

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 NORMAN L. LINDSTEDT
5 and MERRINELL LINDSTEDT,)
6)
7 Petitioners,)
8)
9 vs.)
10)
11 CITY OF CANNON BEACH,)
12)
13 Respondent.)

LUBA No. 96-134

FINAL OPINION
AND ORDER

14
15
16 Appeal from City of Cannon Beach.
17

18 Norman L. Lindstedt, Portland, filed the petition for
19 review and argued on behalf of petitioners. With him on the
20 brief was Lindstedt, Buono & Welch.
21

22 William R. Canessa, Seaside, filed the response brief
23 and argued on behalf of respondent. With him on the brief
24 was Campbell, Moberg, Canessa, Faber & Hooley.
25

26 LIVINGSTON, Referee; HANNA, Referee, participated in
27 the decision.
28

29 AFFIRMED 09/24/97
30

31 You are entitled to judicial review of this Order.
32 Judicial review is governed by the provisions of ORS
33 197.850.

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the city's denial of their
4 application for a tree removal permit.

5 **MOTION FOR LEAVE TO FILE REPLY BRIEF**

6 Petitioners request leave to file a reply brief. The
7 city opposes petitioners' request. The reply brief is not
8 "confined solely to new matters raised in the respondent's
9 brief," as required by OAR 661-10-039. Because petitioners
10 do not demonstrate a need for a reply brief, and because the
11 reply brief appears simply to embellish arguments advanced
12 in the petition for review, petitioners' request is denied,
13 and we do not consider the brief. Wissusik v. Yamhill
14 County, 20 Or LUBA 246, 250 (1990); Knapp v. City of
15 Jacksonville, 20 Or LUBA 189, 193-94 (1990).

16 **FACTS**

17 On April 1, 1996, petitioners submitted to the city an
18 application for removal of a tree from their backyard. The
19 tree was planted by petitioners in 1973, and petitioners now
20 want to remove the tree in order to facilitate the
21 landscaping of their yard and to improve their neighbors'
22 ocean views. The application was denied by city staff, and
23 petitioners appealed to the city council. The city council
24 held a de novo hearing on petitioners' appeal on June 4,
25 1997. On July 2, 1997, the city council voted to uphold the
26 staff decision, adopting findings of fact and conclusions of

1 law denying petitioners' permit application. This appeal
2 followed.

3 **FIRST ASSIGNMENT OF ERROR**

4 Petitioners contend that, under the city's charter and
5 ORS 227.215, the city does not have the power

6 "to regulate the private landscaping decisions of
7 property owners where the property owners are not
8 seeking to develop their property or to obtain
9 building permits which may require the application
10 of zoning ordinances." Petition for Review 14.

11 ORS 227.215(2) authorizes cities to plan and regulate
12 the development of land, and provides that

13 "a city may adopt an ordinance requiring that
14 whatever land development is undertaken in the
15 city comply with the requirements of the ordinance
16 and be undertaken only in compliance with the
17 terms of a development permit."

18 Essentially, petitioners argue that the city may not
19 prohibit them from removing a tree from their yard for
20 landscaping purposes because the proposed tree removal is
21 not related to any "land development" under ORS 227.215(2).
22 The city responds, and we agree, that the statutory
23 definition of "development" is sufficiently broad to
24 encompass the removal of a tree for landscaping purposes.
25 Under ORS 227.215(1), "development" includes "making a
26 material change in the use or appearance of a structure or
27 land." Thus, the city is authorized by statute to regulate
28 tree removal through the issuance of development permits.

29 Petitioners also contend that the city tree removal
30 ordinance "was not written to deal with backyard landscaping

1 of property owners," but was intended to apply only where
2 building permits or development permits are applied for.
3 Petition for Review 16. In support of this argument,
4 petitioners point to Cannon Beach Zoning Ordinance (CBZO)
5 17.70.010, which sets forth the purpose of the tree removal
6 ordinance:

7 "A. The purpose of this chapter is to establish
8 protective regulations for trees within the
9 city in order to better control problems of
10 soil erosion, landslide, air pollution,
11 noise, wind and destruction of scenic values
12 and wildlife habitat."

13 "B. The intent is not to prohibit the removal of
14 trees completely, or to require extraordinary
15 measures to build structures; but the intent
16 is to stop the wanton and oftentimes
17 thoughtless destruction of that vegetation
18 which has a beneficial effect on the value of
19 property and on the city in general."
20 (Emphasis added.)

21 According to petitioners, the emphasized language in
22 CBZO 17.70.010(B) leads to the conclusion that the ordinance
23 is only meant to apply where a tree removal permit is sought
24 in conjunction with the building of a structure, or as part
25 of some larger development plan. We disagree. CBZO
26 17.70.010(B) expressly states two limitations on the
27 application of the ordinance: (1) not to prohibit the
28 removal of trees completely; and (2) not to require
29 extraordinary measures to build structures. The language of
30 the ordinance does not indicate an intent to require a
31 permit only where an applicant seeks to build a structure.

1 In fact, the language of the tree removal ordinance and
2 the city's acknowledged comprehensive plan both indicate an
3 intent on the part of the city to regulate the removal of
4 trees for purposes related to aesthetics and public safety.
5 One of the express purposes set forth in CBZO 17.70.010(A)
6 regarding the regulation of tree removal is "to better
7 control problems of soil erosion, landslide, air pollution,
8 noise, wind and destruction of scenic values * * *." Also,
9 under a section entitled "General Development Policies," the
10 city's comprehensive plan provides, in relevant part:

11 "15. The city shall regulate the removal of trees
12 in order to preserve the city's aesthetic
13 character, as well as to control problems
14 associated with soil erosion and landslide
15 hazards."

16 Under the applicable statutes, ordinances and
17 comprehensive plan provisions, the city is authorized to
18 regulate petitioner's proposed tree removal through the
19 permitting process.

20 The first assignment of error is denied.

21 **SECOND ASSIGNMENT OF ERROR**

22 As in their first assignment of error, petitioners
23 contend that "the permit criteria of the ordinance [were]
24 not written to deal with backyard landscaping of property
25 owners." Petition for Review 17. Petitioners argue that
26 because the ordinance is only applicable where the
27 applicants seek to build structures on their property, no
28 tree removal permit was required in this instance, and the

1 city's decision must be reversed.

2 The city responds that it interpreted its ordinance to
3 apply to the removal of all trees that fall within the
4 definition set forth in the city code, and that this
5 interpretation is entirely consistent with the city's
6 comprehensive plan and with the express language of the
7 ordinance. The findings adopted by the city provide, in
8 relevant part:

9 "[Petitioners] applied to cut down a Sitka spruce
10 tree which is 8" in diameter measured at four and
11 one-half feet above the natural grade. A tree of
12 this size meets the definition of a tree.
13 Pursuant to Section 17.04.560, cutting down a tree
14 which is 8" in diameter four and one-half feet
15 above the natural grade constitutes tree removal.
16 Section 17.70.020 requires that a permit be
17 obtained from the city prior to cutting down the
18 tree in question.

19 "[Petitioners] have argued that they are not
20 required to obtain a tree removal permit. The
21 first reason cited is that 'removal of this tree
22 on the [petitioners'] property planted by
23 [petitioners] after ownership, is not a tree
24 removal within the purview of the ordinance.' The
25 second reason cited is that 'the removal of the
26 tree at issue relates to required and reasonable
27 landscaping only, and does not fall within the
28 purpose and purview of [CBZO] 17.70.010(B).' The
29 third reason cited is that the proposed tree
30 removal is not in conjunction with the
31 construction of a home or other improvement.
32 Chapter 17.70 provides for only one exemption from
33 the requirement to obtain a tree removal permit.
34 Section 17.70.030(B) provides that dead trees may
35 be cut at the owner's discretion without a permit.
36 Because [petitioners'] tree is not dead and is
37 more than 6" in diameter measured at a height of
38 four and one-half feet above the natural grade, a
39 tree removal permit is required." Record 3-4.

1 The city's interpretation is consistent with the
2 express language of the ordinance and with section 15 of the
3 "General Development Policies" set forth in the city's
4 comprehensive plan. Petitioners have established no basis
5 for reversal or remand of the city's decision. ORS
6 197.829(1); Clark v. Jackson County, 313 Or 508, 836 P2d 710
7 (1992).

8 Petitioners also contend that the city's tree removal
9 ordinance is unconstitutionally vague. Although it is not
10 entirely clear from their brief, petitioners appear to argue
11 that the ordinance is impermissibly vague because the
12 criteria for tree removal are not applicable to petitioners'
13 situation. Petitioners' constitutional argument is
14 insufficiently developed for our review. Tylka v. Clackamas
15 County, 28 Or LUBA 417, 431 (1994).

16 The second assignment of error is denied.

17 **THIRD ASSIGNMENT OF ERROR**

18 Petitioners argue that the challenged decision is
19 unconstitutional in its application to petitioners because
20 it violates their right to equal privileges and immunities
21 under Article I, section 20 of the Oregon Constitution, and
22 their right to equal protection of the law under the
23 Fourteenth Amendment to the United States Constitution. In
24 support of this claim, petitioners submitted copies of 80
25 tree removal permit applications received by the city from
26 approximately January 26, 1995 through May 8, 1996. Record

1 115-224. The material facts of those applications and
2 resulting decisions by the city are summarized by
3 petitioners in a nine-column table that was also entered
4 into the record below. Record 33-35. Petitioners contend:

5 "In this matter, the schedule prepared and
6 included in the Summary of Facts (A-4), clearly
7 establishes that your petitioners, as absentee
8 homeowners and not as developers or members of the
9 City of Cannon Beach elite, are being deprived of
10 privileges and immunities, not upon the same terms
11 of others. The conduct of the action of the City
12 of Cannon Beach and the summary of its permits
13 granted, establishes that special privileges are
14 given to protect people or classes of people, to
15 wit: people who are constructing improvements,
16 developing property, maintaining right of ways
17 [sic], and related matters. * * * The fact that
18 the schedule of 80 applications establishes 76
19 permits granting removal, of in excess of 300 to
20 400 trees, and the fact that only four
21 applications have resulted in a complete denial is
22 especially relevant to the equal protection issue.
23 There is simply no rational basis to deny the
24 petitioners' application when hundreds of trees
25 are allowed to be cut by developers, the City
26 itself, and other residents." Petition for Review
27 18-19.

28 To the extent petitioners assert that the city's
29 application of its ordinance denies them, as absentee
30 homeowners, privileges or immunities equal to those
31 available to "the Cannon Beach elite," or other full-time
32 Cannon Beach residents, we first note that the ordinance
33 itself does not create classifications by calling for
34 disparate treatment of persons or groups such as "absentee
35 homeowners," or "full-time residents." On its face, the
36 ordinance merely establishes certain criteria that must be

1 met by anyone who wishes to remove a tree.¹ Thus, under the
2 terms of the ordinance, the "privilege" of removing a tree
3 is available to all on the same terms. See Hunter v. State
4 of Oregon, 306 Or 529, 533, 761 P2d 502 (1988). Further,
5 petitioners do not identify any evidence indicating that the
6 ordinance has been applied to absentee homeowners in an
7 impermissibly discriminatory fashion. Petitioners rely on
8 the fact that the city has denied only four tree removal
9 permits out of 80 applications received since January 26,
10 1995. Record 33-35. However, nothing in the record or in

¹CBZO 17.70.020 provides:

"Prior to tree removal, a permit shall be obtained from the city. In granting a permit, written findings that one or more of the following criteria has been met shall be made:

- "A. The necessity to remove tree(s) which pose a safety hazard;
- "B. The necessity to remove diseased tree(s) weakened by age, storm, fire or other injury;
- "C. The necessity to remove tree(s) in order to construct proposed improvements as a result of:
 - "1. The need for vehicular or utility access to property from city or private rights-of-way; in such cases, access shall be routed within the right-of-way, so as to preserve the maximum number of trees,
 - "2. The need for placement of the structure(s),
 - "3. The need for essential grade changes,
 - "4. The need to locate the structure so as to avoid unreasonable economic hardship, or
 - "5. The need for solar access, or the obtaining of views which cannot be accomplished by pruning."

1 petitioners' brief indicates that any of the four
2 applications denied by the city were submitted by absentee
3 homeowners. Petitioners' claim of unequal treatment to
4 absentee homeowners is without merit.

5 Petitioners further contend that, in the application of
6 its ordinance, the city extends "special privileges" to
7 "people who are constructing improvements, developing
8 property, maintaining right[s] of [way], and related
9 matters." Petition for Review 19. It is apparently
10 petitioners' position that the city's application of its
11 ordinance denies them, as individuals and as a class of
12 people who are not constructing improvements, developing
13 property, or maintaining rights-of-way, equal privileges or
14 immunities with those people or classes of people who are.

15 In order to claim inequality of treatment as a class,
16 petitioners must be members of a true class, whose disparate
17 treatment is "by virtue of characteristics they have apart
18 from the law in question." Hunter, 306 Or at 533; State v.
19 Clark, 291 Or 231, 240, 630 P2d 810 (1981); State v. Scott,
20 96 Or App 451, 456, 773 P2d 394 (1989). Such is not the
21 case here. The classifications alleged by petitioners arise
22 out of the specific criteria of the ordinance, which provide
23 that a permit will be granted where the applicant
24 establishes a "necessity to remove tree(s) in order to
25 construct proposed improvements." CBZO 17.70.020(C). Under
26 the ordinance, the necessity to remove a tree can be

1 established by showing, inter alia, a need for vehicle
2 access, placement of structures, or essential grade changes
3 arising out of the construction of proposed improvements.
4 Id. Thus, under the criteria set forth in the ordinance,
5 people who are planning to construct certain types of
6 improvements that require the removal of a tree will be
7 granted a permit to do so. Petitioners' failure to satisfy
8 the applicable permit criteria does not place them in an
9 impermissible "class" of non-developers. Nor do petitioners
10 identify any evidence indicating that individuals similarly
11 situated to petitioners have been granted tree removal
12 permits.

13 For the reasons set forth above, petitioners' claims
14 under Article I, section 20 of the Oregon Constitution are
15 without merit. Petitioners' equal protection claim under
16 the Fourteenth Amendment to the United States Constitution
17 is insufficiently developed for our review. Tylka, 28 Or
18 LUBA at 431.

19 The third assignment of error is denied.

20 **FOURTH ASSIGNMENT OF ERROR**

21 Petitioners contend that the challenged decision is an
22 unconstitutional taking of property without just
23 compensation under Article I, section 18 of the Oregon
24 Constitution and the Fifth Amendment to the United States
25 Constitution. Petitioners argue that the city's denial of
26 the requested tree removal permit has "taken" that portion

1 of petitioners' property equal to the circumference and
2 diameter of the foliage and surface roots of the tree
3 because that property "is no longer usable either for
4 landscaping or other purposes." Petition for Review 21.

5 In circumstances such as these, where the city's
6 decision does not contemplate the eventual acquisition of
7 petitioners' property for public use, but rather applies
8 zoning regulations that limit the permissible uses of
9 property, there is no unconstitutional taking if the
10 challenged decision allows petitioners "some substantial
11 beneficial use" of their property. Dodd v. Hood River
12 County, 317 Or 172, 855 P2d 608 (1993) (quoting Fifth Avenue
13 Corp. v. Washington County, 282 Or 591, 609, 581 P2d 50
14 (1978)); Stern v. City of Portland, 26 Or LUBA 544, 546-47
15 (1994). Although the city's decision may deprive
16 petitioners of their ability to landscape their yard in
17 precisely the manner they would prefer, it is clear that
18 petitioners will retain substantial beneficial use of their
19 property with the tree remaining in place.

20 For similar reasons, petitioners' argument under the
21 Fifth Amendment to the United States Constitution also
22 fails. The city's denial of petitioners' tree removal
23 application has not left petitioners without an economically
24 viable use of their property. See Nollan v. California
25 Coastal Comm'n, 483 US 825, 835-36, 107 S Ct 3141, 97 L Ed
26 2d 677 (1987); Agins v. City of Tiburon, 447 US 255, 260,

1 100 S Ct 2138, 65 L Ed 2d 106 (1980).

2 Petitioners' reliance on Dolan v. City of Tigard, 512
3 US 374, 114 S Ct 2309, 129 L Ed2d 304 (1994) is misplaced.
4 In Dolan, the United States Supreme Court held that, where a
5 local government requires a dedication of land from a
6 developer as a condition to proposed development, the local
7 government must first establish that there is "rough
8 proportionality" between the impacts of the proposed
9 development and the burden imposed on the developer. The
10 Oregon Court of Appeals has extended the rough
11 proportionality test of Dolan to apply not just to
12 conditions requiring dedications of real property, but also
13 to conditions requiring improvements to public property.
14 Clark v. City of Albany, 137 Or App 293, 904 P2d 185 (1995);
15 J.C. Reeves v. Clackamas County, 131 Or App 615, 887 P2d 360
16 (1994). However, the rule established in Dolan clearly does
17 not apply to local zoning decisions that merely limit the
18 available uses of private property.

19 Petitioners have cited no authority supporting their
20 position that the city has "taken" that portion of
21 petitioners' property defined by the circumference of the
22 foliage and surface roots of the tree. Petitioners have not
23 established that the city's denial of petitioners'
24 application for a tree removal permit is an unconstitutional
25 taking of property under either the Oregon Constitution or
26 the United States Constitution.

1 Petitioners' fourth assignment of error is denied.

2 **FIFTH ASSIGNMENT OF ERROR**

3 Petitioners contend that certain documents they
4 submitted to the city council after the conclusion of the
5 city council's de novo hearing on June 4, 1997 should have
6 been included in the record before this Board. The minutes
7 of the June 4, 1997 hearing indicate that the record was
8 closed on that date. Record 44. At that time, petitioners
9 did not request that the record remain open for the
10 submission of further evidence as allowed by ORS
11 197.763(6)(a). In this Board's Order on Record Objections
12 dated February 11, 1997, we denied petitioners' record
13 objections on the basis that the documents at issue were
14 submitted after the record was closed. We adhere to that
15 conclusion.

16 Petitioners' fifth assignment of error is denied.

17 The city's decision is affirmed.