

LAND USE
BOARD OF APPEALS

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

Nov 29 3 14 PM '83

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2
3 FOREST HIGHLANDS NEIGHBORHOOD,)
ASSOCIATION, MARJORIE, L. MEYER,)
4 GENE R. MEYER, MR. and MRS.)
JOSEPH LIEN, MR. and MRS. JERRY)
5 KNOLTON, MR. and MRS. C. E.)
WARD, MR. and MRS. KEN WEBER)
6 and MR. and MRS. DAVID MILLER,)

7 Petitioners,)

8 v.)

9 THE CITY OF LAKE OSWEGO,)

10 Respondent,)

11 MARK DEVELOPMENT, INC., a)
corporation,)

12 Intervenor.)

LUBA No. 83-074

FINAL OPINION
AND ORDER

13 Appeal from City of Lake Oswego.

14 Jess M. Glaeser, Portland, filed a petition for review and
15 argued the cause for Petitioners.

16 James M. Coleman, Lake Oswego, filed a brief and argued the
case for the City of Lake Oswego.

17 Stephen T. Janik, Portland, filed a brief and argued the
18 cause for Intervenors. With him on the brief were Ball, Janik
and Novack.

19 BAGG, Board Member.

20
21 REMANDED

11/29/83

22 You are entitled to judicial review of this Order.
23 Judicial review is governed by the provisions of Oregon Laws
1983, ch 827.
24
25
26

1 BAGG, Board Member.

2 NATURE OF THE DECISION

3 Petitioners appeal an order of the city council of Lake
4 Oswego made June 7, 1983. The order affirmed a decision of the
5 Lake Oswego Development Review Board approving a development
6 plan for a neighborhood shopping center.

7 FACTS

8 The applicant, Mark Development, Inc., submitted an
9 application for a shopping center on the northwest corner of
10 the intersection of Monroe Parkway and Boones Ferry Road in
11 April of 1982. After hearings, the Development Review Board
12 approved the application along with conditions in June of
13 1982. Opponents of the shopping center appealed the decision
14 to the city council, and the city council reversed the
15 Development Review Board's approval in part because of
16 questions about whether the size of the development was
17 consistent with the comprehensive plan. There followed an
18 amendment to the comprehensive plan to authorize 163,000 square
19 feet of retail, service and office uses on the subject site.

20 The applicant submitted a second application in January of
21 1983. The application was reviewed by the Development Review
22 Board in March of 1983, and the Board approved the application
23 with conditions on April 5, 1983. Opponents submitted an
24 appeal to the city council, and the council considered the
25 appeal at a hearing on May 24, 1983. On June 8, 1983, the city
26 issued findings and an order affirming the decision of the

1 Development Review Board.

2 The shopping center is on 13.3 acres and is designated
3 "neighborhood commercial" in the city's comprehensive plan. A
4 portion of the site contains a wetland, and it is designated "a
5 distinctive natural area" in the comprehensive plan. There are
6 poplar trees within the wetland along with other vegetation.
7 The development will include 116,535 square feet of building
8 area. The development will include 60,000 square feet of
9 retail space, 30,735 of service space and 25,800 feet of
10 medical and dental office space.

11 The site is adjacent to condominiums to the west,
12 condominiums and a commercial area to the south, single family
13 residences to the north, undeveloped land to the northeast and
14 single family uses to the east.

15 ASSIGNMENT OF ERROR NO. 1

16 "RESPONDENT ERRED IN DISMISSING PETITIONER'S [sic]
17 APPEAL FOR FAILURE TO COMPLY WITH THE REQUIREMENTS OF
18 THE NOTICE OF APPEAL."

18 Petitioners argue the city council erred in dismissing
19 their appeal from the Design Review Board (DRB). The dismissal
20 was for failure to comply with the notice requirements in the
21 Lake Oswego Code. LOC 49.625(4) provides, in part, that the
22 notice of appeal must contain a statement of the interest of
23 the appellant. The notice on file in this matter does not
24 contain such a statement. Petitioners argue, nonetheless, they
25 had a right to appeal, and point to the fact the city went
26 ahead notwithstanding the dismissal and heard petitioners

1 appeal on the merits.

2 Respondents say the city's dismissal was proper because
3 petitioners did not comply with Lake Oswego's ordinance
4 provisions requiring petitioners to show how they were
5 aggrieved by the DRB's decision. The city argues the errors in
6 the notice are "jurisdictional," and may not be waived.

7 The city's findings, conclusions and order of June 8, 1983
8 include a dismissal of petitioners' appeal for failure to
9 comply with LOC 49.625(4). The city's order is not specific as
10 to the provision violated, but it appears the appeal was
11 dismissed because the notice did not state petitioners' had
12 participated in the DRB hearing, and petitioners did not state
13 how they were aggrieved by the DRB decision. Notwithstanding
14 failure to comply with the notice requirements in LOC
15 49.625(4), the city council did hold a full hearing on the
16 issues raised by petitioners in their notice of appeal, and the
17 city made findings. In other words, the city council treated
18 the appeal as though it had been properly presented.

19 The Lake Oswego Code provides the city may consider
20 improperly filed appeals. LOC 49.625(2) permits the council to
21 hear an appeal even though it does not comply with the notice
22 requirements.

23 "The appeal of a hearing body decision to the Council
24 shall be accomplished in accordance with the
25 provisions of this section. Failure by a person to
26 follow the procedures described in this section may
preclude that person from bringing an appeal before
the council." (Emphasis added)

1 Also, the city may consider issues not raised in petitioners'
2 notice.

3 "(7) Evidence not contained in the record made before
4 the hearing body may not be presented in the hearing
5 before the city council. In considering the appeal
6 the council need only consider those matters
7 specifically raised by the appellant. The council may
8 consider other matters if it so decides." LOC
9 49.625(7) as amended by Lake Oswego Ordinance No.
10 1851, §20. (Emphasis added)

11 In this case, the council's action in hearing the appeal
12 and making findings is in compliance with the council's
13 discretionary power to consider appeals notwithstanding defects
14 in the notice of appeal. Had the drafters of the code intended
15 notice defects to control council review, the ordinance could
16 have clearly so stated.¹

17 The first assignment of error is denied.

18 ASSIGNMENT OF ERROR NO. 2

19 "RESPONDENT ERRED IN ITS ALLOWING THE RESUBMITTAL OF
20 INTERVENOR'S APPLICATION IN VIOLATION OF LOC
21 49.640(4)."

22 Petitioners claim the city erred in considering the
23 intervenor's application within less than six months of the
24 city's denial of a previous and similar application by the same
25 applicant. Petitioners claim LOC 49.640(4) precludes this
26 resubmittal.

LOC 49.640(4) provides:

"If a request is denied by a hearing body or the City
Manager and no appeal taken, or if upon review or
appeal the denial is affirmed, no new request for the
same or substantially similar proposal shall be filed
within six months after the date of final denial. An

1 application may be denied without prejudice and a
2 waiver of the six month restriction granted. The
3 hearing body, at the request of the City Manager, may
4 consider new evidence that conditions have changed to
an extent that further consideration of an application
is warranted, and waive the six month restriction."

5 Petitioners claim this provision is violated because the city
6 council has already denied this application. Petitioners
7 further complain the city was required to issue a denial
8 "without prejudice" if it had any intent of allowing
9 resubmittal, and in this case the city did not do so.
10 Petitioners argue this fact alone precludes entertaining
11 intervenor's new application. Also, petitioners make what
12 appears to be an alternative argument that no new evidence
13 sufficient to show changed conditions was introduced, thereby
14 precluding resubmittal of this application.

15 The city interprets LOC 49.640(4) to prohibit submittal
16 only where a hearing body or the city manager and the city
17 council deny an application. In other words, the first
18 sentence of LOC 49.640(4) precludes resubmittal only where an
19 application is denied at a lower level and the denial is
20 affirmed by the city council. Here, the DRB approved an
21 earlier application for this shopping center, and the city
22 council reversed the DRB and denied the application.
23 Therefore, under the city's interpretation of the code, there
24 is no prohibition against resubmittal.²

25 The Board believes the city's interpretation of its code is
26 reasonable and not contrary to law. Fifth Avenue Corp. v.

1 Washington County, 282 Or 591, 581 P2d 60 (1978); Alluis v.
2 Marion County, 7 Or LUBA 98 (1982). The plain meaning of the
3 first sentence of the controlling code provision prohibits
4 resubmittal only where there has been a denial and the denial
5 is affirmed. See Davis v. Wasco IED, 286 Or 261, 593 P2d 1152
6 (1979). The facts in this case do not show those conditions to
7 exist, and the applicant was not prohibited, by the terms of
8 the code, from submitting a second application for this
9 development within six months of denial of its first
10 application.

11 The second assignment of error is denied.

12 ASSIGNMENT OF ERROR NO. 3

13 "RESPONDENT ERRED IN FINDING THAT THE APPROVAL OF THE
14 DEVELOPMENT COMPLIED WITH GOAL 2."

15 Petitioners claim Goal 2 requires that a decision maker
16 consider "alternative courses of action" in making a decision
17 on any application. Petitioners do not announce what
18 "alternative courses of action" they would have the city
19 consider. However, in petitioners' "Summary of Argument,"
20 petitioners make the following statement:

21 "Since the city's comprehensive plan has not been
22 acknowledged, the city was required, in evaluating the
23 proposed development, to consider alternative courses
of action (i.e., alternative sites)." Petition for
Review at 5.

24 The Board notes the property is zoned for the requested use,
25 and petitioners are not challenging the zoning.

26 Respondent City argues Goal 2's requirement for

1 consideration of alternative courses of action applies only to
2 plans, not quasi-judicial decisions.

3 "All land use plans shall include identification of
4 issues and problems, inventories and other factual
5 information for each applicable state-wide planning
6 goal, evaluation of alternative courses of action and
7 ultimate policy choices, taking into consideration
8 social, economic, energy and environmental needs. The
9 required information shall be contained in the plan
10 document or in supporting documents." LCDC Goal 2.

11 This land use decision was not the adoption of a plan wherein
12 alternative designations for property would have to be
13 considered, but was an implementation measure under Goal 2,
14 according to respondent. That is, this decision is one that
15 carries out a comprehensive plan, it is not the plan itself.

16 In Gruber v. Lincoln County, 2 Or LUBA 180 (1981), the
17 Board said Goal 2 required a consideration of alternative
18 courses of action in connection with a choice of zone to apply
19 to particular property. The land use decision in the Gruber
20 case was adoption of Lincoln County Comprehensive Land Use Plan
21 and Ordinance which amended Lincoln County zoning code to bring
22 the code into conformity with designations in the comprehensive
23 plan. It was characterized as a legislative decision, one in
24 which there were competing choices between various zones to
25 apply to the property.³

26 In this case, the choice of action for this property has
already been determined. A comprehensive plan designation
exists and a zone has been applied to the property. The
question is not what competing zones or land uses are to be

1 allowed on the property, the question is whether or not the
2 particular proposal meets applicable land use criteria.

3 The Board declines to hold Goal 2 to require an explanation
4 of alternative courses of action under circumstances such as
5 exist here. If the Board followed petitioner's view, the Board
6 would be requiring the county to go through each of the
7 permitted and conditional uses within a particular zone and
8 explain why one proposal should be allowed as opposed to other
9 possible uses which are not pending before the local
10 government. That is, if a particular zone allows shopping
11 centers, filling stations and pool halls, a local government
12 would be required to explain why it chose to allow an
13 application for a shopping center as opposed to the filling
14 station and the pool hall with no application pending for such
15 uses on that same property. The Board believes this exercise
16 would be a foolish waste of time and money.

17 To the extent that petitioners are arguing Goal 2 requires
18 the city to look to other places to put the development, the
19 Board finds no such requirement in this case. The proceeding
20 on review did not include a Goal 2 exception. A requirement to
21 consider alternative locations is a requirement of a Goal 2
22 exception.⁴ The Board notes, however, the city did consider
23 alternative sites for this development. The city made a
24 finding that because of the limited amount of land available
25 for a neighborhood-commercial development in the city and the
26 unique size of this parcel, there were no alternative sites

1 available for a development of this size. Also, the city
2 correctly found the commercial designation for this site was
3 determined during the comprehensive planning process. Record
4 19. Petitioner has not challenged this comprehensive plan
5 designation or the zoning for the site.

6 The third assignment of error is denied.

7 ASSIGNMENT OF ERROR NO. 4

8 "RESPONDENT ERRED IN FINDING THAT THE APPROVAL OF THE
9 DEVELOPMENT COMPLIED WITH GOAL 5."

10 Petitioners argue the city's finding of compliance with
11 Goal 5 is not sufficient and is not supported by substantial
12 evidence in the record. Petitioners say the site has been
13 identified as a "distinctive natural area" pursuant to the Lake
14 Oswego Comprehensive Plan, and the site has been identified as
15 containing a wetland within the "distinctive natural area."
16 See Record 278. Comprehensive Plan of Lake Oswego, Community
17 Resource Policy Element, "Wetlands", p. 38. These designations
18 bring the area within what is known as an "essential wetland"
19 within the meaning of Section 4.015(2) of the development
20 standards in the city's development ordinance.

21 Petitioners advise the city relied on the "Conservancy
22 Commission" recommendation that the wetland was being preserved
23 by the maximum extent possible. Petitioners complain, however,
24 that the Conservancy Commission based its recommendation on
25 evidence that contained only the applicant's information.

26 Petitioners add the wetlands report submitted by the

1 intervenor was inadequate because it failed to address the
2 issue of wildlife habitat. A review of the chief document made
3 to support compliance, the Bierly report, shows no attempt to
4 inventory wildlife, according to petitioners.

5 Petitioners go on to complain that the size of the wetland
6 as determined by the county is inaccurate. Petitioners argue
7 the Development Review Board and the city council found that
8 size was not an issue and it was only necessary to determine
9 the boundaries of the wetlands. Petitioners argue the size of
10 the wetland will determine the boundary, and the respondent
11 city ignored discrepancies about the size of the wetland.
12 Petitioners point to no evidence, however, as to what the size
13 of the wetland should be.

14 Respondent City argues the city detailed the evidence and
15 findings relied upon to reach the conclusion that it had
16 complied with Goal 5. See Record 62-66. Further, the city's
17 order analyzed petitioners' objections about Goal 5. Record
18 36-38, 9-12. The city argues petitioners' fear about the
19 boundary of the wetland is mistaken because the applicable city
20 development standard, Section 4.035(2), requires identification
21 of wetland boundary at the time of the preapplication
22 conference.

23 "2. For major developments, essential wetlands
24 boundaries shall be determined at the time of
25 preapplication conference, on the basis of detailed
site inventory and analysis and the recommendation of
the city manager."

26 The city found the wetland occupies only a very small portion

1 of the southeast corner of the site, Record 62, 261, 400-401.
2 Respondent says the city appropriately considered the only
3 conflict with Goal 5 to be the western most finger of the
4 wetland. This portion is used for landscaping and parking lot
5 purposes.

6 The intervenor characterizes petitioners' position as one
7 requiring no activity whatever within the wetland. Intervenor
8 rejects this position. Intervenor posits Goal 5 is not a
9 prohibitory goal, but one that requires the local government to
10 develop programs to provide open space and protect
11 environmentally significant areas. In this case, the evidence
12 shows the plan to protect this wetland will in fact enhance its
13 wildlife habitat quality. See letter of Department of Fish and
14 Wildlife, Record 326. See also Order at 9-13, and the Bierly
15 Report, Record 263-290. Intervenor goes on to remind the
16 Board the wetland is essentially a man-made drainage area
17 resulting from construction of Boones Ferry Road. It is
18 approximately .6 acres in size (a 20 foot by 30 foot pond) now
19 filled with tires, trash and other debris. The evidence in the
20 record shows this wetland has no significant hydrologic or
21 habitat value, and that it will be enhanced through the action
22 of the developer. For discussion of wildlife, see the Bierly
23 Report, see Record 270-271.⁵

24 Goal 5 requires development of programs to:

25 "(1) insure open space, (2) protect scenic and
26 historic areas and natural resources for future
generations, and (3) promote healthy and visually

1 attractive environments in harmony with the natural
2 landscape character."

3 To that end, resources, including wetlands and wildlife
4 habitats, must be inventoried.

5 "Where conflicting uses (for the resources) have been
6 identified the economic, social, environmental and
7 energy consequences of the conflicting uses shall be
8 determined and programs developed to achieve the goal."

9 The wetland on the subject property has been identified by
10 the city as an essential wetland and included as a distinctive
11 natural area in its comprehensive plan. The subject parcel is
12 designated for neighborhood commercial development. Thus, the
13 city has identified conflicting uses for the site and is
14 required to identify economic, social, environmental and energy
15 consequences therefrom and to develop a program to achieve Goal
16 5.

17 The city found the development would not adversely affect
18 the wetland, but would preserve and enhance it. The city
19 relied on evidence showing the wetland is small, man-made and
20 rubbish filled. The intervenor will clear the rubbish, and
21 construct a drainage detention pond to increase the value of
22 the wetland. Intervenor will also landscape the area to
23 increase wildlife habitat and construct the buildings to
24 prevent interference with the wetland. The record reveals
25 intervenor's prior application was denied for failure to
26 adequately protect and preserve the wetland. Intervenor's
second application reflects a more than adequate effort to

1 address these concerns. Petitioners cite no contrary evidence
2 to show harm to the wetland as a result of the development.
3 That petitioners did not have input before the Conservancy
4 Commission is not fatal to the city's compliance with the goal
5 because petitioners had an adequate opportunity to rebut the
6 Conservancy Commission's conclusions before the DRB.⁶

7 With respect to wildlife habitat, the DRB made the
8 following findings of fact:

9 "Its [the wetland's] visual, cultural and economic
10 values are also uniformly low as are its uses for
11 wildlife, biological production, open space and
12 educational values." Record 62.

13 "The developer proposes to install a drainage
14 detention pond near the existing wetland. This
15 detention pond will add to existing wetland values of
16 turbidity reduction/nutrient filtration and storm
17 water storage values of the existing wetland. The
18 plantings incorporated into the landscape plan will
19 enhance and add to natural biological functions. The
20 developer will remove the existing automobile tires
21 and other trash from the wetlands and the site.
22 Proposed landscaping will also maintain or improve the
23 scenic value of the property. The development will
24 result in increased surface water area, increased
25 vegetation, and increased compatible habitat for
26 existing wildlife compared to the site in its
undeveloped condition." Record 63.

19 Based on these facts, the DRB concluded:

20 "Finding: The development will increase the wildlife
21 habitat values of the property by providing mechanisms
22 for wetland preservation, surface water area and
23 increasing vegetation." Record 65.

24 The city council reviewed these findings and the evidence
25 supporting them and found they were adequate to protect and
26 preserve wildlife values. Record 10-12.

1 The city council also found persuasive a letter from the
2 Department of Fish and Wildlife. Record 326. That letter,
3 dated March 4, 1983, indicates the author visited the wetland
4 and reviewed the revised wetlands report and plan prepared to
5 support intervenor's application. The Fish and Wildlife
6 biologist concludes intervenor's proposals for the site "will
7 add significantly to the wildlife habitat and use on the
8 area." Id. In addition, the report by Bierly and Associates,
9 revised January, 1983, said the wildlife value in the
10 particular wetland is low. Record 270. The Board concludes
11 the city had substantial evidence to support its conclusion the
12 development will enhance, rather than harm, wildlife habitat of
13 the wetland. The Board believes the city was justified in
14 selecting this evidence as the more credible than the little
15 offered by petitioners. See Findings pp. 8-13.

16 The Board concludes intervenor's proposal constitutes a
17 program sufficient to meet Goal 5 requirements for conflicting
18 uses. The city did not violate Goal 5 in approving the site
19 plan for this development.

20 The fourth assignment of error is denied.

21 ASSIGNMENT OF ERROR NO. 5

22 "RESPONDENT ERRED IN FINDING THAT ITS APPROVAL OF THE
23 APPLICATION COMPLIED WITH CITY OF LAKE OSWEGO
24 COMPREHENSIVE PLAN POLCIES [sic] AND DEVELOPMENT
25 STANDARDS."

26 Under this assignment of error, petitioners make four
subassignments of error alleging violation of specific plan

1 policies. At the outset, the Board must address petitioners'
2 argument the city erred in finding petitioners' notice of
3 appeal inadequate because it referred to comprehensive plan
4 "objectives" instead of "policies." Petitioners admit they
5 incorrectly cited comprehensive plan objectives, but
6 petitioners say the city understood the references were to
7 policies.⁷

8 The record and the city's findings show a shared
9 understanding between the parties that petitioners' references
10 were to plan policies and not simply to plan objectives. There
11 is no statement as to how the applicant and the city were
12 misled by petitioners' mistaken reference, and the Board
13 concludes any error in petitioners' citation is harmless. The
14 Board will consider petitioners' arguments.

15 "A. Respondent's Approval of the Application Does Not
16 Comply with Comprehensive Plan Policies Relating
to Distinctive Natural Areas."

17 Under this subassignment of error, petitioners allege the
18 city violated comprehensive plan policies on distinctive
19 natural areas. Petitioners point to General Policy No. 1 which
20 calls for the city to "preserve the general wooded character of
21 Lake Oswego and protect the natural functions served by native
22 tree stands, street and yard trees." City of Lake Oswego
23 Comprehensive Plan, page 26. Petitioners are particularly
24 concerned about the removal of some Lombardy Poplar trees on
25 the site.

26 Respondents say the policy does not prohibit removal of all

1 natural vegetation and trees. Respondents claim not all the
2 Lombardy Poplars to be removed are within the distinctive
3 natural area, and this particular development provides for the
4 maximum preservation of native trees. The development also
5 provides a landscaping plan, and action is taken to enhance the
6 wetland on the site, according to respondents.

7 The Board agrees with respondents. The Board finds the
8 policy cited to be a general policy that does not speak to
9 specific actions such as the one under review here unless it
10 can be shown that the "general wooded character" of the city is
11 adversely affected. The policy does not prohibit removal of
12 trees, and petitioners have not shown how the "general wooded
13 character of Lake Oswego" will be lessened by removal of some
14 trees on the site.

15 This subassignment of error is denied.

16 "B. Respondent's Approval of the Application Does Not
17 Comply with Comprehensive Plan Policies Relating
to Wetlands."

18 Petitioners argue a general plan policy requires
19 preservation of wetlands and encouragement of land use
20 compatible with wetland preservation.⁸ Petitioners argue, as
21 in Assignment of Error No. 4, supra, that there was substantial
22 and credible evidence which conflicted with the intervenor's
23 evidence on the issue of the compatibility of this development
24 with the wetland. Petitioners claim the city's failure to
25 identify the size of the wetland, and the city's allowance of
26 development within the wetland, are not consistent with

1 comprehensive plan policies on wetlands. Petitioners add the
2 city was required to address the conflicting evidence about the
3 compatibility of this use with the wetland and did not do so.

4 The Board finds no violation as alleged. The specific
5 policy on wetlands cited by petitioners does not prohibit
6 development within the wetland. The policy directs the city to
7 write development standards which will preserve wetlands. This
8 direction is hardly a prohibition on development.

9 As to the matter of the size of the wetland, the Board does
10 not find the plan policy requires a determination of size. The
11 city did delineate the boundaries of the wetland, and
12 petitioners offer no explanation as to how the boundary chosen
13 is inadequate. In short, these policies do not provide a basis
14 for petitioner to allege that the city's failure to state the
15 size of the wetland is error or that the city's grant of
16 permission to develop within the wetland is error.

17 The Board has already discussed the evidence about wetlands
18 under Assignment of Error 4, supra.

19 For these reasons and those discussed in assignment of
20 error no. 4 supra, this subassignment of error is denied.

21 "C. Respondent's approval of the Application Does Not
22 Comply with Comprehensive Plan Policies Relating
23 to Stream Corridors, Nor Does It Comply With the
24 City of Lake Oswego's Development Standard 3
25 Pertaining to Stream Corridors."

26 Petitioners claim development standard 3.035 of the city
code requires determination of stream corridor boundaries at
the time of preapplication for any major development. Because

1 there is no finding of a detailed site inventory and no
2 analysis of the stream corridor, the city has violated his
3 comprehensive plan policies about stream corridors, according
4 to petitioners. Petitioners point to a city staff report
5 stating that a city hydrology map showing a stream corridor in
6 the area is no longer accurate. Petitioners claim the
7 statement of staff is not proof that the hydrology map is
8 inaccurate. Petitioners argue the city's reliance on its own
9 staff was misplaced because city planning staff members are not
10 qualified as experts on stream corridors. Further, petitioners
11 argue the Bierly report does not mention a stream corridor.
12 The absence of a reference to a stream corridor in the report
13 does not mean there is no stream corridor, according to
14 petitioners.

15 The city found no stream corridor to exist. The city found
16 the City of Portland constructed a pipe storm sewer system in
17 1979 which replaced the natural stream on the site. The city
18 recognizes the existence of a ditch to channel localized
19 runoff, but the ditch was artificially created and does not
20 meet the definition of a stream corridor, according to the
21 city's findings. See Record 19. Further, the Bierly report
22 does make a statement about stream corridors. The report
23 states:

24 "Surface storage of runoff is an important function of
25 the existing wetland, although an underground storm
26 water drainage system has already replaced the area
identified as a major stream corridor on the city
hydrology map." Record 272.

1 The Board believes the city is entitled to rely on the
2 evidence presented by its staff and that included in the Bierly
3 report. Evidence offered by petitioners at pages 169 to 171 is
4 simply a reference to the hydrology map with no additional
5 evidence contradicting that presented by Mr. Bierly and staff.
6 The Board does not find this evidence undermines that presented
7 by staff and Mr. Bierly. The city was entitled to conclude, as
8 it did, that no stream corridor exists from the evidence in the
9 record. See Norvell v. City of Portland, 43 Or App 849, 604
10 P2d 896 (1979).

11 The Board finds no violation of development standard no. 3.

12 This subassignment of error is denied.

13 "D. Respondent's Approval of the Application Does Not
14 Comply With City of Lake Oswego Development
Standards Relating to Wetlands."

15 1. Procedural Issue.

16 Before considering petitioners' arguments about the city's
17 compliance with code provisions on wetlands, the Board must
18 consider a procedural issue raised by respondents. Respondents
19 assert petitioners did not raise the matter of non-compliance
20 with city wetland development standards in the letter of appeal
21 to the city council. Respondents argue, therefore, petitioners
22 are precluded from raising it before this Board.

23 The Board rejects this argument for the reasons stated
24 under Assignment of Error 5(A), supra. The city did consider
25 the development standard, and the Board believes it was
26 entitled to do so notwithstanding defects in the petitioners'

1 notice of appeal. The city exercised an option available to it
2 under its ordinance and is precluded from now claiming
3 petitioners failed to raise the argument.⁹

4 2. Wetlands Standards.

5 Petitioners point to Lake Oswego Development Standard 4.005
6 et seq. which requires compliance with five criteria before any
7 development may be placed in an essential wetland. Petitioners
8 claim there is no evidence to support the city's conclusion
9 that this development meets the first criterion, that the
10 development is "primarily dependent" upon placement in or near
11 the essential wetland. Also, petitioners say the city did not
12 make a finding that there were no feasible alternative sites
13 available outside the wetland, as required by the second of the
14 five criteria. Petitioners say they offered a reasonable
15 alternative site for this development.

16 The city's findings state the proposed development "is
17 primarily dependent on being partially located in or in close
18 proximity to the wetland." Record 65. There is no explanation
19 for this conclusion, and the Board has been cited to nothing in
20 the record to show upon what facts the city made this
21 conclusion.¹⁰

22 The Board looks to the city's code for guidance as to the
23 meaning of the wetland dependency requirement. However, the
24 standards in Section 4.020 of the city's code are not clear.
25 Subsection (1) of 4.020 lists the uses which may be allowed
26 within essential wetlands. The uses listed are those which

1 seem to be associated with essential wetlands. The uses listed
2 are

3 "a. Conservation of soil, vegetation, water,
4 fish and wildlife;

5 "b. Outdoor recreation including hiking, nature
6 study, camping, and swimming;

7 "c. Walkways, docks, etc. built on piers; and

8 "d. Uses associated with adjacent development,
9 including yards, play areas."

10 In the next subsection, the city provides that development
11 within essential wetlands may occur only when the following are
12 met:

13 "2. Any development is allowed in essential wetlands
14 only after the permit granting authority concludes
15 that all of the following criteria are met:

16 "a. The proposed development is primarily
17 dependent on being located in, or in close proximity
18 to, the essential wetland;

19 "b. There are no feasible alternative sites
20 available outside the essential wetland;

21 "c. The applicant has provided sufficient
22 information to demonstrate the need to locate the
23 proposed development in the essential wetland, and the
24 lack of feasible alternative sites;

25 "d. The proposed development would not
26 significantly damage, reduce or pollute the essential
wetland; and,

"e. The applicant has demonstrated that the
design and construction of the proposed development
provides for protection and enhancement of the
essential wetland to the maximum practical extent."

Subsection (3) of § 4.020 provides that the development must
provide for the "survival and quality of essential wetland

1 areas" through site design.

2 The Board believes it is required to read the ordinance to
3 give each of its provisions effect. 2A Sands, Sutherland
4 Statutory Construction, §46.05, 06 (3d ed, 1973). Under this
5 rule, the Board finds the most reasonable reading of ordinance
6 section 4.020(2) is that it requires that uses within an
7 essential wetland be somehow wetland dependent. Moreover,
8 even wetland dependent uses can be sited only if they cause no
9 interference with the essential wetland. §4.020(2)(b-e) It
10 also appears, however, that non-wetland use "associated with
11 adjacent development" may exist. §4.020(1)(d). This
12 provision, standing alone, suggests that a non-wetland
13 dependent use can be placed within the essential wetland.
14 However, §4.020(2)(a) requires wetland dependency of "any use"
15 in an essential wetland.

16 In order to give meaning to both §4.020(1)(d) and
17 4.020(2)(a), the Board reads the ordinance to allow non-wetland
18 dependent intrusions into the essential wetland only when they
19 are associated with a wetland dependent use. For example, one
20 could have a nature study facility with an associated parking
21 lot. The nature study facility is wetland dependent, the
22 parking facility is not.

23 The Board does not know why the city adopted such a strict
24 standard. The Board finds nothing in the comprehensive plan
25 section on wetlands or in LCDC Goal 5 to suggest that that
26 non-wetland dependent uses must be prohibited from the

1 wetland. It is tempting to read §4.020(2)(a) out of the
2 ordinance. There is no legal basis for doing so, however. The
3 Board may not legislate for the city. 5 E. McQuillin,
4 Municipal Corporations, §15.14 (3d ed, 1981); Cannady v.
5 Roseburg, 2 Or LUBA 134 (1980); ORS 174.010.

6 In this case, the city approved a use which is certainly
7 not dependent upon a wetland. The use is a shopping center, it
8 is not a nature study center or some other use that might be
9 considered dependent upon placement in or near an essential
10 wetland. Accordingly, this decision must be remanded to the
11 city for application of §4.020(2)(a) and an explanation of how
12 this development is "primarily dependent" upon placement in or
13 near the essential wetland.¹¹

14 3. Alternative Sites.

15 On the issue of availability of alternative sites for the
16 development, the DRB found

17 "Finding: Because of the limited amount of land
18 available for neighborhood-commercial development in
19 Lake Oswego and the unique size of this parcel, there
20 are no alternative sites available for a development
of this size and nature for the types of uses
proposed, including 60,000 square feet of retail
space." Record 65.

21 "Finding: Because of setback requirements, height
22 limitation, improvements to Boones Ferry Road by the
23 applicant, parking requirements, alignment of the
24 entry way with Green Ridge Road across Monroe Parkway,
the actual location of wetlands on the site and site
topography, there are no feasible alternative sites
outside the wetland and on site for the development."
Record 66.

25
26 The DRB dealt with the issue of alternative sites by saying

1 that Section 4.020(2)(b) requires the city to consider
2 alternative sites "on the site on which the development is
3 proposed." Record 64. However, notwithstanding this
4 interpretation, the city went on to examine the zoning map, the
5 comprehensive plan, and the text of the zoning ordinance and
6 found no other comparatively zoned site of equal or greater
7 size in the city. The city did find a site known as the "Town
8 Center" to be a possible alternative, but rejected it because
9 of code limitations on the square footage that could be devoted
10 to retail use (40,000 sq. ft.).

11 As part of petitioners' challenge, however, they point to
12 LOC Section 48.315(6), allowing for exceptions to the retail
13 space limitation in the Town Center upon a showing of a market
14 need for developments of greater size. Petitioners contend
15 respondents were obligated to demonstrate that the Town Center
16 could not be converted into a suitable site by the exception
17 provision outlined in the code. At the hearing before the city
18 they claimed that a market study which would justify an
19 exception was available. However, they were unable to produce
20 the study. Record 26.

21 The Board does not believe that in construing the
22 alternative site requirement, the city was obligated to
23 consider the mere possibility of an exception at the Town
24 Center. It was sufficient that an existing code limitation
25 precluded use of the site for the development as proposed by
26 respondents. See Neuberger v City of Portland, 288 Or 155, 603

1 P2d 77 (1980).

2 Therefore, contrary to petitioners' assertions that the
3 city looked only at on-site alternatives and that there were no
4 findings on the matter of alternative sites elsewhere in the
5 city, the city council properly considered the code's
6 alternative site provisions.

7 The Board finds that the city was correct in determining
8 there were no feasible alternative sites for this development.

9 This subassignment of error is sustained as discussed, and
10 the fifth assignment of error is sustained in part.

11 ASSIGNMENT OF ERROR NO. 6

12 "RESPONDENT'S APPROVAL OF THE APPLICATION
13 IMPERMISSIBLY SUBSTITUTES A CONDITION FOR A REQUIRED
14 FINDING OF FACT."

15 Petitioners argue the city's finding of compliance with DEQ
16 ambient noise standards is inadequate and not supported by
17 substantial evidence. Petitioners say failure to make findings
18 showing compliance with the standards violates LCDC Goal 6 and
19 comprehensive plan policies relating to reduction of noise.

20 Petitioners point to a condition imposed by the city that

21 " * * * a registered Acoustical Engineer charged with
22 the responsibility of insuring compliance with DEQ
23 regulations should be required to specify and monitor
24 the installation of noise generating mechanical
25 equipment." Record 15.

26 Requiring monitoring of the development by a registered
acoustical engineer as a condition of approval is an
impermissible delegation of decision-making authority,
according to petitioners. See LaChance v. Josephine Co., 7 or

1 LUBA 59 (1982).

2 Respondent answers the evidence is sufficient to show
3 compliance with DEQ noise regulations and the DRB so found.
4 Record 67. Imposition of a condition is authorized by
5 ordinance, adds respondent, and is necessary because the noise
6 level is indeterminable until the development is operating.
7 See LOC 49.620(1), (2)(F). Intervenor argues further that
8 evidence in the form of a letter from DEQ shows the project
9 will comply with DEQ noise standards. Record 354, 359, 360.

10 The city's comprehensive plan general policies regarding a
11 quiet environment are:

12 "I. The city will cooperate with all federal, state
13 and regional agencies to encourage and maintain
14 effective noise control procedures.

15 "II. The city will consider noise control in land use
16 planning." L. O. Comp. Plan at 34.

17 While petitioners do not state which policy the city allegedly
18 violated, the Board assumes petitioners' argument relates to
19 general policy I. This general policy is defined more
20 specifically in the plan, in pertinent part, as requiring the
21 city to:

22 "Comply with all federal and state noise control
23 acts. Comply and consult with DEQ on all existing
24 noise control criteria and regulations and on noise
25 control recommendations." L.O. Comp. Plan, p. 34.

26 With respect to the quiet environment policy of the
27 comprehensive plan, the city council, after listing all
28 relevant evidence, found:

29 "The opposition testified that there were

1 inaccuracies and omissions in the Noise Report as
2 reviewed by Daly Engineering Co. (Exhibit 24). The
3 applicant addressed those items on pages 125-128 of
4 the transcript. The letter from Daly Engineering
5 concludes that: 'Most of the solutions will, if
6 enforced, most likely prove to be acceptable'. The
7 Noise Report concludes that: 'That proposed Towne
8 Square at Mt. Park will meet applicable DEQ noise
9 regulations if the operational recommendations
10 presented in this report are implemented.'

11 "The applicant had already submitted Noise
12 Policies (Exhibits 21 and 22) to deal with enforcement
13 questions.

14 "After reviewing this evidence, the Board
15 concluded that DEQ Regulations and Comprehensive Plan
16 Policies would be met provided that the
17 recommendations of the Noise Study were carried out
18 and that the procedures listed in the Landlord Noise
19 Policy were implemented. The Board believed that a
20 registered Acoustical Engineer charged with the
21 responsibility of insuring compliance with DEQ
22 regulations should be required to specify and monitor
23 the installation of noise generating mechanical
24 equipment. They established that requirement as a
25 condition of approval believing that it was the best
26 way to insure compliance with the recommendations of
27 the Noise Study." Record at 15.

28 Citing testimony relied on by the DRB, the city council
29 concluded the DRB's order adequately addressed noise control as
30 required by Goal 6 and the comprehensive plan. Record 16.¹²

31 The Board believes this finding is adequate to address
32 relevant noise control standards. The Board notes Goal 6 sets
33 no particular standard for noise control. Goal 6 addresses
34 noise pollution only indirectly, by referring to noise
35 pollution as a "waste and process" discharge. The goal
36 provides, in part, that waste and process discharges

37 "when combined with such discharges from existing
38 developments shall not threaten to violate, or violate
39 applicable state or federal environmental quality

1 statutes, rules and standards."

2 The Board believes the goal includes, then, an implicit
3 recognition of the Department of Environmental Quality's
4 regulatory authority.

5 In this case, the Board finds no violation of Goal 6
6 because of any lack of any noise control devices or plans. The
7 city adopted DEQ standards in its comprehensive plan, and the
8 city found this development would meet DEQ standards in the
9 order under review here.

10 The city's finding cites considerable evidence to support
11 the DRB's conclusion the development would not violate
12 comprehensive plan policies about a quiet environment.¹³ The
13 DRB's discussion of the evidence is instructive on the issue of
14 efforts to reduce noise and on the evidence used to conclude
15 noise standards would be met:

16 "The applicant has submitted a noise analysis
17 report prepared by Seton, Johnson and Odell, Inc. and
18 a noise management plan consistent with that report to
19 minimize noise emanating from the development. Hours
20 for parking lot sweeping will be restricted to between
21 the hours of 8:00 A.M. and 6:00 P.M. Each lot will be
22 cleaned at a different time using the quietest
23 equipment commercially available. Trash collection
24 will be limited to between the hours of 7:00 A.M. and
25 10:00 A.M. and will be of only 2-3 minute duration at
26 each of three pickup sites. Operation of trash
compaction equipment will be limited to the hours of
7:00 a.m. and 8:00 a.m. for durations of less than one
minute. All refrigerated trucks will turn their units
off before entry on site and until they are off site.
Building mechanical equipment will be operated
intermittently as required and is fully enclosed. The
board also reviewed and considered a noise report
prepared by Daly Engineering and submitted by
opponents to the development." Record at 67.

1 Based on this evidence, the DRB found:

2 "Finding: The development complies with applicable
3 DEQ noise regulations and standards and adequately
4 considers noise control issues.

5 "Finding: Supervision of the installation of and
6 approval of the specifications for noise generating
7 equipment by an acoustical engineer will help ensure
8 compliance with DEQ noise standards." Record at 67.

9 Also, DEQ, in a letter of May 11, 1982, provided comments
10 on the report by Seton, Johnson and Odell, recommending certain
11 steps be taken to insure compliance with DEQ regulations.
12 Record 360-361. The DRB's discussion quoted above indicates
13 intervenor incorporated many of DEQ's recommendations into its
14 final application.¹⁴ Additionally, evidence submitted by
15 petitioners in the form of a noise report review by Daly
16 engineering concludes the development will meet DEQ standards
17 if the report's recommendations are followed. Record 355-359.
18 The city's order shows consideration of this evidence which the
19 Board finds amply supports the finding of DEQ compliance. The
20 Board finds there is substantial evidence to support the
21 finding of compliance with the comprehensive plan policy on
22 quiet environment.

23 The fact a condition was added by the DRB does not negate
24 the finding of compliance, nor has the DRB impermissibly
25 delegated decision-making authority. The condition imposed by
26 the DRB that an acoustical engineer be responsible for insuring
compliance with noise regulations is not a statement that the
development can not meet noise regulations. The condition is

1 insurance that once the structure is complete and operating,
2 the operation will fulfill its promise. The respondent has
3 done all it can do to assure noise criteria will be met, and
4 the Board believes it perfectly permissible to provide for
5 follow up monitoring and adjustment to insure compliance with
6 noise criteria.

7 The sixth assignment of error is denied.

8 ASSIGNMENT OF ERROR NO. 7

9 "RESPONDENT'S APPROVAL OF THE DEVELOPMENT DOES NOT
10 COMPLY WITH THE NEIGHBORHOOD COMMERCIAL DESIGNATION
11 APPLICABLE TO THE SUBJECT PROPERTY."

11 Petitioners claim the city violated its plan by permitting
12 development of the size and scope contemplated here within an
13 area designated in the plan as a "neighborhood commercial"
14 area. Petitioners further argue that there has been no need
15 shown for this development, and the city was required to show
16 need under the provisions of its plan. According to
17 petitioners, the comprehensive plan discussion of this
18 particular site, the Monroe/Boones Ferry site, requires that a
19 site development plan be approved as a part of a planned unit
20 development for a shopping center. The provision states

21 "The site development plan approved as part of the PUD
22 should be revised to permit commercial uses which
23 would be appropriate for present needs for types of
24 commercial uses." Comprehensive Plan 78-79.

24 The comprehensive plan discussion of the "neighborhood
25 commercial" designation is included in a definitional section
26 of the plan. "Neighborhood Commercial," is defined as

1 "Commercial activities primarily required by families
2 of intervals of less than a week, with the service
3 area radius of about one mile or 3-5 minutes travel
time, containing a population of approximately 5,000
to 7,000 persons."

4 This provision may be compared with the "Community Commercial"
5 designation which is applied to commercial centers with a
6 larger service area and a larger population. The Board
7 understands petitioners to argue the size of this development
8 is greater than is necessary to serve a neighborhood commercial
9 area.

10 The petitioners' interpretation is certainly reasonable,
11 but there are other plan provisions which must be considered.
12 Within the commercial land use policies, there are specific
13 policies for specific areas of the city. One such area is the
14 one chosen for this development, the Monroe/Boones Ferry site.
15 The plan provides the overall building area on the site shall
16 not exceed 163,000 square feet. The plan, then, has provided
17 for a large development on this specific property
18 notwithstanding the general neighborhood commercial
19 designation. The proposed development is 116,000 square feet,
20 well within the plan limitation. The Board finds this site
21 specific plan provision is not limited by the more general plan
22 definition. 2A Sands, Statutory Construction, §47.07 (4th ed,
23 1973); ORS 174.020.

24 As to the second claim, that the city was required to show
25 a need for the use as part of the PUD application, the Board
26 does not find the city to have committed error. The plan

1 policy calls for a revision of a site development plan to
2 permit uses found appropriate for "present needs." The policy
3 appears to recognize the existence of a development plan which
4 the drafters of the comprehensive plan found, for one reason or
5 another, to be inadequate. The framers of the comprehensive
6 plan apparently thought the site plan should be revised as
7 needs dictated. The city, did not proceed in that fashion,
8 however. In a revision to Section 48.315(5) of its zoning
9 code, the city provided for a development of precisely the size
10 contemplated on this property. See Record 486. Section 48.300
11 of the zoning code was amended at the same time. The amendment
12 to Section 48.300 says that the uses listed, including those in
13 the amended sections, "have been determined to implement the
14 neighborhood commercial policies of the comprehensive plan."
15 Therefore, instead of waiting for the PUD stage of approval,
16 the city made a legislative determination of compliance with
17 the plan provision on the Monroe/Boones Ferry site..

18 The Board does not believe the city's approach constitutes
19 a violation of the comprehensive plan policy controlling this
20 site. The city has chosen to show need in a legislative
21 manner, rather than await a privately sponsored PUD
22 application. The Board does not believe this method is
23 objectionable as long as the determination of need required by
24 the plan is addressed.¹⁵

25 The seventh assignment of error is denied.

26 The decision of Lake Oswego is remanded for proceedings not

1 inconsistent with this opinion. The city must review this
2 development under §4.020(2)(a) of the zoning code.

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FOOTNOTES

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3 See Overton v. Benton County, 61 Or App 667, 658 P2d 574
4 (1983).

5
6 2 In the alternative, the city argues there were substantial
7 changes between the old application and the new application.
8 The Board does not reach this assertion, as the Board views the
9 city's interpretation of the first sentence of LOC 49.640(4) to
10 be correct.

11
12 3 In another case cited by petitioners, Scappoose Drainage
13 District v. Columbia County, 2 Or LUBA 174 (1981), the Board
14 held Columbia County was required to articulate its reasons for
15 choosing an aggregate mining use over an agricultural use on
16 agricultural land. The county was subject to an enforcement
17 order issued by LCDC that required the county to follow certain
18 procedures and answer certain questions when considering
19 applications for uses on agricultural land. While the issuance
20 of the conditional use permit was a quasi-judicial decision,
21 the question in Scappoose Drainage was one of why, given an
22 existing agricultural use on agricultural land, the county
23 chose a different use. The Board wishes to note, however, that
24 the Scappoose case is of questionable validity. The order
25 issued by the Board was primarily about Columbia County's
26 compliance with its own ordinances and rules as required by the
LCDC enforcement order. The Board's discussion of what Goal 2
required, as implemented through the county's own ordinance,
was not passed on to LCDC for review and, therefore, can not be
considered as an accurate statement of the commission's view as
to what Goal 2 means in the context of a quasi-judicial
decision. By its terms, a conditional use permit requires an
explanation of how the requested permit complies with
applicable criteria. In this context, the Board's view
expressed in Scappoose could simply be understood to be a
requirement that the reasons for granting a conditional use be
well articulated in the order.

23
24 4 The Goal 2 exceptions criteria are

- 25 " (a) Why these other uses should be provided for;
26 " (b) What alternative locations within the area could
be used for the proposed uses;

- 1 (c) What are the long term environmental, economic,
2 social and energy consequences to the locality,
3 the region or the state from not applying the
4 goal or permitting the alternative use;
5 (d) A finding that the proposed uses will be
6 compatible with other adjacent uses."

5 5

6 A letter from the Audubon Society raising questions about
7 the presence of a significant plant species known as Bebb
8 Willow at Record 329 is refuted by the curator of the herbarium
9 of Oregon State University at Corvallis, stating the subject
10 species is not present on the site. Record 285.

9 6

10 Under the comprehensive plan, the Conservancy Commission
11 seeks funds to acquire "Distinctive Natural Areas" and advises
12 the city council on preservation of natural areas.

12 7

13 Comprehensive plan "objectives" are short statements of the
14 purpose of comprehensive plan policies. The plan includes
15 "General Policies" which are methods of achieving comprehensive
16 plan objectives and "Special Policies" which are detailed steps
17 to carry out "General Policies." There are also maps which
18 show location of types of land uses and public facilities. See
19 Lake Oswego Comprehensive Plan, page 2. Respondent maintains
20 and petitioners do not challenge, that the objectives are not
21 binding directives, while the policies (both general and
22 specific) are binding directives. See Brief of Respondent City
23 at 19.

19 8

20 "FOR GENERAL POLICY II: Establish development
21 standards.

21 "The City will:

22 "1. Encourage open space use of wetlands.

23 "2. Develop policies and procedures to control
24 construction, filling or excavation on essential
25 wetlands.

26 "3. Establish a conditional use procedure which will
27 identify uses which can be allowed in wetlands
28 through careful site design. Such uses would be

1 required to:

- 2 "a. Incorporate natural wetland features (ponds,
streams, etc.) in site design.
- 3 "b. Prevent clearing of nature vegetation in
4 essential preservation areas.
- 5 "c. Preserve the natural retention storage
6 capacity of the land, or present findings
adequate to show that reduced capacity meets
7 public need.
- 8 "d. Prevent discharge of water pollutants onto
the ground.
- 9 "4. Establish a storm drainage management program
10 that will incorporate subsurface and surface
retention wherever practical.
- 11 "5. Provide for density transfers on individual
12 parcels to allow landowners to shift development
to preserve wetlands." City of Lake Oswego
13 Comprehensive Plan 38.

14 9

15 The Board notes a petitioner is not precluded from raising
16 an argument on the merits by failure to raise the same argument
before the local governing body. Twin Rocks Water Dist. v.
17 Rockaway, 2 Or LUBA 36 (1980). Where petitioner seeks to raise
18 procedural errors before LUBA, a petitioner must show he took
advantage of any possible opportunity to raise the same errors,
and have them cured in the proceedings below. Dobaj. City of
Beaverton, 1 Or LUBA 237 (1980).

19 10

20 The Board notes, however, a finding that

21 "The proposed development has been planned so as to
22 place the buildings and associated structures and
parking as far from the wetlands as possible in order
23 to minimize the impact on the wetland. Setback
requirements, height limitations, improvements to
24 Boones Ferry Road by the applicant, parking
requirements, alignment of the entry way with Green
25 Ridge Road across Monroe Parkway, the actual location
of the wetlands on the site and site topography all
26 combined to dictate the location of the development."
Record 63.

1 This finding does not discuss primary dependency on the
2 essential wetland, however, it discusses siting choices.

3
4 11

5 The city might wish to amend its ordinance to eliminate
6 Section 4.020(2)(a). As discussed under assignment of error
7 no. 5(B), the comprehensive plan does not call for so
8 restrictive an implementing policy. See West Hills and Island
9 Neighbors v. Multnomah County, _____ Or App _____ (LUBA No.
10 83-018, Slip Opinion of June 29, 1983).

11
12 12

13 See also the finding about Goal 6 at Record 67.

14
15 13

16 The city did not concede that the allegation raises
17 comprehensive plan policy issues, since petitioners' notice of
18 appeal challenged objectives, not policies. The Board has
19 determined petitioners' notice of appeal is not defective
20 because it refers to objectives instead of policies.

21
22 14

23 Indeed, the noise report was revised by Seton, Johnson and
24 Odell, in light of the DEQ's comments.

25
26 15

27 There is one additional comment by respondents that needs
28 to be considered. Respondents say because LCDC has determined
29 that the designation and use of this property meets statewide
30 planning goal 9, any inconsistency within the plan no longer
31 exists.

32 The Board believes the criteria necessary to meet Goal 9
33 are not the same criteria that the county has written in to its
34 plan and ordinance structure. The fact that a proposal may
35 meet statewide planning goals does not necessarily mean it
36 meets the provisions of the local ordinance. Indeed, local
37 ordinances frequently go beyond requirements of statewide
38 planning goals.



STATE OF OREGON

Agenda Item 5.1

TO: MEMBERS OF THE LAND CONSERVATION AND DEVELOPMENT COMMISSION DATE: 11/01/83

FROM: THE LAND USE BOARD OF APPEALS

SUBJECT: FOREST HIGHLANDS v LAKE OSWEGO
LUBA No. 83-074

Enclosed for your review is the Board's proposed opinion and order in the above captioned appeal.

This case is about a neighborhood shopping center in Lake Oswego. Petitioners allege violation of Goals 2, 5 and 6. The Board recommends denying each of petitioners' claim of goal violation.

Petitioners' claim violation of Goal 2 on the theory the goal requires consideration of "alternative courses of action" when making any land use decision, no matter whether the decision is quasi-judicial or legislative. The Board believes an analysis of alternative courses of action is a proper endeavor during the development of the comprehensive plan. The Board does not believe analysis of alternative courses of action, other than during an exception, is necessary when deciding whether to grant a permit for a use which is permitted under a zoning ordinance.

Petitioners next complain the city violated Goal 5 in several respects. The Board recommends denial of petitioners' complaint largely because the Board finds the city (1) considered the Goal 5 resource, (2) the potential conflict with that resource, and (3) proceeded to take action which would ensure preservation and indeed enhancement of the resource. The Board believes this action complies with Goal 5.

The complaint about Goal 6 is that the city failed to make adequate findings showing compliance with Goal 6. The argument centers on whether the city can comply with Department of Environmental Quality noise regulations. The Board recommends denial of the Goal 6 claim because the Board finds the city adopted DEQ noise standards in its comprehensive plan and ensured that DEQ standards would be met by this development.

The Board is of the opinion that oral argument will not assist the commission in its understanding or review of the statewide goal issues involved in this appeal. Therefore, the Board recommends that oral argument before the commission not be allowed.



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