BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON NATURAL RESOURCES COUNCIL, Petitioner, vs. CITY OF OREGON CITY, Respondent, and RONALD JOHNSON, RAY BARTEL, and PHILLIP BROWN, Intervenors-Respondent.	LUBA No. 94-148 FINAL OPINION AND ORDER

Appeal from City of Oregon City.

Peggy Hennessy, Portland, filed the petition for review and argued on behalf of petitioner.

Daniel Kearns, Portland, filed a response brief and argued on behalf of respondent. With him on the brief was Preston Gates & Ellis.

James H. Bean and Thomas H. Cutler, Portland, filed a response brief. With them on the brief was Lindsay, Hart, Neil & Weigler. James H. Bean argued on behalf of intervenors-respondent.

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

REMANDED 03/16/95

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

Petitioner appeals a city commission decision modifying a previously approved final development plan for a residential planned development (PD).

MOTION TO INTERVENE

Ronald Johnson, Ray Bartel and Phillip Brown, the applicants below, move to intervene in this proceeding on the side of respondent. There is no opposition to the motion, and it is allowed.

PRELIMINARY ISSUES

A. Content of Record

OAR 661-10-025(2) allows local governments to retain "any large maps, tapes or documents that are difficult to duplicate" until the time of oral argument. Such items are not required to be served on petitioners, but must be listed in the record table of contents. OAR 661-10-025(3) and (4)(a)(B).

Page 34 of the Record bears the following text:

> "Oversized Exhibit submitted in support by applicant's attorney * * *, dated June 15, 1994. This document is available for inspection at City Hall * * *."

The city submitted the above mentioned exhibit to the Board six days after the oral argument in this appeal. The exhibit includes 23 documents.

Petitioner objects to the inclusion of the exhibit in

the record. Petitioner points out that although the exhibit is over 100 pages in length, it is comprised entirely of 8 1/2 X 11 inch sheets of paper. Petitioner contends such a document is not "difficult to duplicate" within the meaning of OAR 661-10-025(2) and should have been included in the record originally submitted to LUBA and served on petitioner. Petitioner contends it was prejudiced by the city's failure to include this exhibit in the record served on petitioner, because the exhibit contains substantial information not found elsewhere in the record. Petitioner asks that the exhibit be stricken from the record or that petitioner be allowed to supplement its petition for review to reflect the additional information in the exhibit.

Under OAR 661-10-026(2), petitioners have 10 days after they receive the local record to file objections to that record. During that time, petitioners have a duty to review the contents and format of the record and to include in any objections they may file, all respects in which they believe the record fails to comply with this board's rules.

In this case, petitioner could have discovered the identity of the "oversized exhibit" named at Record 34, by reviewing the record and consulting with the city. Petitioner filed objections to the record, but those objections did not include any objection to the city's decision to retain the "oversized exhibit" described at

Record 34 until the time of oral argument.[1]

Had petitioner raised an objection to the city's retention of the exhibit at Record 34 in a timely manner, we likely would have agreed that a document composed of 8 1/2 X 11 inch sheets of paper is not a "difficult to duplicate" document that can be retained until oral argument under OAR 661-10-025(2). However, petitioner's objection must be rejected because it is not timely under OAR 661-10-026(2), and to sustain it would require this appeal to be delayed for additional briefing, prejudicing the other parties' right to a timely review.

B. Official Notice

In an order on petitioner's earlier record objections, we stated that we would take official notice of the city's "Water Resources Ordinance, [Ordinance No. 93-1007,] including any maps adopted as part of such ordinance," if any party provided them to us at or prior to oral argument. ONRC v. City of Oregon City, ___ Or LUBA ___ (LUBA No. 94-148, Order on Objection to Record, December 2, 1994), slip op 9. The parties have submitted a copy of Ordinance No. 93-1007, including an Exhibit A entitled "Description of Water Resources," incorporated by reference into the ordinance. We take official notice of Ordinance

[1]The city submitted this exhibit six days after oral argument, rather than at the time of oral argument. However, petitioner does not contend the six-day delay in itself prejudiced petitioner, and we view it has a harmless technical violation of our rules. OAR 661-10-005.

No. 93-1007.

In its petition for review, petitioner moves that we also take official notice of the city's "official water resources inventory maps and supporting documentation related to adoption of the Water Resources Overlay District." Petition for Review 6. The only item which any party has provided to us pursuant to this motion is a large map of "Oregon City and Vicinity," labeled "Inventory of Water Resources," which petitioner submitted at oral argument.

The city and intervenors object to our taking official notice of the above described map. The city contends petitioner fails to demonstrate that this map has been adopted by the city as part of its code or plan.

Under OEC Rule 202(7), we may take official notice of local government enactments. Sunburst II Homeowners v. City of West Linn, 18 Or LUBA 695, aff'd 101 Or App 458, rev den 310 Or 243 (1990). However, no party has provided us with any proof that the map submitted by petitioner at oral argument has been officially adopted by the city in any manner.[2] Consequently, we do not take official notice of this map.

[2]As far as we can tell, Ordinance No. 93-1007 makes no reference to adopting or incorporating any particular map as an inventory of water resources, but rather lists and describes such resources.

FACTS

On June 3, 1992, the city approved intervenors' final development plan for a PD in Newell Creek Canyon, consisting of 214 apartment units. A condition stated the approval must be exercised within one year. The condition also stated the approval "may be extended, prior to expiration, by the Planning staff, for a period of six (6) months, up to an aggregate period of one year." Record 157. The city subsequently approved two six-month extensions of this final development plan approval.

On August 18, 1993, the city amended its comprehensive plan to add a section titled "Water Resources Text, Goals and Policies." Ordinance No. 93-1007. On the same date, the city amended the Oregon City Municipal Code (OCMC) to add Chapter 17.49, titled "WR Water Resources Overlay District." Record 12.

In January 1994, intervenors filed an application to modify the approved PD final development plan. The proposed modification would reduce the maximum number of apartment units from 214 to 125, and would alter certain conditions imposed as part of the 1992 approval.

The planning commission held an evidentiary hearing on the modification application on March 29, 1994, and left the record open until April 5, 1994. On April 26, 1994, the planning commission adopted a decision to recommend approval of the proposed modification of the PD final development

plan to the city commission.

On June 15, 1994, the city commission held a de novo evidentiary hearing on the proposed modification. The city commission denied petitioner's request to hold the record open for an additional seven days. The city commission then made a tentative oral decision to approve the proposed modification. On July 20, 1994, the city commission adopted the challenged order approving the proposed modification of the PD final development plan and modifying certain conditions imposed as part of the 1992 approval. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues the city erred by refusing to leave the record of the city commission's June 15, 1994 hearing open for seven days, after petitioner made such a request prior to the close of that hearing. Petitioner contends the city violated ORS 197.763(6), which provides:

> "Unless there is a continuance, if a participant so requests before the conclusion of the initial evidentiary hearing, the record shall remain open for at least seven days after the hearing. * * *" (Emphasis added.)

Petitioner further argues the city commission's denial of its request for the record to remain open was "an effective denial of Petitioner's meaningful opportunity to rebut evidence that is applicable to the approval standards" and, therefore, prejudiced petitioner's substantial rights.

The city's "initial evidentiary hearing" on the subject

modification application was held before the planning commission on March 29, 1994. Consequently, the city did not violate ORS 197.763(6) by denying petitioner's request to leave the record of the June 15, 1994 city commission hearing open. Additionally, petitioner's argument that it was denied a meaningful opportunity to rebut evidence presented at the June 15, 1994 hearing does not provide an independent basis for remand, because petitioner does not identify any evidence relevant to applicable approval standards, submitted at the June 15, 1994 hearing, that it was denied an opportunity to rebut. Compare Mazeski v. Wasco County, 26 Or LUBA 226, 229, 233-34 (1993); Caine v. Tillamook County, 25 Or LUBA 209, 213-14 (1993).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

ORS 197.763(3)(b) provides that a local government's notice of its first evidentiary hearing on a quasi-judicial land use application shall:

> "List the applicable criteria from the ordinance and the [comprehensive] plan that apply to the application at issue[.]"

The city's notice of the initial March 29, 1994 evidentiary hearing before the planning commission identifies the subject application as "modification of the Plan[ned] Development Approval" and states:

> "Criteria: Set forth in Title 17 of the [OCMC]. * * *" Record 235.

The city's notice of the June 15, 1994 evidentiary hearing before the city commission similarly identifies the subject application and states:

> "Criteria: Set forth in Title 17.50 and 17.64 of the [OCMC]. * * *" Record 88.

Where a local government's notice of its first evidentiary hearing fails to list the applicable standards, as required by ORS 197.763(3)(b), under ORS 197.835(2)(a) petitioners may raise issues at LUBA even though such issues may not have been raised during the local proceedings. However, under ORS 197.835(7)(a)(B), such a procedural error provides no basis for reversal or remand of the decision unless petitioners establish the error caused prejudice to their substantial rights. Shapiro v. City of Talent, ___ Or LUBA ___ (LUBA No. 94-096, January 20, 1995), slip op 2-3; Mazeski v. Wasco County, 26 Or LUBA 226, 235 (1993).

We agree with petitioner that in listing the entire zoning ordinance as the applicable criteria, the city's notice of its initial evidentiary hearing failed to comply with ORS 197.763(3)(b). See Eppich v. Clackamas County, 26 Or LUBA 498, 503 (1994). Therefore, petitioner may raise issues before this Board regardless of whether they were raised below. We next consider whether petitioner demonstrates its substantial rights were prejudiced by this violation of ORS 197.763(3)(b).

The subsequent notice of the city commission's evidentiary hearing lists as applicable criteria OCMC

chapters 17.50 and 17.64. Petitioner contends this notice does not cure the ORS 197.763(3)(b) violation, because (1) the generic reference to OCMC chapters 17.50 and 17.64 is inadequate to inform participants that an application for an extension of PD approval, to which OCMC 17.64.120 applies, was being considered; and (2) it does not give notice that OCMC Chapters 17.44 (Unstable Soils and Hillside Constraint Overlay District -- hereafter USOD) and 17.49 (Water Resources Overlay District -- hereafter WROD) also contain standards applicable to the modification application. We understand petitioner to contend its ability to participate effectively in the proceedings below was impeded by this inadequate notice.

We agree with petitioner that simply listing OCMC chapters 17.50 and 17.64 does not satisfy the requirement of ORS 197.763(3)(b) to list the criteria applicable to the subject application. These OCMC chapters contain criteria for several additional types of applications (e.g., preliminary PD development plan, final PD development plan, authorization of similar use). However, petitioner's allegation of prejudice with regard to these chapters is limited to its contention that it was not given notice the city would consider an extension application under OCMC 17.64.120. The record shows petitioner submitted detailed oral and written argument to the city commission regarding the applicability of OCMC 17.64.120 and whether an

extension of the 1992 PD approval could be granted pursuant to that section. Record 27, 35-42, 117. We therefore conclude the city's failure to list the specific applicable criteria in OCMC chapters 17.50 and 17.64 did not prejudice petitioner's substantial rights. Furler v. Curry County, 27 Or LUBA 546, 550 (1994).

Petitioner also fails to establish that it was prejudiced by the city's failure to list provisions of the WROD as applicable criteria for the subject PD modification application. We do not determine whether provisions of the WROD are criteria applicable to the subject modification application. As we explain under the sixth assignment of error, infra, that is something the city will have to reconsider on remand. However, the record shows petitioner and its representative argued before the city commission and planning commission that the WROD is applicable to the modification application. Record 27, 233.

Finally, petitioner's argument that the city's notice should have listed provisions of the USOD as applicable criteria for the PD modification application is dependent on petitioner's factual contentions that the USOD (1) was adopted after intervenors' initial application for PD approval was filed, and (2) was not applied in the city's 1992 decision granting final development plan approval. As we explain, infra, under the fifth assignment of error, petitioner fails to establish that either of these factual

contentions is correct.

The second assignment of error is denied.

THIRD AND FOURTH ASSIGNMENTS OF ERROR

As stated above, intervenors' PD was originally approved on June 3, 1992. According to petitioner, under OCMC 17.50.340 and 17.50.350 and a condition of the 1992 approval, that approval was effective for one year, with the possibility of two six-month extensions. The city granted those extensions, yielding a maximum effective period of two years. Petitioner further argues that under OCMC 17.50.340, quasi-judicial land use approvals become void if no building permit has been issued, and the approved activity has not commenced, within the required time.[3] Petitioner concedes

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[3]OCMC 17.50.340.A (When Approved Decisions Become Void) provides, in relevant part:

> "* * * All quasi-judicial land use * * * approvals * * * become void under any of the following circumstances:
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> "1. If, within one year of the date of the final decision, a building permit has not been issued; or
>
> "2. If, within one year of the date of the final decision, the approved activity has not commenced * * *."

OCMC 17.50.350 (Extension) provides, as relevant here:

> "A. The principal planner may extend, prior to its expiration, any land use * * * permit for a period of six months up to an aggregate period of one year; provided, however, that there has been substantial implementation of the permit. * * *
>
> "B. Substantial implementation of a permit shall require at a minimum, for each six month extension, demonstrable evidence in a written application for extension showing [four listed criteria are satisfied."

that with regard to a PD approval, OCMC 17.64.120 allows additional extensions, beyond the two-year limit established by OCMC 15.50.340 and 17.50.350.[4] However, according to petitioner, here the original PD approval became void on June 3, 1994, because intervenors did not request an extension under OCMC 17.64.120 prior to June 3, 1994 and, therefore, there is no PD approval in effect to be modified by the challenged decision.

Petitioners additionally argue the challenged decision cannot itself approve an extension pursuant to OCMC 17.64.120, because no written application for such an extension was filed and the planning commission did not conduct a public hearing on and determine whether there has been "substantial construction or development" and whether there is "good cause" for such an extension, as petitioner contends is required by OCMC 17.64.120. Petitioner also contends that even if the planning commission decision in this matter did have the effect of approving an extension under OCMC 17.64.120, petitioner cannot be faulted for failing to appeal the planning commission decision, because it was expressly adopted as only a recommendation to the city commission. Record 151.

OCMC 17.64.120 (Expiration of Planned Development) provides:

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[4]OCMC 17.64.120 is quoted in the text, infra.

> "If within two years substantial construction or development has not occurred in compliance with the approved final development plan * * *, the authorization shall expire. The planning commission may authorize for good cause up to two additional one-year extensions, following a public hearing after application by the owner or authorized agent. If no extensions are granted, the authorization shall expire * * *. Decision[s] of the planning commission may be appealed to the city commission by written notice filed within ten days of the planning commission action." (Emphases added.)

The challenged decision explains that with regard to expiration of PD final development plan approvals, OCMC 17.64.120 controls, rather than OCMC 17.50.340 and 17.50.350, because "those sections relate primarily to general administrative procedures [whereas OCMC] 17.64.120 is more specific and relates only to planned developments." Record 8. The decision goes on to explain that OCMC 17.64.120 authorizes the planning commission to grant up to two one-year extensions of PD final development plan approval "upon showing substantial construction or development within two years of the approved [final] development plan * * *."[5] Record 10. According to the

[5]The decision concludes that "[e]vidence demonstrating substantial development * * * was provided." Record 11. The decision also contains detailed findings that "substantial development occurred prior to [the] December 3, 1993" request for a second six-month extension of approval under OCMC 17.50.350. Record 6. Petitioner does not explain why these findings are inadequate to show that "substantial construction or development," as that term is used in OCMC 17.64.120, occurred prior to June 3, 1994.

decision, if an applicant has timely requested an extension of PD final development plan approval, under OCMC 17.64.120 the existing approval does not expire until the city's review of the extension request has been completed:

> "[OCMC 17.64.120] does not require the Planning Commission to grant an extension prior to the expiration of said two years. It would not be logical to allow the owner/developer two years to achieve substantial construction or development and also require action by the Planning Commission 'following a public hearing' if the project were deemed terminated because the public hearing process had not concluded before the two years had expired." Id.

In their briefs, the city and intervenors (respondents) argue that OCMC 17.64.120 should be interpreted to mean that if substantial construction or development in compliance with the approved final development plan has occurred within the two-year period, the final development plan approval does not expire and no extension of that approval is necessary. In other words, respondents contend the extensions of final development plan approval allowed under OCMC 17.64.120 are required only if the applicant has not carried out substantial development or construction within the original two-year final development plan approval period. According to respondents, because the city determined that substantial development occurred within the original two-year approval period, no extension of final development plan approval under OCMC 17.64.120 is required, and these assignments of error must be denied.

To be reviewable by LUBA, a local government's interpretation of its regulations must be provided in the challenged decision or the supporting findings, not in the local government's brief. Eskandarian v. City of Portland, 26 Or LUBA 98, 109 (1993); Miller v. Washington County, 25 Or LUBA 169, 179 (1993). The above described interpretation of OCMC 17.64.120 appears reasonable, and we might well be required to defer to it if it were expressed in the challenged decision. However, the challenged decision does not take the position that an extension under OCMC 17.64.120 is unnecessary because substantial development occurred within the two-year period. Rather, the decision states that an extension under OCMC 17.64.120 can only be granted "upon showing substantial construction or development within two years," (Record 10) and concludes that approving a change in a final development plan pursuant to OCMC 17.64.110 satisfies the requirement for obtaining an extension under OCMC 17.64.120.

The decision then interprets the provisions of OCMC chapter 17.64 to mean that "a request for a change [in a PD final development plan under OCMC 17.64.110[6]] which, if approved, automatically involves a new approval date, is equivalent to a request [under OCMC 17.64.120] for an extension of time from the original date of approval." Record 9. The decision also concludes:

> "* * * The applicant's repeated oral requests for an extension, including those made before the Planning Commission, together with the Planning Commission's specific granting of an additional year plus the possibility of two additional six-month extensions if needed,[7] demonstrate the applicant has fully satisfied the requirements of [OCMC] 17.64.120. The development approvals were properly extended. * * *" Record 11-12.

We are required to defer to a local governing body's interpretation of its own enactment, unless that

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[6]OCMC 17.64.110 (Changes to Final Development Plan), which is discussed in more detail under the fifth assignment of error, provides that a modification to an approved PD final development plan, such as the one proposed here, "shall be processed in the same manner as for a new PD." OCMC 17.64.110.B.

[7]This finding appears to refer to the following condition adopted by the planning commission as part of its recommendation to approve the requested modification to the PD final development plan:

> "**Expiration:** This land use decision shall be exercised within a period of one (1) year from the effective date of the final decision. Any land use permit may be extended, prior to expiration, by the Planning staff, for a period of six (6) months, up to an aggregate period of one year. However, no permit may be extended unless there has been substantial implementation of the permit." Record 151.

An identical condition was adopted as part of the challenged city commission decision. Record 4, 168.

interpretation is contrary to the express words, purpose or policy of the local enactment or to a state statute, statewide planning goal or administrative rule which the local enactment implements. ORS 197.829; Gage v. City of Portland, 319 Or 308, 316-17, 877 P2d 1187 (1994); Clark v. Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992). This means we must defer to a local governing body's interpretation of its own enactments, unless that interpretation is "clearly wrong." Reeves v. Yamhill County, 132 Or App 263, 269, ___ P2d ___ (1995); Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 217, 843 P2d 992 (1992); West v. Clackamas County, 116 Or App 89, 93, 840 P2d 1354 (1992).

The city is well within its discretion under ORS 197.829 and Clark v. Jackson County to interpret the OCMC to provide that OCMC 17.64.120, rather than 17.50.340 and 17.50.350, governs the expiration of the 1992 PD final development plan approval. Langford v. City of Eugene, 126 Or App 52, 867 P2d 535, rev den 318 Or 478 (1994). The city is also well within its interpretive discretion in interpreting the "if no extensions are granted, the authorization shall expire" provision of OCMC 17.64.120 to mean that if an extension is requested prior to the expiration of the two-year period, the final development plan approval does not expire while city review of the extension request is pending.

While it is less certain, we also believe the city is within the discretion afforded by the extremely deferential Clark standard in interpreting OCMC 17.64.010, 17.64.110 and 17.64.120 together to mean that if a change in an approved PD final development plan is requested under OCMC 17.64.110.B before the expiration of the original approval, the approval does not expire while the modification application is being processed, and a separate extension application under OCMC 17.64.120 is not necessary in this circumstance. This is because, if the modification is ultimately approved, the decision approving the modified PD final development plan will itself establish a new expiration date for the approval of the modified final development plan.

The third and fourth assignments of error are denied.

FIFTH ASSIGNMENT OF ERROR

Petitioners contend the challenged decision erroneously failed to apply the USOD and WROD to the subject PD modification application because they were not in effect when the original application for PD approval was filed. Petitioners argue the USOD and WROD should be applied to the PD modification application because they were adopted as part of the OCMC prior to the January 1994 filing of the PD modification application.

A. Unstable Slopes Overlay District

The city contends the USOD was in effect when the

original PD application was filed, and was applied in granting the 1992 PD final development plan approval.[8] The city points to the following condition of the original PD final development plan approval:

> "**Unstable Slopes:** Requirements of the unstable slopes overlay zone shall apply to this project for slopes greater than 25 percent. The recommendations of the March 31, 1992 [engineering report] shall be incorporated in the final construction plans * * *." (Emphasis added.) Record 154.

The challenged decision amends the above quoted condition to provide:

> "**Unstable Slopes:** Requirements of the unstable soils and hillside constraints overlay zone shall apply to this project for unstable slopes.[9] The recommendations of the March 31, 1992 preliminary geotechnical report * * *, the January 12, 1994 preliminary engineering geology report * * *, and the review comments by the City's consultant * * * dated March 7, 1994 shall be followed, with the exception that detention will not be required. * * *" (Emphasis added.) Record 159.

Petitioner does not provide us with the city ordinance adopting the USOD or any other proof of when the USOD was adopted. Petitioner does not explain how the USOD differs from the "unstable slopes overlay district" that apparently

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[8]No party provides us with a copy of the ordinance adopting the USOD, of which we could take official notice, so we cannot determine when the USOD was adopted.

[9]The USOD, at OCMC 17.44.030.A, provides that the USOD "shall apply to those lands designated US unstable slopes on a special city zoning map." We have not been provided with a copy of such map, and cannot ascertain whether the subject property in fact includes land designated US.

was applied when the initial PD final development plan was approved. Neither does petitioner explain why the above quoted amended condition is insufficient to insure compliance with applicable requirements of the USOD. Therefore, even if the USOD is applicable to the subject PD modification application, as petitioner contends, petitioner's arguments provide no basis for reversal or remand.

This subassignment of error is denied.

B. Water Resources Overlay District

With regard to the applicability of the WROD to the proposed PD modification, the challenged decision states:

> "[T]he approved development is subject to the standards and criteria in effect on the date of the [initial] application for the planned development. Those standards and criteria were fully reviewed and found to have been satisfied by the Final Approval for the Planned Development on June 3, 1992. [OCMC] Chapter 17.49 [the WROD] was adopted August 18, 1993 and does not apply to this development." Record 12.

We understand the above findings to mean the city believes it is not required to apply the WROD to the challenged decision, because the WROD was not in effect in 1991, when the original PD application was filed, and was not applied in approving that application.

Petitioners argue that under OCMC 17.64.110.B, the proposed modification must be processed like a new PD. Petitioners further argue that OCMC 17.64.110.B must be interpreted consistently with ORS 227.178(3), to mean that a

new permit application, such as the application for a modification to an approved PD final development plan at issue here, is subject to the standards and criteria in existence on the date that application was filed.

ORS 227.178(3) provides:

> "If the [permit] application was complete when first submitted * * * and the city has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted." (Emphasis added.)

We agree with petitioner that the PD final development plan modification application filed in January 1994 is a permit application subject to the requirements of ORS 227.178(3). Gage v. City of Portland, 24 Or LUBA 47, 50 (1992). Consequently, under ORS 227.178(3), the modification application is subject to the city standards for PD final development plan modifications in effect in January 1994. As far as we can tell, the only such city standard is OCMC 17.64.110.B, which provides that proposed changes to approved PD final development that alter total density, such as the modification at issue here, "shall be processed in the same manner as for a new PD." (Emphasis added.)

However, the determination of what standards apply to a new PD application is itself governed by ORS 227.178(3). It would be contrary to that statute, which OCMC 17.64.110.B at

least in part implements, to interpret OCMC 17.64.110.B to mean that an otherwise applicable city standard, in effect when the subject PD modification application was filed, is not applicable. In other words, OCMC 17.64.110.B must be interpreted consistently with ORS 227.178(3) to mean that any standard which would be applicable to a new application for PD approval is applicable to applications for modifications to approved PDs that are within the scope of OCMC 17.64.110.B.

As we understand it, were it not for the fact that the WROD was not in effect when the original PD application was filed, there would be no dispute that the WROD contains standards potentially applicable to a new PD, and hence the subject PD modification application. Consequently, this subassignment of error is sustained.[10]

The fifth assignment of error is sustained, in part.

SIXTH ASSIGNMENT OF ERROR

As explained supra, OCMC chapter 17.49 is the WROD. OCMC 17.49.030.A (Development Review Process) provides, as relevant here:

"The standards contained in this chapter shall

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[10]The challenged decision includes an alternative determination that even if the WROD is potentially applicable to the subject application, compliance with WROD provisions is not required because the subject property does not include land subject to the requirements of the WROD. This determination is challenged under the sixth assignment of error. Therefore, sustaining this subassignment of error provides a basis for reversal or remand only if the sixth assignment of error is also sustained.

> apply to any application for a development permit or land use or limited land use permit involving property within [100] feet of a water area, water course or wetland, as shown on the water resources inventory of the city or county. * * *
>
> "1. Applications for * * * planned developments shall demonstrate compliance with these standards as part of the review proceedings for those developments[.]
>
> "* * * * *" (Emphasis added.)

OCMC 17.49.020 provides:

> "'Water course' means a river, stream, or creek, and its perennial and seasonal tributaries, together with the channel occupied by such running water. * * *" (Emphasis added.)

The city determined that under OCMC 17.49.030, quoted above, the provisions of the WROD do not apply to the proposed development, as follows:

> "[T]he evidence and the testimony of the applicant's planner demonstrate no part of the Planned Development, as modified, is within 150 [sic] feet of any water area, water course or wetland [shown on the water resources inventory of the city or Clackamas County]. * * *" Record 12.

Petitioner contends the above determination that the WROD is not applicable to the proposed development is not supported by substantial evidence in the record. Petitioner claims the city's inventory of water resources includes both Newell Creek and its tributaries. Petitioner cites evidence in the record, including evidence submitted by intervenors' consultant, that a proposed access road would be within 90 feet of a wetland and would cross a stream channel on the

subject property, and that the proposed multi-family dwelling structures would be within 100 feet of two "intermittent drainageways" on the subject property. Record 50, 273, 290, 299. According to petitioner, these "intermittent drainageways," which carry water to Newell Creek, are "seasonal tributaries" that are within the definition of "water courses" in OCMC 17.49.020 and are included on the city's water resources inventory.

Respondents contend the city comprehensive plan and water resources inventory protect only Newell Creek itself, and not its tributaries. Respondents also contend there is evidence in the record supporting the above quoted finding. Record 28, 164.

Ordinance No. 93-1007 adopts an "Inventory of Water Resources" as part of the city's comprehensive plan. Under the heading "Rivers, Streams and Creeks," the list includes "Newell Creek and Tributaries." (Emphasis added.) Ordinance No. 93-1007, p. 3. The ordinance also adopts, as Exhibit "A", a description of the inventoried water resources. Id. at p. 4. The description of "Newell Creek and tributaries" states:

> "Description: Newell Creek flows through a large drainage basin area which is largely undeveloped. * * * The creek areas consist of forested maple-alder communities, including blackberries, swordfern, and snowberry. A number of [animal] species were observed * * *. The stream corridor has a high diversity and excellent understory. The area also consists of several seeps and ponds as well as several intermittent creeks. The

> Newell Creek Canyon area has been identified as high quality primary resources in the metro area.
>
> "Potential conflicts: The potential for residential development to impact upon the creek and associated habitat is high. * * * Development should only occur if the standards of the proposed water resources ordinances can be met. * * *" (Emphases added.) Ordinance No. 93-1007, Ex. A, p. 4.

Based on the above provisions of the city's water resources inventory, we reject respondents' contention that only Newell Creek itself is included on the city's water resources inventory. Clearly, the inventory includes the tributaries of Newell Creek. The evidence cited by respondents are statements that the PD, as modified, is no closer than 150 feet to Newell Creek. We are cited to no evidence in the record that the proposed development, as modified, is no closer than 100 feet to tributaries of Newell Creek. Rather, the evidence cited by petitioner is that the proposed development is within 100 feet of streams or "intermittent drainageways" on the subject property. Although there is no dispute that the entire subject property is within the watershed of Newell Creek, neither the findings nor the evidence are adequate to establish that such streams or intermittent drainageways on the subject property are not tributaries of Newell Creek. Consequently, a reasonable person could not conclude, based on the evidence in the record to which we are cited, that the proposed PD, as modified, is not subject to the provisions

of the WROD.[11]

The sixth assignment of error is sustained.

SEVENTH ASSIGNMENT OF ERROR

Petitioner contends the county's findings are deficient, because they fail to respond to concerns expressed by a representative of the Oregon Department of Fish and Wildlife (ODFW) in testimony before the city commission. Waugh v. Coos County, 26 Or LUBA 300 (1993).

In Waugh v. Coos County, 26 Or LUBA at 314-15, we found that a county's failure to respond in its findings to "legitimate concerns" expressed by a state agency was a violation of the coordination requirement of Statewide Planning Goal 2 (Land Use Planning). Goal 2 was applicable in Waugh because the decision challenged was an amendment to the county's comprehensive plan and zoning ordinance. The

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[11]The challenged decision also states that even if the WROD is applicable, it can be satisfied, and intervenors will demonstrate compliance with the WROD during the city's design review process. Record 13. The decision imposes the following condition:

> "The Site Plan and Design Review process shall include a review to assure compliance with the standards and criteria of [the WROD]." Id.

Petitioner contends the above condition is not an adequate substitute for demonstrating compliance with the WROD as part of PD final development plan approval.

It is not clear to us how it is possible to apply the "standards and criteria" of the WROD if no inventoried water resources are identified on the subject property. In any case, neither the city nor intervenors contend the above findings and condition provide an independent basis for determining the challenged decision satisfies the provisions of the WROD and, therefore, we do not consider this issue further.

Statewide Planning Goals are not applicable to a permit decision made under an acknowledged comprehensive plan and land use regulations, such as the decision challenged in this appeal. ORS 197.175(2)(d); Byrd v. Stringer, 295 Or 311, 666 P2d 1332 (1983); Spiering v. Yamhill County, 25 Or LUBA 695, 721 (1993).

Of course, the city's findings must address and respond to specific issues relevant to compliance with applicable approval standards that were raised in the proceedings below. Norvell v. Portland Area LGBC, 43 Or App 849, 853, 604 P2d 896 (1979); White v. City of Oregon City, 20 Or LUBA 470, 477 (1991); Grover's Beaver Electric v. City of Klamath Falls, 12 Or LUBA 61, 66 (1984). However, petitioner fails to explain why the cited comments by the ODFW representative should be considered relevant to any applicable approval standard.

The seventh assignment of error is denied.

The city's decision is remanded.