

JUN 9 4 49 PM '87

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

DOUGLAS R. ALLEN, JIM HOWELL )  
and CITIZENS FOR A BETTER )  
TRANSIT, )  
Petitioners, )  
vs. )  
CITY OF PORTLAND, )  
Respondent. )

LUBA No. 86-090

FINAL OPINION  
AND ORDER

Appeal from the City of Portland,

Kirkland T. Roberts, Portland, filed the petition for review and argued on behalf of Petitioners.

Ruth Spetter, Portland, filed a response brief and argued on behalf of Respondent City of Portland.

Kelly Clark, Portland, filed a response brief and argued on behalf of Participant Central Eastside Industrial Council.

Michael A. Holstun, Salem, filed a response brief and argued on behalf of Participant State of Oregon Department of Transportation Highway Division.

BAGG, Referee; DuBAY, Chief Referee; participated in the decision.

REMANDED

6/09/87

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioners appeal the city's approval of a conditional use  
4 permit. The decision allows filling a portion of the east bank  
5 of the Willamette River, new highway construction,  
6 reconstruction of the Greenway Trail and improvements to the  
7 esplanade. Petitioners ask that we reverse the city's decision.

8 FACTS

9 This approval implements the "Ramps Project." The Ramps  
10 Project is the East Marquam Interchange Ramp Project which  
11 allows a connection between McLoughlin Boulevard (U.S. Highway  
12 99E) and Interstate 5.

13 In 1980, the city council gave conceptual approval to this  
14 highway improvement project. Following this approval, the  
15 city's parks bureau and ODOT, along with representatives of the  
16 surrounding community, developed plans to facilitate the  
17 highway development and associated improvements to the  
18 esplanade. The conditional use subject to this appeal  
19 incorporates the design developed by the participants.<sup>1</sup>

20 The design incorporates a new ramp from Southeast Water  
21 Avenue at Southeast Salmon Street to the Marquam Bridge. In  
22 addition, the freeway approach to the east end of the Marquam  
23 Bridge will be widened. Along with the highway improvements,  
24 the Greenway Trail and esplanade will be rebuilt along the  
25 Willamette River from the bridge to Southeast Clay Street.

26 There will be reconstruction of the pedestrian bicycle ramp at

1 the Southeast end of the Morrison Bridge as well as a new  
2 pedestrian and bicycle ramp at the northeast end of the bridge.

3 The entire distance spans approximately 4,500 feet. A fill  
4 will be required to move the river bank from 0 to 15 feet west  
5 for approximately 2,000 lineal feet. The fill makes possible  
6 the reconstruction of the trail and esplanade.

7 The city's hearings officer heard the application in July,  
8 1986 and approved it. Petitioners appealed the approval, and  
9 on September 3, 1986 the city council voted to deny the  
10 appeal. A written order and findings followed, and petitioners  
11 filed a notice of intent to appeal with this Board.

12 FIRST ASSIGNMENT OF ERROR

13 "The city misconstrued its own land use regulations  
14 and applicable law, and has acted inconsistently with  
15 its acknowledged comprehensive plan by failing to  
16 require the applicants to obtain a Statewide Planning  
17 Goal 15 (Willamette River Greenway) Exception, as  
18 provided in PCC Sec. 33.77.035 and 33.77.050."

19 Petitioners argue that the proposed location of the Water  
20 Avenue on-ramp would encroach within the existing Willamette  
21 River Greenway 25 foot setback. Petitioners assert the highway  
22 use is a "non river-dependent use" and must be "set back at  
23 least 25 feet from the ordinary high water line or top of the  
24 bank." Portland City Code, Sec. 33.77.092(A)(2) and  
25 33.77.102(A)(4). According to petitioner, because the highway  
26 improvement is a non river-dependent use, if the city wishes to  
proceed with placement of the highway as planned, the city must  
take an exception to Statewide Planning Goal 15 (the Willamette

1 River Greenway Goal) as provided for in PCC 33.77.035 and  
2 33.77.050.<sup>2</sup>

3 Petitioners discount the city's claim that no exception is  
4 required because the fill supports the Greenway Trail and  
5 esplanade and is therefore a river-related use. Petitioners  
6 claim the purpose of the fill is to support the highway, and  
7 its benefit to the esplanade and trail is only incidental.  
8 According to petitioners, because the primary purpose of the  
9 fill is for a non river-related use the city must not be  
10 allowed to bootstrap itself out of taking a Goal 15 exception.

11 The parties do not dispute that the new highway  
12 construction would, if the boundary of the Greenway is  
13 unchanged, intrude within the 25 foot Greenway setback.  
14 However, the city and ODOT urge us to conclude no exception is  
15 required because, in essence, the river boundary is being moved  
16 by the fill. Once completed, the 25 foot Greenway setback will  
17 be occupied by a river related use, the trail and esplanade.  
18 The highway improvement will be more than 25 feet from the new  
19 riverbank.

20 To adopt the city's position would, in our view, approve  
21 otherwise prohibited encroachments into protected areas. In  
22 essence, the city is attempting to do indirectly what its  
23 ordinance will not permit it to do directly.<sup>3</sup> Without the  
24 fill, the roadway would be within the Greenway. Further, the  
25 trail and esplanade can be improved without the fill and the  
26 companion highway project.

1 The highway is a non-river dependent or river-related use.  
2 See our discussion, under Assignment of Error 2. We believe,  
3 therefore, the city must follow the exception process outlined  
4 in PCC 33.77.035, 050. The exception should be taken for the  
5 fill.

6 We sustain this assignment of error.

7 SECOND ASSIGNMENT OF ERROR

8 "Assuming, arguendo, that a greenway exception is not  
9 mandated by the circumstances, the city, in approving  
10 the greenway permits under review, acted  
11 inconsistently with its comprehensive plan and  
12 misconstrued the applicable law and its own land use  
13 regulations by permitting a use (highway on-ramp) not  
14 authorized or allowed by the applicable zone."

12 A. "The City's Zoning Ordinances Do Not Permit the  
13 Proposed Water Avenue On-Ramp Within the Willamette  
14 River Greenway."

14 B. "The Proposed Water Avenue On-Ramp Is Not An Allowed  
15 Use Under The Exemption Criteria of 33.77.092(A)(7)  
16 And 33.77.102(A)(6)."

16 Petitioners argue the on-ramp is not a river related use.  
17 PCC 33.77.040(9) provides that "roads and highways,  
18 restaurants, factories and trailer parks are not generally  
19 considered dependent or related to water location needs." The  
20 purpose of the Greenway overlay is to

21 "protect, conserve, enhance and maintain the natural,  
22 scenic, historical, agricultural, economic, and  
23 recreational qualities of lands along the Willamette  
24 River." PCC 33.77.010.

23 Therefore, argue petitioners, the highway is not a use  
24 consistent with the Greenway ordinance or its purposes.  
25 Petitioners go on to argue that even if the fill is only for  
26

1 the purpose of lowering the Greenway Trail (a river related use  
2 under PCC 33.77.145) the construction of the highway on-ramp is  
3 not necessary for that trail improvement.

4 We agree with petitioners that the highway ramp is not a  
5 river dependent or river-related use.

6 "(8) 'River dependent use' means a use or activity  
7 which can be carried out only on, in, or adjacent to,  
8 the river because the use requires access to the river  
9 waterborne transportation or recreation.

10 "(9) 'River related use' means a use which is not  
11 directly dependent upon access to a water body and  
12 which provides goods or services which are directly  
13 associated with water dependent land or waterway use,  
14 and which, if not located adjacent to water, would  
15 result in a public loss of quality in the goods or  
16 services offered. Except as necessary for water  
17 dependent or related water uses of facilities,  
18 residences, parking lots, spoil and dump sites, roads  
19 and highways, restaurants, factories, and trailer  
20 parks are not generally considered dependent or  
21 related to water location needs. Notwithstanding the  
22 definition of residences as non-river related uses,  
23 houseboat moorages, because of their historic role on  
24 the Willamette, may be allowed as conditional uses."  
25 PCC 33.77.040(8) and (9).

26 Also, PCC 33.77.040(9) expressly states that highways are  
"not generally considered dependent or related to water  
location needs."<sup>4</sup>

We conclude, therefore, that the highway is not a river  
dependent or river-related use under the city's code.

In response to petitioners' argument under "B" above, the  
city argues that the on-ramp falls within certain "exemption  
criteria" found in the city's ordinance at Sections  
33.77.092(A)(7) and 33.77.102(A)(6). The exemption criteria  
provide that replacement or an intensification of

1 "uses within existing public utility corridors,  
2 railroad rights-of-way and terminal facilities that  
3 exist from the adoption of these regulations shall be  
4 allowed, providing the requirements for landscaping  
5 are met."

6 The city's findings say that the planning director issued  
7 an interpretation of the ordinance finding that a freeway  
8 system is similar to a public utility right-of-way. Further,  
9 freeways, utility corridors and railroad rights-of-ways are  
10 uses which have similar characteristics; and, therefore,  
11 freeways are included within the exemptions found in the code.

12 We do not agree with the city's interpretation of its  
13 code. The exemption criteria appears to list all of the uses  
14 exempt from Greenway regulation. The city code provision  
15 clearly designates the kinds of uses exempt from otherwise  
16 applicable regulation. As is typically the case with  
17 exclusions from applicable regulation,

18 "the enumeration of exclusions from operation of a  
19 statute indicates that the statute should apply to all  
20 cases not specifically excluded." 2A Sands Sutherland  
21 Statutory Construction, Sec. 4723 (4th Ed, 1984).  
22 See also, Clatsop County v. Morgan, 19 Or App 173, 526  
23 P2d 1393 (1974).

24 We are mindful of the city's argument, made in its  
25 findings, that the purposes of the Greenway regulations include  
26 the economic and recreational qualities of land along the  
Willamette River. Record, 72. We also recognize that the  
city's findings list freeways as similar to railroad  
right-of-ways and that freeways have defined corridors and can  
not easily be removed without great expense and effort. The

1 code provision, however, does not list the exceptions as  
2 examples against which to measure other uses, but lists the  
3 exceptions exclusively. That is, the code provision reads as  
4 an exhaustive list of uses not covered by the code rather than  
5 a guide to interpreting the code. The city's argument,  
6 expressed in its findings and its brief, is very persuasive and  
7 might provide justification for an amendment to the code, but  
8 we do not believe the city's interpretation is reasonable given  
9 the clear language in PCC 33.77.092(A)(7) and 33.77.102(A)(6).

10 The city makes an additional argument that freeways are  
11 permitted uses within the two applicable Greenway zones, the  
12 Willamette Greenway Scenic Zone (WSR) and the Willamette Scenic  
13 Development Zone (WSD). The city argues the code does not  
14 regulate freeways, and the city simply assumes that  
15 "rights-of-way for street purposes and pedestrian trails are  
16 allowed uses in every zone." Record, 44.

17 We agree with the city that, in general, rights-of-way for  
18 public use are assumed permitted in every zone. However, the  
19 city's code includes an express provision that roads and  
20 highways are not to be "generally" considered dependent or  
21 related to water location needs. PCC 33.77.040(9). This  
22 provision appears, when considered with regulations regarding  
23 setback in the Greenway Zone and the purpose of the Greenway  
24 Zone, to limit this particular zone designation to uses which  
25 are clearly water related or water dependent. It must be  
26 remembered that the WSR and WSD zones are overlay zones which

1 impose additional restrictions on the underlying industrial  
2 zone. While the city's argument makes sense with respect to  
3 the underlying industrial zone, it is less persuasive when  
4 considering the very restrictive provisions included in the  
5 overlay zones.

6 We conclude, therefore, that as presented to us in the  
7 findings, the city's interpretation of its code is not  
8 reasonable. Alluis v. Marion County, 64 Or App 428, 668 P2d  
9 1242 (1983).

10 The Second Assignment of Error is sustained.

11 THIRD ASSIGNMENT OF ERROR

12 "Assuming, arguendo, that a greenway exception is not  
13 mandated, and that construction of the Water Avenue  
14 on-ramp is permitted in the WSR zone, the city acted  
15 in violation of its comprehensive plan and land use  
regulations by failing to consider any alternatives to  
the proposed fill of the River, Which Have Less  
Adverse impacts on the river and riverbank resources."

16 A. "The City Considered No Alternatives to the Proposed  
Fill of the River."

17 Petitioners argue that city code Sec. 33.77.142(B) requires  
18 findings that

19 "there are no reasonable on-site alternatives with  
20 less adverse impacts on the river or riverbank  
resources."

21 Petitioners argue the city failed to undertake this process,  
22 and petitioners expressly discount the city's finding that  
23 alternatives were considered. The city found:

24 "The EA prepared for the East Marquam Interchange  
25 Ramps examined a no-build and three build  
26 alternatives. The alternative selected as a result of  
the EIS process does not require any fill in the river

1 for the highway improvements, however, the alternative  
2 selected results in columns in the existing esplanade  
3 area. Therefore, with regard to the trail, the  
4 alternatives are to wind the greenway trail among the  
5 proposed columns or to move the trail to a fill within  
6 the river. The council made the decision to move the  
7 trail to a fill in the river ranging from zero to  
8 thirteen feet in width." Record at 55.

9 The city explained it wanted a development which would  
10 provide parking for Greenway and trail users, decrease the  
11 trail elevation to allow people to have water contact. The  
12 design chosen achieves these aims, according to the city. The  
13 city argues that without moving the trail to the west, pillars  
14 supporting the roadway will intrude into the esplanade area.  
15 Record, 55. The fill makes it possible to move the trail.

16 The city's standard calls for a review of "on-site"  
17 alternatives with "less adverse impact on the river or river  
18 bank resources." PCC 33.77.142(3). The city was not required  
19 to look all over the City of Portland for an alternative  
20 location for this on-ramp and improvements to the Greenway.  
21 Rather, the city is only obliged to consider those alternatives  
22 within the site with less adverse impact on the river or river  
23 bank resources.

24 We understand that all of petitioners' proposed  
25 alternatives are based on abandoning the highway on-ramp. That  
26 is, the alternative development proposals favored by  
petitioners do not include construction of the highway.

The city regarded improvements to the trail, the esplanade  
and the highway as a package. The city did not consider

1 abandoning the highway project in favor of a project to enhance  
2 the Greenway. We do not believe the city had any obligation to  
3 consider this alternative. The city's project included the  
4 ramp, and any search for alternatives must be based on this  
5 premise.

6 We find the city's discussion of alternatives to be  
7 adequate. We therefore find no error as alleged.

8 The Third Assignment of Error is denied.

9 FOURTH ASSIGNMENT OF ERROR

10 "The city council's order approving the conditional  
11 use and greenway permit to allow a fill in the river,  
12 and construction of the Water Avenue on-ramp in the  
13 greenway, is not supported by substantial evidence in  
14 the whole record. The following findings upon which  
15 the order was based are either: (1) not supported by  
16 evidence, (2) contrary to the evidence, or (3)  
17 irrelevant to the city's decision:"

18 There follows a list of 17 findings which petitioners  
19 complain are not supported by substantial evidence or not  
20 relevant to the decision. In this regard, we note, generally,  
21 that if a local government makes an irrelevant finding we may  
22 consider it mere surplusage, and the fact the finding may be  
23 erroneous or not supported in the record is not grounds for  
24 reversal or remand. Bonner v. City of Portland, 11 Or LUBA 40  
25 (1984).

26 Much of petitioners' complaint is about findings which do  
not appear critical to the decision. Indeed, petitioners offer  
little explanation of why the findings, if erroneous and not  
supported by evidence in the record, should result in reversal

1 or remand. Specifically, we find the following findings  
2 challenged by petitioners, are not critical to the decision:

- 3 "1. These fills are a result of a noise study. Rec.  
4 43.
- 5 "2. It should be noted that street rights-of-way  
6 transcend every land use designation. Rec. 35.
- 7 "3. The EPA requires sound levels to be below 70  
8 dBA. Rec. 43.
- 9 "4. Therefore, the purpose of the fill is to provide  
10 for sound attenuation by allowing the trail to be  
11 depressed. Rec. 43.
- 12 "5. The fill, however, is not required for freeway  
13 improvement. Rec. 44.
- 14 "6. Part of the fill is required to change the slope  
15 of the bank from 1:1 to a 2:1 slope. Rec. 44."

16 Of the remaining challenged findings, the following are  
17 about alternatives to the proposed project.

- 18 "9. Allowing the trail to remain in or near its  
19 present location will have a greater impact on  
20 the river and river bank resources, because the  
21 slope of the bank will remain at 1:1 and the old  
22 fill will remain. Rec. 55.
- 23 "10. In addition, allowing the trail to remain in its  
24 present location will make the river resources  
25 inaccessible to people, expose people to higher  
26 noise levels and expose people to a hazard from  
flying debris. Rec. 56.
- "12. This is the only place where the city has an  
opportunity to create an esplanade which enlarges  
the scope of river recreational uses in the heart  
of the City.... Rec. 58.
- "13. The use of the east bank for recreational  
purposes is contingent upon lowering the noise  
levels from freeway traffic. This can only be  
accomplished by depressing the trail 20 feet.  
The fill makes it possible to lower the trail.  
Rec. 58."

1 We have already discussed the city's obligation to  
2 consider alternatives in Assignment of Error 3.<sup>5</sup>

3 The following findings are about criteria important to  
4 the decision.

5 "8. The class 200 rip rap will enhance the fish  
6 habitat because it will provide hiding areas for  
fingerling fish from predators. Rec. 50.

7 "11. The council further finds that the path relocated  
8 on the fill will have no adverse impacts on the  
river or riverbank resources. Rec. 56.

9 "15. Highways in the urban area affect water quality  
10 of the Willamette River very little.

11 \* \* \*

12 No threatened or endangered species are known in  
13 the area, nor is there any critical habitat.  
14 Rec. 51."

15 The city is required to consider impact on biological  
16 productivity and fish habitat. PCC 33.77.142(A)(5). While the  
17 findings clearly state that there is no such impact, we are  
18 cited to no basic facts in the record to support the findings.

19 We note that the reference to critical habitat is explained  
20 in the findings. The findings note that habitat is divided  
21 into several rankings from I to V, with V having the lowest  
22 habitat value. Record, 51-52. The findings reference the  
23 Willamette River Greenway updated document. This document is  
24 not in the record. Further, the environmental impact statement  
25 prepared for the project in 1980 is not in the record. Without  
26 basic facts to support the city's findings we must agree with  
petitioners that these findings are not supported by

1 substantial evidence in the record.

2 We find the following finding to be a mere conclusion not  
3 required by any approval criteria.

4 "7. The council finds the relocation of the trail  
5 improves the view of the river. Rec. 48.

6 We note PCC 33.77.142(A)(4) requires that a proposed  
7 structure "not substantially interfere with views of the river  
8 from the trail." We are cited to no evidence discussing the  
9 view, although the findings are quite detailed on the aesthetic  
10 improvements to be made to the trail and esplanade.

11 "14. The trail is...relocated closer to the river for  
12 the purposes of...reducing noise levels and  
13 protecting people from falling debris. In  
14 relocating the trail closer to the river it  
15 reduces the noise levels. Rec. 41."

16 This finding is supported by the city's noise study  
17 discussed supra.

18 The last two findings are mere conclusions, their  
19 importance was discussed earlier.

20 "16. Approval criteria 33.77.142(C) is not applicable  
21 because the fill is for a use, the greenway  
22 trail, which has been contemplated in the  
23 acknowledged Willamette River Greenway Plan as a  
24 river-related use. Rec. 63.<sup>6</sup>

25 "17. The fill is river-related. Rec. 67."

26 This assignment of error is sustained in part.

The city's decision is remanded for an exception as  
required by the city's code and for additional evidence to  
support the city's findings.

1 FOOTNOTES

2  
3 1  
4 The present plan represents the first two of three phases  
as follows:

5 Phase I - Water Avenue On-Ramp and I-5 widening between  
6 the Morrison Bridge and the Hawthorne Bridge.

7 Phase II - I-5 widening at approach to Hawthorne Bridge  
8 and improvements to ramp connecting I-5 to Interstate 84.

9 Phase III - McLoughlin Boulevard ramps connecting north  
bound US 99E to north bound I-5 and south bound I-5 to  
south bound 99E.

10 2  
11 PCC 33.77.145 recognizes the trail as a river related use.

12 3  
13 Respondent ODOT responds that there are two reasons an  
14 exception is not desirable:

15 "Those who attempt to avoid Statewide Planning Goals  
standards by taking exceptions to those standards usually  
lose when the exceptions are appealed...

16 "and more importantly, in this case, even if an exception  
17 could be justified, the encroachment of the Water Avenue  
ramp onto the Greenway setback would be undesirable.  
18 Maintenance of the 25 foot setback is paramount importance  
to both the city and ODOT." Brief of Respondent ODOT at 3.

19 We doubt ODOT can predict the outcome of an exception  
20 proceeding. In addition, the exception for the fill will, in  
effect, move the Greenway boundary. The city's plan will  
21 maintain the new 25 feet setback.

22 4  
23 We imagine access to a boat ramp would be considered water  
related under this code provision.

24 5  
25 We note, however, that other than a sound study found at  
26 pages 128 to 168, the record includes little in the way of

1 supporting evidence. The findings are detailed on the  
2 alternative proposals reviewed by the city, but we are cited to  
no basic facts in the record to support the city's discussion.

3 \_\_\_\_\_  
4 6  
5 PCC 33.77.142(C) requires an exception to Statewide  
6 Planning Goal 15 for non-river related uses.  
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