

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

SEP 14 2 42 PM '87

3	ALVIN URQUHART,	)	
4	Petitioner,	)	LUBA No. 87-040
5	vs.	)	FINAL OPINION
6	CITY OF EUGENE,	)	AND ORDER
7	Respondent.	)	

8 Appeal from the City of Eugene.

9 Alvin Urquhart, Eugene, filed a petition for review.

10 Timothy Sercombe, Eugene, filed a response brief on behalf  
11 of Respondent City of Eugene.

12 BAGG, Referee; DuBAY, Chief Referee; HOLSTUN, Referee;  
13 participated in the decision.

14 AFFIRMED 09/14/87

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioner appeals adoption of the City of Eugene Ordinance  
4 No. 19470 entitled "An Ordinance Establishing a Riverfront Park  
5 Development District." The ordinance creates a zoning district  
6 applicable to a particular geographic area in the City of  
7 Eugene. Among other provisions, it lists permitted uses and  
8 establishes development standards.

9 FACTS

10 The area subject to control by the Riverfront Park Special  
11 Development District (SD) established by the new ordinance is  
12 regulated by a refinement plan. The refinement plan, the  
13 Riverfront Park Study (RPS) is a subplan of the  
14 Eugene-Springfield Metropolitan Area General Plan or "Metro  
15 Plan." The specific property subject to this ordinance,  
16 approximately 147.5 acres, is currently zoned public land,  
17 community commercial, heavy industrial and medium industrial.  
18 A portion of the area is within the Willamette Greenway  
19 boundary.

20 The ordinance is intended to apply initially to a 71 acre  
21 tract owned by the State Board of Higher Education. The tract  
22 is near the University of Oregon campus. The ordinance makes  
23 possible development of a university research park.

24 Petitioner appealed the plan designation of  
25 University/Research to a portion of the property controlled by  
26 the ordinance in Urquhart v. LCOG and City of Eugene, 14 Or

1 LUBA 335 (1986) reversed on other grounds, 80 Or App 176, 712  
2 P2d 870 (1986). Petitioner claimed, in part, the plan  
3 designation violated Goal 15, the Greenway Goal. Petitioner's  
4 allegations about Goal 15 were ultimately not sustained.

5 FIRST ASSIGNMENT OF ERROR

6 "The use section of the Special Distict [sic] Zoning  
7 ordinance violates the Willamette Greenway  
8 legislation, Statewide Planning Goal 15, Policy 9 of  
9 the Eugene-Springfield Metropolitan Area General Plan  
10 (including the Greenway submission of the City of  
11 Eugene), and Eugene Zoning Code 9.260 because it  
12 allows land uses other than those permitted by the  
13 above laws and regulations."

14 As we understand petitioner's complaint, the proposed  
15 ordinance does not support the intent and purposes of the  
16 Willamette Greenway legislation (ORS 390.310-368), Goal 15, the  
17 city's Greenway Plan and the Eugene Zoning Code. Specifically,  
18 petitioner alleges the ordinance does not comply with these  
19 regulations because the zoning allowed under the ordinance  
20 permits uses other than open space. Petitioner claims that  
21 other than certain preexisting uses, open space use is the only  
22 use permitted by Goal 15 within the Greenway.<sup>1</sup> Petitioner  
23 states the only lands which comply with Goal 15 and city  
24 regulations requiring comformity with Goal 15 are those zoned  
25 for public recreation or institutional use. That is, because  
26 the new ordinance permits other uses, it violates the goal and  
implementing measures.

Respondent makes two arguments. First, respondent insists  
that the issue of uses within the Greenway has been decided by

1 this Board in Urquhart, supra. Petitioner contended, in the  
2 earlier appeal, that the plan permitted intensification of  
3 inappropriate uses within the Greenway. LUBA concluded that no  
4 particular land use is precluded from location within the  
5 Greenway. We said

6 "Neither Statewide Goal 15, the agency interpretive  
7 rules concerning this goal, nor the acknowledged Metro  
8 Plan express the idea that development consistent with  
9 the purposes set forth in ORS Chapter 390 is  
10 prohibited. To the contrary, the acknowledged Metro  
11 Plan includes policies that sanction new development  
12 along the Willamette River, including industrial  
13 development. Of course, new development must be  
14 compatible with, or enhance, the natural, scenic and  
15 environmental qualities of the river." (14 Or LUBA at  
16 342).

17 Because the issue of compliance with Goal 15 has already  
18 been decided, petitioner's argument must fail, according to  
19 respondent.

20 Respondent's second argument is that the ordinance simply  
21 implements Goal 15 and the city's comprehensive plan. The  
22 ordinance is a new land use regulation under ORS  
23 197.015(11)(13), and LUBA's responsibility is to affirm  
24 challenges to a new land use regulation if we find that it is  
25 in compliance with the comprehensive plan goals and is  
26 consistent with specific related land use policies found in the  
27 acknowledged comprehensive plan. See ORS 197.835(4).

28 According to the city, such conformity exists here.

29 Specifically, the new ordinance implements the Metro plan  
30 category of "University/Research." It also, according to  
31 respondent, implements portions of the Riverfront Park Study

1 mandating setbacks from the river and the mill race providing  
2 for public access to the river. The city says the ordinance  
3 codifies these policies. See Policies 2, 5 and 6 at III-D-4 in  
4 the Metro Plan providing:

5 "2. Land use regulations and acquisition programs  
6 along river corridors and waterways shall take  
7 into account all the concerns and needs of the  
8 community, including recreation, resource, and  
9 wildlife protection; enhancement of river  
corridor and waterway environments; potential for  
supporting nonautomobile transportation;  
opportunities for residential development; and  
other compatible uses.

10 \* \* \*

11 "5. New development that locates along river  
12 corridors and waterways shall be limited to uses  
13 that are compatible with the natural, scenic, and  
14 environmental qualities of those water features.

15 "6. New industrial development that locates along the  
16 Willamette and McKenzie Rivers shall enhance  
17 natural, scenic, and environmental qualities."

18 See also Policy 5 in the Eugene RPS providing:

19 "5. Development standards within the SD, Special  
20 Development District, applied to the Riverfront Park,  
21 shall be designated to:

22 "a) Provide for intensity of development while  
23 recognizing the environmental and open-space  
24 attributes and requirements of the area.

25 "b) Recognize that proximity to alternate  
26 transportation facilities may provide  
opportunities to reduce parking requirements  
for certain industrial uses.

"c) Provide for signing standards consistent  
with the purpose of the district.

"d) Allow for a mixture of uses in the SC,  
Special Development District.

"e) Ensure that development in the Riverfront

1 Park is primarily related to University  
2 activities and programs."

3 We agree with respondent that the issues raised in  
4 petitioner's first assignment of error regarding compliance  
5 with Statewide Planning Goal 15 and other implementing criteria  
6 have been litigated and decided against petitioner. As a  
7 consequence, petitioner is barred from raising them here. The  
8 plan designation of University/Research established in the  
9 Metro Plan and applied in this ordinance was tested against  
10 Goal 15 in our previous case. Indeed, the new plan designation  
11 of University/Research was applied to the same 71 acres owned  
12 by the University of Oregon that petitioner believes should be  
13 left in open space. In that case, we found the application of  
14 the new plan designation did not violate the goal and ORS  
15 390.314.

16 We conclude that Petitioner Urquhart has fully litigated  
17 the question of whether the University/Research plan  
18 designation complies with Statewide Planning Goal 15 and the  
19 Metro Plan. As these issues have been decided against  
20 petitioner, we believe these issues are settled in this review  
21 proceeding. See Jones v. Flannigan, 270 Or 121, 455 P2d 609  
22 (1974) and State v. Bradley, 51 Or App 569, 626 P2d 403 (1981).

23 In the Court of Appeals, petitioner raised compliance with  
24 the Eugene Code, Section 9.260. The ordinance section permits  
25 the city to apply conditions "deemed necessary to carry out the  
26 purpose and intent of the Willamette Greenway and to insure

1 that any intensification, change of use, or developments within  
2 the Greenway boundary as fully approved are compatible with the  
3 Greenway."

4 In his petition for review appealing our order in Urquhart,  
5 supra, petitioner claimed that we erred in finding that the  
6 Eugene Code Provision permitted intensification or change in  
7 use in the Riverfront Park amendment area. The Court of  
8 Appeals, referring to this claim, stated that the issue did not  
9 require discussion. Urquhart v. Lane Council of Governments,  
10 80 Or App supra at 182.

11 Our order in Urquhart, supra, did not discuss the Eugene  
12 Code. We are reluctant, then, to hold that petitioner is  
13 precluded from raising this issue in the present review  
14 proceeding. However, we find in any event that Code Section  
15 9.2.60 provides no relief for petitioner. The code only gives  
16 the city permission to attach conditions to development as  
17 needed to insure compliance with Greenway controls. This code  
18 section neither requires nor limits particular land use.

19 If petitioner's complaint under this assignment of error is  
20 not barred by our review in Urquhart, supra, we are cited to  
21 nothing in the city's acknowledged planning documents,  
22 comprehensive plan policies and implementing documents  
23 suggesting that the uses permitted by the new ordinance and the  
24 controls imposed are contrary to the goal in the Eugene plan.  
25 We recognize that petitioner's complaint is that the uses  
26 allowed in the new ordinance are inconsistent with those

1 required by applicable regulation. However, the provisions  
2 cited by petitioner do not limit the uses which may be  
3 established in the Greenway. Rather, the provisions cited  
4 simply impose restrictions on the intensity and kind of  
5 development. Petitioner does not appear to challenge the  
6 controls in the new ordinance, only the fact that uses other  
7 than open space uses are allowed. Because nothing in the  
8 material to which we have been cited prohibits uses other than  
9 open space uses in the Greenway, petitioner's challenge must  
10 fail.<sup>3</sup>

11 Specifically, the Metro Plan category of University/Research  
12 is intended to "accommodate light industrial, research and  
13 development, and office uses related to activities, research  
14 and programs of the University of Oregon." Metro Plan  
15 II-E-11. Also, certain limited retail, service uses and  
16 multiple family dwellings are allowed. These uses are  
17 reflected in the challenged ordinance.

18 The Willamette Greenway Policy 9 element in the Metro Plan  
19 provides:

20 "The specific use management considerations and  
21 requirements of statewide Goal 15, 'Willamette River  
22 Greenway,' shall be applied, where they are not  
23 specifically addressed in policy or land use  
24 designations elsewhere in this Plan, in local  
25 refinement plans and local implementing ordinances."

26 The Riverfront Park Study, we discussed in our opinion in  
Urquhart, supra, implements this provision and is the local  
refinement plan applying Goal 15 to the Riverfront Park section



1 of the Greenway. Policies in the Riverfront Park Study address  
2 management and access to the Greenway. The challenged  
3 ordinance establishes setbacks, public access, management plans  
4 and development constraints for the area. The new ordinance,  
5 then, directly implements certain Eugene plan provisions. We  
6 find, therefore, that ORS 197.835(4) applies and we are  
7 required to affirm this decision because it implements land use  
8 policies found in the acknowledged comprehensive plan.

9 We reiterate, however, that petitioner's charge is, in the  
10 main, that the new ordinance permits uses not allowed by the  
11 goal. In Urquhart, supra, we rejected this claim. We reject  
12 the claim again here. We find nothing in the goal, the Metro  
13 Plan, the Riverfront Park Study or the Eugene Code to limit the  
14 uses to open space as asserted by petitioner.

15 The first assignment of error is denied.

16 SECOND ASSIGNMENT OF ERROR

17 "The review section of the Special District Zoning  
18 ordinance violates the Statewide Planning Goal 15  
19 because it permits "balancing" of non-conforming uses  
20 with conforming uses within the Willamette Greenway  
21 through a process of conditional use permits rather  
22 than a process of Goal 2 - Exceptions. (Written  
23 testimony submitted by A.W. Urquhart for Final Hearing  
24 on Periodic Review of Eugene-Springfield Metropolitan  
25 Area General Plan, March 17, 1987.)"

26 Petitioner complains about the following section of the new  
27 ordinance:

28 "As used in this section, the words 'greatest possible  
29 degree' are drawn from Statewide Planning Goal 15  
30 (F.3.b.) and are intended to require a balancing of  
31 factors so that each of the identified Greenway  
32 criteria is protected to the greatest extent possible

1 without precluding the requested use. Goal 15  
2 (C.3.j.) provides that 'lands committed to urban uses  
3 within the Greenway shall be permitted to continue as  
4 urban uses.'" Ordinance 19470, Section 7.2.

5 Petitioner argues that the uses permitted by Goal 15 are  
6 already balanced. Petitioner explains:

7 "'Balancing' usually refers to conflicts in  
8 permissible uses among the various Statewide Planning  
9 Goals, not to the degree of compliance within one  
10 goal. For example, the use of this area as a natural  
11 area, a playing field, or even an intensively  
12 developed urban plaza is not a question. All of these  
13 uses fit within the allowable uses within Goal 15 and  
14 thus no 'balancing' is required. However, if a Goal 9  
15 and a Goal 15 use come into conflict, 'balancing'  
16 would be required. But in the area under question,  
17 all permitted uses are Goal 15 uses. Therefore no  
18 'balancing' of uses is required."

19 Petitioner concludes that because the ordinance allows uses  
20 not permitted by Goal 15 through a process of "balancing,"  
21 non-permitted uses may thereby be established in the Greenway.  
22 Establishment of such uses by any means, as we understand the  
23 argument, is prohibited.

24 The new ordinance requires conformity with particular  
25 criteria for any development within the Riverfront Park area  
26 and certain additional criteria for development within the  
27 Greenway. The following policies are applicable to development  
28 within the Greenway:

29 "c. To the greatest possible degree, the  
30 intensification, change of use, or development  
31 will provide the maximum possible landscaped  
32 area, open space, or vegetation between the  
33 activity and the river.

34 \* \* \*

35 e. To the greatest possible degree, necessary and  
36

1           adequate public access will be provided to and  
2           along the river by appropriate legal means."  
          Ordinance 19470, Section 7.2(c)(e).

3           The plan definition of "greatest possible degree" simply  
4           provides that open space and public access will be required up  
5           to the point where further provision of such amenities would  
6           prevent development of an otherwise allowable use, according to  
7           the city.

8           We do not find the challenged ordinance offensive to the  
9           city's Goal 15. We are cited to nothing in the goal or in case  
10          law to suggest that "greatest possible degree" means something  
11          more restrictive than the definition adopted by the city. The  
12          city's interpretation of the "greatest possible degree"  
13          language appearing in Goal 5 is reasonable. Because it is  
14          reasonable, we are not entitled to overturn it. Alluis v.  
15          Marion County, 64 Or App 478, 668 P2d 1242 (1983). Further, we  
16          stated in Urquhart v. City of Eugene, supra, that Goal 15 does  
17          not prohibit uses other than open space. Petitioner's claim  
18          that the new ordinance violates the goal by interpreting it to  
19          allow a balancing of competing interests lacks a legal basis in  
20          the goal.

21          The second assignment of error is denied.

22          The decision of the City of Eugene is sustained.

FOOTNOTES

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Petitioner notes that part of the area is currently zoned heavy industrial and states that this zoning may be "overlooked only if the LCDC-acknowledged Greenway Plan of the City of Eugene replaced it."

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Petitioner argues that certain staff notes show that the new ordinance is not consistent with city's adopted Greenway Program. We do not find staff notes to be (1) part of the record or (2) particularly relevant to the issue of compliance with applicable criteria. It is the city's order which provides the basis for our finding of conformity, or lack of it, with applicable criteria.

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We note, in addition, respondent argues that petitioner's challenge is premature. That is, petitioner limits his claim to application of the new zoning district to some 26 acre portion of the larger acreage subject to ordinance application. Petitioner does not argue the zoning district may not be applied to any property. Respondent argues that

"Only if the zoning district could not be applied to any property (and petitioner makes no such claim) is adoption of the zoning district legally suspect."

Because petitioner claims the ordinance allows uses not consistent with Goal 15 and the city's plan on some property, it is within our power to review the ordinance for conformity with applicable criteria.

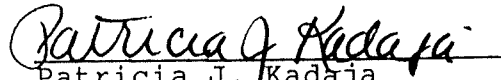
CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 87-040, on September 14, 1987, 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:

Alvin Urquhart  
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Eugene, OR 97401

Timothy Sercombe  
Harrang, Long, Watkinson,  
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101 East Broadway  
Eugene, OR 97401

Dated this 14th day of September, 1987.

  
Patricia J. Kadaja  
Management Assistant