



1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the city's approval of a subdivision  
4 application.

5 **MOTION TO INTERVENE**

6 Kanzelman Construction (intervenor), the applicant  
7 below, moves to intervene on the side of respondent. There  
8 is no objection to the motion, and it is allowed.

9 **DISCUSSION**

10 This is petitioner's second appeal of the city's  
11 approval of intervenor's subdivision application. In  
12 McCrary v. City of Talent, 29 Or LUBA 110 (1995), we  
13 remanded the city's approval because the city failed to  
14 interpret several comprehensive plan and ordinance  
15 provisions, which petitioner alleged to be applicable to the  
16 challenged decision. We also determined the city's findings  
17 were inadequate to establish compliance with certain  
18 criteria. On remand, the city provided the required  
19 interpretations and findings.

20 In this appeal, petitioner disagrees with several of  
21 the city's interpretations and findings. Despite his  
22 disagreement, petitioner has not established that the city's  
23 interpretations are clearly wrong or that the findings are  
24 not adequate or supported by substantial evidence.  
25 Petitioner has provided no basis for remand or reversal of  
26 the city's decision.

1           One argument warrants comment, however.     Petitioner  
2 argues the city improperly transferred the responsibility to  
3 address wildlife habitat to another entity by requiring, as  
4 a condition of approval, that the applicant conduct a  
5 wetland inventory and mitigation plan, subject to review and  
6 approval by the Division of State Lands (DSL). The specific  
7 comprehensive plan provision to which petitioner assigns  
8 error is Ch. V, Issue No. 6.E, which states

9           "It is the policy of the City of Talent to  
10          protect, manage and avoid urbanization and  
11          destructive alterations of known wildlife habitat  
12          and resource lands."

13          The extent to which the city determined this plan  
14 policy to be a mandatory approval criterion is unclear. The  
15 city's subdivision approval will not cause the urbanization  
16 of this site. Rather, since the site is zoned R-1-8 (urban  
17 low density residential), the determination that it is  
18 appropriate for an urban level of development has already  
19 been made. Because of its urban residential zoning, the  
20 city has also previously determined that the subject site is  
21 not resource land. Nor did the city find this site to be a  
22 known wildlife habitat. It did, however, rely on this  
23 policy when it found that petitioner had submitted  
24 sufficient factual evidence to warrant a requirement that  
25 the applicant evaluate whether the site contains wetlands.  
26 It thus made the following finding:

27          "The Council recognized that wetlands are  
28          regulated by \* \* \* [DSL] and that it is illegal to

1 destroy wetlands without DSL permit and  
2 appropriate mitigation. The Council also  
3 recognized that DSL is more able to evaluate the  
4 issue of wetlands than is this Council, and  
5 therefore found that the above policy will be  
6 adequately met for the purposes of preliminary  
7 subdivision approval if Applicant is required to  
8 perform a wetland inventory by an expert in the  
9 field, and if DSL either 1) determines that no  
10 wetland fill permit is necessary or 2) issues a  
11 fill permit subject to mitigation measures  
12 acceptable to DSL. The Council therefore  
13 conditioned approval upon the following, to be  
14 verified in writing prior to final subdivision  
15 approval:

16 "i) Applicant shall have a wetland expert  
17 inventory the subject property; and

18 "ii) Based upon that inventory, DSL shall  
19 determine that either 1) no wetland fill  
20 permit is necessary to construct the  
21 subdivision, or 2) a wetlands mitigation  
22 plan acceptable to DSL has been  
23 submitted." Record 3.

24 As the council recognized, regulation of wetlands is  
25 within DSL's jurisdiction. With or without the condition  
26 imposed by the city, development of any wetlands area will  
27 require a permit from DSL. To the extent the city erred in  
28 relying on its comprehensive plan policy to require an  
29 inventory, such error is harmless. To the extent petitioner  
30 argues the city incorrectly interpreted this policy by  
31 failing to require additional scrutiny of this site, we  
32 disagree.

33 The city's decision is affirmed.