MULTNOMAH COUNTY OREGON

BOARD OF COUNTY COMMISSIONERS
ROOM 605, COUNTY COURTHOUSE
1021 S.W. FOURTH AVENUE
PORTLAND, OREGON 97204

GLADYS McCOY • Chair • 248-3308
PAULINE ANDERSON • District 1 • 248-5220
GRETCHEN KAFOURY • District 2 • 248-5219
RICK BAUMAN • District 3 • 248-5217
POLLY CASTERLINE • District 4 • 248-5213
JANE McGARVIN • Clerk • 248-3277

AGENDA OF

MEETINGS OF THE MULTNOMAH COUNTY BOARD OF COMMISSIONERS

FOR THE WEEK OF

January 9 - 13, 1989

NOTE: FORMAL MEETING STARTING TIME CHANGED TO 9:00 AM

Tuesday, January 10, 1989 - 1:30 PM

Multnomah County Courthouse, Room 602

EXECUTIVE SESSION

EXECUTIVE SESSION - for the purpose of reviewing Litigation allowed under ORS 192.660(1)(h)

IMMEDIATELY FOLLOWING THE EXECUTIVE SESSION, THE FOLLOWING WILL BE HEARD:

INFORMAL

1. Informal Review of Bids and Requests for Proposals:
   a) Cab & Chassis
   b) Wetland Interpretive Center - Blue Lake Park

2. Briefing regarding East Burnside Sewer Project - Grant Nelson

3. Review of efforts to accomplish consolidation of management and operation of the Coliseum and other city facilities with the Oregon Convention Center, and a discussion to determine County roles, especially regarding the Expo Center

4. Informal Review of Formal Agenda of January 12

NOTE: CHANGE OF STARTING TIME TO 9;00 AM

Thursday, January 12, 1989, 9:00 AM

Multnomah County Courthouse, Room 602

Formal Agenda

REGULAR AGENDA

BOARD OF COUNTY COMMISSIONERS

R-1 In the matter of the appointment of Mike Fahey to the Exposition Center Advisory Committee. Term expires 12/91

R-2 Public Hearing to review applications for County nominations for tourist attractions development funding from the Oregon State Lottery through the Oregon Tourism Alliance

DEPARTMENT OF ENVIRONMENTAL SERVICES

R-3 Order in the Matter of the Execution of Deed D89322 for Certain Tax Acquired Property to the City of Troutdale, Oregon (Continued from December 29)

R-4 Order in the Matter of the Execution of Deed D89323 for Certain Tax Acquired Property to the City of Troutdale, Oregon (Continued from December 29)

R-5 Notice of intent to apply for $40,000 grant from the Oregon State Land & Water Conservation fund for restroom renovation and picnic shelter at Blue Lake Park

R-6 In the matter of an intergovernmental agreement with the Housing Authority of Portland (HAP) for joint acquisition and rehabilitation of property for conversion to a Residential Training Home

PUBLIC CONTRACT REVIEW BOARD

(Recess as the Board of County Commissioners and reconvene as the Public Contract Review Board)

R-7 In the Matter of Exempting from Public Bidding a Contract to Screen off the Living Units at Multnomah County Correctional Facility for Security of Staff and Inmates, and Riot Control in Facility

R-8 In the Matter of Exempting from Public Bidding the Purchase of Miscellaneous Electrical Supplies to Complete the Installation of Computer Hardware at Information Services Division

(Recess as the Public Contract Review Board and reconvene as the Board of County Commissioners)

DEPARTMENT OF GENERAL SERVICES

R-9 Budget Modification DGS #9 reclassifying three positions within Finance Division, 1) reclassify vacant position Finance Technician in Treasury to Finance Specialist 1; 2) reclassify two OA 3 positions in Payroll - 1 position to Finance Technician and 2 positions to Finance Specialist 1

BOARD OF COUNTY COMMISSIONERS

R-10 Resolution in the Matter of Fair and Equal Treatment for all Citizens (This matter will be heard at 10:00 AM)

ORDINANCES - NONDEPARTMENTAL

R-11 First Reading - An Ordinance establishing a recycling program within County Facilities

R-12 First Reading - An Ordinance concerning the organization and functions of the Office of County Counsel and repealing MCC 2.30.450(H)

THE FOLLOWING INFORMAL BRIEFING WILL IMMEDIATELY FOLLOW THE FORMAL MEETING:

1. Briefing concerning National & State Juvenile Justice Reform issues related to the Downsizing of MacLaren School to develop community based programs for "gang related youth" as an alternative to adding 70 new beds to MacLaren

Thursday Meetings of the Multnomah County Board of Commissioners are recorded and can be seen at the following times:
Thursday, 10:00 PM, Channel 11 for East and West side subscribers
Friday, 6:00 P.M., Channel 27 for Rogers Multnomah East subscribers
Saturday 12:00 PM, Channel 21 for East Portland and East County subscribers

0498C.7-10

DATE SUBMITTED _____

(For Clerk's Use)
Meeting Date _____
Agenda No. _____

REQUEST FOR PLACEMENT ON THE AGENDA

Subject: Executive Session

Informal Only* Jan 10, 1989 1:30 PM (Date) Formal Only _____ (Date)

DEPARTMENT General Services DIVISION County Counsel

CONTACT John DuBay TELEPHONE 3138

*NAME(s) OF PERSON MAKING PRESENTATION TO BOARD John DuBay and Larry Kressel

BRIEF SUMMARY Should include other alternatives explored, if applicable, and clear statement of rationale for the action requested.

Executive Session in the matter of the Appeal of the Luba Decision regarding City of Fairview vs. Multnomah County, and discussion of options

(IF ADDITIONAL SPACE IS NEEDED, PLEASE USE REVERSE SIDE)

1989 JAN -3 PM 2:26
MULTNOMAH COUNTY OREGON
BOARD OF COUNTY COMMISSIONERS

ACTION REQUESTED:

☐ INFORMATION ONLY ☐ PRELIMINARY APPROVAL ☐ POLICY DIRECTION ☐ APPROVAL

INDICATE THE ESTIMATED TIME NEEDED ON AGENDA _____

IMPACT:

☐ PERSONNEL

☐ FISCAL/BUDGETARY

☐ General Fund

☐ Other _____

SIGNATURES:

DEPARTMENT HEAD, ELECTED OFFICIAL, or COUNTY COMMISSIONER: _____

BUDGET / PERSONNEL _____ /

COUNTY COUNSEL (Ordinances, Resolutions, Agreements, Contracts) _____

OTHER _____
(Purchasing, Facilities Management, etc.)

NOTE: If requesting unanimous consent, state situation requiring emergency action on back.

(8/84)

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MULTNOMAH COUNTY, Petitioner, vs. CITY OF FAIRVIEW, Respondent, and DON TOOMBS TRUCKING, INC., Intervenor-Respondent.	LUBA Nos. 88-035 and 88-076 FINAL OPINION AND ORDER

Appeal from City of Fairview.

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

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

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

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

REMANDED - 88-035; AFFIRMED - 88-076 12/23/88

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

NATURE OF THE DECISION

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

MOTION TO INTERVENE

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

FACTS

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

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

to stockpile sand.

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

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

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

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

88-035. Assignments of error four through seven challenge the city's decision to change the zoning designation of the property in LUBA No. 88-076.[2]

FIRST ASSIGNMENT OF ERROR

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

SECOND ASSIGNMENT OF ERROR

> "Fairview's findings did not address applicable criteria."

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

A. Relevant Code Provisions

All parties agree the county's UF-20 zone applied to intervenor's property at the time the conditional use permit was issued. The UF-20 zone specifies "primary uses," "uses permitted under prescribed conditions" and "conditional uses." MCC .2383-.2392.[3] Only the conditional use provisions are important in this appeal, and they provide in pertinent part:

/ / /

/ / /

"Conditional Uses

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

"* * * * *

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

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

"* * * * *

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

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

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

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

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

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

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

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

If intervenor simply proposes an expansion or enlargement of a preexisting use, no additional conditional use standards are imposed by MCC .7615; and only the general conditional use standards in MCC .7120, quoted supra at n 4, will apply. However, if, as the county argues in the alternative, the conditional use permit approves a change of a preexisting use to a listed use (i.e., mining and processing of aggregate and other mineral or subsurface resources as listed in MCC

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

B. Resolution 6-1988

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

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

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

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

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

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

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

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

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

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

/ / /

C. Petitioner's First Two Assignments of Error

In its first assignment of error, petitioner argues that the county improperly approved the conditional use permit because the intervenor's existing operation and the operation as proposed, extract no minerals. Rather, all minerals are extracted elsewhere and delivered to the site for processing and retransport. In its second assignment of error, petitioner points to the additional approval criteria imposed on mineral extraction sites under MCC .7305-.7335, noted supra. Petitioner argues even if the proposed use properly were viewed as a mineral extraction site, the city adopted no findings demonstrating compliance with these criteria.

Intervenor suggests it might be possible to consider the proposed use as "mining and processing of aggregate and other mineral or subsurface resources" under MCC .2390(B)(1). However, it is clear to us, as explained supra, that this was not the city's basis for approving the conditional use permit. This view is reinforced by the fact the city did not, as petitioner notes correctly in the second assignment of error, adopt any findings to demonstrate compliance with the conditional use standards in MCC .7305-.7335 applicable to mineral extraction.

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

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

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

THIRD ASSIGNMENT OF ERROR

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

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

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

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

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

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

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

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

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

/ / /

FIFTH ASSIGNMENT OF ERROR

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

SIXTH ASSIGNMENT OF ERROR

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

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

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

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

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

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

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

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

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

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

> "The proposed zoning designation is appropriate within the Fairview Comprehensive Plan in that it states:
>
> > "For areas outside the Fairview City Limits, the land use designation shown in Figure 6 shall have the status of 'proposed designations' until such time as those areas are annexed by Fairview." Record 10.

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

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

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

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

SEVENTH ASSIGNMENT OF ERROR

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

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

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

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

Supreme Court stated

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

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

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

Petitioner does not explain why these documents and the

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

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

CONCLUSION

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

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

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

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

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

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

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

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

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

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

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

FOOTNOTES

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1 ORS 215.130(2) provides as pertinent:

> "An ordinance designed to carry out a county comprehensive plan and a county comprehensive plan shall apply to:
>
> > "(a) the area within the county also within the boundaries of a city as a result of extending the boundaries of the city or creating a new city unless, or until the city has by ordinance or other provision provided otherwise.
> >
> > "* * * * *."

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

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

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4 MCC .7120 provides as follows:

"Conditional Use Approval Criteria

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

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

"(B) Will not adversely affect natural resources;

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

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

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

"(F) Will not create hazardous conditions; and

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

---

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

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

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

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

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

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

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

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

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

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

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

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 88-035 and 88-076, on December 23, 1988, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 23rd day of December, 1988.

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