

LAND USE
BOARD OF APPEALS

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

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RON MORRISON, dba)
MORRISON FAMILY TRUE VALUE)
HOME CENTER,)
Petitioner,)
vs.)
CITY OF CANNON BEACH,)
Respondent.)

LUBA No. 83-001
FINAL OPINION
AND ORDER

Appeal from the City of Cannon Beach.

Nicholas D. Zafiratos, Astoria, filed the Petition for Review and argued the cause on behalf of Petitioner. With him on the brief were Zafiratos and Roman.

Respondent Cannon Beach waived appearance.

BAGG, Board Member.

Remanded 07/18/83

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a), as amended by Oregon Laws 1981, ch 748.

1 BAGG, Board Member.

2 NATURE OF THE DECISION

3 Petitioner appeals the partial grant, with conditions, of
4 his request to expand an existing conditional use in the City
5 of Cannon Beach. In granting petitioner's request, the city
6 attached a condition limiting the height of the expansion to 18
7 feet. Petitioner asks that the Board reverse the decision.

8 FACTS

9 Petitioner owns and operates a hardware store in the City
10 of Cannon Beach. Petitioner requested an expansion of his
11 hardware store so as to facilitate sales of building
12 materials. Petitioner's property is located in the C-1,
13 Limited Commercial Zone, and building material sales is a
14 conditional use in that zone.

15 The expansion was approved by the city's Design Review
16 Committee and the Planning Commission. See record, p. 29, 25.
17 The approval allowed petitioner's request to expand his
18 building to a height of 24 feet. The maximum building height
19 in the C-1 zone is 28 feet (for a flat roof structure). Zoning
20 Ordinance of Cannon Beach, Oregon (Ordinance 79-4A), p. 22.

21 The Planning Commission decision was appealed to the city
22 council. The city council upheld the expansion request but
23 limited the building to 18 feet in height.

24 This same conditional use request was before the Board in
25 Morrison v City of Cannon Beach, 6 Or LUBA 74 (1982),
26 hereinafter cited as Morrison I. The Board remanded the city's

1 decision, in part, because the Board was unable to find
2 substantial evidence in the record to support the city's
3 conclusion that the proposed use was not in keeping with the
4 size and character of surrounding uses. See Morrison I at 6 Or
5 LUBA 75-79.

6 After the remand and on December 7, 1982, the city adopted
7 new findings of fact. The record shows an agenda for the
8 December 7 city council meeting noting "Morrison/LUBA: Findings
9 of Fact." The minutes of that meeting reveal that Mr.
10 Morrison, petitioner, was present. The minutes further reveal
11 that there was "some further discussion," about the matter;
12 however, there is no indication that the city considered any
13 evidence beyond that obtained in the earlier proceeding.
14 Minutes of December 7, 1982 meeting, p. 7.

15 The new document differs from the ones reviewed in Morrison
16 I, in that it includes two maps. The first appears to be a lot
17 and block map of the immediate area in Cannon Beach with
18 certain properties shaded. At the bottom of the map is a note
19 showing that the shaded areas represent "Objecting Property
20 Owners." The zoning of the shaded properties is not shown.
21 Further, there are lines on the lot and block map that are not
22 explained but appear to run through the Morrison True Value
23 Hardware property and on through some of the objecting property
24 owners' properties. The second map shows parallel lines which
25 are labeled "Field of vision to the ocean due to topography."
26 As we understand the two maps together, they show the location

1 of the "objecting properties" and a field of view running from
2 the objectors' property (shaded on both maps) to the ocean.

3 Other than minor wording changes in the new order, the
4 changes in the findings under review here include
5 acknowledgment of an appearance by Abner Childress, "for the
6 appellants," a reference to the earlier appeal of the city's
7 action to LUBA and acknowledgment of this Board's order of
8 remand. Included also is a conclusion that the increased
9 height is "not in the best interest of the surrounding
10 property."

11 ASSIGNMENT OF ERROR NO. 1

12 "The City Council did not have jurisdiction to issue
13 new Findings of Fact since it failed to notify the
14 adjacent property owners and the general public by the
manner specified in the Cannon Beach City Ordinances."

15 Petitioner says Section 10.050(2)(a)(b) of the zoning
16 ordinance requires the city council to give notice to adjacent
17 property owners and notice generally by newspaper whenever the
18 city is required to hold a public hearing. The Board
19 understands petitioner to allege the city was required to hold
20 a public hearing in order to adopt new findings of fact after
21 the remand from this Board. Petitioner also asserts the city
22 failed to have an ordinance that adequately informs petitioner
23 of his rights on appeal. Petitioner was denied due process
24 because he was not informed as to how the city would proceed to
25 consider the case.

26 The record reveals the petitioner was present at the time

1 the city considered new findings of fact. The minutes do not
2 show the nature of the discussion between the petitioner and
3 the city council members, but the minutes do show that some
4 discussion did occur. See Minutes of December 7, 1982 meeting
5 at p. 7. The petitioner's presence and the fact that he spoke
6 to the council precludes a finding the city acted in error as
7 alleged by petitioner. This Board may reverse or remand a
8 decision on procedural irregularities only when those
9 irregularities are shown to create prejudice. These
10 circumstances do not amount to prejudice as petitioner had the
11 opportunity to object to the proceedings and, conceivably,
12 encourage the city to remedy any existing procedural error.
13 The minutes do not show the petitioner to have objected to the
14 city's procedure. 1979 Or Laws, ch 772, sec 5(4)(a)(B); Dobaj
15 v Beaverton, 1 Or LUBA 237 (1980).

16 This assignment of error is denied.

17 ASSIGNMENT OF ERROR NO. 2

18 "The decision of the City Council modifying the
19 Planning Commission ruling is void because the City
20 Council did not receive a report and recommendation
21 from the Planning Commission prior to the hearing on
22 the appeal."

23 Section 10.020 of the zoning ordinance controls appeals
24 from the planning commission to the city council. It provides
25 in part, that

26 "[i]f the appeal is filed within the 10 day period the
City Council shall receive a report and recommendation
on it from the Planning Commission and shall hold a
public hearing on the appeal." Ordinance 79-4A,
Section 10.020, p. 75.

1 Petitioner claims there is no report. The existence of the
2 word "shall" in the provision means that it is mandatory, and a
3 decision lacking the required report must be reversed as a
4 matter of law, according to petitioner.

5 It is not clear whether the petitioner is talking about the
6 original hearing on this permit before the city council or
7 whether petitioner is referring to the December 7, 1982 meeting
8 in which the city adopted new findings pursuant to this Board's
9 order of remand. If petitioner is referring to the present
10 proceedings, the Board does not believe Section 10.020
11 applies. The remand was to the city council, and the Board is
12 not aware of any requirement that the Planning Commission begin
13 new proceedings because of a remand on the adequacy of the city
14 council's record and findings. If petitioner is talking about
15 the original proceeding in early 1982 resulting in the appeal
16 in 6 Or LUBA 74, the petitioner is too late. Petitioner should
17 have raised that argument during the course of the earlier
18 proceeding.¹

19 This assignment of error is denied.

20 ASSIGNMENT OF ERROR NO. 3

21 "The City Council on remand of this case from LUBA did
22 not prepare Findings consistent with the opinion on
23 remand and, therefore, the City Council decision
24 should be reversed."

25 Under this assignment of error, petitioner alleges the
26 Board's opinion in Morrison I mandated a more detailed
explanation of the city's reason that the building addition

1 would be out of character or size with the village character of
2 Cannon Beach. Petitioner alleges there is still no explanation
3 as to why the structure is out of character with the commercial
4 part of the city.

5 The city's findings in this issue are as follows with
6 Findings III and IV being quotes from the comprehensive plan:

7 "Page 5, Preamble

8 III

9 "It is recognized by the citizens of Cannon Beach, the
10 Planning Commission, and the City Council that Cannon
11 Beach is essentially a residential city which has,
12 over the years, developed a unique commercial district
13 which is noted for its village character.

12 IV

13 "This character has, and is, created by having charm
14 and design of buildings, by keeping buildings small in
15 scale...." Finding, p. 2.

15 The city's finding on this portion of its plan simply says:

16 "The proposed expansion with additional height from
17 the existing structure, will not result in a building
18 that is small in scale and therefore it is not
19 compatible with the village character of Cannon
20 Beach." Ibid.

19 The city added a conclusion that

20 "[t]he increased height of 24 feet is not in the best
21 interest of the surrounding property [sic] and
22 therefore, the height of the expanded structure shall
23 not exceed the 18 foot height of the present
24 structure." Finding, p. 3.

23 Petitioner is correct that the city's order does not
24 adequately explain how it is that this building addition would
25 be out of the "village character" of the city. There are
26 insufficient findings about the scale of buildings in the city

1 and about the scale of this building in relation to those
2 others. The city's findings simply do not make the comparison
3 that is required to demonstrate how it is that this proposal is
4 not within the character of the city.

5 This assignment of error is sustained insofar as it alleges
6 the city failed to fully explain the basis for its
7 decision.² See Heilman v City of Roseburg, 39 Or App 71, 591
8 P2d 390 (1979); Marracci v City of Scappoose, 26 Or App 131,
9 552 P2d 552, rev den (1976); Weyerhaeuser v Lane County, 7 Or
10 LUBA 42 (1982).

11 ASSIGNMENT OF ERROR NO. 4

12 "The City Council erred in amending the Planning
13 Commission order by limiting Petitioner's building
14 height to 18 feet, since there is no substantial
evidence in the record to support the findings relied
upon by the City Council."

15 In this assignment of error petitioner first attacks
16 Finding V which states:

17 "The proposed expansion with additional height from
18 the existing structure, will not result in a building
19 that is small in scale and therefore it is not
compatible with the village character of Cannon Beach."

20 Petitioner claims there is nothing in the record showing the
21 scale of the proposed building or of the other buildings in the
22 area.

23 The Board was not cited to and does not find evidence in
24 the record on the height and scale of buildings in the area.
25 The Board, therefore, agrees Finding V is not supported by
26 substantial evidence.

1 Petitioner goes on and appears to attack Findings VI. and
2 VII. Finding VI is a quote from the comprehensive plan.

3 VI

4 "Page 20, Housing Policies.

5 "4. The City recognizes the importance of residential
6 neighborhoods, and the need to protect them from
unnecessary traffic and other disruptions.

7 VII

8 "The proposed height increase would be a disruption to
9 the neighborhood in terms of view, scale, light and
air."

10 Petitioner acknowledges testimony from neighbors that there
11 would be a blockage of view, however, petitioner says there is
12 no evidence that the "neighborhood" be disrupted. Petitioner
13 claims there is nothing in the record showing the size of the
14 adjacent neighborhood, the number of objectors or where they
15 live.

16 The Board views the issue to be whether this proposal will
17 indeed result in a disruption of the adjacent neighborhood.³
18 The finding is understood to say that there will be a
19 disruption in view, scale, light and air, and the maps and the
20 record do show the building is in the line of sight of certain
21 "objectors' properties" within the city. How much of the
22 proposed building would be visible to the objecting property
23 owners or to the "neighborhood" generally is not explained,
24 however. Also, how much of a blockage of view would occur is
25 not explained. The Board cannot tell from the record whether
26 the enlarged True Value Store will be visible where it is not

1 now or whether the expansion will result in an increased
2 blockage of view, scale, light and air over what may already
3 exist. The Board, therefore, agrees with the petitioner that
4 there is not substantial evidence to support the city's
5 conclusion that there would indeed be a disruption to the
6 neighborhood in terms of "view, scale, light and air."

7 Petitioner next argues Findings VIII and IX are not
8 supported by substantial evidence. The Board understands
9 petitioner to argue that Finding IX is objectionable because
10 there is no evidence about petitioner's future growth
11 requirements and how much of an expansion he needs. Finding
12 VIII is a comprehensive plan policy on the economy of the city.

13 Findings VIII and IX are as follows:

14 "Page 21. The Economy Policies.

15 VIII

16 "3. Zoning designations for commercial areas shall be
17 sufficiently large to accommodate future growth
18 requirements, but not so large that commercial
19 activity affects adjacent residential neighborhoods.

19 IX

20 "The expansion can be accommodated with an addition
21 which does not exceed the height of the present
22 building. There is an area in the commercial zone to
allow for a one-floor expansion."

23 Petitioner is correct that there is no evidence in the
24 record to support the city's belief the expansion can be
25 limited to the height of the present building. Also, there is
26 no evidence about where in the commercial zone the petitioner

1 might make a one floor expansion. The only evidence the Board
2 can find as to petitioner's need for expansion is that
3 furnished by petitioner. See Record, pp. 27 and 41. Cf
4 Advance Health Systems v Washington County, 4 Or LUBA 20 (1981).

5 This assignment of error is sustained.

6 ASSIGNMENT OF ERROR NO. 5

7 "The City Council erred in applying Section 6.020 of
8 the Zoning Ordinance [sic] and it was error to use
9 that Section as a guide since it does not contain a
10 standard definite enough to provide guidance for
11 applicants in the City when applying for a conditional
12 use permit."

13 Petitioner's argument is that Section 6.020 is imprecise
14 and does not give sufficient guidance to the applicant and
15 others as to what will be required for approval. Section 6.020
16 provides as follows:

17 "Uses designated in this Ordinance as conditional uses
18 may be permitted, enlarged, or otherwise altered upon
19 authorization by the Planning Commission or denied by
20 the Planning Commission. This will be done in
21 accordance with the Comprehensive Plan, standards for
22 the district, standards in Section 4.010 to 5.030,
23 additional zoning provisions, and other city ordinance
24 requirements. The burden is on the applicant to
25 demonstrate that these requirements can be met. In
26 permitting a conditional use or the modification of an
existing conditional use, the Planning Commission may
impose, in addition to those standards and
requirements expressly specified in this Ordinance,
any conditions which it considers necessary to protect
the best interest of the surrounding property or the
city as a whole. These conditions may include, but
are not limited to:

27 * * *

28 "2. Reducing the required height and size of
29 buildings;" Zoning Ordinance at 61.

1 The Board does not reach the issue of whether Section 6.020
2 is defective on its face as being devoid of standards.
3 Presumably, the "best interest" issue is one that may be
4 measured against the policies in the comprehensive plan and the
5 standards in the zoning ordinance. As yet, the city has not
6 explained its condition in terms of compatibility with
7 surrounding development (General Development Policy No. 1) or
8 the "scale and design throughout the city." Whether it can
9 make findings that are sufficiently detailed to explain the
10 "best interests of the city" has yet to be demonstrated. See
11 generally, Springfield Education Association v. The School
12 District, 290 Or 217, 621 P2d 547 (1980). As the Board said in
13 Morrison I,

14 "We note that the findings as a whole seem to say that
15 the proposal does not meet the particular character of
16 the City of Cannon Beach. It may be that the city
17 believes that all the policies quoted in its findings
18 show that the request to increase the height of the
19 building to 24 feet is not in the 'best interest of
20 the surrounding property or the city as a whole.' We
21 believe such a finding is required by Section 6.020 of
the zoning ordinance in order for the city to limit
the otherwise permitted height of the building.
Without an explanation of the city's belief as to this
issue and description of the facts upon which the city
based its conclusion, the findings that are given here
are not adequate to support the decision." [Footnotes
omitted]. Morrison I, 6 Or LUBA at 78.

22 We sustain this assignment of error.

23 The decision of the City of Cannon Beach is remanded for
24 further proceedings not inconsistent with this opinion.

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FOOTNOTES

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The existence or non-existence of a report does not deprive the city council of jurisdiction to hear the appeal. It appears to the Board that this provision imposes a duty on the planning commission, but there is nothing in the ordinance that evidences any intent by the city council to divest itself of the power to hear a matter simply because the planning commission may fail to produce a report. Further, the nature of the "report" is not specified. Conceivably, the report could simply be the minutes of the planning commission meeting.

2
Though not raised by petitioner, a question may be raised as to whether or not a statement in the preamble to the Cannon Beach Comprehensive Plan is sufficient authority to deny a request where there are other specific plan policies and ordinance provisions that control development proposals. The Board notes the city does have "general development policies" in its comprehensive plan which require the Design and Review Board to evaluate commercial development "to insure it is in keeping with the design criteria of the zoning ordinance, and is compatible with the surrounding development."

Additionally, General Development Policy No. 2 specifically requires that

"the present building height (as of adoption of the Plan) shall be maintained in order to preserve consistent scale and design throughout the City."

The city's findings, the record in this case and the parties have not discussed this provision, and it is unknown whether this conditional use proposal is in keeping with the present building height in Cannon Beach or not. It would appear this is an important inquiry for the city in future proceedings.

Also, there are detailed conditional use approval criteria in the zoning ordinance at Section 6.110 as follows:

"Before a conditional use is approved, findings will be made that the use will comply with the following standards.

- 1 "1. A demand exists for the use at the proposed
2 location. Several factors which should be
3 considered in determining whether or not this
4 demand exists include: accessibility for users
5 (such as customers and employees); availability
6 of similar existing uses; availability of other
7 appropriately zoned sites, particularly those not
8 requiring conditional use approval; and the
9 desirability of other suitably zoned sites for
10 the use.
- 11 "2. The use will not create excessive traffic
12 congestion on nearby streets or overburden the
13 following public facilities and services: water,
14 sewer, storm drainage, electrical service, fire
15 protection, and schools.
- 16 "3. The site has an adequate amount of space for any
17 yards, buildings, drives, parking, loading and
18 unloading areas, storage facilities, utilities,
19 or other facilities which are required by city
20 ordinances or desired by the applicant.
- 21 "4. The topography, soils, and other physical
22 characteristics of the site are appropriate for
23 the use. Potential problems due to weak
24 foundation soils will be eliminated or reduced to
25 the extent necessary for avoiding hazardous
26 situations.
- "5. An adequate site layout will be used for
transportation activities. Consideration should
be given to the suitability of any access points,
on-site drives, parking, loading and unloading
areas, refuse collection and disposal points,
sidewalks, bike paths, or other transportation
facilities required by city ordinances or desired
by the applicant. Suitability, in part, should
be determined by the potential impact of these
facilities on safety, traffic flow and control,
and emergency vehicle movements.
- "6. The proposed use will be aesthetically compatible
with the general character of the area due to the
architectural style, building materials and
colors, landscaping, fencing, and/or other
building or site characteristics."

There is no explanation why the city did not consider these

1 criteria. Indeed, it appears that the six criteria echo the
2 general development policies of the comprehensive plan and are
3 to be applied by the city in its consideration of any
4 conditional use application. It may be assumed the city
5 believes the proposal meets the criteria because the
6 conditional use was allowed. Given the allowance of the
7 conditional use in a zone where a 28 foot height limitation
8 exists, the city is under a duty to explain a condition
9 limiting the building's height to 18 feet. Is the city trying
10 to say the height limit is necessary to comply with Section
11 6.110(6) If so, it should explain its reasons.

7

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8 The record does not show this "neighborhood" with any
9 certainty. It is not clear that the shaded properties on the
10 maps attached to the findings are residences. We take
11 petitioner's argument, however, to assume the existence of a
12 residential "neighborhood" within the view of the True Value
13 Hardware Store.

11

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12 The city's "economy policies" citation appears to be an
13 admonition about the size of commercial zones, not the
14 individual uses in the commercial zones. Finding VIII may,
15 then, be mere surplusage. Finding IX seems to address a needs
16 standard. The city does not cite a need provision in its
17 order. Note, however, Section 6.110 of the zoning ordinance
18 provides specific standards for granting conditional uses that
19 appears to include a need standard. See Footnote 2, supra.
20 Particularly, Section 6.110(1) includes consideration of "other
21 appropriately zoned sites" that might permit the use. Finding
22 IX may be an attempt to address this consideration. However,
23 with no evidence other than that of petitioner to support the
24 finding, the Board is unable to sustain the finding as a reason
25 for denial of the permit.
26