BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RAY M. KNAPP and JULIE M. KNAPP, Petitioners, vs. CITY OF JACKSONVILLE, Respondent, and ROBERT R. CECIL, Intervenor-Respondent.	LUBA No. 90-064 FINAL OPINION AND ORDER

Appeal from City of Jacksonville.

Karen C. Allan, Medford, filed the petition for review and argued on behalf of petitioners. With her on the brief was Foster, Purdy, Allan, Peterson & Dahlin.

Martial E. Henault and Tonia L. Moro, Medford, filed a response brief and Martial E. Henault argued on behalf of respondent.

Robert R. Cecil, Jacksonville, represented himself.

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

AFFIRMED 10/31/90

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners appeal a Jacksonville City Council order denying their application to subdivide an 11.5 acre parcel into 19 lots.[1]

MOTIONS

A. Motion to Intervene

Robert R. Cecil moves to intervene in this proceeding on the side of respondent. There is no objection to this motion, and it is allowed.

B. Petitioners' Motion to Strike / Intervenor-Respondent's Motion for Extension of Time

Intervenor-respondent Cecil's (intervenor's) response brief was due on August 17, 1990, 42 days after the Board received the second supplemental record from respondent on July 6, 1990. OAR 661-10-050(3)(b); 661-10-035(1). Intervenor filed his response brief by mail on September 7, 1990. The certificate of service attached to intervenor's

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[1]This Board has exclusive jurisdiction to review "land use decisions." ORS 197.825(1). "Land use decision," however, does not include a decision which "* * * denies a subdivision * * * located within an urban growth boundary where the decision is consistent with land use standards * * *." ORS 197.015(10)(b)(B). In Cecil v. City of Jacksonville, ___ Or LUBA ___ (LUBA No. 90-013, August 27, 1990), slip op 5-9, we determined that this exception only applies to decisions concerning subdivisions within an "established," i.e. acknowledged, urban growth boundary (UGB) and that the City of Jacksonville's UGB is not acknowledged by the Land Conservation and Development Commission (LCDC). Thus, because the city's UGB is not acknowledged, the challenged decision denying a subdivision is not within the exception to the definition of "land use decision" recognized by ORS 197.015(10)(b)(B).

brief states that copies of the brief were served on petitioners' and respondent's attorneys by hand delivery on September 10, 1990. Oral argument in this proceeding took place on September 13, 1990. Intervenor was not present at oral argument.

On September 17, 1990, petitioners filed a motion to strike intervenor's brief because it was not filed in a timely manner. Petitioners' attorney states in an affidavit that a copy of intervenor's brief was hand delivered to her law offices on the afternoon of September 12, 1990. Petitioners' attorney states that she had very little time to look at the brief prior to oral argument. Petitioners contend intervenor's failure to timely file and serve his brief, or to request an extension of time for filing his brief, prejudiced petitioners' right to reply to that brief at oral argument and in a reply brief.

On September 24, 1990, intervenor filed a Motion to Allow Intervenor-Respondent to File Brief Outside of Specified Time Limits. Intervenor essentially requests an extension of time to allow his brief to be filed, and opposes petitioners' motion to strike. Intervenor argues that his brief "was inadvertently delayed due to the severity of continuing medical problems * * *." Intervenor's motion also states that "[i]nconvenience created the unknown delay in hand delivery of Intervenor-

Respondent's brief to the Petitioners * * *."[2]

There is no dispute that under our rules, intervenor's brief was due on August 17, 1990 and was filed 21 days late. Furthermore, although OAR 661-10-067(4) requires that a motion for extension of time be filed "within the time required for the performance of the act for which an extension of time is requested," intervenor did not request an extension of time for filing his brief until September 24, 1990. Thus, it is undisputed that neither intervenor's brief nor his request for an extension of time was timely filed under our rules.

However, OAR 661-10-005 authorizes us to overlook technical violations of our rules, if such violations do not affect the substantial rights of parties. The parties' substantial rights to which OAR 661-10-005 refers are rights to (1) the speediest practical review, (2) a reasonable opportunity to prepare and submit argument, and (3) a full and fair hearing. Kellogg Lake Friends v. City of Milwaukie, 16 Or LUBA 1093, 1095 (1988).

Petitioners received intervenor's brief less than one full day before the oral argument in this appeal. We, therefore, agree with petitioners that they did not have an adequate opportunity to submit argument in response to the

[2]We interpret this statement as an acknowledgment that intervenor's brief was not delivered to petitioners' attorney's office until the afternoon of September 12, 1990.

arguments in intervenor's brief, a right which is among the substantial rights referred to above. If the late filing of intervenor's brief were allowed, we would have to grant petitioners an opportunity to present argument in response to intervenor's brief, which would necessitate further delay in the issuance of the final opinion in this proceeding. Under these circumstances, the late filing of intervenor's brief and motion for extension of time are not excusable technical violations of our rules. See Beck v. City of Tillamook, ___ Or LUBA ___ (LUBA No. 90-056, October 25, 1990), slip op 4.

Intervenor's Motion to Allow Intervenor-Respondent to File Brief Outside of Specified Time Limits is denied. Petitioners' Motion to Strike intervenor's brief is granted.

C. Motion to File Reply Brief

On September 11, 1990, pursuant to OAR 661-10-039,[3] petitioners filed a Motion to File Reply Brief. Petitioners ask to file a reply brief "in order to respond to new matters raised in the respondent's brief."

Respondent objects to petitioners' motion on three grounds. First, respondent contends petitioner's reply brief does not comply with the requirement of OAR 661-10-039

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[3]OAR 661-10-039 ("Reply Brief") provides:

> "A reply brief may not be filed unless permission is first obtained from the Board. A reply brief shall be confined solely to new matters raised in the respondent's brief. * * *"

that reply briefs be limited to new matters raised in the respondent's brief. Respondent argues the reply brief merely repeats arguments made in the petition for review. Second, respondent argues petitioner's motion was not filed within a reasonable time after respondent's brief was served on petitioners.[4] Respondent argues it is prejudiced because it did not receive the reply brief until the day before oral argument, and did not have time to review or respond to the brief at oral argument. Third, respondent contends that granting petitioner's motion would further delay the issuance of this Board's final opinion and order on this case, as respondent would request additional time to file a written response to the reply brief.

OAR 661-10-039 does not expressly state what circumstances justify filing a reply brief, only that such a brief is limited to addressing new matters raised in respondent's brief. However, we have interpreted this rule "to require petitioners to demonstrate a need for a reply brief." Kellogg Lake Friends v. Clackamas County, ___ Or LUBA ___ (LUBA No. 88-061, December 22, 1988), slip op 5, aff'd 96 Or App 536, rev den 308 Or 197 (1989) (Kellogg Lake); Martin v. City of Tigard, ___ Or LUBA ___ (LUBA No. 88-034, Order Denying Request to File Reply Brief, August 17, 1988). In Kellogg Lake, supra, slip op at 34

[4]Pursuant to a stipulation of the parties, the time for respondent to file its brief was extended from August 17, 1990 to August 27, 1990.

n 4, we also stated that although it would be desirable to have a full explanation of the need for a reply brief in a petitioner's motion, we will also consider oral argument in support of the motion in determining whether the need for a reply brief has been demonstrated.

In this case, petitioners' motion states only that petitioners wish "to respond to new matters raised in the respondent's brief." Except as noted below, petitioners do not identify, in their motion or in their oral argument, what those new matters are or why they merit a response in a reply brief.[5] Petitioners' reply brief contains sections which reply to respondent's response to the statement of facts in the petition for review, and to each of respondent's responses to petitioners' seven assignments of error. Nowhere is there any identification of new issues raised in respondent's brief.

It is petitioners' responsibility to explain why the filing of a reply brief under OAR 66-10-039 is warranted. Petitioners have not done so in this case.

Petitioners' Motion to File Reply Brief is denied.

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[5]At oral argument, the Board asked petitioners for their response to the allegation in respondent's brief that petitioners, the applicants below, had entered into a November 17, 1989 settlement agreement whereby they waived their right to object to any procedural defects in the city's proceedings which occurred prior to November 7, 1989. Respondent's Brief 3. Petitioners stated they prefer to respond to this issue in their reply brief. However, petitioners do not identify, and we cannot find, any portion of the reply brief which directly addresses whether petitioners entered into the November 17, 1989 settlement agreement and what the effect of any such agreement is on our review.

FACTS

On August 7, 1989, petitioners filed with the city an application to subdivide a vacant 11.5 acre parcel into 19 lots. The subject parcel is designated Suburban Residential on the plan map and is zoned Suburban Residential, 20,000 sq. ft. minimum (SR-20). The property to the south is also zoned SR-20, properties to the west and north are zoned Single-Family Residential, 6,000 sq. ft. minimum (R-1-6), and property to the east, outside the UGB, is zoned Suburban Residential, 40,000 sq. ft. minimum (SR-40). The parcel is heavily wooded, and Daisy Creek flows through its southwest corner. The western end of the parcel is within a National Historic Landmark District. Property adjoining the parcel to the north is also within this district. Plan Map 8.

On September 26, 1989, the city planning commission opened a public hearing on the subdivision application, but refused to take testimony because the originally filed tentative subdivision plat (Flatebo plat) was not "prepared by or under the direction of a registered civil engineer, or registered surveyor, licensed by the state of Oregon," as required by Jacksonville Land Division Regulations (JLDR) 16.12.020. Record 605. On October 16, 1989, the planning commission issued an order denying the subdivision application on this basis. Record 606. Petitioners appealed this decision to the city council. Record 600.

On November 7, 1989, the city council remanded the

decision to the planning commission for review of petitioners' second tentative subdivision plat (Farber plat), which was prepared by a registered surveyor, but which the planning commission refused to consider in its earlier decision. Record 592. A letter to petitioners from the city attorney, dated November 17, 1989, indicates that (1) petitioners' August 7, 1989 subdivision application would be remanded to the planning commission for a complete review on the basis of the Farber plat, (2) the Flatebo plat "would not be before the Planning Commission or at issue in any way," (3) the city would not consider a current residential building moratorium to be applicable to petitioners' application, (4) petitioners agreed to waive any procedural defects in the city's proceedings occurring on or before November 7, 1989, and (5) petitioners agreed to waive any deadlines for city action on their subdivision application.[6] Record 536-537.

On January 25, 1990, after additional public hearings on November 30 and December 20, 1989, the planning commission adopted an order denying the subdivision application. Record 143-172. Petitioners appealed this decision to the city council. On April 17, 1990, after an additional public hearing on March 5, 1990, the city council

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[6]The city attorney's letter asked petitioners to inform him immediately if they had any disagreement with the points set out in his letter. As far as we know, petitioners did not inform him of any disagreement with the content of the letter.

adopted the challenged order denying petitioners' subdivision application. Record 2-20.

FIRST THROUGH FOURTH ASSIGNMENTS OF ERROR

> "The City erred by failing to identify what standards petitioners must meet to obtain approval for their tentative plat."
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> "The City erred in failing to consider Ordinances No. 289 and 317 which are directly applicable to this proceeding."
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> "The City erred in making a decision not supported by substantial evidence in the whole record."
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> "The City erred in failing to make adequate findings. Oregon law requires a rational analysis of how [the] City made its decision."

The city's denial of petitioners' subdivision application has three independent bases -- failure to comply with (1) JLDR 16.12.020 ("Submission of Tentative Plat"); (2) the Jacksonville Comprehensive Plan (plan); and (3) Statewide Planning Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources). Petitioners' interlocking arguments under the above quoted assignments of error challenge all three of the city's bases for denying the subject subdivision, on grounds that the city (1) failed to identify the applicable standards, (2) misconstrued the applicable law, (3) adopted inadequate findings, and (4) made a decision not supported by substantial evidence. We first address petitioners' arguments challenging respondent's denial on the basis of noncompliance with Goal 5.

A. Introduction

Goal 5 mandates that open space and certain listed natural resources be protected. Goal 5 establishes a comprehensive planning process whereby local governments are required to (1) inventory the location, quality and quantity of the listed natural resources within their jurisdiction; (2) identify conflicting uses for the inventoried sites; (3) determine the economic, social, environmental and energy (ESEE) consequences of the conflicting uses; and (4) develop programs to achieve the goal of resource protection. See OAR Chapter 660, Division 16.

In acting on a development application prior to acknowledgment of its comprehensive plan and land use regulations by LCDC pursuant to ORS 197.251, a local government must determine whether Goal 5 is applicable to the subject property and, if so, whether the proposed development complies with the goal. ORS 197.175(2)(c); Gearhard v. Klamath County, 7 Or LUBA 27, 34 (1982). This requires (1) determining whether Goal 5 resources are present on the site, or will be affected by the proposed development of the site; (2) identifying conflicts between the proposed development and such Goal 5 resources; and (3) determining the ESEE consequences of such conflicts. See Panner v. Deschutes County, 14 Or LUBA 1, 9-10, aff'd 76 Or App 59 (1985). Only if this analysis is carried out, can the local government decide whether approval of the proposed

development can comply with Goal 5.

As explained in n 1, we previously determined that the city's plan and land use regulations are not acknowledged. In the challenged decision, the city found that two resources protected by Goal 5, "fish and wildlife areas and habitats" and "historic areas, sites, structures and objects," are located on the subject property. Record 15. The city also found that the proposed subdivision would "impact and intensify the conflicting nature of possible uses as the land is developed as proposed." Id. The city concluded:

> "* * * in the absence of prior city action to fully determine the ESEE consequences and to develop programs to meet [Goal 5], the applicants in this case bear the burden of proof on the issue of whether, and to what extent, the proposed subdivision impacts on the Goal 5 resources identified in the subject area, the consequences thereof and showing that these consequences are compatible with Goal 5 requirements.
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> "The city council finds, based on the whole record, that the ESEE consequences are not addressed by the Application and that it does not otherwise resolve the resource conflicts so as to meet Goal 5 requirements. Therefore, the city council finds that in applying Goal 5 to the subject Application the Goal 5 requirements have not been met and that the Application is not in conformance with Goal 5 requirements." Record 15-16.

B. Identification of Standards

Petitioners contend that both statutory and case law require quasi-judicial decisions on land use development

matters to be based on identified standards. Petitioners argue that both ORS 92.044(1) and 227.173(1) require the city to set out standards for approval of tentative subdivision plats in its ordinances. Petitioners also contend that Sun Ray Dairy v. OLCC, 16 Or App 63, 517 P2d 289 (1973), establishes that an applicant is entitled to know the standards by which the application will be judged before investing the time and money necessary to make application. Further, according to petitioners, when the city denies a proposed subdivision based on broadly worded general standards, it must inform the applicant both which standards govern the decision and specifically how those standards are applicable to the proposed subdivision. Commonwealth Properties v. Washington County, 35 Or App 387, 582 P2d 1384 (1978) (Commonwealth Properties).

With regard to Goal 5, petitioners assert that "the City identifies no standards which the [subdivision] application must meet." Petition for Review 26. Petitioners contend the city has adopted ordinances which provide architectural standards for the location of residences within or near historic districts and control matters such as building color and vegetation. However, petitioners contend these ordinance provisions "apply to the development stage, not the tentative plat approval stage." Id.

ORS 197.175(2)(c) requires local government land use

decisions made prior to acknowledgment of the local government's comprehensive plan and land use regulations to comply with the Statewide Planning Goals. Neither ORS 92.044(1) nor 227.173(1) requires that local governments set out the Statewide Planning Goals in their ordinances as approval standards applicable prior to acknowledgment. The record shows that petitioners were aware that Goal 5 is applicable to the proposed subdivision at least as early as December 12, 1989, when their land use consultant submitted a memorandum addressing and proposing findings to demonstrate compliance with Goal 5 to the planning commission. Record 255. Further, both the planning commission and city council decisions identify Goal 5 as applicable to the proposed subdivision. Record 6, 148. We conclude the city adequately identified Goal 5 as applicable to its decision.

In reviewing a county order denying tentative approval of a subdivision plat on the basis of noncompliance with generally worded plan policies, the Court of Appeals explained:

> "[the] grounds must be articulated in a manner sufficiently detailed to give a subdivider reasonably definite guides as to what it must do to obtain final plat approval, or inform the subdivider that it is unlikely that a subdivision will be approved." Commonwealth Properties, 35 Or App at 400.

We understand petitioners to argue that the challenged decision should be remanded because it does not adequately

identify what they must do to comply with Goal 5.

We disagree. To the extent Commonwealth Properties is applicable to denials based on generally worded goal provisions, as well as to denials based on generally worded plan provisions, the portions of the city's decision quoted above adequately explain what petitioners must do to obtain approval. Petitioners must (1) submit evidence establishing the impacts of the proposed subdivision of the identified Goal 5 resources (fish and wildlife habitat and historic areas and structures); (2) identify the ESEE consequences of those impacts; and (3) demonstrate that the proposal resolves the conflicts so as to satisfy the Goal 5 requirement to protect the resources. See Record 16.

This subassignment of error is denied.

C. Misconstruction of Applicable Law

1. Burden of Proof

Petitioners challenge the city's legal conclusion that they, as applicants, bear the burden of proof in demonstrating that the proposed subdivision complies with Goal 5. Petitioners contend the administrative rules adopted by LCDC to interpret and implement Goal 5 do not put the burden of proof on the applicant. Petitioners cite OAR 660-16-005, which provides that it "is the responsibility of local government" to identify conflicts with inventoried Goal 5 sites and determine the ESEE consequences of the conflicts. Petitioners also argue that

OAR 660-16-010 requires a "jurisdiction" to develop a program to achieve the goal and resolve conflicts with resource sites.

An applicant for quasi-judicial land use approval has the burden of proving that applicable approval standards are met. Fasano v. Washington Co. Comm., 264 Or 574, 586, 507 P2d 23 (1973); Van Sant v. Yamhill County, ___ Or LUBA ___ (LUBA No. 88-100, March 24, 1989), slip op 9; Billington v. Polk County, 13 Or LUBA 125, 131 (1985). This principle applies whether the approval standard is in a local government plan or code or a Statewide Planning Goal.[7] We agree with the city's conclusion that petitioners, as the applicants below, bear the burden of proving that the proposed subdivision complies with Goal 5. If the evidence in the record is insufficient to enable the city to carry out the evaluation required by Goal 5 (described in Section A, supra), denial of the application is proper.

This subassignment of error is denied.

2. Failure to Consider Ordinances 289 and 317

Ordinance 289, adopted March 6, 1984, amended the

[7]OAR Chapter 600, Division 16 describes the comprehensive planning process which local governments must follow to bring their plans and land use regulations into compliance with Goal 5. Although these rules may provide guidance in interpreting how Goal 5 applies to development applications prior to acknowledgment, they do not specifically address that situation. We do not believe that references in these rules to local governments being required to identify conflicts, determine ESEE consequences and develop programs to achieve the goal do anything to alter the principle that when a quasi-judicial land use action must comply with Goal 5, the applicants bear the burden of proving such compliance.

city's plan, including adoption of a UGB. Exhibit D to that ordinance adopted findings of fact in support of the city's UGB addressing the seven UGB establishment factors of Statewide Planning Goal 14 (Urbanization). Petition for Review App-52 to App-57. Ordinance 289 included the subject parcel within the UGB and zoned the parcel SR-20.

On August 16, 1984, the city's plan and land use regulations were acknowledged by LCDC. LCDC 84-ACK-176. However, LCDC's acknowledgment order was reversed and remanded by the Court of Appeals for failure to comply with ORS 197.251 and Goals 5 and 14. Collins v. LCDC, 75 Or App 517, 707 P2d 599 (1985). Following the Court of Appeals' remand, LCDC adopted a continuance order which found that the city's plan and land use regulations failed to comply with Goals 5 and 14. LCDC 85-CONT-178. The order directed the city to identify conflicts with inventoried historic sites, evaluate the ESEE consequences of those conflicts, and adopt implementing measures to meet Goal 5. Id. at 2. The order also directed the city to exclude certain lands from its UGB. Id.

The city subsequently adopted amendments to its plan and land use regulations to comply with the court decision and LCDC continuance order. These amendments included Ordinance 317, which adopted a new UGB, which was smaller but still included the SR-20 zoned subject parcel. LCDC subsequently adopted a continuance order which finds the new

UGB complies with Goal 14, but states that the plan and land use regulations remain out of compliance with Goal 5. LCDC 88-CONT-309 at 2.

Petitioners contend that Ordinances 289 and 317 remain part of the city's plan. Petitioners argue these ordinances consider conflicting goal interests, determine that the subject parcel is committed to urban development and resolve conflicts concerning Goal 5 resources in favor of large lot development as proposed by petitioners' subdivision. Petitioners further argue that the Goal 5 ESEE consequence analysis which the city found to be lacking was already done by the city in Exhibit D to Ordinance 289, and determines that the subject parcel should be developed with urban half acre lots. Petition for Review App-56 to App-57.

The city argues that neither Ordinance 289 nor 317 were found by the court or LCDC to satisfy the requirements of Goal 5. The city also argues that Ordinance 289, including the findings in Exhibit D, although not repealed, was superseded by Ordinance 317, which adopted a different UGB designed to correct the deficiencies in the UGB adopted by Ordinance 289. In any case, according to the city, Exhibit D to Ordinance 289 could not constitute an adequate ESEE analysis of the Goal 5 resources on the subject parcel because the factors required to be addressed by Goals 14 and 5 are different.

We agree with the city. LCDC specifically found that

the city's plan and land use regulations, including Ordinances 289 and 317, do not yet comply with Goal 5. Both Goals 5 and 14 require consideration of ESEE consequences. Under Goal 14, the establishment of a UGB must be based on consideration of the ESEE consequences of designating land for urban, rather than rural, uses. Goal 5 protects resources both inside and outside UGBs. It requires determination of the ESEE consequences of conflicts between urban uses and identified resources, and resolution of those conflicts in a way that adequately protects urban Goal 5 resources. The findings in Exhibit D cited by petitioners address only Goal 14's UGB establishment ESEE consequences factor.[8] They do not constitute an adequate analysis of the conflicts between the existing Goal 5 resources and proposed development of the subject parcel.

This subassignment of error is denied.

D. Lack of Substantial Evidence

We understand petitioners to challenge the city's conclusion that Goal 5 applies to development of the subject parcel on the basis that there is not substantial evidence

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[8]Petitioners also cite findings in Exhibit D to Ordinance 289 which address Goal 14's "need for livability" factor. Petition for Review App-53 to App-54. This factor requires consideration of whether land should be included within a UGB to provide for livability. It has no discernable relationship to the standards of Goal 5. In any case, the findings of Exhibit D cited by petitioners specifically address the inclusion of the "priority #3 area" within the UGB. Even if it is assumed that the subject parcel was part of the "priority #3 area," Ordinance 319 deleted much of the "priority #3 area" when it amended the city's UGB and, therefore, these findings must be considered to be superseded.

in the record to support the city's determination that there are Goal 5 resources on or near the subject parcel. Petitioners contend there is no evidence that a significant fish population exists in Daisy Creek.[9] Petitioners also argue that the plan, at pages 68-80, identifies government owned properties within the city which provide deer habitat and that "thousands of acres of hills and mountains" surrounding the city also provide such habitat. Petition for Review 36. With regard to historic resources, we understand petitioners to contend there is no evidence that there is anything of historic significance located on the subject parcel or where it would be affected by development of the subject parcel.

The city cites in its brief evidence in a staff report that the subject parcel provides habitat for deer and bear. Record 368. The staff report also states that the plan indicates the parcel may support three endangered or threatened species -- peregrine falcon, northern bald eagle and northern spotted owl. Id.

With regard to fish and wildlife habitat, we note that in addition to the evidence cited by the city in its brief, the city's decision cites certain inventory information in the plan. The plan's Forest Lands Inventory maps the

[9]Petitioners also contend there is evidence in the record that Daisy Creek is an intermittent stream which is dry for significant portions of the year. However, petitioners do not cite where in the record such evidence is located.

subject parcel as forest lands and states that these lands are important for wildlife protection. Plan, p. 111, Map 11. The plan also states that "[f]orested and wooded hillsides and riparian vegetation along Jacksonville creeks provide wildlife habitats." Plan, p. 33. Furthermore, petitioners cite no evidence in the record or statements in the plan which indicate that the subject parcel does not provide fish and wildlife habitat areas.

As far as we can tell, the city has not yet adopted an actual inventory of fish and wildlife habitat areas, as required by Goal 5 and OAR 660-16-000. However, based on the evidence to which we are cited in the record and the plan, we believe it is reasonable to conclude, as did the city, that there are fish and wildlife habitat areas on the subject parcel and, therefore, Goal 5 applies to the approval of development of the property.

As for historic resources, the facts that part of the subject parcel is within a National Historic Landmark District and additional portions of the property are adjacent to a National Historic Landmark District are sufficient basis for the city to conclude that Goal 5 applies to the subject parcel with regard to historic resources.

This subassignment of error is denied.

E. Adequacy of Findings

The city's findings determine that there are

conflicting uses proposed for the identified Goal 5 resources on the subject property and, therefore, the proposed subdivision must be denied because petitioners failed to demonstrate to what extent the proposed subdivision would impact the Goal 5 resources, the consequences thereof and that the conflicts will be resolved in a manner which complies with the requirements of Goal 5. Record 16. We understand petitioners to argue that the city's underlying finding that conflicting uses exist for the Goal 5 resources on the subject property is inadequate because the city did not identify what those conflicting uses are.

The city's findings state that "the proposed subdivision itself would impact and intensify the conflicting nature of possible uses as the land is developed as proposed." (Emphasis added.) Record 15. We understand this finding to state that the proposed subdivision of the property into half acre residential lots is itself a use which conflicts with the identified wildlife habitat and historic resource qualities of the property, because it will result in development of the lots with new dwellings. The finding adequately identifies the nature of the conflicting uses of the subject property.

This subassignment of error is denied.

The first through fourth assignments of error are

denied.[10]

SIXTH ASSIGNMENT OF ERROR

> "The City erred by making its decision in bad faith and without an impartial tribunal."

Petitioners argue that quasi-judicial land use decisions must be made by an impartial tribunal. Fasano v. Washington Co. Comm., 264 Or 574, 588, 507 P2d 23 (1973). Petitioners contend the city decision makers' bias and lack of good faith prejudiced their substantial right to an impartial tribunal. Petitioners describe examples of the city decision makers' alleged bad faith and bias.

The examples cited by petitioners include (1) the city planner changing his mind, two days before a planning commission hearing, on whether the proposed subdivision could comply with the city plan; (2) the planning commission denying the proposed subdivision because of the Flatebo plat

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[10]A local government's denial of a land use development application will be sustained if the local government's determination that any one approval criterion is not satisfied is sustained. Baughman v. Marion County, ___ Or LUBA ___ (LUBA No. 88-117, April 12, 1989), slip op 5-6; Van Mere v. City of Tualatin, 16 Or LUBA 671, 687 n 2 (1988); Weyerhauser v. Lane County, 7 Or LUBA 42, 46 (1982). Therefore, because we reject petitioners' challenges to the city's determination that approval of the proposed subdivision does not comply with Goal 5, we do not address petitioners' arguments under these assignments of error challenging the other two bases for the city's denial. Douglas v. Multnomah County, ___ Or LUBA ___ (LUBA No. 89-086, January 12, 1990), slip op 24.

Furthermore, we do not address petitioners' fifth assignment of error because it challenges the denial of the proposed subdivision solely with regard to the city's determination of noncompliance with JLDR 16.12.020. Therefore, even if we were to sustain the fifth assignment of error, it would not provide a basis for reversal or remand of the city's decision.

when petitioners had already submitted the Farber plat; (3) active participation by the planning commission chairman at the planning commission meetings, after the chairman had decided to abstain from voting; (4) failure to consider or apply Ordinances 289 and 317, as requested by petitioners; (5) denying petitioners' subdivision application on incorrect grounds, such as the absence of tree maps and street grades or insufficient lot sizes; and (6) denying the application without discussing alternative acceptable subdivision configurations with petitioners and giving them a chance to amend their proposal.

In order for petitioners to obtain reversal or remand of the city's decision on the basis that they were not afforded an impartial tribunal, petitioners must demonstrate bias on the part of the city decision makers. In this case, the city council members are the sole decision makers, because the city council conducted a de novo review of the planning commission's decision. Therefore, actions by the city planner and planning commission members, even if they could be construed to demonstrate bias, do not demonstrate bias on the part of the city decision makers. See Slatter v. Wallowa County, 16 Or LUBA 611, 617 (1988) (regardless of possible bias by planning commissioner, de novo review by city council gave petitioners the impartial tribunal to which they were entitled).

Furthermore, in Lovejoy v. City of Depoe Bay, 17 Or

LUBA 51, 65-66 (1988), we stated:

> "* * * in order to obtain reversal or remand [for bias] petitioner must show 'actual bias' on the part of the decision makers, rather than merely a lack of the 'appearance of fairness.' 1000 Friends of Oregon v. Wasco Co. Court, 304 Or 76, 82-85, 742 P2d 39 (1987). Personal bias sufficiently strong to disqualify a public official must be demonstrated in a clear and unmistakable manner. Petitioner has the burden of showing clearly that a public official was incapable of making a decision based on the evidence and argument before him. Schneider v. Umatilla County, 13 Or LUBA 281, 284 (1985)."

Bias on the part of decision makers can be due to the decision maker either having a personal interest in the outcome of the proceeding or having prejudged the matter. 1000 Friends of Oregon v. Wasco Co. Court, 304 Or at 83. Petitioners do not claim that any of the city council members have a personal stake in the decision which would prevent them from making a decision based on the applicable standards and the evidence and argument before them. The examples of "bias" on the part of the city council cited by petitioners amount to allegations that the city council misinterpreted plan and JLDR provisions and overlooked items in the record. These allegations, even if true, would simply demonstrate error in the decision made by the city council, not that the council members had prejudged the matter and were incapable of making an objective decision on petitioners' subdivision application based on the evidence and argument before them.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

> "The City erred by failing to grant petitioners' application for tentative plat approval of Ashleigh Woods subdivision."

Petitioners argue that the city's failure to consider their subdivision application in good faith and its bases for denying that application are completely outside the bounds of the city's discretion. According to petitioners, the appropriate remedy is for this Board to order the City to grant tentative subdivision plat approval pursuant to ORS 197.835(8).[11] Petitioners also request a separate proceeding for determination of the appropriate attorneys fees to be awarded pursuant to the statute.

This assignment of error presumes this Board will conclude that none of the city's bases for denying petitioners' subdivision application are sustainable or that the city acted in bad faith in reviewing petitioners' application. Because we do not reach such conclusions, this

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[11]ORS 197.835(8) provides:

> "The board shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds, based on the evidence in the record, that the local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances. If the board does reverse the decision and orders the local government to grant approval of the application, the board shall award attorney fees to the applicant and against the local government."

assignment of error is denied.

The city's decision is affirmed.