

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

4	E. RAY SPARKS and SONDRAS SPARKS,)	
5)	
6	Petitioners,)	LUBA No. 94-226
7)	
8	vs.)	FINAL OPINION
9)	AND ORDER
10	CITY OF BANDON,)	
11)	
12	Respondent.)	

15 Appeal from City of Bandon.

17 Martin E. Stone, Coquille, filed the petition for
18 review and argued on behalf of petitioners. With him on the
19 brief were Slack, Stone, Trew & Cyphers.

21 Frederick J. Carleton, City Attorney, Bandon, filed the
22 response brief and argued on behalf of respondent.

24 HANNA, Referee; LIVINGSTON, Chief Referee, participated
25 in the decision.

27 AFFIRMED 10/06/95

29 You are entitled to judicial review of this Order.
30 Judicial review is governed by the provisions of ORS
31 197.850.

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a limited land use decision of the
4 city council denying their application for a spa structure.

5 **FACTS**

6 On December 16, 1993, at a public hearing, the city
7 planning commission orally approved petitioners' proposal to
8 build a structure for a home spa on their residentially
9 zoned lot. No notice of the hearing was given to anyone.
10 On April 4, 1994, the city issued a building permit for the
11 structure, and petitioners began construction.

12 On April 28, 1994, an adjoining property owner, Thelma
13 Redmon (Redmon), requested a new hearing from the planning
14 commission because the oral approval had been granted
15 without proper notice. After providing proper notice, the
16 planning commission held a hearing on May 26, 1994, and on
17 June 23, 1994, again approved petitioners' application.¹ On
18 July 5, 1994, Redmon appealed the planning commission's June
19 23, 1994 decision to the city council.

20 Prior to an October 17, 1994 city council hearing on

¹Although the challenged decision concerns site review within an urban growth boundary and is therefore a limited land use decision as defined in ORS 197.015(12), the city did not follow the procedures set forth in ORS 197.195(3). Instead, the city used the procedures established for land use decisions under ORS 197.763 and BZO Article XIV. Therefore, it was required to provide all of the procedural safeguards required for land use decisions. Gensman v. City of Tigard, 29 Or LUBA ____ (LUBA No. 94-211, August 14, 1995), slip op 8-9.

1 the appeal, a member of the city council visited the Redmon
2 residence and observed the location of the spa structure and
3 its effect on Redmon's ocean view. Before the hearing, she
4 discussed her observations with another member of the city
5 council. At the hearing she disclosed both the site visit
6 and the discussions.

7 On November 7, 1994, the city council made a final
8 decision denying the application for the structure.² This
9 appeal followed.

10 **FIRST ASSIGNMENT OF ERROR**

11 Petitioners contend that the city council exceeded its
12 jurisdiction in three respects in considering the June 23,
13 1994 approval of the planning commission: (1) in determining
14 that the Redmon appeal was filed timely; (2) in determining
15 that the planning commission had authority to conduct a
16 second proceeding; and (3) in failing to acknowledge that
17 the city was equitably estopped from denying the approval.

18 **A. Time Period in Which to Appeal**

19 Petitioners contend that Redmon's July 5, 1994 notice
20 of appeal to the city council was not filed within 10 days
21 of the planning commission decision, as required by BZO

²Subsequent to this appeal, the Bandon Zoning Ordinance (BZO) was renumbered and amended. Petitioner cites to the new numbers. As required by ORS 227.178(3), we apply the BZO as it existed on the date of the application. Our citations are to that ordinance.

1 13.010.³

2 The planning commission decision was made on June 23,
3 1994, and mailed on June 27, 1994. While BZO 13.010
4 establishes a 10-day period in which to appeal, it does not
5 state whether the final decision date for purposes of appeal
6 is the date the body acted or the date the decision was
7 mailed. The city responds that BZO 14.090(2) requires that
8 an appeal be filed within 10 days of the date the planning
9 commission mails a decision to the parties.⁴ The city
10 argues that BZO 14.090(2) and BZO 13.010 should be read
11 together to allow an appeal within 10 days of the June 27,
12 1994, mailing.

13 The general ordinance provision of BZO 13.010 is
14 controlled by the more specific provision of BZO 14.090(2).
15 See Hansen v. Abrasive Engineering and Manufacturing, 317 Or
16 378, 856 P2d 625 (1993). The appeal was filed within 10
17 days after the planning commission decision was mailed. It

³BZO 13.010 provides:

"An action or ruling of the Planning Commission authorized by this ordinance may be appealed to the Common Council within 10 days after the Commission has rendered its decision by filing written notice with the City Recorder. * * *"

⁴BZO 14.090(2) provides:

"A participant in the hearing who is aggrieved by the action of the Planning Commission may appeal the action to the Common Council by filing a written notice of appeal with the City Recorder within ten (10) days of the date the Planning Commission or designate mails or delivers the decision of the Planning Commission to the parties."

1 was timely filed under BZO 14.090(2).

2 This subassignment of error is denied.

3 **B. Planning Commission Authority for Second Proceeding**

4 Petitioners contend that the planning commission's
5 December 16, 1993 review of the plan to build a spa
6 structure was a public proceeding, approval was granted, and
7 no appeal was filed within 10 days of that proceeding.
8 Accordingly, petitioners conclude that the decision is
9 final.

10 The city responds that the oral decision of the
11 planning commission has no legal effect because the process
12 resulting in the decision was fatally defective under BZO
13 14.030 and 14.080.⁵ The oral approval did not meet the
14 notice requirements of BZO 14.030. The decision was not

⁵BZO 14.030 provides, in relevant part:

"(1) Notice for a quasi-judicial land use hearing for a zone change or permit or an appeal of a decision of the Planning Director or Planning Commission shall be provided to (where applicable):

"* * * * *

"(d) owners of record on the most recent property tax assessment roll of property within 250 feet of the property which is the subject of the notice."

BZO 14.080 provides in relevant part:

"(1) A written notice of final decision of a hearing under these sections shall be mailed to all participants of the hearing and those parties in the notice area within seven (7) days of the decision.

"* * * * *"

1 reduced to writing and mailed as required by BZO 14.080.

2 We agree with the city that the December 16, 1993,
3 planning commission hearing did not meet the hearing notice
4 requirements of BZO 14.030 and the decision notice
5 requirements of 14.080, to Redmon's prejudice. The December
6 16, 1993, planning commission hearing was without legal
7 effect.

8 This subassignment of error is denied.

9 **C. Equitable Estoppel**

10 Petitioners contend that they relied, to their
11 detriment, on the December 16, 1993, oral decision of the
12 city planning commission and that the city is estopped from
13 changing that decision now.

14 Our authority to reverse a local government decision
15 based on equitable estoppel is unclear. Pesznecker v. City
16 of Portland, 25 Or LUBA 463 (1993). We need not reach the
17 issue of the extent of our authority, however, because the
18 facts of this case do not support a claim of equitable
19 estoppel.

20 In DLCD v. Benton County, 27 Or LUBA 49 (1994), we
21 considered our authority to grant relief based on a claim of
22 equitable estoppel. We were guided by the discussion of the
23 elements of equitable estoppel as explained by the Oregon
24 Supreme Court in Coos County v. State of Oregon, 303 Or 173,
25 734 P2d 1348 (1987):

26 "The elements of equitable estoppel in Oregon were
27 set out by this court in Oregon v. Portland

1 General Elec. Co., 52 Or 502, 528, 95 P 722
2 (1908):

3 'To constitute estoppel by conduct there must
4 (1) be a false representation; (2) it must be
5 made with knowledge of the facts; (3) the
6 other party must have been ignorant of the
7 truth; (4) it must have been made with the
8 intention that it should be acted upon by the
9 other party; (5) the other party must have
10 been induced to act upon it: Bigelow,
11 Estoppel (5 ed.), 569, 570.'" Coos County
12 v. State of Oregon, 303 Or at 180-81.

13 The court went on to describe the application of these
14 elements to the facts:

15 "Courts generally have held that the
16 misrepresentation must be one of existing material
17 fact, and not of intention, nor may it be a
18 conclusion from facts or a conclusion of law. * *
19 * The party seeking estoppel must demonstrate not
20 only reliance, but a right to rely upon the
21 representation of the estopped party. * * * The
22 facts creating an estoppel must be proved by a
23 preponderance of the evidence." (Citations
24 omitted.) Id. at 181.

25 Petitioners do not establish that the facts support
26 each of the elements of equitable estoppel. Furthermore, we
27 find no support for petitioners' contention that LUBA can
28 reverse the decision of a city board and thereby require the
29 city to allow a violation of its zoning ordinance. See
30 Bankus v. City of Brookings, 252 Or 257, 260, 449 P2d 646
31 (1969), Holdner v. Columbia County, 123 Or App 48, 858 P2d
32 901 (1993) (estoppel cannot arise from an action of an
33 official who purports to waive a mandatory standard).

34 This subassignment of error is denied.

1 The first assignment of error is denied.

2 **SECOND ASSIGNMENT OF ERROR**

3 Petitioners contend that the city council did not
4 provide an unbiased and impartial tribunal and thereby
5 prejudiced their substantial rights.

6 The city councilor who visited the Redmon home and the
7 councilor with whom she spoke disclosed their observations
8 and communications at the beginning of the public hearing.
9 Petitioners contend the councilor who visited the Redmon
10 home concluded before the city council hearing that the
11 enclosure obstructed Redmon's view. Petitioners point to
12 the councilor's statement that she had been in the Redmon
13 home and to her comment that "the Sparks hot tub obstructed
14 the view." Record 23. Petitioners contend also that the
15 councilor's discussion of her observations may have
16 improperly influenced other councilors.

17 The city responds that since the city council members
18 disclosed their observations and communications as required
19 by ORS 227.130(3), petitioners had an opportunity at the
20 hearing to rebut any impressions the city councilors may
21 have had as a result of one councilor's site visit.

22 In order to establish bias, petitioners must establish
23 that the city council was not capable of making a decision
24 based on the evidence and arguments of the parties. Nalette
25 v. City of Klamath Falls, 28 Or LUBA 709, 710 (1995).
26 Petitioners' assertions and conjecture regarding the

1 conclusions of one or more councilors do not meet this
2 standard.

3 The second assignment of error is denied.

4 **THIRD ASSIGNMENT OF ERROR**

5 Petitioners contend that the city council did not
6 follow the procedures required by the city's ordinances at
7 the October 17, 1994 hearing.

8 The parameters of our review of a limited land use
9 decision are set forth in ORS 197.828. We must determine if
10 "the local government committed a procedural error which
11 prejudiced the substantial rights of the petitioner." ORS
12 197.828(2)(d).

13 **A. Substantive Criteria**

14 Petitioners contend the mayor failed to clearly state
15 the applicable substantive criteria at the commencement of
16 the city council hearing, as required by BZO 14.050(1)(a).⁶

⁶BZO 14.050(1) provides, in relevant part:

"At the commencement of a hearing a statement shall be made to those in attendance that state:

"(a) a listing of the applicable substantive criteria;

"(b) that testimony and evidence must be directed toward the criteria described in (a) above or other criteria in the plan or land use regulation which the person believes to apply to the decision, and

"(c) that failure to raise an issue with sufficient specificity to afford the decision-maker an opportunity to respond to the issue precludes appeal on that issue;

"* * * * *"

1 They state that although the mayor mentioned BZO 3.630 as
2 the applicable criterion, the newspaper notice of the
3 hearing stated that the application would be weighed against
4 the Statewide Planning Goals and state law, and the Bandon
5 comprehensive plan and zoning ordinance, particularly BZO
6 3.230(2)(b). Petitioners remark that the mayor did not
7 identify which goals or statutes the city would consider.

8 The mayor's omission of any reference to the Statewide
9 Planning Goals and the statutes was appropriate. The
10 challenged decision was made solely on the basis of local
11 regulations.

12 This subassignment of error is denied.

13 **B. Hearing Procedure Disclosure and Jurisdictional**
14 **Inquiry**

15 Petitioners contend that at the commencement of the
16 hearing the mayor did not properly state "that testimony and
17 evidence must be directed to identified criteria and that
18 failure to raise an issue with sufficient specificity would
19 preclude appeal of that issue." Petition for Review 12.
20 Petitioners point out that "the Mayor did not comply with
21 the mandatory ('shall') requirements set forth in those
22 sections of the Code." Id. at 12-13. Petitioners do not
23 provide any further explanation of this error. Petitioners
24 contend also that "the mayor asked for objections concerning
25 whether she or any other councillor should hear the matter,
26 but she did not ask if any member of the audience objected
27 to the jurisdiction of the Council as a whole to hear the

1 Redmon appeal." ⁷ Id. at 13.

2 This subassignment of error relates to procedural
3 errors that provide a basis for reversal or remand only if
4 petitioners' substantial rights were prejudiced. ORS
5 197.828(2)(d). Petitioners do not show prejudice to their
6 substantial rights.

7 This subassignment of error is denied.

8 **C. Ordinance Identification in Published Notice**

9 Petitioners note that in the published notice the city
10 referred to the wrong BZO section, 3.230(2)(b) instead of
11 BZO 3.630. Petitioners contend that the city's error is
12 both procedural and critical.

13 The language of BZO 3.230(2)(b) is almost identical to
14 that of BZO 3.630.⁸ The only difference, the reference in

⁷The generic reference to decision makers at BZO 14.030(1) indicates that BZO 14.060 could be interpreted to prescribe procedures for all land use hearings in the city, including those conducted by the city council. BZO 14.060 provides in relevant part:

"(1) The hearings Officer, in conducting the hearing, shall:

* * * * *

"(c) Inquire of the audience whether there are any objections to the jurisdiction of the Commission to hear the matter * * *"

⁸BZO 3.630 provides in relevant part:

"(2) Siting of structures should minimize negative impacts on the views of the ocean or river 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

1 BZO 3.630 to views of the river, has no significance because
2 the view of the river from abutting lots is not an issue.
3 BZO 3.230(2)(b) sets forth the requirements for the
4 Controlled Development 1 Zone (CD-1). BZO 3.630 sets forth
5 the requirements for the Controlled Development Residential
6 1 Zone (CD-R1). Because the application pertains to
7 property in the CD-R1 zone, BZO 3.630 is the applicable
8 provision. The published notice was indeed inaccurate, but
9 the mayor correctly stated prior to the hearing that BZO
10 3.630 contained the applicable criteria. Petitioners fail
11 to demonstrate the city's procedural error prejudiced their
12 substantial rights. ORS 197.828(2)(d).

13 This subassignment of error is denied.

14 **FOURTH ASSIGNMENT OF ERROR**

15 Petitioners contend that the city failed to identify
16 all relevant approval criteria and standards in its findings
17 and decision, and did not address in the findings and
18 decision all of the criteria and standards that were
19 contained in the published notice. Petitioners do not

existing structures and not extend further out into those
viewscapes." (Emphasis added.)

BZO 3.230(2)(b) provides in relevant part:

"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."
(Emphasis added.)

1 support this conclusion with any facts or legal argument.

2 Even if the city failed to identify all relevant
3 approval criteria and standards, petitioners do not state in
4 what manner the decision incorporated the criteria and
5 standards that were not included in the notice. The city
6 acknowledges that some of the verbiage in the published
7 notice may be superfluous, but argues nonetheless that the
8 decision conformed to ordinance criteria. Moreover,
9 petitioners are not raising any of the superfluous
10 provisions in their agreement that the spa structure be
11 allowed.

12 This assignment of error is denied.

13 **FIFTH ASSIGNMENT OF ERROR**

14 Petitioners contend that the city council's Findings
15 and Decision of November 7, 1994, contain a "procedural
16 record" that is not, in part, supported by evidence in the
17 record. They quote the following passage from the city
18 council's decision:

19 "The Planning Commission ruled that it was error
20 to have granted the application without giving
21 notice to Appellant and that Appellant therefore
22 had standing to appeal the original decision."
23 (Emphasis added.)

24 The city responds that the characterization of the
25 planning commission conclusion was an allowable
26 interpretation by the city council of the commission
27 conclusions.

28 The city council's characterization of the planning

1 commission proceeding is adequate. Petitioners have not
2 shown how they were prejudiced by any mischaracterization.

3 This assignment of error is denied.

4 **SIXTH ASSIGNMENT OF ERROR**

5 Petitioners contend that the city's interpretation of
6 BZO 3.630(2) is inconsistent with the BZO. The city
7 responds that not only is its interpretation of BZO 3.630(2)
8 supported by substantial evidence in the record, it is
9 consistent with the city's position in Davis v. City of
10 Bandon, 28 Or LUBA 38 (1994).⁹

11 We are required to affirm the city's interpretation of
12 its comprehensive plan and land use regulations unless it is
13 clearly wrong. ORS 197.829; Gage v. City of Portland, 319
14 Or 308, 316, 877 P2d 1187 (1994); Clark v. Jackson County,
15 313 Or 508, 514, 836 P2d 710 (1992). The city is within its
16 interpretative discretion in applying the "in line"
17 requirement to just the immediately adjacent properties.

18 The sixth assignment of error is denied.

19 The city's decision is affirmed.

⁹Davis addressed, inter alia, BZO 3.230(2)(b), which provides for protection of ocean views.