BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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| DAVID L. DAVIS,<br><br>Petitioner,<br><br>vs.<br><br>CITY OF BANDON,<br><br>Respondent,<br><br>and<br><br>CHRIS KAPPOS, DENEICE KAPPOS, RICHARD HAMEL, JOANN HAMEL, JOHN GILCHRIST, SUE GILCHRIST, WALT LIVELY, and LYN A. BECK,<br><br>Intervenors-Respondent. | LUBA No. 94-033<br><br>FINAL OPINION AND ORDER |

Appeal from City of Bandon.

Daniel Kearns and Edward J. Sullivan, Portland, filed the petition for review. With them on the brief was Preston Gates & Ellis. Daniel Kearns argued on behalf of petitioner.

Frederick J. Carleton, City Attorney, Bandon, and Douglas M. DuPriest, Eugene, filed the response brief. With them on the brief was Hutchinson, Anderson, Cox & Coons. Douglas M. DuPriest argued on behalf of intervenors-respondent.

HOLSTUN, Referee; KELLINGTON, Chief Referee; SHERTON, Referee, participated in the decision.

REMANDED 09/12/94

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

Opinion by Holstun.

**NATURE OF THE DECISION**

Petitioner appeals a city decision granting conditional use and subdivision approval, with conditions, for a proposed seven lot subdivision.

**MOTION TO INTERVENE**

Chris Kappos, Deneice Kappos, Richard Hamel, Joann Hamel, John Gilchrist, Sue Gilchrist, Walt Lively and Lyn A. Beck move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

**FACTS**

The subject 1.7 acre parcel is zoned Controlled Development 1 (CD-1). Single family dwellings are a permitted use in the CD-1 zone. City of Bandon Zoning Ordinance (BZO) 3.210(1). The CD-1 zone imposes certain limitations on residential development, which are discussed later in this opinion.

A portion of the subject property is located within Shoreland Management Unit 12 and is subject to the Shoreland Overlay (SO) zone. Within the SO zone, filling, land divisions and residential uses are conditional uses. The challenged decision grants conditional use approval for the portions of the proposal located within the SO zone.[1]

[1]The subject application also sought a flood hazard development permit and variance approval. These aspects of the application are not at issue in this appeal.

Petitioner's initial proposal for subdivision of the subject property was approved by the city planning commission in March 1993. That planning commission decision was appealed, and petitioner thereafter withdrew the initial application. In June 1993, petitioner submitted the subject application. The planning commission approved the subject application on October 22, 1993, but imposed a number of conditions. As approved by the planning commission, Lots 1 and 2, which are located at the eastern end of the property and contain wetlands, may not be developed residentially and must be dedicated as open space. The remaining five lots are to be served by Pelican Place, a newly constructed roadway along the northern boundary of the subject property. Pelican Place intersects with existing Beach Loop Road, which adjoins the subject property to the east.

Petitioner appealed the planning commission decision to the city council. At its January 24, 1994 hearing, the city council voted to grant the requested subdivision and conditional use approvals, subject to additional conditions. Those conditions require that a bridge be constructed to carry Pelican Place across the wetlands located at the eastern end of the subject property. The city council also conditioned its approval of the subdivision on no residential development occurring on Lot 7, at the western end of the subject property. According to the city council, Lot 7, as configured in the application, is rendered

unbuildable by zoning ordinance restrictions adopted to minimize impacts on ocean views from existing structures.

At the January 24, 1994 hearing, petitioner objected to the additional conditions and notified the city council that he was withdrawing his appeal. Nevertheless, the city council met on February 14, 1994 to consider adoption of a written decision and findings. The decision challenged in this appeal was signed by the mayor on February 17, 1994.

**FIRST ASSIGNMENT OF ERROR**

Petitioner was the only party to the local proceedings to file an appeal of the planning commission decision in this matter. As noted above, at the January 24, 1994 city council meeting at which the city council voted to approve the requested development with additional conditions, petitioner's representative orally advised the city council that petitioner was withdrawing his appeal. Petitioner also notified the city council in writing that he was withdrawing his appeal. Despite petitioner's oral and written notices, the city council nevertheless adopted the decision challenged in this appeal on February 14, 1994. Petitioner contends the city council lacked jurisdiction to adopt the challenged decision, and that the decision is therefore a nullity. Petitioner argues withdrawal of his appeal of the planning commission decision in this matter had the legal effect of making the planning commission decision the city's final decision.

In support of his argument, petitioner relies on the lack of explicit provisions in the BZO concerning the city council's authority over a local appeal after the party filing the local appeal unilaterally withdraws the appeal. Petitioner also relies on cases decided by LUBA in three somewhat analogous situations: (1) withdrawal of an application for land use approval before a final local decision is made on the application, (2) withdrawal of an application for land use approval after a final local decision is made and appealed to LUBA, and (3) withdrawal of a notice of intent to appeal after an appeal is filed at LUBA.[2]

**A. City Interpretation of the BZO**

In the challenged decision, the city rejected petitioner's position and offered a number of reasons for doing so, citing a number of BZO provisions. Two BZO provisions cited by the city in its decision are BZO 13.010 and 14.090(5), which provide as follows:

> "An action or ruling of the Planning Commission authorized by this ordinance may be appealed to the [City] Council within 10 days after the [Planning] Commission has rendered its decision * * *. If no appeal is taken within the 10 day appeal period, the decision of the [Planning] Commission shall be final. If an appeal is filed,

[2]As explained more fully below, in the first two situations, the application itself, rather than an appeal of a decision concerning that application is withdrawn. In the third situation, it is a LUBA appeal of a final local decision that is withdrawn, rather than a local appeal of a decision by a lower level local decision maker.

> the [City] Council shall receive a report and recommendation from the Planning Commission and shall hold a public hearing on the appeal. * * *" BZO 13.010.
>
> "An appeal or review [before the City Council] shall be a full de novo hearing based on the same set of plans presented at the Planning Commission. The review or appeal shall consider the record of the [Planning] Commission hearing. * * * The [City] Council shall affirm, modify, reverse or reverse in part or modify, eliminate or add conditions [to] the decision being appealed." BZO 14.090(5).

The city council interpreted BZO 13.010 as providing that because a timely appeal of the planning commission decision was filed by petitioner, "the planning commission decision never became final." Record 20. The decision goes on to explain the city's interpretation of BZO 14.090(5):

> "More specifically, we interpret the phrase '**full de novo hearing**' to mean that the planning commission decision is not, and cannot be, the final decision of the city, once an appeal is filed or review is begun (absent consent of the council and other participants). The appeal was filed and now the council must act for there to be a city decision. The code says: 'The Council **shall** affirm, modify, reverse ...' * * * There is no final action on an appeal until the city council renders a decision as required by the code section. Having filed an appeal, an applicant does not have the ability to turn back the hands of time and pretend he never filed the appeal in an attempt to resurrect a planning commission decision that might be more favorable, when the planning commission decision never became[,] and will never become, final." (Emphases in original.) Record 21.

**B. Petitioner's Arguments**

Petitioner first cites cases decided by this Board in which we have held that a local government loses jurisdiction over an application for land use approval, where the application is withdrawn before a final decision is rendered. Lamb v. Lane County, 14 Or LUBA 127, 130-31 (1985); Robert Randall Co. v. Wilsonville, 8 Or LUBA 185, 189-90; Friends of Lincoln Cty v. Newport, 5 Or LUBA 346, 352 (1982). Petitioner analogizes the withdrawal of his local appeal in this matter to the withdrawal of pending applications in the above cited cases. Petitioner reasons that just as the local government's final decisions on the withdrawn land use applications in Lamb, Robert Randall Co. and Friends of Lincoln Cty were rendered moot, so was the city council's decision on petitioner's appeal in this matter. Moreover, petitioner contends his withdrawal of the appeal has the legal effect of making the planning commission decision the city's final decision.

Petitioner next cites cases involving withdrawal of an application for land use approval after the local government renders a final decision, and that decision is appealed to LUBA. This Board has rejected motions to dismiss such appeals as moot, where the local code does not make it clear that withdrawal of an application in such circumstances has any legal effect on the local government's final decision. Berg v. Linn County, 22 Or LUBA 507, 509 (1992); Gilson v.

City of Portland, 22 Or LUBA 343, 352 (1991); McKay Creek Valley Assoc. v. Washington County, 16 Or LUBA 1028 (1987). Petitioner contends that because the BZO does not make it clear the city council retains jurisdiction over a local appeal after it is withdrawn, it should have concluded it lacked jurisdiction in this case following petitioner's withdrawal of the appeal.

A final circumstance cited by petitioner, which is somewhat closer to the one presented in this appeal, is where a notice of intent to appeal is filed at LUBA and thereafter is withdrawn by petitioner. LUBA interprets ORS 197.830(1) to require maintenance of a validly filed notice of intent to appeal. National Advertising Company v. City of Portland, 20 Or LUBA 79 (1990); Gross v. Washington County, 17 Or LUBA 640 (1989). LUBA has held that held that where the notice of intent to appeal is withdrawn, the appeal must be dismissed. Id.

The question presented under this assignment of error is whether the city council committed legal error in not applying the cases cited by petitioner to construe the BZO in the manner petitioner contends it should be interpreted.

**C. Conclusion**

LUBA is required to defer to a local governing body's interpretation of its own enactment, unless that interpretation is contrary to the express words, purpose, or policy of the local enactment or inconsistent with a state

statute, statewide planning goal or administrative rule which the local enactment implements. ORS 197.829; Gage v. City of Portland, 319 Or 308, 316-17, ___ P2d ___ (1994); Clark v. Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992). In applying this standard of review, we defer to a local government's interpretation of its own enactments, unless that interpretation is "clearly wrong." Langford v. City of Eugene, 126 Or App 52, 57, 867 P2d 535, rev den 318 Or 478 (1994); Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 217, 843 P2d 992 (1992); West v. Clackamas County, 116 Or App 89, 93, 840 P2d 1354 (1992).

Petitioner is correct that there is nothing in the BZO explicitly stating the city council retains jurisdiction over a local appeal of a planning commission decision after an appeal is withdrawn by the local appellant. However, it is equally correct that there is nothing in the BZO explicitly allowing a local appellant unilaterally to withdraw a local appeal once it is filed. Therefore, to the extent the BZO is ambiguous on the point, the city's interpretation of the BZO as not allowing petitioner unilaterally to withdraw his local appeal is not inconsistent with the above quoted BZO provision, or the other BZO provisions the city relies upon. The city's interpretation is not "clearly wrong."

Moreover, the question presented under this assignment of error is not whether the city could have extended and

applied the above cited cases involving withdrawal of applications for land use approval in the manner that petitioner argues the city should have or interpreted the relevant BZO provisions in the same way LUBA interprets ORS 197.830(1) concerning withdrawal of a notice of intent to appeal. The question is whether the city was "clearly wrong" in failing to do so. We conclude the city acted within its interpretive discretion under ORS 197.829.

The first assignment of error is denied.

**INTRODUCTION TO REMAINING ASSIGNMENTS OF ERROR**

After the petition for review was filed in this matter, the U.S. Supreme Court issued its decision in Dolan v. City of Tigard, ___ US ___, 114 S Ct 2309, 129 L Ed2d 304 (1994). That case potentially has some bearing on at least one of the remaining assignments of error in which petitioner challenges conditions of approval included in the challenged decision. We therefore discuss the holding of that case as well as our past decisions concerning conditions of approval generally, before turning to the remaining assignments of error.

In Dolan, supra, the U.S. Supreme Court considered the validity of conditions of land use permit approval requiring uncompensated dedications of land for floodway protection and construction of a pedestrian and bicycle pathway. Conditions of land use approval requiring such uncompensated dedications are generally referred to as imposing

exactions.[3] Under the U.S. Supreme Court's decision in Nollan v. California Coastal Comm'n, 483 US 825, 107 S Ct 3141, 97 L Ed2d 677 (1987), conditions imposing such exactions must have an essential nexus with the legitimate state interest the exaction is imposed to further.[4] In Dolan, the U.S. Supreme Court elaborated on the second inquiry that must be satisfied under the Takings Clause of the Fifth Amendment of the United States Constitution, once the Nollan essential nexus is demonstrated -- "whether the degree of the exactions demanded by the * * * permit conditions bear the required relationship to the projected impact of [the] proposed development." Dolan, supra, 129 L

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[3]Exactions may involve uncompensated dedications of land or relinquishment of other property rights as well as required payments of fees and construction of off-site improvements.

[4]Exactions are commonly imposed in granting subdivision approval.

> "Many local governments have chosen to cope with growth-induced financial difficulties by employing a variety of means, including subdivision exactions, the shift the cost of providing capital improvements to the new residents who create the need for them. A subdivision exaction has been defined as 'one form of subdivision control, which requires that developers provide certain public improvements at their own expense.' No aspect of subdivision control law has interested the casebook authors and the law review article writers more than the question of what kinds of conditions, required dedications, payment of fees and improvements can be imposed for subdivision approval. * * *" Hagman, Urban Planning and Land Development Control Law, § 7.8 (2d ed, 1986) at 202.

However, exactions may occur in other contexts as well. For example neither the permit at issue in Dolan (permit to expand hardware store), nor the permit at issue in Nollan (permit to remove and replace a vacation dwelling), involved subdivision approvals.

Ed2d at 318. In explaining the required degree of connection between the exaction and the projected impact, the court considered and rejected two tests applied by a minority of state courts and adopted the majority view requiring that there be a "reasonable relationship" between the exaction and the projected impact.[5] The court elaborated on its understanding of the "reasonable relationship" test:

> "We think the 'reasonable relationship' test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term 'reasonable relationship' seems confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." (Footnote omitted.) Id. at 320.

One of the conditions of approval challenged by petitioner requires that the applicant dedicate all of Lots

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[5]The court explained that "very generalized statements as to the necessary connection between the required dedication and the proposed development," which suffice in some jurisdictions, are too lax to protect a property owner's Fifth Amendment "right to just compensation if * * * property is taken for a public purpose." On the other hand, the court rejected the "specific and uniquely attributable" test followed in some jurisdictions as requiring more scrutiny than is necessary under the Fifth Amendment. Dolan, supra 129 L Ed2d at 319.

1 and 2 as public open space. Petitioner challenges this condition in his fourth assignment of error, arguing this exaction is not authorized by the city's land use regulations and, even if it were, that it lacks the connection required by Dolan to impacts that may reasonably be attributed to the proposed seven lot subdivision.[6]

Petitioner's remaining assignments of error challenge other conditions of approval which do not appear to impose exactions. It is not clear to this Board whether or how the "rough proportionality" requirement of Dolan applies to such conditions. Since the U.S. Supreme Court's decision was issued after the petition for review was filed in this case, and petitioner does not argue the conditions challenged in those assignments of error fail to satisfy the reasonable relationship or Dolan "rough proportionality" requirement, we do not consider the issue. However, even when conditions of approval are imposed which do not constitute "exactions," we have held the record must demonstrate that conditions attached to land use approval must support some legitimate planning purpose, and the local government must have authority under its comprehensive plan or land use

[6]Because the petition for review was filed before the U.S. Supreme Court's decision in Dolan, petitioner relies on the Oregon Supreme Court's decision in that case. Dolan v. City of Tigard, 317 Or 110, 853 P2d 1311 (1993). The Oregon Supreme Court also adopted the reasonable relationship test ultimately adopted by the U.S. Supreme Court. However, unlike the U.S. Supreme Court, the Oregon Supreme Court concluded the reasonable relationship test was met in Dolan.

regulations to impose the conditions. Skydive Oregon v. Clackamas County, 25 Or LUBA 294, 307-08 (1993); Wastewood Recyclers v. Clackamas County, 22 Or LUBA 258, 263-65 (1991); Wheeler v. Marion County, 20 Or LUBA 379, 385 (1990); Century 21 Properties v. City of Tigard, 17 Or LUBA 1298, 1314-15 (1989); Consolidated Rock Products v. Clackamas County, 17 Or LUBA 609, 628 (1989); Benj. Fran. Dev. v. Clackamas County, 14 Or LUBA 758, 761 (1986). With regard to the conditions challenged in the second through fifth assignments of error, petitioner contends the city either lacks authority under its comprehensive plan and land use regulations to impose the disputed conditions, or misconstrues the authority it relies upon.

**SECOND ASSIGNMENT OF ERROR**

Although the subject property is not included on the city's acknowledged comprehensive plan Goal 5 inventory or the State of Oregon's Wetland Inventory List, the Oregon Division of State Lands determined that the subject property includes a wetland in the eastern portion of the property where Lots 1 and 2 and the eastern end of the proposed Pelican Place are located. Pelican Place has been partially completed, using fill placed in the wetland.

The challenged decision finds "the only way to traverse the wetland area * * * is by a bridge and the proper permits must be obtained through DSL to construct it." Record 23. It also includes a condition that "[a] private street must

be carried across the wetland on a bridge or bridgelike structure." Record 32.

Petitioner contends the city erred by failing to explain why the bridge is needed or "how this particular development creates the need for such an elaborate and expensive structure." Petition for Review 19. The question under this assignment of error is whether the city has authority to impose the condition that Pelican Place be carried across the identified wetland on a bridge or bridgelike structure and whether that condition reasonably furthers a legitimate planning purpose.

As an initial point, petitioners appear to suggest that all conditions of approval must be supported by findings which explain the justification for the condition. We are aware of no general requirement that a decision imposing conditions of approval be remanded simply because a condition of approval is not supported by findings, and we reject the suggestion.[7] Where a condition of approval is challenged and the decision or findings do not identify the authority for imposing that condition or the evidence in the

[7]Under the U.S. Supreme Court's decision in Dolan, supra, findings, or some other form of "individualized determination," are required to justify conditions imposing exactions in order to demonstrate compliance with the rough proportionality requirement. In addition, even where a condition does not impose an exaction, if a local government's authority to impose the condition is challenged or the relationship of the condition to a legitimate planning purpose is contested, a local government will improve its chances of successfully defending its decision to impose the disputed condition if it explains in its decision its authority and rationale for imposing the condition.

record supporting its imposition, respondent may, in its brief, identify the requisite authority and the supporting evidence in the record.

There is no dispute that the portion of the property below the 29 foot elevation level is within Shoreland Management Unit 12 and the SO zone. Pelican Place is constructed on fill below the 29 foot elevation level, where it intersects Beach Loop Road.[8] Among the approval standard for conditional uses is BZO 7.030(2)(c), which imposes the following requirement:

> "The characteristics of the site are suitable for the proposed use considering size, shape, location, topography and natural features."

BZO 7.010 specifically authorizes the city to impose conditions when granting conditional use approval "to assure that the use is compatible with other uses in the vicinity and to protect the City as a whole." BZO 7.010(9) specifically authorizes conditions "[r]equiring design features which minimize environmental impacts * * *." These BZO provisions are adequate authority for the city to impose the disputed bridge condition.

Respondent cites testimony expressing concern about construction of driveways on fill in the disputed wetland. We conclude the record is sufficient to show the condition

[8]As noted earlier, conditional use approval is required for fill, residential development and land division in the SO zone.

requiring that Pelican Place be carried across the wetland on a bridge, rather than be constructed on fill placed in the wetland, supports the valid planning purpose of ensuring that the development will be suitable in view of the natural features of the site, which include the wetland in the eastern portion of the property.

The second assignment of error is denied.

**THIRD ASSIGNMENT OF ERROR**

The CD-1 zone permits single family dwellings outright "provided the use promotes the purpose of the [CD-1] zone and all other ordinance requirements are met[.]" BZO 3.210.[9] The purpose of the CD-1 zone is set out in BZO 3.200:

> "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 the these qualities as much as possible by carefully controlling the nature and scale of 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."

In imposing a condition prohibiting residential development of Lots 1 and 2, the city found that placing

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[9]Petitioner generally cites to BZO 3.600 et seq, which sets out standards for the Controlled Development Residential 1 (CD-R1) zone, rather than to the provisions of BZO 3.200 et seq for the CD-1 zone, which apply in this case. As relevant in this appeal, the parallel provisions for the CD-1 zone at BZO 3.200 et seq are substantially the same as the CD-R1 zone provisions cited in the petition for review.

fill on, and residential development of, proposed Lots 1 and 2 would be inconsistent with the purpose of the CD-1 zone. The city explains:

> "The Planning Commission found 'the proposed development is not designed with consideration of the unique natural land form and that the overall density should be reduced.'
>
> "We view the Planning Commission's finding on density as being in part connected to the preservation of the unique qualities of this site which most notably include features like this wetland area.
>
> "The developer has attempted to pose a development he feels is sensitive to this area and is in good taste and of the quality of other developments he has been involved in. We note that the evidence is overwhelming that * * * birds and wildlife [were] displaced by the loss of vegetation removed by the applicant. We find that the disallowance of building on Lots 1 and 2, regardless of DSL finding on the wetland process, is appropriate in assuring protection of this areas [sic] unique qualities. The applicant has chosen to provide lots that exceed the minimum lot size and has chosen to argue that the significant amounts of these [lots] are in fact open space. We feel that the remaining attributes of Lots 1 and 2 and the potential for revegetation are still significant and worth preserving for protection of the immediate area." Record 29.

As petitioner notes, the city does not rely on any specific authority in the BZO to regulate wetlands in concluding that Lots 1 and 2 should not be developed.[10] Petitioner contends the problem with the city's reliance on

[10]Respondents point out the BZO 1.100(10) states a general policy under the BZO to protect wetlands, among other things.

BZO 3.200 is that the city prohibited all development of Lots 1 and 2, rather than "controlling the nature and scale of development in this zone," as BZO 3.200 requires.

Petitioner's focus on Lots 1 and 2 is misplaced. The city did not preclude the development of the subject property, it merely concluded that a portion of the subject property, i.e. Lots 1 and 2 as presently configured, cannot be developed consistent with the requirements of BZO 3.200. We fail to see how the city erred or exceeded its authority under BZO 3.200 and 3.210.

The third assignment of error is denied.

**FOURTH ASSIGNMENT OF ERROR**

In addition to the condition requiring that Lots 1 and 2 not be developed, the city conditioned approval of the subdivision as follows:

> "The wetland area associated with Lots 1 and 2 shall be dedicated as open space." Record 32.

Petitioner contends that because the precise location of the wetland on Lots 1 and 2 is not yet delineated, it must be assumed this condition extends to require dedication of all of Lots 1 and 2. When that area is added to land the applicant already proposed to dedicate as open space, the area the applicant is required to dedicate totals between 20% and 25% of the entire property. Petitioner contends the condition requires dedication of more open space than is required under the City of Bandon Subdivision Ordinance (BSO), and is disproportionate to the impacts that are

reasonably associated with the proposed subdivision. See Dolan v. City of Tigard, supra.

BSO 33(2) provides in pertinent part:

> "Within or adjacent to a subdivision, a parcel of land of not less than 6 per cent of the gross area of the subdivision shall be set aside and dedicated to the public by the subdivider. The parcel shall be approved by the planning commission as being suitable and adaptable for park and recreation uses. In the event no such area is suitable for park and recreation purposes, the subdivider shall, in lieu of setting aside land, pay into the public land acquisition fund a sum of money equal to current market value x .06 per gross acre for each acre in the subdivision. The sums so contributed shall be used to aid in securing land or providing facilities for park and recreation purposes within the City. * * *"

Respondents point out the six percent dedication requirement set forth in BSO 33(2) is a minimum requirement, not a maximum. Moreover, respondents dispute petitioner's assertion that the condition requires dedication of all of Lots 1 and 2; according to respondents, it only requires dedication of the wetland portion of those lots.

The challenged decision does not cite BSO 33(2) as the basis for imposing the requirement that the wetland portions of Lots 1 and 2 be dedicated as public open space. Neither does the decision explain why the city is requiring the additional dedication of open space beyond that already designated by petitioner to comply with BSO 33(2). When the wetland portion of Lots 1 and 2 is added to the other area dedicated as open space, the city has required substantially

more than 6% of the gross area of the subdivision. If the city's position is that BSO 33(2) authorizes it to require three or four times more than 6% of the gross area of the subdivision be dedicated to the public as open space, it must state and explain that interpretation in its findings.[11] A remand is required for the city to explain its interpretation of BSO 33(2).

Even if the city interprets BSO 33(2) to authorize a requirement that 6% or more of the gross area of the subdivision be dedicated to the public as open space, it "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." Dolan v. City of Tigard, supra, 129 L Ed2d at 320. We are unable to determine from the challenged decision and the record whether the Dolan requirement for "rough proportionality" is met.

The fourth assignment of error is sustained.

**FIFTH ASSIGNMENT OF ERROR**

CD-1 zoning requires protection of scenic vistas and the residential character of the Bandon coastline. BZO 3.230(2)(b) provides as follows:

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[11]Interpretation of BSO 33(2) as imposing only a minimum dedication requirement of 6% of the gross area of the subdivision, with no maximum limit, is arguably inconsistent with the provision of BSO 33(2) requiring, in the alternative, a fee in lieu of dedication equal to 6% of the current market value of the property.

> "Siting of structures should minimize negative impacts on the ocean views of existing structures on abutting lots. Protection of views from vacant building sites should also be taken into consideration. Where topography permits, new structures should be built 'in line' with other existing structures and not extend further out into those viewscapes."

The city's findings apply BZO 3.230(2)(b) and conclude that Lot 7, as presently configured, cannot be developed. The city's findings take the approach of drawing a line connecting existing ocean front residences located to the south and north of the subject property. Because most of Lot 7 lies seaward of that line, and the proposed building site lies seaward of that line, the city concluded Lot 7 was not buildable as presently configured. In reaching this conclusion, the city rejected petitioner's arguments that it should have recognized the home proposed for Lot 7 would be lower than the dwelling to the south, allowing the ocean to be viewed from the dwelling to the south over the dwelling on Lot 7. The city also rejected petitioner's contention that in applying BZO 3.230(2)(b), more than the immediately adjacent properties should be considered in establishing the "in line" requirement.[12] We conclude the city was within

[12]The city's findings are as follows:

> "The applicant has submitted both the model and an aerial photograph of the surrounding area contending that this shows that the building envelopes have been placed 'in line' with other existing homes along this area. The property immediate [sic] south, noted in the testimony as the Landers' Home, the applicant contends is built further back from the coastline

its interpretive discretion under ORS 197.829 in interpreting and applying BZO 3.230(2)(b).

A final point raised by petitioner concerns the use of the word "should" in BZO 3.230(2)(b). Petitioner contends the city improperly interprets the word "should" to mean "shall." As petitioner correctly notes, where this Board has been required to construe local code and comprehensive plan provisions employing the word "should," we generally have concluded such provisions are nonmandatory. However, it is clear from the city's decision that it construes BZO 3.230(2)(b) as imposing a mandatory requirement. However we might interpret BZO 3.230(2)(b) if we were called upon to do

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than any other homes and that the Landers should be able to see over the top of a two-story house on Lot 7.

"The applicant has contended that the northwest corner of the house on Lot 7 is aligned with the Kappos house to the north. There was an attempt by the application show this by using the model.

"The chief piece of evidence contradicting the applicant was the Kappos photograph that disputed the applicant's placement of a house on Lot 7 in line with other existing structures. Also, after listening to the testimony of Mr. Kappos, Mr. Davis, Mr. Winterowd, Mr. Lander, and others, we cannot find that the model accurately depicts the real situation in regard to this issue. We have relied on the Kappos photograph as the convincing evidence as to the issue. We find that there can be no building on the proposed Lot 7 because it is beyond the in line restriction shown by the Kappos photograph.

"The topography permits the placement of dwellings on the Davis property east of Lot 7. We find that a significant portion of the proposed building site on Lot 7 is west of the line created by connecting the western most [sic] points of the existing Landers and Kappos residences located adjacent to the north and south respectively. Record 30.

so in the first instance, we cannot say the city's interpretation is clearly wrong.

Petitioner also points out the city does not explicitly explain why it views BZO 3.230(2)(b) as a mandatory requirement, despite the "should" language employed in that section. We do not believe a remand is required under Weeks v. City of Tillamook, 117 Or App 449, 453-54, 844 P2d 914 (1992), and Larson v. Wallowa County, 116 Or App 96, 104, 840 P2d 1350 (1992), for the city to explain further why it interprets BZO 3.230(2)(b) to express a mandatory criterion. The city's interpretation and application of BZO 3.230(2)(b) is set out in the challenged decision. See n 12, supra. The city adequately articulates its view that BZO 3.230(2)(b) is a mandatory criterion.[13]

The fifth assignment of error is denied.

The city's decision is remanded.

[13]We did remand a city decision for further interpretation in a somewhat similar situation in Eskandarian v. City of Portland, 26 Or LUBA 98 (1993). However, the plan provisions applied by the city as mandatory approval standards in that case not only contained nonmandatory language, a prior case had determined that city plan guidelines were by nature nonmandatory. In that circumstance, we concluded a remand was necessary for the city to further explain its apparent view that the guidelines at issue in Eskandarian were mandatory approval standards. That circumstance does not exist here.