

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

3
4 JOHN V. GETTMAN,)
5))
6 Petitioner,) LUBA No. 94-094
7))
8 vs.) FINAL OPINION
9)) AND ORDER
10 CITY OF BAY CITY,)
11))
12 Respondent.)

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14
15 Appeal from City of Bay City.

16
17 John V. Gettman, Bay City, filed the petition for
18 review and argued on his own behalf.

19
20 No appearance by respondent.

21
22 HOLSTUN, Referee; SHERTON, Referee, participated in the
23 decision.

24
25 REMANDED 09/27/94

26
27 You are entitled to judicial review of this Order.
28 Judicial review is governed by the provisions of ORS
29 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city decision granting conditional
4 use approval for a logging operation on property platted and
5 zoned for residential use.

6 **FACTS**

7 The one acre subject property includes unimproved
8 platted lots located within the city. The subject property
9 is surrounded by unimproved lots to the west, unimproved
10 rights of way to the east and south, and an improved right
11 of way to the north.

12 The subject property is zoned Moderate Intensity (MI),
13 which allows residential development. Forest management is
14 listed as a conditional use in the MI zone. Bay City
15 Development Ordinance (BCDO) 1.3.¹ The applicant does not
16 plan to construct houses on the subject property at this
17 time; he only wishes to remove the trees. The challenged
18 decision authorizes the applicant to remove the trees.

19 **FIRST THROUGH FOURTH ASSIGNMENTS OF ERROR**

20 The challenged decision identifies the following Bay
21 City Comprehensive Plan (plan) provisions as applicable
22 criteria:

¹BCDO 1.3(12) defines "Forest Management," as follows:

"Logging and related management techniques such as slash
removal and replanting."

1 "The City shall promote the use of natural
2 topography and trees in both public and private
3 development." Goal I, Policy 7.

4 "The physical capabilities of the land, as
5 indicated by the Physical Inventory Section of the
6 Plan, should be a controlling factor in
7 designating the types of development that occurs
8 [sic]. Particular attention should be paid to
9 flood and landslide potential, steep slopes,
10 lowlands, and the scenic nature of the area."
11 Goal III, Policy 3.

12 "The prevention of erosion and sedimentation of
13 the Bay shall be promoted through development
14 standards; these shall regulate, as a minimum, the
15 extent of excavation and fill, revegetation of
16 graded areas, degree of cut slopes, removal of
17 trees, and placement of roads." Goal VII, Policy
18 7.

19 "Logging and associated road construction should
20 be allowed on a conditional use basis to insure
21 that the City can assess its impacts on water
22 quality, adjacent development, and geologic
23 stability. The Oregon Forest Practices Act shall
24 be adhered to in all cases." Forestry Policy 1.²

25 BCDO 4.105 and 4.106 set forth information requirements
26 for applications for conditional use approval. The
27 requirements include a map showing a tentative plan, grades,
28 utilities, structures, and hazards. Under BCDO 4.110(c), a
29 geologic report is required because the property includes
30 slopes in excess of 12%.

²Petitioner also identifies Goal III, Policy 4, which provides:

"Flexible development approaches, such as clustering of structures on one portion of the property should be promoted to reduce the removal of trees or disturbance of slopes."

1 Petitioner contends the city erred by failing to
2 require the information specified in BCDO 4.105 and 4.106.
3 Without that information, petitioner contends the city
4 cannot make the required findings demonstrating compliance
5 with the above quoted plan provisions.

6 Some of the information required by BCDO 4.105 and
7 4.106 does not appear to be relevant where the only proposal
8 is to cut trees on the property. However, some of the above
9 plan policies could be circumvented if all the trees are cut
10 now, in advance of residential development of the property.
11 We agree with petitioner that the city's decision must
12 demonstrate compliance with any plan provisions it
13 identifies as approval criteria.³ We also agree the city
14 must require that the applicant supply the information
15 specified in BCDO 4.105 and 4.106 or explain why that
16 information need not be submitted. The findings adopted by
17 the city addressing the above cited plan policies are not
18 adequate to explain how the plan policies apply to the
19 disputed application or to explain that the application
20 complies with those policies.⁴

³If the city proceeds with this matter on remand, it should also explain whether plan Goal III, Policy 4 applies in this case and, if so, whether it is satisfied. See n 2, supra.

⁴The challenged decision authorizes removal of trees on the subject property, but the city council's findings appear to defer to the planning commission determinations that are necessary to grant that authorization. The findings state:

1 The first through fourth assignments of error are
2 sustained.

3 **FIFTH ASSIGNMENT OF ERROR**

4 BCDO 2.210 establishes conditional use standards for
5 "Forest Management Practices." Those standards require
6 consideration of a number of factors designed to reduce
7 possible environmental impacts of forest management
8 practices. The city identified BCDO 2.210 as applicable in
9 this case and adopted findings that those standards are
10 satisfied. Petitioner argues the city erred by applying
11 BCDO 2.210. According to petitioner, those provisions apply
12 only to land designated as forest lands, not land planned,
13 zoned and platted for residential use.

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- "1. The City is evaluating the logging proposal in accordance with the Comprehensive Plan policy. Conditions may be placed on the removal of trees to regulate the impacts on surrounding property, as well as future use of the land.
 - "2. The Planning Commission should carefully evaluate the removal of trees on steep slopes, particularly in the right of way and adjacent to existing developments, to ensure compliance with this policy.
 - "3. The Planning Commission should consider whether the removal of trees can have any impact on the geological stability of the area, since there have been instances of slope failure in the vicinity to Ninth and Seattle. The possibility of a geologic hazard report should be considered as a condition by the Planning Commission.
 - "4. Revegetation (seeding, mulching, silt fence installation) should be a requirement of all tree removal proposals, particularly in steeper slope areas on the lower or southern portion of the property." Record 13.

1 There is nothing in the BCDO which makes the
2 distinction concerning the applicability of BCDO 2.210 that
3 petitioner argues. Even if petitioner is correct, the city
4 simply applied criteria it was not required to apply, but
5 found those criteria satisfied. Therefore, any error is
6 harmless.

7 The fifth assignment of error is denied.

8 **SIXTH ASSIGNMENT OF ERROR**

9 BCDO 4.110(c) lists the following as required
10 information for an application for conditional use approval:

11 "Geologic Report

12 "Site specific geologic investigation report by a
13 licensed engineering geologist, soils engineer, or
14 other qualified expert indicating the feasibility
15 of any proposed structures, cuts or fills,
16 recommended storm drains both on and off the site,
17 erosion control measures and slope stabilization
18 devices, and trees or other stabilizing vegetation
19 to be retained. Required for slopes of 12% or
20 greater. * * *"

21 The planning commission's approval of the applicant's
22 request was conditioned on compliance with a geological
23 report that appears at Record 105-15. The city council's
24 decision does not address petitioner's contentions that the
25 geologic report in the record is defective in several
26 particulars. More importantly, the city council decision
27 does not condition approval on compliance with the
28 recommendations in the geologic report or explain why
29 failure to do so nevertheless results in compliance with the
30 substantive criteria that report presumably is required to

1 address. On remand, if the city again grants conditional
2 use approval, it must address petitioner's contentions
3 concerning the adequacy of the geologic report and either
4 condition approval on implementation of the recommendations
5 contained in the geologic report or explain why the
6 recommendations in that report need not be implemented.⁵

7 The sixth assignment of error is sustained.

8 **SEVENTH ASSIGNMENT OF ERROR**

9 Petitioner argues the city erred by adopting findings
10 prepared by a staff planner after the planner advised the
11 city that two paragraphs in that findings document were
12 erroneous in part.

13 A local government decision maker may adopt staff
14 prepared findings as its own findings. The fact the planner
15 advised the local government decision maker that parts of
16 his findings are erroneous does not establish that the
17 findings actually are erroneous. Petitioner does not offer
18 any additional argument concerning the adequacy of the
19 disputed findings.

20 The seventh assignment of error is denied.

21 The city's decision is remanded.

⁵Petitioner contends a geologic report is also required by BCDO 1.703(b), because the subject property is located in the Hazards Overlay Zone. Because we agree a geologic report is required by BCDO 4.110(c), we do not consider whether BCDO 1.703(b) also imposes that requirement in this case.