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AFFIRMED

04/19/93

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

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision of the city council
4 approving a special use permit for "topographic alterations
5 in the 100-year floodplain" (special use permit) to allow
6 construction of a residential driveway.¹ Record 1.

7 **MOTION TO INTERVENE**

8 Jerry Trimble and Remi Trimble, the applicants below,
9 move to intervene on the side of respondent. There is no
10 objection to the motion, and it is allowed.

11 **FACTS**

12 The subject property is vacant and consists of 1.19
13 acres zoned Residential Low Density (R-7). The property is
14 shaped like a flag pole, with the flag portion being located
15 outside of the floodplain and the pole portion being located
16 within the floodplain. The subject property is surrounded
17 by property zoned R-7. Intervenors-respondent (intervenors)
18 seek approval to use the pole portion for a driveway to
19 provide access to the subject property to develop a
20 residence.

21 The planning commission denied intervenors' request for
22 a special use permit, and intervenors appealed to the city
23 council. The city council overturned the decision of the
24 planning commission and approved the special use permit.

¹The challenged decision also approves a variance. However, petitioners do not challenge this aspect of the decision.

1 This appeal followed.

2 **FIRST ASSIGNMENT OF ERROR**

3 "Respondent misconstrued the applicable law,
4 failed to make adequate findings and made a
5 decision not supported by substantial evidence in
6 the record in [approving] the construction of a
7 driveway for residential use across a wetland
8 without an adopted wetland conservation plan and
9 without requiring compliance with the requirements
10 of [Statewide Planning] Goal 5."

11 ORS 197.279(2) provides that:

12 "Wetland conservation plans shall be adopted and
13 amended by local governments according to the
14 procedures of ORS 197.610 to 197.625."

15 ORS 197.646 provides as follows:

16 "(1) A local government shall amend the
17 comprehensive plan and land use regulations
18 to implement new or amended * * * land use
19 statutes when such * * * statutes become
20 applicable to the jurisdiction.

21 * * * * *

22 "(3) When a local government does not adopt
23 comprehensive plan or land use regulation
24 amendments as required by subsection (1) of
25 this section, the new or amended goal, rule
26 or statute shall be directly applicable to
27 the local government's land use decisions * *
28 *." (Emphasis supplied.)

29 Petitioners argue there are no local standards
30 governing the approval of development in wetland areas
31 within the city; and, accordingly, the requirements of Goal
32 5 apply directly to the challenged decision. In addition,
33 petitioners contend the city's failure to adopt a wetland
34 conservation plan means that "[r]espondent did not have

1 jurisdiction to approve [intervenors'] request * * *."
2 Petition for Review 5.

3 We believe that petitioners read ORS 197.279(2) out of
4 context. ORS 197.279 is entitled "Approved Wetland
5 Conservation Plans Comply with [Statewide Planning] Goals;
6 Exception." ORS 197.279(1) states that wetland conservation
7 plans approved by the Division of State Lands (DSL) are
8 deemed to be in compliance with the goals. There is an
9 entire statutory process, set forth in ORS 196.668 to
10 197.686, addressing wetland conservation plans. ORS 196.678
11 provides that local governments "may develop and submit to
12 [DSL] a wetland conservation plan." (Emphasis supplied.)
13 However, the adoption of such plans is not mandatory.

14 Both ORS 197.279 and ORS 196.668 to 196.686 were
15 enacted by Oregon Laws 1989, chapter 837. In this context,
16 it is clear that ORS 197.279(2) simply establishes the
17 procedures required for the adoption of a wetland
18 conservation plan, if a local government chooses to adopt
19 one pursuant to ORS 196.668 to 196.686. ORS 197.279(2) is
20 not a land use statute that provides standards which must be
21 satisfied by local governments, within the meaning of
22 ORS 197.646. Accordingly, the city's failure to adopt a
23 wetland conservation plan neither deprived the city of
24 jurisdiction to consider intervenors' application, nor
25 provides any other basis for reversal or remand of the
26 challenged decision.

1 Further, Goal 5 does not directly apply to the
2 challenged decision, because it is a permit decision adopted
3 by the city under acknowledged comprehensive plan and land
4 use regulation standards.² ORS 197.175(2)(d); Byrd v.
5 Stringer, 295 Or 311, 316-17, 666 P2d 1332 (1983); Kuedell
6 v. Union County, 19 Or LUBA 394, 400 (1990).

7 The first assignment of error is denied.

8 **SECOND ASSIGNMENT OF ERROR**

9 "Respondent's decision violates a provision of its
10 zoning code by construing a private residential
11 driveway access in a regulatory flood plain
12 district as being a 'public' need."

13 Hillsboro Zoning Ordinance (HZO) 11-6.83(a) and (b)³
14 require:

15 "The granting of the [special use permit] would
16 meet some public need or convenience."

17 "The granting of the application is in the public
18 interest."

19 The challenged decision interprets these standards to
20 be satisfied because (1) there is a public need for, and
21 public interest in, the provision of housing; (2) the
22 subject property is zoned for residential use; and (3) there

²Intervenors argue no issue was raised below concerning Goal 5, the applicability of ORS 197.279, or any requirement for a wetland conservation plan. According to intervenors, because these issues were not raised below, under ORS 197.835(2) and ORS 197.763 those issues were waived. Regardless of whether petitioners may have waived the issues raised under this assignment of error, the issues are without merit in any event, and we do not consider intervenors' waiver arguments.

³HZO 11-6.83(a) and (b) apply because HZO 11-6.131(7)(a) requires that they apply.

1 is a need for, and a public interest in, the provision of
2 access to the property to enable such residential use of the
3 subject property.

4 Petitioners argue the city's interpretation of
5 HZO 11-6.83(a) and (b) is incorrect. Petitioners argue that
6 the findings establish the existence of only a private need
7 and interest, not a public need and interest, to be served
8 by the proposal.

9 We conclude that the city's interpretation of its own
10 code is not clearly wrong. Therefore, we defer to it. West
11 v. Clackamas County, 116 Or App 89, 94, ____ P2d ____
12 (1992).

13 The second assignment of error is denied.

14 **THIRD ASSIGNMENT OF ERROR**

15 "Respondent misconstrued the applicable law by
16 deciding that 'the property' reasonably suited for
17 the construction of a private road was the entire
18 tract, not just the wetland area of the tract
19 which was the subject of the permit under review."

20 HZO 11-6.83(c) requires that:

21 "The property in question is reasonably suited for
22 the use requested."

23 The challenged decision determines compliance with this
24 standard, as follows:

25 "* * * We find substantial evidence in the record
26 to support a finding that the property is
27 reasonably suited for the use requested. We
28 interpret the standard to mean that the use being
29 requested is that of housing. The property in
30 question is the entire 1.19 acre parcel not just
31 the 'pole' portion of the parcel. There is no

1 contention or evidence in the record that
2 indicates the non-flood plain part of the
3 property, the majority of the parcel, is not
4 suited for use as housing. The applicants
5 introduced evidence from a soils engineer that
6 stated the ground would support a driveway
7 sufficient to meet all City codes for fire and
8 safety." Record 39.

9 Petitioners argue the city's interpretation of
10 HZO 11-6.83(c) is incorrect. Petitioners also argue that
11 even if the city's interpretation of HZO 11-6.83(c) is
12 correct, the determination in the challenged decision that
13 the flag pole is suitable for a driveway, is not supported
14 by substantial evidence in the whole record. We address
15 these issues separately below.

16 **A. Interpretation**

17 Petitioners argue the "use requested," within the
18 meaning of HZO 11-6.83(c), is a driveway and not "housing"
19 as provided in the above quoted findings. Petitioners
20 maintain HZO 11-6.83(c) requires only a determination that
21 the pole portion of the subject property, within the
22 floodplain, is suitable for the proposed driveway.
23 Petitioners contend it is erroneous to interpret
24 HZO 11-6.83(c) to require a determination regarding the
25 suitability of the entire subject parcel.

26 We interpret the challenged findings to determine the
27 use requested is both a residence and a driveway which will
28 serve that residence. We further interpret the challenged
29 decision to determine that the entire parcel, including the

1 pole portion located within the flood plain, is physically
2 suited for the requested use. We see nothing in
3 HZO 11-6.83(c) which prevents the city from considering the
4 physical suitability of the entire parcel, including the
5 suitability of the flag portion for a residence and the
6 suitability of the pole portion for a driveway.
7 Accordingly, the city's interpretation of HZO 11-6.83(c) is
8 not "clearly wrong."⁴ West v. Clackamas County, supra.

9 This subassignment of error is denied.

10 **B. Evidentiary Support**

11 Petitioners argue the determination in the challenged
12 decision that the pole portion is physically suited for a
13 driveway, lacks evidentiary support.

14 Intervenors cite evidence in the record to support the
15 city's determination that the pole portion is physically
16 suited for a driveway.⁵

17 Petitioner's citation of contrary evidence does not
18 undermine the evidence supporting the city's determination

⁴We note that petitioners do not challenge the adequacy of the city's findings concerning the suitability of the pole portion of the subject property for a driveway, and those findings do not appear to be inadequate. Accordingly, the findings themselves provide no basis for reversal or remand of the challenged decision.

⁵Intervenors also argue the challenged decision is a limited land use decision rather than a land use decision and that we should, therefore, apply a less demanding evidentiary standard of review. We have some question as to whether the challenged decision, a decision approving a special use permit in a floodplain, is a limited land use decision. However, we need not decide this issue here because regardless of the evidentiary standard applied, petitioners' evidentiary challenge fails.

1 in this regard.⁶ The choice between conflicting, believable
2 evidence belongs to the city; and we will not disturb that
3 choice here. Angel v. City of Portland, 22 Or LUBA 649,
4 659, aff'd 113 Or App 169 (1992).

5 This subassignment of error is denied.

6 The third assignment of error is denied.

7 The city's decision is affirmed.

⁶We note that the letter cited by petitioners from DSL is largely irrelevant to determining compliance with HZO 11-6.83(c). That letter states that DSL does not object to the proposed construction of a driveway in the pole portion of the subject property. Record 232.