BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RUTH MORELAND
Petitioner,

vs.

CITY OF DEPOE BAY,
Respondent,

and

RICHARD ALLYN, VALERIE ALLYN,
REAL ESTATE CENTRE, INC.
and GREY INVESTMENTS, INC.,
Intervenors-Respondent.

LUBA No. 2004-101

FINAL OPINION
AND ORDER

Appeal from City of Depoe Bay.

Ruth Moreland, Depoe Bay, filed the petition for review and argued on her own behalf.

David M. Gordon, Newport, filed a response brief and argued on behalf of respondent.

Dennis L. Bartoldus, Newport, filed a response brief and argued on behalf of intervenors-respondent.

BASSHAM, Board Member; HOLSTUN, Board Chair; DAVIES, Board Member, participated in the decision.

REMANDED 10/19/2004

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a city decision approving construction of two structural stabilization walls on the publicly-owned portion of an oceanfront bluff.

MOTION TO DISMISS

Intervenors-respondent Richard Allyn, Valerie Allyn, Real Estate Centre, Inc. and Grey Investments, Inc. (intervenors) move to dismiss this appeal for three reasons: (1) petitioner failed to serve copies of the notice of intent to appeal on two of the four intervenors, (2) petitioner improperly served copies of the petition for review on respondent and intervenors by parcel post rather than by first-class mail or in person, as required by OAR 661-010-0075(2)(b), and (3) petitioner may have improperly filed the petition for review with LUBA by parcel post, rather than by first-class mail or in person, and if so the petition for review was untimely filed.

A. Notice of Intent to Appeal

Intervenors were the applicants below. OAR 661-010-0015(2) and (3)(f)(C) require that the notice of intent to appeal be timely served on the applicant and, if the applicant was represented by an attorney before the governing body, on the applicant's attorney. Petitioner failed to timely serve the notice of intent to appeal on intervenors Real Estate Centre, Inc. and Grey Investments, Inc. However, petitioner timely served the notice on the attorney that represented all four intervenors below and to an individual who apparently signed as a representative of both corporations. Failure to timely serve the notice on a party entitled to service is a technical violation of LUBA's rules, and will not warrant dismissal of the appeal unless the party's substantial rights are affected. OAR 661-010-0005; *Mountain West Investment v. City of Silverton*, 38 Or LUBA 932 (2000).[1] Here, intervenors Real Estate

[1] OAR 661-010-0005 provides:

Centre, Inc. and Grey Investments, Inc. make no attempt to demonstrate that untimely service of the notice prejudiced their substantial rights in this review proceeding. Accordingly, that failure on petitioner's part provides no basis for dismissing this appeal.

B. Service of the Petition for Review

OAR 661-010-0075(2)(b)(B) requires that all documents filed with the Board, including the petition for review, be served contemporaneously on all parties "in person or by first-class mail." Petitioner served the petition for review on respondent and intervenors' attorney by parcel post on Wednesday, August 18, 2004. Intervenors explain that parcel post is slower than first-class mail, and that in fact intervenors' attorney did not receive the petition for review until Monday, August 23, 2004.

Intervenors are correct that service by parcel post is a violation of our rules. While service under the slower delivery schedules for parcel post certainly could prejudice the substantial rights of a party before LUBA in certain circumstances, here intervenors again make no attempt to demonstrate that any resulting delay in receiving the petition for review prejudiced their substantial rights. For example, intervenors do not argue that the several days' delay that could be attributed to service by parcel post in the present case interfered with their ability to prepare the response brief, and we do not see that it did. Instead, intervenors argue that LUBA should not require intervenors to show prejudice because petitioner's conduct was not isolated, but part of a larger design involving multiple violations

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"These rules are intended to promote the speediest practicable review of land use decisions and limited land use decisions, in accordance with ORS 197.805-197.855, while affording all interested persons reasonable notice and opportunity to intervene, reasonable time to prepare and submit their cases, and a full and fair hearing. The rules shall be interpreted to carry out these objectives and to promote justice. Technical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or limited land use decision. Failure to comply with the time limit for filing a notice of intent to appeal under OAR 661-010-0015(1) or a petition for review under OAR 661-010-0030(1) is not a technical violation."

of LUBA's rules intended to delay construction of structural walls necessary to protect intervenors' property before the onset of winter storms.

We tend to agree with intervenors that, where a party commits multiple violations of LUBA's rules regarding service, whether those violations are "technical violations" that shall not interfere with LUBA's review depends on the cumulative effect of those violations on other parties' substantial rights, rather than on the individual effect of each violation. We also agree that an intentional pattern of violating LUBA's rules regarding service to other parties may warrant dismissal of an appeal. *See Bruce v. City of Hillsboro*, 32 Or LUBA 382 (1998), *aff'd* 159 Or App 495, 977 P2d 435 (1999) (refusal to serve the notice of intent to appeal to entitled parties warrants dismissal). However, we do not perceive an intentional pattern or design here to delay this review proceeding or prejudice other parties' substantial rights, nor do we see that, even viewed cumulatively, the rule violations prejudiced other parties. At oral argument, petitioner characterized the violations as inadvertent, and expressed regret and willingness to correct or compensate for them. We decline intervenors' invitation to view petitioner's rule violations as causing *per se* prejudice to intervenors' substantial rights.

C. Filing of the Petition for Review

Intervenors argue that if the petition for review was filed with LUBA by parcel post, then the date of filing is the date LUBA actually received the petition, August 19, 2004, rather than the date of mailing. OAR 661-010-0075(2)(a). If so, intervenors argue, the petition was untimely filed and this appeal must be dismissed. OAR 661-010-0030(1); *Doob v. Josephine County*, 43 Or LUBA 473 (2003). Intervenors move to take evidence under OAR 661-010-0045 to determine whether the petition for review was filed by parcel post.

In response to both motions, petitioner submitted a copy of a receipt showing that the petition for review was mailed to LUBA by certified mail on August 18, 2004, the date the petition for review was due. Intervenors do not dispute that certified mail is a type of first

class mail. At oral argument, we understood intervenors to withdraw the claim that the petition for review was untimely filed, and hence to withdraw the motion to take evidence under OAR 661-010-0045.

The motion to dismiss is denied.

FACTS

Intervenors own two adjacent oceanfront lots, tax lots 6500 and 6600, each developed with a single-family dwelling. Tax lots 6500 and 6600 are zoned Retail Commercial (C-1) and Coastal Shorelands Overlay (C-S). The western property line for tax lots 6500 and 6600 corresponds roughly with the edge of a bluff that slopes steeply down to the beach. Westward of the western property line is tax lot 7300, a five-acre parcel that is a publicly owned park, although it is not clear which public entity owns it.[2] Tax lot 7300 consists of cliffs, sand and vegetation, and is zoned Public Facilities (PF) and C-S.

The sand bluff on which tax lots 6500 and 6600 sit is currently experiencing an average erosion rate of 3.7 inches per year, which threatens to compromise decks placed in front of each dwelling and which will cause the bluff to erode to the foundations of the dwellings in 68 years. Intervenors made a request to the city council for an easement or legal permission to construct two tiered structural walls on tax lot 7300, one at the toe of the bluff and the other near the top, in order to protect tax lots 6500 and 6600 from the effects of further erosion. The city council required intervenors to file an application with and obtain the approval of the city planning commission.

Intervenors accordingly filed an application for "substantial development" in the C-S zone, as owners of tax lots 6500 and 6600. Record 6. After conducting two hearings, the planning commission denied the application, concluding that intervenors failed to

[2] Apparently tax lot 7300 was deeded to the public when the subdivision that includes intervenors' lots was platted, at a time prior to the city's incorporation. As discussed below, there is an unresolved question as to whether the city or the county owns tax lot 7300.

demonstrate that (1) there is a need to locate the retaining walls on public property, (2) the proposed structures are allowed in the PF zone, (3) the walls comply with C-S zone requirements, (4) the walls comply with Federal Emergency Management Agency (FEMA) requirements, (5) the walls are consistent with various requirements derived from Statewide Planning Goal 17 (Coastal Shorelands), and (6) the owner of tax lot 7300 has authorized the application.

Intervenors appealed the planning commission decision to the city council, which reversed the planning commission decision, approving the application with conditions. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the city council erred in approving the proposed stabilization walls, because stabilization walls are not allowed as an outright permitted, conditional, similar or accessory use in the PF zone.

Depoe Bay Zoning Ordinance (DPZO) 3.350 lists the permitted and conditionally permitted uses in the PF zone, which do not include stabilization walls or walls of any kind.[3]

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[3] DPZO 3.350 provides, in relevant part:

> "1. Uses Permitted Outright: In a P-F Zone, the following uses are permitted subject to the applicable provisions of Articles 4, 5 and 13 of this Ordinance.
>
> "a. Public Parks and playgrounds, swimming pools, golf courses or similar recreation facility intended for use by the public.
>
> "b. Public schools and associated facilities.
>
> "c. Hospitals
>
> "d. Government use
>
> "e. Solid waste disposal facility.
>
> "2. Conditional Uses Permitted: Expansion of existing facilities that would substantially increase the overall capacity or the conversion of one outright use to another may be permitted when authorized in accordance with the provisions of Article 4, 5, 6 and 12 of this ordinance.

DPZO 10.060 provides the city may allow a use not listed in a particular zone, provided the use is compatible with the listed uses and not specifically listed in another zone.[4] Petitioner argues that stabilization walls are not "similar" to any use allowed in the PF zone and, in any case, the city cannot rely on DPZO 10.060, because walls are specifically allowed as accessory uses in other zones in the city, including the C-1 zone that governs tax lots 6500 and 6600, but not in the PF zone.

Petitioner further argues that the proposed walls cannot be viewed as accessory uses at all, because DPZO 1.030(2) defines "accessory use" as a "structure or use subordinate and normally incidental to the main use of a property and located on the same lot as the main use." DPZO 1.030(126) further defines "structure" to mean "[s]omething constructed or built and having a fixed base on, or fixed connection to, the ground or another structure." According to petitioner, the purpose of the stabilization walls is to protect the dwellings on tax lots 6500 and 6600. Because the walls are not subordinate to any use on tax lot 7300, and are not located on the same lot as the uses to which they are subordinate, petitioners contend, the walls cannot be deemed accessory uses.

"a. Expansion of public park and playground, golf course, swimming pool or similar recreation facility.

"b. Expansion of public schools and associated facilities.

"c. Expansion of Hospitals.

"d. Expansion of government use

"e. Expansion of solid waste disposal facility

"f. Conversion of one outright use to another outright use."

[4] DPZO 10.060 provides:

"Authorization of Similar Uses. The Planning Commission may permit in a particular zone a use not listed in this ordinance, provided the use is compatible to the uses permitted there by this ordinance. However, this section does not authorize the inclusion in a zone where it is not listed, a use specifically listed in another zone or which is of the same general type and is similar to a use specifically listed in another zone."

In addition, petitioner argues that the city council failed to adopt adequate findings addressing the planning commission's conclusion the proposed walls are not allowed in the PF zone, and the arguments made below to that effect. Petitioner contends that the city made no findings that the proposed walls are "similar uses" allowed under DPZO 10.060, or accessory uses within the meaning of DPZO 1.030(2).

The city and intervenors (together, respondents) question whether the proposed walls are "structures" as defined by DPZO 1.030(126) or, if they are, whether the universe of structures that may be allowed in the PF zone is confined to the list of permitted and conditionally permitted uses, similar uses or accessory uses. According to respondents, the city may authorize construction of a retaining wall on public property, even if that wall is not a listed use in the zone, or a similar use, or accessory to any listed use or similar use. Intervenors further suggest that the proposed walls are in fact accessory to the public park use on tax lot 7300, in that the walls prevent the bluff from falling onto park users. In addition, intervenors argue that petitioner affirmatively waived the argument that the walls are not allowed uses in the P-F zone, because she stated below that she did not object to protection of personal property.

With respect to findings, respondents point to a city council finding that "it is appropriate for a wall to be built on the public property, assuming the property owners do not object." Record 7.[5] That finding both adequately addresses the issue of whether the walls are allowed in the P-F zone, respondents argue, and constitutes an interpretation of the city code

[5] The cited finding states:

> "**Permission of property owner.**
>
> "The City Council finds that the City can agree that it is appropriate for a wall to be built on the public property, assuming that the property owners do not object. The City Council finds that it is the responsibility of the applicant to determine ownership of the public property and obtain consent to build the stabilization walls from the authorized property owner. Anyone objecting to the building and claiming ownership of the public land would need to prove their ownership or interest in the property." Record 7.

to which LUBA should defer, pursuant to ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 515, 836 P2d 710 (1992).[6]

We first address the question of affirmative waiver. Generally, a party before LUBA may not press before LUBA an issue that the party agreed below was not an issue. *Newcomer v. Clackamas County*, 92 Or App 174, 758 P2d 369 (1988) (a party is not allowed to argue on appeal that black is white where that party specifically agreed below that black was black, nor may a party lure another party into an abbreviated presentation through the pretense of abandoning an issue). However, in the testimony to which intervenors cite petitioner does not specifically agree that the proposed walls are allowed in the P-F zone, or purport to abandon that issue.[7] We disagree with intervenors that petitioner affirmatively waived that issue.

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[6] ORS 197.829 provides, in relevant part:

> "(1) [LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> > "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
> >
> > "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
> >
> > "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]
>
> "(2) If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct."

[7] Intervenors cite to the following testimony by petitioner:

> "[Petitioner] said she is not opposed to protection of personal properties, but the city should be provided with evidence of non-structural stabilization alternatives, such as using rocks or vegetation, or removing the deck to provide room on the private property to build a stabilizing wall, eliminating the need to encroach on public land. She explained the rocky shore has value to the community, whether it is physical access or visual." Record 75.

Turning to the interpretative issue, we disagree with respondents that the city's findings include a reviewable interpretation as to why the proposed walls are allowed in the P-F zone. The finding cited by respondents, that it is appropriate to place a wall on public property absent the owner's objection, addresses the unresolved issue of ownership of tax lot 7300, and does not suggest an answer to the issue raised below regarding whether the proposed walls are allowed in the P-F zone. The theories suggested by respondents are nowhere reflected in the city council decision. We must defer to a governing body's implicit as well as explicit interpretations of local criteria, if adequate for review. *Alliance for Responsible Land Use v. Deschutes Cty.*, 149 Or App 259, 942 P2d 836 (1997), *rev dismissed* 327 Or 555 (1998). That is, in order to perform our review function, we must be able to discern the governing body's understanding of the meaning of the local provision from the decision and findings. *Eddings v. Columbia County*, 36 Or LUBA 159, 165 (1999). Here, if the city council in fact considered the issue and implicitly determined that proposed walls are permitted in the P-F zone, we have no idea why or how it reached that conclusion.

ORS 197.829(2) allows LUBA to interpret a local provision in the first instance, where the local government fails to adopt a necessary interpretation or one that is adequate for review. We decline to exercise that authority in the present case. Although none of the interpretations advanced in the response briefs seem particularly consistent with the portions of the city code cited to us, we are hesitant to adopt petitioner's contrary interpretation—which would entail reversing the city's approval of intervenors' application—without allowing the city council to weigh in on the matter.[8] Remand is appropriate, then, to allow the city council to interpret the pertinent code provisions in the first instance.

[8] For example, respondents' argument that the proposed stabilization walls are not "structures" as defined by DPZO 1.030(126) seems inconsistent with that definition, which is quite broad in scope. Further, if there is any support in the city's code for the respondents' position that the P-F zone implicitly allows uses other than those listed as permitted or conditionally permitted, and those that are similar uses or accessory to permitted, conditionally permitted and similar uses, respondents have not cited us to it. Finally, if there is any evidence or

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioner contends that approval of the lower, western stabilization wall is inconsistent with FEMA regulations that prohibit placement of fill as structural support for buildings in "V-zones," a federal flood hazard zone designation.[9] According to petitioner, tax lot 7300 is located within a flood hazard area designated "V19," with a base flood elevation of 54 feet, and the proposed lower stabilization wall is located at the 40-foot elevation. Because construction of the lower stabilization wall involves placement of backfill behind the wall, and the purpose of the wall is to protect the foundations of the dwellings on tax lots 6500 and 6600, petitioner argues, construction of the wall is prohibited by federal law.

Respondents contend that the purpose of the stabilization walls is to stabilize the bluff, and that neither the walls nor the fill placed behind the walls provide "structural support for buildings." Because the backfill will not provide "structural support for buildings" within the meaning of 44 CFR 60.3(e)(6), respondents argue, the city's decision is consistent with federal law.

Petitioner cites no authority for her view that "structural support for buildings" includes fill placed behind retaining walls, which in turn prevent erosion of soil that underlies the existing foundation of a building. We tend to agree with respondents that 44 CFR 60.3(e)(6) refers to fill that provides direct structural support for a building. Absent some support for the much broader view advanced by petitioner, we decline to adopt that view. Petitioner has not demonstrated that the city's decision is inconsistent with the federal regulation.

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indication in the record that the stabilization walls are accessory to any use on tax lot 7300, intervenors have not cited it to us.

[9] 44 CFR 60.3(e)(6) states in relevant part that communities shall "[p]rohibit the use of fill for structural support of buildings within Zones V1-30 * * *."

Petitioner next argues that the city council imposed a condition of approval that requires intervenors to submit a certified geotechnical report to (1) determine whether there is a need for cliff stabilization to protect the dwellings on tax lots 6500 and 6600, (2) address long term safety for those properties and adjacent properties, and (3) define hazards along with necessary mitigations. According to petitioner, the requirement for post-approval submission of a geotechnical report is inconsistent with the procedural requirements of DPZO 13.020(5), which requires that such a report be submitted to the planning commission and approved *prior* to development approval.[10]

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[10] DPZO 13.020(5) provides, in relevant part:

> "Procedure. The following procedure shall be followed in determining the suitability and desirability of development proposed in areas having geological hazards:
>
> "a. Requesters of development approval within areas having geological hazards shall be required by the Planning Commission to submit a statement as to how such hazards have been recognized in the proposal. Such statement shall be required to include the following:
>
> "1. The cause, the extent and the potential of the hazards.
>
> "2. The provisions proposed to overcome the hazards.
>
> "3. A certified declaration as to the on-going responsibility of the developer should such hazards be of a nature whereby possible future danger may exist. * * *
>
> "4. Additional material as determined by the Planning Commission to be desirable to make a determination as to the acceptability of the statement.
>
> "5. The name and professional stamp of that person or persons determining the causes, extent and potential of the hazards as well as the provisions proposed to overcome the hazards.
>
> "b. Review of Statement of Hazards. The statement of the Hazards will be considered by the Planning Commission prior to development approval. * * * The Planning Commission may approve or give a favorable recommendation to the request for development:
>
> "1) if the findings of the Planning Commission are that the requested development appears to be adequately recognize the causes, extent, and potential of the hazards,

Respondents contend first that no issue or objection was raised below regarding the procedural requirements of DPZO 13.020(5) and thus petitioner's arguments under that code section are waived. ORS 197.763(1).[11] In any case, the city argues, DPZO 13.020(5) relates to the statement of hazards, and does not necessarily require a geotechnical report. According to the city, the planning commission denied the application for, among other reasons, failure to submit a geotechnical report. Record 124. On *de novo* appeal to the city council, the city contends, the city council properly accepted additional evidence regarding hazards, and imposed the condition requiring a geotechnical report. We understand the city to argue that the condition providing for post-approval submission of a geotechnical report is consistent with DPZO 13.020(5), either because DPZO 13.020(5) does not require a geotechnical report or because the code does not require that the geotechnical report be submitted and approved prior to development approval.

The condition requiring a post-approval geotechnical report was apparently suggested by the planning commission, in case the city council decided to reverse the planning commission denial and approve the application. Record 29. Petitioner does not respond to the respondents' waiver argument, or argue that the issue of whether that condition is

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> "2) if the proposal to overcome the recognized hazards appears adequate, and is included in the engineered plans of the development,
>
> "3) if the provisions for continuance of developer responsibility are satisfactory,
>
> "4) if the qualifications of that person or persons certifying the Statement of Hazards area adequate, [and]
>
> "5) if in the event a geotechnical analysis is required, the plans contain the signature and professional stamp of a registered geologist or engineering geologist."

[11] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

consistent with DPZO 13.020(5) was raised below, or contend that that issue can be raised before LUBA notwithstanding failure to raise it below. We agree with respondents that the issue of consistency with DPZO 13.020(5) is waived.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Land use actions within the C-S zone require compliance with the standards at DPZO 3.360. In relevant part, DPZO 3.360(4) requires the applicant to submit a detailed site plan demonstrating how the proposed activities will conform to the standards at DPZO 3.360(5), which in turn require protection of riparian vegetation and exceptional aesthetic resources.[12]

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[12] DPZO 3.360 provides, in relevant part:

> "4. Procedure: Applicants requesting approval for land use actions within the areas subject to the provisions of the C-S zone shall submit, along with any application, a detailed site plan and/or written statement demonstrating how the proposed activities will conform to each of the applicable standards contained in the C-S zone. * * *
>
> "5. Standards. The following standards will be applied in reviewing an application for a land use action in the C-S zone.
>
> "a. Riparian Vegetation
>
> "1. Permanent removal of riparian vegetation shall be permitted only in conjunction with a use which requires direct access to water.
>
> "2. Except as provided for in (1) above, no development which could result in a permanent destruction of riparian vegetation shall be located within the zone of riparian vegetation as defined below.
>
> "* * * * *
>
> 4. Definitions: Zone of Riparian Vegetation
>
> a) Ocean and Estuary – The area between the point of mean higher high water and 50 feet landward measured on the existing grade.
>
> "* * * * *
>
> c. Exceptional Aesthetic Resources

The planning commission denied the application in part because it found that intervenors had failed to submit the "specific design" required by DPZO 3.360(4) and thereby failed to demonstrate that the design protects riparian vegetation and aesthetic resources. The city council's findings with respect to compliance with the C-S standards state, in relevant part:

> "The shoreline is designated as an exceptional aesthetic resource. The City Council finds that the applicant must demonstrate how the proposed stabilization walls will *permanently* and *unobtrusively* blend with the surrounding area.
>
> "The applicant shall also address impacts and protection of riparian vegetation by submitting a vegetation plan." Record 7 (emphasis in original).

The city council decision requires submission of a "specific final design that delineates how the structures will permanently and unobtrusively blend with the surrounding area." Record 8. It also requires the applicants to submit for city staff review a vegetation plan that "shall identify location and type of existing vegetation in the surrounding area, proposed vegetation to be removed, and a revegetation plan demonstrating how vegetation to be removed will be replaced." Record 9.

Petitioner contends that the city council erred in approving the application, notwithstanding that the applicants had failed to submit the detailed site plan and other information necessary to demonstrate compliance with the C-S zone standards. According to petitioner, the city cannot approve the application under DBZO 3.360(5) when the information necessary to determine compliance with those criteria has not been submitted and will not be submitted until a subsequent review.

Respondents argue that the record includes sufficient information to determine that the application complies with the DBZO 3.360(5) standards regarding protection of riparian

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> "Development in areas of exceptional aesthetic resources or coastal headlands shall not substantially alter the existing visual character of the area."

vegetation and aesthetic resources, and there is nothing impermissible in requiring additional information to be submitted prior to building permit review. Intervenors also question whether the riparian vegetation standards at DBZO 3.360(5)(a) even apply, since the proposed walls will be located more than 50 feet landward of the mean higher high water.

Intervenors may be correct that the application does not trigger the riparian vegetation requirements. However, the city council decision did not take that approach. Rather, it appears to require intervenors to comply with the riparian vegetation requirements of DBZO 3.360(5)(a). Similarly, respondents may be correct that the record already includes sufficient information to determine compliance with DBZO 3.360(5). But, if so, the city council did not see it that way. The city council decision does not find that the application complies with DBZO 3.360(5), or even that it is feasible to comply with that provision. Instead, it plainly defers a determination of compliance with those standards to a subsequent informal review by city staff, based on a "specific site plan" and vegetation plan to be submitted later.

Although petitioner does not cite the lead case on this point, petitioner's arguments invoke the well-established principle that local governments can defer a determination of compliance with applicable discretionary permit approval criteria to a subsequent proceeding only under limited circumstances. *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447-48 (1992) (where the local government finds that there is insufficient evidence to determine compliance or the feasibility of compliance with permit approval criteria, it may defer that determination to a second review only if the second review provides the statutorily required notice and opportunity for a hearing). To the extent petitioner argues that the city can never defer a determination of compliance with approval criteria to a second review, petitioner is incorrect. However, petitioner is correct that the city erred in the present case, by deferring a determination of compliance with DBZO 3.360(5) to a subsequent planning staff review

process that no party disputes does not provide statutorily required notice and opportunity for a hearing.

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

Petitioner contends that the city failed to follow required procedures to clarify the ownership of the public parkland prior to adopting the challenged decision. According to petitioner, DPZO 10.030 requires that if the applicant is someone other than the owner that the owner be provided a copy of the application prior to development approval.[13] Instead of determining the ownership of tax lot 7300 and either requiring the owner to sign the application or requiring intervenors to comply with DPZO 10.030, petitioner argues, the city council determined that it was intervenors' responsibility to determine the owner of tax lot 7300, and imposed a condition requiring that intervenors either obtain the approval of the owner or "otherwise judicially establish the right to construct a stabilization wall." Record 9.

Respondents offer several responses, but we address only their argument that the city in fact complied with DPZO 10.030. According to respondents, it is undisputed that the only potential legal owners of tax lot 7300 are the city or the county. Respondents point out that the county was provided notice of the application delineating tax lot 7300 as the subject property, but the county chose not to comment or participate. There is no dispute that the city knew about the application. Because both potential owners were notified of the application, respondents argue, DPZO 10.030 is satisfied, and the fact that the city went further to require intervenors to resolve the question of ownership between the city and county prior to

[13] DPZO 10.030 states in relevant part that

> "[i]f the applicant is other than the legal owner or contract purchaser of the property for which the development is proposed a copy of the application shall be sent to the owner or contract purchaser prior to such development approval."

receiving building permit approval is not a basis to remand the decision. We agree with respondents.

The fourth assignment of error is denied.

The city's decision is remanded.