

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision of the city planning
4 director that concludes a conditional use review is not
5 required prior to approval of a rail bridge crossing in the
6 city's Open Space zone.

7 **FACTS**

8 The facts giving rise to this appeal are stated in our
9 earlier order denying the city's motion to dismiss:

10 "On December 15, 1995, the Port of Portland (Port)
11 applied for an environmental conservation review
12 to construct a rail bridge crossing over the
13 Columbia Slough. The Columbia Slough is zoned
14 Open Space (OS), with Environmental Conservation
15 (c) and Airport Height Limitation (h) overlays.
16 The Port paid an application fee and hearings
17 officer fee based on the nature of the review
18 requested. It did not pay a fee for a conditional
19 use review, which is significantly higher than the
20 fee for an environmental conservation review.
21 Record 54.

22 "On January 5, 1996, the city gave notice to
23 interested persons, describing the proposed
24 development and stating,

25 'The slough itself is zoned Open Space
26 with an Airport Height Limitation and an
27 Environmental Conservation overlay.
28 Because the site is in an environmental
29 zone, the proposal is subject to an
30 Environmental Review.' Record 32.

31 "The same language was included in the city's
32 February 1, 1996 administrative decision (February
33 1 decision). The decision states it is the
34 '[a]pproval of environmental review for the
35 construction of a railroad crossing over the
36 Columbia Slough, which is in an Environmental

1 Conservation zone, in accordance with [exhibits]
2 * * *.' Record 22. The findings address only
3 those sections of the Portland Zoning Ordinance
4 (PZO) that pertain to environmental reviews. The
5 decision states that if it is not appealed, it
6 will become final on February 19, 1996.

7 "In a letter dated June 13, 1996 (June 13 letter),
8 petitioners asked the city planning director to
9 issue a stop-work order to halt construction of
10 the rail bridge. Petitioners contended a
11 conditional use permit should have been required
12 before construction of a rail bridge was approved
13 in the OS zone. On July 3, 1996, the planning
14 director stated in a letter (July 3 letter) to
15 petitioners that their appeal was untimely. The
16 letter explained:

17 'You * * * argue in your letter that the
18 rail bridge crossing * * * is located in
19 an Open Space zone, necessitating
20 conditional use review. In processing
21 requests of environmental review for
22 proposed uses that also require
23 conditional use review, the City
24 requires that the conditional use review
25 occur concurrently. * * * In short,
26 environmental review for conditional
27 uses requires either concurrent
28 conditional use review or imposition of
29 a condition of approval so that the
30 environmental review is conditioned on
31 obtaining a conditional use review.'

32 'The decision in LUR 95-00943 was based on
33 an assumption that conditional use review
34 was not required. Otherwise, concurrent
35 conditional use review would have been
36 required or the environmental review
37 decision would have been conditioned on
38 conditional use review. If the assumption
39 upon which LUR 95-00943 EN is based is
40 legally erroneous, that decision could
41 have been appealed to the Land Use
42 Hearings Officer. The time for such an
43 appeal has long since expired, and the
44 City's decision in LUR 95-00943 EN is now

1 final. That decision and the legal and
2 factual assumptions upon which it is based
3 cannot be challenged now. Therefore, your
4 request * * * is denied.' Record 7.

5 "On July 23, 1996, petitioners appealed the
6 'decisions [including LUR 95-00943 EN] contained
7 in City of Portland's letter of July 3, 1996' to
8 LUBA." (Footnotes omitted.) Order on Motion to
9 Dismiss, ___ Or LUBA ___ (LUBA No. 96-133, October
10 21, 1996), slip op 1-3.

11 To these facts, we add that the proposed rail crossing
12 involves land zoned Heavy Industrial with an airport height
13 limitation (IHh), as well as the land in the Columbia Slough
14 zoned OSch. However, on the proposed development site, the
15 boundaries of the OS zone and the Environmental Conservation
16 (c) overlay zone are identical. Record 151.

17 We denied the city's motion to dismiss on the basis
18 that in reviewing the city's land use regulations and
19 concluding a conditional use review was not required, a
20 conclusion announced for the first time in the July 3
21 letter, the city planning director had made a land use
22 decision over which we have jurisdiction. In our order we
23 did not reach the issue of whether a conditional use review
24 was in fact required.

25 **BACKGROUND**

26 Rail lines are a conditional use in the OS zone.
27 Portland Zoning Code (PZC) Table 100-1. As a conditional
28 use, rail lines are governed by conditional use approval

1 criteria and development standards. PZC 33.100.100(C).¹ A
2 request for a new conditional use development is processed
3 through a "Type III procedure." PZC 33.815.040(A). Type
4 III procedures require, among other things, a public hearing
5 before an assigned review body, an application accompanied
6 by the correct fee, mailed and posted notice, and an
7 opportunity to appeal to the city council. PZC 33.730.030.

8 Petitioners' first two assignments of error are
9 premised on their contention the city erred in permitting a
10 new rail line in the OS zone without a Type III conditional
11 use review, including a public hearing.² The city responds
12 that the proposed rail line is within the boundaries of the
13 area covered by the Smith-Bybee Lake Management Plan
14 (SBLMP), which is a "natural resource management plan." PZC
15 chapter 33.430 governs environmental zones. As described in
16 PZC 33.430.310, natural resource management plans "provide
17 an alternative approach to individual environmental
18 reviews." The city notes that whenever natural resource

¹PZC 33.100.100(C) provides, in relevant part:

"Uses which are allowed if approved through the conditional use review process are listed in Table 100-1 with a 'CU'. These uses are allowed provided they comply with the conditional use criteria for that use, the development standards, and other regulations of this Title. * * * The conditional use review process and approval criteria are stated in Chapter 33.815, Conditional Uses."

²Petitioners do not assign error to any aspect of the February 1 decision other than that it was not accompanied by a conditional use review.

1 management plan provisions conflict with other provisions of
2 PZC chapter 33.430, the natural resource management plan
3 provisions supersede. PZC 33.430.330.³

4 The city then argues that as part of the regulations
5 governing the environmental overlay zone, the SBLMP
6 provisions supersede not only conflicting provisions of PZC
7 chapter 33.430, but also regulations in base zones. The
8 city maintains that because SBLMP Policy 24 makes the
9 extension of a rail line through Rivergate a use permitted
10 outright, it supersedes the requirement in PZC Table 100-1
11 that there be a conditional use review for rail lines in the
12 OS zone. The city relies on PZC 33.700.070(E)(1).⁴

13 SBLMP Policy 24 states:

14 "Extension of a rail line through Rivergate which
15 crosses or infringes upon the management area
16 shall be permitted provided that adverse impacts
17 are taken into account and the 'no net loss'
18 principle is applied. (Figure 5 [which is a part
19 of the SBLMP] shows the approximate location of
20 the future rail line.)" (Emphasis added.)

³PZC 33.430.330 provides, in relevant part:

"* * * Whenever natural resource management plan provisions conflict with other provisions of this chapter, the natural resource management plan provisions supersede. Non-conflicting provisions supplement the provisions of this chapter."

⁴PZC 33.700.070(E)(1) provides, in relevant part:

"Different levels of regulations. In general, an area with base zoning, overlay zoning, and/or in a plan district is subject to all of the regulations of each. When the regulations conflict, unless specifically indicated otherwise, the regulations * * * in an overlay zone supersede regulations in base zones. * * * " (Emphasis added.)

1 A use permitted outright cannot be a conditional use.⁵
2 All of that part of the development site zoned OS is also
3 zoned with the Environmental Conservation overlay. Because
4 the city's environmental regulations make the challenged
5 rail line a use permitted outright and because the
6 Environmental Conservation overlay zone regulations
7 supersede the regulations of the base zone, the OS zone
8 requirement that a conditional use review occur prior to
9 approval of the rail line is superseded. The city correctly
10 applied the SBLMP and the PZC in determining no conditional
11 use review was required.

12 **JURISDICTION**

13 When we denied the city's motion to dismiss for lack of
14 jurisdiction, we were unaware of the significance of
15 language in the February 1 decision which neither the July 3
16 letter nor the city's motion to dismiss mention, but which
17 the arguments in the briefs, discussed above, have brought
18 to our attention. The decision states:

19 "Because the site is in an environmental zone, the
20 proposal is subject to an Environmental Review.
21 Additionally, the site is contained within the
22 Smith-Bybee Natural Resource Area. This railroad
23 bridge project is part of the north south
24 Rivergate rail connection and was anticipated in
25 the Smith-Bybee Natural Resource Management Plan.
26 (Emphasis added) Record 21.

⁵PZC 33.815.010 makes this clear in its opening sentence: "Certain uses are conditional uses instead of being allowed outright, although they may have beneficial effects and serve important public interests."

1 The emphasized language is a reference, admittedly oblique,
2 to SBLMP Policy 24. It explains why a conditional use
3 review was not required at the time of the February 1
4 decision.

5 We now understand the city to have explained and
6 announced, though barely, in the February 1 decision its
7 conclusion that a conditional use review is not required.
8 We now agree with the city's argument in its motion to
9 dismiss that the July 3 letter

10 "did not involve the application of the City's
11 land use regulations; [the planning director's]
12 response contains no new analysis or findings of
13 fact. The Planning Director merely provided
14 petitioners with an explanation of LUR 95-00943.
15 The Planning Director, at most, reiterated the
16 contents of [the February 1 decision]."
17 Respondent's Motion to Dismiss 3.

18 Because the planning director's July 3 letter was not a
19 new land use decision, we have no jurisdiction over an
20 appeal of the letter. Assuming petitioners' notice of
21 intent to appeal could be construed to appeal the February 1
22 decision, as well as the July 3 letter, it was untimely as
23 to the February 1 decision. See Lloyd Dist. Community
24 Assoc. v. City of Portland, 141 Or App 29, 916 P2d 884, rev
25 den 324 Or 322 (1996).

26 This appeal is dismissed.