

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS JUN 7 4 11 PM '88

OF THE STATE OF OREGON

KENTON NEIGHBORHOOD ASSOCIATION,)

Petitioner,)

vs.)

CITY OF PORTLAND,)

Respondent,)

and)

OREGON WASTE SYSTEMS, INC.,)

Intervenor-Respondent.)

LUBA No. 88-119

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Gregory S. Hathaway, and Virginia L. Gustafson, Portland, filed the petition for review. With them on the brief was Garvey, Schubert & Barer. Gregory S. Hathaway argued on behalf of petitioners.

Adrienne Brockman, Portland, filed a response brief and argued on behalf of respondent.

Steven W. Abel, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Schwabe, Williamson & Wyatt.

SHERTON, Referee; HOLSTUN, Chief Referee, participated in the decision.

REMANDED

06/07/89

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

1 Opinion by Sherton.

2 NATURE OF DECISION

3 Petitioner appeals an order of the City of Portland (city)
4 rezoning 49 acres from Heavy Manufacturing (M1) to Heavy
5 Industrial (HI).

6 MOTION TO INTERVENE

7 Oregon Waste Systems, Inc., moves to intervene on the side
8 of respondent city in this proceeding. There is no opposition
9 to the motion, and it is granted.

10 FACTS

11 The subject property consists of three parcels. Two
12 undeveloped parcels, totalling 5.3 acres, lie north of N.
13 Marine Drive. These parcels have frontage on N. Marine Drive
14 and on North Portland Harbor (Columbia River). A 43.7 acre
15 third parcel is south of, and adjacent to, N. Marine Drive.
16 This parcel is partially developed with stockyards and several
17 industrial, commercial and office structures. An approximately
18 12 acre area in the southwest portion of this parcel is
19 undeveloped and is designated as wetlands by the U.S. Army
20 Corps of Engineers. The subject property is adjoined to the
21 west by the James River Corporation, to the south by the city's
22 Delta Park and to the east by the Multnomah County Exposition
23 Center.

24 On February 12, 1988, intervenor-respondent Oregon Waste
25 Systems, Inc. (intervenor) applied for a comprehensive plan map
26 amendment for the subject property from Heavy Manufacturing to

1 Heavy Industrial and for a zone change for the subject property
2 from M1 to HI. This application was made to allow construction
3 and operation of a solid waste transfer station and recycling
4 center. Record 1340. The city planning director previously
5 determined that such uses are conditional uses in the M1 zone,
6 but are outright permitted uses in the HI zone. Record 39.

7 The city hearings officer recommended approval of
8 intervenor's application on May 19, 1988. On June 2, 1988,
9 petitioner appealed the hearings officer's recommendation to
10 the city council. In June, 1988, the city amended its
11 comprehensive plan to replace, citywide, the Heavy Industrial
12 designation with a new Industrial Sanctuary designation. At
13 that time the plan map designation for the subject property was
14 legislatively changed from Heavy Manufacturing to Industrial
15 Sanctuary. On December 1, 1988, the city council approved
16 intervenor's application for a zone change from M1 to HI.¹
17 This appeal followed.

18 FIRST ASSIGNMENT OF ERROR

19 "The city misconstrued the applicable law in finding
20 that the zone change request should be approved
21 despite the city's finding that the zone change is
22 premature."

23 Portland City Code (PCC) 33.102.015 provides, in relevant
24 part, the following criteria for approval or disapproval of a
25 zone change:

26 "Approval or disapproval of rezoning of property shall
be determined using the following criteria. Three
major sets of conditions must be met before rezoning

1 may be approved. If all conditions are satisfied, the
2 rezoning request will be approved. The conditions are:

3 "(1) The proposed rezoning must be to the maximum
4 Comprehensive Plan Map designation * * *

5 * * * * *

6 "(2) It must be found that services adequate to
7 support the proposed industrial or commercial use
8 * * * are presently available or can be
9 reasonably made available, (consistent with the
10 Comprehensive Plan Public Facilities Policies) by
11 the time the proposed use qualifies for a
12 certificate of occupancy or completion from the
13 Bureau of Buildings. For the purpose of this
14 requirement, services include:

15 "(a) Water supply;

16 "(b) Sanitary sewage disposal;

17 "(c) Stormwater disposal;

18 "(d) Transportation capabilities;

19 "(e) Police and fire protection.

20 "Where public utilities are required to be
21 installed or improved by the applicant, a
22 performance contract or bond, assuring their
23 installation to specified standards, is required.

24 "(3) Findings shall be provided by the Hearings
25 Officer that the proposed rezoning:

26 * * * * *

27 "(b) Should be approved if consistent with * * *
28 2 above with the condition that development
29 be specifically limited consistent with the
30 adequacy of available service until such
31 time as existing service deficiencies are
32 corrected; or

33 "(c) Is premature and should be denied because
34 the land use designation on the
35 Comprehensive Plan is related to, or
36 dependent upon, completion of major public
37 projects or other off-site improvements."

1 Petitioner argues that the city determined the zone change
2 to be premature under PCC 33.102.015(3)(c). Petitioner argues
3 the city found the proposed zone change premature because the
4 proper plan designation for the subject property "is dependent
5 on several factors, including off-site improvements and the
6 completion of planned public development to the adjacent
7 properties, as well as incomplete planning studies." Petition
8 for Review 10. Petitioner asserts the factors on which the
9 city based its determination of prematurity include an
10 incomplete Statewide Planning Goal 5 (Open Spaces, Scenic and
11 Historic Areas, and Natural Resources) planning process and
12 Delta Park Master Plan.

13 Petitioner contends the city approved the zone change,
14 notwithstanding the requirement of PCC 33.102.015(3)(c) that it
15 be denied for prematurity, because the city "balanc[ed] its
16 finding of prematurity against what it determined to be an
17 overriding 'public interest.'" Petition for Review 12.
18 According to petitioner, the "overriding public interest" found
19 by the city is that the Metropolitan Service District (Metro)
20 "is seeking proposals for the Eastside Solid Waste Transfer and
21 Recycling Center," and approving a site for such a facility "is
22 necessary because the St. Johns landfill will close in 1990."
23 Record 48.

24 Petitioner argues the PCC does not allow the balancing of
25 the public interest against a finding of prematurity under
26 PCC 33.102.015(3)(c). Petitioner contends that as the city did

1 not find that the Metro approval process negates the
2 prematurity of the zone change request, PCC 33.102.015(3)(c)
3 requires denial of the zone change.

4 The city and intervenor (respondents) agree that the
5 provisions of PCC 33.102.015 are mandatory criteria for the
6 approval of zone changes. However, respondents argue the city
7 did not find that the proposed zone change is premature
8 pursuant to PCC 33.102.015(3)(c). Respondents point out that
9 PCC 33.215.170(D) specifically allows the city to apply
10 conditions of approval to decisions such as the one at issue in
11 this proceeding to protect the public from potentially
12 deleterious effects of a proposed use. Respondents maintain
13 the city's findings concerning "timing" and "prematurity"
14 relate only to the city's conclusion that "this is not the
15 proper time to unconditionally approve this zone change
16 * * *." (Emphasis added by respondents.) Record 47. Thus,
17 respondents assert that the findings relating to prematurity
18 cited by petitioner do not address the requirements of
19 PCC 33.102.015(3)(c), but rather are designed simply to provide
20 the basis for the city's imposition of conditions on its
21 approval, as provided in PCC 33.215.170(D).

22 Additionally, respondents argue the city's findings
23 regarding timing and prematurity do not require denial of the
24 application under PCC 33.102.015(3)(c) because the prematurity
25 referred to in that provision as a basis for denial must be
26 "related to, or dependent upon, completion of major public

1 projects or other off-site improvements."
2 Intervenor-Respondent's Brief 10. Respondents contend the
3 public projects and off-site improvements referred to in this
4 provision include only the types of services for which adequacy
5 is made an approval criterion by PCC 33.102.015(2).
6 Respondents argue the city did not find, and petitioner does
7 not argue, that the subject property's Industrial Sanctuary
8 plan designation is dependent on public service projects or
9 improvements. According to respondents, the incomplete
10 planning projects mentioned in the city's findings and cited by
11 petitioner are irrelevant to the prematurity standard of
12 PCC 33.102.015(3)(c).

13 We first consider whether the city did find the proposed
14 zone change is "premature" pursuant to PCC 33.102.015(3)(c).
15 In the section of its order entitled "The Nature of the Request
16 and Applicable Approval Criteria," the city states the criteria
17 applicable to the proposed zone change are set forth in
18 PCC 33.102.015. Record 44. In this section, the city also
19 cites PCC 33.215.170(D) as granting it authority to condition a
20 zone change.² Record 46.

21 The section of the city's order entitled "Findings" has
22 three relevant subsections.³ These subsections do not
23 identify the approval criteria which they address. However, we
24 believe it is clear from their content and context that they
25 address the three subsections of PCC 33.102.015. The first
26 subsection states "the proposed rezoning from M1 to HI is

1 consistent with the maximum Comprehensive Plan Map designation,
2 Industrial Sanctuary." Record 47. This subsection of the
3 findings clearly addresses the criterion of PCC 33.102.015(1).
4 In the third subsection, the city concludes that "public
5 facilities and services are adequate and are presently
6 available to support the proposed industrial use at the site."
7 Record 53. This conclusion is followed by five sets of
8 findings addressing each of the five types of services
9 identified in PCC 33.102.015(2)(a)-(e). Thus, although the
10 city does not mention PCC 33.102.015 in these two subsections
11 of the findings, it is nevertheless clear they address the
12 criteria of PCC 33.102.015(1) and (2).

13 The second subsection of the "Findings" section is headed
14 "Timing of Zone Change." Record 47. This subsection provides
15 as follows:

16 "Timing of Zone Change. The council finds this is not
17 the proper time to unconditionally approve this zone
18 change because: (1) the plan designation and zoning
19 are based on the historic uses in the area; and, (2)
20 this area is subject to incomplete planning studies
21 required by the Council as a prerequisite to
22 legislatively rezoning this area and by LCDC as a part
23 of Periodic Review. Therefore, these two factors
24 could result in a determination that the site is
25 improperly planned and zoned. Nonetheless, the plan
26 designation on the property is consistent with the
zone requested for the property and the zone as
currently inacted allows the use. The compelling
reasons for making the change out of sequence with the
studies is that the Metropolitan Service District
(Metro) is seeking proposals for the Eastside Solid
Waste Transfer Station and Recycling Center. This is
necessary because the St. John's Landfill will close
in 1990 and Metro has sited a landfill in Arlington,
Oregon. Therefore, Metro proposes three transfer
station areas: Clackamas, Westside, and Eastside

1 areas. It is necessary to site the Eastside Transfer
2 Station and Recycle Center and to have it operating by
3 1990. Therefore, the Council balances the need to
4 site this facility against the question of proper
5 timing of the zone change. The Council believes it is
6 in the public interest to make this change in order to
facilitate the need to site the facility, but timing
is a major issue and, therefore, it is conditioned
upon the applicant receiving approval from Metro to
operate the east side solid waste transfer station and
recycling center on this site.

7 "The City legislatively amended its plan text in July
8 of 1988. There were a number of changes, one of which
9 amended the plan legend by changing the Heavy
10 Industrial designation to Industrial Sanctuary. This
11 change was not based on a site-bysite (sic) analysis.
12 At that time, the Council directed that the existing
13 industrial zoning not be changed legislatively until
the environmental overlay zone was adopted and the
required environmental studies and mapping completed.
These studies are part of the Goal 5 requirement and
have not been done. The applicant is aware of this
14 fact.

15 "There are a number of factors which raise the
16 question of whether the proper designation for this
property is industrial sanctuary. These factors are:
17 The significant changes in the development pattern,
18 City Delta Park Plans formulated since the adoption of
19 the comprehensive plan, and the requirement of LCDC
20 Goal 5 under OAR 660-16-000. This analysis is being
21 done presently. At the conclusion of this process, it
will be the proper time to consider the appropriate
plan and zoning designations. * * * This finding and
22 condition of approval 7 are based on the following
23 facts in the record.

24 * * * * *

25 "(3) * * * The City has not prepared an analysis of
26 conflicting uses or an ESEE analysis as required
27 by LCDC's new post acknowledgment requirements
28 for Goal 5. The following are important factors
in the determination that a zone change in the
area is premature.

29 "a. Resource Inventory. * * * The area is rich
30 with Goal 5 resources. An ESEE analysis may
31 show this area is improperly designated on
32 the plan and is improperly zoned.

1 "b. ESEE Analysis Required. The city has
2 included in its work program the preparation
3 of an ESEE analysis but it has not prepared
4 it to date. It will be required by LCDC
5 because: the area is a significant wildlife
6 habitat which includes a large blue heron
7 rookery; there is a large wetland, there is
land used and needed for open space, and
there is Force Lake which is being stocked
with fish and which is important to the
wildlife. There are outstanding views and
vistas and there are historic structures on
or in the vicinity of the applicant's site.

8 "(c) Delta Park Master Plan. The following
9 opportunities are being planned or explored
10 by the City as a part of the implementation
11 of the 1984 Delta Park Master Plan:

12 "(1) A sports complex * * *

13 "(2) An additional 9 golf holes bringing the
14 total to 36. Depending on feasibility
15 work yet to be done and the outcome of
16 work with the U.S. Army Corp of
17 Engineers to improve the dike
18 surrounding West Delta Park, a new
19 clubhouse facility for the golf course
20 could include a restaurant, pro shop,
21 convention/meeting room facilities, a
22 day lodge, complementary retail shops
23 or even golf course-related lodging.

24 "(3) Enhancement of open space areas which
25 are used for overflow parking * * *

26 "(4) Exercise and nature trails * * *

27 "(5) An Indian cultural center.

28 "(4) Status of Industrial Zoning.

29 * * * * *

30 "d. The Council instructed that the HI zone not
31 be applied legislatively to the Columbia
32 Corridor area until the Environmental (E)
33 zone was adopted and the environmental
34 mapping completed. The (E) zone provides
35 for the protection of wetlands, fish and
36

1 wildlife areas, water bodies and areas of
2 ecological and scientific concern. It does
not protect other Goal 5 resources.

3 "The Council, therefore, finds that when the
4 compelling need to site a facility is weighted against
5 such factors as the changing land use pattern, the
6 ongoing Park plan implementation process and the
7 incomplete studies that this zone change should be
8 approved subject to the conditions that it not be
9 effective unless and until the applicant receives
10 approval from Metro to operate a solid waste transfer
11 station. Should the Council grant an outright zone
12 change and the applicant not receive the necessary
13 approvals from Metro, any use allowed in the H-I zone
14 would be permitted on the site. These uses may be
15 inappropriate uses with the changing land use
16 pattern. The result could be an improper and
17 incompatible land use pattern.

18 "Conversely, should the applicant receive approval
19 from Metro to operate a transfer station and recycling
20 center, the City needs assurances the Statewide Goal 5
21 resources will be rehabilitated, protected, and
22 managed since the E (Environmental) Zone has not been
23 applied to this area. * * *

24 ** * * * *

25 "In making this finding and in applying the conditions
26 of approval, the Council also relied upon the
applicant's representations that if they do not
receive approval from Metro, they will not site a
solid waste transfer station and recycling center on
this site. The applicant stated they would buy the
property and use it for another use or not buy the
property.

27 "Based on these findings the Council finds that it is
28 necessary to attach conditions 5, 7, 14, 15, 37."
29 (Emphasis added.) Record 47-53.

30 The finding addressing PCC 33.102.15(1) directly precedes
31 the above-quoted findings. The finding addressing
32 PCC 33.102.15(2) directly follows the above-quoted finding.
33 The above-quoted findings address the timing and potential
34 prematurity of the proposed zone change. We agree with

1 petitioner that the findings quoted above address whether the
2 proposed zone change is premature under PCC 33.102.15(3)(c).⁴

3 We further agree with petitioners that the above-quoted
4 findings provide that the appropriateness of the application of
5 the Industrial Sanctuary plan designation to the subject
6 property is dependent on the completion of major city planning
7 projects addressing compliance with Goal 5, application of the
8 city's environmental overlay zone and the Delta Park Master
9 Plan.⁵ Furthermore, the above-quoted findings state that
10 approving a zone change allowing more intensive use of the
11 subject property before these major city planning projects are
12 complete would be untimely, in the absence of the following
13 condition of approval:

14 "This zone change request shall not be effective
15 unless and until the applicant receives approval from
16 Metro to operate the Eastside Solid Waste Transfer
17 Station and Recycling Center. The effective date of
18 the zone change will be the date the action granting
19 approval became [sic] legally enforceable."
20 Record 31."

21 Thus, if intervenor does not obtain Metro approval for a
22 transfer station and recycling center, the zone change will
23 never take effect and, effectively, is denied. The only basis
24 which the city's decision reasonably suggests for such a denial
25 is the "prematurity" criterion of PCC 33.102.015(3)(c). We
26 conclude that the city did determine that the proposed zone
27 change is "premature" under PCC 33.102.015(3)(c).

28 However, even though the city found the proposed zone
29 change to be premature, it decided to grant the zone change

1 because the public interest in its approval outweighed its
2 prematurity. Record 48. We agree with petitioner that no
3 provision in the PCC to which we are cited allows the city to
4 find the zone change to be premature under
5 PCC 33.102.015(3)(c), but to overlook such prematurity and
6 authorize the zone change upon a finding of "public interest"
7 in its approval.

8 The first assignment of error is sustained.

9 SECOND ASSIGNMENT OF ERROR

10 "The City of Portland misconstrued the applicable law
11 by amending the zone on the subject property to HI
12 (Heavy Industrial) to allow for a use which is
inconsistent and incompatible with the characteristics
of uses allowed in the HI zone."

13 The parties agree that PCC 33.111.110 ("Industrial
14 Service") sets out the characteristics, and a list of examples,
15 of industrial service uses, which are permitted outright in the
16 HI zone.⁶

17 However, petitioner argues that PCC 33.111.110 does not
18 automatically make the proposed solid waste transfer station
19 and recycling operation, for which the subject zone change was
20 approved by the city, an industrial service use permitted in
21 the HI zone. Petitioner concedes that under PCC 33.111.110.C,
22 solid waste transfer stations and recycling operations are
23 examples of uses which may be industrial service uses and,
24 therefore, permitted in the HI zone. Petitioner argues it is
25 significant that the city uses the word "may" regarding the
26 "examples" of industrial service uses. The specific language

1 at issue is as follows:

2 "(C) Examples. Industrial service activities may
3 include * * * solid waste transfer stations; * * *
4 recycling operations * * *." PCC 33.111.110.C.

5 However, petitioner contends that even though a use may be
6 of a type listed as an "example," the particular use must be
7 determined not to be an industrial service use if it is found
8 to have characteristics which are not consistent with the
9 "characteristics" provision of PCC 33.111.110.A. Thus,
10 petitioner argues that the "characteristics" provision of PCC
11 33.111.110.A is an approval criterion.⁷ In this case, that
12 "characteristics" provision includes the following:

13 " * * * few customers, especially the general public,
14 come to the site." PCC 33.111.110.A.

15 Petitioner maintains that

16 "The applicant's proposed use is characterized by and
17 dependent upon customers, particularly the general
18 public, coming to the site. Regardless of the label
19 the applicant chooses to give its proposed facility,
20 the characteristics of that facility are inconsistent
21 and incompatible with the characteristics of uses
22 permitted outright in the HI zone." Petition for
23 Review 17.

24 Thus, petitioner contends the city approved a zone change for a
25 proposed use whose characteristics keep it from being a
26 permitted use in the new zone.

27 The city argues that the proposed solid waste transfer
28 station and recycling operation is listed as an outright
29 industrial service use in PCC 33.111.110.C, and that the
30 statement of characteristics set forth in PCC 33.111.110.A is
31 no more than a statement of purpose and intent, not an approval

1 criterion. See Standard Insurance Company v. Washington
2 County, ___ Or LUBA ___ (LUBA No. 87-020, September 1, 1987);
3 Hoffman v. City of Baker, 14 Or LUBA 198, 201 (1986); Cook v.
4 Yamhill County, 13 Or LUBA 137 (1985). The city implicitly
5 argues that it does not have authority to determine that a use
6 listed as an example in PCC 33.111.110.C does not belong in the
7 industrial service use category, even if one or more of the
8 use's essential characteristics fall outside of the
9 characteristics listed in PCC 33.111.110.A for the industrial
10 service use category.

11 In interpreting a city ordinance, we accept the city's
12 interpretation only if it is reasonable and correct. McCoy v.
13 Linn Co., supra. In this case, we are cited to no legislative
14 history to assist our understanding of what the city intended
15 in PCC 33.111.110.

16 The context in which PCC 33.111.110 appears is
17 significant. PCC 33.111.010 explains it is the purpose of the
18 General Activity Categories chapter to classify activities into
19 categories on the basis of common characteristics.
20 PCC 33.111.040 sets out the scheme for the classification of
21 the various activities. PCC 33.111.040, in relevant part,
22 states:

23 "A. Classification. All activities shall be
24 classified into the category whose description
25 most closely portrays the nature of the activity.
26 Activities or firms not clearly belonging to a
category shall be assigned to a category by the
director. The assignment shall be based on the
characteristics of the specific firm.

1 "B. Multi-Activity Uses. A firm containing more than
2 one separate activity shall be assigned to a
3 category based on the firm's primary business
activity. If the firm has more than one primary
activity, it shall be classified into categories.

4 "* * * * *" (Emphasis added.)

5 We read the provisions of PCC 33.111.010, 33.111.040 and
6 33.111.110 together in a manner which gives meaning to all
7 parts. Foster v. City of Astoria, ___ Or LUBA ___ (LUBA No.
8 88-030/88-031, August 15, 1988), slip op 8; Forest Highlands
9 Neighborhood Assoc. v. Portland, 11 Or LUBA 189, 193 (1984).

10 It is significant that PCC 33.110.040.A specifies that "all
11 activities shall be classified into the category whose
12 description most closely portrays the nature of the activity.

13 * * * " (Emphasis added.) Thus, PCC 33.111.040 acknowledges
14 that the code does not require an exact fit between the
15 characteristics of a category and those of a particular use.

16 Further, instead of stating that a particular use "shall"
17 or "will" be classified in the industrial service use category,
18 the city has stated that examples of industrial service uses
19 "may include * * * solid waste transfer stations; * * *
20 recycling operations * * *." PCC 33.111.110.C. In the usual
21 case, this would mean that the listed activities are examples
22 of uses which may belong in the use category if they meet
23 specific criteria. However, the use of the word "may" in the
24 "examples" subsections of the use categories of PCC

25 / / / / /

26 / / / / /

1 chapter 33.111 is not consistent. PCC 33.111.100, 33.111.110,
2 33.111.120, 33.111.130, and 33.111.550 specify that the
3 subject use category "may include" the various uses listed as
4 examples. However, PCC 33.111.200, 33.111.210, 33.111.220,
5 33.111.230, 33.111.310(A), 33.111.320, 33.111.330, 33.111.340,
6 33.111.350, 33.111.500, 33.111.520, and 33.111.530 omit the
7 word "may" and instead say simply "examples include * * *."

8 We can ascertain no pattern in the city's inclusion or
9 omission of the word "may" in the "examples" subsections of the
10 PCC chapter 33.111 use categories to assist us in interpreting
11 PCC 33.111.110. It does not make sense, in our view, for the
12 city to have some use categories where activities listed as
13 "examples" belong in the use category only if they are found to
14 be consistent with the "characteristics" provisions of the
15 category, and other use categories where activities listed as
16 "examples" automatically belong in the use category, without a
17 determination of consistency with the "characteristics"
18 provisions of the category.

19 The city's ordinance is internally inconsistent and is,
20 therefore, ambiguous. See Fisher v. City of Gresham, 69 Or
21 App 411, 416, 685 P2d 486 (1984); McCoy v. Linn County, 90
22 Or App at 276, n 1. Under these circumstances, we consider the
23 city's interpretation that use types listed as examples in
24 PCC 33.111.110.C are automatically considered to be industrial
25 service uses, and find that this interpretation is not clearly
26 contrary to the express language of the ordinance. While it is

1 a close question, we believe that the city's interpretation of
2 PCC 33.111.110.C as specifying uses legislatively determined to
3 belong in the industrial service use category is correct and
4 reasonable.⁸

5 We, therefore, conclude that the city did not err in
6 approving a zone change to HI for the purpose of developing the
7 proposed solid waste transfer station and recycling operation.

8 The second assignment of error is denied.

9 THIRD ASSIGNMENT OF ERROR

10 "The City of Portland's approval of the applicant's
11 proposal is not based upon substantial evidence
12 demonstrating that the approval criteria have been met
13 but rather on conditions which improperly defer
14 consideration of mandatory approval criteria and fail
15 to adhere to the applicable procedures for evaluating
16 zone change requests."

17 Under this assignment of error, petitioner argues the
18 city's decision fails to comply with PCC 33.102.015(2). This
19 code provision, quoted in full under the first assignment of
20 error, supra, requires the city to find that services adequate
21 to support the proposed use "are presently available or can be
22 reasonably made available * * * by the time the proposed use
23 qualifies for a certificate of occupancy or completion * * *."
24 Petitioner divides its argument under this assignment of error
25 into two parts, one addressing sanitary sewage and stormwater
26 disposal services, and the other addressing transportation
capabilities. We address each subassignment separately below.

27 A. Sewage and Stormwater Disposal Services

28 With respect to sanitary sewage and stormwater disposal,

1 the city found, in relevant part, the following:

2 "* * * The Bureau of Environment Services has
3 responded that existing sanitary and storm sewers are
4 adequate, but the nature of the discharges must be
5 controlled.

6 "There will be two types of water discharged from the
7 site; sewerage and storm water. City Code authorizes
8 the City to require a discharge permit for sewerage
9 when the discharged waste will be too strong to be
10 adequately treated by the sewer system. * * * In
11 these situations, on-site pretreatment is required.

12 "A solid waste transfer station and recycling center
13 has no control over the types of waste which will be
14 brought to the site. Waste from individual homes and
15 business is mixed in 5-ton compactor trucks. It is
16 possible that acids, materials destructive to the
17 biological system, and heavy metal will be mixed in
18 the solid waste. The system does not have the
19 capacity to treat these materials. Therefore, in
20 order to satisfy the approval criteria, the city will
21 require the applicant to apply for a wastewater
22 discharge permit and to pretreat the sewage to be
23 discharged into the system. This is the basis for
24 conditions 24, 25, 26, 27, 28 and 34. In addition, in
25 order to assure there is continued capacity, the city
26 has applied condition 29.

27 "* * * Storm water drainage is released directly into
28 streams. In this case, the storm water will be
29 released into the Oregon Slough. Therefore, the storm
30 water drainage must be kept separate from pollutants.

31 "There are a number of potential on-site pollutants;
32 e.g., the water from wasting [sic] the commercial
33 hauler trucks; storm water running off cans holding
34 toxic materials and from cans holding hazardous waste
35 in storage areas. In order to assure the drainage
36 water is not polluted water, it must be kept separate
37 from contaminated water. The City's direct discharge
38 system does not have the capacity to treat
39 contaminated water. Therefore, to assure this approval
40 criteria is satisfied, the City has applied condition
41 23, 30, 31, 32, 33 and 34." Record 54-55.

42 The conditions referred to in the above-quoted findings
43 provide as follows:

- 1 "23. The applicant shall not allow storm or rainwater
2 to mix with processed wastewater or truck washing
water.
- 3 "24. The applicant shall provide pretreatment of the
4 waste stream excluding domestic sewage to the
5 sanitary sewer as required by the City to meet
current and future federal, state and local
discharge limits.
- 6 "25. The applicant shall designate a pretreatment
7 area, if necessary, on the building permit
application site plan.
- 8 "26. The applicant shall obtain and comply with a City
of Portland Industrial Waste Discharge Permit.
- 9 "27. The applicant shall provide positive isolation of
10 all hazardous materials, toxic materials or other
materials prohibited from the sewer system.
- 11 "28. The applicant shall provide hazardous material,
12 hazardous waste or toxic waste containment and
clean up procedures that provide isolation of
13 such materials from the sanitary sewer. The
applicant will participate in improvements to the
14 system if determined necessary by the Bureau of
Environmental Services.
- 15 "29. The applicant shall provide estimates of the
16 quantity of treated discharge for a determination
of the impact on pump station and sewer line
17 capacities.
- 18 "30. The applicant shall isolate stormwater from all
19 waste transfer and processing surfaces of the
facility.
- 20 "31. Stormwater must be collected from all impervious
21 surfaces on the site including container storage
and loading facilities. All stormwater must be
22 conveyed to the north for discharge into the
Columbia River only (Oregon Slough). No
23 stormwater from the operation shall be allowed to
discharge to the wetlands south of the site
24 directly or indirectly. New public storm sewer
construction will be required.
- 25 "32. The applicant shall store no hazardous materials,
26 toxic materials or materials that are otherwise
prohibited from the sewer systems in unroofed

1 and/or unbermed areas.

2 "33. The applicant shall provide for containment
3 capability and cleanup procedures for the storm
collection system on the site.

4 "34. All storage areas of hazardous materials, toxic
5 materials or materials otherwise prohibited in
the sewer systems shall have no drainage to the
6 sanitary or storm sewer." Record 34.

7 Petitioner argues the city did not determine that adequate
8 systems for sewage and stormwater disposal for the proposed use
9 are presently available or can reasonably be made available, as
10 required by PCC 33.102.015(2). Petitioner says that the fact
11 the city's sewage and stormwater disposal systems are
12 inadequate to support the proposed use is apparent from a
13 memorandum from the Portland Bureau of Environmental Services
14 (BES). Record 770. Petitioner contends the city deferred
15 making a determination of compliance with PCC 33.102.015(2),
16 and instead improperly relies on the imposition and
17 implementation of conditions 23-34, quoted above, to achieve
18 compliance at some time in the future.

19 Petitioner contends the city's reliance on these conditions
20 is error for two reasons. First, petitioner maintains there is
21 not substantial evidence in the record that there are feasible
22 means to implement the city's conditions. Petitioner argues:

23 "* * * For example, the City's condition no. 27
24 requires that 'the applicant shall provide positive
isolation of all hazardous materials, toxic materials
25 * * * The applicant, however, has presented no
substantial evidence as to how it will satisfy this
26 requirement or even that it is even capable of

1 satisfying this requirement. A condition that
2 hazardous and toxic materials are prohibited from the
3 sewer system is no substitute for substantial evidence
4 from the applicant as to how those materials can be
5 isolated or that reasonable solutions exist to
6 implement that isolation. Likewise all other
7 conditions regarding sewage and storm water disposal,
8 including conditions 23-34, suffer from a similar
9 failure. The applicant has simply not presented
10 evidence that feasible solutions exist to implement
11 the City's conditions." Petition for Review 24.

12 Second, petitioner argues the city's reliance on the
13 conditions is error because the city has provided no
14 opportunity for interested parties to participate in future
15 decisions on whether the conditions are met. Petitioner argues
16 this Board held that a local government

17 " * * * cannot defer consideration of compliance with
18 [a] mandatory zone change approval criterion to a
19 later stage in its approval process unless its
20 regulations or decision require the full opportunity
21 for public involvement provided in [the] initial zone
22 change proceeding." Holland v. Lane County, ___
23 Or LUBA ___ (LUBA No. 87-106, April 13, 1988), slip op
24 19 (citing Spalding v. Josephine County, 14 Or LUBA
25 143, 147 (1985); Storey v. City of Stayton, ___
26 Or LUBA ___ (LUBA No. 86-057/058, December 30, 1986);
Meyer v. City of Portland, 67 Or App 274, 280, 678 P2d
741, rev den 297 Or 82 (1984)).

18 Respondents argue that, unlike the cases cited by
19 petitioner above, here the city did not defer its determination
20 on the adequacy of sewage and stormwater disposal services to a
21 later stage in its proceedings. Respondents contend the city's
22 decision found services adequate to serve the proposed use are
23 presently available, and simply imposed conditions necessary to
24 advise the applicant of what is required of the proposed
25 development.
26

1 The city argues its decision that adequate sewage and
2 stormwater disposal services are available for the proposed use
3 is supported by BES memos in the record, including the one
4 cited by petitioner. The city asserts it is entitled to rely
5 on the expertise of its staff, citing Scott v. City of
6 Portland, ___ Or LUBA ___ (LUBA No. 88-063, December 2, 1988),
7 slip op 7; Meyer v. City of Portland, 7 Or LUBA 184, 196
8 (1983), aff'd 67 Or App 274 (1984). Intervenor argues that the
9 city's determination of availability of adequate sewage and
10 stormwater disposal services is also supported by the testimony
11 of Robert Carn of URS Consultants, an engineering firm retained
12 by intervenor, and Steve Kenworthy, of the BES Engineering
13 Services Division. Intervenor further contends Carn's
14 testimony clearly rebuts petitioner's specific contention that
15 there is no substantial evidence in the record that it is
16 feasible for intervenor to satisfy condition 27.

17 Respondents argue the conditions imposed by the city are
18 merely "restatements of the regulatory power which [the BES]
19 has over industrial storm[water] and sewer waste discharges."
20 Respondent's Brief 23. Intervenor also argues that once a
21 local government decides that a proposed use complies with
22 applicable approval criteria, it may rely on the imposition of
23 conditions to ensure the criteria will be met, citing McCoy v.
24 Linn County, ___ Or LUBA ___ (LUBA No. 87-046, December 15,
25 1987), aff'd 90 Or App 271 (1988).

26 We agree with respondents that the city did determine

1 adequate sewage and stormwater disposal services are available
2 to serve the proposed use. The city did not defer
3 determination of compliance with PCC 33.102.015(2) to some
4 later stage of the development process. However, we do not
5 agree with respondents that conditions 23-34 are merely
6 restatements of the BES's regulatory authority. We understand
7 the city's findings to say that its sewage and stormwater
8 disposal services will be adequate to serve the proposed use if
9 conditions 23-34 are met.⁹ It was not error for the city to
10 so find. Once a local government decides that a proposal can
11 meet applicable criteria, imposition of conditions is an
12 appropriate way to insure that the criteria are met. McCoy v.
13 Linn County, supra at slip op 7; Sigurdson v. Marion County, 9
14 Or LUBA 163, 176 (1983).

15 We are authorized to reverse or remand the city's decision
16 if we find that the decision is not supported by substantial
17 evidence in the whole record. ORS 197.835(8)(a)(C). In this
18 case, petitioner does not challenge the evidentiary support for
19 the city's overall conclusion that adequate sewage and storm-
20 water disposal facilities will be available for the proposed
21 use if conditions 23-34 are met.¹⁰ What petitioner
22 challenges is the evidentiary support for a determination that
23 it is feasible for the proposed use to satisfy conditions
24 23-34.

25 Substantial evidence is evidence which a reasonable mind
26 could accept as adequate to support the city's conclusion.

1 Braidwood v. City of Portland, 4 Or App 477, 480, 546 P2d 777,
2 rev den (1976); Gibson v. Deschutes County, ___ Or LUBA ___
3 (LUBA No. 89-002, May 8, 1989), slip op 17. We must decide
4 whether, in light of all the evidence to which we are cited in
5 the record, the city's decision is reasonable. Younger v. City
6 of Portland, 305 Or 346, 360, 752 P2d 262 (1988).

7 In this case, the city was able to approve the proposed
8 zone change in part because it decided that its sewage and
9 stormwater disposal facilities would be adequate to serve the
10 proposed use if certain conditions are met. Although this
11 aspect of the city's decision does not have to be supported in
12 the record by technical evidence of the precise means by which
13 the conditions will be satisfied, we do not believe that this
14 decision would be reasonable if there were not substantial
15 evidence in the record that it is feasible for the proposed use
16 to satisfy the conditions.¹¹

17 The May 19, 1988 hearings officer's report recommended
18 adoption of the same BES conditions adopted by the city council
19 as conditions 23-34. Record 1172-1173. The July 26, 1988 BES
20 memorandum discusses conditions sought by the BES regarding
21 stormwater disposal and pretreatment of industrial wastewater
22 discharges. Record 767-768. The memorandum concludes:

23 "In summary, the Bureau of Environmental Services
24 believes that the proposed transfer station site has
25 or can be provided with sewage disposal and drainage
26 services sufficient to mitigate adverse environmental
impacts from stormwater runoff and industrial
discharges from the site." Record 768.

1 This conclusion is evidence that compliance with the BES
2 recommended conditions is feasible.¹² In addition, the
3 testimony of BES staff member Steve Kenworthy concerning the
4 separation and containment of stormwater on the subject site
5 indicates that compliance with conditions 30, 31 and 33 is
6 feasible. Intervenor-Respondent's Brief 17. The testimony of
7 engineering consultant Robert Carn, quoted at pages 15-17 of
8 Intervenor-Respondent's Brief, similarly indicates that
9 satisfaction of conditions 23-26 and 31 is feasible. Finally,
10 Carn's testimony with regard to the identification, control and
11 disposal of hazardous waste at the proposed facility, quoted at
12 pages 22-23 of Intervenor-Respondent's Brief, indicates that
13 compliance with conditions 27, 28, 32 and 34 is feasible.

14 The above-described evidence is evidence on which a
15 reasonable person would rely to determine that it is feasible
16 for the proposed use to satisfy conditions 23-34. We conclude
17 the city's decision to approve the proposed zone change because
18 adequate sewage and stormwater disposal services will be
19 available for the proposed use, if it satisfies conditions
20 23-34, is supported by substantial evidence in the record.

21 This subassignment of error is denied.

22 B. Transportation Capabilities

23 Petitioner asserts that PCC 33.102.015(2)(c) requires the
24 city to find that adequate transportation capabilities for the
25 proposed use are presently available or reasonably can be made
26 available. Petitioner points out that the zone change

1 application includes a barge loading facility. Record 1355.
2 Petitioner argues that the city's decision approves inclusion
3 of a barge facility as a component of the waste transfer
4 station, at the applicant's option. Record 60. Petitioner
5 argues that the city made no findings, and there is not
6 substantial evidence in the record, concerning the effects of
7 the proposed use on the city's transportation system if a barge
8 facility is included. Petitioner contends that especially
9 because the city found that the adequacy of the capacity of
10 N. Marine Drive is questionable, substantial evidence regarding
11 the cumulative traffic impact of the proposed use, with a barge
12 facility added, is essential to support a determination of
13 compliance with PCC 33.102.015(2)(c).

14 Petitioner also argues that the city's order defers to the
15 State Highway Division and City Office of Transportation to
16 make a determination on the compliance of a barge facility with
17 the mandatory approval criterion of PCC 33.102.015(2)(c) .
18 Record 60. Petitioner maintains this deferral of a
19 determination of compliance with a mandatory approval criterion
20 is error because neither the city's regulations nor its
21 decision provide opportunity for public involvement in making
22 that determination, as is required in the current zone change
23 proceeding.

24 Respondents contend a barge facility is not part of the use
25 approved for the subject property. The city concedes it did
26 not adopt any findings supporting the approval of a barge

1 facility on the subject property. Respondent's Brief 27. The
2 city argues it did not defer making a determination on
3 compliance of a barge facility with PCC 33.102.015(2)(c) to the
4 City Transportation Office or State Highway Division.
5 According to the city, its findings simply recognize that
6 future vehicular access to a barge site on the property north
7 of N. Marine Drive must be approved by those agencies.¹³
8 Petitioner points out that state statute and PCC 17.28.110
9 require a permit for all driveways. The city contends its
10 decision does not attempt to transfer responsibility for
11 determining compliance with PCC 33.102.015(2)(c) to those
12 agencies.

13 A barge facility was part of intervenor's original zone
14 change application. We are not cited to any amendment of that
15 application in the record. The city's findings state that
16 "[t]he primary mode of transportation to be used to transport
17 the wastes to central Oregon will be rail, with ground and
18 water-borne transport to be used in emergencies." (Emphasis
19 added.) Record 38. There are no conditions of approval which
20 prevent intervenor from including a barge facility as part of
21 the proposed use. Thus, in our view, it is reasonably clear
22 that the city's decision does authorize the use of water-borne
23 transport (barge) as part of the proposed use.

24 PCC 33.102.015(2)(c) requires a determination of whether
25 adequate transportation services are available to support the
26 proposed use. The city concedes that it has not adopted any

1 findings on whether adequate transportation services are
2 available or reasonably can be made available with respect to
3 the use of water borne transport (barge). We are cited to no
4 evidence in the record concerning the transportation impacts of
5 the use of a barge. Furthermore, the city's decision does not
6 purport to authorize the City Transportation Office or State
7 Highway Division to determine compliance with
8 PCC 33.102.015(2)(c) in some subsequent proceeding. We agree
9 with the city that the provision of its order quoted at n 13,
10 supra, simply recognizes that vehicular access to the property
11 north of N. Marine Drive for a barge facility, as for any use
12 of that property, requires city and state permits. Thus, the
13 city's decision neither demonstrates compliance with
14 PCC 33.102.015(2)(c) with regard to a potential barge facility,
15 nor defers such a determination to a subsequent
16 proceeding.¹⁴

17 This subassignment of error is sustained.

18 This assignment of error is sustained, in part.

19 The city's decision is remanded.

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FOOTNOTES

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The city council's order does not mention intervenor's application for a change in plan designation from Heavy Manufacturing to Heavy Industrial. Presumably the city considered this request moot in view of its June 1988 legislative change of the plan designation for the subject property to Industrial Sanctuary.

2

PCC 33.215.170(D) provides in relevant part:

" * * * Conditions may include * * * other conditions which meet one of the following criteria:

"1. The condition is required to protect the public from the potentially deleterious effects from the proposed use;

"2. The condition is required to fulfill the public service or public facility demand created by the proposed use; or

"3. The condition is required to carry out the policies of an adopted City Plan or Code provision."

3

The "Findings" section also contains a fourth subsection which is specifically identified as addressing "PCC 33.805: Off Site Impacts." Record 62.

4

We cannot agree with respondents that the findings quoted in the text do not address compliance with PCC 33.102.015(3)(c), but rather only establish the basis under PCC 33.215.170(D) for the city's imposition of conditions of approval. We note the sections of the findings addressing PCC 33.102.015(2) and 33.805 also contain statements that the findings therein provide the basis for imposition of specific conditions of approval. Record 54, 55, 57, 62, 63.

5

We infer from the above-quoted findings addressing PCC 33.102.105(3)(c) that the city council interpreted the

1 "major public projects" referred to in that paragraph as
2 including major public planning projects, not just major public
3 service projects, as argued by respondents in their briefs. We
4 note the city council's interpretation of this provision to
5 include major public planning projects is not challenged in the
6 petition for review or by cross-petition. What petitioner
7 challenges is the city council's interpretation of the
8 applicable law as allowing it to balance the public interest in
9 a proposed zone change against prematurity of the proposed zone
10 change under PCC 33.102.015(3)(c). However, we find the city
11 council's interpretation of the "major public projects"
12 provision, as applied in its order, to be reasonable and
13 correct. McCoy v. Linn County, 90 Or App 271, 275-276, 752 P2d
323 (1988). We also believe the interpretation espoused by
respondents in their briefs is reasonable. However, we cannot
say, based on the argument supplied by respondents, that we
should accept as "correct" their interpretation, and reject as
incorrect the interpretation apparently adopted by the city.
We note that if the interpretation of PCC 33.102.015(3)(c)
espoused by respondents in their briefs were correct,
PCC 33.102.015(2) and 33.102.015(3)(c) would be redundant. In
other words, PCC 33.102.015(3)(c) would require denial of a
proposed zone change only in instances where adequate services
were unavailable and, therefore, where denial also would be
required by PCC 33.102.015(2).

14 _____
15 6

16 PCC 33.111.110 states:

17 "Industrial Service.

18 "A. Characteristics. Firms are engaged in the repair
19 or servicing of industrial, business or consumer
20 machinery, equipment, products or by-products. Firms that
21 service consumer goods, do so by mainly providing
centralized services for separate retail outlets. Contractor's
building maintenance services and similar activities perform
services off-site. Few customers, especially the general public,
come to the site.

22 "B. Accessory activities. Accessory activities may
23 include offices, retail drop-off centers, rail spur or lead
lines, and docks.

24 "C. Examples. Industrial service activities may
25 include welding shops; machine shops; tool and
26 appliance repair; electric motor repair; enameling and
plating; truck and large equipment repair, storage, and
salvage; drydocks; auto

1 salvage; truck service stations; garbage and
2 sanitary services (but not disposal); solid waste
3 transfer stations; headquarters for building,
4 heating, plumbing or electrical contractors;
5 printing, publishing and blueprinting;
6 exterminators; recycling operations; janitorial
7 and building maintenance services; medical,
8 research and testing laboratories; laundry,
9 drycleaning, and carpet cleaning plants; and
10 photofinishing laboratories."

11 _____
12 7

13 Petitioner also says this characteristics provision is
14 clearly not intended as a statement of intent and purpose
15 because PCC chapter 33.111 ("General Activity Categories")
16 already has such a section:

17 "Purpose: This chapter classifies land use activities
18 into categories on the basis of common, functional,
19 product or compatibility characteristics. These
20 characteristics include the type of activity, the type
21 of customers, how goods or services are sold or
22 delivered, and certain site factors. The categories
23 provide a systematic basis for assignment of
24 activities to zones based on the goals and policies of
25 the comprehensive plan." PCC 33.111.010.

26 _____
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28 We do not, however, believe that the "characteristics"
29 provision of PCC 33.111.110.A is a mere intent and purpose
30 statement. In order to give meaning to and maintain
31 consistency with PCC 33.111.040, that "characteristics"
32 subsection must be applied to additional uses, uses not
33 already specified legislatively in the list of examples.
34 In other words, uses not identified as industrial service
35 uses in the examples of PCC 33.111.110.C may be deemed
36 industrial service uses if found consistent with the
37 "characteristics" provisions of that use category.
38 PCC 33.111.040.

39 _____
40 9

41 The significant city findings state:

42 "* * * The [city sewage treatment] system does not
43 have the capacity to treat [certain] materials.
44 Therefore, in order to satisfy the approval criteria,
45 the City will require the applicant to apply for a
46 wastewater discharge permit and to pretreat the sewage

1 to be discharged into the system. This is the basis
2 for conditions 24, 25, 26, 27, 28 and 34. In
3 addition, in order to assure there is continued
capacity, the city has applied Condition 29."
(Emphasis added.) Record 54.

4 "* * * The City's direct discharge system [for storm
5 water] does not have the capacity to treat
6 contaminated water. Therefore, to assure this
approval criteria is satisfied, the City has applied
Condition 23, 30, 31, 32, 33 and 34." (Emphasis
added.) Record 55.

7
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9 This is probably due to the fact that petitioner mistakenly
10 believed the city had not found adequate services to be
11 available, but rather had deferred making such a
12 determination. In any case, we would agree with respondents
13 that the BES memoranda in the record constitute substantial
14 evidence in support of this aspect of the city's decision. The
15 BES concluded that sewage and stormwater disposal services "are
16 available," but that "it is imperative that conditions be
applied to this zone change providing for review and approval
of stormwater and sanitary sewage collection, treatment and
discharge systems by this Bureau prior to building permit
approvals." Record 770. The BES also stated that the city's
storm and sanitary sewer systems are adequate to serve the
proposal so long as "hazardous materials, toxic materials or
other materials which are prohibited from the sewer system are
positively isolated." Id. The BES concluded:

17 "In summary, the Bureau of Environmental Services
18 believes that the proposed transfer station site has
19 or can be provided with sewage disposal and drainage
20 services sufficient to mitigate adverse environmental
impacts from stormwater runoff and industrial
discharges from the site." Record 768.

21

11

22 We note that absent some evidence in the record suggesting
23 a condition cannot be met or that the city questioned the
24 feasibility of a condition, we do not believe the city is
25 required to specifically find, in its decision, that each
26 condition it imposes is feasible. See Dougherty v. Tillamook
County, 12 Or LUBA 20, 31 (1984). Petitioner does not point to
any evidence in the record challenging the feasibility of the
conditions or suggesting the city did not believe the
conditions were feasible. In these circumstances, we assume
the conditions the city imposed to meet the applicable approval

1 standards were considered by the city to be feasible
2 requirements, without a specific city finding to that effect.

3 12

4 We note that in Meyer v. City of Portland, 7 Or LUBA 184,
5 196 (1983) we recognized that:

6 "A finding of initial feasibility of a project is
7 sufficient if the experts have concluded that
8 'solutions to problems are possible and likely.'"

9 13

10 The findings in question state:

11 "If barge facilities are used, vehicular access to the
12 barge site must be approved by the City Office of
13 Transportation and the State Highway Division. This
14 approval can only occur after a traffic analysis of
15 the proposed use is obtained."

16 14

17 Of course, if the city did attempt to defer a determination
18 of compliance with a mandatory approval criterion, it would
19 have to provide, with regard to the subsequent deferred
20 decision, the full opportunity for public involvement which it
21 provides in its initial zone change proceedings. Holland v.
22 Lane County, supra.