

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

3
4 FOREST HIGHLANDS NEIGHBORHOOD)
5 ASSOCIATION, EDWARD H. KIRSCHBAUM,))
6 MARJORIE R. KIRSCHBAUM, and)
7 TONY M. OLIVER,)

8)
9 Petitioners,)
10)

11 vs.)

12)
13 CITY OF LAKE OSWEGO,)
14)

15 Respondent,)
16)

17 and)

18)
19 DAVID ROY NORRIS and)
20 DAVID MARK NORRIS,)
21)

22 Intervenors-Respondent.)
23
24

LUBA No. 92-083

FINAL OPINION
AND ORDER

25 Appeal from City of Lake Oswego.

26
27 Robert D. Van Brocklin, Portland, filed the petition
28 for review. With him on the brief was Stoel, Rives, Boley,
29 Jones & Grey. Steven L. Pfeiffer and Robert D. Van Brocklin
30 argued on behalf of petitioners.

31
32 Jeffrey G. Condit, Lake Oswego, filed a response brief
33 and argued on behalf of respondent.

34
35 Timothy J. Sercombe, Portland, filed a response brief
36 on behalf of intervenors-respondent. With him on the brief
37 was Preston Thorgimson Shidler Gates & Ellis.

38
39 KELLINGTON, Referee; SHERTON, Chief Referee; HOLSTUN,
40 Referee, participated in the decision.

41
42 AFFIRMED 11/05/92

43
44 You are entitled to judicial review of this Order.
45 Judicial review is governed by the provisions of ORS

1 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal an order of the city council
4 approving two building permits and two tree cutting permits.

5 **MOTION TO INTERVENE**

6 David Roy Norris and David Mark Norris move to
7 intervene on the side of respondent in this appeal
8 proceeding. There is no objection to the motion, and it is
9 allowed.

10 **MOTION TO DISMISS**

11 Respondent and intervenors-respondent (respondents)
12 move to dismiss this appeal proceeding on the ground that it
13 is moot. Respondents contend the appeal is moot because the
14 trees on the two parcels subject to the disputed tree
15 cutting permits have been cut, and a dwelling has been built
16 on one of the subject parcels pursuant to one of the
17 disputed building permits.

18 In determining whether a decision is moot "the question
19 is whether any decision on the merits would resolve merely
20 an abstract question without practical effect." Citadel
21 Corp. v. Tillamook Co., 66 Or App 965, 675 P2d 1114 (1984).
22 Here, our decision will have practical effect. If we were
23 to sustain petitioners' assignments of error, the trees cut
24 pursuant to the disputed tree cutting permits could be
25 replanted and the dwelling built pursuant to one of the
26 disputed building permits could be removed. Respondents'

1 motion to dismiss is denied.

2 **FACTS**

3 On March 7, 1990, the city approved a minor partition
4 creating three parcels. The two parcels that are the
5 subject of this appeal are zoned Residential (R-7.5) and are
6 12,153 square feet and 9,267 square feet in size.

7 The challenged decision states the following additional
8 facts concerning the subject parcels and their history:

9 "The property is roughly wedge shaped and is
10 bisected by a stream. The stream is approximately
11 five feet wide and is located at the bottom of a
12 ravine that slopes down from relatively flat areas
13 adjacent to Country Club and Goodall Roads. The
14 stream passes under Country Club Road through a
15 thirty-inch culvert located at the intersection of
16 the two roads. The parcels are in the area of
17 [Distinctive Natural Area No. 28, according to
18 Lake Oswego Comprehensive Plan] Distinctive
19 Natural Area Map, p. 35. This particular
20 Distinctive Natural Area is listed under the
21 'Douglas Fir Groves' category and is specifically
22 described as consisting of 'Specimen Firs - W. of
23 Goodall Road.'" Record 10.

24 "As part of the decision to allow the partition,
25 the City located the stream corridor plus the
26 buffer zone boundary at roughly the top of the
27 ravine that slopes down to the stream * * *. The
28 width of this stream corridor buffer zone ranges
29 from approximately 95 to 130 feet (or
30 approximately 45 to 62 feet on either side of the
31 stream) and contains more than 15,000 square feet.
32 * * * Staff required the applicant to dedicate
33 this stream corridor and buffer zone to the City
34 as a conservation easement and for drainage way
35 and public utility purposes as a condition of
36 approval of the minor partition. Staff then
37 imposed an additional ten foot special setback
38 from both edges of the stream corridor buffer zone
39 in order to further protect the stream from

1 erosion and to protect the Distinctive Natural
2 Area pursuant to [Lake Oswego Development
3 Standards (LODS)] 3.020(2). * * * As condition
4 Number 4 of [the 1990 minor partition decision]
5 makes clear, the Stream Corridor Buffer Zone was
6 included within the required stream corridor
7 conservation easement; the ten foot setback was an
8 additional protection required by staff pursuant
9 to Condition Number 5 in order to protect the
10 distinctive Natural Area and the Stream Corridor
11 and Buffer Zone from erosion. * * *" Record
12 14-15.

13 No timely appeal of the 1990 minor partition decision
14 was filed. Thereafter, the applicant applied for building
15 and tree cutting permits to enable construction of two
16 single family dwellings on the two parcels. The city
17 Development Review Board (DRB) conducted a public hearing
18 and reviewed the applications for the tree cutting and
19 building permits. The DRB approved the permits.
20 Petitioners appealed the DRB decision to the city council.
21 The city council affirmed the decision of the DRB, and this
22 appeal followed.

23 **FIRST ASSIGNMENT OF ERROR**

24 "The city misapplied its Stream Corridor
25 Development Standards and Development Code in
26 determining the location and boundaries of the
27 subject Stream Corridor and Stream Corridor Buffer
28 Zone, or [failed] to adopt adequate findings to
29 support the land use decisions made by the city
30 regarding the location and boundaries of the
31 Stream Corridor, Stream Corridor Buffer Zone, ten-
32 foot setback, or Open Space Conservation Easement.
33 * * *"

34 Under Lake Oswego Development Code (LODC) 49.140(K),
35 the proposed tree cutting permits are considered "minor

1 development." LODS chapter 3 provides certain standards
2 relating to development within a "stream corridor." One of
3 those standards is LODS 3.035, which provides that the city
4 manager is to determine the boundaries of stream corridors
5 in approving a minor development. Once those boundaries are
6 established, LODS chapter 3 establishes certain requirements
7 for development within a stream corridor and stream corridor
8 buffer zone.

9 As a part of the 1990 minor partition decision creating
10 the subject two parcels, the boundaries of the stream
11 corridor and the stream corridor buffer zone were
12 established. On this issue, the minor partition decision
13 contains the following conditions of approval:

14 "4. The final plan shall clearly show the limits
15 of the stream corridor buffer zone (stream
16 corridor boundary as shown on Exhibit 3) and
17 dedicate the area within the buffer zone to
18 the City of Lake Oswego as a storm drainage
19 and open space conservation and public
20 utility easement.

21 "5. The final plan shall clearly delineate a 10'
22 setback west and east from both sides of the
23 Stream Corridor Buffer Zone required by
24 Condition No. 4 above. No development shall
25 take place toward the stream channel from
26 this setback line." Record 726-27.

27 Petitioners argue the city was required to reevaluate
28 the stream corridor and stream corridor buffer zone
29 boundaries established in the 1990 minor partition decision.
30 Petitioners also contend the city failed to apply to the
31 proposal the requirements of LODS chapter 3 concerning

1 development within a stream corridor.

2 We agree with respondents that once the stream corridor
3 and stream corridor buffer zone were established by the city
4 for the subject property through the 1990 minor partition
5 decision, it was unnecessary for the city to reexamine those
6 boundaries to issue the subject building and tree cutting
7 permits. Further, we believe that, reasonably read, the
8 conditions of the 1990 minor partition quoted above state
9 that no development, including tree cutting, may occur in
10 the buffer zone. However, no development is proposed to
11 occur within the buffer zone established by the 1990 minor
12 partition decision. Therefore, the requirements of LODS
13 chapter 3 pertaining to development within the buffer zone
14 do not apply.

15 The first assignment of error is denied.

16 **SECOND ASSIGNMENT OF ERROR**

17 "The city's conclusion that the removal of trees
18 authorized by the challenged land use decision
19 will not significantly change the characteristics
20 of the Distinctive Natural Area located at the
21 site is not supported by substantial evidence in
22 the whole record. In addition, when the Stream
23 Corridor and Stream Corridor Buffer Zone are
24 correctly sited on the subject property, trees
25 proposed to be cut are located within the Stream
26 Corridor Buffer Zone in violation of the
27 provisions of said designation. Since all trees
28 within the Stream Corridor Buffer Zone are within
29 the Open Space Conservation Easement required by
30 the city to be located on the subject property,
31 the decision to authorize these trees to be cut is
32 error."

33 Under this assignment of error, petitioners argue the

1 proposal to cut trees on the subject parcels is inconsistent
2 with the Distinctive Natural Area designation applied to the
3 parcels. Petitioners also argue the city's determination
4 that the challenged decision "adequately protects the
5 [Distinctive Natural Area]" is not supported by substantial
6 evidence in the whole record.¹ However, petitioners fail to
7 cite any applicable standard prohibiting the cutting of
8 trees in the "Distinctive Natural Area," and we are aware of
9 none. Further, petitioners fail to cite any standard
10 requiring that the city "adequately protect" the distinctive
11 natural area. Thus, the findings on this issue are, as far
12 as we can tell, surplusage and need not be supported by
13 substantial evidence. This assignment of error provides no
14 basis for reversal or remand of the challenged decision.

15 The second assignment of error is denied.

16 The city's decision is affirmed.

¹Petitioners' remaining arguments under this assignment of error repeat arguments advanced under the first assignment of error; that the challenged decision erroneously allows trees to be cut within a "Stream Corridor Buffer Zone." However, we determine above that no trees will be cut in the buffer zone. Accordingly, these arguments provide no basis for reversal or remand of the challenged decision.