LAND USE
BOARD OF APPEALS
SEP 28 10 30 PM '89

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 JIM MOOREFIELD, TONY HOWELL,)
SIERRA CLUB, PATRICIA BENNER,)
4 NICK LEON, GLENN BURKET,)
JACK LYFORD, KEITH KING,)
5 KEN OFELEIN, JAN BOTTJER,)
and JO MOOREFIELD,)
6)
Petitioners,)
7) LUBA No. 89-045
vs.)
8) FINAL OPINION
CITY OF CORVALLIS,) AND ORDER
9)
Respondent,)
10)
and)
11)
EVANITE FIBER CORPORATION,)
12)
Intervenor-Respondent.)

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Appeal from City of Corvallis.

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15 Allen Johnson, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Johnson & Kloos.

16

17 Jack Orchard, Portland, and Michael Newman, Corvallis, filed a joint response brief on behalf of respondent and intervenor-respondent. Jack Orchard argued the case on behalf of respondent and intervenor-respondent. With them on the brief was Ball, Janik & Novak.

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

21 REMANDED 9/28/89

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

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Opinion by Kellington.

NATURE OF THE DECISION

Petitioner appeals an order of the City of Corvallis granting Willamette River Greenway (WRG) conditional development approval.

MOTION TO INTERVENE

Evanite Fiber Corporation Inc. moves to intervene on the side of the respondent in this proceeding. There is no opposition to the motion, and it is granted.

FACTS

The subject property consists of 13.06 acres. The property is planned Light Industrial (LI), is zoned General Industrial (GI) and is located within the WRG Overlay District. To the southwest are residential uses, to the east and north is city park land, to the east is the Willamette River and to the west is a use characterized by the city as industrial.[1] The subject property was in unincorporated Benton County until 1987, when the property was annexed to the city.

Intervenor-respondent (intervenor) has operated a glass fiber plant in facilities located on the subject property since 1979, and will continue to use the existing facilities for this purpose. The WRG conditional development approval authorizes intervenor to construct an additional 47,000 square foot

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[1]The nature of this use is not clear. In the record, this use is described as a non profit social service organization. Record 418, 465. The nature of this use is not, however, an issue in this appeal.

building on the site and a 104 space parking lot. The proposed new building is intended to accommodate warehousing, offices and relocation and intensification of the "flame blown process" portion of intervenors' existing glass fiber plant.[2] Record 382-383, 474, 640-641. The proposed facility will increase intervenor's glass fiber production capacity from 9,500 tons per year to 10,720 tons per year and will:

> "* * * add a fourth and fifth glass fiber forming line, and * * * increase flouride containing glass production from glass melter II to both glass melters I and II. The changes will allow an increase in the proportion of production allocated to finer fibers." Record 640.

The planning commission granted WRG conditional development approval, and petitioners appealed the planning commission's decision to the city council. The city council denied the appeal and granted the WRG conditional development approval. This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The City erred and made a decision unsupported by substantial evidence in the record in finding that the proposed use is consistent with the 'Light Industrial' comprehensive plan map designation for the site and in approving an application for an intensive industrial use on a site designated for light industial use in the Corvallis Comprehensive Plan."

FOURTH ASSIGNMENT OF ERROR

> "The city erred in finding that Corvallis

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[2]The existing flame blown process "* * * consists of taking glass pallets which have been previously manufactured and processing these into glass fibers, using a flame blown process, and packaging the finished glass fibers." Record 282.

Comprehensive Plan use designations are not directly applicable to the subject decision."

Petitioners argue that allowing the proposed use impermissibly conflicts with the Corvallis Comprehensive Plan (plan). Petitioners contend, citing ORS 197.175(2) and Phillipi v. City of Sublimity, 294 Or 500, 533 P2d 772 (1975), that, to the extent the LDC authorizes a use which conflicts with the plan, the plan controls. Petitioners argue that the proposed use must, but does not, correspond to the definitional characteristics of the LI plan designation. Petitioners argue that the proposed use meets the definitional characteristics for the Intensive Industrial (INT IND) plan designation, rather than the LI plan map designation. Petitioners point out plan economy element finding 7.7(f) (finding 7.7(f)) relating to the LI plan designation provides as follows:

> "There are three types of industrial areas in Corvallis shown on the Comprehensive Plan Map:
>
> "The intensive industrial designation is applied to existing intensive industrial development and to the airport development park.
>
> "The light industrial designation is applied to developed and vacant lands and allows manufacturing and related activities with few, if any, nuisance characteristics.
>
> "The limited industrial designation is applied to areas suitable for small scale, on-site, limited manufacturing and related uses which evidence few, if any, nuisance characteristics." (Emphasis supplied.) Finding 7.7(f)

Petitioners contend the proposed use is inconsistent with finding 7.7(f) because the proposed use will have greater than "few, if any, nuisance characteristics."

Petitioners also contend that plan conformity should have been, but was not, addressed at the time the city considered intervenor's application. Petitioners argue the city erroneously determined that earlier decisions by Benton County and the city, applying the prior and existing planning designations to the property, foreclosed any present inquiry into whether the proposed use satisfies the plan's LI use characteristics.[3]

Intervenor-respondent and respondent (respondents) suggest that the definitional characteristics of the INT IND and LI plan designations and the plan economy findings are analogous to statements of intent and purpose and are not approval criteria. Respondents argue the only relevant approval standards are the requirements of the WRG overlay district.

Respondents also argue the city was not required to find the proposed use conforms to the LI plan map designation and the plan findings because the proposed use is identical in kind to intervenor's existing uses, to which the city, in 1987, applied the LI plan designation. From this, respondents reason the proposed use must necessarily be consistent with the LI plan designation, without regard to LI plan policies or plan findings.

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[3]The city initially appealed Benton County's 1980 application of the county's LI plan designation. However, in 1982, the city acquiesced in the county's plan designation. In 1987, after annexation, the city applied its LI plan and GI zone designations to the property.

1 The definitional characteristics for the LI plan
2 designation are found in the plan section entitled
3 "Comprehensive Plan Map." This section sets out the
4 characteristics of a variety of planning designations shown on
5 the plan map, and includes industrial designations as follows:

6 "C. Industrial

7 "1. Limited Industrial

8 "Refers to establishments primarily engaged in
9 the on-site production of goods by hand manufacturing, which involves only the use of
10 hand tools or light mechanical equipment, and the incidental direct sale to consumers of only
11 those goods produced on-site with no outside open storage permitted. Activities and/or
12 operations within this designation shall comply with the applicable state, federal and
13 environmental standards.

"2. Light Industrial

14 "Refers to the:

15 "Production, processing assembling, packaging,
16 or treatment of food products from previously processed materials; or

17 "Production, processing, assembling, packaging
18 of finished products from previously prepared materials; or

19 "Manufacturing and assembly of electronic
20 instruments and electronical devices.

21 "Activities and/or operations within this
22 designation shall comply with the applicable state, federal and local environmental standards.

23 "3. Intensive Industrial

24 "Refers to the manufacturing, processing, or
25 assembling from raw materials. Activities and/or operations within this designation shall
26 comply with the applicable state, federal and

local environmental standards."

Plan policy 1.1.2 requires that the city "shall develop and adopt appropriate implementation mechanisms to carry out the policies of the plan." The city has carried out its obligation under plan policy 1.1.2 by adopting use characteristics and performance standards for the GI zone as part of the Corvallis Land Development Code (LDC). The use type characteristics described for the GI zone are identical to the characteristics described by the plan for the LI plan designation. Nothing to which we have been cited, indicates that the plan description of characteristics is an independent approval criterion for uses under the LI designation. See, Standard Insurance Co. v. Washington County, ___Or LUBA___ (LUBA No. 89-020, September 1, 1987). Furthermore, petitioners point to no conflict between the use type characteristics allowed under the GI zone and LI plan map designation. Because the use type characteristics for the GI zone set out in LDC 200.02.04(c) are the same as those contained in the LI plan designation, we do not see any conflict.

Additionally, there is nothing to which we have been cited in finding 7.7(f) to indicate that this finding is intended to be an independent approval criterion.[4] This finding is simply a

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[4]Finding 7.7(f) is fully implemented through performance standards contained in the LDC. LDC 213.06. While there are differences in the wording of finding 7.7(f) and the performance standards of LDC.213.06, we do not view these differences to be important. Finding 7.7(f) provides, in relevant part, that LI uses have "few, if any, nuisance characteristics." The LDC 213.06 performance standard states, in relevant part, that GI uses "shall not create a nuisance because of odor, noise, dust, smoke, or gas."

1 finding supporting plan policies which may or may not be
2 mandatory criteria.

3 We conclude that neither the plan LI designation
4 characteristics, nor plan economy element finding 7.7(f),
5 constitute independent approval criteria for uses in the GI
6 zone.[5]

7 Petitioners also raise an evidentiary challenge to the
8 city's findings that the proposed use conforms to the LI plan
9 designation and finding 7.7(f). In order for inadequate
10 findings to be a basis for reversal or remand of the city's
11 decision, the disputed findings must be essential to the city's
12 decision. Randall v. Washington County, ___ Or LUBA ___ (LUBA
13 No. 89-019, July 21, 1989), slip op 9. Because we determine
14 that the county is not required to make findings that the
15 proposed use conforms to the characteristics of the LI plan
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17 If the proposed use meets the performance standards of the GI zone (discussed infra), we do not understand how the proposed use could conflict
18 with finding 7.7(f).

19 [5]LDC 102.01 provides that "all land development regulations and related actions must conform to the comprehensive plan." This restates
20 ORS 197.175(2)(d), which provides:

21 "* * * each city and county in this state shall * * *

22 "(d) If its comprehensive plan and land use regulations have been acknowledged by the commission, make land use
23 decisions in compliance with the acknowledged plan and land use regulations."

24 This statutory requirement does not, of itself, convert all plan provisions into approval standards. We do not resolve here, however,
25 petitioners' other assignments of error regarding the applicability of other parts of the plan. Under these assignments of error we determine
26 only that the LI plan designation and finding 7.7(f) are not independent approval standards.

designation, we need not examine the substantiality of the evidence supporting such findings.

The first and fourth assignments of error are denied.

SECOND ASSIGNMENT OF ERROR

> "The City erred and made a decision unsupported by substantial evidence in the record in finding that the proposed use is consistent with the 'General Industrial' zoning map plan map designation for the site and in approving an application for an intensive industrial use on a site designated for general industrial use on the Corvallis zoning district map."

Petitioners contend that the proposed use is not consistent with the LDC 200.02.04(c) description of the GI use type and that the proposed use will not meet the LDC 213.06 performance standards for the GI zone. We address petitioners' contentions regarding applicability of and compliance with both LDC 200.02.04(c) and LDC 213.06 separately below.

A. LDC 200.02.04(c)

1. Applicability of LDC 200.02.04(c)

Under LDC 200.03, uses must be classified into appropriate LDC "use types" as follows:

> "Uses will be classified into use types based upon the description of the use types as contained in Section 200 and upon common functional, product, or compatibility characteristics with other uses already classified within the use type. A list of common uses and the use types into which they are classified shall be maintained by the director. The Director shall have the authority to classify common uses according to the use type. The classification of a use is subject to the right of appeal in accordance with the provisions of Section 118."

Petitioners contend that the proposed use must, but does not, meet the definitional characteristics of the GI zone set

out in LDC 200.02.04(c)[6] Petitioners argue that the proposed use actually meets the use type characteristics set out in LDC 200.02.04(d) for the Intensive Industrial zoning designation, rather than those for the GI zone designation.[7]

Petitioners point out that the key distinction between a use being considered "General Industrial" or "Intensive Industrial" is whether the proposed use will "manufacture, process, or assemble * * * products from raw materials," or whether the materials are "produc[ed], process[ed], assembl[ed], and packag[ed] from previously prepared materials." (Emphasis supplied.) LDC 200.02.04(c) and (d). Petitioners argue that if the materials converted into a product by the proposed use are considered "raw materials," then the use is

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[6]LDC 200.02.04(c) states the General Industrial use type description. This use description parallels the use type description in the plan for the LI plan designation. LDC 200.02.04(c) provides in full:

> "General Industrial
>
> "Refers to the:
>
> "Production, processing, assembling, packaging, or treatment of food products from previously processed materials; or
>
> "Production, processing, assembling, and packaging of finished products from previously prepared materials; or
>
> "Manufacturing or assembly of electronic instruments and equipment and electrical devices."

[7]LDC 200.04.02(d) provides

> "Intensive Industrial
>
> "Refers to the manufacturing, processing, or assembling of semi-finished or finished products from raw materials."

properly characterized as "Intensive Industrial." If, however, the proposed use converts materials considered "previously prepared" into a product, then the use is properly characterized as "General Industrial."

Respondents claim the LDC description of use type characteristics for the GI zone is a mere statement of intent and purpose, not an approval criterion.

We do not agree with respondents that the LDC provisions regarding classification of use types are mere statements of intent and purpose. LDC Section 200, which governs classification of use types, contains both a statement of intent and purpose and the use type classification descriptions. The statement of intent and purpose for LDC Section 200 provides the following statement of intent and purpose for the use classification provisions, separate from the LDC use type characteristics descriptions themselves:

> "The provisions of Section 200 shall be known as the Use Classifications. The purpose of these provisions is to classify uses into a limited number of use types on the basis of common functional, product, or compatibility characteristics, thereby providing a basis for the regulation of uses in accordance with criteria which are directly relevant to the public interest. These provisions shall apply throughout the Land Development Code." LDC 200.01.

Further, LDC 200.03 employs the mandatory term "will" to describe the city's obligation to classify uses according to "common functional, product, or compatibility characteristics." Together, these LDC provisions support petitioners' position that LDC use type characteristics are independent approval

criteria for uses in the zoning districts to which they apply.[8] Our determination that the use descriptions are independent approval criteria is an interpretation of LDC Section 200 which gives meaning to each of the parts of LDC Section 200 and to the city's use classification system as a whole. See, Kenton, supra, slip op at 16. Thus, we conclude the LDC 200.02.04(c) description of use characteristics for the GI zone is an approval criterion. We, therefore, address petitioners' contentions that the city's determination that the proposed use is consistent with LDC 200.02.04(c) is not supported by adequate findings or by substantial evidence in the record.[9]

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[8] In Kenton Neighborhood v. City of Portland, ___ Or LUBA ___ (LUBA No. 88-119, June 7, 1989) (Kenton), we interpreted internally inconsistent code sections which classified uses by identified characteristics. The code in Kenton contained both a description of the characteristics of uses authorized in the zone and examples of uses permitted in the zone. We agreed with the City of Portland's determination that the uses listed as examples were permitted outright in the zone, without reference to the statement of use characteristics for the zone. We determined that the statement of characteristics could not be used to defeat approval of uses permitted outright. However, we noted that the "characteristics" provisions of the code did apply, as approval criteria, in determining whether uses not listed as examples could be authorized in particular zones. Kenton, supra, slip op at 32, n 8. The latter situation is analogous here. The LDC authorizes "industrial" use types by descriptions of characteristics, rather than through a partial or complete list of uses predetermined to fit each industrial category.

[9] We note, however, it is not entirely clear that the city's decision treated the LDC 200.02.04(c) use characteristics for uses in the GI zone as applicable approval criteria. The city determined:

> "To approve a request for conditional development in a General Industrial District / Willamette River Greenway Overlay, the proposal must comply with the Review criteria of [LDC] Section 216.01.04. When found to comply with all of these criteria, a development proposal may be approved by the hearing body.
>
> "Findings and conclusions on issues raised by the appeal, but

This subassignment is sustained.

2. Adequacy of Findings

Respondents contend that even if LDC 200.02.04(c) is an approval criterion, the city made adequate findings of compliance with LDC 200.02.04(c). Respondents argue that the city found that the proposed plant will not use "raw materials" as that phrase is used in the the LDC Intensive Industrial use type classification as follows:

> "* * *[t]he early stages of the rotary-fiber process melts processed sand, borax, Nepheline, Syenite, Dolomite, Soda Ash, and Limestone into glass disks. These materials are highly refined before Evanite purchases them to assure quality control. The later stages of the rotary-fiber process, and the flame-blown process, spin glass disks into fiberglass. Only the flame-blown process, which converts glass disks (previously processed material) into fiberglass, will be installed in the proposed expansion." Record 48-49.

> "* * * Council notes that the materials used in the manufacturing processes may appear to be 'raw materials,' but is persuaded that the materials have been substantially processed before Evanite purchases them for their processes." Record 52.

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which the Council did not consider applicable, are addressed at the end of the narrative. These issues included the appropriatness of use * * *." (Emphasis supplied.) Record 33.

However, the city's decision also states:

> "In conclusion, the Council finds that the proposed application complies with all of Section 200.01.04 [sic] criteria. Fiber glass manufacture, as conducted at the subject site, is a use permitted in the General Industrial district. The council finds that the Comprehensive Plan policies referred to by appellants are not applicable to a quasi-judicial, site specific development request; but rather these requests are subject to the more detailed requirements of the LDC which implements the Comprehensive Plan policies. * * *" (Emphasis in original.) Record 57.

Petitioners contend the following finding contradicts those cited above by respondents:

> "* * * A third glass fiber forming line, using glass 'marbles' from the earlier furnaces as raw material, was installed in 1984." (Emphasis supplied.) Record 31.

We do not agree that the finding cited by petitioners contradicts those cited by respondents. The fact that the finding cited by petitioners refers to the glass "marbles" (disks) as a "raw material" does not mean the city found that these glass marbles are "raw materials" within the meaning of LDC 200.02.04(d)[10]

We believe the findings cited by respondents are adequate to demonstrate that the city concluded the proposed use is properly characterized under LDC 200.02.04(c) as a GI use.[11]

3. Evidentiary Support

Petitioners also challenge the adequacy of the evidence in the record to support the city's determination that the proposed use conforms to the LDC 200.02.04(c) GI use type characteristics.

Petitioners cite statements made by intervenor in a land use compatiblity statement filed in connection with its application for an air contaminant discharge permit.

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[10]It is not disputed that these glass marbles are made by intervenor at intervenor's existing facility from other materials.

[11]Specifically, the city determined that the materials used in intervenor's processes are "highly refined" and "substantially processed," rather than "raw materials."

Petitioners point out that under the heading of "Major Raw Materials including fuels utilized in current or anticipated year," intervenor listed "Sand, Borax, Syenite, Dolomite, Soda Ash, Limestone, Natural Gas." Record 390. Petitioners further point out that intervenor discloses in this document that it uses up to "550 therms of natural gas per hour for a total of 4,000,000 therms per year." Id.

The flame blown process, which is the only part of intervenor's manufacturing process proposed to be included in the new facility, spins glass disks into glass fibers. See n 2, supra; Record 48-49. Petitioners do not contend that the glass disks used in the flame blown process are not "previously prepared" material, as required by LDC 200.02.04(c). The flame blown process does not directly utilize the sand, borax, soda ash, limestone and other materials listed as "raw materials" or "fuels" on intervenor's application for an air contaminant discharge permit.[12] Thus, even if we were to agree with petitioners that the record does not contain substantial evidence to support the city's decision that these materials are

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[12]The only item listed on the air contaminant discharge permit application which may be used in connection with the flame blown process is natural gas. However, the use of natural gas in the flame blown process would be relevant to determining use classification under LDC 200.02.04(c) only if the natural gas is a "raw material" from which the semi-finished or finished products are "manufactured, processed or assembled." The air contaminant discharge permit application requires listing of both "raw materials" and "fuels utilized." Record 390. Petitioners do not specifically contend that natural gas is used as a raw material, rather than a fuel, in the glass blown process, and we see no reason to assume that it is.

"previously processed," that would provide no basis for invalidating the city's determination that the proposed use satisfies the GI use classification provision of LDC 200.02.04(c).

This subassignment of error is denied.

B. LDC 213.06

1. Applicability of LDC 213.06

Petitioners argue that the proposed use does not conform to the following "performance standards" for the GI zone set out in LDC 213.06:

> "Each use, activity, or operation within this district shall comply with the applicable local state and federal standards and shall not create a nuisance because of odor, noise, dust, smoke or gas."

Petitioners maintain that if LDC 213.06 is not interpreted as an approval criterion the LDC would conflict with the portion of the plan LI designation description that:

> "Activities and/or operations within this designation shall comply with the applicable state, federal and local environmental standards." [13] Plan p.137.

Respondents argue that the LDC performance standards are statements of intent and purpose which do not apply here. Respondents contend that even if they did apply, satisfaction of LDC 213.06 requires petitioners to demonstrate the existence of

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[13]Petitioners also state that the LDC would be inconsistent with the plan economy element findings discussed supra. However, the existence, if any, of inconsistency between plan findings and the LDC, does not, without some expression of an intent that plan findings be considered mandatory, make such findings control over LDC provisions.

a common law nuisance, and petitioners have not done so.

Respondents also argue the city made a previous and binding determination that intervenor's existing use, causing the same impacts petitioners identify for the proposed use, meets the performance standards of the GI zone. Respondents contend that this prior determination prevents a different determination now that essentially the same processes will "create a nuisance." Respondents also maintain that the use "is regulated and controlled by the City and the State;" and, therefore, the proposed use "does not interfere with the legal rights of others." Respondents' Brief 10.

Finally, respondents suggest that the LDC performance standards are only applicable in regulating existing uses in the GI zone, and are not applicable in determining whether a proposed use is allowed in the GI zone.

We disagree with respondents' claim that LDC 213.06 is only a statement of intent and purpose. LDC 213.01, which precedes the disputed LDC provision, is specifically identified as a statement of intent and purpose for the GI zone.[14] The

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[14]LDC 213.01 provides:

> "The purpose of this district is to provide appropriate locations for general industrial uses including manufacturing and related activities with few, if any nuisance characteristics. The GI district is intended to permit manufacturing, processing, assembling, packaging, or treatment of products from previously prepared materials. It is also intended to prohibit residential uses, and limit intensive retail uses as being incompatible with the primary industrial and related uses permitted."

1 existence of LDC 213.01 suggests LDC 213.06 was not intended as
2 merely a statement of intent and purpose. LDC 213.06 is termed
3 a "performance standard." It uses the mandatory term "shall" in
4 requiring that GI uses create no "nuisance," as nuisance is used
5 in LDC 213.06. LDC 213.06 is surrounded by other approval
6 criteria. Respondents offer no explanation for how the other
7 LDC criteria surrounding LDC 213.06 can be applied as approval
8 criteria while ignoring LDC 213.06. For instance, it is not
9 seriously disputed that LDC 213.05 regarding height of
10 structures, LDC 213.07 regarding off street parking or LDC
11 213.04 regarding landscaping and screening are applicable
12 approval standards. We conclude that LDC 213.06 is a mandatory
13 approval standard.

14 Furthermore, the LDC 213.06 performance standards require
15 <u>both</u> that the proposed use comply with all "local, state and
16 federal standards" and that the proposed use not "create a
17 nuisance." We agree with petitioners that the plan is
18 significant in this context. The plan <u>does</u> require GI uses to
19 comply with "local environmental standards." LDC 213.06
20 provides such "local environmental standards." Under LDC
21 213.06, the proposed use <u>may not</u> "create a nuisance," as that
22 term is used in the LDC, <u>and</u> also <u>must</u> comply with relevant
23 regulations of governmental agencies, in this case the DEQ and
24 the city. We believe that determining the proposed use complies
25 with regulations of the DEQ does not remove the necessity for
26 determining that the proposed use does not "create a nuisance."

In order to find that the city's local environmental regulations are met, the city must determine that the proposed use does not "create a nuisance" due to odor, noise dust smoke or gas. As the LDC is now written, the city cannot rely on issuance of a DEQ air contaminant discharge permit to establish that the proposed use satisfies the city's own nuisance standard. The LDC applies the city's own environmental standard in addition to the requirements of other agencies. Each requirement under LDC 213.06 is separate, and the city is required to make findings demonstrating compliance with each of the requirements of LDC 213.06.[15]

Finally, even if previous determinations were made that a similar use complied with the disputed approval criteria, such determinations do not eliminate the requirement to apply relevant approval criteria to the proposed use. The fact that the city settled its differences with Benton County concerning,

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[15]Petitioners offer another reason why issuance of a DEQ permit does not satisfy the LDC requirement that the use not create a nuisance. Petitioners argue:

> "* * * the record clearly shows that the current plant has continuously operated at below legal standards. In a March 15, 1989, letter to an Evanite executive, the regional manager for the Oregon Department of Environmental Quality concedes that Evanite has regularly exceeded emission limits and that the DEQ has failed to enforce these limits because of Evanite's 'cooperative nature' and statutory direction to use 'conference conciliation, and persuasion' rather than legal enforcement tools. ORS 468.090." Record 316-318.

Although not conclusive, this is persuasive evidence that reliance upon DEQ standards may not satisfy the requirement that the use not create a "nuisance."

intervenor's property by agreement, and that the city annexed intervenor's property and applied the GI zone to it, neither allows the city to waive LDC approval criteria nor determines that the proposed use falls within the use type classification for the GI zone.[16]

2. Adequacy of Findings

Petitioners contend that the city's findings do not address whether the proposed use will create a nuisance within the meaning of LDC 213.06. Petitioners maintain that the LDC term "nuisance" in this regard has its common dictionary meaning rather than its tort law meaning. In support of their understanding of the LDC meaning of "nuisance," petitioners cite LDC 101.01, which provides:

> "All words and terms used in this Code have their commonly accepted dictionary meaning unless they are specifically defined in this Code or the context in which they are used clearly indicates to the contrary."

Petitioners further cite the following dictionary meaning of the term "nuisance:"

> "1. A source of inconvenience, annoyance, or vexation; bother; 2. Law. A use of property or course of conduct that interferes with the legal rights of others by causing damage, annoyance, or inconvenience." American Heritage Dictionary.

Respondents cite findings they claim adequately address

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[16]As petitioners point out, it is equally possible that the city's application of its GI zone to intervenor's property expressed the city's desire to limit expansion of intervenor's business operations by making the existing use a nonconforming use. See discussion under the third assignment of error, infra.

LDC 213.06. However, respondents refer us to findings stating only that the city's application of the LI plan and GI zone designations to the subject property conclusively demonstrates that the proposed use conforms to the LDC performance standards for the GI zone.

We examine the adequacy of the findings cited by respondents to demonstrate that the proposed use meets the LDC 213.06 performance standards for the GI zone.

We agree with petitioners that the city must find, as part of its conditional development approval, that the proposed use satisfies relevant approval standards for uses in the GI district. As discussed, infra, that the city previously applied the GI zone to the subject property, in itself, has no significant bearing on this obligation. Application of a zoning designation to property is not equivalent to a determination that an existing use conforms to that zoning designation.

The city's findings are inadequate because they do not address whether the LDC 213.06 performance standards are met. The city must find that the performance standards of LDC 213.06 are satisfied. This requires the city to find that the proposed use will not "create a nuisance."[17]

3. Evidentiary Support

Under ORS 197.835(10)(b), we examine evidence identified by

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[17]We agree with petitioners that the LDC contemplates that the common rather than "legal" dictionary meaning of the term nuisance applies. LDC 101.01.

1 the parties to determine whether it clearly supports the city's
2 decision, notwithstanding the lack of required findings.[18]
3 Respondents cite evidence they argue would support findings
4 satisfying LDC 213.06. The only evidence cited by respondents,
5 however, is evidence that the proposed use will conform to DEQ
6 regulations applicable to the proposed use and evidence
7 regarding the previous land use actions taken by the city and
8 Benton County.
9 Petitioners point out that intervenor identified, in its
10 application for an air contaminant discharge permit, "[t]here
11 are currently 4 gaseous flouride/nuisance dust emission point
12 [sic] with Venturi Scrubber/Cyclonic Separator control equipment
13 and 3 gaseous flouride emission points with no control
14 equipment. This permit modification requests permission to add
15 two additional emission points 10/89 and a third emission point
16 around 4/90." (Emphasis supplied.) Record 390. Petitioners
17 claim the air contaminant discharge permit authorizes
18 intervenor's proposed glass fiber forming line to emit 38.5 tons
19 of particulates per year or 8.75 pounds per hour into the air,
20 and also permits 1.3 tons per year or 2.4 pounds per 8 hours of
21 gaseous flouride to be released into the air. Record 320.
22
23 [18]ORS 197.835(10) (b) provides in relevant part:
24 "Whenever the findings are defective because of failure to recite facts or legal conclusions * * * but the parties
25 identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm
26 the decision or a part of the decision supported by the record * * *."

Petitioners argue that these quantities of "dust" or "particulate" emissions are evidence that the proposed use impermissably "creates a nuisance" because of dust in that it both interferes with the legal rights of surrounding property owners by decreasing property values and interferes with area livability. Petitioners also claim that the evidence in the record establishes that the existing facilities produce regular noise which, when the use is relocated and expanded to the proposed location, will continue to occur. Petitioners contend that these dust and noise problems "annoy, concern and harm area residents and business" and, therefore, create a nuisance within the meaning of that term in LDC 213.06.

Petitioners cite the following testimony to support their position:

> "Noise emission from Evanite in our S.E. Corvallis Residential areas, our Greenway with its boat ramps and parks, our confluence area and river front have for years induced a chronic disturbance to the nervous systems of citizens using and living in these areas. * * * DEQ officials informed me that the legislature doesn't provide them enough money to properly monitor noise pollution.* * * [I]n 1988 noise levels were measured at Evanite by DEQ only three times. * * *
>
> "At the second Planning Commission meeting in February * * * several citizen from S.E. Corvallis testified of being woken up at night by sudden noises, and I testified of the six year annoying and disturbing noise level I have witnessed from Evanite on the bike path on my daily walks from Van Buren Bridge to Pioneer Park * * * At the confluence area on the bike path, the noise from Evanite in 1988 was so acute that * * * one was forced to * * * move on to free the nervous system.* * *
>
> "The intermittent, sudden loud noises S.E. Corvallis citizens testified about coming from Evanite * * *

which woke them up at night are not measured at all because of their short intermittent nature.* * *" Record 195-97

"I have been a resident of Corvallis since January 1, 1972. I am here to address you as a property owner in S.E. Corvallis. My wife and I still own this property and are very concerned about the proposed expansion of Evanite. Our concern regarding our property lies in the declining values in that area of town. When our house was bought in 1978, it cost $42,000. Two years ago two realtors independently told us we would be lucky to receive $38,000 from the sale of our house. This estimate was after we had roughly made $10,000 of upgrades and improvements, including the purchasing of a flag lot adjacent to our lot. The house across the street from us was repossessed by the bank and sold for $28,000. We have friends in the neighborhood who cannot move because they themselves owe more on their mortgages than the house is worth, after paying on the mortgage for eight years. Property values in S.W. [sic] Corvallis have declined at a sharper rate than anywhere else in the city. I feel certain that a large part of the declining property values is due to the presence of heavy industry from the Evanite plant in this neighborhood. We have suffered through explosions from the backfiring at Evanite, from pollution burners, we have suffered through the continuous deposition of nuisance dust, we have suffered through the endless rumblings that come from Evanite, and we have suffered from the obnoxious odors that come from the vapors that inundate our neighborhood from the pollution burners. The presence of Evanite Plant decreases the resale value of the neighborhood properties." Petition for Review 13.[19]

Petitioners identify evidence in the record that the proposed use will "create a nuisance." Respondents do not cite us to any evidence in the record, and we find none, supporting the city's decision that the proposed use will not create a nuisance, other than the previous planning approvals and alleged

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[19]The petition for review quotes a transcript of the March 27, 1989 city council hearing. The parties stipulated that the tapes of the proceedings below are a part of the record and that transcripts could be made from those tapes, as was done here.

1 compliance with the requirements of the DEQ. However, we have
2 already determined that this evidence is irrelevant to whether
3 the proposed use satisfies the LDC 213.06 "nuisance" standard.
4 See, Louisignont v. Union County, ___ Or LUBA ___ (LUBA No.
5 87-065, December 9, 1987.)

6 Accordingly, this subassignment of error is sustained.

7 The second assignment of error is sustained, in part.

8 THIRD ASSIGNMENT OF ERROR

9 "The city erred and made a decision not supported by substantial evidence in the record in finding that a
10 binding determination has been made in previous proceedings that the proposed use is permitted by the
11 comprehensive plan and zoning ordinance."

12 Petitioners argue that intervenor's existing facility is a
13 nonconforming use in the GI zone because it does not meet the
14 characteristics of the GI zone and because it does not meet the
15 performance standards for the GI zone. Petitioners contend that
16 the proposed use is an impermissable expansion of intervenor's
17 existing nonconforming use. Petitioners argue that the city has
18 not made any previous determination that the existing use
19 conforms to the city's LI plan and GI zone designations.

20 Respondents maintain that intervenor's existing use of the
21 subject property is a use conforming to the GI zone and LI plan
22 designations and that the LDC nonconforming use provisions are
23 not applicable. Respondents argue that compliance with the LDC
24 performance standards for the GI zone is not relevant to
25 determining whether intervenor's existing use is conforming or
26 nonconforming. Respondents further contend that petitioners'

1 allegation that intervenor's existing use of the property is
2 nonconforming is an impermissable collateral attack on the plan
3 and zone designations that the city applied to the property two
4 years ago. Respondents claim that the city made a determination
5 that the proposed use complies with the LI plan and GI zone
6 designations when it applied those designations after
7 annexation.

8 Respondents also claim that the city made a determination,
9 in the proceedings below, that intervenor's existing use
10 conforms to the requirements of the LI plan and GI zone
11 designations. Respondents cite the following findings:

12 "The Council notes that nothing in the record indicates the use issue was specifically addressed in
13 any land use actions since the 1979 City appeal of the County Building Official's decision. It also notes,
14 however, that Comprehensive Plan Finding 7.7.f states that 'the light industrial designation is applied to
15 developed and vacant lands and allows manufacturing and related uses which evidence few if any, nuisance
16 characteristics.' If this description had not described the uses on the property, the site would not
17 have been designated Light Industrial on the Comprehensive Plan and when annexed, General
18 Industrial on the LDC District Map.

19 "There have been many other opportunities to raise the use issue. The plant has operated at the site for
20 nearly ten years. DEQ discharge permits have been reviewed on several occasions. The 1987 extension of
21 services hearings, the 1987 annexation hearings, and the annexation election passed with no one questioning
22 the appropriateness of use.

23 "The Council acknowledges that it may evaluate the appropriateness of use during this land use action,
24 however, and fully considered the issue. Council notes that the materials used in the manufacturing
25 processes may appear to be 'raw materials', but is persuaded that the materials have been substantially
26 processed before Evanite purchases them for their

> processes. Furthermore, the offices, warehousing, and flame-blown process proposed for the expansion are permitted in the GI district. These findings support the negative decision on a motion made by Councilor McDaniels to declare the existing and proposed uses of the site as non-conforming. When this motion failed, Councilor McDaniels clarified for the record, that the Council had determined the existing and proposed uses conform to the General Industrial District. Therefore, the Council finds that 'appropriateness of use' issue, raised in the appeal, does not apply to GCU-88-2." Record 52.

We agree with petitioners that the city is required to determine in this proceeding whether intervenor's existing use is a conforming or nonconforming use in the GI zone.[20]

LDC 111.03 defines nonconforming structure or use as follows:

> "Nonconforming Structure or Use - A lawful existing structure or use in existence at the time this code, or any amendment thereto, becomes effective which does not conform to the requirements of the district in which it is located."

Under the above definition for the existing use to be conforming in this case, it must "conform to the requirements of the [GI] district." This means that it must comply with both the use description and the performance standards for the GI zone.

We turn to the adequacy of the city's findings to

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[20]We disagree that there have been numerous previous opportunities to address the issue of the conformance of the existing use with the GI zone. We are cited to nothing demonstrating that the city ever determined, prior to the proceeding below, whether the existing use conforms to the LDC requirements for the GI zone. This is the first time it has been necessary for the city to determine whether the existing use of the property is a nonconforming use. Petitioners correctly point out that the plan and zone classifications applied to the property are equally consistent with the city's desire to limit intervenor's ability to expand its operations at the present location.

demonstrate that intervenor's existing use is not a nonconforming use.

The city found that the existing use complies with the GI zone use type classification. Under the second assignment of error, we agreed with respondents that the city's findings that the proposed use does not utilize "raw materials" are adequate. In this assignment, however, we must determine whether intervenor's exisiting use of the property converts "raw materials," as that term is used in the INT IND use type classification, into finished or semi-finished products or whether the materials converted are "previously processed," as that phrase is used in the GI use type classification.

The existing facility employs rotary fiber processes to manufacture glass disks. The city's findings state the rotary fiber process melts "processed sand, borax, Nepheline, Syenite, Dolomite, Soda Ash, and Limestone into glass disks. These materials are <u>highly refined</u> before Evanite purchases them to assure quality control." (Emphasis supplied.) Record 48-49.

These findings are adequate to support the city's conclusion that the existing use employs materials which were "previously processed," as required by the GI zone use type classification. However, the parties do not cite any evidence in the record supporting the city's finding that the sand, borax, limestone, and other materials are "processed" or "highly refined" before intervenor uses them in its manufacturing

process.[21] Without such evidence, the city's determination that the existing use complies with the GI use type classification is not supported by substantial evidence in the record.

Whether the existing use is nonconforming also depends upon whether it complies with the performance standards of LDC 213.06.[22] The city made no findings on whether the existing use meets the performance standards for the GI zone. The city must determine whether the existing facility creates a "nuisance because of odor, noise, dust, smoke, or gas." LDC 213.06.

Thus, on remand, the city must determine whether the existing use is nonconforming and, if so, whether the proposed use constitutes an expansion of the nonconforming use.[23] If both these determinations are affirmative, the proposed use is subject to the restrictions of LDC 111.03.02.[24]

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[21]As discussed in the previous assignment, petitioners do cite intervenor's air contaminant discharge permit application as listing these materials as "raw materials." This evidence does not support the city's determination, but also does not conclusively establish that the materials listed cannot be "previously processed," as that phrase is used in LDC 200.02.04(c).

[22]We note the intervenor's existing use of the subject property could be a conforming use in the GI zone if it either complied with LDC 213.06 when the GI district was applied to the property or was brought into compliance with LDC 213.06 after the GI district was applied to the subject property.

[23]It is not for us to make the initial determination of whether the existing use is a nonconforming use, or whether the proposed use is an expansion of the existing use. We note that the proposed use appears to be an expansion of intervenor's existing use, however intervenor's existing use is ultimately characterized by the city, in that the proposal is to relocate and enlarge an existing product line, to provide a parking lot to serve both the existing and the proposed facility and to provide offices which will serve both the proposed and existing facility.

[24]LDC 111.03.02 provides:

1 This subassignment of error is sustained.

2 The third assignment of error is sustained in part.

3 FIFTH ASSIGNMENT OF ERROR

4 "The city erred in finding that Corvallis
5 Comprehensive Plan Policies 1.1.4, 8.4.4, 13.4.4, 6.4.5, 5.1.3, 5.1.4, and 5.1.7.a-j are not directly
6 applicable to the subject decision."[25]

SIXTH ASSIGNMENT OF ERROR

7

8 "The city erred and made a decision not based upon substantial evidence in the whole record or upon
9 adequate findings in finding the following plan policy to be inapplicable or satisfied * * *:

10 "B. Policy 1.1.4: 'Where conflicting land uses abut, the more intensive land use, or
11 the site being developed, shall be subject to special site development standards
12 designed to enhance livability and reduce the negative impact on the less intensive
13 use.'"

14 SEVENTH ASSIGNMENT OF ERROR

15 "The city erred and made a decision not based upon

16

17

18 "No nonconforming development shall be expanded or moved to occupy a different or greater area of land, buildings or structures than was occupied by such development at the time it
19 became nonconforming."

20 Furthermore, LDC 111.01 provides the intent and purpose for the nonconforming use provisions as follows:

21 "Within the development district established by this Code or amendment hereof, development may exists which was lawful before the effective date
22 of this Code but which would be prohibited in the future under the terms of this code or future amendments. It is the intent of this code that
23 nonconformities shall not be enlarged, expanded, or extended nor be used to justify development prohibited elsewhere in the same district."

24

25 [25]Under the sixth through tenth assignments of error petitioners present specific claims that the city erred in finding that each of the plan policies referred to in the fifth assignment are inapplicable.
26 Accordingly, the issue raised in the fifth assignment of error is addressed in our discussion under the sixth through tenth assignments of error below.

substantial evidence in the whole record or upon adequate findings in finding the following plan policy to be inapplicable or satisfied * * *:

> "Policy 8.4.4: 'The City should review all development proposals for compatibility with surrounding established residential areas.'"

Petitioners claim that the above cited policies were not addressed by the city. Petitioners contend that these policies apply because there are less intensive uses surrounding the proposed use including residential uses, a park and other recreational and resource uses and because the proposed use is incompatible with the surrounding established neighborhoods.

Respondents argue that these policies were addressed by the city through the LDC WRG overlay conditional development criteria, as follows:

> "The land development regulations contained in this Code are in accordance with the Comprehensive Plan and are intended to ensure that development is of the proper type, design, and location and serviced by a proper range of public facilities and services; and in all other respects be consistent with the goals and policies of the Corvallis Comprehensive Plan." LDC 100.01.a.

We agree with respondents that policies 1.1.4, and 8.4.4 are not independent approval criteria. Policy 1.1.4 is mandatory only in the sense that it requires application of special site development standards to "enhance livability and to reduce the negative impact on the less intensive use." However, the WRG overlay zone and the performance standards of LDC 213.06 apparently were adopted to provide this assurance. Policy 8.4.4 does not use mandatory language, but rather only recommends what

the city should do. See, Standard Insurance v. Washington County, supra, slip op 9-10.

LDC 100.01 sets out the role of the LDC to carry out plan policy. While we cannot say all plan policies are satisfied through application of the LDC, we do conclude that nonmandatory policies, such as policy 8.4.4 are satisfied by applying the LDC, and that policies contemplating application of further standards like policy 1.1.4 are satisfied by application of relevant LDC standards.

We conclude that policies 1.1.4 and 8.4.4 are not independent approval criteria, and the city was not required to make findings showing compliance with them.[26]

Petitioners also challenge the substantiality of the evidence to support the city's findings that these policies were satisfied. Because the findings are unnecessary to the city's decision, it is unnecessary to evaluate the substantiality of the evidence to support the findings. Bonner v. City of Portland, 11 Or LUBA 40 (1984).

The sixth and seventh assignments of error are denied.

EIGHTH ASSIGNMENT OF ERROR

> "The City erred and made a decision not based upon substantial evidence in the whole record or upon adequate findings in finding the following plan policy

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[26]The city made findings in which it stated that these plan policies were not independent approval criteria. The city also made alternative findings that these plan policies are met. However, it is not necessary to determine the adequacy of findings which are unessential to the decision. Bonner v. City of Portland, supra.

to be inapplicable or satisfied * * *:

> "Policy 13.4.4: 'Buffers or transition areas shall be established where necessary to separate and protect residential, commercial, industrial, recreational, and urban support lands from each other.'"

Petitioners contend the city erred by not demonstrating compliance with plan policy 13.4.4.

Respondents note the city found this policy inapplicable to development within the city. Record 53. However, respondents also point out that the city made findings which respondents contend satisfy this plan policy, if it applies. The findings respondents cite do address buffering to the extent that the plan policy applies. Petitioners do not explain why the findings cited by respondents are inadequate to satisfy the plan policy and, therefore, do not demonstrate a basis for reversal or remand of the city's decision. Rogers v. Douglas County, ___ Or LUBA ___ (LUBA No. 88-059, November 10, 1988), slip op 8-9.

The eighth assignment of error is denied.

NINTH ASSIGNMENT OF ERROR

> "The city erred and made a decision not based upon substantial evidence in the whole record or upon adequate findings in finding the following plan policy to be inapplicable or satisfied * * *:
>
> > "Policy 6.4.5: 'Ensure that special precautions are taken for the storage of hazardous substances particularly in the 100 year floodplain.'"

Petitioners do not identify what, if any, hazardous substances will be stored at the proposed facility. The city

found:

> "The applicant's request does not indicate that any hazardous materials will be stored on the site. Since the floor elevation of the building will be above the 100-year floodplain elevation, the last part of the criterion would not relate to any of the storage in the building.
>
> "Therefore, the Council finds that Comprehensive Plan Policy 6.4.5 does not apply to this request." Record 55-56.

Petitioners do not explain the extent to which this plan policy applies or why the policy is not satisfied by the decision. The city indicates that no hazardous materials will be stored on the site. In the absence of some citation to evidence in the record or argument from petitioners establishing that hazardous materials will be stored at the proposed site, we do not understand how this provision could be violated. It is petitioners' responsibility to explain how the cited plan policy is violated. Deschutes Development v. Deschutes County, 5 Or LUBA 218, 220 (1982). Petitioners have not done so.

The ninth assignment of error is denied.

TENTH ASSIGNMENT OF ERROR

> "The city erred and made a decision not based upon substantial evidence in the whole record or upon adequate findings in finding the following plan policy to be inapplicable or satisfied * * *:
>
> "Policies 5.1.3, 5.1.4, 5.1.7.a-j."

A. Policies 5.1.3 and 5.1.4

We first determine the applicability of plan policies 5.1.3 and 5.1.4, before turning to petitioners' arguments regarding plan policies 5.1.7.a-j.

Plan Policy 5.1.3 provides:

"Development shall be directed away from the river to the greatest possible degree; provided, however, that lands in the downtown area shall be permitted to develop for urban uses in a manner which both enhances the greenway and provides opportunities for residential, commercial, and other urban uses."

Plan Policy 5.1.4 provides:

"The diverse nature of the greenway requires development of a compatibility review process which allows for:

"Creation of commercial and residential opportunities;

"development and maintenance of public access within the urban context;

"creation of controls which assure high quality development within and abutting the greenway to encourage citizen utilization;

"retention of rural areas of the greenway in open space uses;

"assessment of the trade-offs between rural uses and public access;

"location of transportation corridors."

Petitioners contend that these policies are mandatory approval criteria and that they "back up" other "review criteria." Petition for Review 23. These policies may indeed "back up" other review criteria. However, these policies do not appear to be independent approval criteria. Policy 5.1.3 requires development occur "away from the river to the greatest possible degree," but provides that downtown development is permitted to develop in a manner which "enhances the greenway and provides opportunities for residential, commercial and other

urban uses." (Emphasis supplied.) This policy states a city preference that development occur away from the river, but also states that its preference in this regard is not absolute. We see nothing in the words or context of policy 5.1.3, and nothing is cited, which would make policy 5.1.3 a mandatory approval criterion as opposed to a plan standard to be considered in developing implementing regulations. See, Bennett v. City of Dallas, ___ OR LUBA ___ (LUBA No. 88-078, February 7, 1989), aff'd 96 Or App 645 (1989).

LDC 216.01.04 and 216.01.05 provide specific WRG conditional development approval criteria which are designed to implement the plan. LDC 216.01.01. We do not see any conflict between the WRG conditional development approval criteria and policy 5.1.4 which might require direct application of this plan policy. See, Baker v. City of Milwaukie, 271 Or 500, 533 P2d 772 (1975).

Because the findings challenged under this subassignment of error are not necessary to support the city's decision, evidence in support of the findings is also unnecessary.

This subassignment of error is denied.

B. Policy 5.1.7.a-j

Plan policy 5.1.7 a-j provides:

> "Any change of use, intensification, or development within the greenway shall be reviewed to determine conformance with adopted greenway regulations and the following use management considerations or requirements:
>
> "a. Public access to and along the river shall be

provided to the maximum extent possible.

"b. Significant fish and wildlife habitats shall be protected.

"c. Significant natural and scenic areas, viewpoints, and vistas shall be preserved.

"d. The quality of the air, water, and land resources in and adjacent to the greenway shall be preserved in the development, change of use, or intensification of use.

"e. Areas of annual flooding, floodplains, and wetlands shall be preserved in their natural state to the maximum possible extent.

"f. The natural vegetative fringe along the river shall be maintained and enhanced to the maximum extent that is practical to assure scenic quality, protection of wildlife, protection from erosion, and screening of uses from the river.

"g. Any public recreational use or facility shall not substantially interfere with the established uses on adjoining property.

"h. Maintenance of public safety and protection of public and private property, especially from vandalism and trespass, shall be provided to the maximum extent practicable.

"i. Extraction of aggregate deposits shall be conducted in a manner designed to minimize effects on water quality, fish and wildlife, vegetation, bank stabilization, stream flow, visual quality, noise and safety, and to guarantee necessary reclamation.

"j. Development, change, or intensification of use shall provide the maximum possible landscaped area, open space, or vegetation between the activity and the river." (Emphasis supplied.)

Petitioners argue that these plan policies are independent approval standards that are not satisfied by the city's findings.

Respondents correctly point out that these comprehensive

1 plan policies are fully implemented through LDC Section 216.01.
2 The considerations and requirements of this plan policy are
3 applied almost verbatim in LDC 216.01.04. We conclude, pursuant
4 to LDC 100.01, that these plan policies are implemented through
5 LDC 216.01.04. Petitioners' challenges to the city's
6 application of the LDC requirements are addressed infra.
7 This subassignment of error is denied.
8 The tenth assignment of error is denied.
9 ELEVENTH ASSIGNMENT OF ERROR
10 "The city erred and made a decision not based upon
substantial evidence in the whole record or upon
11 adequate findings in finding the following code
criterion to be satisfied * * *:
12
"Section 216.01.04(e): Areas of annual
13 flooding, floodplains, and wetlands shall
be preserved to the maximum possible
14 extent."
15 Petitioners argue that the proposed use is within the 100
16 year floodplain and consequently LDC 216.01.04(e) is a mandatory
17 approval criterion. Petitioners state that the use of the term
18 "preserve" in LDC 216.01.04(e), "* * * requires preservation of
19 areas of annual flooding, floodplains, and wetlands within the
20 greenway." Petition for Review 28. Petitioners contend that
21 LDC 216.01.04(e) is satisfied only by a finding that it is "not
22 possible to locate the structure elsewhere on the property or on
23 other property reasonably available for the purpose." Id.
24 Petitioners claim the city's findings that "'no significant
25 change in flood levels' are anticipated" are inadequate to
26 satisfy LDC 216.01.04(e). Id.

Respondents contend that the property is not in its "natural state due to its prior use as an aggregate extraction site." Respondents' Brief 18. Respondents disagree with petitioners' interpretation of the term "preserved" in the context of LDC 216.01.04(e). Respondents argue that LDC 216.01.04(e) uses both the term "preserve," and the phrase "to the maximum possible extent," and read together they "involv[e] an assessment of existing conditions, the realities of the property's designation as General Industrial use and the inability of the user to minimize impacts on the floodplain." Respondents' Brief 18-19.

The city found:

> "* * * The basic design layout specifically addresses the need to minimize impact on the flood plain. The discretionary phrase, 'to the maximum extent possible,' does not preclude development of the site nor does it demand consideration of other sites that may be available elsewhere in the community. The applicant's design minimizes impacts on the flood plain by limiting the amount of intensive development that will occur in the floodplain. Through comparison with the by-pass fill, Council concludes that no significant impact on the flood plain will occur." Record 46.

We agree with petitioners that these findings misapply the standard. LDC 216.01.04(e) requires that area in the floodplain be "preserved" to the "maximum extent possible." While we consider the city's interpretation of LDC 216.01.04(e) in interpreting that LDC provision, it is ultimately our responsibility to determine whether the city's interpretation is correct. McCoy v. Linn County, 90 Or App 217, 275-276,

752 P2d 323 (1988). We conclude the city's interpretation, that the LDC floodplain standard "preserve to the maximum extent possible" means the same thing as "no significant impact to the floodplain will occur," is not correct. The city must find that the floodplain will be preserved or, if not, whether it is preserved to the "maximum extent possible" in view of the use allowable under the zoning ordinance and the particular characteristics of the site.

Accordingly, the eleventh assignment of error is sustained.

TWELFTH ASSIGNMENT OF ERROR

> "The city erred and made a decision not based upon substantial evidence in the whole record or upon adequate findings in finding the following code criterion to be satisfied * * * :
>
> > "F. Section 216.01.04(c): Significant natural and scenic areas, viewpoints, and vistas shall be preserved."

Petitioners' arguments under this assignment of error are primarily in the form of a quotation from their notice of appeal to the city council (council).[27] Petitioners' arguments are directed at the planning commission's (commission) findings. The commission's findings were not, however, adopted by the council. Petitioners do not identify or explain how the

---

[27]Other than a reference to this quotation from their notice of appeal, petitioners' argument under this assignment consists of the following:

> "* * * The landscaping plan submitted by the applicant improves the situation, but it doesn't alter the basic fact that a large, unsightly structure is going to go in the Greenway and that it will in no sense 'preserve' the qualities in question." Petition for Review 29-30.

council's decision is erroneous, and therefore, we cannot determine what petitioners view as wrong in the council's decision. Petitioners invite us to compare the decisions of the commission and council and infer how petitioners would view the council's decision from petitioners' disagreement with the decision of the commission. However, explaining what is wrong with the city's decision is petitioners' responsibility and we do not make petitioners' arguments for them. Deschutes Development v. Deschutes County, supra.

The twelfth assignment of error is denied.

THIRTEENTH ASSIGNMENT OF ERROR

> "The city erred and made a decision not based upon substantial evidence in the whole record or upon adequate findings in finding the following code criterion to be satisfied * * *:
>
>> "G. Section 216.01.04 (d): The quality of air, water, and land resources in and adjacent to the Greenway shall be preserved in the development, change of use, or intensification of use."

Petitioners argue that LDC 216.01.04(d) sets a stricter standard for impacts on air, water and land resource quality than would exist if the WRG provisions were not applied. Petitioners point out that independent of any of the requirements of the WRG district, intervenor is required to obtain a DEQ air contaminant discharge permit for the proposed development. Petitioners contend that if this WRG standard is to have meaning, satisfaction of the standard must require more than showing that the proposed use complies with DEQ

1 requirements. Petitioners maintain that WRG 216.01.04(d)
2 requires that "[a]ny applicant proposing development, change of
3 use, or intensification of use within the Greenway must show
4 that the proposed activity will result in no adverse effect upon
5 or degradation of 'air, land, or water quality resources in and
6 adjacent to the Greenway.'" Petition for Review 30.

7 Petitioners also argue in the alternative, that even if
8 LDC 216.01.04(d) could be interpreted to be satisfied by
9 compliance with the standards of the DEQ, the city improperly
10 delegated to DEQ the responsibility of determining compliance
11 with this local standard. <u>See</u>, <u>Louisignont v. Union County</u>, __
12 Or LUBA ___ (LUBA No. 87-065, December 9, 1987). Furthermore,
13 petitioners argue the proposed use will <u>not</u> comply with the DEQ
14 "noise sensitive area" standards.

15 Respondents argue that WRG 216.01.04(d) is satisfied by
16 establishing that the proposed use will comply with DEQ
17 standards. The city found as follows:

18 > "* * * Corvallis has relied on the standards and expertise of the Department of Environmental quality
19 > (DEQ) to assure maintenance of air and water quality. The applicants stated that this practice should be
20 > continued. Facts regarding this topic area are discussed below * * *
21 >
> "* * * * *
22 >
> "The applicant testified that the present amount of
23 > particulate fibers in the air at the perimeter of the site is approximately 70/10,000ths. The applicant
24 > pointed out that with the expansion, the increase would be to 87/10,000ths, which is an increase of only
25 > 17/10,000ths. The applicant pointed out that these levels are comparable to 'ambient levels', which
26 > represents the amount of fibers already in the air in

urban communities generally, based upon all sources of fibers. The applicant testified that at the DEQ hearing, an air quality officer pointed out that the requested 38.5 tons per year was the equivalent of a one-time burning of a 400 acre grass seed field.

"* * * * *

"With respect to air and noise quality, the City of Corvallis does not have its own specific criteria which have been adopted to regulate particulate discharge or noise levels. In the past, the City has relied upon statewide standards promulgated by the Department of Environmental Quality. In addition, Section 213.06 of the General Industrial District provides:

> "Each use activity, or operation within this District shall comply with the applicable local, state and federal standards.

"Similarly, Policy 6.2.1 of the Comprehensive Plan provides:

> "Insure that development complies with applicable state and federal noise emission standards.

"Given the fact that Corvallis has not adopted specific standards to regulate these forms of emissions, the City cannot now impose standards in the context of this quasi judicial case without previously adopting such standards. The city has conditioned this approval upon compliance with applicable DEQ standards regarding particulate and noise and absent more stringent local standards, these state level standards regulate.

"The applicant's evidence indicated that the amount of glass fiber in the air at the perimeter of the plant would be within levels which pose no material health concern based upon the DEQ standards and the most recent scientific analyses of the effect of glass fibers. * * *

"Given the fact that noise levels will be reduced from the requested expansion, the expansion, in and of itself, will not adversely affect the Greenway.* * *

"Finally, as noted above, the standard of 'preserve' does not require a development to prevent any and all

impacts from affecting the Greenway airshed. If that interpretation were followed, virtually no development could occur. The Council notes that a balance must be struck within the Greenway between allowing development and preserving the qualities of the Greenway.

"Therefore, based on the evidence presented, the Council finds that the proposed development meets the air quality criteria in the Greenway regulations." Record 39-44.

It is not entirely clear how the city interpreted and applied LDC 216.01.04(d). As best as we can determine, the city interpreted LDC 216.01.04(d) to be satisfied by imposing a condition that the approved use comply with applicable DEQ regulations. WRG 216.01.04(d) is a local standard with which the proposed use must be found to comply. While we do not agree with petitioners that this standard necessarily requires there be _no_ adverse impacts to the identified resources, we also do not agree with the city that this standard is satisfied by a condition requiring compliance with DEQ regulations. _Louisignont v. Union County_, _supra_. Requiring that environmental qualities be "preserved" is not necessarily the same as requiring compliance with the requirements of the state and federal governments.

We conclude the city applied an incorrect interpretation of LDC 216.01.04(d). On remand, the city must determine what "preserve" means in the context of its WRG overlay district and plan and apply it to intervenor's proposed use of the property.

The thirteenth assignment of error is sustained.

The city's decision is remanded.