BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

VICKIE CROWLEY, DON WISWELL
and MARRIETTA WISWELL,
Petitioners,

vs.

CITY OF BANDON,
Respondent.

LUBA No. 2002-071

FINAL OPINION
AND ORDER

Appeal from City of Bandon.

Vickie Crowley filed the petition for review and argued on her own behalf.

No appearance by City of Bandon.

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

REMANDED 09/26/2002

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal plan review approval for an addition to an existing dwelling located within the city's Controlled Development (CD-1) zone.

FACTS

This matter is before us a second time. We recite the following facts from our earlier opinion:

> "The subject property is a 16,000 square foot lot bordered on the east by Beach Loop Drive and on the west by the Pacific Ocean. The eastern third of the property consists of a flat-topped bluff, while the western two-thirds slopes down to the beach. In 1974, a flat-roofed two-bedroom house was built into and below the grade of the bluff, with its western wall roughly in line with the current bluff line. The only structure on the property on top of the bluff and visible from Beach Loop Drive is a small garage. Petitioners own property across Beach Loop Drive from the subject property.
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> "The CD-1 zone is designed to preserve scenic and unique qualities of the city's oceanfront by controlling the nature and scale of development. A single-family dwelling is permitted in the CD-1 zone, provided it meets certain code requirements. Part of the subject property is also within a Shoreland Overlay zone, which allows new residences or expansions of existing residences as a conditional use.
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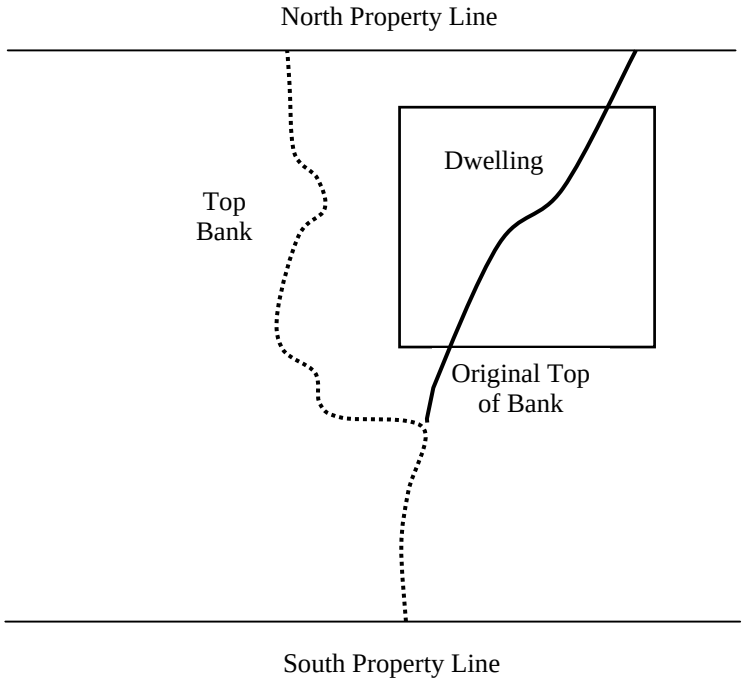
> "On March 2, 2001, intervenor applied for approval of a 2,000 square foot addition to the existing house, to be built above the bluff on top of the existing house. The main level of the proposed addition contains a kitchen, dining and living area, master bedroom and bath. A second level in a tower above the main level consists of two rooms. The roof line of the proposed main level is 17 feet in height, while the second level is 21 feet tall." *Crowley v. City of Bandon*, 41 Or LUBA 87, 90-91 (2001) (footnotes omitted).

The city conducted hearings and approved the proposed addition. Petitioners appealed that decision to LUBA. We rejected a number of challenges to the decision, but remanded to the city to resolve two issues: (1) the location of the "top of the bluff" and thus whether the dwelling was within the Shoreland Overlay zone; and (2) whether Bandon Municipal Code (BMC) 17.20.020 is an approval criterion requiring a finding that the proposed use "promotes the purpose of the [CD-1] zone."

On remand, the city issued a written notice on March 26, 2002, scheduling a public hearing before the city council on May 6, 2002. The March 26, 2002 notice stated that "[o]nly parties to the LUBA case will be permitted to participate," and that the issues to be addressed would be limited to the two issues identified in LUBA's remand. Record 64. The notice further provided that any new evidence was to be submitted by April 16, 2002, and any written argument was to be submitted by April 26, 2002. The notice stated that both sides would have 10 minutes of oral argument at the May 6, 2002 hearing. Notice of the hearing was sent only to petitioners and the applicant.

On April 16, 2002, the applicant submitted a site plan of the subject property that shows a north-south line, marked "original top of bank," crossing through the location of the existing dwelling at an approximate elevation of 80 feet. Record 28. A second line, marked "top bank" runs north from the southern boundary line at the 80-foot elevation, then drops west down the slope beside the house to an approximate elevation of 70 feet, and then meanders north at the 70-foot elevation. See figure below (not to scale).



Petitioners also submitted evidence on April 16, 2002, and at the same time objected that they should be allowed an opportunity to submit rebuttal evidence to the new evidence provided by the applicant. On April 26, 2002, petitioners submitted written argument. On April 29, 2002, city staff issued a report summarizing the evidence regarding the location of the Shoreland Overlay zone boundary. The staff report also urged the city to interpret the purpose statement at BMC 17.20.020 as not constituting an approval criterion.

The city council conducted the public hearing on May 6, 2002, at which petitioners and the applicant testified. The city council deliberated and voted 4-2 to conclude that the "top of the bluff" was the line marked on the site plan as the "top bank," west of the existing dwelling, and thus the dwelling was not within the Shoreland Overlay zone. By the same margin, the city council voted to interpret the BMC 17.20.020 purpose statement as not constituting an approval criterion. The city council issued its final decision May 20, 2002. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners challenge the city's finding that the "top of the bluff" on the subject property and hence the eastern boundary of the Shoreland Overlay zone, is located west of the existing dwelling. Petitioners explain that if the existing dwelling is within the Shoreland Overlay zone, then approval of the proposed addition to that dwelling requires a conditional use permit.

The city's findings state, in relevant part:

> "1) The Shoreland Overlay boundary is the top of the bluff on the subject property, as stated in the Bandon Comprehensive Plan. There are no other criteria relevant for the determination of the Shoreland Overlay boundary.
>
> "2) The top of the bluff is not static. Forces which affect its location include previous development, alteration and erosion.
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> "3) The subject property was altered in 1976 as part of the construction of the existing single-family residence, which required the excavation of

the bluff. The residence was set into the bluff, with a garage constructed above.

"4) The location of the top of the bluff moved westward as a result of this development." Record 12.

A. Other Criteria

Petitioners first challenge finding 1, that "[t]here are no other criteria relevant for the determination of the Shoreland Overlay boundary." According to petitioners, the Shoreland Overlay zone is designed to implement Statewide Planning Goal 17 (Coastal Shorelands). Goal 17 is, in relevant part, to "reduce the hazard to human life and property * * * resulting from the use and enjoyment of Oregon's coastal shorelands." Goal 17 requires comprehensive plans to identify "coastal shorelands" in relevant part as follows:

> "Lands contiguous with the ocean * * * shall be identified as coastal shorelands. The extent of shorelands shall include at least:
>
> "1. Areas subject to ocean flooding and lands within 100 feet of the ocean shore or within 50 feet of an estuary or a coastal lake;
>
> "2. Adjacent areas of geologic instability where the geologic instability is related to or will impact a coastal water body;
>
> "* * * * *
>
> "6. Areas of exceptional aesthetic or scenic quality, where the quality is primarily derived from or related to the association with coastal water areas[.]"

Petitioners assert that the portions of the subject property below the top of the bluff were placed in the Shoreland Overlay zone because those portions are "[a]djacent areas of geologic instability" and "[a]reas of exceptional aesthetic or scenic quality." According to petitioners, the Land Conservation and Development Commission (LCDC) originally refused to acknowledge the city's attempt to map the Shoreland Overlay boundary at the top of the bluff, because the zone is supposed to reflect the geologic instability of the bluff, and therefore the boundary should not be drawn at the edge of an eroding bluff. Record 63. Petitioners assert that the city ultimately obtained acknowledgment of its comprehensive plan

by proposing to locate the precise Shoreland Overlay zone boundary location on a case-by case basis after "site review as provided in the [CD-1] section of the City's zoning ordinance." Record 60 (May 16, 1984 LCDC acknowledgment order).

Petitioners dispute that the required "site review" occurred in this case. Petitioners explain that BMC 17.20.040(C) requires that the city review development plans to assess the possible presence of geologic hazards.[1] Where any part of the subject property is in an area designated as a moderate or severe hazard area or any geologic hazard is suspected, the city must require a report to address any hazard. *Id.* Such reports may include soil or geology reports. No such reports were prepared in this case. Petitioners argue that the site plan on which the city relied to locate the Shoreland Overlay boundary was prepared by a surveyor, and does not purport to evaluate the "degree of hazard present[.]"

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[1] BMC 17.20.040(C) provides, in relevant part:

> "Plans [for development in the CD-1 zone] shall be reviewed to assess the possible presence of any geologic hazard. If any part of the subject lot is in an area designated as a moderate or severe hazard area on the Bandon Bluff Inventory Natural Hazards Map or if any geologic hazard is suspected, the planning commission shall require a report to be supplied by the developer which satisfactorily evaluates the degree of hazard present and recommends appropriate precautions to avoid endangering life and property and minimize erosion. The burden of proof is on the landowner to show that it is safe to build.
>
> "1. The following identifies the reports which may be required:
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> "a. Soils Report. This report shall include data regarding the nature, distribution and strength of existing soils, conclusions and recommendations for grading, design criteria for corrective measures, and options and recommendations covering the carrying capabilities of the sites to be developed in a manner imposing the minimum variance from the natural conditions. The investigation and report shall be prepared by a professional civil engineer currently registered in the state of Oregon.
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> "b. Geology Report. This report shall include an adequate description as defined by the city manager or designate of the geology of the site, conclusions and recommendations regarding the effect of geologic conditions in the proposed development, and opinions and recommendations as to the carrying capabilities of the sites to be developed. The investigation and report shall be prepared by a professional geologist currently registered in the state of Oregon."

The city has not filed a response brief, and we therefore have no reason to question petitioners' contention that BMC 17.20.040(C) provides the "site review" described in the LCDC acknowledgment order. If so, the review and reports required by BMC 17.20.040(C) are a necessary component of locating the Coastal Shorelands boundary, which was one of the bases for our remand. It is not clear to us whether the requirement for a specific soil or geology report has been triggered in this case. However, it is clear that BMC 17.20.040(C) requires in every case an assessment of the "possible presence of any geologic hazards." We understand petitioners to argue that that assessment is essential to locate the Shoreland Overlay boundary, and that no such assessment took place. Given the lack of response from the city on this point, we agree with petitioners that the city erred in finding that no other criteria are relevant for the determination of the Shoreland Overlay boundary, and further in failing to assess the "possible presence of any geologic hazards."

B. Top of the Bluff

Petitioners next challenge finding 4, that the "top of the bluff moved westward" as a result of the excavation and development of the existing house. The site plan on which the city relied depicts a line marked "top bank" that runs north at the 80-foot elevation to the retaining wall beside the house, then drops down and westward to the 70-foot elevation, continuing north approximately 10 feet west of the existing dwelling. Record 28. The site plan also shows a line marked "original top of bank" continuing north at the 80-foot elevation where the "top bank" line drops down. The line marked "original top of bank" passes through the existing dwelling. The city apparently chose the line marked "top bank" as the current "top of the bluff" on the subject property. The city apparently views a portion of the top of the bluff on the subject property to have moved westward at least 10 feet and downward approximately 10 feet as a result of excavating the existing dwelling.

Petitioners challenge that view, arguing that it is impossible for excavation of the bluff to result in moving the top of the bluff westward. According to petitioners, such

excavation must result in moving the top of the bluff eastward. Petitioners contend that if the original top of a westward-facing bluff was at the 80-foot elevation, then any slump or excavation along the top of the bluff would necessarily move the top, *i.e.*, the 80-foot elevation, eastward. Any other view, petitioners argue, would allow a landowner to avoid the requirements of the Shoreland Overlay zone by first excavating the top of the bluff and thus moving it westward.

We do not understand petitioners to dispute any of the elevations on the site plan or other evidence that the city relied on to determine the current location of the "top of the bluff." Rather, petitioners' arguments turn on a question of law: what is the legal effect of an excavation that modifies a landform that defines a zoning boundary? The term "top of the bluff" is not defined in the city's legislation or elsewhere drawn to our attention.[2] Petitioners attach a number of pictures of the bluff to the petition for review, from which it is evident that the Bandon Bluff is a variegated landform. Reasonable people could view different elevations or slope features as being the "top of the bluff." Where the top of the bluff has slumped westward (as some of the pictures show has happened), reasonable people could differ over whether the top of the bluff has moved eastward or westward. Similarly, an excavation of the top of a west-facing bluff can be reasonably viewed as moving the top of the bluff either east or west. Given the essentially legal and nonfactual nature of that question, we view petitioners' argument as a challenge to the city's interpretation of the term "top of the bluff," as applied to the undisputed facts in this case. We must give deference to the city's interpretation of its comprehensive plan, unless that interpretation is inconsistent

[2] *Webster's Third New Int'l Dictionary*, 242 (unabridged ed 1981), includes the following relevant definition of "bluff":

"[A] high steep bank (as by a river or the sea or beside a ravine or plain): a cliff with a broad face[.]"

with the text, purpose or policy underlying the plan provision, or contrary to any statute, land use goal or rule that the provision implements. ORS 197.829(1).[3]

The city appears to have located the current "top of the bluff" by determining the elevation on the site where the steeply pitched face of the bluff stops and a more level part of the site begins. In other words, it appears that the city implicitly interprets "top of the bluff" to mean the point at which steep gives way to level and nothing more. We cannot say that interpretation "[i]s inconsistent with the express language of" the BMC. ORS 197.829(1)(a).

The question of whether the city's interpretation is inconsistent with the purpose and policy underlying the plan provision, or contrary to Goal 17 (which the Shoreland Overlay zone implements) is more difficult. We understand petitioners to argue that Goal 17 requires the city to regulate geologically unstable bluffs adjacent to the ocean such as Bandon Bluff, and that the purpose and policy underlying the Shoreland Overlay zone is the same. That being the case, petitioners argue, the city must interpret the Shoreland Overlay zone in such a way as to locate the boundary (and the protections of the zone) to include geologically unstable portions of the bluff. According to petitioners, the city's interpretation would have the effect of moving the zone boundary westward when the top of the bluff slumps or slides westward, leaving an area of obvious geologic instability eastward of the new location.

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[3] ORS 197.829(1) provides:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
>
> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

Petitioners argue that that result would be contrary to Goal 17. Petitioners view the excavation and development on the subject property to be equivalent to a slump or landslide. Because the city's interpretation moves the boundary location westward as a result of excavation and development, petitioners argue, the city's interpretation is contrary to Goal 17.

The city's findings, quoted above, do little to explain why the city believes that excavation and development of the subject property caused the top of the bluff to move westward. Nor do those findings address petitioners' Goal 17 arguments. As noted, the city did not file a response brief. The city's reliance on the applicant's site plan would suggest that it views the "top of the bluff" on the subject property to correspond roughly to the 80-foot elevation, where the bluff flattens out, *except* where the bluff was excavated to site the existing dwelling.

We have little hesitation in agreeing with petitioners that it would be contrary to Goal 17 for the city to relocate the Coastal Shorelands boundary westward when the landform on which that boundary is described becomes active and slumps westward. The present facts, however, do not involve a landform that has slid westward. An excavation to site a below-grade concrete dwelling is not the same as a slump or landslide. It might well be consistent with Goal 17 to relocate the Coastal Shorelands boundary westward, when the landform on which that boundary is described is excavated and replaced with a concrete structure, at least where there is evidence that the excavated area is geologically stable or that the structure stabilized the former top of the bluff in that location. However, that brings us back to petitioners' original point: the city has not, apparently, complied with BMC 17.20.040(C) and reviewed the plans "to assess the possible presence of any geologic hazard." Nor has the city required any of the reports that must, in certain circumstances, be required under that provision. As discussed above, petitioners argue, and it seems to be the case, that the plan

review provided by BMC 17.20.040 is a necessary part of identifying the Shoreland Overlay zone boundary on the subject property.

In sum, we agree with petitioners that the city erred to the extent it interpreted comprehensive plan provisions implementing Goal 17 to allow the top of the bluff (and with it the Coastal Shorelands boundary and the Shoreland Overlay zone boundary) to be relocated westward, in the absence of an assessment of the geologic stability of the area between the original boundary and the relocated boundary.[4]

We would feel differently if LCDC had both acknowledged the "top of the bluff" as the location of the Coastal Shorelands and Shoreland Overlay zone boundary *and* acknowledged a local definition of "top of the bluff" as being purely a question of where the steep part of the bluff face stops and a level area begins. However, that is not the case here. The "top of the bluff" is not defined. It is an admittedly ill-defined and shifting location that was selected as the location of the Coastal Shorelands and Overlay boundary in this area. Because Goal 17 makes geologic stability a relevant consideration in locating the Coastal Shorelands boundary, locating the current "top of the bluff" requires more than locating an elevation where the steep face of the bluff becomes level. If the applicant demonstrates that the area between the original top of the bluff and the relocated boundary is geologically stable, it may well be consistent with Goal 17 to find that the top of the bluff (which, under the City's acknowledged comprehensive plan, is the Coastal Shorelands Boundary and the Shoreland Overlay zone boundary) is where the city says it is in this decision. It seems likely that the applicant believes that is the case, or he would not be seeking permission to build an

[4] At one point in the petition for review, petitioners note that coastal shorelands include "[a]reas of exceptional aesthetic or scenic quality," and states that the subject property is in an area of exceptional scenic quality. Petition for Review 12. However, petitioners do not argue that the city erred in failing to take into account the scenic qualities of the subject property in locating the Shoreland Overlay zone boundary, or suggest any way for the city to do so. On the contrary, the argument under this assignment of error is focused almost exclusively on the role of geologic instability in locating the zone boundary. We therefore do not consider, and the city need not consider on remand, the role of scenic quality, if any, in locating the zone boundary.

addition on that portion of the site. However, the city must squarely address that question and answer it in locating the "top of the bluff" and the Shorelands Overlay boundary.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioners challenge the city's finding that BMC 17.20.020 does not require the city to find, as a precedent to approving development in the CD-1 zone, that the proposed development "promotes the purpose of the zone."[5]

In our earlier decision, we rejected the applicant's argument that BMC 17.20.020 simply lists the permitted uses in the zone and does not require the city to consider whether a particular proposal does, in fact, promote the purpose of the zone. We noted that that view of BMC 17.20.020 reduces the modifying clause "provided that the use promotes the purpose of the zone" to surplusage. 41 Or LUBA at 95. We remanded the decision to the city to either explain why BMC 17.20.020 does not impose a requirement that the proposed use promotes the purpose of the zone, or adopt findings addressing that requirement.[6]

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[5] BMC 17.20.020 provides, in relevant part:

> "In the CD-1 zone, the following uses are permitted outright *provided that the use promotes the purpose of the zone* and all other requirements of this title are met:
>
> "A. Single-family dwelling, or manufactured dwelling[.]" (Emphasis added.)

BMC 17.20.010 describes the purpose of the CD-1 zone:

> "The purpose of the CD-1 zone is to recognize the scenic and unique qualities of Bandon's ocean front and nearby areas and to maintain these qualities as much as possible by carefully controlling the nature and scale of future development in this zone. It is intended that a mix of uses would be permitted, including residential, tourist commercial and recreational. Future development is to be controlled in order to enhance and protect the area's unique qualities."

[6] In our earlier opinion, we explained:

> "* * * The statement 'X provided that Y' generally means that X is conditioned on Y. *See Webster's Third New International Dictionary*, 1827 (unabridged ed 1981) (defining 'provided' to mean 'on condition that,' 'with the understanding,' 'if only'). Thus, absent some textual or contextual indications to the contrary, [BMC] 17.20.020 would seem to allow certain uses in the CD-1 zone subject to the requirement that the proposed use promotes the purpose of the zone. The purpose of the CD-1 zone is described at [BMC]17.20.010. The

On remand, the city adopted the following findings:

> "1) The purpose section of [BMC 17.20.010] is meant to convey general information as to what the chapter should accomplish. It is a broad and general policy statement.
>
> "2) Chapter 17.20 lists all allowed uses, both permitted and conditional. If in fact the Council believes that any of the uses are not furthering the purpose of the zone, they could be amended or removed.
>
> "3) There are no clear or objective criteria contained in the purpose statement.
>
> "4) The chapter contains specific criteria for development, *i.e.*, height, setbacks, lot coverage, inline view, etc.
>
> "5) The City has not considered consistency with the purpose statement as a separate approval criter[ion] in any past applications for development.
>
> "Conclusion: The Council concludes that the purpose of the zone is implemented by the combination of permitted and conditional uses and specific development criteria. The use being proposed is a permitted use, satisfies the specific requirements of the chapter, and is therefore deemed to meet the purpose of the zone." Record 13.

Petitioners challenge the city's interpretation, arguing that it is inconsistent with the text, purpose and policy underlying BMC 17.20.020. Petitioners argue that the city's interpretation renders the clause "provided that the use promotes the purpose of the zone" meaningless, and essentially writes those terms out of the city's code. With respect to finding 3, petitioners dispute that the purpose statement at BMC 17.20.010 is not clear and objective. With respect to finding 5, petitioners cite to testimony by the city attorney, to the effect that the language "provided that the use promotes the purpose of the zone" is not

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> city's findings neither address [BMC]17.20.020 nor determine whether the proposed development promotes the purpose of the CD-1 zone. Neither do the city's findings interpret [BMC] 17.20.020 or explain why no inquiry under that code provision is necessary. We agree with petitioners that remand is necessary so that the city can either explain why [BMC] 17.20.020 does not impose a requirement that the proposed use promote the purpose of the zone, or adopt findings addressing that requirement." 41 Or LUBA at 95.

simply precatory but was added to BMC 17.20.020 specifically to authorize the city to reject proposed development that did not fit the style or scale of other development in the CD-1 zone. Petitioners assert that the city has in fact applied that language as approval criteria in past applications for development.

We agree with petitioners that the city's interpretation essentially reads the disputed clause out of the code. As we explained in our earlier decision, that language on its face appears to constitute a mandatory approval criterion. We left open the possibility that the city might be able to interpret that language in context in a manner that gives it meaning, but does not necessarily require a finding that proposed development promotes the purpose of the zone. However, the city interpretation fails to give any meaning to that language, and is thus inconsistent with the text of BMC 17.20.020.

The only finding that requires separate comment is finding 3, that the purpose statement at BMC 17.20.010 does not contain clear and objective criteria. That finding might be construed as a reference to the needed housing statutes at ORS 197.307, which require, in relevant part, that approval standards for needed housing must be "clear and objective." ORS 197.307(6). Arguably, if ORS 197.307(6) applies here, and BMC 17.20.010 and 17.20.020 are not "clear and objective," then the city cannot apply those code provisions to the proposed development. However, if that is in fact the city's position its findings do not clearly take or establish a foundation for that position. For example, it is not clear that the development proposed here constitutes "needed housing." While we do not necessarily agree with petitioners that BMC 17.20.010 and 17.20.020 are "clear and objective," we agree that finding 3 is inadequate to explain why those provisions need not be applied as approval criteria.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Petitioners argue that on remand the city committed two procedural errors that prejudiced their substantial rights. First, petitioners argue, the city erred in refusing to allow petitioners to submit evidence in response to the evidence submitted by the applicant on April 16, 2002, *i.e.*, the site plan, or in response to the April 29, 2002 staff report. According to petitioners, the site plan itself does not indicate where the applicant believes the "top of the bluff" is located. That position was first clarified, petitioners argue, in the staff report. Petitioners state that, had they been given the opportunity, they would have submitted additional evidence showing that the line marked "top bank" on the site plan is not the top of the bluff.

Second, petitioners contend that the city sent notice only to the parties of the previous appeal, and the notice stated that only those parties would be permitted to testify.[7] In fact, petitioners argue, the city opened the hearing up to testimony from others, but without advance notice of that opportunity petitioners were unable to arrange for expert testimony or for other interested persons to testify.

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[7] The notice provided by the city states, in relevant part:

"NOTICE IS HEREBY GIVEN that the City Council of Bandon has set a hearing for the LUBA remand of the decision approving a single-family residence addition at 1400 Beach Loop Drive. * * * (Only parties to the LUBA case will be permitted to participate.)

"The City Council hearing has been set for Monday, May 6, 2002 * * *.

"* * * * *

"The procedure for this remand hearing shall be as follows:

"1) Any new evidence shall be submitted no later than 5:00 pm on April 16, 2002.

"2) All arguments shall be submitted no later than 5:00 pm on April 26, 2002.

"3) At the remand hearing, each side shall be granted 10 minutes of argument.

"'Evidence' means facts, documents, data, or other information offered to demonstrate compliance or noncompliance. 'Argument' means assertions and analysis regarding the satisfaction or violation of legal standards or policies believed relevant." Record 64.

Generally, the scope of proceedings on remand from LUBA is governed by the terms of the remand and any applicable local requirements. *Fraley v. Deschutes County*, 32 Or LUBA 27, 36 (1996) (absent instructions from LUBA or local provisions to the contrary, a local government is not required to repeat on remand the procedures applicable to the initial proceeding); *Bartels v. City of Portland*, 23 Or LUBA 182, 185 (1992) (same). On remand the city chose to provide an evidentiary hearing, limited to the two issues identified on remand. The city apparently has no specific local provisions governing proceedings on remand. The notice set out the procedures to be followed, which differ from those prescribed in the city's public hearing procedures at BMC 17.120. For example, BMC 17.120.100(A) provides that "[t]he documents or evidence relied upon by the applicant shall be submitted to the local government and be made available to the public at the time the notice is provided * * *."

As petitioners point out, the city's notice imposed a single deadline for evidentiary submissions by all parties, and limited further submissions thereafter to "argument." Petitioners thus had no opportunity to submit evidence in response to the applicant's evidence, only argument. Although we are not aware of any specific statutory or local provisions governing limits on presentation of evidence on remand from LUBA, petitioners have a fundamental right during an evidentiary proceeding to "present and rebut evidence." *Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d 23 (1973). Once the city chose to conduct an evidentiary proceeding on remand (which the terms of our remand arguably required), it must ensure that its proceedings provide an opportunity for all parties to rebut evidence that another party submits on remand.

Whether the city may limit participation in the proceedings on remand to the parties in the original appeal, in the absence of specific authority to do so, is an open question. Here, the city provided notice of the remand hearing only to the original parties, and that notice stated that only those parties "would be permitted to participate." Record 64. We are

cited to no specific authority for that limitation. Petitioners allege that they were misled by the city's notice and, had they not been misled, they would have enlisted experts to testify on petitioners' behalf, and also enlisted other neighbors to testify in opposition.

A petitioner is entitled to remand based on procedural error only when the error prejudices the *petitioner's* substantial rights. ORS 197.835(9)(a)(B). Therefore, the fact that other persons did not get notice of the hearing does not provide a basis for remand. However, as discussed above, petitioners are entitled to present rebuttal evidence, including expert testimony, provided that expert testimony is offered on petitioners' behalf. It is not clear to us that the city intended its notice to prohibit petitioners from presenting expert testimony. Because the city must conduct a new evidentiary proceeding in any case, we need not resolve that issue.

The third assignment of error is sustained, in part.

The city's decision is remanded.