

Land Use Cases

Friends of the Reservoirs are challenging the city's reservoir destruction proposals in both Mt. Tabor and Washington Park. Cases are pending in both Multnomah County Circuit Court and the Oregon Court of Appeals.

All of the cases involve complicated and technical land use questions. However, the essence of all of them is the same: Both projects are in violation of the Portland zoning code for the same two reasons.

First, the present use of the reservoirs is for two main purposes: 1) a primary water storage facility use and 2) a primary water quality facility use. The water quality facility use is achieved by exposing water to the natural and significant purification benefit of light and air. The city proposal involves a major change in the water quality facility whereby open-air purification is exchanged for barrier protection, accomplished with the construction of a new water storage building. The city determined that there would be no change in use because the water storage use continues. However, the city reached this conclusion in a so-called "use determination" that was not preceded by the evidentiary hearing required by Oregon law. Moreover, even as it stands, the city's use determination is confined to the parameters of its factual description of the project. This description omits and therefore does not consider the change in the water quality facility use from purification to protection. The zoning code is quite clear that a development can have more than one primary use and also that water storage and water quality are different primary uses within the same basic utility use category. The zoning code is also quite clear that a change in primary uses within the same basic utility use category requires a Type II land use process, which the city's limited use determination did not consider. Accordingly, the Friends seek a court declaration that a Type II hearing is required, mandating such compliance and enjoining further work until the land use review process is complete.

Second, both use determinations were made without the historic design review required by the zoning code for historic resources, such as the reservoirs, that are listed on the National Register of Historic Places. Although the listing is new, January 15, 2004, the nomination was made a year ago in February and the city consented to the nomination last May. The Portland zoning code historic design review approval criteria forbid changes in historic materials that characterize the property. The nominations specify the special patented concrete and the reservoirs' deep, open water as materials that are essential to the historic character of the property. Accordingly, the Friends seek a court declaration that a Type III historic design review is required, mandating the removal of all materials installed in Washington Park since its case was filed on September 23, 2003 and enjoining all further work until completion of the code required reviews.

Third, what is the effect of the city's public safety contentions? The Portland zoning code takes public safety into consideration for both conditional use and historic design review purposes. However, for conditional use review purposes the city states that the proposed new water storage buildings are not public safety facilities, which eliminates public safety as a relevant value. For historic design review purposes the city determined that the proposal is an alteration, not a demolition. Public safety would only trump historic protection if a demolition was necessary because the property otherwise had no value for any purpose whatsoever.