



1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the Cannon Beach City  
4 Council denying a subdivision application.

5 **FACTS**

6 Petitioner applied to the city for approval of an 11-  
7 lot subdivision in the city's RL zone. The RL zone is  
8 defined as low density residential, with a density of four  
9 units per acre.

10 The proposed subdivision site is 4.04 acres. It is  
11 listed in the Cannon Beach Comprehensive Plan (CBCP) as  
12 being within a potential geologic hazard area, and includes  
13 a potential hazard overlay designation on the city zoning  
14 map. The site has moderate to steep slopes, and is  
15 trisected by two naturally occurring streams.

16 The challenged decision represents petitioner's third  
17 attempt to gain subdivision approval of the subject site.  
18 According to petitioner, after the second denial, the city  
19 informed petitioner that it would not consider approval of  
20 variances to any development standards on the subject site.  
21 Petitioner did not appeal either of the two previously  
22 denied applications.

23 The city characterizes the challenged decision as a  
24 limited land use decision. Nonetheless, the city conducted  
25 an initial evidentiary hearing before the planning  
26 commission, for which it provided notice of the applicable

1 approval criteria, including both comprehensive plan and  
2 zoning ordinance criteria. The planning commission denied  
3 the application, based primarily on the failure of the  
4 application to satisfy applicable comprehensive plan  
5 policies. On appeal, the city council upheld the planning  
6 commission decision. This appeal followed.

7 **FIRST ASSIGNMENT OF ERROR**

8 Petitioner alleges the challenged decision violates ORS  
9 227.173, both because the city based its denial of the  
10 application on general comprehensive plan policies instead  
11 of on development code policies that support approval; and  
12 because the city did not address applicable ordinance  
13 criteria which could support approval. Petitioner further  
14 argues that, because the city relied upon the comprehensive  
15 plan policies to support denial of the application,  
16 petitioner could not anticipate the standards by which the  
17 application would be judged.

18 ORS 227.173 states, in relevant part:

19 "(1) Approval or denial of a discretionary permit  
20 application shall be based on standards and  
21 criteria, which shall be set forth in the  
22 development ordinance and which shall relate  
23 approval or denial of a discretionary permit  
24 application to the development ordinance and to  
25 the comprehensive plan for the area in which the  
26 development would occur and to the development  
27 ordinance and comprehensive plan for the city as a  
28 whole.

29 "(2) Approval or denial of a permit application or  
30 limited land use decision shall be based upon and  
31 accompanied by a brief statement that explains the

1 criteria and standards considered relevant to the  
2 decision, states the facts relied upon in  
3 rendering the decision and explains the  
4 justification for the decision based on the  
5 criteria, standards and facts set forth."

6 Petitioner contends ORS 227.173(1) means that only  
7 development ordinance criteria, and not comprehensive plan  
8 criteria, can provide the basis for approval or denial of an  
9 application; and argues that the city erred by basing its  
10 decision on general comprehensive plan policies, instead of  
11 code provisions that implement the comprehensive plan.

12 ORS 227.173(1) requires that permit standards and  
13 criteria themselves must be set out in the city's  
14 development ordinances and that land use decisions identify  
15 the applicable standards and criteria. BCT Partnership v.  
16 City of Portland, 130 Or App 271, 277, 881 P2d 176 (1994).  
17 It does not, however, prohibit a city from requiring  
18 compliance with comprehensive plan policies through its  
19 development ordinance, or otherwise prohibit the city from  
20 applying the comprehensive plan criteria during quasi-  
21 judicial proceedings.

22 The city interprets its zoning ordinance to require  
23 subdivision applications to comply with the applicable  
24 comprehensive plan policies.<sup>1</sup> This Board has previously

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<sup>1</sup>Cannon Beach Zoning Ordinance (CBZO) 16.04.020 states:

"In their interpretation and application, the provisions of this chapter are held to be the minimum requirements adopted for the protection of the public health, safety and welfare.

1 affirmed that interpretation. Shelter Resources Inc. v.  
2 City of Cannon Beach, 27 Or LUBA 229, aff'd 129 Or App 433,  
3 879 P2d 1313 (1994). That interpretation is consistent with  
4 the language of ORS 227.173(1). Petitioner's argument that  
5 comprehensive plan policies may be implemented only through  
6 legislative processes is not warranted by the language of  
7 ORS 227.173(1).

8 Petitioner's argument that ORS 227.173(2) mandates  
9 findings on each of the approval criteria is also  
10 unsupported by the statute's language. ORS 227.173(2)  
11 expressly holds that the decision must "explain the criteria  
12 and standards considered relevant," and "the justification  
13 for the decision based on the criteria, standards and facts  
14 set forth." It does not require that, when a city denies an  
15 application for failure to satisfy one or more approval  
16 criteria, it must also make findings on criteria which could  
17 support approval of the application. Where the  
18 challenged decision is one to deny a development proposal, a  
19 local government need only adopt findings, supported by  
20 substantial evidence, demonstrating that one or more

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To protect the public, among other purposes, such provisions are intended to provide for a permanently wholesome community environment, adequate municipal services and orderly and safe street design and construction, in conformance with the Comprehensive Plan."

CBZO 16.04.150 states:

"The proposed subdivision shall conform to the comprehensive plan and official maps of the city which are in effect at the time of the application for subdivision approval."

1 standards are not met. Duck Delivery Produce v. Deschutes  
2 County, 28 Or LUBA 614, 616 (1995); Horizon Construction,  
3 Inc. v. City of Newberg, 28 Or LUBA 632, 635, aff'd, 134 Or  
4 App 414, 894 P2d 1267 (1995). The city determined that the  
5 application failed to satisfy applicable comprehensive plan  
6 policies, and denied the application on that basis. ORS  
7 227.173(2) does not require the city to make findings  
8 regarding those criteria which could be satisfied or require  
9 the city to make findings regarding criteria upon which it  
10 did not rely in reaching its decision. See Shelter  
11 Resources, 27 Or LUBA at 241.

12 Finally, petitioner argues that the city's reliance on  
13 comprehensive plan policies as the basis for the denial,  
14 notwithstanding more specific development code criteria upon  
15 which findings of compliance could be made, precluded  
16 petitioner from knowing the standards by which the  
17 application would be judged. Petitioner cites case law to  
18 support the assertion that parties are entitled to know the  
19 criteria by which their application will be judged, without  
20 having to guess "under which shell lies the pea." Phillipi  
21 v. City of Sublimity, 59 Or App 295, 300, 650 P2d 103  
22 (1982); Commonwealth Properties v. Washington County, 35 Or  
23 App 387, 399, 582 P2d 1384 (1978). See also, Feitelson v.  
24 City of Salem, 46 Or App 815, 613 P2d 489 (1980); Baker v.  
25 City of Milwaukie, 271 Or 500, 533 P2d 772 (1975).

26 Petitioner is correct that where a challenged decision

1 denying development approval fails to inform the applicant  
2 of the steps it must take to gain approval of its  
3 application or, alternatively, of the standards the  
4 application does not meet, the decision must be remanded.  
5 Ellis v. City of Bend, 28 Or LUBA 332 (1994). However, that  
6 did not occur in this case, nor do any of the cases  
7 petitioner cites address the situation at issue. Each of  
8 those cases involved local governing bodies applying,  
9 through a quasi-judicial hearings process, comprehensive  
10 plan policies that were not cited as approval criteria, and  
11 which petitioners had no way of knowing the hearings body  
12 would apply as approval criteria.

13       Petitioner in this case knew that the city's  
14 subdivision ordinance provisions require compliance with  
15 both the comprehensive plan policies and the subdivision  
16 development ordinance provisions. The comprehensive plan  
17 policies, while more general, do not conflict with the  
18 development ordinance provisions, and do not preclude an  
19 applicant from knowing the applicable standards. Petitioner  
20 also knew how the city determined petitioner did not satisfy  
21 relevant approval criteria. Petitioner's disagreement is  
22 not that petitioner did not know which criteria were  
23 applicable. Rather, petitioner disagrees with the criteria  
24 upon which the city relied in denying the application. The  
25 city did not deprive petitioner of knowledge of the

1 standards upon which the application would be evaluated.<sup>2</sup>

2 The first assignment of error is denied.

3 **SECOND ASSIGNMENT OF ERROR**

4 Petitioner contends the city's conclusion that "[t]his  
5 site is not capable of supporting an 11 lot subdivision" is  
6 inconsistent with the site's zoning and the expert evidence  
7 in the record, and amounts to a rezoning of the property.  
8 Petitioner disagrees both with the city's interpretation of  
9 CBCP General Policy 5 (Policy 5) and the city's evaluation  
10 of the evidence upon which it relied to conclude that the  
11 site is not capable of supporting 11 housing units.

12 Policy 5 states:

13 "The density of residential development throughout  
14 the City shall be based on the capability of the  
15 land in terms of its slope, potential for geologic  
16 hazard and drainage characteristics. Density  
17 throughout the City shall generally be:

18 "High (R3), (RM) - 15 dwellings per acre

19 "Duplex or Medium (R2), (RMa), (MP), (RAM) - 11  
20 dwellings per acre

21 "Moderate Single-Family (R-1) - 8 dwellings per  
22 acre

23 "Low (RL) - 4 dwellings per acre

24 "Very Low (RVL) - 1 dwelling unit per acre"

25 The subject property was rezoned in the past from R-1

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<sup>2</sup>This is not a case of petitioner not knowing and having to guess "under which shell lies the pea." All the peas are exposed. Petitioner objects to the recipe the city uses to mix the peas and, ultimately, to the taste of the resulting soup.

1 to RL. Petitioner argues that the RL zone allows 4 units  
2 per acre, as both the minimum and maximum density. However,  
3 petitioner also recognizes that the zone may provide for  
4 some flexibility, reasoning that "[t]he act of reducing the  
5 density [from R-1 to RL] carries with it the presumption  
6 that it was appropriate to rezone the property to 4 units  
7 per acre." On that basis, petitioner concludes that "[a]ny  
8 reduction from that density during a quasi-judicial  
9 proceeding must be based upon scientifically supportable  
10 facts." Petition for Review 29. Petitioner cites no  
11 authority for the standard he proposes for evaluating  
12 density reductions.

13 The city interprets Policy 5 to provide maximum  
14 densities, and in its findings explains its interpretation  
15 of the policy, and how the policy factors are evaluated to  
16 determine the appropriate density for a given development.<sup>3</sup>

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<sup>3</sup>The city interprets Policy 5, in part, as follows:

"General Development Policy 5 provides that the density of all residential development in the city shall be based on the characteristics of the site on which the development is to occur. This is reflected in the phrase 'density \* \* \* shall be based on the capability of the land in terms of its slope, potential for geologic hazard and drainage characteristics'. The policy recognizes that within a given zone, not all sites are similar with respect to their ability to accommodate a given level of residential density. Each site must be reviewed on an individual basis to determine the density that is consistent with the enumerated characteristics of the site. The policy requires that in establishing the appropriate density for a given residential development, the following site characteristics are to be evaluated: slope, drainage characteristics, and potential for geologic hazard. Where an evaluation of the site, based on the features listed above,

1 Based on its evaluation of the site against its  
2 interpretation of the policy factors, the city determined  
3 that the subject site is not capable of supporting 11  
4 housing units.

5 Petitioner's interpretation of Policy 5 is not  
6 unreasonable. However, a local governing body's  
7 interpretation of its own enactment is entitled to  
8 deference, and LUBA is required to affirm the local  
9 interpretation unless that interpretation is contrary to the  
10 express words, purpose or policy of the local enactment or  
11 to a state statute, statewide planning goal or  
12 administrative rule which the local enactment implements.  
13 ORS 197.829; Clark v. Jackson County, 313 Or 508, 836 P2d  
14 710 (1992); Zippel v. Josephine County, 27 Or LUBA 11  
15 (1994); Melton v. City of Cottage Grove, 28 Or LUBA 1  
16 (1994), aff'd 131 Or App 626, \_\_\_ P2d \_\_\_ (1995). The city  
17 has provided a detailed interpretation of CBCP General  
18 Policy 5. That interpretation, while affording the city  
19 substantial flexibility in evaluating allowable densities,  
20 is not legally wrong, and this Board is required to affirm

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finds that necessary site improvements can be installed consistent with the characteristics of the site, then a residential development at the maximum density provided for by the zone is appropriate. However, if after an evaluation of the site, it is determined that the installation of the necessary site improvements is not consistent with the capability of the site, the General Development Policy 5 permits a reduction in the density of a given residential development below the general standard listed." (Ellipsis in original.)

1 it.

2 Likewise, this Board is not entitled to substitute its  
3 judgment of the evidence in the record for that of the  
4 governing body. Rather, if there is substantial evidence in  
5 the whole record to support the city's decision, LUBA will  
6 defer to it, notwithstanding that reasonable people could  
7 draw different conclusions from the evidence. Adler v. City  
8 of Portland, 25 Or LUBA 546, 554 (1993). Where the evidence  
9 is conflicting, if a reasonable person could reach the  
10 decision the city made, in view of all the evidence in the  
11 record, LUBA will defer to the city's choice between  
12 conflicting evidence. Bottum v. Union County, 26 Or LUBA  
13 407, 412 (1994); McInnis v. City of Portland, 25 Or LUBA  
14 376, 385 (1993); Mazeski v. Wasco County, 28 Or LUBA 178,  
15 184 (1994), aff'd, 133 Or App 258, 890 P2d 455 (1995).  
16 Moreover, in challenging a local government's determination  
17 of noncompliance with an applicable approval standard on  
18 evidentiary grounds, petitioner must demonstrate he  
19 sustained his burden of proof of compliance with the  
20 applicable standard as a matter of law. Horizon  
21 Construction, Inc. v. City of Newberg, 28 Or LUBA at 641.

22 Petitioner cites to substantial evidence in the record  
23 that the site can accommodate 11 units, provided adequate  
24 design and construction techniques are used. However, the  
25 evidence in the record also reveals that the site is heavily  
26 wooded, is significantly constrained by steep ravines,

1 slopes and stream corridors, and that development would  
2 require elimination of 41% of the site's trees for roads and  
3 utilities, and 48% of the trees along another portion of the  
4 site, as well as substantial filling and culverting of the  
5 site's stream corridors. Based on all the evidence in the  
6 record, petitioner has not established that a reasonable  
7 person could not reach the same conclusion as did the city,  
8 or that, as a matter of law, Policy 5 is satisfied.

9 The second assignment of error is denied.

10 **THIRD ASSIGNMENT OF ERROR**

11 Petitioner contends the city misapplied the  
12 requirements of CBZO 17.70.030 and CBCP General Development  
13 Policy 15 (Policy 15), regarding tree removal.

14 The city determined that the application fails to  
15 comply with CBSO 17.70 030(c) and Policy 15. CBSO  
16 17.70.030(c) states:

17 "The retention of trees shall be considered in the  
18 design of major partitions, subdivisions or  
19 planned developments; placement of roads and  
20 utilities shall preserve trees whenever possible.  
21 The need to remove trees shall be considered in  
22 the review process for major partitions,  
23 subdivisions or planned developments."

24 General Policy 15 states:

25 "The City shall regulate the removal of trees in  
26 order to preserve the City's aesthetic character,  
27 as well as to control problems associated with  
28 soil erosion and landslide hazards."

29 Petitioner asserts that the zoning ordinance recognizes  
30 the need to remove trees. He also argues that compliance

1 with numerous design standards requires removal of trees,  
2 and that the city's refusal to consider any design variances  
3 dictates the removal of more trees than might otherwise have  
4 been necessary. According to petitioner,

5 "[t]he applicant requested variances from some of  
6 the street standards but was refused. The result  
7 of meeting the applicable standards as written  
8 dictated loss of more trees. The city should not  
9 be allowed to ignore those [street] standards and  
10 rely solely upon the general policies of its  
11 comprehensive plan as a basis to deny the  
12 application." Petition for Review 33.

13 The city made detailed findings, based on evidence in  
14 the record, that the proposed development would not  
15 adequately protect the site's three significant features,  
16 including a large stand of trees and two streams.  
17 Petitioner disagrees with the city's interpretation and  
18 evaluation of evidence necessary to comply with CBZO  
19 17.70.030. However, petitioner does not dispute the city's  
20 findings regarding Policy 15. Instead, petitioner reasons  
21 that the city should not be allowed to rely on Policy 15 to  
22 deny the application because he has proposed a road  
23 configuration mandating tree removal in order to satisfy  
24 other street design standards.

25 The city is not mandated to grant variances to street  
26 standards when the site characteristics preclude compliance  
27 with them, based on petitioner's proposed design.  
28 Satisfaction of some criteria does not excuse an applicant  
29 from complying with other applicable criteria.

1           Petitioner's disagreement with the criteria upon which  
2 the city evaluated his application is not a basis for remand  
3 or reversal. Petitioner has not established that the city's  
4 interpretation of CBSO 17.70.030 and Policy 15 are legally  
5 wrong, or that there is not substantial evidence in the  
6 record to find that the proposed development does not  
7 satisfy those approval criteria.

8           The third assignment of error is denied.

9           **FOURTH ASSIGNMENT OF ERROR**

10           Petitioner contends, summarily, that none of the  
11 findings or conclusions upon which the city based its denial  
12 are supported by the record as a whole. Petitioner does not  
13 address the applicable comprehensive plan policies, but  
14 asserts that "the [petitioner] addressed each standard  
15 contained in the Cannon Beach Zoning Code and its  
16 subdivision ordinance applicable to the proposed 11 lot  
17 subdivision." Petition for Review 34.

18           There is evidence in the record from which a reasonable  
19 person could conclude that the application satisfies the  
20 applicable subdivision ordinance criteria. However, there  
21 is also conflicting evidence from which an equally  
22 reasonable person could conclude, as the city did, that one  
23 or more of those criteria are not satisfied. Petitioner has  
24 not established, as a matter, of law, that each subdivision  
25 ordinance standard has been satisfied.

26           Moreover, as stated above, in order to reverse or

1 remand the city's denial of a discretionary application,  
2 petitioner must determine, as a matter of law, that all  
3 approval criteria are satisfied. Regardless of whether the  
4 application could satisfy some, or even all, of the  
5 subdivision ordinance criteria, there is substantial  
6 evidence in the record, upon which the city relied, to  
7 determine that the proposed development fails to comply with  
8 several comprehensive plan policies.

9 The fourth assignment of error is denied.

10 The city's decision is affirmed.<sup>4</sup>

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<sup>4</sup>Petitioner concludes that, if LUBA affirms the city's decision, the city's decision amounts to a taking of petitioner's property, and petitioner requests an evidentiary hearing to determine the amount of damages. We lack jurisdiction to conduct an evidentiary hearing following the issuance of our final opinion. Moreover, petitioner did not raise this issue before the city and has not established the city has taken his property. See Larson v. Multnomah County. 25 Or LUBA 18 (1993).