

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS

APR 1 2 10 PM '88

OF THE STATE OF OREGON

3 SELLWOOD HARBOR CONDOMINIUM)
4 ASSOCIATION,)

5 petitioner,)

6 vs.)

LUBA No. 87-079

7 CITY OF PORTLAND and EASTPORT)
8 EQUITIES CORPORATION, an)
9 Oregon Corporation,)

10 Respondents.)

FINAL OPINION
AND ORDER

11 EASTPORT EQUITIES CORPORATION,)
12 an Oregon Corporation,)

13 petitioner,)

14 vs.)

LUBA No. 87-080

15 CITY OF PORTLAND and SELLWOOD)
16 HARBOR CONDOMINIUM)
17 ASSOCIATION,)

18 Respondents.)

Appeal from City of Portland.

19 Dennis Elliott, Portland, filed the petition for review in
20 LUBA No. 87-079 and a response brief in LUBA No. 87-080 and argued
on behalf of Sellwood Harbor Condominium Association. With him on
the briefs was Elliott & Freedman.

21 Phillip E. Grillo and Timothy V. Ramis, Portland, filed the
22 petition for review in LUBA No. 87-080 and a response brief in
LUBA No. 87-079 and Timothy V. Ramis argued on behalf of Eastport
23 Equities Corporation. With them on the briefs was O'Donnell,
Ramis, Elliott & Crew.

24 Ruth Spetter, Portland, filed a response brief and argued on
25 behalf of Respondent City of Portland in LUBA No. 87-079.
Adrianne Brockman, Portland, filed a response brief and argued on
26 behalf of Respondent City of Portland in LUBA No. 87-080.

1 SHERTON, Referee; BAGG, Chief Referee; HOLSTUN, Referee;
2 participated in the decision.

3 AFFIRMED 04/01/88

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

1 Opinion by Sherton.

2 NATURE OF THE DECISION

3 Petitioners Sellwood Harbor Condominium Association (SHCA)
4 and Eastport Equities Corporation (EEC) appeal the August 17,
5 1987 order of respondent City of Portland (city) approving a
6 Conditional Use/Greenway permit to reestablish the 25 houseboat
7 Watery Lane moorage, subject to a condition that a maximum of
8 six two-story houseboats be allowed.

9 FACTS

10 The Watery Lane houseboat moorage (Watery Lane) site is
11 approximately four acres in size and extends approximately 300
12 feet north and 700 feet south of the Sellwood Bridge along the
13 east bank of the Willamette River. The Greenway Trail is
14 located on the property at the top of the riverbank, south of
15 the Sellwood Bridge. The Sellwood Harbor Condominiums are
16 located to the east of the property.

17 Watery Lane was first constructed in 1965, as a permitted
18 use under the then existing M2 (General Manufacturing) zoning
19 district. Watery Lane continued to be a permitted use when the
20 site was rezoned C2 (General Commercial) in 1977. In 1979, the
21 Willamette Greenway Scenic Development Overlay (WSD) zone was
22 applied to the site, making Watery Lane a conditional use. In
23 1981, upon adoption of the Portland Comprehensive Plan (plan),
24 the portion of the site south of the Sellwood Bridge was
25 rezoned Medium-Density Multifamily Residential (R1). Houseboat

26 //

1 moorages are not permitted in the R1 zone. The portion north
2 of the bridge remained zoned C2. Both the R1 and C2 portions
3 of the site remained subject to the WSD overlay zone.

4 In 1977, the ownership of Watery Lane changed, and the new
5 owners initiated proceedings to evict Watery Lane tenants. In
6 February, 1986, EEC acquired the Watery Lane property. By this
7 time eviction proceedings had been halted. On February 25,
8 1986, during a period of exceptionally high river flow, the
9 Watery Lane moorage was torn from its pilings, and the 19
10 houseboats then present at the site went floating down the
11 Willamette River. The cause of the moorage breaking loose is a
12 matter of dispute in this case. On December 2, 1986, EEC
13 applied to the city for conditional use and Willamette River
14 Greenway permits to rebuild Watery Lane.

15 SHCA FIRST ASSIGNMENT OF ERROR

16 "The permit conflicts with the Lower Willamette River
17 Management Plan and previous decisions of the Portland
City Council."

18 A. Lower Willamette River Management Plan

19 SHCA argues that the city's approval of the rebuilding of a
20 25 houseboat moorage at Watery Lane violates the Lower
21 Willamette River Management Plan (LWRMP) policy prohibiting
22 additional houseboats in the Lower Willamette River Study
23 Area.¹ SHCA points out that at least seven of the proposed
24 houseboat slips are north of the Sellwood Bridge and,
25 therefore, in the area subject to the LWRMP. See Record 95S.

26 The city responds that 90% of Watery Lane is outside of

1 LWRMP boundaries, and nothing in the LWRMP prohibits the
2 continued existence of houseboats at the portion of Watery Lane
3 within LWRMP boundaries. The city argues that this portion of
4 Watery Lane is in LWRMP Zone 24, which expressly permits
5 houseboats. EEC agrees with the city and argues in addition
6 that compliance with the LWRMP is not a criterion for city
7 approval of the appealed permit. EEC asserts that the LWRMP is
8 enforced solely by the State Land Board and Division of State
9 Lands, not by local governments.

10 We agree with EEC that compliance with the LWRMP is not a
11 criterion for city approval of the reestablishment of Watery
12 Lane. SHCA has not identified any provision of the city plan
13 or land use regulations which requires that the challenged
14 permit comply with the LWRMP.

15 The LWRMP has been adopted by the State Land Board as an
16 administrative rule. OAR 141-80-105. The LWRMP does not
17 explicitly require that local governments apply its substantive
18 provisions (the "Policies," "River Zones" and "Permitted
19 Activity Types" sections) in their land use decisionmaking
20 processes. The "Administrative Review Process" section of the
21 LWRMP sets out a detailed process for Division of State Lands
22 (DSL) review of applications for state permits for alteration
23 of the bed or banks of the river to determine whether the
24 proposed project is consistent with the LWRMP. Projects which
25 DSL finds inconsistent with the LWRMP can be approved only if
26 authorized by the State Land Board pursuant to criteria for

1 such authorizations contained in the LWRMP. No other method of
2 LWRMP application or enforcement is identified in the
3 LWRMP.² We conclude that the adoption of the LWRMP as an
4 administrative rule did not have the effect of making the LWRMP
5 a standard for local government land use decisions.

6 However, even if the LWRMP were applicable to the city's
7 decisionmaking process, the reestablishment of the portion of
8 Watery Lane north of the Sellwood Bridge would not violate the
9 LWRMP policy on houseboats, as argued by SHCA. This LWRMP
10 policy states:

11 "Within the Lower Willamette River Study area, at
12 river and riverbank areas, no additional houseboats
shall be permitted." LWRMP at 19.

13 This policy must be read with the Zone 24 use guideline that
14 allows "maintenance of existing houseboat communities." LWRMP
15 at 45.

16 Taken together, these LWRMP provisions allow houseboat
17 moorages which existed in Zone 24 at the time the LWRMP was
18 adopted to be maintained. Watery Lane was constructed in 1965,
19 some eight years before the LWRMP was adopted. SHCA does not
20 allege that the houseboat moorages north of the Sellwood Bridge
21 were not in existence when the LWRMP was adopted.³ We must
22 conclude, therefore, that the LWRMP policy cited by SHCA does
23 not prohibit reestablishment of these moorages.

24 This subassignment of error is denied.

25 B. City Decisions and Actions

26 SHCA argues that the city's decision breaches promises it

1 made when inducing the surrounding neighborhood and the State
2 Land Board to accept 37 houseboat spaces at Willamette
3 Moorage. Petitioner specifically points to a letter by the
4 city Commissioner of Public Affairs supporting the application
5 to the State Land Board and describing the proposed project as
6 "consolidating three existing moorages." Record 274-277. SHCA
7 also argues that the city should be estopped from allowing
8 further development of houseboats in the area because SHCA
9 undertook substantial changes in position in reliance on the
10 city's 1983 and 1984 promises and actions.

11 The city replies it has never entered into any promises or
12 agreements which would prohibit the continued use of Watery
13 Lane for houseboats prior to the 1995 termination of the state
14 lease. EEC agrees, and states that assumptions, which later
15 turned out to be incorrect, were made by various parties in
16 1984 that factors such as pending evictions, economics and
17 relocation incentives would operate to phase out Watery Lane.
18 However, according to EEC, these assumptions were never
19 translated into plan, ordinance or regulation provisions
20 affecting the existence of Watery Lane.

21 The city also argues that, under ORS 227.173(1), its action
22 on a discretionary permit application must be based on
23 standards and criteria set out in its development ordinance.
24 The city could not, therefore, base its decision on the permit
25 application on promises and agreements of the sort that SHCA
26 alleges were made by the city.

1 SHCA does not identify any legally binding commitment by
2 the city, made by ordinance, regulation or otherwise, which
3 would prevent the city from approving the reestablishment of
4 Watery Lane. The city correctly points out that its action on
5 EEC's permit application is required by statute to be based on
6 criteria in its plan and land use regulations. Without a
7 showing that an applicable legal criterion has been violated by
8 the city's decision, we cannot grant relief. Lane County
9 School District 71 v. Lane County, ___ Or LUBA ___ (LUBA
10 No. 86-049; December 10, 1986).

11 Finally, SHCA has not set forth in the Petition for Review,
12 or cited in the record, facts necessary to establish a claim of
13 estoppel.⁴ In any case, the general rule is that estoppel
14 cannot be invoked to prevent a local government from enforcing
15 its land use regulations. Hanley v. City of Salem, 14 Or LUBA
16 204, 210 (1986); Clackamas County v. Emmert, 14 Or App 493,
17 501, 503, 513 P2d 532 (1973).

18 This subassignment of error is denied.

19 SHCA's first assignment of error is denied.

20 SHCA SECOND ASSIGNMENT OF ERROR

21 "Granting of the permit conflicts with Statewide
22 Planning Goal 15."

23 SHCA argues that allowing houseboats in the Sellwood Bridge
24 area violates Statewide Planning Goal 15 (Willamette River
25 Greenway) because houseboats are not water-related uses, as
26 that term is defined in the Goals. SHCA asserts that Portland

1 Municipal Code (code) 33.77.150 states that an exception to
2 Statewide Planning Goal 15 is required for uses within the
3 Greenway setback which are neither river-dependent nor river
4 related. SHCA argues that the code's definition of houseboats
5 as river-related uses applies only to existing houseboats.
6 According to SHCA, houseboats at Watery Lane do not qualify as
7 existing houseboats because their slips were allocated to
8 Willamette Moorage (see footnote 3).

9 The city argues that its decision is controlled by its
10 acknowledged plan and land use regulations, not the Statewide
11 Planning Goals. The city argues its acknowledged code permits
12 houseboat moorages, as river-related uses, within the Greenway
13 setback without an exception to Goal 15. Furthermore, the city
14 argues that the code 33.77.040(9) definition of houseboat
15 moorages as river-related uses is not limited to existing
16 houseboats. According to the city, it may allow new houseboat
17 moorages within the setback through a conditional use procedure.

18 EEC agrees with the city and also argues that, even under
19 SHCA's interpretation of the code, no Goal 15 exception would
20 be required in this case because the Watery Lane moorages were
21 in existence at the time of acknowledgment of the city's plan
22 and land use regulations.

23 This assignment of error alleges a violation of Statewide
24 Planning Goal 15. After acknowledgment of a local government's
25 comprehensive plan and land use regulations by LCDC, the
26 criteria applicable to a land use decision, other than an

1 amendment to the acknowledged plan or regulations, are found in
2 the acknowledged plan and regulations, not in the Goals.
3 ORS 197.175(2)(c) and (d). Byrd v. Stringer, 295 Or 311, 313,
4 666 P2d 1332 (1983); Todd v. Jackson County, 14 Or LUBA 223,
5 237 (1986). After acknowledgment, we are not authorized to
6 reverse or remand land use decisions, other than amendments to
7 acknowledged plans or regulations, for failure to comply with
8 the Goals. ORS 197.835(2)-(6). Cf. Fujimoto v. LUBA, 52
9 Or App 875, 878, 630 P2d 364 (1981).

10 The city's plan and land use regulations were acknowledged
11 by LCDC. The appealed decision approves a conditional
12 use/Greenway permit for reestablishment of a preexisting use.
13 The Goals are not applicable to such a decision and, therefore,
14 this assignment of error does not assert a basis upon which we
15 can grant relief. City of Corvallis v. Benton County,
16 Or LUBA ____ (LUBA No. 87-115; March 21, 1988).

17 However, even if we interpret this assignment of error as
18 alleging a violation of code 33.77.150, we find no error in the
19 city's decision. Code 33.77.150 provides, in relevant part:

20 "(A) The siting of uses which are neither river
21 dependent nor river related within the Greenway
Setback shall require a Statewide Planning Goal 15
exception * * * "

22
23 The code definition of "river related use" states that
24 residences are not generally considered river related, but that
25 notwithstanding this, houseboat moorages may be allowed as
26 conditional uses.⁵ Code 33.77.040(9). The city interprets

1 code 33.77.040(9) and 33.77.150(A) together as allowing it to
2 approve houseboat moorages (whether preexisting or new) within
3 the Greenway setback, through the conditional use/Greenway
4 permit process, without adopting an exception to Goal 15.

5 We will defer to a local government's interpretation of its
6 own enactment, if that interpretation is reasonable. Alluis v.
7 Marion County, 64 Or App 478, 481, 668 P2d 1242 (1983). The
8 city's interpretation of its code provisions is reasonable, and
9 allows reestablishment of Watery Lane without an exception to
10 Goal 15.⁶

11 SHCA's second assignment of error is denied.

12 SHCA THIRD ASSIGNMENT OF ERROR

13 "The record does not contain substantial evidence that
14 the destruction of the moorage was due to causes
15 'beyond the control of the owner.'"

15 SHCA argues that the city's conclusion that the permit
16 complies with the code requirement that reestablishment of a
17 preexisting use be allowed only if destruction was due to
18 causes "beyond the control of the owner" is not supported by
19 substantial evidence. SHCA asserts that the city's decision is
20 based on four specified findings, three describing the
21 condition of the Watery Lane pilings and one the speed of a
22 tugboat passing Watery Lane when the breakage occurred. SHCA
23 attacks the evidentiary support for each of these findings.

24 The city responds that the specific findings challenged by
25 SHCA either are not relevant to the basis for the city's final
26 decision or are recitations of evidence, rather than findings

1 of fact. The city argues the findings show the city was
2 persuaded by eye witness testimony that a combination of a
3 high, swift river and a speeding tugboat led to the moorage
4 breaking away, and that this determination is supported by
5 substantial evidence. The city also argues that the condition
6 of the pilings at the moorage was "beyond the control of the
7 owner" in that the present owner acquired Watery Lane in the
8 same month that the disaster occurred, "after almost ten years
9 of neglect by previous owners". Respondent's Brief at 12.

10 EEC argues that each of the findings challenged by SHCA is
11 supported by substantial evidence. EEC also argues that the
12 challenged findings are not essential to supporting the city's
13 decision. According to EEC, the essential findings are
14 statements of testimony describing the tugboat incident, as the
15 city determined that the most credible evidence on the issue of
16 causation was the eyewitness testimony of a Mr. Elam. EEC
17 claims that SHCA wants LUBA to substitute its judgment for that
18 of the city council or to determine which side presented the
19 greater weight of evidence below, but that LUBA can only decide
20 whether the record contains substantial evidence to support the
21 city's decision.

22 We are authorized to reverse or remand the challenged order
23 if the city made a decision not supported by substantial
24 evidence in the whole record. ORS 197.835(8)(a)(C); Bonner v.
25 City of Portland, 11 Or LUBA 40, 52 (1984). SHCA alleges that
26 the city's determination that the Watery Lane moorage was

1 destroyed by a cause beyond the control of the owner⁷ is not
2 supported by substantial evidence in the record. However,
3 SHCA's argument is primarily directed towards demonstrating
4 that four particular statements in the city's findings are not
5 supported by substantial evidence.⁸

6 We agree with the city that the four statements
7 specifically challenged by SHCA are not actual findings of
8 fact, but rather are descriptions of evidence. See Hill v.
9 Union County Court, 42 Or App 883, 886-887, 601 P2d 905
10 (1979). Thus, no purpose would be served by specifically
11 determining whether each of these non-findings is supported by
12 substantial evidence in the record.⁹ However, our inquiry
13 does not stop at this point. Because SHCA has sufficiently
14 raised a substantial evidence challenge to the city's overall
15 conclusion on causation, we must determine whether the city's
16 decision that destruction of Watery Lane was due to "a cause
17 beyond the control of the owner" is supported by substantial
18 evidence in the record.

19 In its decision, the city explains that it believes the
20 cause of Watery Lane's destruction was a combination of
21 unusually high river flow and the exceptionally strong wake of
22 a passing tugboat, and that this cause was beyond the control
23 of the owner of the moorage.¹⁰ The city based its decision
24 primarily on the eyewitness testimony of a Mr. Elam, a resident
25 of Watery Lane. Elam testified that on the morning in question
26 he saw a heavy tugboat pass Watery Lane, creating a large wake,

1 heard the moorage pilings fracture and observed that the
2 pilings broke off toward the shore, rather than in the
3 direction of the river current. Elam also testified that the
4 extraordinary strength of the wake broke two truck inner tubes
5 that were fastened between his pleasure boat and his houseboat.

6 SHCA does not challenge the content or credibility of
7 Elam's testimony, or the city's conclusion that the occurrence
8 of the exceptionally strong tugboat wake was beyond the control
9 of the moorage owner. Rather, SHCA contends that the city
10 should have given greater weight to the testimony of engineer
11 Bruce Wong that the Watery Lane pilings were rotted through the
12 center, and that the moorage broke loose because of the
13 condition of the pilings. Record 107, 213-215, 241-249. SHCA
14 contends that the city should have drawn a different conclusion
15 from the evidence in the record - namely that the destruction
16 of Watery Lane was caused by rotten pilings.

17 Substantial evidence is evidence which a reasonable mind
18 could accept as adequate to support a conclusion. Braidwood v.
19 City of Portland, 24 Or App 477, 480, 546 P2d 777, rev den
20 (1976). See also, Christian Retreat Center v. Comm. for Wash.
21 Co., 28 Or App 673, 679, 560 P2d 1100, rev den (1977). We must
22 determine whether, in light of all the evidence in the record,
23 the city's conclusion is reasonable. Younger v. City of
24 Portland, ___ Or ___, ___ P2d ___ (March 29, 1988, p. 16).

25 The city chose to rely on the testimony of Elam, rather
26 than Wong, in reaching its conclusion as to the cause of the

1 destruction of the Watery Lane moorage. The city explained in
2 its decision that it found eyewitness testimony more credible
3 than testimony based on tests performed more than one year
4 after the incident. Record 323. Wong's testimony does not so
5 detract from the weight or undermine the credibility of the
6 evidence relied on by the city as to render it not
7 substantial. Cf. Universal Camera Corp. v. Labor Bd., 340 US
8 474, 488, 71 S Ct 456, 95 L Ed 456 (1951); Sane Orderly
9 Development v. Douglas County Bd of Comm'rs, 2 Or LUBA 196, 206
10 (1981).

11 Based on the evidence in the whole record, we find that the
12 city's conclusion that the combination of the high river flow
13 and exceptionally strong tugboat wake was the cause of the
14 Watery Lane pilings breaking is reasonable.

15 SHCA's third assignment of error is denied.

16 EEC ASSIGNMENT OF ERROR

17 "The August 17, 1987 City Council decision to impose a
18 condition limiting the applicant to the replacement of
19 no more than six two-story houseboats at Watery Lane
20 is invalid."

19 A. Code 33.32.135(c)(3)

20 "The City misinterpreted its preexisting use
21 standards in PCC 33.32.135 et seq. to impose a
22 height condition on petitioner's Minor Greenway
Permit Approval."

23 EEC contends code 33.32.135(c)(3) (see footnote 7) must be
24 interpreted to allow reconstruction of a preexisting use¹¹ to
25 be limited with regard to height only by the current height
26 limitation for the zoning district which applied to the use on

1 December 31, 1980. In other words, EEC argues that, unlike
2 code provisions regarding reestablishment of a nonconforming
3 use, which limit reconstruction to what previously existed, the
4 code provision regarding reestablishment of a preexisting use
5 allows changes from what previously existed, so long as (1) the
6 change was allowable on December 31, 1980; and (2) the
7 specified current standards for height, floor area ratio,
8 setbacks and parking (for the zoning district applicable when
9 the use became preexisting) are met. According to EEC, this
10 interpretation is consistent with a code preexisting use
11 purpose statement that the preexisting use regulations are
12 intended to be less restrictive than the code's nonconforming
13 use regulations.¹²

14 EEC argues that prior to becoming a preexisting use, on
15 January 1, 1981, Watery lane complied with all zoning
16 regulations. EEC contends that because the permits issued for
17 Watery Lane at that time placed no restriction on the height of
18 houseboats at the moorage, all houseboats at the moorage were
19 entitled to have two stories,¹³ so long as the 45 foot height
20 limitation in effect at the time for the C2 zone was met.
21 Therefore, according to EEC, the city cannot limit the
22 reestablishment of Watery Lane with regard to the height of the
23 houseboats at the moorage, other than to require compliance
24 with the current code 33.42.090 45 foot height limitation for
25 the C2 zone.

26 The city replies that the preexisting use provisions of its

1 code do not supersede the code's Willamette River Greenway
2 regulations. Under the Greenway regulations, any development,
3 change or intensification of use requires approval through the
4 Greenway review process. Code 33.77.030. According to the
5 city, to allow all 25 houseboats at the reestablished Watery
6 Lane to be two-story, when only six were two-story previously,
7 would be an intensification of use as defined in code
8 33.77.040(7). The city argues that EEC's proposed
9 reestablishment of Watery Lane is therefore subject to the
10 Greenway review process of the WSD overlay zone. Code
11 33.77.092. The city also asserts code 33.215.170(D)(3)
12 authorizes it to impose conditions on Greenway permit approvals
13 to carry out the policies of a city plan or code provision.

14 The city interprets its preexisting use and Greenway code
15 provisions together. Under the city's interpretation, in an
16 area subject to the WSD overlay zone, reestablishment of a
17 preexisting use including a change or intensification of the
18 use,¹⁴ requires compliance both with the current height,
19 floor area ratio, setback and parking requirements for the
20 zoning district applied to the site on December 31, 1980, and
21 with the current WSD approval standards for changes and
22 intensifications of use.

23 EEC has not identified any code provision which
24 specifically provides that the preexisting use provisions
25 supersede the Greenway provisions. EEC has not demonstrated
26 that the code generally gives the owner of a preexisting use a

1 right to change that use from what actually existed on
2 December 31, 1980 to any use which could have legally existed
3 on December 31, 1980,¹⁵ except as specifically limited by the
4 preexisting use regulations. In fact, such an interpretation
5 would conflict with the code preexisting use purpose statement
6 that the preexisting use regulations provide the "affected uses
7 some of the rights of their previous zoning."¹⁶ (emphasis
8 added) Code 33.32.135(a).

9 Furthermore, the city's interpretation does not make the
10 code provisions for reestablishment of a preexisting use more
11 restrictive than those governing reestablishment of a
12 nonconforming use.¹⁷ Except in limited circumstances
13 inapplicable here, a nonconforming structure damaged by causes
14 beyond the control of the owner cannot be rebuilt at all if the
15 cost exceeds 75% of the cost of replacing the entire
16 structure. Code 33.94.020(c). Reestablishment of a
17 nonconforming use after a lesser degree of damage would be
18 limited to replacement of what previously existed. Record 80S.

19 The city's interpretation of its code is reasonable and
20 will be upheld. See Alluis v. Marion County, supra. Thus, we
21 agree with the city that it has the authority to impose a
22 condition restricting houseboat height if the condition is
23 required to carry out the policies of a plan or code provision,
24 pursuant to code 33.215.170(D)(3). Whether the height
25 limitation imposed satisfies this code requirement is addressed
26 under subassignments B. and C. below.

1 This subassignment of error is denied.

2 B. Code 33.77.142(A)(4)

3 "The City cannot justify the height limitation it
4 has imposed on Watery Lane through application of
the Greenway Trail provisions in PCC 33.77.142(4)."

5 EEC argues the Greenway permit approval criterion that a
6 structure below the ordinary high water line "not substantially
7 interfere with views of the river from the trail" (code
8 33.77.142(A)(4)) does not authorize the city's imposition of
9 the six two-story houseboat limitation. EEC contends the city
10 found that two-story houseboats at Watery Lane comply with this
11 standard. EEC argues the city is bound by its interpretation
12 of the "substantial interference" test, in approving Willamette
13 Moorage, that two-story houseboats do not "substantially
14 interfere" with views of the river from the trail.

15 The city argues it found that two-story houseboats at
16 Watery Lane would meet the "substantial interference" test
17 based upon consideration of the proposed use as limited to six
18 two-story houseboats. The city and SHCA contend there are
19 significant factual differences between the Willamette Moorage
20 and Watery Lane situations with regard to location and setting
21 of the Greenway trail.

22 Code 33.77.142(a)(4) provides the following criterion for
23 approval for structures below ordinary high water line:

24 "The Willamette Greenway Trail is provided as required
25 in the Greenway Plan and this Chapter, and the
proposed structure does not substantially interfere
with views of the river from the Trail."

26

1 We agree with the city and SHCA. The city's conclusion
2 that the reestablishment of Watery Lane will meet this
3 criterion, and its supporting findings, are based on the
4 premise that the number of two-story houseboats at Watery Lane
5 will be limited to six. There are numerous references in
6 findings addressing other Greenway permit approval criteria to
7 this six two-story houseboat limitation. See, e.g., Record
8 328-332. The references in the findings under this criterion
9 to "two-story houseboats" and "approved houseboats" at Watery
10 Lane can reasonably be understood to refer to the maximum of
11 six two-story houseboats approved under the city's condition.
12 Record 334-336.

13 The city's conclusion states as follows:

14 " * * * We note that this particular application is
15 conditioned to a maximum of six two-story houseboats,
16 in contrast with Willamette Moorage's approval for all
17 two-story houseboats. Accordingly, we conclude that
18 river views from the Greenway trail behind Watery Lane
19 would not be substantially interfered with by
20 approving two-story houseboats. Watery Lane will
21 maintain a lower profile on the River than does the
22 Willamette Moorage, thereby increasing visibility from
23 the east bank Greenway trail." Record 336.

24 The above statements can reasonably be interpreted to base
25 the conclusion of compliance with the "substantial
26 interference" criterion on the premise that there will be no
27 more than six two-story houseboats at Watery Lane. From that,
28 it can be inferred that the city imposed the condition, at
29 least in part, to ensure compliance with this code
30 criterion.¹⁸ It was not necessary for the city to

1 specifically state in its findings that the presence of 25
2 two-story houseboats at Watery Lane would violate the criterion.

3 This subassignment of error is denied.

4 C. ORS 227.173

5 "The City's height condition for the rebuilding
6 of a preexisting use is not based on applicable
7 standards or criteria in the respondents [sic]
land use regulations, and therefore violates
ORS 227.173."

8 EEC argues that the city's imposition of the six two-story
9 houseboat limitation violates statutory requirements that its
10 approval of a discretionary permit be based (1) on standards
11 and criteria set forth in the development ordinance; and (2) on
12 a statement explaining the justification for its decision based
13 on such standards and criteria. ORS 227.173(1) and (2).
14 According to EEC, the only justification for the height
15 limitation stated in the city's decision is that of "insuring
16 the moorage will be well within the [45-foot] height limit
17 established by the C2 zone." Record 325. EEC claims the
18 limitation in effect arbitrarily imposes additional height
19 restrictions in the C2 zone, since there are no criteria in the
20 code on which the city could base such a condition.

21 The city and SHCA argue that the city's height condition
22 was based upon the WSD zone Greenway permit approval criteria
23 of code 33.77.092(A)(3), (4) and (6), the Greenway permit
24 approval requirements for structures below ordinary high water
25 of code 33.77.142(A)(4) and the city's authority to impose
26 conditions under ORS 227.175(4) and code 33.215.170(D).

1 Respondents argue that the city's findings adequately identify
2 the criteria applied and explain the basis for imposition of
3 the condition.

4 We determined under subassignment A. above that the city
5 could interpret its code provisions as requiring that the
6 reestablishment of Watery Lane with a change to a possible 25
7 two-story houseboats be subject to Greenway permit review. We
8 also determined that under code 33.215.170(D) the city is
9 authorized to impose conditions on the approval of the
10 reestablishment when necessary to carry out the policy of a
11 plan or code provision.¹⁹ Under subassignment B. above, we
12 found that the imposition of the six two-story houseboat
13 limitation was authorized by code 33.77.142(a)(4), and that the
14 city's findings adequately set forth a basis for imposition of
15 the condition under this criterion.

16 This analysis is a sufficient basis for us to conclude that
17 the requirements of ORS 227.173(1) and (2) have been met. The
18 condition is based on standards in the code and is based on and
19 accompanied by an adequate statement of the standards, facts
20 and reasons.²⁰ We therefore deny this subassignment of
21 error. However, on the chance that our conclusion with regard
22 to imposition of the condition under code 33.77.142(a)(4) is in
23 error, we will also determine whether the condition was
24 properly imposed to carry out the other Greenway review
25 provisions cited by the city.

26 The code 33.77.092(A) criteria for approval of a change or

1 intensification of use in the WSD overlay zone include the
2 following:

3 "(3) The scale of the project, density of
4 development, and/or intensity of use are in keeping
5 with the character of the river, and preserve or
6 enhance the scenic qualities of the river, the site,
7 and adjacent riparian lands.

8 "(4) Architectural scale, style, building materials,
9 and finishes are in keeping with the character of the
10 Willamette River. * * *

* * * * *

11 "(6) The proposed development does not conflict with
12 existing adjoining developments, land uses, and
13 Greenway zones."

14 The findings addressing these criteria clearly indicate
15 that the city's determination of compliance was based on there
16 not being more than six two-story houseboats at the
17 reestablished Watery Lane. For instance, the findings under
18 (3) state that "the scale, density and intensity of this
19 moorage use will remain essentially unchanged" because there
20 will only be a limited number of two-story houseboats. Record
21 328. They also state that the 1-2 story scale and continuation
22 of essentially the same number of houseboats as existed
23 previously is compatible with the mixed use character of the
24 river in this area. Record 329.

25 In addition, the findings under (4) note that most of the
26 houseboats will be one-story, and conclude that this scale is
consistent with other floating structures on the river and
should provide visual interest and enhance the style of the
riverfront in this vicinity. Record 331. The findings under

1 (6) note that the reestablished Watery Lane will be
2 approximately equal in size to the previous Watery Lane, and
3 for that reason (and reasons discussed under (3) and (4)) will
4 not conflict with adjacent uses and developments. Record 332.

5 We conclude that the city imposed the six two-story
6 houseboat limitation in part to carry out the requirements of
7 code 33.77.092(A)(3), (4) and (6), an action authorized by
8 ORS 227.175(4) and code 33.215.170(D). The city's findings
9 comply with ORS 227.173(1) and (2) by identifying these code
10 criteria and adequately setting out the facts and reasons on
11 which its decision was based.

12 This subassignment of error is denied.

13 D. Substantial Evidence

14 "The decision by the City of Portland to impose a
15 height restriction limiting the number of
16 two-story houseboats to six, is not supported by
substantial evidence in the whole record."

17 EEC argues the city's decision to impose the six two-story
18 houseboat limitation is not supported by substantial evidence
19 in the record. EEC argues that, even if there are applicable
20 standards to support imposition of the condition, the condition
21 must be "reasonable," i.e. must further a planning policy or
22 goal and arise out of evidence in the record. EEC states the
23 evidence must enable a reasonable person to conclude that there
24 is a need for the condition, citing Benjamin Franklin Dev. v.
25 Clackamas County, 14 Or LUBA 758, 761 (1986). EEC argues that
26 the evidence in the record does not support a conclusion that

1 the "insurance" of the six two-story houseboat limitation is
2 needed to prevent violations of the C2 zone 45-foot limitation.

3 The city and SHCA argue that the height limitation furthers
4 the city's planning policies or goals of preserving the views
5 from the Greenway trail and ensuring that the scale and density
6 of the project is in keeping with the character of the river.
7 Respondents cite us to testimony and photographs in the record.

8 We determined under subassignments B. and C. above that the
9 height limitation carries out the purposes of code
10 33.77.142(a)(4) with regard to preventing substantial
11 interference with the view of the river from the Greenway trail
12 and of code 33.77.092(A)(3), (4) and (6) with regard to
13 insuring compatibility of the scale and intensity of the use
14 with the character of the river, the scenic qualities of the
15 site and existing adjoining uses. Therefore, what remains to
16 be determined under this subassignment is whether there is
17 evidence in the record which would lead a reasonable person to
18 conclude that the evidence supports a need for the condition to
19 further these purposes.²¹ Benjamin Franklin Dev. v.
20 Clackamas County, supra.

21 With regard to impacts of two-story houseboats on views of
22 the river from the Greenway trail, the city and SHCA cite us to
23 testimony by a local resident and Friends of the Greenway that
24 such views would be blocked by two-story houseboats at higher
25 water levels, and testimony by SHCA that two-story houseboats
26 block such views, unless the houseboats are immediately beneath

1 the Sellwood Bridge. Record 79, 228, 261. This is evidence
2 which would allow a reasonable person to conclude that a
3 limitation on the number of two-story houseboats at Watery lane
4 is necessary to prevent substantial interference with the view
5 of the river from the trail.

6 With regard to compatibility of the scale and intensity of
7 the proposed use, the city and SHCA direct us to photographs in
8 the record of the Watery Lane site and the adjacent river,
9 trail and uplands. Record 438-445. We agree with the city
10 that these photographs enable a decisionmaker to make
11 determinations on the character of the river, the scenic
12 qualities of the site, the scale of adjacent uses and the
13 compatibility of one and two-story houseboats with these
14 factors. A reasonable person could conclude, on the basis of
15 these photographs, that a limitation on the number of two-story
16 houseboats at Watery Lane is needed to ensure compatibility of
17 the proposed use with the character and scenic quality of the
18 river.

19 We conclude that the evidence in the record supports the
20 city's imposition of a six two-story houseboat limitation to
21 carry out the purposes of code 33.77.092(A)(3), (4) and (6) and
22 33.77.092(a)(4). This subassignment of error is denied.

23 EEC's assignment of error is denied

24 The city's decision is affirmed.

FOOTNOTES

¹ The Lower Willamette River Study Area (Study Area) includes both the bed and banks of the Lower Willamette River from the Sellwood Bridge downstream to its confluence with the Columbia River and adjacent upland areas to the first natural barrier, freeway or major arterial. LWRMP at 9.

² The LWRMP covers the Study Area described in footnote 1 above. The LWRMP notes that the upland areas included in the Study Area are not within the jurisdiction of the state permit process governing alterations to the river, but states that "recommendations" to local governments for beneficial uses on uplands are included in the LWRMP because their impact on river use is substantial. Id.

³ Petitioner SHCA, although not contending that the Watery Lane moorages were not in existence when the LWRMP was adopted, nonetheless argues that houseboats at a reestablished Watery Lane will constitute "additional" houseboats within the Study Area because of a complicated series of events which took place after the owner who acquired Watery Lane in 1977 initiated proceedings to evict Watery Lane tenants.

At that time a new houseboat moorage on the east bank of the river, north of Watery Lane, was proposed. This proposal concerned the city because it owned property next to this section of shoreline which it wanted to develop into a riverfront park. The city also owned property directly across the river from the hoped for park and had as lessees two dilapidated houseboat moorages containing 13 houseboats.

An agreement was reached whereby the developer proposing the new houseboat moorage would give the city the shoreline property on the east side of the river, so the city could develop its park, and the city would lease its property on the west bank of the river to the developer and would allow the developer to build a 37 houseboat moorage site (Willamette Moorage), sufficient to accommodate the houseboats at the three existing moorages (including Watery Lane). The lease would require the developer to give a right of first refusal to the houseboat owners in the three existing moorages when Willamette Moorage was developed.

In 1984, the Willamette Moorage developer applied to the

State Land Board for authorization to construct its
houseboat moorage site. State Land Board authorization was
necessary because the project did not comply with the LWRMP
policy against "additional" houseboats in the Study Area and
because LWRMP Zone 23 (where Willamette Moorage is located)
does not identify houseboats as a permitted use.

On February 23, 1984, the State Land Board authorized the
Willamette Moorage project. Its order discusses consequences
of the proposed project, depending on whether or not there will
be a permanent reduction in houseboats at the Watery Lane site,
and orders the Division "not [to] lease the area of Watery Lane
for houseboat moorage after this date." Record 303, 305.

Petitioner SHCA argues that the State Land Board decision
had the effect of allocating Watery Lane's existing houseboat
slips (either all 25 or at least those within the Study Area)
to Willamette Moorage and, therefore, reestablishment of Watery
Lane will allow "additional" houseboats within the Study Area.
We, however, view the State Land Board's 1984 order
differently. The order authorized 24 "additional" houseboats
(the 37 it permitted minus the 13 which already existed) at the
Willamette Moorage site. (We note that this approval was not a
violation of the LWRMP, because the LWRMP gives the State Land
Board authority to authorize projects which are not consistent
with the LWRMP.) The order did not alter the status of the
existing Watery Lane moorage, it merely expressed an intent not
to renew Watery Lane's lease of the underlying submerged land,
which expires in 1995.

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To constitute an equitable estoppel, or estoppel by
conduct, (1) there must be a false representation; (2)
it must be made with knowledge of the facts; (3) the
other party must have been ignorant of the truth; (4)
it must have been made with the intention that it
should be acted upon by the other parties; (5) the
other party must have been induced to act upon it."
Earles v. Clarke, 223 Or 527, 355 P2d 213 (1960).

5
The code 33.77.040(9) definition of "river related use"
provides:

"(9) "River related use" means a use which is not
directly dependent upon access to a water body and
which provides goods or services which are directly
associated with water dependent land or waterway use,
and which, if not located adjacent to water, would

1 result in a public loss of quality in the goods or
2 services offered. Except as necessary for water
3 dependent or related water [sic] uses or facilities,
4 residences, parking lots, spoil and dump sites, roads
5 and highways, restaurants, factories, and trailer
6 parks are not generally considered dependent or
7 related to water location needs. Notwithstanding the
8 definition of residences as non-river related uses,
9 houseboat moorages, because of their historic role on
10 the Willamette, may be allowed as conditional uses."

11 With the exception of its last sentence, the above-quoted
12 definition parallels the definition of "water-related" found in
13 the Statewide Planning Goals. However, as we have already
14 explained, it is the code definition which is applicable to the
15 challenged city decision, not the definition in the Goals.

16
17 We also note that even under SHCA's interpretation of the
18 code river-related definition, as including only existing
19 houseboat moorages, no Goal 15 exception would be required in
20 this case because the Watery Lane moorages were in existence at
21 the time of acknowledgment of the city's plan and land use
22 regulations. They have not lost their preexisting use status
23 so long as the city approves their reestablishment pursuant to
24 the provisions of code 33.32.135(c)(3) for reestablishment of
25 preexisting uses. Contrary to SHCA's argument, the status of
26 the Watery Lane moorages was not altered by the approval of the
37 houseboat Willamette Moorage (see footnote 3, supra).

7
Code 33.32.135(c)(3), which governs the reestablishment of
preexisting uses, provides:

"Damage by Fire. Any structure containing a
pre-existing use damaged or destroyed by fire or other
cause beyond the control of the owner may be
reconstructed in accordance with the floor area ratio,
yard, height and parking regulations currently in
effect for the zoning category in place on
December 31, 1980."

8
The statements specifically challenged by SHCA are:

"Other witnesses testified that Watery Lane was in
better condition than over one-half of the moorages in
the Portland area." Record 322.

1 "Even Mr. Wong testified that the pilings were in the
2 same condition as most pilings in the Portland area."
3 Id.

4 "Mr. Burtchaell, the applicant, testified that the
5 speed of the water across the bow of the tugboat was
6 approximately 18 miles per hour and that the tugboat
7 was going very fast into the current, thus creating an
8 unusually large wake." Record 323.

9 " * * the opponents' expert and others found that
10 the Watery Lane pilings were in similar condition to
11 others along the river that did not break." Id.

12 We note that SHCA did not challenge the adequacy of the
13 city's findings on the causation issue.

14 In its findings the city explains its conclusion as follows:

15 "From the evidence presented, we conclude that the
16 eyewitness testimony is more credible than the
17 Association's report which is based on clinical
18 observations made more than one year after the
19 accident. The wake explanation is also the most
20 plausible in light of the fact that the opponents'
21 expert and others found that the Watery Lane pilings
22 were in similar condition to others along the river
23 that did not break. The extraordinary impact of the
24 wake on the Watery Lane moorage would explain why
25 other pilings in similar condition survived the high
26 water while the Watery Lane pilings did not.

27 "This Council believes that the most plausible
28 explanation for Watery Lane's damage was the speed and
29 passage of the tugboat during unusually high water --
30 a cause beyond the control of the owner. Accordingly,
31 we conclude that this condition precedent to
32 reconstruction of a preexisting use is satisfied."
33 Record 323.

34 11 Under the code, a "preexisting use" is a type of
35 nonconforming use. Preexisting uses are uses which were in
36 compliance with applicable city regulations on December 31,
37 1980, but became nonconforming on January 1, 1981 when the
38 city's comprehensive plan and corresponding zone changes were

1 adopted. When a use is a preexisting use, the city applies the
2 preexisting use provisions of its code, not the nonconforming
3 use provisions. Record 311-312.

4 Code 33.32.135(a) provides in relevant part:

5 " * * * The pre-existing use regulations are a means
6 to provide these affected uses some of the rights of
7 their previous zoning, while making new uses subject
8 to the current Zoning Code and map. The regulations
9 provide flexibility for expansion and continued
10 operation of the pre-existing use. They are intended
11 to generally be less restrictive than the
12 non-conforming use regulations of Chapter 33.94."

13 We note, however, that EEC does not claim that there were
14 more two-story houseboats at Watery Lane on January 1, 1981
15 than the six which the city found to have existed on that date
16 and to which the city limited the reestablished Watery Lane by
17 condition. Record 5, 328.

18 We agree with the city that reestablishment of Watery Lane
19 with a change from the previously existing six two-story
20 houseboats to an allowable 25 two-story houseboats constitutes
21 an "intensification" as defined by code 33.77.040(7) and
22 therefore requires Greenway review under code 33.77.092. Code
23 33.77.040(7) provides, in relevant part:

24 "Intensification" means any additions which increase
25 or expand the area or amount of an existing use, or
26 the level of activity. Remodeling of the exterior of
a structure is an intensification when it will
substantially alter the appearance of the
structure. * * *

27 A change of up to 19 houseboats from one-story to two-story
28 would constitute an addition which expands the area or amount
29 of the preexisting use. It would also constitute a
30 substantial alteration to the appearance of the Watery Lane
31 moorage.

32 In any case, we do not agree with EEC that Watery Lane was
33 legally entitled to contain 26 two-story houseboats on

December 31, 1980. The WSD overlay zone was applied to Watery Lane in 1979. On December 31, 1980, approval of a change or intensification of use in the WSD zone was subject to Greenway review. The code provision defining "intensification" was identical on December 31, 1980 and on the date of the appealed decision. If a change from six to 25 two-story houseboats constituted an intensification requiring Greenway review on August 17, 1987 (see footnote 14), it also constituted an intensification of use requiring Greenway review on December 31, 1980. Thus, even under EEC's own interpretation of code 33.32.135(c)(3), it is not entitled to the proposed change to its preexisting use without Greenway review, as that change would not have been allowable without Greenway review on December 31, 1980.

16 This purpose is carried out in the code by allowing (1) changes in use to equal or more restrictive uses which could have been permitted on December 31, 1980 through a conditional use process; (2) floor area expansions which comply with restrictions currently in effect for the zoning district applied on December 31, 1980; and (3) site expansion of up to 100% where the expansion would have been allowed under the zoning in place on December 31, 1980. See code 33.32.135(c)(1), (4) and (5). We note, in contrast, in residential zones changes in nonconforming uses require variances and, except in limited circumstances requiring a variance, enlargements of nonconforming uses are not allowed unless the use is brought into conformity with all requirements of the current zoning.

17 Even if there were some circumstance in which the city's interpretation would make its preexisting use regulations more restrictive than its nonconforming use regulations, as applied to a particular use, that would not make the city's interpretation unreasonable. Code 33.32.135(a) only states that the preexisting use regulations "are intended to generally be less restrictive" (emphasis added). This statement does not preclude there being circumstances in which the preexisting use regulations are not less restrictive.

18 Furthermore, the city was not precluded from finding that the six two-story houseboat limitation was required to ensure compliance with the "substantial interference" criterion by its previous approval of Willamette Moorage for all two-story houseboats. Although the findings state that the elevation of the Greenway trail is the same at both locations, and that the

1 city will consider its application of the criterion to the
2 approval of Willamette Moorage (Record 335-336), the findings
3 do not state that the situations at the two moorages are in all
4 respects identical. Respondents cite to evidence in the record
5 that the location, nature and surroundings of the Greenway
6 trails at the two moorages are dissimilar. Record 26-27, 96.

19

5 As noted by the city, the imposition of conditions in these
6 circumstances is authorized by ORS 227.175(4), which provides:

7 "The application shall not be approved unless the
8 proposed development of land would be in compliance
9 with the comprehensive plan for the city. The
10 approval may include such conditions as are authorized
11 by ORS 227.215 or any city legislation."

20

10 ORS 227.173 (1) and (2) provide:

12 "(1) Approval or denial of a discretionary permit
13 application shall be based on standards and criteria,
14 which shall be set forth in the development ordinance
15 and which shall relate approval or denial of a
16 discretionary permit application to the development
17 ordinance and to the comprehensive plan for the area
18 in which the development would occur and to the
19 development ordinance and comprehensive plan for the
20 city as a whole.

17 "(2) Approval or denial of a permit application shall
18 be based upon and accompanied by a brief statement
19 that explains the criteria and standards considered
20 relevant to the decision, states the facts relied upon
21 in rendering the decision and explains the
22 justification for the decision based on the criteria,
23 standards and facts set forth."

21

21 Respondents do not claim, and we have not found, that the
22 height limitation carries out the purposes of the C2 zone's 45
23 foot limit. Therefore, we need not determine whether the
24 evidence in the record would support imposition of the height
25 limitation for such purpose.