

LAND USE  
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

~~AUG 31~~ 4 34 PM '83  
Sept. 1. 83

MULTNOMAH COUNTY, )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
CITY OF FAIRVIEW, )  
 )  
Respondent, )  
 )  
and )  
 )  
DON TOOMBS TRUCKING, INC., )  
 )  
Intervenor-Respondent. )

LUBA No. 89-052

FINAL OPINION  
AND ORDER

Appeal from City of Fairview.

John L. Dubay, Portland filed the petition for review and argued on behalf of petitioner.

William L. Brunner, Portland, filed a response brief and argued on behalf of respondent.

Peter P. Adamco and John Spencer Stewart, Portland, filed a response brief on behalf of intervenor-respondent. With them on the brief was Stafford, Frey, Cooper & Stewart. John Spencer Syewart argued on behalf of intervenor-respondent.

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

REMANDED 09/01/89

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioner appeals City of Fairview Resolution 12-1989, which approves a conditional use permit for an aggregate barge unloading, stockpiling and truck transshipping facility on the Columbia River.

MOTION TO INTERVENE

Don Toombs Trucking, Inc., the applicant for the conditional use permit, moves to intervene on the side of respondent in this proceeding. There is no opposition to the motion, and it is allowed.

FACTS

A city decision approving the subject conditional use permit was appealed to LUBA in Multnomah County v. City of Fairview, \_\_\_ Or LUBA \_\_\_ (LUBA Nos. 88-035 and 88-076, December 23, 1988) (Multnomah County I).<sup>1</sup> In Multnomah County I, we stated:

"Intervenor owns a 2.18 acre tract between the Columbia River and Marine Drive in the City of Fairview. Petitioner owns and operates Blue Lake Park across Marine Drive, opposite intervenor's property.

"Intervenor's property currently is used to store

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<sup>1</sup>Petitioner's appeal of the conditional use permit, LUBA No. 88-035, was consolidated with its appeal of a subsequent city zone change which would make the proposed use an outright permitted use, LUBA No. 88-076. In Multnomah County I, we remanded the conditional use permit approval, but affirmed the zone change. Our decision in LUBA No. 88-076 affirming the zone change was affirmed by the Court of Appeals in Multnomah County v. City of Fairview, 96 Or App 14, \_\_\_ P2d \_\_\_, rev allowed, 308 Or 184 (1989). Our decision in LUBA No. 88-035 remanding the conditional use permit approval was not appealed to the Court of Appeals.

1 trucked-in dredged river sand and aggregate material.  
2 The sand is trucked out in dump trucks which average  
3 10 cubic yards of capacity. The trucks sometimes tow  
4 trailers which have a capacity of eight cubic yards.  
5 Approximately 200 cubic yards of aggregate is stored  
6 on site and about one-half of the 2.18 acres is used  
7 to stockpile sand.

8 "The use intervenor proposes calls for installation of  
9 a barge moorage and a receiving hopper. Barges will  
10 be delivered once or twice a week. The barges will  
11 carry 1600 cubic yards of material and will take three  
12 to four hours to unload using a self-contained  
13 conveyor. A shoreside conveyor will move the material  
14 from the unloading hopper to the storage area on site.  
15 The material will then be loaded onto trucks for  
16 delivery off-site, in the same manner as under the  
17 current operation." Multnomah County I, slip op at  
18 3-4.

19 To these facts, we add that the subject property is located  
20 on the south shore of the Columbia River, across from the  
21 eastern end of McGuire Island, near the eastern mouth of the  
22 South Channel. The South Channel is a relatively shallow  
23 channel between the river's south bank and McGuire and other  
24 islands. The main navigational channel of the river, adjoins  
25 the south shore of the river to the east of the subject  
26 property, but passes to the north of McGuire Island and the  
other islands to the west. Record 68-69.

In Multnomah County I, we remanded the conditional use  
permit approval because we concluded the city's findings did not  
adequately address the requirement of Multnomah County Code  
(MCC) .7120(A) that the proposed use be "consistent with the  
character of the area."<sup>2</sup> In that opinion, we stated:

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<sup>2</sup>The Multnomah County Zoning Ordinance is codified as Chapter 11.15 of  
the MCC. The zoning ordinance sections in the MCC are numbered 11.15.XXXX.

1 "[The city's] finding simply restates the approval  
2 standard. A finding that simply restates the approval  
3 standard is not adequate to explain why that standard  
4 is met. The balance of the city's findings \* \* \*  
5 simply state that the proposed use will expand the  
6 present use. \* \* \*

7 "The city's findings are not responsive to  
8 MCC .7120(a). The findings do not explain what the  
9 character of the area is. More importantly, the  
10 city's findings are based on the assumption that the  
11 existing use is consistent with the character of the  
12 area. Without findings identifying the character of  
13 the area and explaining why the existing use is  
14 consistent with the existing character of the area,  
15 findings that the proposed change would have no  
16 significant additional impacts are not sufficient to  
17 show compliance with MCC .7120(A)." (Citation  
18 omitted.) Multnomah County I, slip op at 10-11.

19 After our remand in Multnomah County I, the city planning  
20 commission held an evidentiary hearing on the "character of the  
21 area" issue, and approved the conditional use permit.  
22 Record 57, 128. Petitioner appealed the planning commission's

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23 We cite only the four digit section number, omitting the citation to  
24 Chapter 11.15, as does the county in the MCC. MCC .7120(A) provides in  
25 relevant part:

26 "A Conditional Use shall be governed by the approval criteria  
listed in the district under which the conditional use is  
allowed. If no such criteria are provided, the approval  
criteria listed in this section shall apply. In approving a  
Conditional Use listed in this section, the approval authority  
shall find that the proposal:

"(A) Is consistent with the character of the area;

" \* \* \* \* \* "

When the subject conditional use permit application was initially  
submitted to and approved by the city, intervenor's property had been  
annexed by the city but was still subject to the county's comprehensive  
plan and zoning ordinance, because the city had not yet applied its own  
plan and zoning ordinance to the property. ORS 215.130(2). Accordingly,  
the city applied the county's plan and zoning ordinance in its initial  
decision to grant the conditional use permit.

1 decision to the city council. After another evidentiary  
2 hearing, the city council adopted the challenged resolution  
3 determining that the proposed use is consistent with the  
4 character of the area, affirming the planning commission  
5 decision and approving the conditional use permit.<sup>3</sup> Record 19.  
6 This appeal followed.

7 FIRST ASSIGNMENT OF ERROR

8 "The city misconstrued the law and made a decision  
9 without adequate findings and not supported by  
10 substantial evidence in the record by selecting an  
11 area for analysis of compliance with a necessary  
12 criterion without identifying in the record where the  
13 area is located or stating why it was selected."

11 SECOND ASSIGNMENT OF ERROR

12 "The city misconstrued the law and made a decision  
13 without adequate findings and not supported by  
14 substantial evidence in the record that the proposed  
15 use is consistent with the character of the area."

15 Under these assignments of error, petitioner contends the  
16 city's determination that the proposed use "is consistent with  
17 the character of the area," required by MCC .7120(A), is  
18 inadequate because (1) the city did not identify "the area" it  
19 considered; (2) the city provided no rationale for its selection

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20  
21 <sup>3</sup>As previously noted, after the city initially approved the subject  
22 conditional use permit, it applied its own Heavy Manufacturing (Columbia  
23 River) (M-1(CR)) zone to the property, and that decision was affirmed by  
24 this Board and the Court of Appeals. Multnomah County I; Multnomah County  
25 v. City of Fairview, supra. However, we note that both the city and county  
26 have acknowledged comprehensive plans and land use regulations. Under  
ORS 215.428(3) and 227.178(3), if a county or city has an acknowledged plan  
and regulations, "approval or denial of [a permit] application shall be  
based upon the standards and criteria that were applicable at the time the  
application was first submitted." Thus, we assume, as have the parties,  
that the city was correct in applying the county's zoning ordinance to the  
subject conditional use permit on remand.

1 of the area it considered; (3) the city misinterpreted  
2 MCC .7120(A) in identifying the area it considered; and (4) the  
3 city did not adequately describe the characteristics of the area  
4 it considered. We address each contention separately below.

5 A. Identification of the Area

6 Petitioner argues that in cases involving the Statewide  
7 Planning Goal 3 standard requiring minimum lot sizes of  
8 agricultural land to be appropriate to continue "the existing  
9 agricultural enterprise within the area" (emphasis added), LUBA  
10 has consistently required the decision makers to specifically  
11 identify the area to be considered in their decisions.  
12 Petitioner cites Stephens v. Josephine County, 11 Or LUBA 154,  
13 163 (1984); Kenagy v. Benton County, 6 Or LUBA 93, 103 (1982);  
14 and Still v. Marion County, 212, 214 (1981). Petitioner also  
15 contends that in cases involving county code requirements that  
16 nonfarm dwellings "not materially alter the stability of the  
17 overall land use pattern of the area" (emphasis added), LUBA has  
18 remanded county decisions where the areas considered were not  
19 specified. Petitioner cites Bruck v. Clackamas County, 15  
20 Or LUBA 540 (1987) and Resseger v. Clackamas County, 7 Or LUBA  
21 154 (1983).

22 Petitioner does not contend that MCC .7120(A) can only be  
23 satisfied if lines are drawn on a map to identify "the area."  
24 Rather, petitioner argues "the record should disclose where the  
25 area is located and provide a means available to the reviewing  
26 body to determine whether particular territory is in or out."

1     Petition for Review 10.     In this case, petitioner contends  
2     nothing in the record discloses the outline of "the area."  
3     Petitioner calls particular attention to the city's  
4     identification of "the area" as being "north of the dike."  
5     Petitioner argues that because no map or photo in the record  
6     shows the dike, it cannot be determined from the record whether  
7     a particular use is north or south of the dike.

8             The city and intervenor (respondents) argue that the LUBA  
9     decisions relied on by petitioner are irrelevant to this case  
10    because the standards they apply relate to the preservation of  
11    agricultural land.    Respondents also contend that Fedde v. City  
12    of Portland, 8 Or LUBA 220 (1983) (which interprets an MCC  
13    standard identical to MCC .7120(A)) is contrary to petitioner's  
14    argument because, in Fedde, LUBA accepted as adequate findings  
15    which did not describe a specific "area" of consideration.  
16    Respondents also assert that "the dike" referred to in the  
17    city's findings can easily be seen on aerial photographs in the  
18    record.    However, respondents also contend that "the area"  
19    considered by the city was not limited to the identified land  
20    north of the dike, but also included other uses in "the  
21    vicinity" and "the entire City of Fairview and adjoining areas."  
22    Record 17-19.

23             The city findings which specifically refer to the  
24    consistency of the proposed use with an "area" are as follows:

25             "17. The proposed use is consistent with the  
26                immediate area.

1 " \* \* \* \* \*

2 "19. The Council finds and does here determine that  
3 an area of specific concern with respect to this  
4 decision is that area lying north of the dike  
5 area which runs along the Columbia River from  
6 the westerly boundary of Fairview to the Sandy  
7 River and the proposed use is most consistent  
therewith and that in making such determination  
of said area the Council has also concerned  
itself and is aware generally of the uses within  
the entire City of Fairview and adjoining  
areas." (Emphasis in original.) Record 19.

8 In addition, the city's individual findings are prefaced by  
9 the following statement:

10 "COUNCIL FINDINGS: With respect to the Conditional  
11 Use Permit application of applicant, Don Toombs  
12 Trucking, and in particular as concerns the character  
of the area this Council does find that:" (Emphasis  
added.) Record 17.

13 This preface is followed by findings which variously refer to  
14 "adjacent property" (findings 2, 14), "the vicinity"  
15 (finding 3), "the shoreline area" (finding 4) and "the immediate  
16 vicinity" (finding 5).

17 We agree with petitioner that demonstration that a proposed  
18 use "is consistent with the character of the area," as required  
19 by MCC .7120(A), requires identification in the city's decision  
20 of "the area" it considered.<sup>4</sup> See Stephens v. Josephine County,  
21 supra; Resseger v. Clackamas County, 7 Or LUBA at 158. On the  
22 other hand, we agree with respondents that the location of "the  
23

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24  
25 <sup>4</sup>We note that in Fedde v. City of Portland, supra, the petitioner's  
26 argument was that the proposed use would change the visual character of the  
area. Whether the city had adequately identified "the area" it considered  
was not an issue in that case.

1 dike" can be seen on the aerial photographs in the record and,  
2 therefore, the boundaries of the "area of special concern"  
3 referred to by the city in finding 19 is sufficiently identified  
4 by the city as being the Columbia River to the north, the Sandy  
5 River to the east, the dike to the south and the city limits to  
6 the west.

7 However, it cannot be determined from the city's decision  
8 whether this "area of special concern" is in fact "the area" the  
9 city considered in addressing MCC .7120(A). As previously  
10 pointed out, the city's findings also refer to consistency of  
11 the proposed use with "the immediate vicinity" and "the entire  
12 City of Fairview and adjoining areas." Record 19. In addition,  
13 the city's findings refer to the "character of the area" as  
14 relating to "the vicinity," "the immediate vicinity," "the  
15 shoreline area" and "adjacent properties."<sup>5</sup> Record 17. Thus,  
16 we conclude the city failed to identify "the area" it considered  
17 in addressing MCC .7120(A).

18 This subassignment of error is sustained.

19 B. Justification of the Area Identified

20 Petitioner argues that LUBA has consistently required local  
21 governments to adopt findings to justify identification of a  
22 particular "area" for consideration, citing Bruck v. Clackamas

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24  
25 <sup>5</sup>Furthermore, at least some of the sites referred to in these latter  
26 findings, such as Blue Lake Regional Park, are clearly south of the dike  
and, therefore, not within the "area of special concern" identified in  
finding 19.

1 County, supra; Stephens v. Josephine County, supra; and Resseger  
2 v. Clackamas county, supra. In this case, petitioner maintains  
3 the city's findings are inadequate because they provide no  
4 rationale for selecting "the area" to be considered in  
5 determining consistency of the proposed use with MCC .7120(A).  
6 Assuming the city's "area of special concern" were "the area"  
7 identified for addressing MCC .7120(A), petitioner argues that  
8 the city failed to explain why the selected area excluded all  
9 territory south of the dike, including property adjacent to the  
10 subject site, or why the selected area included land more than  
11 two miles up the Columbia River. Petitioner concludes the city  
12 had no basis for identifying a narrow strip of land more than  
13 three miles along the river, but excluding large areas directly  
14 affected by the proposed use.

15 Respondents cite evidence in the record which they argue  
16 would provide adequate justification for excluding all land  
17 south of the dike from "the area" to be considered under  
18 MCC .7120(A).

19 We agree with petitioner that the city is required to  
20 include in its findings some justification or rationale for its  
21 selection of "the area" to be considered under MCC .7120(A).  
22 See Stephens v. Josephine County, supra. Under the first  
23 subassignment of error, we determined that the city failed to  
24 identify "the area" it considered in addressing MCC .7120(A).  
25 We also find that the city failed to set out in its findings a  
26 rationale for the identification of such area.

1 This subassignment of error is sustained.

2 C. Consistency of Area Identified with MCC .7120(A)

3 Petitioner argues that identification of an "area" that  
4 includes distant industrial uses, yet excludes territory within  
5 sight and sound, or other effects, of the proposed use is an  
6 unreasonable interpretation of MCC .7120(A). Petitioner cites  
7 Holder v. Josephine County, 14 Or LUBA 454, 456 (1986).

8 Under the previous subassignments, we determined the city  
9 failed to identify "the area" required to be considered by  
10 MCC .7120(A). Since the city failed to identify such an "area,"  
11 we cannot determine whether its identification misinterpreted  
12 MCC .7120(A).<sup>6</sup>

13 This subassignment of error is denied.

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14  
15 <sup>6</sup>The MCC provides no specific definition of or criteria for identifying  
16 "the area," as used in MCC .7120(A). However, in dealing with a similar  
17 situation in Holder v. Josephine County, *supra*, (interpretation of "the  
18 vicinity," as used in a standard for alteration of a nonconforming use), we  
obtained interpretive guidance from the overall purpose of that portion of  
the county's code. We note that in this case, the MCC provides the  
following purpose statement for its conditional use provisions:

19 "Conditional uses as specified in a district or described  
20 herein, because of their public convenience, necessity, unique  
21 nature, or their effect on the Comprehensive Plan, may be  
22 permitted as specified in the district or described herein,  
provided that any such conditional use would not be detrimental  
to the adjoining properties or to the purpose and intent of the  
Comprehensive Plan." MCC .7105.

23 In light of this purpose statement, we would likely agree with  
24 petitioner that it would be an unreasonable interpretation of MCC .7120(A)  
25 to exclude from "the area" for determination of consistency property  
26 adjoining the subject site which would be affected by the proposed use. We  
further note, as petitioner points out, that nowhere does the city identify  
the portion of the South Channel adjoining the subject site as part of "the  
area," although this portion of the river would seem likely to be affected  
by the use of a barge docking facility on the subject site.

1           D.    Determination of Characteristics of the Area

2           Petitioner argues that the city's findings fail to describe  
3 the character of "the area," as required by MCC .7120(A).  
4 Petitioner points out that city findings describe certain  
5 industrial uses as simply being in "the vicinity," without  
6 further elaboration. Petitioner argues the findings are silent  
7 on the recreational characteristics of the area in general, and  
8 on water dependent recreational uses in particular. Petitioner  
9 contends uncontradicted evidence in the record shows the  
10 character of the area within a one mile radius of the subject  
11 site is recreational-agricultural-residential, not industrial.

12           We agree with petitioner that MCC .7120(A) requires the  
13 city to describe the character of "the area" in its findings.  
14 In order to do that, the city must first identify "the area" in  
15 question, and then adopt findings describing the uses or other  
16 characteristics of that area.<sup>7</sup>

17           This subassignment of error is sustained.

18           The first and second assignments of error are sustained in  
19 part.

20           The city's decision is remanded.

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22  
23           <sup>7</sup>We note that much of petitioner's argument under the second assignment  
24 of error is based on evidence in the record of the character of uses within  
25 an "area" which petitioner considers a reasonable interpretation of  
26 MCC .7120(A), e.g., within a one-half or one mile radius of the subject  
site, or within sight and sound of the subject site. However, the  
identification of "the area" to be considered under MCC .7120(A) must be  
performed in the first instance by the city. Until it does so, it cannot  
adopt findings adequately describing the characteristics of such "area."

CERTIFICATE OF MAILING

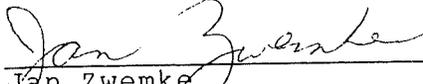
I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 89-052, on September 1, 1989, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 1st day of September, 1989..

  
\_\_\_\_\_  
Jan Zwemke  
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