

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

3
4 HALVORSON MASON CORPORATION,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF DEPOE BAY,
10 *Respondent.*

11
12 LUBA No. 2000-057

13
14 VISTA LAND CORPORATION,
15 *Petitioner,*

16
17 vs.

18
19 CITY OF DEPOE BAY,
20 *Respondent.*

21
22 LUBA No. 2000-060

23
24 FINAL OPINION
25 AND ORDER

26
27 Appeal from City of Depoe Bay.

28
29 Garry P. McMurry, Portland, filed a petition for review and argued on behalf of
30 petitioner Halvorson Mason Corporation.

31
32 Douglas R. Holbrook, Newport, filed a petition for review and argued on behalf of
33 petitioner Vista Land Corporation. With him on the brief was Litchfield and Carstens, LLP.

34
35 George B. Heilig, Corvallis, filed the response brief and argued on behalf of
36 respondent. With him on the brief was Cable, Huston, Benedict, Haagensen and Lloyd.

37
38 BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,
39 participated in the decision.

40
41 REVERSED

12/08/2000

42
43 You are entitled to judicial review of this Order. Judicial review is governed by the
44 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a city decision that preliminary planned development approvals expire two years after the effective date of such approvals.

FACTS

The challenged decision affects two planned developments located within the city limits of Depoe Bay.

A. Little Whale Cove Planned Development¹ (LUBA No. 2000-057)

The city approved a planned development application for Little Whale Cove submitted by Halvorson Mason Corporation (Halvorson) on February 2, 1976. The approval permitted a mixed-use residential development, including condominium housing and single-family dwellings on individual lots. Some ancillary uses, including supporting recreational facilities, were approved as part of the development. At the time of the Little Whale Cove approval, the city did not have its own zoning ordinance. The city applied the Lincoln County Zoning Code (LCZC) when it granted preliminary planned development approval for Little Whale Cove in 1976.

Approximately two months after the city granted preliminary planned development approval for Little Whale Cove, the city adopted the Depoe Bay Zoning Ordinance (DBZO). The zoning ordinance contains approval criteria for planned developments. On May 21, 1984, the city adopted the Depoe Bay Partition and Subdivision Ordinance (DBSO). DBSO 2.040(2) provides that tentative subdivision plan approvals expire two years following their initial approval.²

¹The two appeals were consolidated after the records were filed. Therefore, the record in LUBA No. 2000-057 is referred to as “Halvorson Record,” and the record in LUBA No. 2000-060 is referred to as “Vista Record.”

²DBSO 2.040 includes the following provisions:

1 In June 1977, Halvorson obtained a building permit for and constructed a large
2 recreation center on its property. Since 1977, approximately 80 percent of Little Whale Cove
3 has been developed in five separate phases, with three more phases yet to be completed. The
4 first five phases received final planned development plan approval in 1976, 1978, and 1993.³
5 In May 1996, Halvorson applied for permission to modify Phase VI to create 19 single-
6 family residential lots on six acres. Phase VI had previously been granted preliminary
7 approval for condominium development on a single lot. The planning commission granted
8 preliminary approval for modified Phase VI on August 21, 1996. In approving the planned
9 development modification, the planning commission applied the “procedural and substantive
10 requirements of the Depoe Bay Zoning [Ordinance].”⁴ Halvorson Record 51.

11 **B. SeaPointe Planned Development (LUBA No. 2000-060)**

12 On November 7, 1994, Vista Land Corporation (Vista) obtained preliminary planned
13 development approval for SeaPointe. The planned development was reviewed and approved
14 pursuant to DBZO 3.410. As approved, SeaPointe’s 12.56 acres were to be developed into 21
15 single-family dwellings on individual lots, 68 condominium units, 14 long-term rental units
16 and a single lot for a water tank.⁵ As was the case with Little Whale Cove, in approving

“The [tentative subdivision plan] approval is valid for two years from the effective date of that approval.” DBSO 2.040(3)(e).

“No more than sixty (60) nor less than ten (10) days prior to the expiration date of the tentative plan approval, City staff must notify the subdivider in Writing of the expiration of any unrecorded portion of the tentative plan.” DBSO 2.040(4)(a).

“A one year extension of a tentative plan approval may be requested. The Planning Commission may approve or disapprove a request for time extension if the tentative plat is substantially unchanged from the plan previously approved.” DBSO 2.040(4)(b).

³DBZO 3.410(4) provides that “approval to establish a [planned development overlay] zone shall constitute final approval of the plan for the planned development.”

⁴The planning commission did not follow the procedures that are specified for subdividing land in DBSO 2.040. We discuss these subdivision procedures later in this opinion.

⁵In 1996, the SeaPointe preliminary planned development approval was modified slightly to decrease the number of condominiums to 62 in 15 buildings, and to allow for the elimination of the water tank. This

1 SeaPointe, the city applied the planned development provisions of DBZO 3.410 and did not
2 apply or follow the procedures that are specified for subdividing land in DBSO 2.040.

3 **INTRODUCTION**

4 DBSO 2.040 sets out provisions for tentative plan and final plat approval for
5 subdivisions generally. DBSO 2.050 sets out specific provisions for “planned unit
6 subdivisions.”⁶ DBZO 3.410 sets out the procedures and standards for approval of “planned
7 development.”⁷ The lack of a clear connection between the planned development provisions
8 of DBZO 3.410 and the provisions of DBSO 2.050 for planned unit subdivisions is at the
9 heart of the controversy in this matter. We discuss those provisions generally, the city’s
10 apparent past practice under those provisions, and the challenged decision before turning to
11 the parties’ arguments.

12 **A. DBSO 2.040 and 2.050**

13 DBSO 2.040(1), (2) and (3) set out the standards and review procedure for granting
14 tentative subdivision plan approval. Tentative subdivision plan approval is valid for two
15 years and may be extended for one year under DBSO 2.040(4). DBSO 2.040(5), (6) and (7)
16 set out the requirements for submitting, approving and recording final subdivision plats. The

modification was approved with conditions on December 18, 1996. Neither party contends that these modifications are affected by the challenged decision.

⁶DBSO 1.030(20) provides:

“Planned Unit Subdivision: A subdivision of land in which the individual building sites may be reduced in size, but are compensated by area used in common for recreational or other open spaces purposes; Planned Unit subdivision involving dwelling or commercial units may incorporate detached, semi-detached, attached single-story, or multi-story units or any combination of the above. Such projects may also involve religious, cultural, recreational and commercial uses and purposes.”

⁷DBZO 1.030(106) provides:

“Planned Development (PD): A development in which the applicable subdivision zoning restrictions apply to the development as a whole rather than to each individual lot.”

1 DBSO also includes specific provisions for “planned unit subdivisions.” DBSO 2.050
2 provides:
3

1 “1. Purpose

2 “In order to permit greater flexibility in land development than that permitted
3 by traditional zoning and subdivision ordinances and to permit flexibility of
4 design that will encourage a more creative approach in the development and
5 use of land, the Planning Commission may authorize exceptions to the
6 regulations of this ordinance through the application of a Planned Unit
7 subdivision.

8 “When the individual lots are reduced in size below that required by the zone
9 in which the proposed division is located, a zone change to Planned
10 Development must be authorized prior to submitting the tentative plan.

11 “If a Planned Development has been authorized pursuant to applicable zone
12 regulations, the tentative plan and plat of the subdivision shall conform with
13 the preliminary plan of the Planned Development as approved by the Planning
14 Commission and City Council.

15 “2. Procedure for Consideration of Planned Unit Subdivision

16 “The tentative plan and plat application procedures for Planned unit
17 subdivisions are the same as stated in [DBSO 2.040].”

18 **B. DBZO 3.410**

19 DBZO 3.410 sets out a multi-step procedure for obtaining approval of a planned
20 development. The first step is submission of a preliminary plan for a planned development,
21 with the information that is required by DBZO 3.410(3)(a). DBZO 3.410(3)(b) through (e)
22 set out a procedure for review and approval of a preliminary plan for a planned development.
23 Following approval of a preliminary plan for a planned development, final approval requires
24 that the applicant initiate a request for a zoning map amendment. DBZO 3.410(3)(g).⁸
25 Approval of a planned development (PD) overlay zone “constitute[s] final approval of the

⁸DBZO 3.410(3)(g) provides:

“If the Planning Commission approves the preliminary plan of the planned development, the applicant may initiate a request for an amendment to the zoning map to establish a PD zone in combination with another zone. Amendment procedure shall be as specified in [DBZO] 9.010 to 9.020 * * *. If the Planning Commission finds to the contrary, it may recommend [that] the application be denied or returned to the applicant for revision.”

1 plan for the planned development.” DBZO 3.410(4). DBZO 3.410(6) requires that building
2 permits be obtained within two years after final planned development approval and DBZO
3 3.410(7) requires that development be substantially completed within five years following
4 final planned development approval.

5 **C. The City’s Past Practice**

6 No part of DBZO 3.410 specifically addresses subdividing land and there are no
7 cross-references in DBZO 3.410 to the DBSO. From the briefs and the responses of the
8 parties to questions at oral argument it appears that it has been the city’s practice in the past
9 to grant preliminary plan approval for planned developments that include proposals to
10 subdivide land under DBZO 3.410(3)(e). Following approval of such preliminary planned
11 development plans under DBZO 3.410(3)(e), the city apparently has approved final planned
12 development plans under DBZO 3.410(4) and has allowed such final planned development
13 plans to be recorded. Further, the city has allowed the development and sale of lots without
14 also requiring separate review and approval of a tentative subdivision plan and a final
15 subdivision plat under DBSO 2.040.⁹

16 **D. The Decision**

17 On February 3, 1998, the city attorney issued a legal opinion to the effect that
18 planned developments that include proposals to subdivide land could be approved under
19 *either* DBZO 3.410 *or* DBSO 2.050.¹⁰ In other words, the February 3, 1998 letter takes the
20 position that an applicant for a planned development that will subdivide land may seek

⁹We need not determine in this appeal whether this past practice is correct under the DBZO and DBSO. However, this past practice and the confusion it has created form the critical background for this appeal.

¹⁰The February 3, 1998 letter states in part:

“A developer may seek approval of a planned development under the Depoe Bay Zoning Ordinance Section 3.410 or Depoe Bay Partition and Subdivision Ordinance Section 2.050. The standards and criteria for a planned development are different between the two sections.” Vista Record 36.

1 approval for a “planned unit subdivision” under DBSO 2.050 or seek approval of a “planned
2 development” under DBZO 3.410. The city attorney also concluded that, following
3 preliminary planned development approval under DBZO 3.410(3), there is no specific
4 deadline under DBZO 3.410 for seeking final planned development approval through
5 application of the planned development overlay zone under DBZO 3.410(3)(g).¹¹

6 In 1999, a question arose regarding the potential applicability of the two-year
7 deadline for final subdivision plat approval imposed by the DBSO to preliminary planned
8 development approval decisions governed by DBZO 3.410. On December 20, 1999, a new
9 city attorney issued an opinion that appears to conclude that the DBSO 2.040(3)(e) two-year
10 time limit applies to preliminary planned development approval decisions under DBZO
11 3.410(3). Halvorson Record 214-15; Vista Record 169-70.¹²

12 On January 10, 2000, the city council and the planning commission met to discuss the
13 issues involving the two legal opinions.¹³ On January 11, 2000, apparently relying on the
14 second legal opinion, the city council voted to send a notice to “any applicant that has a
15 tentative plan of the expiration of that plan, that the plan has expired, and that they may come
16 in and ask the Planning Commission for a one-year extension.” Halvorson Record 210; Vista
17 Record 70. On February 1, 2000, the city council considered the two legal opinions in

¹¹In the February 3, 1998 letter, the city attorney notes that in granting preliminary planned development plan approval, the planning commission must find under DBZO 3.410(3)(d)(4) that “[t]he plan can be completed within a reasonable period of time.” Halvorson Record 54; Vista Record 38. The city attorney opined in the February 3, 1998 letter that when the planning commission receives a request for final planned development plan approval it should consider whether the request for final approval has been submitted within the “reasonable period of time” the planning commission identified under DBZO 3.410(3)(d)(4) when it granted preliminary planned development plan approval. *Id.*

¹²We say it “appears” to reach that conclusion because the parties read it to reach that conclusion. The letter can also be read simply to say that an approved “tentative plan” for a “planned unit subdivision” under DBSO 2.040 and 2.050 is subject to the two-year deadline for final plat approval imposed by DBSO 2.040(3)(e). The only reference in the letter to DBZO 3.410 is in a footnote. That footnote reference is unclear to say the least and can be read to say the author did not even consider whether DBSO 2.040(3)(e) applies to preliminary planned development decisions under DBZO 3.410(3). Halvorson Record 215; Vista Record 170.

¹³No record is provided as to the contents of this meeting.

1 executive session. The council reconvened in public session and voted, without discussion, to
2 send a letter to Halvorson.¹⁴ On February 4, 2000, the city planner, at the request of the
3 planning commission, sent a letter to Vista and Halvorson stating that “The Depoe Bay
4 Planning Commission has recently determined that all planned development subdivision
5 tentative approvals are subject to a two year time limit.” Halvorson Record 196; Vista
6 Record 143. Petitioners separately appealed this letter to the city council.

7 At the April 18, 2000 appeal hearing, the city council combined the two appeals.
8 After testimony, the city council voted unanimously to affirm the planning commission’s
9 decision. The city council issued its written decision on May 2, 2000. The city council’s
10 decision takes the position that the preliminary planned development approvals for Little
11 Whale Cove and SeaPointe that were granted under DBZO 3.410(3) in 1996 and 1994,
12 respectively, also constitute tentative planned unit subdivision approval decisions under
13 DBSO 2.040(3), which are subject to the two-year deadline for final plat approval that is
14 imposed by DBSO 2.040(3)(e). The written decision advises both petitioners that they have
15 60 days to seek a one-year extension under DBSO 2.040(4).

16 These appeals followed.

17 **FIRST ASSIGNMENTS OF ERROR (HALVORSON AND VISTA)**

18 Halvorson argues that the time limits that may be applicable to other tentative
19 subdivision plats are not applicable to the Little Whale Cove planned development because
20 the Little Whale Cove development was approved and zoned as a planned development
21 pursuant to the LCZC. According to Halvorson, the 1976 decision was a final approval of the
22 entire planned development, including the proposed land divisions and, therefore, any
23 modifications to the planned development should be subject to only those land use
24 regulations that were in place at the time of the original approval. Halvorson argues that the

¹⁴The record does not address the effect of the application of DBSO Article 2 on Vista. We assume that at the time of the city council’s initial notification decision, only Little Whale Cove was thought to be affected.

1 city has approved all previous phases over the past 24 years pursuant to either the LCZC or
2 the DBZO, and has never previously applied the time limits found in DBSO 2.040.

3 Vista's first assignment of error presents a similar argument. Vista argues that the city
4 has misinterpreted its ordinances by applying the time limitations found in the DBSO to the
5 SeaPointe planned development. Vista contends that the planning commission approved the
6 SeaPointe planned development solely under the provisions found in DBZO 3.410 and that
7 the city's new, retroactive application of DBSO 2.040 to the SeaPointe planned development
8 creates an absolute development deadline where one did not previously exist.

9 Both petitioners assert that the evidence in the record demonstrates that, at the time
10 the two developments were approved, the city considered DBZO 3.410 and the DBSO to
11 operate independently. According to petitioners, planned development approvals that
12 resulted from the application of the PD overlay zone constituted final subdivision plat
13 approvals in that lots could be sold without further review or approval pursuant to DBSO
14 2.040.¹⁵

15 The city responds that Halvorson's Little Whale Cove and Vista's SeaPointe qualify
16 as subdivisions as they each propose to divide land into more than four lots. According to the
17 city, even if Halvorson's initial planned development approval is not subject to the time
18 limitations contained in DBSO 2.040 because the subdivision ordinance was adopted after
19 the 1976 approval, the 1996 application to modify the planned development plan constitutes
20 a separate application for a tentative subdivision plat approval, and is thus governed by the
21 subdivision ordinance provisions.¹⁶ The city contends that Halvorson's 1996 modification

¹⁵The city does not dispute that it has, in the past, treated planned development plans as subdivision plats, and that both Little Whale Cove and SeaPointe planned developments have conveyed lots to other parties in accordance with those planned development plans without filing separate subdivision plats for review and approval pursuant to DBSO 2.040.

¹⁶The city's findings of fact and conclusions of law and order state in part:

1 application and Vista’s 1994 application for the SeaPointe planned development are subject
2 to DBSO 2.040 because the applications were submitted after the subdivision ordinance was
3 adopted. The city argues that conceptual approval of a proposed land division as part of an
4 approval of a plan for planned development does not result in the actual division of land. The
5 city contends that it is necessary to file a final subdivision plat in order to effect the land
6 division.

7 ORS 227.178(3) provides in part:

8 “[A]pproval or denial of [an] application shall be based upon the standards
9 and criteria that were applicable at the time the application was first
10 submitted.”

11 According to the Court of Appeals, the purpose of ORS 227.178(3) is

12 “* * * to assure both proponents and opponents of an application that the
13 substantive factors that are actually applied and that have a meaningful impact
14 on the decision permitting or denying an application will remain constant
15 throughout the proceedings.” *Davenport v. City of Tigard*, 121 Or App 135,
16 141, 854 P2d 483 (1993).

17 All parties agree that some sort of tentative land division approvals took place in
18 1994 for the SeaPointe planned development¹⁷ and in 1996 for Phase VI of the Little Whale
19 Cove planned development.¹⁸ The question before us is whether DBSO 2.040(3)(e) is among
20 those “standards and criteria that were applicable at the time the application was first
21 submitted” as those terms are used in ORS 227.178(3). The city contends that the applicants
22 are obligated to follow the ordinances in effect at the time the relevant applications were
23 submitted, and those ordinances include the DBSO. The city argues that its failure to list or
24 discuss the DBSO deadline provisions for filing a final subdivision plat in its staff reports

“The City Council concludes that the [1996] application of [Halvorson was] to create four or more lots and [is] therefore [a] subdivision[.]” Halvorson Record 68.

¹⁷Halvorson Record 175; Vista Record 45 and 81.

¹⁸Halvorson Record 44-51; Vista Record 40-44.

1 and decisions does not mean that those provisions do not apply. The city contends that the
2 deadline provisions do not constitute a basis for “approval or denial” of the initial
3 applications and, therefore, the city is not obliged by either ORS 197.763(5)(a) or ORS
4 227.178(3) to include the DBSO final plat deadline provisions in any staff report dealing
5 with a proposed planned development.¹⁹

6 The city’s 1996 approval of the Little Whale Cove planned development modification
7 does not refer to DBSO 2.040; the order’s only citations to the DBSO are to Articles 3, 5, 10,
8 11, and 12.²⁰ The only reference to a time limit in the 1996 decision is consistent with the
9 original approval for Little Whale Cove and DBZO 3.410(3)(d)(4), in that the order
10 concludes that “[t]he development will be completed within a reasonable period of time.”
11 Halvorson Record 51.

12 Vista filed its application for the SeaPointe planned development in 1994. The final
13 order from the planning commission approving the SeaPointe planned development notes
14 that the project is to be completed in several phases and its anticipated construction time will
15 be six years depending upon “market conditions.”²¹ Additionally, neither the final order nor
16 the staff report references DBSO 2.040. Like the 1996 Little Whale Cove approval, the only
17 reference to a time limit is a statement in the staff report that finds the development can “be

¹⁹ORS 197.763(5)(a) requires, in relevant part, that prior to the commencement of a land use hearing, the local government shall make a statement that includes a list of the “applicable substantive criteria.”

²⁰The order states in its conclusion section c:

“The application complies with applicable provisions of the Subdivision and Partition Ordinance (No. 111, Article 3: Section 3.015-3.095, Section 3.140-3.180; Article 5: Section 5.010; Article 10: Section 10.010; Article 11: Section 11.010, and Article 12: 12.010).” Halvorson Record 51.

²¹The planning commission’s final order states:

“* * * The applicant has indicated this project will be built in eight (8) phases; with the first phase consisting of 5 lots and a greenbelt. Market conditions will determine the rates of construction of the succeeding phases but it is anticipated that all phases will be constructed within six years.” Vista Record 93.

1 completed within a reasonable period of time,” and the staff report’s conclusion that the
2 development timeframe complies with DBZO 3.410.²²

3 For purposes of this opinion, we assume that the city would be within its discretion to
4 interpret DBZO 3.410 in a manner that would allow the city to conclude that a planned
5 development approval subject to DBZO 3.410 also constitutes tentative planned unit
6 subdivision approval under DBSO 2.040(3) and 2.050. However, for the city to apply that
7 new interpretation to its 1994 Little Whale Cove Phase VI and 1996 SeaPointe approvals
8 would subject those approvals to “standards and criteria” that were *not* applicable at the time
9 those decisions were rendered. Neither of those decisions includes any reference to tentative
10 plan approval or final plat approval under DBSO 2.040 or any reference to “planned unit
11 subdivisions” under DBSO 2.050. Both decisions are entirely consistent with the parties’
12 representations that the city’s practice at that time was to allow final approval and recording
13 of such planned development plans under DBZO 3.410(4) when an application for a PD
14 overlay zone is approved. DBZO 3.410(4) itself imposes no time limit for seeking approval
15 of the PD overlay zone.²³

16 The city may be able to apply its new interpretation of DBZO 3.410 and DBSO 2.040
17 when it reviews future applications for planned development approval under DBZO 3.410,
18 including future applications for modification of the Little Whale Cove and SeaPointe

²²The staff comments state:

“The zoning provides that if no building permits have been issued within two years of the date of final approval of the Planned Development, it shall be terminated and the zone change automatically repealed, unless a request to extend the time limit is approved by the Planning Commission.” Vista Record 118.

²³DBZO 3.410(3)(f) provides that the city can impose any conditions it finds necessary. However, the 1994 and 1996 decisions did not include any condition that the applicants seek final planned development approval within any particular time limit.

1 planned developments.²⁴ However, the city may not apply that new interpretation
2 retroactively to planned developments that were granted preliminary approval under DBZO
3 3.410 under the city’s prior procedure of allowing planned developments, which include
4 proposed subdivisions, to elect whether to proceed under DBZO 3.410 or DBSO 2.040 and
5 2.050. *See Holland v. City of Cannon Beach*, 154 Or App 450, 459, 962 P2d 701, *rev den*
6 328 Or 115 (1998) (city may not change its interpretation concerning the inapplicability of an
7 approval criterion after its initial decision to deny a permit based on another standard is
8 remanded on appeal). Having taken the apparent position in the 1994 and 1996 approvals
9 that DBSO 2.040 and 2.050 do not apply, the city cannot now seek to apply those
10 standards.²⁵

11 Halvorson’s first assignment of error is sustained.

12 Vista’s first assignment of error is sustained.

13 **CONCLUSION**

14 OAR 661-010-0073(1)(c) provides that the Board shall reverse a limited land use
15 decision when:

16 “The decision violates a provision of applicable law and is prohibited as a
17 matter of law.”

18 The city erred in retroactively applying the deadlines contained in DBSO 2.040 to the
19 1994 application involving the SeaPointe planned development and the 1996 modification of
20 the Little Whale Cove planned development plan. Therefore, we do not address petitioners’
21 remaining assignments of error, which pertain either to the procedures used by the city to

²⁴The simplest way to avoid any possible confusion in this regard would be to include a condition of planned development approval under DBZO 3.410(3)(f) that specifies a deadline for seeking approval of any required subdivision final plats.

²⁵We emphasize that our extension of *Holland* in this case is limited. It is based on the parties’ apparent agreement regarding the city’s past practices in approving planned developments such as Little Whale Cove and SeaPointe, without requiring tentative subdivision plan and final subdivision plat approval under DBSO 2.040, and on the fact that the 1994 and 1996 decisions refer to some sections of the DBSO as being applicable, without also referring to DBSO 2.040.

- 1 reach its decision or to the effect the city's 2000 interpretation may have on the Little Whale
- 2 Cove and SeaPointe developments.
- 3 The city's decision is reversed.