

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

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3
4 CITIZENS FOR RESPONSIBLE GROWTH,)
5 WAYNE POOLE, BARBARA STEPHENS,)
6 BOB POOLE, SHIRLEY LOUTZENHISER,)
7 TERESA TAYLOR, KAY DUNCAN, AURORA)
8 JONES, PAUL JONES, KATHLEEN)
9 WYSONG, PETER TER HAR, JEFF TER)
10 HAR, DAVE LANGLO, MIRIAM HUNTSMAN,)
11 HELEN GASTON, RALPH WINSOR and)
12 OLIVE BLUMENSHEIN,)
13)
14 Petitioners,) LUBA No. 91-194
15)
16 vs.) FINAL OPINION
17) AND ORDER
18 CITY OF SEASIDE,)
19)
20 Respondent,)
21)
22 and)
23)
24 CENTERS WEST DEVELOPMENT CO.,)
25)
26 Intervenor-Respondent.)

27
28
29 Appeal from City of Seaside.

30
31 Robert L. Liberty, Portland, filed the petition for
32 review and argued on behalf of petitioners.

33
34 No appearance by respondent.

35
36 Lawrence R. Derr, Portland, filed the response brief
37 and argued on behalf of intervenor-respondent.

38
39 KELLINGTON, Referee; HOLSTUN, Chief Referee; SHERTON,
40 Referee, participated in the decision.

41
42 REMANDED 04/08/92

43
44 You are entitled to judicial review of this Order.
45 Judicial review is governed by the provisions of ORS

1 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision of the city council
4 approving a conditional use permit for a factory outlet
5 shopping center.

6 **MOTION TO INTERVENE**

7 Centers West Development Co. moves to intervene on the
8 side of the respondent. There is no opposition to the
9 motion, and it is allowed.

10 **FACTS**

11 The subject property consists of several parcels
12 located "between Highway 101 * * * on the west, tidal Wehana
13 Creek on the east, 14th [S]treet on the north and 9th Street
14 on the south * * *." Petition for Review 5. The parcels
15 comprise 9.75 acres.

16 The proposal is for a factory outlet theme shopping
17 center including three buildings with a gross area of
18 102,000 square feet and 538 parking spaces to serve the
19 shopping center, as well as additional recreational vehicle
20 parking spaces and five parking spaces for busses.

21 Most of the property within the project area is zoned
22 Industrial (M-1). In particular, the area where the
23 shopping center buildings are to be located is zoned M-1.
24 However, much of the land upon which the parking lot is to
25 be located is zoned Commercial (C-3). The easternmost
26 portion of the property is "within the Estuary Shoreland

1 (and wetland) boundary and [is] zoned A-2 Aquatic
2 [Conservation] Zone." Petition for Review 6.

3 The planning commission approved the proposal and
4 petitioners appealed. The city council denied petitioners'
5 appeal and affirmed the decision of the planning commission.
6 This appeal followed.

7 **JURISDICTION**

8 The challenged decision states, in relevant part:

9 "The applicant provided traffic information
10 demonstrating that the proposed circulation
11 pattern will function safely and efficiently.
12 However, the detailed design of improvements on
13 Hwy 101 has not been completed. The design will
14 be reviewed and approved by the Planning
15 Commission in coordination with [the Oregon
16 Department of Transportation] to assure compliance
17 with all City requirements." Record 13.

18 Intervenor-respondent (intervenor) points out that
19 under ORS 197.825(1)¹ and ORS 197.015(10)(a)(A),² LUBA only
20 has jurisdiction to review final land use decisions.
21 Intervenor argues the challenged decision is not a "final"
22 decision because the traffic circulation plan referred to
23 above has not yet been approved. Accordingly, intervenor

¹ORS 197.825(1) provides, in relevant part:

"[LUBA] shall have exclusive jurisdiction to review any land
use decision or limited land use decision of a local government
* * * in the manner provided in ORS 197.830 to 197.845."

²ORS 197.015(10)(a)(A) provides that land use decision includes:

"A final decision or determination made by a local government
or special district * * * [.]"

1 contends this Board lacks jurisdiction to review the
2 challenged decision.

3 We disagree. OAR 661-10-010(3) states:

4 "A decision becomes final when it is reduced to
5 writing and bears the necessary signatures of the
6 decisionmakers(s), unless a local rule or
7 ordinance specifies that the decision becomes
8 final at a later time, in which case the decision
9 is considered final as provided in the local rule
10 or ordinance."

11 We are aware of no provision in the Seaside Zoning
12 Ordinance (SZO) which requires that the approval of a
13 traffic circulation plan is necessary for a city conditional
14 use permit decision to be final for purposes of appellate
15 review. SZO 4.021 requires "[t]he Planning Commission [to]
16 do a site review of all proposed developments on or adjacent
17 to Highway 101 to consider impacts of [proposed] development
18 on the traffic carrying capacity and safety of U.S. 101."³

19 Specifically, we do not understand SZO 4.021 to require
20 that planning commission site review occur before a city
21 conditional use permit decision is final for purposes of our
22 review. SZO 4.021 simply requires that the planning
23 commission review certain traffic related issues concerning
24 Highway 101, without specifying when or in what context that
25 review must occur. Further, while the findings quoted above
26 purport to defer planning commission review of the traffic

³U.S. Highway 101 is variously referred to by the parties, and in the challenged decision, as "U.S. 101" and "Highway 101." For simplicity, we refer to it as Highway 101.

1 issues identified in SZO 4.021 to later proceedings, such
2 deferral does not render the challenged decision any less
3 final.⁴

4 We see nothing in the SZO which provides that, until
5 compliance with SZO 4.021 is established, city conditional
6 use permit decisions are not final for purposes of review by
7 this Board. We conclude we have jurisdiction to review the
8 challenged decision.

9 **PRELIMINARY MATTERS**

10 Both petitioners and intervenor have submitted
11 transcripts of the proceedings below to this Board. Each
12 party offers objections to the transcripts prepared by the
13 other.

14 Petitioners reassert their argument made pursuant to
15 their record objection, resolved earlier in this appeal, and
16 object to the transcripts attached to intervenor's brief.
17 Petitioners argue that only if the tapes of the local
18 proceedings below were actually made a part of the record
19 submitted to this Board, can intervenor properly append
20 transcripts to its brief to be considered during our review
21 of the challenged decision. Because the tapes of the
22 proceedings below were not submitted as a part of the

⁴A decision properly deferring a determination of a proposal's compliance with a particular approval requirement may result in two separately reviewable decisions, e.g., the initial decision and the subsequent deferred decision on the proposal's compliance with the particular approval requirement. See Holland v. Lane County, 16 Or LUBA 583, 596-97 (1988).

1 record, petitioners argue that the transcripts of such tapes
2 cannot properly be appended to intervenor's brief.

3 Intervenor objects to petitioners' transcript submitted
4 at oral argument, alleging it is incomplete, and requests
5 that we strike that transcript. In the alternative,
6 intervenor states that to portray a more complete picture of
7 the local proceedings below, petitioners' transcript should
8 be supplemented with a transcript intervenor prepared of the
9 dialogue following that which is transcribed by petitioners.

10 We have stated that words spoken during the proceedings
11 before the local decision maker are considered part of the
12 local record. Hammack & Associates, Inc. v. Washington
13 County, 16 Or LUBA 75, 99 n 2, aff'd 89 Or App 40 (1987).⁵
14 Accord Priest v. Marion County, 19 Or LUBA 231, 233 n 1,
15 aff'd 103 Or App 131 (1990), rev den 311 Or 60 (1991);
16 Sunburst II Homeowners Assoc. v. City of West Linn, 18 Or
17 LUBA 695, aff'd 101 Or App 458 (1990); see also Columbia
18 Steel Castings Co. v. City of Portland, 19 Or LUBA 338, 344,

⁵Specifically, in Hammack we stated:

"It has been this Board's view that even though the tapes or a transcript are not submitted as part of the record, as required under [OAR] 661-10-025, the words that are spoken at a local hearing are part of the record. Where the tapes are retained locally, they are available to the parties. The Board has permitted parties who wish to transcribe portions of the taped record and attach the transcripts to their briefs. The other parties, of course, are free to contest the accuracy of such transcripts in their opening brief or in a reply brief submitted pursuant to OAR 661-10-039. This practice frequently eliminates the need to delay appeals to resolve record disputes." Id.

1 rev'd on other grounds 104 Or App 244 (1990), rev allowed
2 311 Or 261 (1991).

3 Consequently, we will not strike the transcript
4 attached to intervenor's brief or the transcript submitted
5 by petitioners at oral argument, as it is undisputed that
6 they are simply writings which evidence the words spoken
7 before the decision maker below. However, we allow
8 intervenor's request to supplement petitioners' transcript
9 with the transcript prepared by intervenor and attached to
10 its March 18, 1992 letter objection. The transcripts
11 submitted by the parties will be considered by the Board in
12 resolving this appeal.

13 **SIXTH ASSIGNMENT OF ERROR**

14 "The city approved the project without ever
15 determining whether an alternative to direct
16 access onto Highway 101 was 'possible.'"

17 **SEVENTH ASSIGNMENT OF ERROR**

18 "A final decision to approve the project was made
19 prior to the required site review by the planning
20 commission."

21 Petitioners argue the challenged decision violates
22 SZO 4.021,⁶ which provides:

⁶Petitioners also argue that the challenged decision violates certain Seaside Comprehensive Plan (plan) provisions relating to access to Highway 101. Those plan provisions provide, among other things, "[t]he number of commercial use access points to U.S. Highway 101 will be minimized, wherever possible, through the use of common driveways, frontage roads, or other techniques;" "[t]he city shall cooperate to reduce traffic congestion along U.S. 101 through [the requirement] that new uses access onto side streets whenever possible * * *[.]" Plan 61, 23. We believe

1 "The Planning Commission will do a site review of
2 all proposed developments on or adjacent to
3 Highway 101 to consider impacts of the development
4 on the traffic carrying capacity and safety of
5 [Highway] 101.

6 "The city and State Highway Division shall
7 cooperate to reduce traffic congestion along
8 [Highway] 101 through:

9 "(a) The requirements that new uses access onto
10 side streets whenever possible; and

11 "(b) Widening or relocation of street right-of-
12 ways particularly in the south part of the
13 city."⁷

14 Petitioners state the site plan for the proposal
15 contemplates "direct access onto Highway 101 from the large
16 parking lot." Petition for Review 45. Petitioners argue
17 the city failed to adopt any findings explaining why it is
18 not "possible" to utilize side streets for access to the
19 proposed shopping center, as required by SZO 4.021(a),
20 rather than allowing direct access from the shopping center
21 to Highway 101.

22 Petitioners also argue the challenged decision

these plan policies are implemented by SZO 4.021, and do not constitute approval standards separately applicable to individual development actions.

⁷It is somewhat unclear the extent to which SZO 4.021(b) applies to the proposal. The proposed shopping center is not located in the "south part of the city." However, SZO 4.021(b) states it applies "particularly in the south part of the city." (Emphasis supplied.) It does not foreclose the possibility that SZO 4.021(b) also applies in the northern part of the city, including the subject area. While SZO 4.021(b) emphasizes its applicability to the southern part of the city, in the absence of an adequate explanation of why it would not also apply to the northern part of the city, it would appear to apply there as well. We need not decide here the extent to which SZO 4.021(b) applies to the proposal.

1 improperly defers a decision on the issue of access to
2 Highway 101. Petitioners contend the SZO contains no
3 provisions for authorizing the planning commission to
4 conduct a "site review" once the conditional use permit is
5 approved. According to petitioners, the proper time to
6 conduct site review and to determine compliance with
7 SZO 4.021, is during the proceedings on the conditional use
8 permit application.

9 While intervenor states the proposal contemplates
10 access from three adjacent side streets, and that only one
11 portion of the parking lot is proposed to have direct access
12 onto Highway 101, it acknowledges the "ultimate decision as
13 to whether there will be access to Highway 101 was
14 deferred." Intervenor's Brief 17. Intervenor argues it was
15 proper for the city to defer making this decision to a later
16 time.

17 In Holland v. Lane County, supra, the Board stated a
18 local government may not defer consideration of mandatory
19 discretionary approval criteria to a later stage in the
20 development process, through a condition of approval, unless
21 that later stage provides for the full opportunity for
22 public involvement provided in the initial stage of the
23 process. Here, nothing in the SZO or in the decision itself
24 requires an opportunity for public hearing on the issue of
25 the proposal's compliance with SZO 4.021(a), as was required
26 prior to approval of the challenged conditional use permit.

1 Consequently, it was improper for the city to defer the
2 decision of whether it is possible to access the proposed
3 shopping center from side streets, as required by
4 SZO 4.021(a), rather than through direct access to
5 Highway 101.⁸

6 The sixth and seventh assignments of error are
7 sustained.

8 **FIRST ASSIGNMENT OF ERROR**

9 "The city's conclusion that the factory outlet
10 center satisfies plan policy 5.1.1 (to strengthen
11 and contribute to the tourist based economy) is
12 unsupported by substantial evidence in the whole
13 record."

14 Plan policy 5.1.1 states:

15 "Since recreation and tourism are the major
16 economic base in Seaside, all future development
17 decisions shall consider both beneficial and
18 adverse impacts on that base, and only projects
19 that contribute to or strengthen Seaside's economy
20 shall be approved." (Emphasis supplied.)

21 Petitioners argue the findings of compliance with
22 policy 5.1.1 reflect an incorrect interpretation of that
23 policy and are not supported by substantial evidence in the
24 whole record. We review these contentions separately below.

⁸We note that there is nothing of which we are aware which would prohibit the city from approving in concept, direct access from the proposed shopping center to Highway 101, so long as such a decision contains an adequate explanation of why direct access to Highway 101 is unavoidable. In these circumstances, the city could defer to a later time approval of the engineering details of such a plan. See Bartels v. City of Portland, ___ Or LUBA ___ (LUBA No. 90-111, December 3, 1990).

1 **A. Interpretation**

2 The city adopted the following findings of compliance
3 with policy 5.1.1:

4 "Economic Policy 5.1.1 provide[s] that new
5 projects should contribute to or strengthen the
6 recreation and tourism economic base in Seaside.
7 The proposed factory outlet will attract
8 additional tourism to the City, thereby
9 contributing to the economy. The present tourist
10 based economy is sensitive to seasonal
11 fluctuation, with little activity occurring in the
12 winter months. The factory outlet will be a
13 destination type tourist draw throughout the year,
14 bringing people to the community to consume goods
15 and services at a time when they would not
16 otherwise be present. This will be a significant
17 factor in strengthening the existing economy * *
18 * .

19 "Concerns have been expressed that some existing
20 retail businesses will be adversely affected by
21 the proposed factory outlet. These concerns are
22 based on reports of the experience of some
23 merchants in Lincoln City. Policy 5.1.1 is
24 directed at protecting the characteristics of the
25 Seaside community that contribute to its
26 recreation and tourism economic base. The policy
27 is not intended to protect any specific business
28 from competition from another business. There is
29 no evidence rebutting the factors noted in the
30 paragraph above or demonstrating that the overall
31 tourist based economy of the city will be
32 adversely affected. The concerns of individual
33 merchants based on experiences in Lincoln City do
34 not take into account Seaside's strong, pedestrian
35 oriented commercial district in the central
36 business district that functions as a mall-like
37 commercial center. This function is in contrast
38 to the Lincoln City auto oriented strip commercial
39 district that is easily by-passed in favor of the
40 outlet center." Record 15.

41 Essentially, these findings determine that (1) the

1 proposed shopping center will bring in additional tourists
2 to the city who would not otherwise visit, and (2) even
3 though there may be some adverse impact on particular
4 existing retail businesses in the city, the proposal will
5 have a positive effect on the tourism and recreation
6 economic base referred to in policy 5.1.1. These findings
7 reflect a correct interpretation of plan policy 5.1.1.

8 This subassignment of error is denied.

9 **B. Evidentiary Support**

10 Petitioners argue the evidence in the record does not
11 support the city's findings that policy 5.1.1 is satisfied
12 because the proposed shopping center (1) will attract
13 additional tourists to the city, (2) is located so
14 differently from the factory outlet shopping center in
15 Lincoln City that evidence concerning the Lincoln City
16 shopping center is inapplicable, and (3) will be a
17 "destination type tourist draw throughout the year." Record
18 15.

19 Petitioners cite evidence that the proposed shopping
20 center would have certain deleterious effects on some
21 existing businesses within the city. However, evidence of
22 alleged deleterious effects on existing retail businesses is
23 not conclusive of whether the proposed shopping center would
24 contribute to the city's tourism and recreation economic
25 base, as required by policy 5.1.1. Moreover, there is
26 evidence cited by intervenor that the shopping environment

1 in Seaside is different than in Lincoln City. According to
2 the record, in Lincoln City, retail businesses other than
3 those within the factory outlet shopping center are located
4 on a shopping "strip" that requires customers to use their
5 automobiles to move from store to store, and parking along
6 the strip is very limited. On the other hand, in Seaside,
7 the existing retail stores are largely located in a
8 pedestrian mall shopping area which does not require the use
9 of automobiles, and parking is not, therefore, as
10 problematic.

11 Further, while not overwhelming, there is evidence in
12 the record that the proposed shopping center will draw
13 additional tourists to the city during the winter months
14 when tourism is otherwise fairly weak. Intervenor's Brief
15 App 1; Record 27, 89.

16 We must determine whether a reasonable person, in view
17 of the evidence in the whole record, could conclude as the
18 city did that the proposed shopping center will draw
19 additional tourists to Seaside and, thus, improve its
20 tourism and recreation economy base. See Younger v. City of
21 Portland, 305 Or 346, 360, 752 P2d 262 (1988). While the
22 question is a close one, we conclude that a reasonable
23 person could draw the conclusions the city drew in the
24 challenged decision. Accordingly, the city's findings of
25 compliance with policy 5.1.1 are supported by substantial
26 evidence in the whole record.

1 This subassignment of error is denied.

2 The first assignment of error is denied.

3 **SECOND ASSIGNMENT OF ERROR**

4 "The approval of a factory outlet center was made
5 without any evidence or analysis of compliance
6 with the comprehensive plan provisions and
7 policies protecting the city's downtown commercial
8 core area."

9 **THIRD ASSIGNMENT OF ERROR**

10 "The city's finding that its decision complied
11 with comprehensive plan policy 5.1.6 is
12 unsupported by substantial evidence in the whole
13 record."

14 Petitioners argue the city failed to adequately address
15 compliance with plan policies 5.0.2, 5.0.3, 5.0.4, 5.0.5
16 and 5.1.2.⁹ Petitioners also contend the record lacks

⁹Policies 5.0.2- 5.0.5 provide the city's "efforts will be":

- "2. To work with the area economic development agencies and organizations in seeking small light industry, needed for diversification of the area's economy.
- "3. To improve the appearance of the city, and encourage continued improvements of tourist and recreation facilities and areas such as the Seaside Civic Convention Center and supporting tourist accommodations, the downtown area, cultural attractions, and expanded river access.
- "4. To strengthen Seaside's downtown area as an important tourist and commercial center.
- "5. To provide sufficient land in the Comprehensive Plan and Zoning Ordinance to allow for the reasonable expansion of business and industry."

Policy 5.1.2 provides:

1 evidentiary support to establish compliance with these
2 policies.

3 Whether plan policies are approval standards applicable
4 to individual permit decisions is determined by reference to
5 both the words used in the particular plan policy and the
6 structure of the plan itself. Thormahlen v. City of
7 Ashland, ___ Or LUBA ____ (LUBA No. 90-102, November 5,
8 1990), slip op 6. The question is whether the cited
9 policies are intended to govern individual permit decisions
10 or to provide general policy guidance for the development of
11 implementing ordinances. Here, none of the above quoted
12 plan policies are stated in mandatory terms. Rather, they
13 are aspirational only and written in general terms to guide
14 development of implementing ordinances. We conclude these
15 plan policies do not constitute approval standards
16 applicable to individual development applications. See
17 Stotter v. City of Eugene, 18 Or LUBA 135, 146-47, 166-67
18 (1989).

19 Accordingly, that the challenged decision does not
20 adequately address these plan policies, or that the record
21 does not contain evidentiary support for findings of
22 compliance with these policies, provides no basis for
23 reversal or remand of the challenged decision. See Bennett

"Continued support should be given to the upgrading and revitalizing of the Broadway core area. The Urban Renewal District is seen as an important means of achieving this goal."

1 v. City of Dallas, 17 Or LUBA 450, aff'd 96 Or App 645
2 (1989).

3 Finally, petitioners argue the challenged decision does
4 not establish compliance with policy 5.1.6, which provides:

5 "The city, through the Comprehensive Plan and
6 Zoning Ordinance, shall protect the very limited
7 amount of industrial sites in the Urban Growth
8 Area."

9 While this policy is written in mandatory terms, we believe
10 it is correctly interpreted to apply to planning and zoning
11 map designation and redesignation decisions and not to
12 individual permit decisions. Here, the subject land is
13 largely zoned for industrial use and shopping centers are
14 listed as conditional uses in the M-1 industrial zone. We
15 believe the plan and zone designations of the property are
16 designed to implement the requirement expressed in
17 policy 5.1.6.

18 The second and third assignments of error are denied.

19 **FOURTH ASSIGNMENT OF ERROR**

20 "The proposed center was approved without a
21 determination of whether all applicable plan
22 policies and zoning ordinance provisions for
23 protection of estuarine resources have been
24 satisfied."

25 Petitioners contend the proposal violates plan
26 policy 13.1.3-B which provides:

27 "Development that takes place in areas adjacent to
28 natural estuarine designations shall be carefully
29 reviewed to insure that it is designed in a manner
30 that will protect the integrity and function of
31 the natural area. Additional buffers, setbacks,

1 or other controls may be required in order to
2 carry out this policy." (Emphasis supplied.)

3 The city determined the following relating to
4 policy 13.1.3-B:

5 "The policies under Goal 13 have been implemented
6 in the [SZO] by the Aquatic Zone provisions and
7 the Estuarine Standards. The A-2 standards
8 applicable to the site are addressed above. The
9 Estuarine Standards do not apply to the
10 development as proposed."¹⁰ Record 17.

11 "No development will occur in the A-2 Zone nor
12 within the 15 foot setback required from [the]
13 estuary boundary." Record 12.

14 Petitioners point out that the easternmost portion of
15 the property is within the A-2 zone. Petitioners contend
16 the parking lot designed to serve the proposed shopping
17 center is partially within the A-2 zone and will create a
18 large impervious surface immediately adjacent to an estuary.
19 Petitioners argue that storm water runoff containing oils
20 and other fluids associated with automobile traffic could

¹⁰The A-2 zone has as its purpose:

"To provide for aquatic areas which can withstand limited amounts of adjacent development or alteration, consistent with the intent of the overall goals and policies of the Estuary Section of the Comprehensive Plan. Uses and activities within this zone must be non-consumptive, in that the area is to be managed for resource protection. Aquatic conservation areas may include water areas of the estuary and salt marshes and tidal flats of lesser biological significance than those in the A-1 zone."

The Estuarine Standards referred to in the findings quoted in the text are contained in SZO 6.150 and apply to, among other things, proposals for dredged material disposal and fill.

1 drain into the estuary. Petitioners argue the city's
2 findings fail to address where the storm runoff from the
3 parking lot serving the proposed development will be
4 channelled, as required by policy 13.1.3-B. Finally,
5 petitioners maintain "storm water outfall" is a
6 conditionally permitted use in the A-2 zone and requires
7 particular determinations which have not been made, before
8 storm water from any development may be permitted to drain
9 into an estuary.

10 Intervenor argues policy 13.1.3-B is implemented
11 entirely by the requirements of the A-2 zone, and that the
12 Estuarine Standards, and policy 13.1.3-B, do not apply to
13 individual development applications.

14 We might agree with intervenor that policy 13.1.3-B
15 does not contain standards applicable to individual permit
16 decisions, were it not for the emphasized portion of
17 policy 13.1.3-B quoted above. That portion of
18 policy 13.1.3-B envisions individually crafted, additional
19 requirements for protection of an estuary as a supplement to
20 the protective measures established by the A-2 zone and the
21 Estuarine Standards.

22 The challenged decision does not disclose in what
23 manner storm water runoff from the parking lot is to be
24 disposed of. The city must either explain in its findings
25 that storm water runoff from the parking lot will be
26 disposed of through the city's storm drainage system and,

1 thus, will have no effect on the estuary, or establish how
2 the storm drainage from the parking lot is designed to be
3 collected and disposed of in a manner that "will protect the
4 integrity and function" of the estuary, as required by
5 policy 13.1.3-B.

6 The fourth assignment of error is sustained.

7 **FIFTH ASSIGNMENT OF ERROR**

8 "The proposed factory outlet center's site plans
9 demonstrate violation of the plan policy requiring
10 a fifteen foot setback from the estuary boundary."

11 Plan policy 13.2.1.3 provides:

12 "Because of the value that stream bank vegetation
13 has for wildlife habitat, water quality
14 protection, prevention of erosion, and other
15 purposes, it shall be maintained and protected. *
16 * * [S]tructures, parking lots, roads, fills,
17 utilities or other uses or activities shall be
18 kept away from the estuary boundary a distance of
19 at least 15 feet (15'). Location on the estuary
20 boundary shall be considered justification for a
21 setback variance on the nonshoreline side of a lot
22 in cases where the size of the lot would not
23 permit a setback. Each case must be carefully
24 reviewed by the Planning Commission. Setbacks
25 from natural areas within the estuary boundary
26 shall be a minimum of twenty five feet (25')."
27 (Emphasis supplied.)

28 SZO 3.139(4) requires the following:

29 "Structures, parking lots, roads fills, utilities
30 or other uses or activities except decks, walkways
31 and bridges (in areas without riparian vegetation)
32 shall be setback from the estuary boundary a
33 distance of at least 15 feet." (Emphasis
34 supplied.)

35 Policy 13.2.1.3 is nearly identical to SZO 3.139(4),
36 except in one respect. SZO 3.139(4) provides a specific

1 exception to the 15 foot setback requirement for walkways in
2 areas without riparian vegetation, and policy 13.2.1.3 does
3 not contain that specifically expressed exception. However,
4 the express rationale for policy 13.2.1.3 is to protect
5 riparian vegetation. Consequently, we see no conflict
6 between policy 13.2.1.3 and SZO 3.139(4). Accordingly,
7 policy 13.2.1.3 is correctly interpreted to constitute a
8 general statement to guide development of the SZO, and it is
9 implemented through SZO 3.139(4). Policy 13.2.1.3 does not
10 purport to, and does not, govern individual permit
11 decisions.

12 The challenged decision finds compliance with
13 SZO 3.139(4) as follows:

14 "No development will occur in the A-2 zone nor
15 within the 15 foot setback required from [the]
16 estuary boundary." Record 12.

17 Petitioners argue the evidence does not support this
18 finding. Petitioners state the site plan for the proposal
19 establishes that the sidewalk on one side of the parking lot
20 is improperly within the 15 foot estuary setback.

21 Intervenor argued during oral argument that a sidewalk
22 is a walkway, and under SZO 3.139(4) is thus exempted from
23 the setback requirement. Intervenor also contends that even
24 if the sidewalk is not a walkway, it is not within the
25 15 foot setback area.

26 The SZO does not define either the term sidewalk or
27 walkway. However, we see no basis upon which to distinguish

1 between a sidewalk and a walkway. SZO 3.139(4) exempts only
2 walkways "in areas without riparian vegetation" from its
3 setback requirement. We cannot tell from the record whether
4 the proposed walkway is in an area without riparian
5 vegetation, and thus whether the setback exemption applies.
6 On remand, the city should explain whether the exemption
7 applies to the proposal.

8 The fifth assignment of error is sustained, in part.

9 **EIGHTH ASSIGNMENT OF ERROR**

10 "A final decision to approve the project was made
11 prior to the adoption of the findings needed to
12 support the decision."

13 Petitioners argue the city announced its decision
14 orally to approve the application before it adopted its
15 written findings and conclusions explaining its rationale.
16 Petitioners state "[i]t is improper for a local government
17 to adopt the findings and conclusions to support a final
18 decision after that final decision has been made." Petition
19 for Review 47.

20 The oral decision the city made was tentative only and
21 did not bind it to any particular result. See Carsey v.
22 Deschutes County, ___ Or LUBA ____ (LUBA No. 91-003, April
23 15, 1991), slip op 15-16, aff'd 108 Or App 339 (1991) (no
24 violation of law where a county board of commissioners
25 orally voted to grant land use approval with conditions, but
26 later learned one of the conditions was based on an
27 erroneous factual assumption and could not be complied with,

1 and thereafter denied the application). We find no
2 prohibition against a city making a tentative oral decision
3 on a permit application, followed by adoption of a final
4 written decision containing its supporting findings. See
5 Sokol v. City of Lake Oswego, 18 Or LUBA 375, 400-01 (1989).

6 The eighth assignment of error is denied.

7 The city's decision is remanded.

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