

197.850.

Opinion by Kellington.

NATURE OF THE DECISION

Petitioners appeal an order of the West Linn City Council approving a Willamette River Greenway (WRG) permit for construction of a ramp and dock on the Willamette River.

MOTION TO INTERVENE

J. Kent Grote, the applicant for the WRG permit below, and James Roake, an adjacent property owner, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

Intervenors-respondent Grote and Roake (intervenors) own separate, contiguous pieces of real property along the Willamette River (river). Both properties extend to the low water mark of the river. Intervenors' properties are zoned for residential use. Intervenor Grote applied for authorization to build a shared ramp and dock for his and intervenor Roake's pleasure boats. The proposed ramp and dock is a "T" shaped floating structure which would run along a portion the property line between intervenors' properties, extending past the river low water mark. The proposed ramp would extend 120 feet into the river, with a 40 foot dock perpendicular to the ramp. The underside of the dock and ramp will be supported by crossbars to prevent the dock and ramp from resting on the river bottom during low water periods.

Additional facts are set forth in the city's order, and are, in part, as follows:

"The [proposed ramp and dock are] located to the west side of [the river] at the foot of Failing Street. The shoreline in the immediate vicinity of the Site is ringed with homes set back approximately 200 feet from an area commonly referred to as 'the beach.'

"Much of the indigenous vegetation along the River near the site has been removed. The exception is in front of the applicant's property and Mr. James Roake's property, where natural grasses and a large number of trees occupy the bottom land.

"Burnside park is adjacent to the applicant's waterfront property. The park offers public access to the waterfront and to the River.

" * * * * *

" * * * The Dock will be located along the property line between the applicant's property and a lot owned by Mr. Roake. * * *

"The banks of the [river] at the site slope gradually from the tree line to the water. During high water periods the River level comes up to the trees. During low water periods, the River level often drops to expose 80-90 feet of additional land.

"According to * * * an Army Corps of Engineers map, the River at the site is approximately 1,150 feet wide, subject to seasonal variations. The River immediately upstream and downstream of the site has an average width of 650 to 700 feet. The distance between the proposed Dock and the tip of Clackamette (aka Goat) Island is approximately 1000 feet. The River channels on either side of the island are approximately 630 and 320 feet wide." Record 2-3.

The planning commission denied the WRG permit and intervenors appealed to the city council. The city council

reversed the planning commission and approved the WRG permit.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

"The city misconstrued the applicable law and made a decision not based on substantial evidence in the whole record or on adequate findings in finding the following criterion of CDC Section 28.090 to be satisfied:

''(A) The development complies with each of the following criteria:

''1. Public access to and along the river shall be provided to the maximum extent possible.'"

In this assignment of error, petitioners make two separate challenges to the city's decision. Petitioners argue that (1) the city incorrectly interpreted, and made findings inadequate to satisfy, West Linn Community Development Code (CDC) Section 28.090(A)(1) quoted above, and (2) to the extent that the city's findings are adequate, they are not supported by substantial evidence in the whole record.

We address these issues separately below.

A. Interpretation of CDC Section 28.090(A)(1)
Adequacy of Findings

The city interpreted CDC Section 28.090(A)(1), quoted above, to require the following:

"Code Section 28.090(A)(1) requires that 'public access to and along the River shall be provided to the maximum extent possible.' The City interprets this criterion, in pertinent part, to mean that:

(a) public access on public land along the River shall remain as unobstructed as is reasonably possible; and (b) structures extending into the River may not unreasonably interfere with waterborne travel along the River." (Emphasis in original.) Record 4.

The city's findings of compliance with CDC Section 28.090(A)(1) are as follows:

"[e]vidence * * * establishes that the applicant's private property at the Site extends to the low water line. Public use of the land between the low and high water marks therefore, constitutes trespass. Construction of the Dock across land between the high and low water marks will not interfere with public access along the River because the public has no access rights at the Site.

"Based on information from the U.S. Army Corps of Engineers and the Division of State Lands, presented by the applicant, instances where the River falls below the low water mark are infrequent. It is also difficult or impossible to tell when the River has fallen below the low water mark. Members of the public cannot tell whether they are on public land during low water periods or trespassing on private property. Construction of the Dock will not unreasonably interfere with access to or along the River.

"* * * the River at the Site is approximately 1,150 feet wide. During the summer months, when recreational use of the River is greatest, the Dock will extend only 40-50 feet into the River. The River both upstream and downstream of the Site is considerably narrower, averaging 650 to 700 feet in width. The River channel at these narrower points provides adequate water surface for boaters, skiers and other River users. The City finds, based on the width of the River at the site, that construction of the Dock will not unreasonably interfere with waterborne access along the River. Applicant's proposed Dock therefore satisfies Code Section 28.090(A)(1)."

Record 4-5.

Petitioners argue that the city's interpretation of CDC Section 28.090(A)(1) is incorrect. Petitioners also argue that the city's findings that the proposed dock "will not unreasonably interfere" with public access and that public access will remain as "unobstructed as is reasonably possible" are inadequate to demonstrate compliance with CDC Section 28.090(A)(1). Citing Moorefield v. City of Corvallis, ___ Or LUBA ___ (LUBA No. 89-045, September 28, 1989), petitioners claim that, in considering provisions for public access, the phrase in CDC Section 28.090(A)(1) "to the maximum extent possible" requires the city to do the following:

"[t]he city must consider the particular characteristics of the proposed site and the dock's design to determine whether the configuration of this Dock, at this site, provides public access to and along the River to the maximum extent possible." Petition for Review 10-11.

Petitioners also argue that the city erred in determining that there was no existing public access along the River which should be "provided to the maximum extent possible" under CDC Section 28.090(A)(1). Petitioners maintain that during low water periods, the proposed ramp will rest on publicly owned land and, therefore, will impair public access along lands below the low water mark. Petitioners contend that the city did not address how public access to and along the river would be provided during low

water periods. Petitioners also argue that while the city's findings do address access along the river, they do not address access to the river at all, as is required by CDC Section 28.090(A)(1).

Finally, petitioners contend the city was incorrect in determining that only public access on public land is protected by CDC 28.090(A)(1). Petitioners argue that nothing in that CDC section:

"* * * restricts public access to and along the River to only those areas where the land is publicly owned. * * * One can envision many ways in which public access to and along the River can be protected in conjunction with the granting of a WRG permit, even though the access may involve some private property. For example, the city could require that in exchange for allowing Mr. Grote to extend his dock onto public waters and over public lands, he grant a public easement across his land to provide public access to public lands and waters." (Citations omitted.) Petition for Review 8.

The city and intervenors (respondents) argue that the city properly interpreted CDC Section 28.090(A)(1). They argue that CDC Section 28.090(A)(1) addresses (1) public "access along the river bank," (2) public "access to the river from the bank," and (3) public "waterborne access along the river." Respondents' Brief 4. According to respondents, under the city's order, all three of these aspects of public access to and along the river are "provided to the maximum possible extent," and the city's decision approving the ramp and dock is consistent with the

requirements of CDC Section 28.090(A)(1).¹ Respondents claim that the city's interpretation of CDC Section 28.090(A)(1) is consistent with this Board's interpretation of a City of Corvallis code provision having a requirement similar to that found in CDC 28.090(A)(1), namely, "preserve [floodplains] to the maximum extent possible." Moorefield v. City of Corvallis, supra.²

Respondents contend there is no requirement that the city's findings recite the exact words of CDC Section 28.090(A)(1). Respondents argue that so long as the city's findings demonstrate compliance with the purpose of CDC Section 28.090(A)(1), they are adequate. Respondents maintain that in its order, the city accurately explained the purpose of the requirements of CDC Section 28.090(A)(1) and properly found compliance with the purpose of those

¹Respondents also argue that petitioners did not raise below their contention that CDC Section 28.090(A)(1) authorizes the city to require privately owned land be dedicated to the public for provision of public access. Intervenors argue that because the dedication issue was not raised below, we should not consider it. Dedication of public easements is not explicitly required by CDC Section 28.090(A)(1), and petitioners did not contend below that easements for public access to the river were required. Accordingly, the city did not err by failing to adopt findings specifically explaining why such easements are not required. However, CDC Section 28.090(A)(1) does require that public access to the river shall be provided to the maximum extent possible. The city's findings must, therefore, be sufficient to explain how the development approval in this case is consistent with the requirement that such access be provided.

²The code standard involved in Moorefield v. City of Corvallis, supra, required that floodplains be "preserve[d] to the maximum possible extent," whereas in this case the relevant code standard requires public access be "provide[d] to the maximum possible extent." (Emphasis supplied.)

requirements. Respondents suggest that further findings are unnecessary because no public access exists to the river which the city could find is "provided" under CDC Section 28.090(A)(1). Respondents reason that the only access from the banks to the river at the subject location requires trespass over intervenors' privately owned property. Respondents suggest the evidence demonstrates that the land over which access to the river could be "provided" is privately owned and, accordingly, "clearly supports" a finding under CDC Section 28.090(A)(1), that "public access to the river is provided to the maximum extent possible." ORS 197.835(9)(b).³

In summary, throughout their response to this assignment, respondents rely on essentially three premises in support of the city's decision. They are: (1) there is no public access to or along the river, except along the water during low water periods; (2) during these low water periods the public cannot distinguish between public and private land; and (3) under these circumstances, there is no public access to or along the river existing in the first place to continue to provide to the public under

³ORS 197.835(9)(b) provides in relevant part:

"Whenever the findings are defective because of failure to recite adequate facts or legal conclusions * * * but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record * * *."

CDC Section 28.090(A)(1).⁴

As respondents point out, CDC Section 28.090(A)(1) relates to three aspects of river access, (1) waterborne access along the river, (2) pedestrian access along the river banks, and (3) pedestrian access to the river from the upland banks. With regard to waterborne access along the river, the city determined that the proposed ramp and dock "will not unreasonably interfere with waterborne access along the river." (Emphasis supplied.) Record 5. With regard to pedestrian access along the river, the city determined that "access along the river shall remain as unobstructed as is reasonably possible. * * * Construction of the Dock across property below the low water mark therefore will not unreasonably interfere with access to or along the River." (Emphasis supplied.) Record 4. The city did not make specific findings regarding access to the river from the upland.

⁴Intervenors argue that the city made findings regarding access to the river as follows:

"Code Section 28.090(A)(1) requires that 'public access to and along the River shall be provided to the maximum extent possible.'" Record 4.

"Construction of the Dock across property below the low water mark therefore will not unreasonably interfere with access to or along the River. Record 4.

"Applicant's proposed dock * * * satisfies Code Section 28.090(A)(1)." Record 5.

While we consider the city's interpretation of its ordinance, it is our responsibility to determine whether the city' interpretation is correct. McCoy v. Linn County, 90 Or App 271, 275-276, 752 P2d 323 (1988). In this case, we find that the city's findings misapply the CDC Section 28.090(A)(1) standard that "public access to and along the river shall be provided to the maximum possible extent." CDC Section 28.090(A)(1) requires the city to show that it has either (1) provided access to the river at the subject location, or (2) provided access to the river to the maximum possible extent, in view of the allowable uses of the subject property, as specified in the CDC, and in view of the the particular characteristics of the site. Moorefield v. City of Corvallis, supra, slip op at 40. In other words, given that (1) a private dock is an allowable use in the Willamette River Greenway, and (2) the proposal is for a private ramp and dock which will extend over public and private land and will float on public waters, the question is whether the city has provided public access to and along the river at the subject location to the maximum extent possible.

These factors, taken together, could require the city to consider whether the dock could be redesigned so that waterborne access along the river will be provided to a greater extent. These factors could also require the city to consider whether, as a condition of WRG permit approval,

a public easement for access along the river should be required, because the proposed development will impair existing public access. Finally, these factors could also require the city to consider whether it is appropriate to require an easement for public access to the river. We understand the city to have interpreted CDC Section 28.090(A)(1) as not authorizing it to require that public access be provided, whether through a requirement of a public easement or otherwise, where public access does not now exist or where it exists only to a limited extent. This interpretation is incorrect. CDC Section 28.090(A)(1) both authorizes and requires the city to provide public access to the maximum possible extent. In some circumstances, this may mean that as a condition of WRG development approval public access must be provided to the full extent permitted by law, even where none previously existed.⁵

Additionally, we infer from the city's findings that the city erroneously equates the requirement that the city "provide public access to and along the river to the maximum extent possible," with protecting access to and along the

⁵If the city believes, as respondents suggest in their brief, that application of CDC Section 28.090(A)(1) to require that intervenors provide public access to or along the river as a condition of permit approval would violate property rights protected under the Oregon or United States Constitutions, the city must explain that position in its findings.

river which is both existing and reasonably available.⁶ However, protecting only existing public access which the city determines is reasonably available, and providing public access to the maximum extent that is possible under the law, are not applications of the same standard. CDC Section 28.090(A)(1), which requires the city to provide public access "to the maximum extent possible," reflects a more burdensome standard than the city applied in this case. The city has not explained how construction of this dock at this location will provide the maximum possible public access to and along the river.⁷

Finally, we are not cited to evidence in the record "clearly support[ing]" a determination that public access to and along the river is provided to the maximum possible extent.⁸

This subassignment of error is sustained.

⁶The city would further restrict the application of CDC Section 28.090(A)(1) by interpreting it as not applying to existing public rights of access which are difficult to ascertain.

⁷We note that if the city is dissatisfied with this strict standard it may change it. However, it is not for this Board to rewrite the city's ordinances. West Hill & Island Neighbors v. Multnomah County, ___ Or LUBA ___ (LUBA No. 83-018, June 29, 1983), slip op 18.

⁸We note that we agree with petitioners that the city did not make findings addressing access to the river from the upland, other than the conclusory statements identified in n 4, supra. As stated above in the text, we are cited to no evidence in the record which would "clearly support" a finding that access to the river is provided to the maximum possible extent consistent with CDC Section 28.090(A)(1). ORS 197.835(9)(b).

B. Evidentiary Support

We have determined that the city's findings are inadequate to satisfy CDC Section 28.090(A)(1). No purpose would be served in reviewing the evidentiary support for inadequate findings.

This subassignment of error is denied.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

"The city made a decision not based on substantial evidence in the whole record or on adequate findings in finding the following criterion of CDC Section 28.090 to be satisfied:

''(A) The development complies with each of the following criteria:

'' * * * * *

''2. Significant fish and wildlife habitat shall be protected.'"

With regard to wildlife habitat, the city found the following:

"None of the local, state or federal agencies contacted about the proposed Dock expressed concern about the effects of the proposed Dock on wildlife habitat, and there is no evidence that the Dock will interfere with such habitat." Record 5.

With regard to fish habitat, the city found the following:

"The National Marine Fisheries Service and the Environmental Protection Agency, in a parallel Corps of Engineers' proceeding, expressed concern about the effects of the Dock on bank erosion, fish habitat and water turbidity if portions of the Dock structure are allowed to "ground," i.e., to rest on the River banks and bottom, during low

water periods. The agencies indicated that their concerns would be addressed by modifications of the Dock design to prevent grounding. The applicant has modified the Dock design by providing crossbars which will prevent the Dock from resting on the ground. No other concerns about fish habitat were raised by any local, state or federal agency, and there is no evidence of other potential effects on fish habitat. The City finds that the Dock will not interfere with significant fish habitat. The application therefore satisfies Code Section 28.090(A)(2)." Record 5-6.

We address the adequacy of the city's findings regarding wildlife habitat⁹ and the adequacy of the findings and the evidentiary support for the findings regarding fish habitat, separately below.

A. Wildlife Habitat

Petitioners argue that the city's findings are inadequate to show that the city made an independent determination that CDC Section 28.090(A)(2), regarding protection of significant wildlife habitat, is satisfied. Citing Moorefield v. City of Corvallis, supra, petitioners argue that the city improperly delegated to other agencies responsibility for determining compliance with CDC Section 28.090(A)(2). Petitioners also contend that the city improperly shifted to petitioners the burden of establishing

⁹Additionally, we note that other than the conclusion in their assignment of error, petitioners make no specific evidentiary challenge to the city's decision regarding wildlife habitat. It is petitioners' responsibility to explain a basis upon which we might grant relief, and no such explanation regarding lack of evidentiary support for the city's decision concerning wildlife habitat has been given here.

the existence of adverse effects on significant wildlife habitat resulting from the proposed ramp and dock.

Finally, petitioners argue the city's order improperly fails to disclose which agencies the city contacted regarding the proposed ramp and dock, or the standards against which those agencies were asked to measure the proposed ramp and dock. Respondents argue the city's findings adequately establish that the city properly and independently applied CDC Section 28.090(A)(2). Respondents argue the city evaluated the evidence in the record and made its own determination that CDC Section 28.090(A)(2) was satisfied. Respondents state:

"[e]vidence always comes from somewhere, whether the source is the applicants, project opponents, the public at large, other governmental agencies, City staff investigations or something else. What is required is that the City make a decision based on the evidence before it and this is what the City did in this case." Respondents' Brief 16.

We agree with the respondents that the city did not delegate the responsibility for determining compliance with CDC Section 28.090(A)(2). This case is unlike Moorefield v. City of Corvallis, supra, slip op at 44, where we determined in part:

"[a]s best as we can determine, the city interpreted [the city code] to be satisfied by imposing a condition that the approved use comply with applicable DEQ regulations. [The city code section] is a local standard with which the proposed use must be found to comply. * * * Requiring that environmental qualities be 'preserved' is not necessarily the same as

requiring compliance with the requirements of the state and federal governments."

However, we also agree with petitioners that the city's findings indicate that the city did reverse the burden of establishing compliance with CDC Section 28.090(A)(2). The city's findings simply state the city was not presented with evidence that the proposed ramp and dock would impair, or otherwise fail to protect, significant wildlife habitat. However, the city must find, based on substantial evidence in the whole record, that either (1) there is no significant wildlife habitat, or (2) significant wildlife habitat will be protected. The city's findings fail to establish that the city complied with CDC Section 28.090(A)(2) with regard to significant wildlife habitat.

This subassignment of error is sustained.

B. Fish Habitat

1. Adequacy of Findings

Petitioners argue that the city's findings rely upon evidence presented by the National Marine Fisheries Service (NMFS) and the Environmental Protection Agency (EPA), to the effect that so long as the proposed ramp and dock is redesigned to prevent grounding on the river floor, these agencies had no objection. Petitioners contend that the city's reliance on the evidence and conclusions of these agencies is an unlawful delegation of the city's responsibility to make independent findings regarding its approval standards. Additionally, petitioners argue that

the city was required to make findings addressing petitioners' testimony that the proposed dock would "limit the fishing run." Record 106.

Respondents argue that the city did not delegate anything to the NMFS or EPA, rather the city simply made findings based on the evidence presented to it. Respondents also argue the city was not required to make findings addressing petitioners' unexplained conclusion that the proposed ramp and dock would limit the fish runs. Finally, respondents contend that whether fish runs are limited is a consideration irrelevant to compliance with CDC Section 28.090(A)(2), which requires protection of significant fish habitat.

We agree with respondents that the city did not delegate to federal agencies the responsibility for making findings that the proposed ramp and dock is in compliance with CDC Section 28.090(A)(2) with regard to fish habitat. The city made findings that the proposed ramp and dock, as redesigned, satisfies the CDC standard, based on evidence presented. The city found that as redesigned, based on the testimony of NMFA and EPA, the proposed ramp and dock will not adversely affect fish habitat and, therefore, significant fish habitat is protected. We also agree with the city that it was not required to address petitioners' conclusory statement that the proposed dock would limit fish runs.

This subassignment of error is denied.

2. Evidentiary Support

Petitioners argue there is no evidence in the record supporting the city's findings that the proposed ramp and dock, redesigned with crossbars, satisfies the concerns of the federal agencies, as specified in the findings. Petitioners also argue that because there is no evidence contrary to petitioners' testimony that the proposed ramp and dock would limit fish runs, the city's determination that CDC Section 28.090(A)(2) is satisfied, is not supported by substantial evidence.

Respondents point to statements by the EPA and NMFS that, if the proposed ramp and dock were redesigned to prevent grounding, these agencies have no concern. Respondents also point to evidence that the proposed ramp and dock were redesigned to prevent grounding, in response to the concerns of these agencies. Respondents contend that there is no evidence in the record the proposed ramp and dock, as redesigned, will ground, and thus, there is substantial evidence in the whole record to support the city's findings.

Finally, respondents argue that, to the extent petitioners' unexplained assertion that fish runs would be limited can be considered as credible evidence, the choice between conflicting credible evidence belongs to the city.

We agree with the respondents. There is substantial

evidence in the whole record to support the city's findings that the proposed ramp and dock as redesigned will not negatively impact fish habitat and, accordingly, that significant fish habitat is protected. The choice between conflicting credible evidence belongs to the city. Younger v. City of Portland, 305 Or 346, 360, 752 P2d 262 (1988)

This subassignment of error is denied.

The second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

"The city misconstrued the applicable law and made a finding not based on substantial evidence in the whole record or on adequate findings in finding the following criterion of CDC Section 28.090 to be satisfied:

''(A) The development complies with each of the following criteria:

''* * * * *

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

The city found this standard satisfied as follows:

"Code Section 28.090(A)(3) requires that significant natural areas, viewpoints and vistas be preserved. None of the neighbors of the site raised objections to the Dock on aesthetic grounds. Two of the neighbors with the clearest views of the Site, Mr. Hutchinson and Mrs. Bates, testified in support of the applicant's permit request. One of these neighbors, an artist, testified that boat docks enhance rather than detract from river views.

"The area in the immediate vicinity of the Site, including Mr. Roake's property, is developed with large homes placed in close proximity to one

another. These homes are fully visible from one another, the River and the opposite bank. The River at the Site is approximately 1,150 feet wide.

"The Dock will be constructed of cedar, which will be left its natural color. The dock is the minimum width and length necessary to accommodate the applicant's boats.

"Based on these facts, the City concludes that the Site is not a significant natural area. The city also concludes that the Site is a scenic area, but that the Dock will not detract from the scenic quality of the area, or interfere with significant viewpoints or vistas. The application satisfies Code Section 28.090(A)(3)." Record 6-7.

Petitioners argue that these findings are inadequate and not supported by substantial evidence in the whole record. We address these arguments separately below:

A. Adequacy of Findings

Petitioners argue that the city's findings do not comply with CDC Section 28.090(A)(3). According to petitioners, the city's findings are inadequate because (1) the city failed to explain why the proximity and number of homes around the site converts the area from being considered "natural" to an area not considered a "natural area;" (2) the city examined only the visual impact of the proposed ramp and dock on neighbors rather than on the views of the general public "who visit the beach to walk or to picnic, or the view of those on the water, or the view of those visiting the adjacent Burnside Park" (Petition for Review 19); (3) the city considered the minimum size

facility acceptable to accommodate the applicant's boats, rather than whether the proposed ramp and dock "preserves significant natural areas, viewpoints and vistas" under CDC Section 28.090(A)(3); and (4) the city's determinations that the proposed dock will "not detract from" and will not "interfere with significant viewpoints and vistas" are not the equivalent of finding that "significant natural and scenic areas, viewpoints and vistas shall be preserved," as required by CDC Section 28.090(A)(3).

Respondents argue the city's findings are adequate to satisfy CDC Section 28.090(A)(3). Respondents contend the city's finding that the area is not a "natural area" because it is ringed by homes in close proximity to one another, represents a reasonable construction of CDC Section 28.090(A)(3). Respondents argue:

"[e]ssentially, the city determined that 'significant natural area,' as used in the Code section, means that the area must be free of substantial residential or other development in the immediate vicinity." Respondents' Brief 17.

Respondents also argue that there is nothing in CDC Section 28.090(A)(3) prohibiting the city from evaluating the proposed ramp and dock based on the minimum size necessary to accommodate intervenors' mooring needs.

Finally, respondents contend the city's findings demonstrate that the city properly understood and applied CDC Section 28.090(A)(3). They argue that because the proposed ramp and dock does not "detract" or "interfere"

with scenic views and vistas, it follows that scenic views and vistas are "preserved." Respondents argue petitioners' construction of CDC Section 28.090(A)(3) would render the entire WGR permit process "superfluous," in that it would prevent any development along the river. Respondents observe that in an absolute sense, any development will not strictly "preserve" existing viewpoints and vistas. Respondents maintain that any development will have some impact on scenic areas, and on significant viewpoints and vistas.

Respondents argue that we are required to read the city's WRG provisions as a whole and that, so read, CDC Section 28.090(A)(3) requires the city to determine the proposed ramp and dock will not interfere with or detract from existing scenic areas, viewpoints and vistas. According to respondents, this interpretation is consistent with the express language and intent of the WRG provisions and should be sustained. McCoy v. Linn County, supra; and Von Lubken v. Hood River County, ___ Or LUBA ___ (LUBA No. 89-023, September 8, 1989), slip op 23.

CDC Section 28.090(A)(3) requires the city to evaluate areas surrounding proposed development and determine whether those areas are "natural areas." We agree the city correctly interpreted CDC Section 28.090(A)(3) in this case in concluding an area along the river which is significantly developed with homes in close proximity to one another is

not a "natural area."

CDC Section 28.090(A)(3) also requires the city to determine if the area proposed for a WRG permit approval is a significant scenic area and whether the area has significant viewpoints and vistas. Once the city identifies a significant scenic area, viewpoint or vista, it must preserve it. While the CDC does not contain a definition of "preserve," CDC Section 28.090(A)(3) contains language that is substantially the same as language used in Statewide Planning Goal 15, Willamette River Greenway (Goal 15). Goal 15 states, in part,:

"Use Management Considerations and Requirements.
Plans and implementation measures shall provide
for the following:

"* * * * *

"(e) Scenic Qualities and views - identified
scenic qualities and viewpoints shall be
preserved."

The term "preserve" is defined by the Goals as follows:

"To save from change or loss and reserve for a
special purpose." Statewide Planning Goals (1985)
24.

Absent a clear expression of intent to the contrary,
when the city adopts a requirement in terms substantially
identical to a statutory or Goal provision, the city code
provision must be interpreted as the mimicked statute or
Goal is interpreted. Joseph v. Lane County, ___ Or LUBA ___
(LUBA No. 89-048, September 11, 1989), slip op 14; Kellog
Lake Friends v. Clackamas County, ___ Or LUBA ___ (LUBA No.

88-061, December 22, 1988), slip op 10-11, aff'd 96 Or App 536, rev den, 308 Or 197 (1989).

In Moorefield v. City of Corvallis, supra, petitioners argued that a city code requirement that Willamette River Greenway environmental qualities be "preserved" meant that the proposed WRG development could have no adverse impact on the protected environmental qualities. Without reaching the issue, we said that the term "preserve" does not necessarily require that there be no adverse impacts to the identified resources * * *." (Emphasis in original.)

We believe that the term preserve means that once the city identifies a particular area as a scenic area, or as having significant viewpoints or vistas, the city must "save those areas from change or loss and reserve [them] for a special purpose." Statewide Planning Goals (1985) 24. The city's determination in this case, that the proposed ramp and dock does not "detract from the scenic quality of the area or interfere with significant viewpoints or vistas" is consistent with this meaning of the term "preserve" and, therefore, applies a correct interpretation of CDC 28.090(A)(4).¹⁰ Record 7.

Finally, we agree with respondents that there is

¹⁰We note we do not read the city's order as petitioners do. The city did not ignore the visual impacts of the dock on public views from the river, from Burnside park or from any other point. The city declared the entire area to be a scenic area and, based on the evidence before it, determined that the dock would neither detract from, nor interfere with, scenic qualities of the area.

nothing in CDC Section 28.090(A)(3) which prohibits the city from analyzing the ramp and dock as proposed. Whether the proposed ramp and dock is the minimum size necessary to accommodate intervenors' mooring needs is not the issue in determining whether the particular proposal meets this approval criterion. If this particular proposal satisfies CDC Section 28.090(A)(3), whether the proposal is the minimum size necessary to serve the proposed use is of no consequence.

This subassignment of error is denied.

B. Evidentiary Support

Petitioners contend that the city's conclusion that neighbors did not object to the proposed dock on "aesthetic grounds" is wrong and is not supported by the evidence. Petitioners point to evidence in the record where various persons petitioners claim are neighbors, testified that the dock would offend various scenic qualities and views in the area.

As we understand it, petitioners also argue that because only two neighbors testified that the proposed ramp and dock would preserve (and in one case improve) the scenic qualities, viewpoints and vistas of the area, and six neighbors said that the proposed ramp and dock would harm these scenic qualities, the city's findings that rely on the testimony of the two neighbors are not based on substantial evidence.

Finally, petitioners argue that there is no evidence in the record to establish that the proposed ramp and dock is the minimum size necessary to accommodate the applicant's mooring needs.

Respondents argue that the evidence in the whole record does support the city's findings. Respondents cite evidence in the record to support the city's finding that the proposed ramp and dock will not interfere with or detract from the scenic area or its existing viewpoints and vistas.¹¹ Specifically, they point to evidence that the proposed ramp and dock will be made of natural cedar and surrounded on the bank side by trees. Respondents cite subjective testimony by persons who feel that the dock is an enhancement to the area or at least will not detract from the aesthetic qualities of the area. Additionally, respondents point to evidence in the record from the applicant that the proposed ramp and dock is the minimum size necessary to accommodate intervenors' mooring needs.

¹¹Respondents do not specifically address petitioners' contention that there is no evidence to support the city's finding that neighbors did not object to the proposed ramp and dock on aesthetic grounds. Some neighbors did testify in opposition to the proposed ramp and dock on aesthetic grounds. Accordingly, the city's finding that neighbors did not so testify is not supported by substantial evidence in the whole record. However, whether neighbors did or did not testify in opposition to the application is not determinative of compliance with CDC Section 28.090(A)(3). The findings which are essential to the city's decision, and which must be supported by substantial evidence, are those addressing whether the proposed ramp and dock will detract from or interfere with significant viewpoints and vistas and the scenic area. If there is substantial evidence to support these findings, then we must sustain the city's determination that CDC Section 28.090(A)(3) is satisfied.

Notwithstanding the contrary evidence in the record identified by petitioners, we believe there is substantial evidence in the whole record to support the city's determination that the proposed ramp and dock will not interfere with, or detract from, the scenic area or its viewpoints or vistas. As we stated under the second assignment of error, the choice between conflicting credible evidence belongs to the city. McCoy v. Linn County, supra; Von Lubken v. Hood River County, supra.

This subassignment of error is denied

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

"The city made a decision not based on substantial evidence in the whole record or on adequate findings in finding the following criterion of CDC Section 28.090 to be satisfied:

''(A) The development complies with each of the following criteria:

'' * * * * *

''4. The quality of the air, water and land resources in and adjacent to the Greenway shall be preserved in the development, change of use, or intensification of use.''

The city made the following findings of compliance with CDC Section 28.090(A)(4):

"Code Section 28.090(A)(4) requires that 'the quality of the air, water and land resources in and adjacent to the Greenway shall be preserved in the development, change of use, or intensification of use.' The proposed Dock will have no impact on air quality. Concerns about water quality

impacts, through increased turbidity caused by grounding, have been addressed by the addition of crossbars to the Dock design. The applicant plans to preserve the trees and other riparian vegetation at the Site, except where removal is necessary for the placement of the ramp. The quality of the affected land resources will therefore be preserved. The application satisfies Code Section 28.090(A)(4)." Record 7.

Petitioners maintain that the city's findings regarding water and land resources are inadequate to satisfy CDC Section 28.090(A)(4) and that these findings are not supported by substantial evidence in the whole record.

A. Adequacy of Findings

Petitioners argue, as they did in the second assignment of error, that the city's findings demonstrate the city improperly delegated to federal agencies the responsibility for determining whether water quality is preserved, as required by CDC Section 28.090(A)(4). Petitioners also argue the city's findings regarding land resources are inadequate because the city begins by assuming that the proposed ramp and dock will be built, and determines only whether construction of the structure will cause a minimum of damage to the riparian area. Finally, petitioners argue that in determining whether the proposed ramp and dock preserve the quality of the land resources, the city must consider a "no dock" alternative.

Respondents argue that the city's findings are adequate. Respondents contend that with regard to water quality, the city simply evaluated the evidence presented to

it and determined that water quality would be preserved.

Respondents also contend that if only a minimum of vegetation is removed, to the extent necessary to construct the proposed ramp and dock, the status quo of the land resource quality is necessarily preserved. Finally, respondents maintain that nothing in the CDC requires the city to consider a "no dock" alternative in determining whether the quality of the land resource is preserved where permitting a use specifically allowed under the CDC.

We determined under the second assignment of error that the city did not delegate to federal agencies the responsibility for making determinations regarding effects on fish habitat. Similarly, we believe the city properly examined the evidence before it regarding water quality, and made an independent determination that the area's water quality would be preserved.

However, we infer from the city's findings, that the city interprets CDC Section 28.090(A)(4) to be satisfied, with regard to preservation of land resource quality, if the proposed development contemplates removal of only that amount of riparian vegetation necessary to accommodate the proposal. This interpretation of CDC Section 28.090(A)(4) is incorrect. It conceivably allows all riparian vegetation that the city identifies as a land resource to be removed, if the city determines that complete removal is the minimum needed to accommodate a proposed development. Furthermore,

the city's interpretation is inconsistent with the meaning of the term "preserve," as we have explained it under the third assignment of error.¹²

The city's WRG permit approval standards are worded differently. Under this and the third assignment of error, we interpret the meaning of city standards requiring the city to "preserve" certain resources if it grants development approval. As we stated under the third assignment of error, while we do not interpret "preserve" to be an absolute non-degradation standard, it is very strict and may result in denial of a permit request.

That the city intended the term "preserve" to impose an exacting standard is apparent from the lack of ambiguity in the approval standard itself, and from the qualifying language the city added in the other WRG approval standards set forth in CDC Section 28.090(A). For example, under the fifth through seventh assignments of error, we consider city

¹²There is no requirement in Goal 15 parallel to CDC Section 28.090(A)(4). However, the city offers no other interpretation of the term "preserve," and we conclude that the definition in the goals is a correct interpretation of the term. However, we do not foreclose the possibility that there may be other correct interpretations of the term in this context. We also note that we disagree with petitioner that CDC Section 28.090(A)(4) requires the city to demonstrate there are no alternatives to building the proposed ramp and dock. The city is not required to explore alternatives to the proposed ramp and dock to determine whether the evidence in the record demonstrates the proposed ramp and dock complies with CDC Section 28.090(A)(4). Either the proposed ramp and dock preserves air, water and land qualities or it does not. If it does not, the city will deny approval of the WRG permit.

WRG standards in which the initial standard is qualified, i.e., "preserve [floodplains] to the maximum extent possible", "maintain and enhance [the vegetative fringe] to the maximum extent practical," and the "maintenance of public safety * * * shall be provided to the maximum extent practicable." (Emphasis supplied.) These standards contain modifying language demonstrating the city does not intend these standards to be applied in a strict, unqualified sense, but rather to impose only the extent of restriction that the particular standard specifies.¹³

Certainly, what is "possible," may not be "practical" or "practicable," and what is "practical," "practicable" or "possible" may not "preserve," "maintain" or "enhance." When a standard requiring preservation, maintenance, or enhancement is qualified in such a manner, we do not believe the standard provides a basis for outright denial of an application for a use permitted in the WRG. Rather, the qualified standards require the permit applicant to show the values identified in the standard are "preserved," "maintained" or "enhanced" to the extent "possible," "practical," or "practicable" and consistent with allowing construction of the use permitted in the WRG by the CDC.

¹³We do not mean to suggest the city's standards containing modifying language are not also substantial standards. As we stated under the first assignment of error, CDC Section 28.090(A)(1) requires that access be provided to the maximum extent possible, and this requires the city to provide access to the maximum extent possible in view of the uses allowed by the CDC and the particular characteristics of the site.

With this view of the different approval standards applicable to the proposed ramp and dock, we turn to CDC Section 28.090(A)(4), which requires, without qualification, that the quality of WRG air, water and land resources be "preserved."

We believe that CDC Section 28.090(A)(4) requires the city, (1) to determine what the quality of the land resources in the area are, and (2) to determine that these qualities will be preserved, as we explained the meaning of that term under the third assignment of error, if it approves the proposed ramp and dock. The city's findings in this case, do not demonstrate that these determinations were made. That an applicant plans only to remove a minimum amount of vegetation to facilitate proposed development, is not the equivalent of a determination that the quality of WRG land resources will be preserved. Removal of the minimum vegetation necessary to accommodate proposed development says nothing about what those land resources are, the qualities of them or how the identified resource qualities will be preserved.¹⁴ The city must explain what the WRG land resources in the area of the proposed development are, describe the quality of these resources, and determine whether the proposed ramp and dock will

¹⁴For example, the city may determine that the beach or the riparian area itself are both land resources. If this were the case the city would be required to determine whether approval of the proposed ramp and dock preserves the qualities of these resources.

preserve those qualities.

This subassignment of error is sustained, in part.

B. Evidentiary Support

Petitioners contend there is no evidentiary support for the city's findings that the quality of WRG land resources are preserved. However, we have determined supra, that the city's findings regarding preservation of the quality of land resources, are inadequate. No purpose would be served in determining the evidentiary support for inadequate findings.

Petitioners also contend:

"* * * no evidence in the record supports the City's implied conclusion that the dock's only effect on water quality would be turbidity."
Petition For Review 22.

Respondents point out that the evidence in the record regarding water quality indicates that the only water quality issue presented by the proposed ramp and dock is turbidity. Respondents argue that the recommended solutions to solve the turbidity concerns expressed were adopted by the applicant and the city. Respondents state that there is no evidence in the record to suggest that the proposed ramp and dock could cause other water quality problems or that the proposed ramp and dock as redesigned, will cause any negative impact to area water quality. Respondents argue that the evidence supports the city's findings that the area water quality will be preserved.

We agree with the respondents. There is substantial evidence in the whole record to support the city's findings that water quality will be preserved.

This subassignment of error is denied

The fourth assignment of error is sustained, in part.

FIFTH ASSIGNMENT OF ERROR

"The city misconstrued the applicable law and made a decision not based on substantial evidence in the whole record or on adequate findings in finding the following criterion of CDC Section 28.090 to be satisfied:

''(A) The development complies with each of the following criteria:

''* * * * *

''5. Areas of annual flooding, flood plains and wetlands shall be preserved in their natural state to the maximum extent possible.'"

The city's findings of compliance with CDC Section 28.090(A)(5) follow:

"Code Section 28.090(A)(5) states that 'areas of annual flooding, flood plains and wetlands shall be preserved in their natural state to the maximum possible extent.' There is no evidence that the applicant's proposal will affect an area of annual flooding, a flood plain or wetlands. To the extent that the Site is located in such area, the applicant plans no alteration to the land and will remove only vegetation necessary for placement of the ramp. The proposal thus preserves any areas of annual flooding, flood plains or wetlands at the site to the maximum possible extent. The application satisfies code Section 28.090(A)(5)." Record 7.

Petitioners argue that the city's findings are

inadequate to satisfy CDC 28.090(A)(5) and are not supported by substantial evidence in the whole record.

A. Adequacy of Findings

Petitioners contend (1) the city's findings are inconsistent because the proposed ramp and dock are either within or outside of the floodplain, (2) the city's findings demonstrate that the city has improperly shifted the burden of proof to the public to provide evidence that the proposed ramp and dock are within the flood plain, and (3) the city was required to "evaluate alternative designs and locations" and find that CDC Section 28.090(A)(5) is met. Petition for Review 24.

Respondents argue the city's findings are adequate and the city made an independent determination based on the evidence presented to it.

We do not believe the city's findings show the city reversed the burden of proving whether the proposed ramp and dock are within a floodplain, floodway or wetland. The city's findings determine that even if the proposed ramp and dock are in a floodplain, floodway or wetland, the standard of CDC Section 28.090(A)(5) is met. The city made affirmative findings that the proposed ramp and dock will not alter the "land" and will only remove the minimum vegetation necessary to accommodate the proposal. This is equivalent to finding that the proposed development will preserve the area in a natural state, to the extent possible

to continue to do so and construct a ramp and dock.¹⁵

Finally, CDC Section 28.090(A)(5), does not, as petitioners contend, require the city to examine alternative ramp and dock designs and locations to determine whether its standard is met. Petitioners do not argue that there are other designs or locations possible on this site which better preserve the floodplain to the maximum possible extent. The city was not required to address in its findings, off site alternatives to the proposed ramp and dock.

This subassignment of error is denied.

B. Evidentiary Support

Petitioners challenge only the evidentiary support for the city's findings that the proposed ramp and dock are not in a flood plain. However, we pointed out that the city also made findings that CDC Section 28.090(A)(5) was satisfied, under the assumption that the proposed ramp and dock are in the floodplain. Petitioners do not challenge the evidentiary support for those or other findings.

This subassignment of error is denied.

The fifth assignment of error is denied.

¹⁵Petitioners argue only that the city's findings are inadequate to comply with CDC Section 28.090(A)(5) because the city's findings (1) do not establish whether the proposed ramp and dock are within a floodplain, floodway or wetland, and (2) do not address "alternatives" to the proposed ramp and dock. Except with regard to these two issues, we express no opinion on the adequacy of the city's findings to satisfy CDC Section 28.090(A)(5).

SIXTH ASSIGNMENT OF ERROR

"The city made a decision not based on substantial evidence in the whole record or on adequate findings in finding the following criterion of CDC Section 28.090 to be satisfied:

''(A) The development complies with of the following criteria:

'' * * * * *

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

The city found CDC Section 28.090(A)(6) satisfied by the following findings:

"Code Section 28.090(A)(6) states that the natural vegetative fringe along the river shall be maintained and enhanced to the maximum extent that is practical to assure, scenic quality, protection of wildlife, protection from erosion, and screening of uses from the river." As noted, the applicant and Mr. Roake have maintained the trees and other natural vegetation along the River, while most of the vegetation on nearby properties has been removed. The applicant's proposal calls for the removal of no trees and no more natural vegetation than is necessary for placement of the ramp. The area's natural vegetative fringe will therefore be maintained to the maximum extent practical. Code Section 28.090(A)(6) is satisfied." Record 8.

Petitioners argue the city's findings are inadequate to comply with CDC Section 28.090(A)(6).

First, petitioners argue that the city's findings do not establish that the proposed ramp and dock will both

maintain and enhance the vegetative fringe to the maximum extent practicable. Second, citing Moorefield v. City of Corvallis, supra, petitioners contend CDC Section 28.090(A)(6) requires the city to "evaluate alternative designs and locations and find that the natural vegetative fringe is maintained and enhanced, or, if not, that it is preserved to the maximum extent practical 'in view of the use allowable under the zoning ordinance and the particular characteristics of the site.'" Moorefield, supra, slip op at 40.

Respondents contend it is unnecessary, in this case, to find that the vegetative fringe will be enhanced as no real change to this fringe is contemplated. Respondents contend CDC Section 28.090(A)(6) does not require enhancement of the vegetative fringe where it will not be changed.

Alternatively, respondents argue that if the city's findings are inadequate to satisfy CDC Section 28.090(A)(6), there is evidence in the record to "clearly support" a proper finding. ORS 197.835(9)(b). Respondents argue that the vegetative fringe on intervenors' property has been left intact and that only a small amount of vegetation is planned to be removed to accommodate the proposed ramp. Respondents point out that what little vegetation will be removed to facilitate construction of the ramp will be replaced under the following condition of approval:

"Riparian vegetation removed from the vicinity of the structure during construction shall be

replaced with indigenous vegetation compatible with surrounding vegetation." Record 13.

Under these circumstances, where the findings establish that the net result to the vegetative fringe is no change, respondents maintain that the city has maintained and enhanced the vegetative fringe to the maximum extent practical.

We agree with respondents. Read as a whole, the city's findings show that (1) the vegetative fringe is in a substantially natural condition, (2) only the minimum amount of vegetation necessary to accommodate the ramp will be removed, and (3) the city has imposed a condition of approval requiring restoration of the vegetative fringe after the ramp is constructed. These findings adequately establish that the vegetative fringe will be maintained and enhanced to the maximum extent practical, as required by CDC Section 28.090(A)(6).

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

"The city made a decision not based on substantial evidence in the whole record or on adequate findings in finding the following criterion of CDC Section 28.090 to be satisfied:

"(A) The development complies with each of the following criteria:

" * * * * *

"8. Maintenance of public safety and protection of public and private property, especially from vandalism

and trespass, shall be provided to the maximum extent practicable.'"

The city's findings of compliance with CDC Section 28.090(A)(8) follow:

"Code Section 28.090(A)(8) requires that 'maintenance of public safety and protection of public and private property, especially from vandals and trespass, shall be provided to the maximum extent practicable.' Testimony was presented that the Dock's extension into the River could pose a safety threat to boaters and waterskiers. Evidence was also presented that: (a) the Dock will extend only 40-50 feet into the River during low water periods, which are the periods of heaviest recreational use; (b) the River is sufficiently wide at the Site (approximately 1,150 feet, as opposed to a 650 to 700 foot width upstream and downstream,) and there is enough room (approximately 1000 feet) between the Dock site and Clackamette island, to provide ample room for boaters, skiers and others to use the River without risk of collision into the Dock; and (c) boats are frequently moored in the River near the Dock site and River users navigate around them without difficulty. The City finds the latter evidence to be more persuasive than the testimony about public safety risks. Compliance with the conditions set forth in this order, to make the dock fully visible to River users, will further ensure that public safety is maintained to the maximum extent practicable." Record 8-9.

A. Adequacy of Findings

We understand petitioners to argue that the city's findings are inadequate to comply with CDC Section 28.090(A)(8) because the findings do not compare equivalent river conditions in concluding that boaters and water-skiers have ample room to navigate around and avoid the proposed

dock. Petitioners point out the city found that during the summer the river has the heaviest use and it is during the summer when the safety hazards the city identified are most severe. Petitioners argue that the city erroneously compared the dock's summer protrusion into the river, 40-50 feet, with the river's winter width of 1150 feet, to conclude that there is "ample room" for water-skiers, boaters and the dock to safely coexist.

We agree with petitioners that whether the proposed ramp and dock will pose a threat to boaters and water-skiers in low water summer conditions is an issue relevant to compliance with CDC Section 28.090(A)(8).¹⁶ To satisfy CDC Section 28.090(A)(8), the city must compare the summer river width with the summer dock protrusion into the river in determining whether the proposed ramp and dock will maintain public safety. If the proposed ramp and dock will not maintain public safety, the city must determine whether the proposed ramp and dock maintain public safety to the maximum extent practicable, considering the uses allowable under the CDC and the characteristics of the particular site. See Moorefield v. City of Corvallis, supra. The city's findings

¹⁶We note the city argues there is evidence in the record that the river around the proposed ramp and dock is "wide" and suggests that a summer reduction in river width is insignificant by comparison. We would agree with respondents, if it were it not for the proximity between the channels alongside of Clackamette Island through which water-skiers and boaters will emerge, and the proposed ramp and dock. The record indicates only that the winter width of these channels are approximately "630 and 320 feet wide." Record 3.

do not show this analysis, or that equivalent comparisons were made to reach its conclusions. The city's findings are, accordingly, inadequate.

This subassignment of error is sustained.

B. Evidentiary Support

No purpose would be served in reviewing the evidentiary support for inadequate findings.

This subassignment of error is denied.

The seventh assignment of error is sustained, in part.

The city's decision is remanded