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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

PAUL VISHER,
Petitioner,
vs.
CITY OF CANNON BEACH,
Respondent,
and
BREAKERS POINT HOMEOWNERS ASSN.,
MARK BORQUIST, BRUCE FRANCIS
and MEL SHULEVITZ,
Intervenors-Respondent.)

LUBA No. 98-030
FINAL OPINION
AND ORDER

Appeal from City of Cannon Beach.

Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioner. With him on the brief was Johnson, Kloos & Sherton.

No appearance by respondent.

Dean N. Alterman, Portland, and Marianne E. Brams, Portland, filed the response brief and argued on behalf of intervenors-respondent.

HANNA, Board Member, participated in the decision.

REMANDED 08/21/98

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

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the city's approval of a conditional
4 use permit to allow grading of a sand dune.

5 **MOTION TO INTERVENE**

6 Breakers Point Homeowners Assn., Mark Borquist, Bruce
7 Francis and Mel Shulevitz (intervenors), the applicants below,
8 move to intervene in this proceeding on the side of
9 respondent. There is no objection to the motion, and it is
10 allowed.

11 **FACTS**

12 On January 27, 1998, the city approved a conditional use
13 permit authorizing the removal of approximately 2,000 cubic
14 yards of sand from a dune on city property and placement of
15 the sand westward, closer to the ocean. Intervenors requested
16 this action to reduce the threat of sand inundation of their
17 condominiums and to enhance their ocean views.

18 On December 18, 1997, the planning commission approved
19 the conditional use permit, and on January 27, 1998, the city
20 council affirmed the planning commission's decision on appeal
21 by petitioner.

22 **FIRST ASSIGNMENT OF ERROR**

23 Petitioner argues that the city erred when it interpreted
24 Zoning Ordinance of Cannon Beach (ZOCB) 17.38.210.G.
25 Petitioner argues that "flood" is explicitly defined by the
26 city's code and is not subject to further interpretation, and

1 that the city erred when it interpreted "flood" to mean "base
2 flood," which is limited to a 100-year flood.¹ Petitioner
3 contends that under ORS 197.829, the city's interpretation is
4 inconsistent with (1) the express language of the code; (2)
5 the purpose of the code provision; and (3) the underlying
6 policy that provides the basis for the code provision. The
7 crux of petitioner's argument is that notwithstanding specific
8 code definitions, the city interpreted "flood" to mean "base
9 flood."² ZOCB 17.38.030 states:

10 "'Flood' or 'flooding' means a general and temporary
11 condition of partial or complete inundation of
12 normally dry land areas from:

13 "1. The overflow of inland or tidal waters; and/or

14 "2. The unusual and rapid accumulation of runoff of
15 surface waters from any source."

16 ZOCB 17.38.030 also defines "base flood," stating:

17 "'Base flood' means the flood having a one percent
18 chance of being equalled or exceeded in any given
19 year [commonly known as a 100-year flood]."

¹ZOCB 17.38.210 regulates coastal high-hazard areas, which it describes as being located within the areas of special flood hazard. Areas of special flood hazard are defined as those areas subject to a 100-year flood. ZOCB 17.38.210.G provides:

"Manmade alteration of sand dunes which would increase potential flood damage is prohibited."

ZOCB 17.38.030 defines "area of special flood hazard" as

"the land in the flood plain subject to a one percent or greater chance of flooding in any given year. Designation on maps always includes the letter A or V."

²At oral argument it was explained that the federal government provided the city with a "model" flood hazard code necessary to qualify for federal flood protection programs. The parties acknowledge that this code is not a model of clarity, and that "flood" and "base flood" are sometimes used interchangeably without reference to context.

1 Applying the definition of base flood to ZOCB
2 17.38.210.G, the city found that the sand dune alteration
3 would not increase potential 100-year flood damage.

4 We are required to affirm the city's interpretation of
5 its comprehensive plan and land use regulations unless it is
6 inconsistent with (1) the express language of the code; (2)
7 the purpose of the code provision; or (3) the underlying
8 policy that provides the basis for the code provision. ORS
9 197.829; Gage v. City of Portland, 319 Or 308, 316, 877 P2d
10 1187 (1994); Clark v. Jackson County, 313 Or 508, 514, 836 P2d
11 710 (1992). That means we must defer to a local government's
12 interpretation of its own enactments, unless that
13 interpretation is "so wrong as to be beyond colorable
14 defense." Reeves v. Yamhill County, 132 Or App 263, 269, 888
15 P2d 79 (1995); Zippel v. Josephine County, 128 Or App 458, 876
16 P2d 854, rev den 320 Or 272 (1994). See also Goose Hollow
17 Foothills League v. City of Portland, 117 Or App 211, 217, 843
18 P2d 992 (1992); Melton v. City of Cottage Grove, 28 Or LUBA 1,
19 aff'd 131 Or App 626, 887 P2d 359 (1994).

20 Petitioner argues that the city's substitution of "base
21 flood" for "flood" when it applied ZOCB 17.38.210 is an
22 interpretation in the absence of an ambiguity. Thus,
23 petitioner argues that, under the express language of the code
24 provision, "flood" is not an appropriate subject for city
25 interpretation.

1 In addition to arguing that the city's interpretation
2 violates the express code language, petitioner argues that the
3 interpretation violates the purpose and polices underlying the
4 code. Petitioner points to the ZOCB 17.38.010 purpose
5 statement that the Flood Hazard Overlay Zone (FHO) is needed
6 to "regulate the use of those areas subject to periodic
7 flooding, to promote the public health, safety and general
8 welfare and to minimize public and private losses due to flood
9 conditions." Petitioner also points to the seven objectives
10 of the FHO stated at ZOCB 17.38.020, which he contends each
11 use some form of "flood" other than "base flood."³

³ZOCB 17.38.020 provides:

"In advancing these principles [the purpose statement] and the general purposes of the comprehensive plan and zoning ordinance, the specific objectives of this zone are as follows:

- "A. To combine with the present zoning requirements certain restrictions made necessary for the known flood hazard areas to promote the general health, welfare and safety of the city;
- "B. To prevent the establishment of certain structures and land uses in areas unsuitable for human habitation because of the danger of flooding, unsanitary conditions or other hazards;
- "C. To minimize the need for rescue and relief efforts associated with flooding;
- "D. To help maintain a stable tax base by providing for sound use and development in flood-prone areas and to minimize prolonged business interruptions;
- "E. To minimize damage to public facilities and utilities located in flood hazard areas;
- "F. To ensure that potential home and business buyers are notified that property is in a flood area;
- "G. To ensure that those who occupy the areas of special flood hazard assume responsibility for their actions." (Emphasis added.)

1 Petitioner also argues that the city's interpretation
2 violates the city's comprehensive plan Flood Hazard Policy 3,
3 which states that "[d]evelopment in areas subject to severe
4 ocean erosion or flooding (the velocity zone) shall be
5 constructed in such a way that hazards are minimized."
6 Petitioner argues that the challenged decision is inconsistent
7 with this plan policy because by reducing a dune that he
8 argues provides flood protection, flood hazards are increased.

9 Intervenors respond generally that the city's
10 interpretation of ZOCB 17.38.210.G "is the only interpretation
11 which is reasonable and consistent with the Comprehensive Plan
12 and the rest of the Code," and that under petitioner's reading
13 of ZOCB 17.38.210, Sand Dune Construction Policy 7, which
14 provides for grading foredunes, would be nullified.⁴
15 Intervenors-Respondent's Brief 3. Intervenors offer several
16 bases to refute petitioner's argument. Intervenors contend
17 that petitioner's reading of ZOCB 17.38.210.G would preclude
18 any grading of dunes in the city because "all of the ocean
19 front beaches within Cannon Beach city limits are designated
20 V-Zones, and thus, coastal high hazard areas." (Emphasis in
21 original.) Intervenors-Respondent's Brief 4.

⁴Sand Dune Construction Policy 7 provides, in relevant part:

"Grading or sand movement necessary to maintain views or to prevent sand inundation may be allowed for structures in foredune areas only if the area is committed to development or is within an acknowledged urban growth boundary and only as part of an overall plan for managing foredune grading."

1 Intervenors argue that ZOCB 17.38.210, by its terms,
2 regulates only areas subject to base floods. ZOCB 17.38.210
3 states, in relevant part:

4 "Coastal high-hazard areas (V zones) are located
5 within areas of special flood hazard established in
6 Section 17.38.040. These areas have special flood
7 hazards associated with high velocity waters from
8 tidal surges and, therefore, in addition to meeting
9 all provisions in this chapter, the following
10 provisions also apply:

11 "* * * * *

12 "G. Manmade alteration of sand dunes which would
13 increase potential flood damage is prohibited."

14 The challenged decision supports intervenors' contention,
15 stating:

16 "Section 17.38.210.G is part of a section, Section
17 17.38.210, that pertains to coastal high-hazard
18 areas. Coastal high-hazard areas are defined as
19 'located within the areas of special flood hazard.'
20 In turn, the definition section of the flood hazard
21 overlay zone defines 'areas of special flood hazard'
22 and 'special flood hazard area' as those areas that
23 are subject to a one percent or greater chance of
24 flooding in any given year, or stated in another
25 way, areas subject to inundation from the waters of
26 a one-hundred-year flood. Thus the purpose of the
27 standards applicable to the coastal high-hazard area
28 is to provide protection from the 100 year flood
29 event and subsection G is specifically intended to
30 prevent manmade alterations that have the potential
31 to increase the risk of flood damage associated with
32 a 100-year storm event."

33 While it may be true that the objectives recited at ZOCB
34 17.38.020 do not use "base flood," the objectives do use a
35 version of "special flood hazard area," which by code
36 definition is a base flood area. More importantly, we agree
37 that the introductory language of ZOCB 17.38.210 can be read
38 to establish the parameters for all of the subsections in that

1 section, including subsection G. Thus, the city's conclusion
2 that the reference to "flood" in ZOCB 17.38.210.G is limited
3 to a "base flood," is not inconsistent with the express code
4 language, policy or purpose.⁵ Accordingly, it is not clearly
5 wrong or beyond colorable defense.⁶

6 The first assignment of error is denied.

7 **SECOND ASSIGNMENT OF ERROR**

8 Petitioner argues that the city failed to apply the
9 comprehensive plan's Northside Policy 3, which he argues is a
10 mandatory standard, and which provides:

11 "Active foredunes shall remain in their undeveloped
12 state in order to provide a buffer from ocean and
13 wind erosion (please refer to the Hazards section of
14 the Plan)."

15 Intervenors respond that petitioner did not raise this
16 issue in a timely manner below, and thus may not raise it now.
17 The challenged decision reflects that petitioner appeared
18 before the planning commission and did not raise the issue in
19 that proceeding. Intervenors contend that petitioner raised
20 the applicability of this criterion for the first time in a
21 letter attached to his notice of appeal when he appealed the
22 planning commission decision to the city council. The city

⁵Flood Hazard Policy 3 is clearly implemented by the "Hazards" section of the ZOCB.

⁶Because we decide this assignment based on the language of ZOCB 17.38.210, it is not necessary for us to address the city's additional rationale that ZOCB 17.38.170, which states that all special flood areas for which base flood elevation data has been provided are subject to the provisions of ZOCB 17.38.180 to 17.38.220, somehow limits the scope of ZOCB 17.38.210 to base flood areas.

1 council reviewed the planning commission record but did not
2 conduct an evidentiary hearing, deciding that petitioner was
3 precluded from raising the applicability of Northside Policy 3
4 after the planning commission hearing.

5 Under ORS 197.835(4)(a) a petitioner may raise new issues
6 to this Board if:

7 "The local government failed to list the applicable
8 criteria for a decision under ORS 197.195 (3)(c) or
9 197.763 (3)(b), in which case a petitioner may raise
10 new issues based upon applicable criteria that were
11 omitted from the notice. However, the board may
12 refuse to allow new issues to be raised if it finds
13 that the issue could have been raised before the
14 local government[.]

15 In Tandem Development Corporation v. City of Hillsboro,
16 ___ Or LUBA ___ (LUBA No. 97-005, June 30, 1997), we did not
17 allow petitioner to raise new issues to us because we found
18 that the criterion the petitioner did appeal to us was
19 proximately located to the allegedly applicable criterion.
20 Additionally the petitioner did not say that he was unaware of
21 the existence of the allegedly applicable criterion. However,
22 in DeBates v. Yamhill County, ___ Or LUBA ___ (LUBA No. 96-
23 100, January 3, 1997), slip op 7, we allowed petitioner to
24 raise a new issue before us because the petitioner was "not
25 informed of the existence or possible application of the
26 relevant provision."

27 Northside Policy 3 is located under the title "Area
28 Policies, Recommendations and Guidelines" at page seven of the
29 comprehensive plan. The plan provision the city identified as
30 the applicable criterion is found under the "Hazards" subtitle

1 of the "Element Policies, Recommendations and Guidelines" title
2 on page 22 of the plan. We find the limited DeBates exception
3 applicable to this case. Petitioner would not likely notice
4 the Northside Policy 3 provision during his review of the
5 "Hazards" provisions. Moreover, petitioner raised the
6 applicability of Northside Policy 3 as soon as he became aware
7 of it, in his appeal to the city council. He did not wait to
8 raise the issue before LUBA.

9 The city has not yet determined if Northside Policy 3 is
10 a criterion applicable to the challenged decision. We remand
11 this matter to the city to make that decision.

12 The second assignment of error is sustained.

13 The city's decision is remanded.