

1                                   BEFORE THE LAND USE BOARD OF APPEALS  
2                                   OF THE STATE OF OREGON  
3

4 OWEN DEVELOPMENT GROUP, INC., and                                    )  
5 PETER O. ESLICK,    )  
6    )  
7                                   Petitioners,                                )           LUBA No. 92-194  
8    )  
9                    vs.    )           FINAL OPINION  
10    )           AND ORDER  
11 CITY OF GEARHART,    )  
12    )  
13                                   Respondent.                                )  
14

15  
16            Appeal from City of Gearhart.  
17

18            Jeff H. Bachrach, Portland, filed the petition for  
19 review and argued on behalf of petitioners. With him on the  
20 brief was O'Donnell, Ramis, Crew & Corrigan.  
21

22            William R. Canessa, Seaside, filed the response brief  
23 and argued on behalf of respondent.  
24

25            SHERTON, Chief Referee; HOLSTUN, Referee; KELLINGTON,  
26 Referee, participated in the decision.  
27

28                           AFFIRMED                                    03/17/93  
29

30            You are entitled to judicial review of this Order.  
31 Judicial review is governed by the provisions of ORS  
32 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city council decision interpreting  
4 a prior 1985 city decision granting preliminary development  
5 plan approval for a shopping center.

6 **FACTS**

7 The subject property is located on the west side of  
8 U.S. Highway 101. It is comprised of two parcels, one 12.21  
9 acres (Parcel A) and one 18.06 acres (Parcel B). The  
10 subject property is zoned Residential Commercial Planned  
11 Development (RCPD). The RCPD zone does not list any uses as  
12 permitted outright. Rather, certain uses are listed in the  
13 RCPD zone as conditionally permitted, subject to the RCPD  
14 zone's standards and procedures for preliminary and final  
15 development plan approval. Gearhart Zoning and Development  
16 Ordinance (GZDO) 3.730. Among the uses listed as  
17 conditionally permitted in the RCPD zone are those uses  
18 allowed in the city's Resort Commercial (C-2) zone.<sup>1</sup>

19 On July 15, 1985, petitioners applied for preliminary  
20 development plan approval for a retail shopping center to be  
21 located on Parcel A.<sup>2</sup> The application described the  
22 proposed shopping center as follows:

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<sup>1</sup>In turn, the C-2 zone states that it allows all uses permitted outright in the city's Neighborhood Commercial (C-1) zone. GZDO 3.520.1.

<sup>2</sup>During the course of city review of their application, petitioners modified the preliminary development plan to include residential development of Parcel B as a later phase of the planned development.

1 "The majority of the development is to be included  
2 in a large L-shaped building, of approximately  
3 104,000 square feet, along the west and south  
4 sides of Parcel A. Included within this building  
5 are to be up to three main anchor tenants,  
6 including a grocer, a drug-department store and a  
7 variety department store. Additional shops  
8 providing a variety of goods and services will  
9 fill the remainder.

10 "In addition, up to three smaller, free-standing  
11 buildings, with up to 15,000 additional square  
12 feet of building area are included in 'pad'  
13 developments at the highway frontage. Two are  
14 proposed to be restaurants and the third a branch  
15 office of a financial institution.

16 "\* \* \* \* \*

17 "The final configuration of the [shopping] center  
18 shown is approximate and schematic until final  
19 lease arrangements can be made with the anchor and  
20 pad tenants." Record 399.

21 On October 30, 1985, the city planning commission  
22 approved petitioners' preliminary development plan for  
23 residential and commercial development of the subject  
24 property including, as the first phase of the development,  
25 the proposed retail shopping center on approximately 10.6  
26 acres of Parcel A.<sup>3</sup> Record 199. The 1985 decision  
27 approving the preliminary development plan (hereafter 1985  
28 decision) states, with regard to the tenants that might  
29 occupy the shopping center space:

30 "The applicant has stated in his testimony that  
31 the retail shopping center proposed will likely

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<sup>3</sup>The 1985 decision also prohibits commercial development on Parcel B.  
Record 216.

1 include a food market, a drug store, a variety  
2 store, a junior department store, a restaurant, a  
3 financial institution and other retail shops.  
4 These are all uses permitted in either the C-1 or  
5 C-2 Zoning Districts and are therefore included as  
6 permitted conditional uses within the RCPD Zone."  
7 Record 201.

8 In 1986, the planning commission granted final development  
9 plan approval for the shopping center.

10 In 1991, the city administrator approved a development  
11 permit authorizing certain work to begin on the shopping  
12 center.<sup>4</sup> During 1991, a dispute arose between petitioners  
13 and the city regarding whether additional planning  
14 commission review and approval is required to allow  
15 particular kinds of retail uses to occupy the shopping  
16 center. To resolve this dispute, petitioners requested an  
17 interpretation of the 1985 decision. This request was  
18 considered at a planning commission meeting. No formal  
19 motion, resolution or order was approved by the planning  
20 commission. However, the city administrator sent  
21 petitioners a letter stating the following "consensus" of  
22 the planning commission members:

23 "[A]ny of the five major [businesses] specifically  
24 named [in the 1985 decision] could be located in  
25 the larger complex without further [planning  
26 commission] approval required. Those businesses  
27 are a financial institution, a restaurant, a  
28 grocery store, a variety store and a drug store.

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<sup>4</sup>The development permit authorizes the installation of utilities, preparation of building pads, grading and paving, and installation of on-site lighting. Record 138.

1 Any other retail stores in the complex would  
2 require conditional use approval as they were not  
3 specifically approved during the original approval  
4 process." Record 119.

5 Petitioners appealed the determinations expressed in  
6 the planning commission's minutes and the city  
7 administrator's letter to the city council. The city  
8 council refused to consider petitioners' appeal.  
9 Petitioners appealed both the city administrator's letter,  
10 and the city's council's refusal to hear the local appeal,  
11 to this Board. In Owen Development Group, Inc. v. City of  
12 Gearhart, 22 Or LUBA 418 (1991), aff'd 111 Or App 476  
13 (1992), this Board determined that both the planning  
14 commission minutes and the city administrator's letter were  
15 merely advisory opinions and, therefore, neither was a land  
16 use decision subject to this Board's review.

17 On March 5, 1992, petitioners submitted a letter to the  
18 city requesting that it make a final determination regarding  
19 the planning commission "opinion" previously expressed in  
20 the city administrator's letter. Record 88-89. A copy of  
21 the final site plan for the shopping center approved by the  
22 city when it issued the development permit in 1991 was  
23 submitted with the letter, and was marked to indicate the  
24 retail tenants now planned to be located in the shopping  
25 center. Record 90. The site plan indicates the tenants in  
26 the main building will be two house and kitchenware stores,  
27 five clothing stores, two gift shops, a toy store and a shoe  
28 store. The site plan also shows a clothing store and

1 "retail" store located in two smaller buildings.

2 On March 24, 1992, the city administrator issued a  
3 letter stating the only uses approved by the 1985 decision  
4 were a grocery store, drug/department store, variety store,  
5 restaurants and a financial institution. Record 87. The  
6 letter further states the plan submitted by petitioners  
7 replaces all these uses with new uses not approved by the  
8 1985 decision and, therefore, constitutes a major  
9 modification of the approved final development plan that  
10 requires planning commission approval as provided in  
11 GZDO 3.780.1.

12 Petitioners appealed the city administrator's decision  
13 to the planning commission, which affirmed the city  
14 administrator's decision. Petitioners appealed to the city  
15 council. On October 7, 1992, the city council adopted an  
16 order affirming the planning commission's decision. This  
17 appeal followed.

18 **ASSIGNMENT OF ERROR**

19 "The city's interpretation should be reversed  
20 because it improperly construed the 1985 approval  
21 to include a condition that was not part of the  
22 [1985] decision."

23 Before considering petitioners' arguments, we briefly  
24 describe the nature of the RCPD zoning district. GZDO 3.710  
25 provides that the purpose of the RCPD zone is:

26 "[T]o provide for \* \* \* a mixture of housing types  
27 and designs; an appropriate mixture of uses; the  
28 creation of attractive and useable open space; and  
29 environmentally sensitive development of sites

1 characterized by special features of topography,  
2 location, size and shape. These objectives shall  
3 be achieved through the requirement of a  
4 comprehensive site development plan."

5 GZDO 3.730 lists the uses conditionally allowed in the RCPD  
6 zone "subject to the standards in [GZDO] 3.740 and the  
7 procedures of [GZDO] 3.750." These uses include various  
8 types of residences and, as explained above, commercial uses  
9 permitted in the C-2 and C-1 zones.<sup>5</sup>

10 GZDO 3.750.1.a(1) requires an application for  
11 preliminary development plan approval to include "a  
12 description of the character of the proposed development."  
13 The preliminary development plan is reviewed by the planning  
14 commission, and must be found to comply with the RCPD zone  
15 standards in GZDO 3.740 and the criteria in GZDO 3.760.  
16 GZDO 3.750.2. These criteria require that the "design, size  
17 and uses" of the planned development (1) are consistent with  
18 the comprehensive plan, (2) do not generate traffic that  
19 cannot be accommodated on existing or planned streets, and  
20 (3) will be adequately served by existing or planned  
21 facilities and services.

22 The final development plan must be reviewed by the  
23 planning commission to determine whether "it conforms in all

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<sup>5</sup>A variety of commercial uses are listed as permitted in the C-2 or C-1 zones, including "[r]etail stores and shops handling things such as clothing, gifts, food and drugs, antiques, furniture and appliances;" restaurants; and banks. GZDO 3.520.3, .5, .10. However, neither the C-2 nor C-1 zone specifically lists "retail shopping center" or "shopping center" as a type of commercial use.

1 substantial respects to the previously approved preliminary  
2 [development] plan." GZDO 3.750.3.b. In addition,  
3 GZDO 3.780.1 provides:

4       "\* \* \* The approved final [development] plan \* \* \*  
5 shall control the issuance of all building permits  
6 and shall restrict the nature, location and design  
7 of all uses. Minor changes in an approved  
8 preliminary or final development plan may be  
9 approved by the Building Official if such changes  
10 are consistent with the purposes and general  
11 character of the development plan. All other  
12 modifications \* \* \* shall be processed in the same  
13 manner as the original application and shall be  
14 subject to the same \* \* \* procedural  
15 requirements." (Emphasis added.)

16       Petitioners contend the challenged city council  
17 decision misconstrues the 1985 decision. According to  
18 petitioners, the 1985 decision approved, pursuant to  
19 GZDO 3.720.6, "a retail shopping center allowing for all  
20 uses that are permitted either outright or conditional[ly]  
21 in the C-2 Zone." Petition for Review 12-13. Petitioners  
22 point out that both the preliminary development plan  
23 application and 1985 decision refer to the proposed  
24 development as a "retail shopping center." Record 201, 399.  
25 Petitioners argue that so long as the uses occupying the  
26 shopping center are commercial uses listed as uses permitted  
27 outright or conditionally in the C-2 zone, no further city  
28 approvals are required.

29       Petitioners further contend the city's interpretation  
30 of the 1985 decision improperly limits the approved shopping  
31 center to only five specific tenants -- "a food market, a

1 drug store, a variety store, a junior department store, a  
2 restaurant, a financial institution \* \* \*." Record 201.  
3 Petitioners argue this is an incorrect interpretation of the  
4 1985 decision, because the decision actually states the  
5 proposed retail shopping center "will likely include" both  
6 these five uses "and other retail shops." Id. Petitioners  
7 also contend the city's position that it merely approved  
8 what petitioners applied for in 1985 is flawed, because  
9 nothing in the application suggests petitioners were seeking  
10 approval for a retail shopping center limited to five  
11 specific types of businesses.<sup>6</sup>

12 Finally, petitioners argue that under the city's  
13 interpretation of the 1985 decision, the following condition  
14 imposed by the 1985 decision is unnecessary:

15 "[G]asoline stations, oil depots, or other uses  
16 that could contaminate wetland areas adjacent to  
17 the project will not be permitted." Record 218.

18 According to petitioners, this condition was imposed to  
19 expressly limit the right otherwise given to petitioners by  
20 the 1985 decision to site any use allowed in the C-2 zone in  
21 the approved retail shopping center.

22 The challenged decision states:

23 "[The 1985 decision] approved a retail shopping  
24 center as described in [petitioners'] application,  
25 i.e., a large L-shaped building, approximately  
26 104,000 sq. ft. where three main anchor tenants,

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<sup>6</sup>Further, according to petitioners, an ordinary and typical retail shopping center is not limited to particular retail uses.

1 including a grocer, a drug-department store and a  
2 variety store would be located and three smaller  
3 free-standing buildings of up to 15,000 additional  
4 square feet of building area where restaurants and  
5 a financial institution could be located.

6 "[Petitioners argue] that the Planning Commission  
7 approved a retail shopping center where all  
8 commercial uses in the C-2 zone could be located  
9 without further approval by the [Planning]  
10 Commission. We disagree. [Petitioners] did not  
11 propose a retail shopping center where all  
12 commercial uses in the C-2 zone could be located.  
13 Having not made this proposal, the [Planning]  
14 Commission did not and could not approve it.  
15 Moreover, the development plan submitted by  
16 [petitioners] proposed a specific mixture of uses  
17 as was required by both the stated purpose of the  
18 [RCPD] zone and the development [plan] review  
19 procedure.

20 "[T]he site plan [submitted by petitioners on  
21 March 5, 1992] proposes five new commercial uses  
22 and eliminates five approved uses. This does not  
23 constitute minor changes in an approved final  
24 development plan which could be approved by the  
25 Building Official. It is a proposal [for] a new  
26 mixture of uses which constitutes a modification  
27 of the approved [development] plan and, therefore,  
28 these changes must be processed in the same manner  
29 as the original application pursuant to  
30 [GZDO] 3.780." Record 19-20.

31 The RCPD zoning district is intended to provide an  
32 "appropriate mixture of uses" through approval of a  
33 "comprehensive development plan." GZDO 3.710. A  
34 preliminary development plan application must "describe the  
35 character of the proposed development," and the "uses"  
36 proposed must meet certain criteria. GZDO 3.750.1.a(1);  
37 3.760.

38 The 1985 decision does not clearly identify the uses it

1 approves as part of the proposed planned development. It  
2 does not specifically state that it approves a retail  
3 shopping center that may contain any commercial use  
4 permitted outright or conditionally in the C-2 zone, as  
5 petitioners contend.<sup>7</sup> It also does not specifically  
6 identify all approved commercial uses. However, the 1985  
7 decision does describe petitioners' proposed commercial  
8 development (Record 201), and states that the proposed "site  
9 plan, size and uses" are approved. (Emphasis added.)  
10 Record 215-16.

11 In view of the nature and requirements for planned  
12 development under the RCPD zone, and the statements in the  
13 1985 decision describing the applicants' proposal and  
14 approving the proposed uses, we agree with the city that the  
15 1985 decision approved the commercial development proposed  
16 in the preliminary development plan application.<sup>8</sup> That  
17 proposal is as follows:

18 "[A] large L-shaped building, of approximately  
19 104,000 square feet, along the west and south

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<sup>7</sup>In fact, as "retail shopping center" is not a type of use listed as permitted outright or conditionally in any zoning district of the GZDO, it is hard to understand how the city could approve a use as such.

<sup>8</sup>Because the proposal approved by the 1985 decision does not purport to specifically identify every commercial use that may be allowed, there is nothing inconsistent about including in the decision a condition saying that gas stations and other uses that could contaminate adjacent wetland areas are prohibited. For instance, such a provision provides guidance to the city building official in determining whether a proposed change in the approved development plan is "consistent with the purposes and general character of the development plan," as required under GZDO 3.780.1.

1 sides of Parcel A. Included within this building  
2 are to be up to three main anchor tenants,  
3 including a grocer, a drug-department store and a  
4 variety department store. Additional shops  
5 providing a variety of goods and services will  
6 fill the remainder.

7 "In addition, up to three smaller, free-standing  
8 buildings, with up to 15,000 additional square  
9 feet of building area are included in 'pad'  
10 developments at the highway frontage. Two are  
11 proposed to be restaurants and the third a branch  
12 office of a financial institution." Record 399.

13 We further agree with the city that the mixture of  
14 commercial uses proposed in the site plan submitted by  
15 petitioners with their March 5, 1992 letter requesting an  
16 interpretation of the 1985 decision, constitutes more than a  
17 minor modification of the approved development plan.  
18 Therefore, the city correctly found that under GZDO 3.780.1,  
19 such a proposal must be processed in the same manner as the  
20 original application for preliminary development plan  
21 approval.

22 The assignment of error is denied.

23 The city's decision is affirmed.