BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BOWMAN PARK NEIGHBORHOOD ASSOCIATION, Petitioner, vs. CITY OF ALBANY, Respondent, and PERMAWOOD NORTHWEST CORPORATION, Respondent.	LUBA No. 84-010 FINAL OPINION AND ORDER

Appeal from City of Albany.

Meredith S. Wiley, Albany, filed the petition for review and argued the cause on behalf of Petitioner Bowman Park Neighborhood Association.

James Delapoer, Albany, filed a response brief and argued the cause on behalf of Respondent City. With him on the brief were Long, Delapoer, Koos & Healy.

Edward F. Schultz, Albany, filed a joint brief and argued the cause on behalf of Respondent-Participant Permawood Northwest Corporation. With him on the brief were Weatherford, Thompson, Brickey & Powers.

KRESSEL, Referee; BAGG, Chief Referee; DUBAY, Referee; participated in the decision.

REVERSED IN PART; REMANDED IN PART 06/05/84

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

Opinion by Kressel.

NATURE OF THE DECISION

Petitioner seeks review of a City of Albany resolution approving a site plan, a conditional use permit, a flood plain review permit and certain variances to allow construction of a factory for the manufacturing of roof tiles. The permit applicant, Permawood Northwest Corporation (Permawood), is a respondent-participant in this proceeding.

FACTS

The 5.28 acre site is located within the Willamette River Greenway in the City of Albany. Although it is designated for light industrial use on the city's comprehensive plan, most of the site is zoned for heavy industrial use. The southwest portion of the site is zoned R-2, Medium Density Residential. A 16 acre undeveloped park site lays to the east. To the northwest is a 5 acre, fully developed park. The Willamette River is immediately to the north. To the south are residential uses on land zoned R-2. A nonconforming industrial use adjoins the site's southern boundary. Another nonconforming industrial use is west of the site. Most of the nearby property is zoned either for open space or residential use.

There are two businesses on the site, a warehouse constructed in 1979 under a conditional use permit and a cabinet shop. Prior to 1978 the site was used as an aggregate extraction and cement plant. The proposed use involves the

blending of concrete, wood fiber and certain chemicals to produce a roof tile. The existing warehouse will contain the manufacturing activity. Cement will be stored in a silo to be erected adjacent to the warehouse. A steel-sided building will be erected for the storage of wood chips and for the processing of the chips into wood fiber. Finished products will be stored on the site.

Additional facts pertinent to this appeal are discussed later in this opinion.

Permawood's permit applications were initially approved on October 17, 1983 by the city's hearings board. This action was upheld by the planning commission on December 5, 1983, after appeal by the petitioner. On further appeal by the petitioner to the city council, the approvals were affirmed. Final approval was issued on January 25, 1984.

STANDING

Permawood and the city challenge petitioner's standing to bring this appeal. The allegations of standing set forth in the petition are said to be insufficient as a matter of law, whether petitioner is claiming standing to represent its own organizational interests or to represent the individual interests of its members. Our decisions have recognized both standing theories. 1000 Friends of Oregon v. Douglas County, 1 Or LUBA 42, 45 (1980); Families for Responsible Government v. Marion County, 6 Or LUBA 254 (1982); Audubon Society of Portland v. Oregon Department of Fish and Wildlife, 7 Or LUBA

166 (1983).[1] Here, however, petitioner asserts standing only to represent the organization's interests. No claim to representational standing is made.

It is undisputed the challenged permit decisions are quasi-judicial in nature. Accordingly, the applicable tests for standing are as follows: (1) petitioner must file a notice of intent to appeal, (2) petitioner must have appeared before the local governing body, either orally or in writing, and (3) petitioner must have been entitled as of right to notice and hearing before the governing body, or be aggrieved or have interests that are adversely affected by the decision. ORS 197.830(3).

The dispute in this case centers on the adequacy of the allegations in the petition with respect to the third test. Respondents focus attention on the section of the petition entitled "standing." We agree the claims of entitlement to notice and adverse impact in that section seem to relate only to individual members of the organization, not to the organization itself.[2] However, we find other parts of the petition supply the allegations necessary to support petitioner's claim to organizational standing under the test in question.

The factual summary appearing at page 14 of the petition indicates petitioner actively participated as a party in the city's proceedings concerning this development. Petitioner states it appealed the permit approvals issued by both the

hearings board and the planning commission. These statements are not contested by Permawood.

Our prior decisions have indicated that status as a party in a contested case permit proceeding entitles one to notice and hearing prior to final decision making and that such status satisfies the requirement in ORS 197.830(3) concerning entitlement to notice. See e.g., Audubon Society of Portland v. Oregon Deparment of Fish and Wildlife, supra; Oregon Environmental Council v. Portland, 4 Or LUBA 208 (1981); Niemi v. Clatsop County, 6 Or LUBA 147 (1982). Petitioner's failure to allege this party status in the section of the petition entitled "standing," is not fatal to its standing claim. So long as the necessary allegations appear in the petition, they are available to support the claim.[3]

We conclude petitioner has standing to bring this appeal. Accordingly, the motion to dismiss the appeal is denied.

FIRST ASSIGNMENT OF ERROR

In this assignment of error petitioner contends three aspects of the city's decision violate the applicable comprehensive plan and zoning ordinance: (1) approval of access to the industrial site over residentially zoned land, (2) allowance of fill and development in the floodway, and (3) allowance of a plant classifiable as a heavy industrial use on land designated only for light industrial use by the comprehensive plan.

1. Access

Permawood's plant lies east of the principal collector street in the area, Geary Street. Site access from Geary Street is to be provided by developing a connecting road across the land immediately south of the proposed plant. This land (Tax Lot 7100 and a portion of Tax Lot 7000) is owned by Permawood but is zoned for residential use.

At the city's hearings, petitioner objected to use of residentially zoned land for industrial site access. In response, the city determined no zoning violation was presented because site access did not constitute a "use" for zoning purposes. Alternatively, the city concluded that if industrial access was a use disallowed by residential zoning, the access proposal was nevertheless authorized by virtue of the historical use of the land by vehicles entering and leaving the industrial enterprises in the area. The following finding sets forth the city's position on the access issue:

"CONCLUSION:

"The design submitted by Permawood and approved by the Hearings Board and Planning Commission provides for the safest access onto Geary Street at the safest point on Geary Street. The position taken by the opponents would essentially eliminate Permawood's access to the improved street. With the Hearings Board having already restricted access onto Alco and Chicago Streets at the request of the neighborhood to only emergency vehicles, opponents' position would mean City action eliminating any access to the property. The City Council does not construe its own code as requiring such a harsh and unrealistic result. In particular, the Development Code does not list access as permitted or prohibited use by zoning district. The Code merely regulates the number, size,

and location of access ways for all uses. If, in fact, this particular point of access was determined to be a zoning conflict, the problem could easily be remedied through dedication of an access easement or actual right-of-way. The Council does not find, however, that such a remedy is necesssary to resolve this alleged violation if for no other reason than that this access location has been utilized for many years by all previous industrial users of the site." Record at 25.

The initial question presented is whether the county properly construed the applicable law, here the zoning ordinance.[4] Where questions of ordinance construction are involved, we give weight to the interpretation given by the local legislative body, provided the interpretation is reasonable. Miller v. City Council of Grants Pass, 39 Or App 589, 594, 592 P2d 1088 (1979).

We have difficulty accepting the city's claim that establishment of a road to accommodate traffic serving an industrial site does not constitute a use of land. The zoning ordinance does not expressly equate access with use, as respondents point out, but the ordinance does define "use" in terms broad enough to encompass the establishment and maintenance of the private road in issue here. The phrase "use" is defined by the ordinance to mean

"The purpose for which land or a building is arranged, designed or intended, or for which either land or a building is, or may be, occupied or maintained." Article 22, Albany Development Code.

We note also the term "development" in the city's ordinance is defined to include establishment of a right of access. Id. A

development permit is required when an access road is established. Id, Section 7.120. We perceive close similarity, if not identity, between the words "use" and "development" in the city's ordinance.

Case law from other jurisdictions supports petitioner's argument that an access road to an industrial site is an accessory industrial use which cannot be established on residentially zoned land. See e.g., Chelmsford v. Byrne, 371 NE2d 1307 (Mass App 1978); Leimbach Construction Company v. Baltimore, 257 Md 635, 264 A2d 109 (1970); see generally, R. Anderson, American Law of Zoning 2d §9.27 (1976). We find these authorities persuasive.

Based on the foregoing, we uphold petitioner's challenge to this aspect of the city's decision. Establishment of the proposed access road is a use of land zoned R-2. We view the use as one which is accessory to Permawood's industrial plant. The list of permitted uses in the R-2 district does not include such an accessory use.

Based on the above, we proceed to the city's alternative contention that the proposed access road can be authorized, despite the zoning conflict, because of its historical status as a road serving industrial facilities in the area.

The city found that even if Permawood's use of land zoned R-2 as an access road was not permitted by the code, the proposal should be approved because "...this access location has been utilized for many years by all previous industrial

users of the site." Record at 25. Petitioner contends the record does not support the finding of historical use of Tax Lot 7100 for industrial access purposes. Further, petitioner claims that even if that use of the lot once existed, it was discontinued in 1978 and its resumption is barred by an express provision of the city's development code. Respondents answer that substantial evidence supports the city's finding, which respondents say includes a determination "...that Tax Lot 7100 has been in continuous industrial use from the time of Hub City Concrete's operation through the continued operations of Oregon Bartile, to the proposed operation by Permawood." Brief of Respondents at 9.

The parties treat the city's finding of historical use of the residentially zoned land for industrial access purposes as a determination that the use qualifies as a nonconforming use. Where such a determination is made by local government, this Board has jurisdiction to review it for correct application of law and for evidentiary support. Foreman v. Clatsop County, 297 Or 129, ___ P2d ___ (1984).

For reasons unknown to us, state statutory law provides guidance on questions pertaining to nonconforming uses where counties are involved but not where cities are involved. Compare ORS Chapter 215 (county zoning) with ORS Chapter 227 (city zoning). In the absence of a controlling statute, we look to the city's development code, which we construe in light of judicially recognized principles derived from analogous

zoning cases. See Oregon City v. Hartke, 240 Or 35, 400 P2d 255 (1965).

Article 22 of the city's development code defines "nonconforming" use as follows:

> "Non-conforming Use: Any use which lawfully existed on the effective date of this code but which due to the requirements adopted herein, no longer complies with the schedule of permitted uses. Uses allowed in certain use districts by conditional use permit but which were existing on the effective date of this code without a conditional use permit shall also be considered as nonconforming." (emphasis added).

As the emphasized portion of the code indicates, lawful existence is a threshold element of nonconforming use status. The Supreme Court has emphasized this requirement in a county nonconforming use case arising under ORS Chapter 215. Polk County v. Martin, 292 Or 69, 75, 636 P2d 952 (1981). See also Morrell v. County of Lane, 46 Or App 485, 612 P2d 304 (1980). The burden of proving an alleged nonconforming use was lawful when established rests on the one who claims nonconforming use protection, not on the opponent of the claim. Lane County v. Bessett, 46 Or App 319, 612 P2d 297 (1980).

The city's finding with respect to the status of the industrial access road as a nonconforming use is skeletal, at best. There is no indication of whether the "historical use" of the land in question for industrial site access, or for other industrial purposes, was lawful when established. If the access-use commenced after the land was zoned for residential purposes, our previous determination that such a use is not

allowable in a residential district would support the conclusion the use was unlawful when established. In that case, it would clearly not qualify for nonconforming use status under the city code. Because of the absence of a finding on the "lawful use" question, the city's decision must be remanded.[5]

2. Floodway

Petitioner next contends the site plan approved by the city provides for extensive fill and development on land within a designated floodway.[6] Specifically, petitioner contends the floodway traversing Permawood's site will be used and improved for a bike path, fencing, parking, industrial traffic circulation, and outside storage of finished products. The development code and the city's comprehensive plan are said to prohibit such uses and improvements. Petitioner claims the city made no findings analyzing the relationship between Permawood's site plan and these prohibitions.

Respondent first urges us to disregard these contentions because of petitioner's failure to bring them to the city's attention during the permit hearings. However, assuming the concerns about floodway development[7] were not specifically raised below by petitioner, they may nonetheless be raised before this Board on appeal. Although a petitioner must have appeared before the local government in order to obtain standing under ORS 197.830(3)(b), we have held the appearance rule does not limit the substantive issues which may be raised

on appeal. Twin Rocks Water District v. Rockaway, 2 OR LUBA 36, 41-42 (1980).

Apart from the above argument, respondents contend the plan and development code do not prohibit the kinds of uses and improvements Permawood will make in the floodway.

The city's plan describes flooding as the most serious natural hazard in the Albany area, with effects ranging from "simple annoyance to loss of life and property." Albany Comprehensive Plan at 23. The following policy, among others, was adopted to address the flooding problem: "No new development (including fill) shall be allowed in the floodways." Albany Comprehensive Plan at 26. This prohibition is expressed in less absolute terms in §11.020 of the development code. That section states "No development, except park and open space uses and flood control projects shall be allowed in any floodway...." §11.020 Albany Development Code.

As petitioner observes, the city's final order makes no mention of the floodway policy or code provision, although we note there is discussion of policies concerning the flood fringe area in relation to Permawood's proposal. The parties agree, however, that certain uses and improvements will in fact occur on land within the floodway: a bike path, vegetative plantings and fencing will be installed (as required by the city), land alterations and improvements will be made for on-site truck maneuvering and two parking spaces will be established. It is undisputed that some fill and grading will

occur to accommodate these activities in the floodway.

It is not immediately clear to this Board whether all or any of the agreed-on floodway improvements are permissible. Under the plan, "new development" is flatly prohibited in the floodway. "New development" however, is not defined in the plan. Although the development code includes an expansive definition of "development"[8] and would therefore seem to fully support petitioner's challenge, a development code provision designed to implement the plan's floodway policy seems to authorize at least some of Permawood's activities in the floodway, i.e., the proposed bikeway and plantings. We agree with respondents these might well qualify as allowable "open space uses" under §11.020 of the development code. On the other hand, the plan and code strongly suggest that preparation and use of land in the floodway for truck maneuvering, parking or outside storage is not allowable.

As we have repeatedly held, the responsibility for interpreting a local land use control is initially that of the local governing body. See e.g., Dawson v. City of Boardman, ___ Or LUBA ___ (1984) (LUBA No. 83-069, February 8, 1984). Our function is that of a reviewing tribunal; we cannot properly perform this function unless local decision makers first set forth their understanding of the facts and the applicable law. In the present situation, we believe the Albany City Council should review Permawood's proposal in light of the above-quoted floodway restrictions in the plan and

development code. Those restrictions are ambiguous, as stated above. On remand, the council should explain (1) specifically what improvements and uses Permawood proposes within the floodway and (2) with respect to each of the above, whether and why the plan and development code permit the improvements and uses, given the highly restrictive policy they both reflect.

3. The "Light Industrial" Designation

Petitioner's final contention under this assignment of error is that approval of Permawood's facility conflicts with the designation of the site as "light industrial" on the city's comprehensive plan.[9] The city council rejected petitioner's argument the facility should be classified as a "heavy industrial" use. On appeal, petitioner reiterates that contention, while the respondents jointly urge us to defer to the city's interpretation.

The city's comprehensive plan defines "light industry" as follows:

> "Areas suitable for a wide range of light manufacturing, warehousing, wholesaling and other accessory and compatible uses which have minimal environmental effects and can conform to the development code performance standards for the Light Industrial Zone." Albany Comprehensive Plan at 128.

The term "heavy industry" is defined by the plan as follows:

> "Most types of manufacturing and processing, storage and distribution, and other types of industrial uses which are potentially incompatible with most other uses but which can comply with the industrial performance standards of the Heavy Industry Zone." Id.

Under these comprehensive plan definitions the difference

between heavy and light industry is defined in terms of operating characteristics and potential impact. We note the development code also defines light and heavy industry in similar terms. "Light industrial" is defined in the code as:

> "Provides for a wide range of manufacturing, warehousing, processing and related establishments which have a limited impact on surrounding properties. This district is particularly suited to areas having good rail and/or highway access."

In contrast, the term "heavy industrial" is defined by the development code as follows:

> "Provides for industrial uses which are potentially incompatible with most other uses and which are characterized by large amounts of traffic, extensive shipping of goods, outside storage or stockpiling of raw materials, by-products or finished goods, and a controlled but higher level of noise and/or air pollution." Albany Development Code, §5.090.

As is customary, the city's development code contains an extensive list of uses permitted in the industrial districts. The city determined Permawood's proposal fell within the following category of uses permitted in the light manufacturing district:

> "Manufacturing, compounding, processing, assembling, packaging, treatment or fabrication of such articles to include cosmetics, drugs, glass, leather, paint, ceramics, paper, perfumes, plaster, plastics, stone, textiles, rubber, wood, and metal products and chemicals." Albany Development Code, §5.100(35).

We note uses in this category are permitted in <u>both</u> the light manufacturing and the heavy manufacturing districts. The pertinent finding with respect to the city's interpretation of the code reads as follows:

"Opponents have argued that Permawood is a major lumber or wood processing plant similar to a sawmill, plywood plant or papermill as designated in 5.100(32). In reviewing the operating characteristics of Permawood, it does not appear to the City Council that Permawood is in fact a major lumber or wood processing plant. They are a manufacturing operation, using paint, stone, wood, and chemicals as designated by Section 5.100(35). Opponents argue that Permawood should be designated heavy industrial because of the summary description of the term heavy industrial as contained in Section 5.090 of the Code. Opponents argue that there will be large amounts of traffic to the site. As indicated in the opponents' own testimony, there may be as many as seven trucks a day and fifteen cars a day to the site. In reviewing its own ordinance, the City Council interprets its own ordinance to indicate that the term 'large amounts of traffic' indicates a volume of traffic that greatly exceeds 22 vehicles per day. Opponents argue that there is also extensive shipping of goods. Every industrial plant which manufactures or produces a product for sale must transfer or ship its product. Two truckloads a day have been identified for the shipping of the product. Two truckloads a day does not, in the City Council's view, constitute extensive shipping of goods. Opponents argue that the Permawood site would have outside storage of finished goods. The City Council agrees that the evidence is clear that Permawood will use outside storage of finished goods. The final issue is whether the Permawood plant contains a 'controlled but higher level of noise and/or air pollution.' The City Council has determined, as indicated in other portions of the findings of fact that the noise levels at the Permawood site would meet DEQ regulations. The City Council does not conclude that there is a higher level of noise or air pollution from the site typical of heavy industries.

"In summary, the opponents have identified one of four parts of the summary description of a heavy industrial use as typifying this use and have failed to demonstrate that the proposed use does not meet the summary description of light industry or the category #35 found by the Hearings Board and Planning Commission to apply to this use, and therefore the City Council concludes that by definition, Permawood is not a heavy industrial operation." Record at 69.

Although this Board will uphold a locality's plan and

ordinance interpretation where it is reasonable, we have also indicated that reasonableness depends on the locality's ability to provide a credible explanation of how the interpretation carries out legislative intent. Dawson v. Boardman, supra; Theland v. Multnomah County, 4 Or LUBA 284, 287-290 (1980). That explanation must do more than simply reject arguments inconsistent with the preferred interpretation or assert, in conclusional terms, that the preferred construction is correct. We read the above-quoted findings to have both of these deficiencies. A remand is therefore in order.[10]

Based on the foregoing, this assignment of error is sustained. We reverse the city's decision that the code allows use of residentially zoned land for access to Permawood's site. We remanded the alternate decision concerning nonconforming use. We also remand the city's decision for more specific findings on the floodway issue and on the question of whether and why the proposal qualifies as a "light industrial use."

SECOND ASSIGNMENT OF ERROR

In this assignment of error, petitioner contends the city's decision violated goals and policies appearing in the comprehensive plan with respect to protection of the greenway. We note the third assignment of error addresses greenway issues in connection with specific provisions of the development code which implement the plan. Because the plan and code interrelate, we will take up the issues concerning the greenway

under the third assignment of error.

THIRD ASSIGNMENT OF ERROR

In this assignment of error petitioner challenges the findings and the supporting evidence relied on by the city in determining Permawood's proposal satisfied various development code criteria. Our attention is directed to the following parts of the code: (1) site plan review (§13.040), (2) greenway conditional use permit (§11.130), (3) flood fringe (§11.130) and (4) variances (§15.030). Below we consider each of petitioner's challenges.

A. Site Plan Review Criteria

1. Adequacy of Sewer System.

Section 13.040(1) of the development code requires a determination that "the adequacy and continuity of public facilities is sufficient to accommodate the proposed development." In connection with this criterion, petitioner challenges the sufficiency of the evidence to support the city's conclusion Permawood's facility could be accommodated by the existing sewer system. The principal argument is that the city did not have sufficient information to determine whether waste water discharged by Permawood would contain toxic substances at levels exceeding the sewer system's treatment capacity.

The city adopted findings with respect to the waste water issue under code §13.040(1). The findings can be summarized as follows:

(1) The record contains no believable evidence toxic substances would be introduced into the sanitary sewer system by employees, e.g., from use of toilets and wash basins;

(2) The other waste water discharge source, the cooling system utilized in the manufacturing process, is a self-contained unit directly connected to the sewer system, does not appear to contain any hazardous chemicals, and appears to raise no problem of heat pollution;

(3) Waste water discharges by Permawood will involve periodic monitoring by the city pursuant to code requirements; problems could thus be detected and remedied or the city could stop operations of the plant. Record at 14-16.

The question presented is whether there is substantial evidence in the record to support the city's determination concerning the sewer system's adequacy. ORS 197.835(8)(a)(C). Substantial evidence consists of evidence a reasonable mind could accept as adequate to support a conclusion. Homebuilders Association of Metropolitan Portland v. METRO, 54 Or App 60, 62, 633 P2d 1320 (1981); Christian Retreat Center v. Board of Comm. of Washington County, 28 Or App 673, 560 P2d 1100 (1977). The burden of producing such evidence and bringing it to the attention of this Board on appeal rests on respondents.

In this case, the record contains numerous reports and exhibits pertaining to Permawood's proposal and the surrounding area. Presumably, a good deal of technical information about the proposal was also presented orally to the city during the permit hearings. However, only a partial transcript of the hearings was prepared for our review, and that portion was

prepared in support of petitioner's challenge.[11]

In answer to this aspect of the petition, respondents direct our attention to findings made by the city concerning the waste water issue and also to a half-page document in the record entitled "waste water." This exhibit is unsigned. It appears as an attachment to a planning staff report. Record at 119. Clearly, the findings themselves do not constitute evidence. On the other hand, the exhibit is evidence. However, standing alone, this evidence does not support the findings summarized above.

The "waste water" exhibit contains some data pertaining to Permawood's proposal for waste water discharge, but it does not describe the direct discharge system referred to in the findings, identify the chemical content of the waste water or discuss the question of thermal pollution. Moreover, we find no indication of the author or source of this document, making it impossible for us to determine whether it meets the substantial evidence test. There may well be other evidence in the record pertaining to this aspect of the petition, or elaborating on the material contained in the cited exhibit, but respondents have not brought such material to our attention.

For the above reason, we must sustain petitioner's challenge under §11.040(1) of the development code.[12]

2. Consideration of Special Site Features

The site plan criteria include a requirement that "any special features of the site (such as topography, hazards,

vegetation, wildlife habitat, archaelogical sites, historic sites, etc.) have been adequately considered and utilized." Section 13.040(2), Albany Development Code. Petitioner claims the city did not address the hazards presented by Permawood's use of toxic substances, such as cement, to the following special features: (1) the Willamette River and river-related wildlife and vegetation, (2) the main sewer interceptor located on the property and (3) the adjacent park sites.

For the most part, the features identified by petitioner are given specific recognition by other criteria applied by the city in this case, i.e., criteria relating to the Willamette River Greenway. We note the site plan criteria loosely require the city to give "adequate consideration" to special features, while the Greenway criteria are expressed in more protective terms. Since we read the greenway criteria to include the concerns embraced by §13.040(2), we consider petitioner's points in connection with our review of the city's action under the greenway criteria. See pages 25-36, infra.

With regard to the presence of the main sewer interceptor on the site, petitioner warns that if the interceptor is damaged, toxic substances could flow from the site into the river. Assuming the interceptor qualifies as a "special feature" covered by §13.040(2), however, it is not clear what sort of "consideration" petitioner claims is required by the code. The city adopted a finding indicating awareness of the presence of the interceptor and a determination that no

significant threat to it was presented by the proposal. Record at 15-16. Petitioner presents no argument why more is required under §13.040(2).

Finally, we cannot accept petitioner's argument that the park sites which lay on either side of Permawood's property constitute "special features" of the site within the scope of §13.040(2). The park sites may well be of relevance under other code criteria, but there is no requirement that the city consider such off-site features in connection with §13.040(2).

3. Reasonable Compatibility with Surrounding Uses

Section 13.040(3) of the code provides:

> "The size, site and building design, and operating characteristics of the proposed development are reasonably compatible with surrounding development and land uses, and any negative impacts have been sufficiently minimized."

Petitioner describes the surrounding uses as parks, open space and residential uses, with the exception of two nonconforming businesses in the R-2 district. Petitioner asserts Permawood's plant will be incompatible with the surrounding uses because it will generate noise on a 24 hour-a-day basis.

The city made extensive findings on the compatibility question. Record at 19-24. Petitioner does not claim the findings are inadequate under §13.040(3). Nor does petitioner raise any other specific objection. Having failed to present a specific objection to the city's decision under §13.040(3), petitioner has presented no basis for remand or reversal. Dotson v. City of Bend, 8 Or LUBA 33 (1983).

4. Safety of Access to the Site

Section 13.040(4) of the code requires that "parking areas and entrance-exit points are designed so as to facilitate traffic and pedestrian safety and avoid congestion." As noted earlier, the prinicipal access to Permawood's plant is Geary Street. Geary is a two lane, paved collector street which runs north-south and adjoins Permawood's property on the west. As it passes to the north of Permawood's site, Geary narrows, decreases in grade, and curves to the west, finally entering Bowman Park.

The city determined that access onto Geary Street should be at the southern end of Permawood's property, where the street is at its widest. The city believed this would provide the best possible view of oncoming traffic. One finding states:

> "The wide access allows any party leaving the site clear vision into the park and up Geary Street before entering Geary Street to insure traffic movement being made in safety." Record at 25.

Petitioner reminds us Geary Street is heavily used by pedestrians, bicyclists and others who visit Bowman Park, including children. A member of petitioner testified at one permit hearing about numerous accidents in the vicinity of Permawood's site in the recent past. Record at 81-66. Petitioner claims the city's findings that the proposed access is at the safest point on Geary Street is unsupported by facts. Petitioner also claims the city failed to address the safety concerns it raised.

We have previously held that Permawood's proposal for access to Geary Street across residentially zoned land is impermissible under the development code and has not been established as a protected nonconforming use. Putting that question aside for purposes of this assignment of error, however, we must disagree with petitioner's attack. There is no dispute the proposed access is at the widest portion of Geary Street. The question whether this circumstance renders the proposal safe is primarily one of judgment, not fact. Without a clear showing the city's conclusion is not reasonable, we defer to the city's judgment on such questions. Moreover, it is clear the city council did consider the safety issue. See e.g., Record at 25. The fact it reached a conclusion unsatisfactory to petitioner is not a reason for this Board to reverse or remand the decision.

In summary, we sustain petitioner's challenge under §13.040(1). Accordingly, we must remand the decision. OAR 661-10-070(1)(C)(2). However, we reject the other challenges under §13.040.

B. Greenway Review

Section 11.130 of the development code requires issuance of a greenway use permit for the development of land within the Willamette River Greenway. The criteria for permit issuance carry out a goal and related policies in the city's comprehensive plan. The goal requires the city to "protect, conserve, enhance and maintain the natural, scenic, historic,

economic and recreational qualities of the Willamette River, its banks and adjacent lands." Albany Comprehensive Plan at 31. Plan policies call for the protection of vegetation, fish and wildlife habitat and the river's scenic character. Recreational and scenic uses are classified as "preferred," but the intensification or change of existing uses is permissible. Proposals in the latter category must be limited "...to insure compatibility with the greenway goal and policies." Albany Comprehensive Plan at 31-32.

Petitioner attacks the city's approval of Permawood's proposal under the above-mentioned provisions of the plan and the implementing permit criteria in the development code. We take up these concerns below.

1. Allegations Under the Plan

Three claims emerge from petitioner's discussion of the plan's greenway goal and policies:

(1) Permawood's facility would introduce hazardous substances to an environmentally sensitive site in the greenway, yet the city obtained no information and attached no conditions with regard to the adequacy of plans in the event of disaster (e.g., flooding) or accidents (e.g., escape of cement and other chemicals during storage, manufacuring or employee cleanup);

(2) In approving the proposal, the city agreed to accept public dedication of less river-front land than it had previously required of another permitee, thereby contravening a plan policy favoring recreational uses in the greenway; and

(3) Permawood's facility is a heavy industrial use and cannot be made compatible with greenway goals and policies due to the nature of the manufacturing process.

The city addressed petitioner's concern that hazardous substances used by Permawood might escape and reach the river. The findings indicate that substances such as cement and chemicals used in the manufacturing process would be contained in units inside or adjacent to structures meeting building code requirements. In the event the containment structures, such as the cement storage silo, gave way in a flood or other disaster, the city concluded that hazardous substances would not reach the river. Instead the city determined the substances would filter into the ground or be contained within protective vegetation to be installed by Permawood between the river and the plant. Record at 23. The city accepted as "plausible" Permawood's argument that escaping cement would mix with gravel and moisture on the site to form concrete, rather than flow into the river or elsewhere. Id.

Petitioner's concern that toxic substances used by Permawood, particularly cement, are difficult to contain even under normal conditions, finds support in the record. Ms. Margaret Pritchard, an engineering consultant retained by petitioner, testified at length on this subject. See transcript of council hearing, January 10, 1984, attached to petition as Exhibit F. Manifestly, the concern is of direct relevance to the plan's greenway goal and policies.

Respondents assure us the city's findings on hazard containment are supported by substantial evidence in the record. However, respondents do not refer us to places in the

record where such evidence can be located. As we have previously said, the findings themselves are not evidence. This Board will not pick its way through an extensive record to uncover evidence supporting a litigant's position. That task is the sole responsibility of the litigant (here, intervenor and the city).

Based on the foregoing, we hold that substantial evidence does not support the city's decision in connection with the plan's greenway goal.

We consider next petitioner's contention under Greenway Policy No. 3 of the comprehensive plan. The policy denotes recreational and scenic uses as "preferred." Petitioner does not contend the policy bars approval of Permawood's industrial proposal, but instead claims the city failed to require Permawood to dedicate sufficient river-front land to recreational use.

The record indicates a previously issued permit for use of this site was conditioned on dedication of a 100 foot public use easement along the property's river frontage. Evidently, the condition was never satisfied. Although Permawood's proposal also included a dedication of land for recreational use (a bike path) the proposed dedication was not identical to the one previously required by the city.[13] Nonetheless, the city found the proposal acceptable. Record at 28-29, 42.

Petitioner claims the city had no factual basis on which to conclude, as it did, that the land to be dedicated by Permawood

provided greater public benefit than the previously required 100 foot easement. However, petitioner does not explain why a factual basis for such a conclusion was required by Policy No. 3 of the plan. We find nothing in the plan's expression of a preference for recreational use requiring the city to insist on precisely the same dedication previously found acceptable. Presumably, a wide variety of approaches could satisfy the plan policy, given its very broad terms. Accordingly, we do not sustain this charge.

Next, we address petitioner's contention the city's decision contravened Greenway Policy No. 6. That policy requires the city to limit the change or intensification of uses "...to insure compatibility with the greenway goal and policies." Albany Comprehensive Plan at 25. Petitioner argues, in essence, that the nature of Permawood's facility is such that it cannot be made compatible with the plan's greenway goal, quoted at page 25, supra.

Without question, Permawood's proposal represents a major change over the past utilization of this greenway site. Land occupied by only a warehouse and a cabinet shop is to be converted into an industrial facility operating seven days a week and on a 24 hour-a-day basis. Heavy trucks and machinery will be utilized, new buildings are to be erected, and potentially hazardous materials are to be used.

The city correctly points out the plan policy in question does not prohibit land use changes in the greenway. Rather,

such changes are to be limited to insure compatibility with the greenway goal and policies stated in the plan.[14] According to the city, the means by which the compatibility objective is carried out is the review process for a greenway conditional use permit under the development code. In other words, satisfaction of the code's permit criteria establishes the necessary "compatibility with the greenway goals and policies." Record at 29. We find this approach reasonable. Accordingly, we proceed to consideration of petitioner's charges that various code provisions concerning the required greenway conditional use permit have been violated.

2. Allegations Under Greenway Permit Criteria

a. Protection of Fish and Wildlife Habitat

Section 11.130(2) of the code requires that "significant fish and wildlife habitat shall be protected." The record contains evidence that wildlife of various kinds, including blue heron, beaver, nutria, and osprey occupy the area. Record at 81-67. The comprehensive plan itself recognizes that vegetation along the river provides important habitat for wildlife and fish. Albany Comprehensive Plan at 6.

Petitioner contends, as it did at the city's hearings, that the presence of toxic substances on the site, particularly cement, present a threat to wildlife and wildlife habitat along the river.[15] The city's final order rejects petitioner's argument. In summary, the following points are made in the final order:

(1) Permawood will install a bike path at the northern edge of the property; a fence and vegetative screen on the south side of the bike path will further shield the river from the manufacturing plant;

(2) Opponents of the permit did not produce convincing evidence that fugitive toxic substances, spillage and accidental discharge due to rain or flooding might cause damage to fish and wildlife; and

(3) The evidence does not show that operation of a cement plant on the site prior to 1978 had any adverse effects on fish and wildlife along the river." Record at 31.

As in previous assignments of error, petitioner does not attack the findings themselves, but claims the findings are not supported by evidence in the record - particularly the finding that a vegetative screen will protect fish and wildlife habitat.[16] Respondents do not come to grips with this charge. Instead they simply refer us to the findings and insist there is evidence in the record to support them. It is axiomatic that where the sufficiency of the evidence is challenged, the burden rests on respondent to identify portions of the record containing the relevant evidence. Without specific references to the record we can do nothing other than sustain the challenge. City of Salem v. Families for Responsible Government, 64 Or App 238, 249, 668 P2d 395 (1983).

b. Protection of Air, Water and Land Resources

Section 11.130(5) of the code requires that "the quality of the air, water, and land resources in and adjacent to the greenway shall be protected." Petitioner contends the city's

determination this criterion was satisfied is not supported by substantial evidence. In particular, petitioner charges the record does not include evidence demonstrating that toxic substances, such as cement, could be safely contained on the site. Petitioner identifies a number of ways in which pollutants from Permawood's operation could contaminate the river and adjacent lands as well as the city's sewer system.[17]

In answer to this claim, respondents again direct our attention to findings made by the city. The findings are extensive and they address many of petitioner's concerns under §13.130(5). Record at 19-24, 33-35, 37-38. However, petitioner's claim is that the findings are not supported by substantial evidence. Respondents tell us the record contains the necessary evidence. However, they do not provide specific references to where this evidence may be located in the record. We note the findings themselves also claim evidentiary support in the record, but they too fail to contain specific references to where the evidence may be found.

Under the circumstances, we must sustain petitioner's challenge under §13.130(5) on grounds that substantial evidence does not support the city's decision.[18] City of Salem v. Families for Responsible Government, supra.

c. Preservation of Flood Plains and Wetlands

Petitioner next challenges the evidentiary support in the record for the city's determination that §11.130(6) of the code was satisfied. That section provides:

"Areas of annual flooding, flood plains and wetlands shall be preserved in their natural state to the maximum possible extent to protect water retention, overflow and other natural functions."

Petitioner asserts that although the site lies within the flood plain, Permawood's proposal involves extensive fill, grading and development. It is charged the record contains no hydrology or soil studies and no technical information on whether the site's "natural functions," as that term is used in §11.130(6), will be protected.

In answer, respondents argue, first that the city made findings based on substantial evidence in connection with §11.130(6), and second, that petitioner did not raise this claim during the city's hearings. Brief of Respondents at 41.

These arguments do not withstand petitioner's challenge. The first, as we have stated earlier, erroneously equates findings with substantial evidence. Once again respondents have failed to respond to an evidentiary challenge with citations to the record. The second answer presents no basis on which we could sustain the city's action. See Twin Rocks Water Dist. v. Rockaway, 2 Or LUBA 36, 41-42 (1980).

For the above reasons, we sustain petitioner's challenge under §11.130(6) on grounds that substantial evidence does not support the city's decision.

d. Compatibility with Existing Uses

Seetion 11.130(9) of the code requires:

"The proposed development change or intensification of use is compatible with existing uses on the site and

the surrounding area."

Petitioner raises the following points under this criterion: (1) the sound buffering proposal submitted by Permawood was insufficient for the city to conclude noise levels will be compatible with adjacent residential and park uses; (2) Permawood proposes to minimize noise impacts on adjacent residences by impermissibly directing noise sources toward the parks and the river; (3) the necessary information on containment systems (for toxic substances) and waste water treatment has not been provided; and (4) traffic problems and congestion at the Bowman Park entrance will be created when trucks and other vehicles enter and leave the site.

With respect to the contentions about noise (points 1 and 2 above) the city concluded that the manufacturing process and the site design proposed by Permawood would sufficiently reduce noise impacts. Record at 21-22. Further the city concluded that satisfaction of the noise standards established by the Department of Environmental Quality (DEQ) would demonstrate reasonable compatibility between the plant and its neighbors, in satisfaction of §11.130(9). Record at 24. Accordingly, conditions requiring approval by DEQ prior to site occupancy were attached to the city's final order. Record at 74.

Petitioner does not challenge the validity of the delegation by the city to DEQ, but instead reiterates its contention there will be a noise problem. Petitioner also complains the city should have required DEQ approval prior to

the issuance of a building permit, rather than a site occupancy permit.

Neither argument presented by petitioner has merit. The quoted approval criterion vests discretion in the city council. Petitioner does not explain how the city erred when it analyzed the issue of compatibility with surrounding uses from the standpoint of noise. Instead, petition simply insists there will be a noise problem. Similarly, petitioner has not demonstrated in what way the city committed error by attaching the condition of DEQ approval to the site occupancy permit. Under the circumstances, we reject these challenges.

Petitioner also challenges the city's decision under §11.130(9) on grounds "the necessary information on containment systems (for toxic substances) and waste water treatment have not been provided." Petition at 44. This is a reiteration of arguments pertaining to other approval criteria in the code. We believe the arguments also have relevance under the compatibility criterion in §11.130(9). Again, however, respondents do not directly answer the challenge, which we read to attack the sufficiency of the evidence. As we have said earlier, respondents' failure to refer us to portions of the record containing the allegedly substantial evidence requires us to sustain the challenge.

Finally, petitioner flatly asserts the use violates §11.130(9) because it will cause traffic problems at Bowman Park. We have previously rejected a similar contention by

petitioner under the site plan review criterion. See page 25-26, supra. Here again, petitioner has not explained why the city could not reach the conclusion it did on this issue. Without such an explanation, we will not consider the challenge.

e. Open Space

Section 11.130(16) of the code requires that

> "The development, change or intensification of use provides the maximum possible landscaped area, open space, or vegetation between the activity and the river."

Petitioner contends the approved development does not meet this criterion because it provides less open space than was previously required of another development on this site. We have already rejected this contention in connection with a greenway policy in the comprehensive plan. See page 28, supra. Our reasoning is equally applicable here. The challenge is therefore rejected.

In summary, we sustain the challenges under §§11.130(2), (5), (6) and (9) of the code. A remand is required. OAR 661-10-070(1)(C)(2).

C. Flood Fringe Criteria

A portion of the approved project lies within a flood fringe area.[19] The development code sets forth 10 criteria applicable to developments in such areas. See §11.030, Albany Development Code. Petitioner claims three of these criteria were not satisfied by the challenged decision. We consider

these claims below.

Petitioner first directs our attention to the following flood fringe criteria.

> "11.030(1) The proposed site of the building will not, during potential future flooding, be so inundated by water as to result in injury to residents or serious damage to property or utilities."
>
> "11.030(4) Any development will not change the flow of surface water during future floodings so as to endanger the residents or property in the area."

Three arguments are presented in connection with these criteria. We summarize them as follows:

> (1) The record discloses no evidence as to the adequacy of Permawood's proposal to contain hazardous substances in the event of flooding;
>
> (2) The city approved Permawood's use of an existing building, the floor of which is not located on the highest point of the 100 year flood elevation, in violation of another section of the code; and
>
> (3) The city did not make adequate findings under Statewide Goal 7, to the effect that appropriate safeguards were present. Petition at 45-46.

We sustain none of these challenges. The first, although relevant to code criteria previously discussed, is not relevant in connection with subsections (1) or (4) of §11.030. These criteria principally concern building placement in relation to flood height (§11.030(1)) and the impact of development on the flow of flood water (§11.030(4)). They do not clearly concern the adequacy of measures within buildings to contain hazardous substances in the event of flooding, although other code criteria do cover that issue. See, e.g., §11.130(5).

The second challenge, concerning Permawood's use of a building which does not meet present elevation requirements,[20] is of relevance under the cited code criteria. However, petitioner appears to assume the substandard elevation alone establishes a violation of one or both of the flood fringe criteria.

We do not agree with petitioner. The city found the one foot deficiency would result in "...minimal amounts of water, if any" entering the building, and that the likelihood of danger to persons or property was remote. Record at 47. Petitioner neither challenges these findings nor the evidence supporting them. Petitioner presents no reason why this aspect of the decision should be rejected.

Petitioner's third challenge under these criteria (that the decision violates Statewide Goal 7 is foreclosed by the city's status as a jurisdiction having its plan and implementing ordinances acknowledged by LCDC. Byrd v. Stringer, 295 Or 311, 666 P2d 1332 (1983).

Based on the foregoing, we reject petitioner's contentions under §§11.030(1) and (4) of the code. We turn next to the challenge under §11.030(3).

Section 11.030(3) of the code requires that

> "The proposed development site or building will comply with all of the requirements as established by the Federal Flood Insurance Program (referenced to special city resolutions 1565, 1566, and 3608)."

Petitioner contends the development will violate flood

insurance requirements by permitting fill and development in the floodway without proof of the impact on flood levels. According to petitioner, federal regulations are especially stringent with respect to proposals for fill in the floodway.

The city briefly addressed the federal flood insurance criterion in the final order. The city determined as follows:

> " A review of the proposed development site plan, and a review of the various development code criteria addressed in these findings of facts, insure that this specific criteria (sic) will be met." Record at 40.

This conclusional statement is not sufficient to withstand the challenge. It does not find compliance with the criterion, but defers making a finding. Compliance with mandatory standards must be achieved before permit approval. Margulis v. City of Portland, 4 Or LUBA 89, 95 (1981). Further, the statement does not indicate the nature of the governing federal requirements and the pertinent facts about Permawood's proposed development. Moreover, it does not explain why the city believed the requirements would be met.[21]

Under the circumstances, the city was not in a position to conclude, as it did, that §11.130(3) was satisfied.

In summary, we sustain the challenge under §1.030(3) but reject the challenges under §§11.030(1) and (4).

D. Variances

In approving Permawood's site plan the city granted variances from development code requirements pertaining to building height, setbacks, buffering, and screening. Two

proposed buildings were permitted to substantially exceed the special height limitations imposed on structures in the Willamette River Greenway.[22] Requirements for fencing, buffering and setbacks applicable to the southern and southwestern portions of the property were also relaxed and in some cases eliminated. These variances were necessary in order to authorize Permawood's proposal for access through the southern portion of the site onto Geary Street.[23]

Petitioner first challenges the city's allowance of a variance permitting Permawood to erect a 31 foot silo at a location where code requirements limit building height to 18 feet. Petitioner claims the decision violates the following criterion for variance approval (§15.030(1) of the code):

> "(1) That there are unique physical circumstances or conditions, such as irregularity, narrowness or shallowness of the lot, or exceptional topographical or other physical conditions peculiar to the affected property."

According to petitioner, this criterion is not met because the need for the height variance does not arise from unique physical circumstances or conditions, but rather from the developer's desire for a particular site layout.

We sustain petitioner's challenge under §15.030(1). The city's findings do not indicate the need for the height variance for the silo is attributable to unique physical circumstances on the site. The findings instead show Permawood's site plan dictated the location of the silo - a location deemed desirable, in large part, because of its

proximity to existing buildings and its distance from residences to the south. Record at 55-61. Under the city code, we do not believe variance relief is available merely to facilitate particular site plans or developments. We read the code to reflect the more restrictive idea, embraced by many local zoning codes, that variance relief is available only where unique physical conditions make it virtually impossible to meet code requirements and still put the land to reasonable economic use.[24] Erickson v. City of Portland, 9 Or App 256, 262, 496 P2d 726 (1972); Faye Wright Neighborhood Planning Council v. Salem, 3 Or LUBA 17 (1981); 3 Anderson, American Law of Zoning 2d §17 (1977).

Petitioner next challenges the validity of each of the variances granted by the city in connection with the following approval criterion in §15.030(2) of the code. That section provides:

> "The property together with any adjoining property under the same ownership is not otherwise reasonably capable of economic use under the provisions of this code and would thus be deprived of a substantial property right if the variance were not granted."

Petitioner charges the city miscontrued this criterion by interpreting the "property right" protected by it to be Permawood's interest in gaining approval of its site plan for the manufacturing facility. The petition states:

> "The city did not make findings that the property was not otherwise capable of economic use without granting the three variances, only that Permawood would not be able to develop it as they wished." Petition at 48.

We read the standard established under §15.030(2) to embody what we consider the traditional or restrictive approach to variance relief mentioned above. Under that approach, relief is available only in the unusual case where enforcement of code standards renders the property virtually incapable of economic or beneficial use. Conversely, relief is not available under standards such as §15.030(2) merely to make the land more profitable or accommodate a particular use or site development plan. Faye Wright Neighborhood Planning Council v. Salem, supra; Fisher v. City of Gresham, __ Or LUBA ___ (LUBA No. 83-105; March 28, 1984).

Taken as a whole, the city's findings relating to the requested variances under §15.030(2) are inconsistent with the restrictive approach reflected in the text of the code. Instead, the findings indicate a more permissive orientation - one that would make variance relief available to accommodate a particular proposal considered, on balance, to be reasonable.[25] Illustrative of the city's interpretation are the following findings, made in connection with allowance of the height variances:

> "The city, in reviewing the evidence, agrees that Permawood has utilized the entire site in development of its project in the most reasonable fashion possible given both the physical and code limitations imposed on the site....In this situation, Permawood is using all of its land in an attempt to resolve the problems raised by the opponents and the provisions of the Albany Development Code. The evidence is uncontraverted and in fact admitted to by the opponents, that if Permawood was unable to have the cement silo, it would not be able to operate on this

site....Furthermore, the restrictions of the 15 degree height restriction in combination with the buffering and other setback requirements restrict the developable portions of the site to a very small area within which very few industrial uses could be accommodated without similar variances." Record at 57.[26]

Whatever the merits or demerits of a permissive variance approach, the approach is not reflected in the text of the city's development code. Section 15.030(2), among others, moves in a decidedly different and more restrictive direction. Accordingly we uphold the challenges to these variances. Fisher v. City of Gresham, supra.

Finally, petitioner sweepingly claims the variances contravene §§15.130(4) and (5) of the code. These sections provide as follows:

"(4) Granting of the variance would not be inconsistent with the comprehensive plan.

"(5) Granting of the variance would not be materially detrimental to the public welfare or adversely affect other property in the vicinity."

Petitioner does not specify the ways in which the approved variances violate these criteria, but instead generally reiterates previously made arguments against the industrial use proposal as a whole. Arguments stated in such generalized terms cannot be considered. Accordingly, we reject these challenges. Dotson v. City of Bend, supra; Lee v. City of Portland, 57 Or App 79-81, 646 P2d 662 (1982).

In summary, we sustain the challenge to the height variance for the silo under §15.030(1). Further, we sustain the

challenges to all the variances allowed by the city because they violate §15.030(2). We reject, however, the vague challenge under §§15.030(4) and (5).

CONCLUSION

Based on the foregoing, the city's decision is reversed in part and remanded in part.

FOOTNOTES

1

The Court of Appeals has recognized representational standing in the land use context, 1000 Friends of Oregon v. Multnomah County, 39 Or App 917, 593 P2d 1171 (1979), but the Supreme Court has yet to approve the concept. See, Benton County v. Friends of Benton County, 294 Or 79, 81, 653 P2d 249 (1982).

2

For example the petition states as follows:

"Several members of the Bowman Park Neighborhood Association were entitled to legal notice of the hearings, e.g., Douglas and Mary Abraham, Wayne and Judity Fisk, Nelson and Elva Zeller, and Marvin and Kathy Lindberg, (Rec. p. 271 & 272).

"The Bowman Park neighborhood residents will be adversely affected in the use and enjoyment of their property, in particular by noise which will come from the industrial site on a twenty-four hour basis and which will destroy the present quiet atmosphere. There will also be increased traffic of heavy industrial nature in the residential area and potential for air and water pollution which will be harmful to nearby residents." Petition at 1 (emphasis added).

3

Petitioner moved to supplement its standing allegations after the motion to dismiss pointed out the ambiguity in the section on standing. Our disposition of the issue in favor of petitioner, which is based on the original petition, makes it unnecessary for us to consider the motion to supplement the petition.

4

Repondents contend we have no jurisdiction over this assignment of error because petitioner has failed to phrase its argument in the exact terms used by the legislature to define our scope of review. See ORS 197.835(8). We reject this contention. In substance, petitioner has maintained the city improperly construed its ordinance on the issue of site access. The allegation is clearly within our review

authority. ORS 197.835(8)(a)(D).review. We regard petitioner's failure to recite the statutory language as of no significance.

We note Respondents have moved to strike substantial portions of the petition on the same ground. We deny the motion.

5

Apart from this reason, we note also the city's finding does not address another question pertinent to the issues raised by petitioner, i.e., whether the proposed access road to Permawood's plant occupies the same land previously used for access purposes. If the proposal would occupy R-2 land other than that occupied by the alleged nonconforming use when established, or would put the land in question to more intensive nonconforming use, it would appear to constitute a "change or expansion" requiring approval under code criteria regulating non-conforming uses not mentioned at all in the city's findings. See §1.100, Albany Development Code. See also Polk County v. Martin, 292 Or 69, 636 P2d 952 (1981) (Tanzer concurring). The city's failure to precisely delineate the boundaries and intensity of the historical (nonconforming) use of the R-2 land for industrial purposes is a further basis for a remand order by this Board.

6

Under §11.020 of the city's development code a "floodway" is defined as follows:

> "(1) Any area designated as a floodway on the official zoning map or more detailed official federal map; or
>
> "(2) The land area which must be reserved in order to discharge the 100 year flood without cumulatively increasing the water surface more than one foot as determined by the U.S. Army Corps of Engineers; or
>
> "(3) The land within 50 feet of the center lines of Burkhart, Truax, and Murder Creeks and 100 feet of the center line of Cox Creek. Where a conflict is shown to exist between any of the above, the city engineer shall determine which methods should be used."

7

The record indicates at least some expression of concern

regarding violation of floodway restrictions. Record at 81-68.

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[8] The Development Code defines "development" as "any man-made change to improved or unimproved real estate, including but not limited to construction, installation or change of a building or other structure, land division, establishment or termination of a right of access, storage on the land, drilling and site alterations such as that due to land surface mining, dredging, paving excavation or clearing." Article 22, Albany Development Code.

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[9] As noted earlier, a "heavy industrial" zoning designation applies to the property. The parties agree, however, that the plan's more restrictive designation controls. This approach is consistent with state law, see e.g., Baker v. City of Milwaukie, 271 Or 500, 533 P2d 772 (1975). It is also specifically in line with a policy on plan/zoning relationships in Albany's Comprehensive Plan. Albany Comprehensive Plan at 129.

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[10] As we noted earlier, §5.100(35) of the code, on which the city relies, describes a class of uses permissible in both the light industrial and the heavy industrial districts. Presumably, certain uses falling within the class would be considered inappropriate for the light industrial district, but appropriate for the heavy industrial district, by virtue of their environmental impacts. As petitioner maintains, and the city evidently agrees, the answer in a given case depends on an impact or environmental assessment.

Guidance as to the focus of such an assessment is provided by the code's definition of "heavy industrial" quoted above. That definition suggests the following inquiries should be made in any particular case: (1) are there "large amounts of traffic", (2) is there "extensive shipping of goods, outside storage or stockpiling of raw materials, by-products or finished goods", and (3) is there "a controlled but higher level of noise and/or air pollution." As we read the quoted findings, the city's treatment of these inquiries was limited to the rejection, expressed in conclusional fashion, of petitioner's assertion that an impact analysis required denial of Permawood's proposal. We find the city's approach inadequate.

To withstand the challenge the findings must (1) identify

the operational characteristics and impacts of the proposal, including those characteristics and impacts mentioned by the code's definition of "heavy industrial use" and (2) explain why the city's decision to treat the use as a "a light industrial" use carries out the intent of the plan, in light of the facts discussed in (1). Presumably, the city's explanation would include a comparison of the impacts of Permawood's proposal with other uses treated by the city as "light industrial" and "heavy industrial." Such a comparison would be of value in interpreting subjective terms in the code, such as "large" amounts of traffic, "extensive" shipping, and "controlled but higher" pollution levels. See Albany Development Code, §5.090.

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[11] Respondents did not provide us with a transcript of pertinent portions of the city's hearings or other citations to the record. As we conclude in our opinion, the absence of citations to supporting evidence forces us to conclude petitioner's substantial evidence challenge has validity.

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[12] The petition also argues the record does not contain substantial evidence demonstrating the sewer system was adequate capacity to handle the quantity of waste water discharged by Permawood's facility. Petition at 33. Respondents dispute this argument but provide us citations to the record to support their position. We therefore uphold this aspect of the challenge under §13.040(1). Petitioner has not challenged the adequacy of the city's findings under §11.040(1). We express no opinion on this subject.

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[13] The findings describe the dedication as including a strip of land of varying widths, from 30 to 95 feet, running along the northern property line at the top of a bank. By contrast, the previously required easement was of uniform width and ran along the water line.

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[14] We read the policy's mandate for "compatibility" between land use changes and the greenway goal to be a way of requiring that land use changes carry out the goal's purposes.

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[15] Technical evidence concerning the toxicity of cement was introduced at the city's hearings and supports petitioner's

claim. See testimony of Margaret Pritchard, City Council Hearing, January 10, 1984 (attached to petition as Exhibit F).

16 Petitioner maintains there is no evidence the cement containment system proposed by Permawood would be adequate in the event of (1) the escape of cement particles in the ordinary course of plant operation or as a result of accidents and (2) the escape of cement as a result of heavy rains, flooding, earthquake or other disasters.

17 For example, petitioner points out that fugitive dust from the outside storage of materials containing cement, or from the manufacturing process itself, could contaminate the river.

18 Respondents also argue we should disregard the challenge because it is not supported by any substantial evidence in the record. Brief of Respondents at 40. If respondents mean petitioner's concerns are unreasonable and therefore deserve no response by the city, we must disagree. There is enough evidence in the record about potential hazards to the river and adjacent lands to require the city to adopt findings, supported by substantial evidence, in connection with the applicable code criteria. See e.g., testimony of Margaret Pritchard, City Council Hearing of January 10, 1984 (Ex. F of the petition).

On the other hand, if respondents mean the burden rests on petitioner to demonstrate the record contains no substantial evidence, they have an incorrect understanding of review proceedings before this Board. Where a challenge on evidentiary grounds is made, the burden rests on respondents to provide citations to evidence in the record supporting the decision.

19 Section 11.030 of the code defines "flood fringe" as "that area located between a floodway boundary and the boundary of the flood plain district."

20 The city determined that a "200 foot elevation contour is the currently established 100 year flood plain marker for the area." Record at 48. It was acknowledged in a finding that Permawood intended to restore and utilize an existing building

located at, but not above the 200 foot flood elevation. Record at 48.

We note a section of the code, §11.130(2), requires "proposed buildings" to be no less than one foot above the 100 year flood level. Petitioner implies, but does not set forth fully, an argument that the code's use of the phrase "proposed buildings" includes an existing building to be remodeled for a new use, as in this case. We express no opinion as to the implied argument, but instead consider only petitioner's express contentions under §11.030(1) and (4).

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[21] Of course, if such an explanation were provided in the final order, substantial evidence would also be required to support it. We make this point for purposes of guiding the city on remand.

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[22] Under §6.140 of the code, building height limitations are measured by a plane which begins at the floodway line and extends directly south from the Willamette River. The maximum angle of the plane is 30 degrees for river-oriented uses and 15 degrees for nonriver-oriented uses. The approved buildings, a silo for cement storage and a wood chip building were classified in the second category by the city.

Under §6.140, the maximum heights for these buildings, in the locations proposed by Permawood, were 18 feet (silo) and 7 feet (wood chip building). The variances permitted the buildings to reach heights of 31 feet and 25 feet respectively. The height of the silo was increased to 45 feet by a baghouse structure (a pollution control device). However, this addition is exempt from the code's height restrictions under §6.200.

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[23] The record does not precisely define the extent of these variances. Three site maps (Record Exhibits 44, 45, and 46) generally indicate that in some areas required buffers were reduced or eliminated; in others, buffers were increased.

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[24] The city code reflects this idea in various ways. For example, the code rules out variance relief where the need for relief has been intentionally created by the applicant. See §15.030(3). Another requirement which reflects the restrictive

approach is discussed at pages 40-42 of this opinion.

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25 We note the city's permissive approach appears to be in line with some of the approval criteria in the code. For example, §15.030(7), authorizes relief where "the intent if not the letter of the code cannot be achieved by alternate means." Although this provision has elements of the permissive approach, other sections of the code, discussed above, do not. We cannot construe those other sections to reflect the permissive variance approach without doing violence to the text. See Fisher v. City of Gresham, __ Or LUBA ___ (No. 83-105, March 28, (1984).

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26 We note the city's findings under §15.030(2) make no mention of the fact the site in question is already being put to economic use, evidently, without variance relief. This fact undercuts the decision to allow the variances requested by Permawood.