the hearing. The city found the ADT
25 count to be 12,000. Petitioners conclude the city ignored
26 contrary evidence, failed to make findings on why it chose to

1 believe the evidence it relied upon and did not relate the
2 facts found to the transportation goal and city transportation
3 policies.

4 Respondent admits that petitioners did raise a factual
5 issue in their presentation to the council which was not
6 directly resolved by the council's order. However, argues
7 respondent, even assuming petitioners' facts are true, the
8 council's conclusion that the street system is adequate is
9 still supported by findings relating to improvements to the
10 street system presently in progress. Respondent argues the
11 road has a capacity of 15,000 average daily trips prior to any
12 system improvements being made. It points out that the city
13 council found two significant facts relating to the capacity
14 issue. Those facts are first, that the highway capacity is
15 being increased by the construction of system improvements
16 taking place on State Highway 43 at the Oswego Creek Bridge,
17 just north of the site. Second, the council found if
18 additional improvements are needed to serve proposed
19 development, they will be required of the developer.
20 Specifically, the city found in adopting the staff report as
21 findings:

22 "The site is served by Highway 43 and Burnham Road.
23 Highway 43 is a paved State Highway with a present
24 average daily trip count of approximately 12,000 ADT.
25 The road has a capacity to carry 15,000 ADT. This
26 capacity will be increased by the construction of the
Oswego Bridge scheduled to begin in October, 1981.
The proposed density on the site will generate from
340 to 408 ADT which would not cause the capacity of
the road to be exceeded, particularly following

1 completion of the bridge widening.

2 "Burnham Road is presently a paved 24-foot street in a
3 45-foot right-of-way. Capacity of that street is
4 8,000 ADT. It is presently carrying out 600 ADT from
5 the Oswego Terrace Apartments and the residence
6 located east of the site being reviewed. If
7 additional street improvements are necessary to carry
8 the traffic generated by a development on this site,
9 the developer will be required to improve the street
10 at his cost before the project can be completed."
11 (Emphasis added).

12 We deny petitioners allegations regarding the ADT capacity
13 of the street system. This Board has held in prior cases that
14 while the local government can choose to believe whichever side
15 of a controversy it chooses, when faced with conflicting data,
16 at a minimum it must choose the most recent data or explain why
17 it chose the older data. See Homebuilders Association v.
18 Clackamas County, 2 Or LUBA 25 (1980), aff'd, ___ Or App ___
19 (1981), and Sane Orderly Development v. Douglas County, 2 Or
20 LUBA 196 (1981). We believe the above quoted finding
21 sufficiently explains why the city concluded the street system
22 capacity was satisfactory.

23 Public Transportation, Pedestrian Safety and Traffic Flow.

24 The record reveals that petitioners raised the issues of
25 public transportation, pedestrian safety and traffic flow.
26 Specifically, the petitioners testified as follows:

"In addition, the Buttke report shows the eventual
problems of Pacific Highway at this site as
intolerable. It will have a volume (end of tape) at
the Pacific Highway intersection. There's no light -
the prior record shows no warrants for a light because
there's no street going across. Try to go south on
Burnham at Pacific Highway at 5:30 or try to walk
across it. Look at the curve before the bridge as

1 you're going towards town from the site. There's no
2 sidewalks to go to town; there's no other plans by
3 ODOT at this time, as shown by the previous record, to
4 improve Pacific Highway except for some intersection
5 changes. That's very important when commercial and
6 shopping areas are a mile away, and that was the
7 reason the Planning Commission turned down a previous
8 application on this site. Mass transit comes every 50
9 minutes, almost nothing after 7, very little on
10 weekends. It's a quarter of a mile away, and when
11 you're coming back, you've got to cross the road.
12 It's dangerous to cross the road, especially with the
13 light." Supplemental Record 4.

14 The city found in adopting the June 23, 1981 staff report
15 that:

16 "Streets serving the property are State Highway 43, a
17 paved 32' road and adjacent bike path in a 60'
18 right-of-way and Burnham Road, a paved street in a 45'
19 right-of-way.

20 "Dedication of an additional 10' of right-of-way on
21 both streets will be requested as part of development
22 review.

23 "Tri Met service is available at the Oswego Terrace
24 Apartments immediately to the north.

25 "Recreational needs can be met by bicycle and
26 pedestrian access to the river and George Rogers Park
27 via the Old River Road bike path. Reconstruction of
28 the Oswego Bridge, which will likely begin in fall
29 1981, includes a pathway connecting this area to the
30 central business district along Highway 43."

31 It then concluded:

32 "6. Analysis of facilities capacity shows that water,
33 sewer, streets, storm drainage, fire and police
34 protection and recreational facilities have
35 capacity and are available at the site or can be
36 provided by the developer during development."

37 We find petitioners' concerns were sufficiently addressed
38 in light of the Lake Oswego Code Chapter 49 requirements
39 addressed supra. Chapter 49, Section 315(12) requires the

1 developer to submit specific information dealing with the
2 concerns of petitioners. 49.315(12) provides

3 "(12) Preliminary plan or plat which shall
4 include narrative and maps showing proposed
5 development. Maps, except detail maps, shall be drawn
6 at the same scale as each other and as the site
7 information from the previous sections. Submittals
8 shall include:

9 "C. Proposed streets, including proposed names,
10 locations, dimensions, centerlines,
11 beginning and ending of curves, radii and
12 radical centers of curves, grade and
13 elevations proposed at 100' intervals, cut
14 and fill slopes to scale, relationship to
15 existing streets; location and dimensions of
16 parking and loading areas, pedestrian and
17 bicycle circulation, and related access ways.

18 "Street designs shall include typical cross sections
19 showing width of roadways, curbs, location and width
20 of walkways, size of utility mains and drainageways."

21 This information must be submitted for not only proposed
22 interior development design but also for existing facilities
23 which abut the property. See 49.315(6).

24 We conclude the findings made, plus the fact that any
25 development must comply with Chapter 49 (which allows for
26 citizen involvement and appeal) show satisfactory compliance
27 with Statewide Goal 12. Therefore, petitioners' allegations
28 regarding Goal 12 are denied.

29 Assignment of Error No. 4

30 Petitioners here assert that the city erred in refusing to
31 allow them to rebut the applicant's rebuttal. Petitioners
32 allege this refusal to allow such rebuttal violates the due
33 process clause of the Fourteenth Amendment as well as Section

1 6(A)(1)(d) of the City of Lake Oswego's procedural ordinance
2 known as Resolution R-80-24. Petitioner do not develop their
3 constitutional argument. As we have held in prior cases, an
4 undeveloped assertion of constitutional error will not be seen
5 as grounds for this Board to reverse or remand a decision to
6 the local jurisdiction. See Jefferson County Co-op v.
7 Jefferson County, 4 Or LUBA 199 (1981) and Van Sant v. Yamhill
8 County, 4 Or LUBA 359 (1982).

9 Section 6 entitled "Miscellaneous Provisions" states:

10 "A. The following time limitations on presentations
11 shall generally be observed:

12 "1. For Section 3 hearings;

13 "a. 20 minutes each for proponent's case and
14 opponent's case,

15 "b. 5 minutes for other persons,

16 "c. 10 minutes for a representative of a
17 group or organization,

18 "d. 5 minutes for all persons on rebuttal."

19 It is petitioners' position the statement that five minutes
20 for all persons on rebuttal means the opponent's (petitioner
21 herein) have a right to five minutes for rebuttal. Respondents
22 claim that it is section 3 of Resolution R-80-24 which controls
23 this situation and not section 6 as alleged by petitioners.

24 Section 3 of Resolution R-80-24 states, in pertinent part,

25 "C. The procedures to be followed by the chair in the
26 conduct of the hearing are as follows:

"1. A statement by the chair of the nature of
the application, * * *

"2. A request that all hearing body members
announce any potential conflict of interest,
bias or ex parte contacts.

- 1 "3. Allow an opportunity for persons to
2 challenge any hearing body member's right to
3 sit as a member in the consideration of the
4 application. * * *
- 5 "4. Presentation of the City staff report.
- 6 "5. Proponent's case.
- 7 "6. Other testimony or evidence in support of
8 the application.
- 9 "7. Opponent's case.
- 10 "8. Other testimony or evidence against the
11 application.
- 12 "9. Testimony or evidence concerning the
13 application which by its nature is neither
14 in favor nor against.
- 15 "10. Rebuttal by proponent or persons speaking in
16 support of the application.
- 17 "11. Close of hearing and deliberation. * * * *

18 We agree with respondent. All section 6 does is set forth
19 the time limits for the presentations that are allowed under
20 Section 3. Granted the wording is somewhat imprecise.
21 However, when read in the context of the rest of the
22 resolution, the only conclusion one can reach is that it does
23 not create on the part of the opponents a rebuttal right which
24 is not set forth in section 3. Therefore, petitioners' fourth
25 assignment of error is denied.

26 Lake Oswego's decision is remanded for further
consideration not inconsistent with this opinion.

FOOTNOTES

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LOC 49.016(12) reads:

"Development: Any man-made change to improved or unimproved real property, including, but not limited to, construction, installation or alteration of a building or other structure, change of use, land division, establishment or termination of a right of access, storage on the land, grading, clearing, removal or placement of soil paving, or removal of trees."

2

ORS 227.215(1) reads:

"As used in this section, 'development' means a building or mining operation, making a material change in the use or appearance of a structure or land, dividing land into two or more parcels, including partitions and subdivisions as provided in ORS 92.010 to 92.285, and creating or terminating a right of access."

3

"Develop" means to bring about growth or availability; to construct or alter a structure, to conduct a mining operation, to make a physical change in the use or appearance of land, to divide land into parcels, or to create or terminate rights of access."

4

The following possible types of development on this parcel are classified as minor developments: single family dwelling, minor partition, lot line adjustment, tree cutting, grading, minor utility facilities. LOC 49.140(1). All types of development not classified as minor are major developments.

5

Under Lake Oswego Code Chapter 49, if after a specific development proposal is submitted it is determined the site will not support a density of one unit per each 7,500 square feet, a lesser density can be mandated.

BEFORE THE LAND CONSERVATION AND DEVELOPMENT

COMMISSION OF THE STATE OF OREGON

FRED CONSTANT, ED and JOAN)	
HART, CARL P. NELSON, GEORGE)	
MACKIN, CLARA OWENS, CAROLYN R.)	
and RUSSELL JONES, DONALD)	
PINSON and SAMUEL E. TRUEBLOOD,)	LUBA No. 81-130
)	
Petitioners,)	ORDER
)	
v.)	
)	
CITY OF LAKE OSWEGO,)	
)	
Respondent.)	

LCDC hereby adopts the recommended opinion of the Land Use Board of Appeals in the above-entitled case.

DATED: May 27, 1982.

FOR THE COMMISSION



JAMES F. ROSS
Director, Department of Land
Conservation and Development