

1 BAGG, Referee.

2 NATURE OF THE DECISION

3 Petitioner appeals the partial grant and partial denial of
4 his request to expand an existing conditional use. Petitioner
5 asks that we reverse the decision of the city council and
6 reinstate a prior decision of the Cannon Beach planning
7 commission, allowing all parts of his application.

8 FACTS

9 Petitioner is the owner and operator of a hardware store in
10 the City of Cannon Beach. Part of his business is in building
11 material sales. Building material sales is a conditional use
12 in the zone in which the property is located (C-1, Limited
13 Commercial). Petitioner sought to expand his business by area
14 and by height, and the petitioner's proposed design was
15 approved by the Design Review Committee of the city. The
16 planning commission similarly approved the request. On appeal
17 to the city council, the council allowed petitioner to expand
18 the area of his structure, but disallowed petitioner's request
19 to expand the height of his structure to 24 feet. The maximum
20 building height in the C-1 zone is 28 feet.

21 The city's findings address several portions of the
22 comprehensive plan. The city states what it believes to be
23 relevant portions of the plan, and then comments on the
24 application pursuant to plan policy. In part, the policies and
25 findings are as follows:
26

1 "Page 4, Purpose. 'The purpose of the Cannon Beach
2 Comprehensive Plan is to control and promote
3 development which is most desireable to the majority
4 of the residents and property owners of the City.'

5 "The majority of residents affected by, and
6 adjoining the proposed expansion object to the
7 additional height of the new structure.

8 "Page 5, Preamble. 'It is recognized by the citizens
9 of Cannon Beach, the Planning Commission, and the City
10 Council, that Cannon Beach is essentially a
11 residential city which has, over the years, developed
12 a unique commercial district which is noted for its
13 village character.

14 "This character has, and is, created by having charm
15 in design of buildings, by keeping buildings small in
16 scale'

17 "The proposed expansion especially in height,
18 will not keep the building small in scale, in
19 comparison with the adjoining residential uses.

20 "Page 20, Housing Policies.

21 "4. The City recognizes the importance of residential
22 neighborhoods, and the need to protect them from
23 unnecessary traffic and other disruptions.'

24 "The proposed height increase would be a disruption to
25 the neighborhood in terms of view, scale, light and
26 air.

27 "10. 'The City Zoning shall encourage housing which
28 takes advantage of the natural landscape.
29 Standards shall be written so buildings may take
30 advantage of ocean views, and exposure to the
31 sun.'

32 "The increase in height would badly intrude on present
33 ocean views of neighboring residences.

34 "Page 21, The Economy Policies

35 "3. Zoning designations for commercial areas shall be
36 sufficiently large to accomodate future growth
37 requirements, but not so large that commercial
38 activity affects adjacent residential
39 neighborhoods.

1 "The expansion can be accomodated with an addition
2 which does not exceed the height of the present
3 building. There is area in the commercial zone to
4 allow for a one floor expansion."

5 The city also quotes Section 6.020 of is zoning code without
6 comment.

7 "Uses designated in this Ordinance as conditional uses
8 may be permitted, enlarged, or otherwise altered upon
9 authorization by the Planning Commission or denied by
10 the Planning Commission. This will be done in
11 accordance with the Comprehensive plan, standards for
12 the district, standards in Section 4.010 to 5.030,
13 additional zoning provisions, and other city ordinance
14 requirements. The burden is on the applicant to
15 demonstrate that these requirements can be met. In
16 permitting a conditional use or the modification of an
17 existing conditional use, the Planning Commission may
18 impose, in addition to those standards and
19 requirements expressly specified in this Ordinance,
20 any conditions which it considered necessary to
21 protect the best interest of the surrounding property
22 or the city as a whole. These conditions may include,
23 but are not limited to:

24 ** * *

25 "2. Reducing the required height and size of
26 buildings; * * * *"

27 ASSIGNMENT OF ERROR NO. 1

28 Assignment of error no. 1 has been withdrawn.

29 ASSIGNMENT OF ERROR NO. 2

30 Assignment of error no. 2 alleges

31 "The Cannon Beach ordinance governing appeals from a
32 Planning Commission ruling do [sic] not afford due
33 process and, therefore, the City Council decision is
34 void and the decision of the Planning Commission is
35 upheld."

36 Petitioner's argument is that even though Section 10.020 of
the zoning ordinance allows a public hearing on appeal, due

1 process requirements are not fulfilled because there is no
2 provision for cross-examination. Petitioner argues that
3 without a showing that cross-examination was allowed and that
4 notice was given to all persons, the decision of the city must
5 be reversed. Petitioner also complains that the record does
6 not even reveal who is talking.

7 Respondent city asserts that "due process" is granted in
8 the ordinance by allowance of the right of appeal. Also, the
9 city has a "suggested order of procedure for hearings" which
10 controls the conduct of city hearings, and respondent urges
11 that petitioner is thereby assured due process of law.

12 Respondent further points out that there is no right of
13 cross-examination in land use cases. Respondent characterizes
14 petitioner's argument as one of "unconstitutionality at large,"
15 which does not provide this Board with a standard for review."

16 We do not believe the process before the city was violative
17 of due process. Petitioner has not pointed us to any
18 procedural error resulting in prejudice to petitioner and has
19 not explained how the procedure prejudiced his rights.¹ The
20 record shows that the petitioner was present during the course
21 of the city proceedings, and he was able to express his views.
22 Petitioner has not explained why the fact that the minutes do
23 not precisely identify persons talking is sufficient cause for
24 us to remand this matter to the city council.

25 Assignment of error no. 2 is denied.

26

1 ASSIGNMENT OF ERROR NO. 3

2 Assignment of error no. 3 alleges

3 "The City Council erred in amending the Planning
4 Commission order by limiting Petitioner's building
5 height to 18 feet, since there is no substantial
6 evidence in the record to support the findings relied
7 upon by the City Council."

8 Petitioner argues that a decision made by a governing body
9 must be reversed if the decision is not supported by
10 substantial evidence in the whole record. Petitioner claims
11 there is no substantial evidence to support the city's finding
12 that a majority of residents objected to the proposed height of
13 the structure, as there is no substantial evidence as to the
14 number of residents affected. Petitioner claims the city's
15 finding that the expansion will not keep the building small in
16 scale in comparison with adjacent uses is similarly unsupported
17 by substantial evidence as there is no evidence concerning the
18 size or scale of adjacent residential uses. Petitioner claims
19 that the city's finding that the height increase would be a
20 disruption of view, scale and light and air is "without merit"
21 as there is no testimony as to the impact of the structure on
22 these qualities.

23 Petitioner also asserts that the portion of the
24 comprehensive plan to which the finding is addressed should not
25 apply to a commercial zone.² We understand petitioner to
26 argue that these height restrictions for aesthetic purposes
27 apply only in residential areas. The property lies in a
28 commercial zone. Petitioner concedes that objectors testified

1 that their views would be blocked, but petitioner argues that
2 there is no showing that the objector's views were "badly
3 intruded upon or that these objectors were a majority of the
4 people nearby." Petitioner also asserts that the city's
5 finding concerning intrusion upon ocean views has no basis.
6 Petitioner asserts that the comprehensive plan does not provide
7 a guarantee of a view. Petitioner concludes the city's belief
8 that the height expansion is not needed has no merit because
9 there is no substantial evidence to show petitioner's expansion
10 could be accommodated with a one-story building.

11 Respondent submits that the record does contain substantial
12 evidence to support the conclusions made by the city council.
13 Respondent specifically notes portions of the record disclosing
14 concern of surrounding property owners in preserving their
15 ocean views. Respondent states that it was the intent of the
16 city to limit the scale of the improvement to the existing
17 structure, and while respondent recognizes that "nobody has the
18 'guarantee' of a view, assuredly this city may consider the
19 reduction of the required height and size of buildings pursuant
20 to its ordinances and plan." ³

21 As to the matter of the feelings of a majority of the
22 residents, we agree with the petitioner that there is
23 insufficient evidence to support the assertion that a majority
24 of residents do not approve of the expansion. There indeed is
25 no count of the persons who disapprove. The record only
26 reveals opposition from persons in the immediate area.

1 As to the matter of the scale of the building, we do not
2 find a description of the surrounding property sufficient for
3 the city to conclude that this proposed development is out of
4 step with the scale of the rest of the neighborhood. We
5 understand from the record what zones surround the property,
6 but the record and the findings do not tell us the size and
7 character of the surrounding uses in relation to the proposed
8 use. Further, the preamble of the comprehensive plan cited in
9 the findings talks about the character of the commercial
10 district of the city. The structure is in a commercial zone
11 and there is no explanation of why it is being compared to
12 residential buildings. We believe such an explanation is
13 needed. Also, the Design Review Board found this proposal to
14 be in compliance with the design review criteria. Presumably,
15 scale of buildings and the "character" of the city would be a
16 matter for Design Review Board inquiry. Given the Design
17 Review Board's approval of the structure, we find a more
18 detailed explanation of the reasons for the city's conclusion
19 to be essential.

20 As to the matter of ocean views, the plan policy requires
21 the city to write standards so that buildings "may take
22 advantage of ocean views, and exposure to the sun." This
23 direction appears to be more to the drafters of city
24 implementing procedures than to a factfinder in a permit
25 application proceeding. We believe the city needs to explain
26 how this comprehensive plan provision controls individual

1 permit applications.

2 We wish to add that our review of the record does show
3 comments from persons complaining about the effect of the
4 proposed structure on their views. Included are drawings
5 showing the blockage of view. We do not know, however, how to
6 interpret the drawings. They appear to be drawings used to
7 rebut claims of view blockage by individual opponents (numbered
8 1, 2, 3 and 4). Without detailed explanation of how to read
9 these documents, we are unable to tell whether they amount to
10 substantial evidence to support the city's conclusions
11 regarding view.

12 We note that the findings as a whole seem to say that the
13 proposal does not meet the particular character of the City of
14 Cannon Beach. It may be that the city believes that all of the
15 policies quoted in its findings show that the request to
16 increase the height of the building to 24 feet is not in the
17 "best interest of the surrounding property or the city as a
18 whole."⁴ We believe such a finding is required by Section
19 6.020 of the zoning ordinance in order for the city to limit
20 the otherwise permitted height of the building. Without an
21 explanation of the city's belief as to this issue and a
22 description of the facts upon which the city based its
23 conclusion, the findings that are given here are not adequate
24 to support the decision.⁵

25 This matter is remanded to the City of Cannon Beach for
26 action not inconsistent with this opinion.

FOOTNOTES

1
2
3 1

Oregon Laws 1981, ch 748 states:

4 (4) The board shall reverse or remand the land
5 use decision under review only if:

6 "(a) The board finds that the local government or
7 special district governing body:

8 "(A) Exceeded its jurisdiction;

9 "(B) Failed to follow the procedure applicable
10 to the matter before it in a manner that prejudiced
the substantial rights of the petitioner."

11 2

The Housing Policy portion of the plan quoted by the
12 city states:

13 "The city recognizes the importance of residential
14 neighborhoods and the need to protect them from
unnecessary traffic and other disruptions."

15 3

16 Section 6.020, in pertinent part, states:

17 "Uses designated in this Ordinance as conditional uses
18 may be permitted, enlarged, or otherwise altered upon
19 authorization by the Planning Commission or denied by
20 the Planning Commission. This will be done in
21 accordance with the Comprehensive plan, standards for
22 the district, standards in Section 4.010 to 5.030,
23 additional zoning provisions, and other city ordinance
24 requirements. The burden is on the applicant to
25 demonstrate that these requirements can be met. In
26 permitting a conditional use or the modification of an
existing conditional use, the Planning Commission may
impose, in addition to those standards and
requirements expressly specified in this Ordinance,
any conditions which it considered necessary to
protect the best interest of the surrounding property
or the city as a whole. These conditions may include,
but are not limited to:

"* * *

1 "2. Reducing the required height and size of
2 buildings; * * * *"

3 4

4 The city finding cited Section 6.020 of its zoning
5 ordinance in its findings but without any comment.

6 5

7 The petitioner did not challenge whether Section 6.020
8 is applicable in the case or whether the standard
9 expressed in Section 6.020 is sufficiently definite to
10 provide a guidance to applicants and the city.