

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS Dec 23 3 14 PM '88

OF THE STATE OF OREGON

MULTNOMAH COUNTY,

Petitioner,

vs.

CITY OF FAIRVIEW,

Respondent,

and

DON TOOMBS TRUCKING, INC.,

Intervenor-Respondent.)

LUBA Nos. 88-035

and 88-076

FINAL OPINION
AND ORDER

Appeal from City of Fairview.

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

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

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

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

REMANDED - 88-035; AFFIRMED - 88-076

12/23/88

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

1 NATURE OF THE DECISION

2 In this consolidated appeal proceeding petitioner
3 challenges two decisions adopted by the city affecting property
4 owned by intervenor-respondent Don Toombs Trucking, Inc.
5 Petitioner challenges a conditional use permit for an aggregate
6 barge unloading, stockpiling and truck shipping facility on the
7 Columbia River. Petitioner also challenges the city's
8 subsequent decision to change the zoning designation for the
9 property from Urban Future (UF-20) to Heavy Manufacturing
10 (Columbia River) (M-1(CR)).

11 MOTION TO INTERVENE

12 Don Toombs Trucking, Inc., the applicant for the
13 conditional use permit, moves to intervene as a respondent in
14 this consolidated proceeding. No party objects. The motion to
15 intervene is allowed.

16 FACTS

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

21 Intervenor's property currently is used to store trucked-in
22 dredged river sand and aggregate material. The sand is trucked
23 out in dump trucks which average 10 cubic yards of capacity.
24 The trucks sometimes tow trailers which have a capacity of
25 eight cubic yards. Approximately 200 cubic yards of aggregate
26 is stored on site and about one-half of the 2.18 acres is used

1 to stockpile sand.

2 The use intervenor proposes calls for installation of a
3 barge moorage and a receiving hopper. Barges will be delivered
4 once or twice a week. The barges will carry 1600 cubic yards
5 of material and will take three to four hours to unload using a
6 self-contained conveyor. A shoreside conveyor will move the
7 material from the unloading hopper to the storage area on
8 site. The material will then be loaded onto trucks for
9 delivery off-site, in the same manner as under the current
10 operation.

11 At the time of the city's approval of the conditional use
12 permit, intervenor's property had been annexed by the city but
13 was still subject to the county's plan and zoning ordinance,
14 because the city had not applied its own plan and zoning
15 ordinance to the property. ORS 215.130(2).¹ Accordingly,
16 the city applied the county's plan and zoning ordinance in
17 granting the conditional use permit. In LUBA No. 88-035,
18 petitioner challenges the city's decision to grant the
19 conditional use permit.

20 After the city approved the conditional use permit and
21 after petitioner's appeal of that decision to LUBA, the city
22 changed the zoning designation for the property from the
23 county's UF-20 designation to the city's M-1(CR) designation.
24 Petitioner appeals that decision in LUBA No. 88-076.

25 The first through the third assignments of error challenge
26 the city's approval of the conditional use permit in LUBA No.

1 88-035. Assignments of error four through seven challenge the
2 city's decision to change the zoning designation of the
3 property in LUBA No. 88-076.²

4 FIRST ASSIGNMENT OF ERROR

5 "The proposed use of the property is neither a
6 permitted nor a conditional use authorized in the
UF-20 Zone."

7 SECOND ASSIGNMENT OF ERROR

8 "Fairview's findings did not address applicable
9 criteria."

10 We have a great deal of difficulty reconciling the approach
11 apparently taken by the city in Resolution 6-1988 approving the
12 conditional use permit with the Multnomah County Code (MCC)
13 provisions that apparently control that decision. We also have
14 difficulty reconciling what the city did with the various
15 arguments presented by the parties in their briefs. We begin
16 with a review of the relevant code provisions before discussing
17 the city's decision and the arguments of the parties.

18 A. Relevant Code Provisions

19 All parties agree the county's UF-20 zone applied to
20 intervenor's property at the time the conditional use permit
21 was issued. The UF-20 zone specifies "primary uses," "uses
22 permitted under prescribed conditions" and "conditional uses."
23 MCC .2383-.2392.³ Only the conditional use provisions are
24 important in this appeal, and they provide in pertinent part:

25 / / /

26 / / /

1 "Conditional Uses

2 "The following uses may be permitted when found by the
3 Hearings Officer to satisfy the applicable ordinance
4 standards:

5 "* * * * *

6 "(B) The following conditional uses, under the
7 provisions of MCC .7105-.7640:

8 "(1) Operations conducted for * * * mining and
9 processing of aggregate and other mineral or
10 subsurface resources;

11 "* * * * *

12 "(C) Other conditional uses as listed in
13 MCC .7105-.7640.

14 "* * * * *." MCC .2390.

15 Both MCC .2390(B) and MCC .2390(C) reference
16 MCC .7105-.7640. In the case of MCC .2390(B)(1), "mining and
17 processing of aggregate and other mineral or subsurface
18 resources," this cross-reference has two effects. First,
19 because no approval criteria are specified in the UF-20
20 district for such uses, the general "conditional use approval
21 criteria" in MCC .7120 apply.⁴ Second, MCC .7305-.7335
22 impose additional approval standards for "mineral
23 extraction."⁵

24 The reference in MCC .2390(C) to "other conditional uses as
25 listed in MCC .7105-.7640" is significant because "preexisting
26 uses" are included as conditional uses under MCC .7605. Under
27 the code, preexisting uses are "distinguishable from those
28 nonconforming uses * * * which predate any county land use
29 plans or regulations, since the former were established in

1 conformity with the adopted pattern, plans and ordinances, and
2 the latter were not." MCC .7605(E). In other words,
3 "preexisting uses" are a special category of nonconforming
4 uses, and are treated differently under the code.

5 The parties apparently do not dispute that intervenor's
6 current use is properly viewed as a preexisting use.⁶
7 Depending on whether the action proposed by intervenor is an
8 "expansion or enlargement" or a "change to a listed use," one
9 of the following code sections applies.⁷

10 "Expansion or Enlargement"

11 "Except as provided in MCC .7630, expansion, change in
12 construction or enlargement of a use described in
13 MCC .7610 shall be permitted but shall be limited to
the lot of record legally occupied by the use on
July 26, 1979." MCC .7615.

14 "Change to a Listed Use"

15 "A change of a use described in MCC .7610 to a use
16 listed in the district as a primary use, use permitted
17 under prescribed conditions or a conditional use shall
be subject to the procedural requirements for
approval, if any, and the locational criteria and the
development standards which are applicable to the
proposed use." MCC .7625.

19 If intervenor simply proposes an expansion or enlargement
20 of a preexisting use, no additional conditional use standards
21 are imposed by MCC .7615; and only the general conditional use
22 standards in MCC .7120, quoted supra at n 4, will apply.

23 However, if, as the county argues in the alternative, the
24 conditional use permit approves a change of a preexisting use
25 to a listed use (i.e., mining and processing of aggregate and
26 other mineral or subsurface resources as listed in MCC

1 .2390(B)(1)), the mineral extraction provisions in
2 MCC .7305-.7335 would apply as well.

3 B. Resolution 6-1988

4 As we noted earlier, the city's resolution does not explain
5 how it applied the above MCC provisions. The closest the
6 resolution comes to explaining the city's view of the
7 applicable code provisions is the following finding:

8 "(10) Multnomah County zoning regulations require that
9 an expansion of current use which would not conform
10 more nearly to the UF-20 zone does require a specific
conditional use permit."8 Record 20.

11 We are not sure what this finding means. The city's
12 finding is followed by additional findings that appear to be
13 adopted to address the applicable general conditional use
14 criteria in MCC .7120. The record also includes a page from
15 the MCC setting forth the requirements for nonconforming uses
16 in MCC .8805. MCC .8805(A) provides:

17 "A nonconforming structure or use may not be changed
18 or altered in any manner except as provided herein,
19 unless such change or alteration more nearly conforms
with the regulations of the district in which it is
located." Record 108.

20 At the bottom of the page is a handwritten note which
21 states as follows:

22 "An 'expansion' of the use would not conform more
23 nearly to the UF-20 zone and would require a
conditional use approval." Record 108.

24 We have no idea who wrote this note. More importantly, no
25 party has cited any MCC provision, and we are aware of none,
26 that would allow, as a conditional use, an expansion of a

1 nonconforming use that does not "more nearly conform with the
2 regulations of the district in which it is located," as
3 MCC .8805 requires. We therefore will not assume that the city
4 granted the conditional use permit as an expansion of a
5 nonconforming use.

6 The county at oral argument suggested the city approved a
7 "change to a listed use" under MCC .7625 rather than an
8 "expansion" of a preexisting use under MCC .7615. However, as
9 noted below, the county also takes the position the use cannot
10 be considered a listed use because the only potentially
11 applicable listed use, "mining and processing of aggregate and
12 other mineral or subsurface resources," requires that there be
13 extraction on-site.

14 In our view, the city approved an "expansion" of on-site
15 facilities to accommodate delivery of sand and gravel by barges
16 in addition to deliveries by trucks. MCC .7615. Although the
17 mode of delivery and some of the impacts of the use will
18 change, we believe the city's decision is correctly
19 characterized as an expansion rather than a change. Approval
20 of such an expansion requires conformance with the general
21 conditional use standards in MCC .7120, as explained supra. We
22 address whether the city adequately demonstrated compliance
23 with the code provisions applicable to an expansion of a
24 preexisting use in our discussion under petitioner's third
25 assignment of error, infra.

26 / / /

1 C. Petitioner's First Two Assignments of Error

2 In its first assignment of error, petitioner argues that
3 the county improperly approved the conditional use permit
4 because the intervenor's existing operation and the operation
5 as proposed, extract no minerals. Rather, all minerals are
6 extracted elsewhere and delivered to the site for processing
7 and retransport. In its second assignment of error, petitioner
8 points to the additional approval criteria imposed on mineral
9 extraction sites under MCC .7305-.7335, noted supra.

10 Petitioner argues even if the proposed use properly were viewed
11 as a mineral extraction site, the city adopted no findings
12 demonstrating compliance with these criteria.

13 Intervenor suggests it might be possible to consider the
14 proposed use as "mining and processing of aggregate and other
15 mineral or subsurface resources" under MCC .2390(B)(1).

16 However, it is clear to us, as explained supra, that this was
17 not the city's basis for approving the conditional use permit.
18 This view is reinforced by the fact the city did not, as
19 petitioner notes correctly in the second assignment of error,
20 adopt any findings to demonstrate compliance with the
21 conditional use standards in MCC .7305-.7335 applicable to
22 mineral extraction.

23 We read petitioner's first assignment of error to argue
24 only that intervenor's proposed stockpiling and retransport
25 operation is not covered by MCC .2390(B)(1), which allows
26 "mining and processing of aggregate and other mineral or

1 subsurface resources" as a conditional use. Because we do not
2 agree that the city approved the conditional use permit under
3 MCC .2390(B)(1), we reject the first assignment of error.⁹

4 The petitioner argues under its second assignment of error
5 that the city findings did not address applicable criteria.
6 The only criteria petitioner identifies under this assignment
7 of error are the mineral extraction criteria contained in
8 MCC .7305-.7335. Because we conclude those criteria are not
9 applicable to the city's decision, we deny the second
10 assignment of error.

11 THIRD ASSIGNMENT OF ERROR

12 "The city's findings of compliance with
13 MCC 11.15.7120(a) are inadequate and not supported by
substantial evidence in the record."

14 MCC .7120(A) is the only general conditional use approval
15 criterion petitioner argues the city improperly applied in
16 granting approval of the proposed expansion of intervenor's
17 preexisting use. That criterion requires that the city find
18 the proposal "is consistent with the character of the area."
19 The finding the city adopted to address this criterion is as
20 follows:

21 "The proposed land use is consistent with the
22 character of the area and will not create a new use
23 but rather expand the present use. In-coming truck
traffic will be decreased when the proposed use is
fully operational." Record 20.

24 As petitioner correctly notes, the above finding simply
25 restates the approval standard. A finding that simply restates
26 an approval standard is not adequate to explain why that

1 standard is met. Moore v. Clackamas County, 7 Or LUBA 106, 113
2 (1982). The balance of the city's finding quoted supra, and
3 other findings cited on page 5 of intervenor's brief, simply
4 state that the proposed use will expand the present use.
5 Intervenor also cites evidence in the record showing truck
6 traffic will not increase significantly and that noise and dust
7 are not to be increased significantly.

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

17 Because the city's findings are not sufficient to show
18 compliance with MCC .7120(A), no purpose would be served by
19 determining whether those findings are supported by substantial
20 evidence. DLCD v. Columbia County, ____ Or LUBA ____ (LUBA No.
21 87-109, March 15, 1988); McNulty v. City of Lake Oswego, 14 Or
22 LUBA 366, 373 (1986).

23 The third assignment of error is sustained.

24 FOURTH ASSIGNMENT OF ERROR

25 "The decision is not in compliance with the city's
26 / / /
acknowledged comprehensive plan."

1 FIFTH ASSIGNMENT OF ERROR

2 "The city's findings fail to identify the relevant
3 standards, fail to recite facts demonstrating
4 compliance with the relevant standards, and fail to
explain the relationship between the facts and
relevant standards."

5 SIXTH ASSIGNMENT OF ERROR

6 "Respondent's finding #6 is not supported by
7 substantial evidence in the whole record."

8 In each of these assignments of error, petitioner argues
9 parts of the city's acknowledged comprehensive plan are
10 violated by the city's rezoning decision. Under the fourth
11 assignment of error, petitioner argues the rezoning is
12 inconsistent with the city's comprehensive plan map designation
13 for the area as "parks and open space." In addition,
14 petitioner argues two city plan policies concerning
15 urbanization and provision of public facilities are violated.
16 In the fifth assignment of error, petitioner argues the city
17 did not demonstrate compliance with city comprehensive plan
18 standards governing zone changes. Under the sixth assignment
19 of error, petitioner challenges the evidentiary support for a
20 finding by the city that "public facilities and services are
21 available for potential expansion to these areas." Record
22 (LUBA No. 88-076) 11. However, petitioner only challenges this
23 finding as a basis for showing compliance with one of the city
24 plan policies identified under the fourth assignment of error.

25 Each of the three assignments of error described above
26 challenging the city's approval of the subject zone change must

1 fail if petitioner's assumption that the city, rather than the
2 county, comprehensive plan applies to the challenged zone
3 change is incorrect. We conclude that petitioner's assumption
4 is incorrect.

5 There is nothing in the city's decision adopting the zone
6 change to suggest the city also acted to apply its acknowledged
7 comprehensive plan or took action to designate the property
8 "parks and open space."

9 As we explained earlier in this opinion, no party disputes
10 that the county's comprehensive plan and zoning regulations
11 applied to the affected property when the city approved the
12 conditional use permit. Nothing has happened to affect that
13 state of affairs except the city's adoption of a new zoning
14 designation for the subject property. That zoning action by
15 the city did not apply the city's "parks and open space" plan
16 designation, or any city plan designation for that matter, to
17 the subject property in changing its zoning designation. Until
18 the city takes action to apply its plan to the disputed
19 property, it is the county's plan, not the city's, which
20 applies to the property under ORS 215.130(2). City of Salem v.
21 Families for Responsible Gov't., 298 Or 574, 581, 694 P2d 965
22 (1985).

23 The only basis we can find for arguing that a city plan
24 designation applies to the disputed property is a note on the
25 city's comprehensive plan map. The map shows the disputed
26 property to be outside the city limits, but nevertheless

1 indicates a city park and open space plan designation for the
2 property. However, the above-mentioned note states, in its
3 entirety:

4 "Note: Land uses outside city limits are
5 recommendations only." Record (LUBA No. 88-076) 24.

6 In adopting the disputed zone change, the city adopted the
7 following finding:

8 "The proposed zoning designation is appropriate within
the Fairview Comprehensive Plan in that it states:

9 "For areas outside the Fairview City Limits, the
10 land use designation shown in Figure 6 shall have
the status of 'proposed designations' until such
11 time as those areas are annexed by Fairview."
Record 10.

12 The above-quoted finding arguably could be interpreted to
13 express the view that the county apparently takes, i.e., that
14 the recommended "parks and open space" designation shown on the
15 city plan map automatically became effective upon annexation of
16 the property by the city.

17 Our problem in adopting that position is that even if the
18 city's finding can be interpreted to express that view, the
19 city's plan does not. The plan note clearly says the
20 designation is only a recommendation. Nothing we have been
21 cited to in the city's plan suggests such recommendations
22 become final plan designations upon annexation, without further
23 action by the city. ORS 215.130(2)(a) makes the county plan
24 the operative comprehensive plan until the city provides
25 otherwise. To date the city has not provided otherwise, or at
26 least no one has called our attention to such an action. We

1 conclude the county's plan, not the city's plan, applies to the
2 disputed property.

3 Accordingly, because the fourth, fifth and sixth
4 assignments of error allege only noncompliance with
5 inapplicable city comprehensive plan provisions, they provide
6 no basis for reversal or remand and are rejected.

7 SEVENTH ASSIGNMENT OF ERROR

8 "The decision does not amend the city's zoning map or
9 the zoning ordinance text."

10 Petitioner argues the city's decision was not adopted by an
11 ordinance amending the zoning map. Petitioner is correct. The
12 city council minutes of the meeting at which it approved the
13 zoning designation, Record (LUBA No. 88-076) 19-21, together
14 with a two page document identifying the decision followed by
15 six findings, Record (LUBA No. 88-076) 10-11, is the only
16 written decision that we can find in the record.

17 The city argues that under City of Fairview Zoning
18 Ordinance Section 8.31 "changes and amendments to the zoning
19 ordinance may be initiated by: * * * resolution of the city
20 council * * * * *." The city argues it acted entirely properly
21 in approving the zone change by resolution.

22 Citing Baker v. City of Milwaukie, 271 Or 500, 511, 533 P2d
23 772 (1975) and Fifth Avenue Corporation v. Washington County,
24 282 Or 591, 596, 581 P2d 50 (1978), intervenor argues the title
25 of the action taken by the city, be it resolution or ordinance,
26 is not significant. In Baker v. City of Milwaukie, supra, the

1 Supreme Court stated

2 "Where a resolution is in substance and effect an
3 ordinance or permanent regulation, the name given to
4 it is immaterial. If it is passed with all the
5 formalities of an ordinance it thereby becomes a
6 legislative act, and it is not important whether it be
7 called ordinance or resolution." Id. 271 Or at 511
8 (quoting 5 McQuillan on Municipal Corporations Section
9 15.02 (1969) at 46).

10 Intervenor further points out that petitioner makes no
11 argument that the procedure followed by the city was
12 insufficient, in and of itself, to constitute a legitimate
13 legislative act. Intervenor argues that omission by petitioner
14 requires rejection of this assignment of error because "the
15 approach of looking to the substance of the action rather than
16 the mere title has been followed in Oregon." Baker v. City of
17 Milwaukie, supra, 271 Or at 511.

18 We agree with intervenor and the city that under the
19 Supreme Court cases cited supra, the substance of the city's
20 action is controlling. We have some problem with the city's
21 argument in that we nowhere find a document labeled a
22 "resolution" in the record. We note that the city's decision
23 challenged in LUBA No. 88-035 is clearly labeled a resolution.
24 In LUBA No. 88-076 we have only the approved minutes describing
25 the city's action together with a document identifying the
26 decision and listing findings. These documents were apparently
27 forwarded to parties participating in the local proceedings.
28 Record (LUBA No. 88-076) 14.

29 Petitioner does not explain why these documents and the

1 procedure followed by the city are inadequate to adopt a
2 legislative act.¹⁰ Petitioner cites 6 McQuillan, the Law of
3 Municipal Corporations, Section 21.04 (1988) and Sands and
4 Libonati, Local Government, Section 11.17 (1981), both of which
5 suggest that because a zoning ordinance is adopted by ordinance
6 it should be amended only by an ordinance as well. Those
7 authorities, however, are not binding, and the Supreme Court's
8 decisions in Baker and Fifth Avenue Corporation made it clear
9 that the Supreme Court does not embrace that principle. In
10 addition, we note ORS 215.130(2)(a) provides that the county's
11 plan and zoning ordinance will continue to apply until "the
12 city has by ordinance or other provision provided otherwise."
13 (Emphasis added).

14 We conclude petitioner has failed to demonstrate why the
15 manner in which the city adopted its decision was ineffective
16 to constitute a legislative act amending the applicable zoning
17 designation.¹¹ Accordingly, the seventh assignment of error
18 is denied.

19 CONCLUSION

20 Because we deny the fourth through seventh assignments of
21 error, the decision of the city amending the zoning map
22 designation for intervenor's property is affirmed.
23 However, our disposition of the city's decision approving the
24 conditional use permit requires further consideration.

25 Our order consolidating these appeals was entered on
26 September 13, 1988, after oral argument in LUBA No. 88-035 and

1 before the record was filed in LUBA No. 88-076. We
2 consolidated the appeals to assist our consideration of the
3 respondent's and intervenor's arguments that the city's
4 decision in LUBA No. 88-076 rendered the appeal of the city's
5 decision in LUBA No. 88-035 moot. See Struve v. Umatilla
6 County, 12 Or LUBA 54 (1984).¹²

7 All of the parties in this proceeding argue that if the
8 city rezoning decision challenged in LUBA No. 88-076 is
9 affirmed by the Board and our decision is affirmed on appeal,
10 then the portion of this consolidated appeal challenging the
11 conditional use permit is moot. Although we would normally
12 agree with the parties and dismiss the portion of the
13 proceeding challenging the conditional use permit as moot, we
14 do not do so in this case for two reasons.

15 First, none of the parties cite or discuss ORS 215.428(3)
16 which provides:

17 "Approval or denial of [a permit] application shall be
18 based upon the standards and criteria that were
19 applicable at the time the application was first
submitted * * *."

20 We are unsure whether this statute, which was adopted after our
21 decision in Struve v. Umatilla, supra, might support a
22 conclusion that the appeal of the conditional use permit is not
23 moot.

24 Second, in affirming the city's zone change, we do so in
25 large part because we conclude the city has not yet applied its
26 comprehensive plan to this recently annexed property, leaving

1 the county's comprehensive plan applicable. We are
2 sufficiently uncertain of the legal impact of this circumstance
3 that we cannot conclude that a decision on the appeal of the
4 conditional use permit would serve no useful purpose.

5 Therefore, because we sustain the third assignment of
6 error, we remand the city's decision approving the conditional
7 use permit.

8 The city's decision in LUBA No. 88-035 is remanded. The
9 city's decision in LUBA No. 88-076 is affirmed.

1
2 FOOTNOTES

3 1

ORS 215.130(2) provides as pertinent:

"An ordinance designed to carry out a county comprehensive plan and a county comprehensive plan shall apply to:

"(a) the area within the county also within the boundaries of a city as a result of extending the boundaries of the city or creating a new city unless, or until the city has by ordinance or other provision provided otherwise.

"* * * * *"

10 2

Separate records were filed in LUBA No. 88-035 and LUBA No. 88-076. We distinguish citations to the record in LUBA No. 88-076 as follows: "Record (LUBA No. 88-076) ____."

13 3

The Multnomah County Zoning Ordinance is codified as Chapter 11.15 of the Multnomah County Code. The zoning ordinance sections in the code are enumerated 11.15.xxxx. We will cite only the four digit section number, omitting the citation to Chapter 11.15, as does the county in its code.

17 4

MCC .7120 provides as follows:

"Conditional Use Approval Criteria

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

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

"(B) Will not adversely affect natural resources;

"(C) Will not conflict with farm or forest uses in the area;

1 "(D) Will not require public services other than those
2 existing or programmed for the area;

3 "(E) Will be located outside a big game winter habitat area
4 as defined by the Oregon Department of Fish and
 Wildlife or that agency has certified that the impacts
 will be acceptable;

5 "(F) Will not create hazardous conditions; and

6 "(G) Will satisfy the applicable policies of the
7 Comprehensive Plan." (Emphasis added).

8 5

9 The county apparently interprets the mineral extraction
10 provisions in MCC .7305-.7335 to apply to uses qualifying as
11 "mining and processing of aggregate and other mineral or
 subsurface resources" under MCC .2390(B)(1). Because no one
 disputes that interpretation, we will assume it is correct for
 purposes of this opinion.

12 6

13 At oral argument the county indicated it did not admit that
14 the existing use qualified as a preexisting use, but neither
15 did it contest the city's and intervenor's position that it is
 a preexisting use.

16 7

17 Because no party argues other preexisting use sections
18 apply in this case, and the city's resolution does not suggest
19 it applied other preexisting use sections, we do not consider
20 whether any of those sections should have been applied.

21 8

22 The city planning staff recommendation included a proposed
23 finding to the same effect. Record 48.

24 9

25 As explained supra, we find the city approved the
26 conditional use permit as an expansion of a preexisting use,
 under MCC .2390(C) and .7615.

27 10

28 Petitioner suggests allowing the city to amend its zoning
29 ordinance without following ordinance adoption procedures may

1 invite "ad hoc responses to temporary influences made without
2 the degree of consideration and debate associated with formal
3 ordinance adoption procedures." Petition for Review 13.
4 Petitioner does not, however, claim such temporary influences
5 affected the decision in this appeal. Petitioner also suggests
6 there may be difficulty determining when the decision becomes
7 final if the city proceeds other than by ordinance. However,
8 petitioner does not argue there was difficulty in determining
9 when the decision became final in this case or that adoption of
10 an ordinance is the only way to make clear the date a decision
11 becomes final.

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The petitioner does not argue and we do not decide whether
the city may have violated city charter provisions applicable
to city ordinances or city legislation.

12

In Struve v. Umatilla County, supra, we held an appeal of a
"zoning permit" allowing a bridge to be replaced was moot
because the county subsequently applied a different zoning
classification that required the proposal be approved as a
conditional use. In Struve we explained

"As a general rule, a permit or license does not create
irrevocable rights, but instead is subject to modification
or revocation by subsequent changes in the law. Twin Rocks
Defense Committee v. Sheets, 15 Or App 445, 448, 516 P2d
472 (1973), rev den (1974); cf Carmel Estates, Inc. v.
LCDC, 51 Or App 435, 439, 625 P2d 1367 (1981), rev den
(1981) (dismissing appeal of LCDC Order as moot on grounds
reviewing court applies current law, not law on which a
challenged decision was based). In Twin Rocks, supra, the
Court of Appeals found this general administrative law
principle was reflected in provisions of the County Zoning
Enabling Statute, ORS Chapter 215. Those provisions, noted
the court, balance the interest of the public in effective
land use planning against the interests of permit holders
by subjecting the latter to changes in zoning law unless
the permit has been "substantially acted upon." 15 Or App
at 448. See also, Robert Randall Co. v. City of Milwaukie,
32 Or App 631, 634, 575 P3d 170 (1978). The Oregon Supreme
Court made a similar point by emphasizing that the statutes
protect the "lawful use" of land from restrictive zoning
amendments. Polk County v. Martin, 292 Or 69, 76, 636 P2d
952 (1981). It follows that mere intended uses are not
protected. See ORS 215.130(5); Parks v. Board of County
Commissioners of Tillamook County, 11 Or App 177, 197, 501
P2d 85 (1973). Respondents' argument that permit holders

1 who act in good faith should be given protection from
2 changes in legal requirements is not in line with the
3 policy reflected in the current law." (Footnote omitted)
4 Id. at 57.
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