

JUN 4 3 53 PM '84

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

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2  
3 FOREST HIGHLANDS )  
NEIGHBORHOOD ASSOCIATION, )  
4 MR. & MRS. GENE MEYER, )  
MR. & MRS. JOSEPH LIEN, MR. )  
5 & MRS. JERRY KNOLTON, MR. & )  
MRS. C.E. WARD, MR. & MRS. )  
6 KEN WEBER, MR. & MRS. DAVID )  
MILLER and TOM ARSTEAD, )  
7 )  
Petitioners, )  
8 )  
9 vs. )  
10 THE CITY OF LAKE OSWEGO, )  
Respondent, )  
11 )  
and )  
12 )  
MARK DEVELOPMENT, INC., a )  
13 corporation, )  
14 )  
Intervenor. )

LUBA No. 84-017

FINAL OPINION  
AND ORDER

15 Appeal from the City of Lake Oswego.

16 Jess M. Glaeser, Portland, filed the petition for review  
17 and argued the cause on behalf of Petitioners. With him on the  
brief were Hoffman, Matasar & Glaeser.

18 James M. Coleman, Lake Oswego, filed the response brief and  
19 argued the cause on behalf of Respondent City of Lake Oswego.

20 Stephen T. Janik, Portland, filed the response brief and  
21 argued the cause on behalf of Respondent-Intervenor Mark  
Development, Inc. With him on the brief were Ball, Janik &  
Novack.

22 BAGG, Chief Referee; DuBAY, Referee; KRESSEL, Referee;  
23 participated in this decision.

24 AFFIRMED

06/04/84

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioners appeal a city council decision affirming the  
4 city's Development Review Board. The Development Review Board  
5 determined, for the second time, that intervenor's shopping  
6 center development complied with the "essential wetland"  
7 standard in the city zoning ordinance. The city's Development  
8 Review Board and the city council reconsidered the development  
9 against the essential wetland standard pursuant to a remand  
10 from this Board in Forest Highlands Neighborhood Association v.  
11 City of Lake Oswego, \_\_\_ Or LUBA \_\_\_ (LUBA NO. 83-074,  
12 11/29/83).

13 FACTS

14 The facts remain as stated in our prior opinion.<sup>1</sup>

15 Pursuant to our order of remand, the Development Review  
16 Board took up the matter of compliance with the essential  
17 wetland standard found at §4.020(2)(a) of the Development  
18 Ordinance portion of the Lake Oswego Code (LOC). That section  
19 provides:

20 "Any development is allowed in essential wetlands only  
21 after the permit granting authority concludes that all  
of the following criteria are met:

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

24 The Development Review Board held hearings on the matter on  
25 January 4, 1984. The board issued an order finding the project  
26 in compliance with the city's wetland standard on January 17,

1 1984. Specifically, the board found the limited portion of the  
2 development which existed in or near the essential wetland was  
3 dependent upon being "in, or in close proximity to, the  
4 essential wetland." Petitioners appealed this determination to  
5 the city council, and the city council considered the matter on  
6 February 14, 1984. The city issued its decision affirming the  
7 Development Review Board, along with some additional findings  
8 on February 21, 1984.

9 ASSIGNMENT OF ERROR

10 Petitioners make one assignment of error which is divided  
11 into two parts. First, petitioners argue the city misconstrued  
12 and misapplied the wetland standard, LOC §4.020(2)(a),  
13 providing dependency on placement in or near the essential  
14 wetland. Secondly, petitioners allege the pre-application  
15 conference required by LOC §4.035(2) never took place.<sup>2</sup>

16 1. Misconstruction and Misapplication of the Wetland  
17 Standard

18 As we understand the events on remand, the city's  
19 Development Review Board did not take new evidence but reviewed  
20 evidence in the record to draw the boundary of the essential  
21 wetland as it exists in and near this development. We  
22 understand the city to claim the evidence was first presented  
23 at a pre-application conference held between city staff and the  
24 applicant. A pre-application conference is required by LOC  
25 §4.035(2). The Development Review Board considered evidence  
26 about the wetland to see if it met the functional test for an

1 essential wetland contained in LOC §4.035(a).<sup>3</sup> This test is  
2 as follows:

3 "1. A wetland qualifies for designation as an  
4 essential wetland when it performs any of the  
5 following functions:

6 "a. Natural Groundwater Recharge

7 Recharge areas where some portion of the  
8 wetland's basin extends below and connects with the  
9 water table (the top surface of groundwater);

10 "b. Storage

11 "Storage areas acting as natural detention basins  
12 for overland runoff and stream flood waters;

13 "c. Turbidity Reduction

14 "Presence of wetland vegetation which reduces  
15 runoff velocity, allowing suspended particles to  
16 settle out or attach to plant material, thus cleaning  
17 the water;

18 "d. Filtration of Nutrients

19 "Presence of wetland vegetation which absorbs  
20 nutrients suspended in storm water runoff and stores  
21 these nutrients in plant tissues. In this way wetland  
22 plants act as a natural nutrient filtration system.

23 "e. Natural Biological Functions

24 "Food chain production, habitat, nesting,  
25 spawning, rearing, and protective cover sites for  
26 aquatic or land species; or has been designated as a

"f. 'Distinctive Natural Area'

"Wetlands which have been designated in the  
Comprehensive Plan as Distinctive Natural Areas."

The city concluded that portions of the wetland qualified as an  
essential wetland. Other portions of the wetland were found  
not to be part of the essential wetland. From this analysis,

1 the Development Review Board determined whether any development  
2 would be in or near the essential wetland boundary. Finally,  
3 the board considered whether any development occurring in or  
4 near the essential wetland was primarily dependent upon the  
5 essential wetland as required by LOC §4.020(2)(a).

6 Of some importance in this case is the city's  
7 interpretation of how its plan and ordinances require  
8 designation of the essential wetland. The cornerstone of the  
9 city's approach is its view that the criteria in LOC §4.035(1)  
10 must be applied before one knows whether a given area is to be  
11 considered an essential wetland or not. To the city, the fact  
12 the hydrology map and the Distinctive Natural Area maps may  
13 show a site as an essential wetland is not conclusive because  
14 those maps reflect only general designations.<sup>4</sup> See City of  
15 Lake Oswego Comprehensive Plan Map at 29 and 37.

16 The city urges that to read its ordinance to establish a  
17 conclusive test based upon the hydrology and Distinctive  
18 Natural Area plan maps is to ignore the analysis provided for  
19 in LOC §4.035(1)(a-f). Further, basing a decision as to  
20 whether land is to be given essential wetland protection on the  
21 maps alone renders LOC §4.035(2) surplusage. That is, there  
22 would be no need for a pre-application conference between the  
23 developer and the city to establish the boundaries of an  
24 essential wetland were the hydrology map and the Distinctive  
25 Natural Area maps conclusive of the areas to be considered  
26 essential wetlands. Also, LOC §4.040(2) lists sources of

1 information to assist persons in "defining wetland areas...."  
2 If the city had made a legislative determination about where  
3 essential wetlands are located, references to additional  
4 sources of information would not be necessary.

5 Petitioners' quarrel with the city's determination rests in  
6 large part on identification of the site as a wetland and a  
7 Distinctive Natural Area on the city's hydrology map and on the  
8 city's Distinctive Natural Area map. Petitioners insist that  
9 LOC §4.035(1) describes two means to identify an essential  
10 wetland, one of which is simple reference to the hydrology  
11 map. The second is the functional test provided for in LOC  
12 §4.035(1). Either test is conclusive, according to  
13 petitioners. We understand petitioners to argue that LOC  
14 §4.035(1)(a-f) will always result in additions to and not  
15 deletions from the essential wetlands inventory shown on the  
16 city's hydrology map.

17 We do not agree that inclusion within a line on the  
18 hydrology map and the Distinctive Natural Area map necessarily  
19 means a particular area is an essential wetland. The city's  
20 interpretation of its code to require application of the  
21 functional analysis in LOC §4.035(1) is reasonable, considering  
22 the maps are not specific but are general, at least for the  
23 most part. The city's hydrology map is broadly drawn and  
24 certainly leaves doubt as to whether a particular geographic  
25 feature or area is in or out of an essential wetland. The map  
26 gives no survey points or precise distances and is, as the city

1 says, useful for locating the general area of a hydrologic  
2 feature. The city's Distinctive Natural Area map contains both  
3 specific site designations and designations which appear to be  
4 more general. In cases where the Distinctive Natural Area map  
5 shows a particular stand of trees as a Distinctive Natural  
6 Area, there seems little room for argument about whether or not  
7 a particular tree would be within the site designation.<sup>5</sup>  
8 This site, however, is listed by a general description and the  
9 map does not define specific boundaries. In such cases, it is  
10 reasonable to conclude the boundary of the essential wetland  
11 must be finally drawn by application of the functional analysis  
12 in LOC §4.035(1) (a-f).

13 We tend to agree with the city that the petitioners'  
14 reading would make unnecessary a pre-application conference as  
15 provided for in LOC §4.035(2) and would make unnecessary the  
16 city's provision for additional sources of information to  
17 define wetland areas found at LOC §4.040(2). An ordinance  
18 should be read to give meaning to all of its parts, and in this  
19 case we believe the city's interpretation does so. 2 A Sands  
20 Sutherlin Statutory Construction, §46.05, 06 (3d ed., 1973);  
21 Alluis v. Marion County, 7 Or LUBA 98 (1983).

22 Because we find the city's interpretation of its code to be  
23 reasonable, we deny petitioners' first assignment of error.

24 2. The City Failed to Comply With LOC §4.035(2)

25 LOC §4.035(2) requires:

26

1 "For major developments, essential wetlands boundaries  
2 shall be determined at the time of preapplication  
3 conference, on the basis of detailed site inventory  
4 and analysis and the recommendation of the City  
5 Manager."

6 Petitioners acknowledge the record includes statements by the  
7 planning staff and the attorney for the intervenor claiming the  
8 pre-application conference did occur and asserting a site  
9 inventory was conducted. However, petitioners complain there  
10 is nothing in the record to show the boundaries which were  
11 allegedly established at that time. Petitioners claim the  
12 boundaries relied upon in this proceeding were not developed  
13 until after remand. Petitioners refer to a report of Bierly  
14 and Associates, Inc., submitted in the course of the original  
15 approval proceeding, which included a map identifying  
16 boundaries of the essential wetland. When the application was  
17 resubmitted in January, 1984, the Bierly and Associates, Inc.,  
18 report was revised. No map appears in the new report,  
19 according to petitioners.

20 Whether a pre-application conference held in 1983  
21 established the boundaries of the essential wetland or not is  
22 of little importance to this appeal. The city has, on remand,  
23 made specific findings on the results of the conference. See  
24 Record, p. 64. The findings have evidentiary support in a  
25 revised wetland evaluation by Bierly and Associates. See  
26 Record, pp. 112-131, 265. If the city failed to conduct a  
required portion of the approval process, a remand from this  
Board certainly would allow the city to go back and correct the

1 defect. To say otherwise would be to say errors are not  
2 subject to correction on remand. We have been cited to nothing  
3 to support such a restrictive view and we decline the  
4 invitation to adopt such a rule here.<sup>6</sup>

5 Because petitioners challenge a procedure which we have  
6 found permissible on remand, we deny this subassignment of  
7 error.<sup>7</sup>

8 The decision of the City of Lake Oswego is affirmed.

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FOOTNOTES

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

16 The applicant submitted a second application in January of  
17 1983. The application was reviewed by the Development Review  
18 Board in March of 1983, and the Board approved the application  
19 with conditions on April 5, 1983. Opponents submitted an  
20 appeal to the city council, and the council considered the  
21 appeal at a hearing on May 24, 1983. On June 8, 1983, the city  
22 issued findings and an order affirming the decision of the  
23 Development Review Board.

24 The shopping center is on 13.3 acres and is designated  
25 "neighborhood commercial" in the city's comprehensive plan. A  
26 portion of the site contains a wetland, and it is designated "a  
27 distinctive natural area" in the comprehensive plan. There are  
28 poplar trees within the wetland along with other vegetation.  
29 The development will include 116,535 square feet of building  
30 area. The development will include 60,000 square feet of  
31 retail space, 30,735 of service space and 25,800 feet of  
32 medical and dental office space.

33 The site is adjacent to condominiums to the west,  
34 condominiums and a commercial area to the south, single family  
35 residences to the north, undeveloped land to the northeast and  
36 single family uses to the east.

22 2

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

1 "For minor developments, essential wetlands boundaries  
2 shall be determined by the City Manager during the  
3 review of the application. If there is difficulty in  
4 locating the boundaries, the minor development shall  
5 be scheduled for pre-application conference." LOC  
6 §4.035(2).  
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9 The city maintains this inquiry is needed to confirm that  
10 the boundary of the essential wetland had been correctly  
11 described in other documents including a city hydrology map.  
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14 4  
15 LOC §4.015(1) and (2) provide as follows:  
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18 "1. Wetlands: Those areas that are inundated by  
19 surface or ground water sufficient to support a  
20 prevalence of vegetation or aquatic life which  
21 requires saturated or seasonally saturated soil  
22 conditions for growth and reproduction. Wetlands  
23 generally include swamps, marshes, bogs, and similar  
24 areas such as sloughs, wet meadows, river overflows,  
25 mud flats, and natural ponds.  
26

27 "2. Essential Wetlands: Essential wetlands are those  
28 designated as such on the Hydrology Map and those  
29 determined to be such after site analysis and  
30 application of the criteria set forth in §4.035(1).  
31 The hydrology map shows the approximate location and  
32 extent of all known wetlands within the City. It also  
33 indicates which of these wetlands are designated as  
34 'essential.' The map is available in the Public Works  
35 Department at City Hall."  
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38 We are less certain about the city's claim that the  
39 functional test in LOC §4.035(1)(a-e) must be applied before it  
40 is clear that an area shown on the plan map as a Distinctive  
41 Natural Area is indeed subject to that classification. The  
42 plan includes an inventory of Distinctive Natural Areas which  
43 in some cases is very general and in others quite specific.  
44 For example, it lists ponds, swamps and marshes by general  
45 location, but does not define boundaries specifically. In  
46 other instances, the plan lists individual street corners and  
47 trees as Distinctive Natural Areas.  
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6 We note, however, respondents argue that the boundaries appearing in the city's new findings only re-affirm boundaries determined at the pre-application conference. In other words, respondents argue that certain factual inaccuracies were carried through the whole of the earlier proceeding before this Board. It is only now that the record is clarified (presumably for all) to show that the essential wetland is nowhere near as large as originally understood, according to respondents.

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7 The parties are in agreement that the essential wetland boundary found by the city on remand includes a portion of the development. Specifically, some landscaping and a catch basin lie within the essential wetland (as found by the city). At the oral argument held in this proceeding, petitioners' attorney commented that the petitioners were not concerned about a catch basin and some landscaping intruding into the essential wetland. In other words, if the boundary were correctly drawn, then there is no violation of §4.020(2)(a), according to petitioners. We express no opinion as to whether the development, given the boundaries found by the city on remand, complies with LOC 4.020(2)(a).

It should also be noted that our earlier opinion in this case did not make a finding as to the location of the essential wetland. Our opinion relied on a finding by the city that the development "is primarily dependent on being partially located in or in close proximity to the wetland." Record in LUBA No. 83-074 at 65.