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BEFORE THE STATE OF OREGON  
OF THE STATE OF OREGON

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4 GENE C. COPE, KEITH KRUCHECK )  
and LYLE G. WELLS, )  
5 Petitioners, )  
6 vs. )  
7 THE CITY OF CANNON BEACH, )  
8 Respondent. )

LUBA No. 87-022  
FINAL OPINION  
AND ORDER

9 Appeal from City of Cannon Beach.

10 Kenneth M. Elliott, Portland, filed the petition for review  
11 and argued on behalf of petitioners. With him on the brief  
were O'Donnell, Ramis, Elliott & Crew.

12 Corinne Sherton, Salem, filed a response brief and argued  
13 on behalf of Respondent City. With her on the brief were  
Mitchell, Lang & Smith.

14 Philip L. Nelson, Astoria, filed a response brief and  
15 argued on behalf of Respondent-Participant Harold Wall.

16 DuBAY, Chief Referee; BAGG, Referee; HOLSTUN, Referee;  
17 participated in the decision.

18 REMANDED 08/07/87

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

1 Opinion by DuBay.

2 NATURE OF DECISION

3 This is an appeal of a variance from an ordinance  
4 requirement that buildable lots must abut a street. The  
5 variance was granted for each of two lots.

6 FACTS

7 The applicant owns several lots created before the city  
8 adopted its zoning ordinance. After adoption of the zoning  
9 ordinance in 1984, the applicant requested exceptions from the  
10 minimum lot size requirements for five lots. On August 23,  
11 1984, the city planning commission granted the request to  
12 reduce the minimum lot size from 10,000 feet to 5,000 feet for  
13 all five lots.

14 In October, 1986, applicant applied for a variance from the  
15 following criterion in the City of Cannon Beach Zoning  
16 Ordinance (CBZO) for two of the lots:

17 "Every lot shall abut a street, other than an alley  
18 for at least 25 feet." CBZO Section 4.030.

19 Petitioners opposed the variances before the planning  
20 commission and at the same time requested reconsideration of  
21 the 1984 decision to grant the lot size exceptions.

22 The planning commission approved the variances on December  
23 23, 1986, and refused to reconsider the 1984 lot size  
24 decision. Petitioners appealed the variance approval to the  
25 city council. On March 13, 1987, the city council affirmed the  
26 planning commission's decision. This appeal followed.

1 FIRST ASSIGNMENT OF ERROR

2 Petitioners allege the city erred by concluding the  
3 application satisfies the first variance criterion in CBZO Sec.  
4 8.030:

5 "That a strict or literal interpretation and  
6 enforcement of the specified requirement would result  
7 in practical difficulty or unnecessary hardship and  
would be inconsistent with the objectives of the  
comprehensive plan...." CBZO Sec. 8.030(1)

8 According to petitioners, the city bases its decision on the  
9 fact that lots 12 and 13 are developable only because of the  
10 1984 decision. Petitioners allege the 1984 lot size decision  
11 was void because procedural irregularities violated ordinance,  
12 statutory and constitutional norms. Petitioners' point appears  
13 to be that the invalidity of the prior decision means the two  
14 lots are too small to develop even with an access variance, and  
15 the lack of access cannot be grounds to satisfy the criterion  
16 in CZBO Section 8.030(1).

17 Petitioners directly challenged the 1984 lot size reduction  
18 in Cope v. Cannon Beach, \_\_\_ Or LUBA \_\_\_, (LUBA No. 87-023,  
19 August 7, 1987). That appeal was dismissed on the ground that  
20 petitioners failed to exhaust available local remedies before  
21 filing an appeal to LUBA. Petitioners present challenge of the  
22 1984 decision, therefore, requests the Board to review that  
23 decision and declare it void in an appeal of a later decision  
24 by the city.

25 We will not take the action petitioners request. Without  
26 reaching the question whether we have authority to declare a

1 prior decision void,<sup>1</sup> the Board's authority to affirm,  
2 reverse or remand land use decisions extends only to those  
3 decisions appealed in accordance with ORS 197.830. Petitioners  
4 challenge to the 1984 decision was not. Petitioners have cited  
5 no authority for the proposition that they may challenge the  
6 prior decision indirectly after their appeal of the decision  
7 was dismissed. We decline to declare or to consider the  
8 decision approving the lot size reduction void.<sup>2</sup>

9 The first assignment of error is denied.

10 SECOND ASSIGNMENT OF ERROR

11 Petitioners claim the decision does not satisfy the second  
12 variance criterion:

13 "That there are exceptional or extraordinary  
14 circumstances or conditions applicable to the property  
15 involved or to the intended use of the property which  
do not apply generally to other properties in the same  
zone;" CBZO Section 8.030(2).

16 Without challenging particular findings, petitioners allege  
17 "the applicant failed to meet his burden of proving compliance  
18 with this criterion." Petition at 4.

19 The city's reasons for concluding the criteria is satisfied  
20 can be summarized as follows:

- 21 (1) Lots 12 and 13 lack street access unlike other  
22 buildable lots in the area.
- 23 (2) The lots were platted before access from the  
24 beach was prohibited by the Supreme Court's  
25 decision in State ex rel Thornton v. Hay, 254 Or  
584, 462 P2d 671 (1969) and subsequent state  
denial of use of the dry sand areas for access;  
and
- 26 (3) Refusing to grant a variance would be

1 inconsistent with zoning code provisions allowing  
2 residential development on lots meeting the lot  
size reduction criteria in CBZO Section 4.150.

3 For the reasons set forth below, these findings do not set  
4 forth facts and reasons showing the variance criterion is met.  
5 The decision must be remanded.

6 Land use law relating to variances is not based on common  
7 law. In a previous decision, we observed:

8 "[W]e note land use law, including the law pertaining  
9 to variance relief, is not a branch of common law, but  
is rather based on particular statutes, ordinances and  
10 rules enacted by legislative and administrative  
bodies. Anderson v. Peden, 284 Or 313, 315, 587 P2d  
11 59 (1978). Thus, in cases of this sort, the focus of  
our inquiry must be on the actual language appearing  
12 in the controlling enactment." Fisher v. City of  
Gresham, 10 Or LUBA 283, 289 (1984)."

13 CBZO Section 8.030(2) requires as a prerequisite to  
14 granting a variance, a finding of exceptional or extraordinary  
15 circumstances or conditions which do not apply generally to  
16 other properties in the same zone. This same language has been  
17 held to result in a very strict ordinance standard. Lovell v.  
18 Independence Planning Comm., 37 Or App 3, 586 P2d 99 (1978);  
19 Patzkowsky v. Klamath County, 8 Or LUBA 64 (1983). Other  
20 variance criteria may have less strict and more liberal  
21 prerequisites for granting variance relief. See e.g., 1000  
22 Friends v. Clackamas Co. Comm., 40 Or App 529, 595 P2d 1273  
23 (1979); Moore v. Bd of Clackamas County Comm'rs, 35 Or App 39,  
24 580 P2d 583 (1978); Fisher v. City of Gresham, 10 Or LUBA 283  
25 (1984).

26 Where a strict interpretation of the variance criteria is

1 indicated by the language of the controlling ordinance or  
2 regulation, "extraordinary circumstances" must arise out of the  
3 land itself. Lovell v. Independence Planning Comm., supra, at  
4 6; Patzkowsky v. Klamath County, supra, at 70.

5 The city found the fact that Lots 12 and 13 are the only  
6 buildable lots in the vicinity without access to a public  
7 street, and this constitutes exceptional or extraordinary  
8 circumstances. In essence, the city claims that because the  
9 lots do not abut city streets there is an extraordinary  
10 circumstance warranting relief from the city's requirement that  
11 lots must abut streets to be buildable. The circularity of  
12 this rationale is obvious.

13 Consistent with prior opinions of the Court of Appeals and  
14 the Board, the language of CBZO Section 8.030(2) mandates a  
15 strict standard for applying the variance criteria. The city's  
16 finding about the lack of access to a public street does not  
17 describe conditions inherent in the land required by  
18 application of the strict construction of variance standards.

19 The second reason advanced by the city is also deficient.  
20 Assuming access from the beach is prevented by state action as  
21 petitioners allege, whether or not the lots have access from  
22 the beach is irrelevant. Development is prohibited because  
23 neither Lot 12 nor 13 abuts a street. Even if access were  
24 available from the beach, however, the zoning code would  
25 prohibit development. The circumstances regarding access from  
26 the beach do not affect the lots' location in relation to the

1 street.

2 The city's rationale that a variance is warranted because  
3 the lots were excepted from the minimum lot size requirement is  
4 also rejected. The minimum lot size decision removed one  
5 restriction prohibiting development. That decision can not be  
6 a basis for removing a development restriction unrelated to  
7 size. We particularly reject the city's interpretation that  
8 granting the lot size reductions made the lots buildable and  
9 thereby rendered other zoning code restrictions inconsistent  
10 with that determination. The two development restrictions are  
11 separate and unrelated.

12 This assignment of error is sustained.

13 THIRD ASSIGNMENT OF ERROR

14 Petitioners allege the decision fails to show satisfaction  
15 of the following criterion:

16 "That the granting of the variance will not be  
17 detrimental to the public health, safety, or welfare,  
18 or materially injurious to properties or improvements  
in the near vicinity;" CBZO 8.030(3).

19 Petitioners assert two arguments. First, they complain  
20 they were denied access to the property to permit their expert  
21 witness to examine the site. Second, petitioners say the  
22 findings include no explanation why the city chose to believe  
23 testimony submitted by the applicant's expert rather than  
24 expert testimony submitted by petitioners.

25 Both arguments are rejected. The findings show the city  
26 relied on the testimony of a registered geologist regarding

1 slope stability. Record at 19. Petitioners do not challenge  
2 the geologist's credibility. Neither do they cite authority  
3 for their position that inability to attain access to the site  
4 constitutes procedural error. Without stating a legal basis  
5 for their claim they were entitled to go upon the applicant's  
6 property to obtain rebuttal evidence, petitioners have not  
7 alleged error warranting reversal or remand.

8 Petitioners' second argument, that the city failed to  
9 discuss evidence conflicting with the evidence relied upon by  
10 the city, is also rejected. Findings need not explain how  
11 conflicts in the evidence are resolved. Ash Creek Neighborhood  
12 Association v. City of Portland, 12 Or LUBA 230 (1984).

13 This assignment of error is denied.

14 FOURTH ASSIGNMENT OF ERROR

15 Under the city code, approval of a variance requires a  
16 determination that the variance supports comprehensive plan  
17 policies. CBZO Section 8.030(4). Petitioners fault the  
18 decision for not supporting three development policies as well  
19 as two citizen involvement policies.

20 The first citizen involvement policy gives residents and  
21 property owners "the opportunity to be involved in all phases  
22 of the planning efforts of the city." Petitioners claim their  
23 inability to obtain an on site examination of the property  
24 violates this policy.

25 We disagree. Neither the generally-worded policy nor the  
26 city ordinances gives citizens the right to go upon private



1 property over the landowner's objection to gather information  
2 relevant to land use proceedings. Petitioners had  
3 opportunities to present their case at two public hearings.  
4 Their inability to present the evidence of their choice does  
5 not indicate petitioners were excluded from the city's planning  
6 efforts.

7 The second citizen involvement policy states that the  
8 city's committees concerned with land use matters "shall be  
9 representative of the wide diversity of views and interests in  
10 the community." Petitioners provide no explanation in support  
11 of their claim this policy is not supported by the decision.  
12 We will not speculate about the basis for petitioners' claim.

13 Petitioners also allege the variance violates General  
14 Development Policy 8 of the city's comprehensive plan. This  
15 policy provides in relevant part:

16 "Slope/density guidelines shall be followed in the  
17 administration of the Comprehensive Plan, Zoning  
18 Ordinance and Subdivision Ordinance. Slope/density  
19 guidelines may be modified by the Planning Commission  
20 upon a demonstration that a sites slope does not  
exceed 20% and a geologic site investigation  
determines that geologic hazards would not be  
increased as a result of higher densities."

21 The slope/density guidelines limit density to four dwelling  
22 units per acre where slopes are 10-24 percent.

23 Petitioners contend the slopes on the property exceed 20  
24 percent, and therefore only four dwelling units per acre are  
25 permissible.

26 The city made findings addressing General Development

1 Policy 8. The city found slopes on the property do not exceed  
2 20 percent and that a geologist's report concludes geologic  
3 hazards would not be increased as a result of the higher  
4 densities proposed. Record at 23.

5 These findings adequately explain the reasons for the  
6 city's conclusion that General Development Policy 8 is met.  
7 Petitioners' contrary claim is denied.

8 Petitioners claim two other policies directed at land slide  
9 hazards are violated. One is General Development Policy 9.  
10 This policy requires site investigations by a registered  
11 geologist in area of potential landslide hazards and areas of  
12 potential coastal erosion hazard. The other policy applies  
13 only to the area where the property is located. It states:

14 "Further development within the large active landslide  
15 on either side of Hemlock (Street) must be carefully  
16 planned and closely monitored." Area Specific Policy  
17 1, Comprehensive plan at 37.

18 Petitioners allege the geologic report shows General  
19 Development Policy 9 is not met.<sup>3</sup>

20 Although the geologist's report does note that future  
21 downslope movement for this area can not be predicted nor  
22 prevented, no plan policy or ordinance provision has been cited  
23 that prohibits development on such slopes for this reason.<sup>4</sup>

24 The report clearly states that geologic stability of the slopes  
25 will not be affected by development at the proposed densities  
26 provided six precautions are observed. Record at 182. The six  
precautions were made part of the lot size reduction approval  
decision in 1984.

1 The requirement for a geologist's site investigation in  
2 General Development Policy 9 is satisfied by the submission of  
3 the report and testimony of geologist Paul D. See. His report  
4 is substantial evidence supporting the city's conclusion that  
5 geologic hazards have been adequately examined and that  
6 residential construction on the affected property is feasible  
7 without increasing the geological hazards. The same findings  
8 also disclose adequate consideration of Area Specific Policy  
9 1. We deny petitioners' claims that the development authorized  
10 by the variances will violate the cited plan policies.

11 This assignment of error is denied.

12 FIFTH ASSIGNMENT OF ERROR

13 Petitioners say the 1984 lot size reduction approval is a  
14 self created circumstance and that a variance is therefore  
15 prohibited by the following ordinance provision:

16 "Variances in accordance with this subsection should  
17 not ordinarily be granted if the special circumstances  
18 on which the applicant relies are a result of the  
19 actions of the applicant or owner, or previous  
20 owner." CBZO Section 8.030.

21 Petitioners allege lots 12 and 13 are developable only  
22 because the applicant requested and obtained an order approving  
23 exceptions to the minimum lot size standard in the zone.  
24 Petitioners say the applicant cites the lot size decision as  
25 the sole circumstance justifying the variance. According to  
26 petitioners, the lot size reduction is a self-created  
27 circumstance that precludes variance approval.

1 We have some difficulty with the petitioners' argument.  
2 While the city apparently made some connection between the 1984  
3 lot size reduction decision and the "exceptional circumstances"  
4 criterion, we do not see the connection. The applicant faced  
5 two hurdles in securing building permits for these lots. The  
6 lot size reduction removed one hurdle -- the minimum lot size.  
7 The access variance removed the second -- the requirement for  
8 road frontage. While it is true that there would be no need to  
9 address the access question had the lot size reduction not been  
10 granted, or vice versa for that matter, we do not believe the  
11 lot size reduction is an exceptional circumstance as that term  
12 is used in CBZO Section 8.030(2). See our discussion under  
13 Assignment of Error No. 2, supra.

14 If we assume that the variance could properly be granted  
15 because the lot size reduction was an exceptional circumstance,  
16 petitioners' point would be well taken that the applicant  
17 initiated the circumstance. Under the provisions of many  
18 variance ordinances, this fact alone would be grounds to deny  
19 the variance. The Cannon Beach Ordinance, however, is not  
20 stated in absolute terms. By stating that variances should not  
21 ordinarily be granted in cases where the exceptional  
22 circumstances are self created, the ordinance allows some  
23 discretion to approve variances where the circumstances or  
24 hardship is of the applicant's own making.

25 The city interpreted the self-created circumstance  
26 provision to have a narrow, limited meaning. The findings

1 state:

2 "The Commission and Council conclude that this portion  
3 of the Zoning Ordinance was meant to prevent  
4 landowners from profiting from the result of the  
5 illegal action of themselves or their predecessors in  
6 interest." Record at 11.

7 Given the discretionary language of the ordinance, this  
8 interpretation of its provisions is reasonable. Under this  
9 interpretation, a self created exceptional circumstance does  
10 not require denial of variance applications in all instances.  
11 The city's finding that the provision does not warrant denial  
12 in this case is within the city's authority. Accordingly, the  
13 assignment of error is denied.

14 SIXTH ASSIGNMENT OF ERROR

15 Petitioners allege a planning commission member  
16 participated in the variance proceedings in violation of the  
17 zoning ordinance. The ordinance prohibits members of hearings  
18 bodies from participating in quasi-judicial proceedings in  
19 which they have a direct or financial interest. CBZO 10.062.  
20 When the variance application came before the planning  
21 commission, Commissioner Rekate stated she was acting as agent  
22 for the applicant and left her chair as a planning commission  
23 member. She joined the audience and spoke on behalf of the  
24 applicant, and responded to questions concerning the proposal.  
25 Record at 161.

26 Petitioners' complaint is directed at Rekate's  
participation in a meeting of the planning commission at a  
later date when the commission reviewed the minutes of the

1 October 23 hearing. The minutes of the November 20, 1986,  
2 meeting state:

3 "APPROVAL OF THE MINUTES OF OCTOBER 23, 1986. Ms.  
4 Rekate suggested a number of modifications to the 2nd  
5 paragraph of p. 3. She asked that it be inserted that  
6 Paul See prepared the geologic report, that the report  
7 is on the record, and that the lot size reduction was  
8 approved. She noted that the Public Works Director  
9 was quoted in the geologic report as stating there was  
no breakage to the water lines on the Wall' property,  
but 'at the time of the slippage' was not part of the  
report. She also noted that reference to the  
subsidence occurring primarily on Hemlock to the east,  
was stated in the geologic report." Record at 155.

10 At the same meeting Commissioner Rekate also participated  
11 in a discussion about the procedure in the 1984 lot size  
12 reduction matter, commenting that

13 "there have been other relatively recent lot size  
14 reductions for which there were not hearings; Sue  
Jarvis Shields' property & property sold by a Mr.  
Vaughn." Record at 155.

15 Petitioners say these comments comprise participation that  
16 violates CBZO Section 10.062, and the city council erred by not  
17 sending the matter back to the planning commission for further  
18 proceedings.

19 In these circumstances, no error was made warranting  
20 reversal or remand. Assuming the comments of commission member  
21 Rekate at the November 20th meeting violated CBZO 10.062, the  
22 error was one of procedure. Although petitioners objected to  
23 Rekate's comments in their appeal to the city council,  
24 petitioners made no claim before the city council, and make no  
25 claim here, that the claimed error resulted in prejudice to  
26 petitioners' substantial rights. To obtain reversal or remand

1 for procedural error, petitioners must specify how the error  
2 has prejudiced their substantial rights. ORS  
3 197.835(8)(a)(B).<sup>5</sup>

4 The assignment of error is denied.

5 The decision is remanded.  
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FOOTNOTES

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4 <sup>1</sup>  
5 See ORS 197.825(4) providing that circuit courts of the  
state retain jurisdiction to issue declaratory judgements.

6 <sup>2</sup>  
7 Petitioners do not argue the city's findings on this  
8 criterion are defective. We express no opinion on whether the  
city's order satisfies this variance standard.

9 <sup>3</sup>  
10 The report states:

11 "Future owners of segments of this property should be  
12 apprised of the unstable nature of coastal sedimentary  
13 slopes, and of the geologic history of this slope, in  
14 particular. It is an unfortunate fact that the timing  
or extent of future downslope movement under such  
conditions can neither be predicted nor prevented."  
Record at 183.

15 <sup>4</sup>  
16 The Cannon Beach Zoning Ordinance has extensive regulatory  
17 provisions concerning development on geologic hazard areas.  
18 See, CBZO Section 4.110. The zoning regulations require  
19 geologic site investigation reports as a prerequisite to  
20 issuance of building permits in identified situations. In  
addition, the ordinance requires on the applicant to show  
proposed uses are not hazardous and that construction methods  
recommended in a site investigation report will either  
eliminate any hazard or minimize it to an "acceptable level."  
CBZO Section 4.110(4).

21 <sup>5</sup>  
22 The ordinance provisions in CBZO 10.062 appear to reflect  
23 the basic right to an impartial tribunal articulated in Fasano  
24 v. Washington Co., 264 Or 574, 507 P2d 23 (1973). Petitioners  
do not claim, and we do not decide, that Rekate's comments  
violated petitioners' constitutional right to an impartial  
tribunal.