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

DAVID HOLLAND,)
)
Petitioner,) LUBA No. 95-049
)
vs.) FINAL OPINION
) AND ORDER
CITY OF CANNON BEACH,)
)
Respondent.)

Appeal from City of Cannon Beach.

William C. Cox, Portland, filed the petition for review and argued on behalf of petitioner.

Edward J. Sullivan and Daniel Kearns, Portland, filed the response brief. With them on the brief was Preston Gates & Ellis. Daniel Kearns argued on behalf of respondent.

GUSTAFSON, Referee; LIVINGSTON, Chief Referee; HANNA, Referee, participated in the decision.

AFFIRMED 10/17/95

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

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the Cannon Beach City
4 Council denying a subdivision application.

5 **FACTS**

6 Petitioner applied to the city for approval of an 11-
7 lot subdivision in the city's RL zone. The RL zone is
8 defined as low density residential, with a density of four
9 units per acre.

10 The proposed subdivision site is 4.04 acres. It is
11 listed in the Cannon Beach Comprehensive Plan (CBCP) as
12 being within a potential geologic hazard area, and includes
13 a potential hazard overlay designation on the city zoning
14 map. The site has moderate to steep slopes, and is
15 trisected by two naturally occurring streams.

16 The challenged decision represents petitioner's third
17 attempt to gain subdivision approval of the subject site.
18 According to petitioner, after the second denial, the city
19 informed petitioner that it would not consider approval of
20 variances to any development standards on the subject site.
21 Petitioner did not appeal either of the two previously
22 denied applications.

23 The city characterizes the challenged decision as a
24 limited land use decision. Nonetheless, the city conducted
25 an initial evidentiary hearing before the planning
26 commission, for which it provided notice of the applicable

1 approval criteria, including both comprehensive plan and
2 zoning ordinance criteria. The planning commission denied
3 the application, based primarily on the failure of the
4 application to satisfy applicable comprehensive plan
5 policies. On appeal, the city council upheld the planning
6 commission decision. This appeal followed.

7 **FIRST ASSIGNMENT OF ERROR**

8 Petitioner alleges the challenged decision violates ORS
9 227.173, both because the city based its denial of the
10 application on general comprehensive plan policies instead
11 of on development code policies that support approval; and
12 because the city did not address applicable ordinance
13 criteria which could support approval. Petitioner further
14 argues that, because the city relied upon the comprehensive
15 plan policies to support denial of the application,
16 petitioner could not anticipate the standards by which the
17 application would be judged.

18 ORS 227.173 states, in relevant part:

19 "(1) Approval or denial of a discretionary permit
20 application shall be based on standards and
21 criteria, which shall be set forth in the
22 development ordinance and which shall relate
23 approval or denial of a discretionary permit
24 application to the development ordinance and to
25 the comprehensive plan for the area in which the
26 development would occur and to the development
27 ordinance and comprehensive plan for the city as a
28 whole.

29 "(2) Approval or denial of a permit application or
30 limited land use decision shall be based upon and
31 accompanied by a brief statement that explains the

1 criteria and standards considered relevant to the
2 decision, states the facts relied upon in
3 rendering the decision and explains the
4 justification for the decision based on the
5 criteria, standards and facts set forth."

6 Petitioner contends ORS 227.173(1) means that only
7 development ordinance criteria, and not comprehensive plan
8 criteria, can provide the basis for approval or denial of an
9 application; and argues that the city erred by basing its
10 decision on general comprehensive plan policies, instead of
11 code provisions that implement the comprehensive plan.

12 ORS 227.173(1) requires that permit standards and
13 criteria themselves must be set out in the city's
14 development ordinances and that land use decisions identify
15 the applicable standards and criteria. BCT Partnership v.
16 City of Portland, 130 Or App 271, 277, 881 P2d 176 (1994).
17 It does not, however, prohibit a city from requiring
18 compliance with comprehensive plan policies through its
19 development ordinance, or otherwise prohibit the city from
20 applying the comprehensive plan criteria during quasi-
21 judicial proceedings.

22 The city interprets its zoning ordinance to require
23 subdivision applications to comply with the applicable
24 comprehensive plan policies.¹ This Board has previously

¹Cannon Beach Zoning Ordinance (CBZO) 16.04.020 states:

"In their interpretation and application, the provisions of this chapter are held to be the minimum requirements adopted for the protection of the public health, safety and welfare.

1 affirmed that interpretation. Shelter Resources Inc. v.
2 City of Cannon Beach, 27 Or LUBA 229, aff'd 129 Or App 433,
3 879 P2d 1313 (1994). That interpretation is consistent with
4 the language of ORS 227.173(1). Petitioner's argument that
5 comprehensive plan policies may be implemented only through
6 legislative processes is not warranted by the language of
7 ORS 227.173(1).

8 Petitioner's argument that ORS 227.173(2) mandates
9 findings on each of the approval criteria is also
10 unsupported by the statute's language. ORS 227.173(2)
11 expressly holds that the decision must "explain the criteria
12 and standards considered relevant," and "the justification
13 for the decision based on the criteria, standards and facts
14 set forth." It does not require that, when a city denies an
15 application for failure to satisfy one or more approval
16 criteria, it must also make findings on criteria which could
17 support approval of the application. Where the
18 challenged decision is one to deny a development proposal, a
19 local government need only adopt findings, supported by
20 substantial evidence, demonstrating that one or more

To protect the public, among other purposes, such provisions are intended to provide for a permanently wholesome community environment, adequate municipal services and orderly and safe street design and construction, in conformance with the Comprehensive Plan."

CBZO 16.04.150 states:

"The proposed subdivision shall conform to the comprehensive plan and official maps of the city which are in effect at the time of the application for subdivision approval."

1 standards are not met. Duck Delivery Produce v. Deschutes
2 County, 28 Or LUBA 614, 616 (1995); Horizon Construction,
3 Inc. v. City of Newberg, 28 Or LUBA 632, 635, aff'd, 134 Or
4 App 414, 894 P2d 1267 (1995). The city determined that the
5 application failed to satisfy applicable comprehensive plan
6 policies, and denied the application on that basis. ORS
7 227.173(2) does not require the city to make findings
8 regarding those criteria which could be satisfied or require
9 the city to make findings regarding criteria upon which it
10 did not rely in reaching its decision. See Shelter
11 Resources, 27 Or LUBA at 241.

12 Finally, petitioner argues that the city's reliance on
13 comprehensive plan policies as the basis for the denial,
14 notwithstanding more specific development code criteria upon
15 which findings of compliance could be made, precluded
16 petitioner from knowing the standards by which the
17 application would be judged. Petitioner cites case law to
18 support the assertion that parties are entitled to know the
19 criteria by which their application will be judged, without
20 having to guess "under which shell lies the pea." Phillipi
21 v. City of Sublimity, 59 Or App 295, 300, 650 P2d 103
22 (1982); Commonwealth Properties v. Washington County, 35 Or
23 App 387, 399, 582 P2d 1384 (1978). See also, Feitelson v.
24 City of Salem, 46 Or App 815, 613 P2d 489 (1980); Baker v.
25 City of Milwaukie, 271 Or 500, 533 P2d 772 (1975).

26 Petitioner is correct that where a challenged decision

1 denying development approval fails to inform the applicant
2 of the steps it must take to gain approval of its
3 application or, alternatively, of the standards the
4 application does not meet, the decision must be remanded.
5 Ellis v. City of Bend, 28 Or LUBA 332 (1994). However, that
6 did not occur in this case, nor do any of the cases
7 petitioner cites address the situation at issue. Each of
8 those cases involved local governing bodies applying,
9 through a quasi-judicial hearings process, comprehensive
10 plan policies that were not cited as approval criteria, and
11 which petitioners had no way of knowing the hearings body
12 would apply as approval criteria.

13 Petitioner in this case knew that the city's
14 subdivision ordinance provisions require compliance with
15 both the comprehensive plan policies and the subdivision
16 development ordinance provisions. The comprehensive plan
17 policies, while more general, do not conflict with the
18 development ordinance provisions, and do not preclude an
19 applicant from knowing the applicable standards. Petitioner
20 also knew how the city determined petitioner did not satisfy
21 relevant approval criteria. Petitioner's disagreement is
22 not that petitioner did not know which criteria were
23 applicable. Rather, petitioner disagrees with the criteria
24 upon which the city relied in denying the application. The
25 city did not deprive petitioner of knowledge of the

1 standards upon which the application would be evaluated.²

2 The first assignment of error is denied.

3 **SECOND ASSIGNMENT OF ERROR**

4 Petitioner contends the city's conclusion that "[t]his
5 site is not capable of supporting an 11 lot subdivision" is
6 inconsistent with the site's zoning and the expert evidence
7 in the record, and amounts to a rezoning of the property.
8 Petitioner disagrees both with the city's interpretation of
9 CBCP General Policy 5 (Policy 5) and the city's evaluation
10 of the evidence upon which it relied to conclude that the
11 site is not capable of supporting 11 housing units.

12 Policy 5 states:

13 "The density of residential development throughout
14 the City shall be based on the capability of the
15 land in terms of its slope, potential for geologic
16 hazard and drainage characteristics. Density
17 throughout the City shall generally be:

18 "High (R3), (RM) - 15 dwellings per acre

19 "Duplex or Medium (R2), (RMa), (MP), (RAM) - 11
20 dwellings per acre

21 "Moderate Single-Family (R-1) - 8 dwellings per
22 acre

23 "Low (RL) - 4 dwellings per acre

24 "Very Low (RVL) - 1 dwelling unit per acre"

25 The subject property was rezoned in the past from R-1

²This is not a case of petitioner not knowing and having to guess "under which shell lies the pea." All the peas are exposed. Petitioner objects to the recipe the city uses to mix the peas and, ultimately, to the taste of the resulting soup.

1 to RL. Petitioner argues that the RL zone allows 4 units
2 per acre, as both the minimum and maximum density. However,
3 petitioner also recognizes that the zone may provide for
4 some flexibility, reasoning that "[t]he act of reducing the
5 density [from R-1 to RL] carries with it the presumption
6 that it was appropriate to rezone the property to 4 units
7 per acre." On that basis, petitioner concludes that "[a]ny
8 reduction from that density during a quasi-judicial
9 proceeding must be based upon scientifically supportable
10 facts." Petition for Review 29. Petitioner cites no
11 authority for the standard he proposes for evaluating
12 density reductions.

13 The city interprets Policy 5 to provide maximum
14 densities, and in its findings explains its interpretation
15 of the policy, and how the policy factors are evaluated to
16 determine the appropriate density for a given development.³

³The city interprets Policy 5, in part, as follows:

"General Development Policy 5 provides that the density of all residential development in the city shall be based on the characteristics of the site on which the development is to occur. This is reflected in the phrase 'density * * * shall be based on the capability of the land in terms of its slope, potential for geologic hazard and drainage characteristics'. The policy recognizes that within a given zone, not all sites are similar with respect to their ability to accommodate a given level of residential density. Each site must be reviewed on an individual basis to determine the density that is consistent with the enumerated characteristics of the site. The policy requires that in establishing the appropriate density for a given residential development, the following site characteristics are to be evaluated: slope, drainage characteristics, and potential for geologic hazard. Where an evaluation of the site, based on the features listed above,

1 Based on its evaluation of the site against its
2 interpretation of the policy factors, the city determined
3 that the subject site is not capable of supporting 11
4 housing units.

5 Petitioner's interpretation of Policy 5 is not
6 unreasonable. However, a local governing body's
7 interpretation of its own enactment is entitled to
8 deference, and LUBA is required to affirm the local
9 interpretation unless that interpretation is contrary to the
10 express words, purpose or policy of the local enactment or
11 to a state statute, statewide planning goal or
12 administrative rule which the local enactment implements.
13 ORS 197.829; Clark v. Jackson County, 313 Or 508, 836 P2d
14 710 (1992); Zippel v. Josephine County, 27 Or LUBA 11
15 (1994); Melton v. City of Cottage Grove, 28 Or LUBA 1
16 (1994), aff'd 131 Or App 626, ___ P2d ___ (1995). The city
17 has provided a detailed interpretation of CBCP General
18 Policy 5. That interpretation, while affording the city
19 substantial flexibility in evaluating allowable densities,
20 is not legally wrong, and this Board is required to affirm

finds that necessary site improvements can be installed consistent with the characteristics of the site, then a residential development at the maximum density provided for by the zone is appropriate. However, if after an evaluation of the site, it is determined that the installation of the necessary site improvements is not consistent with the capability of the site, the General Development Policy 5 permits a reduction in the density of a given residential development below the general standard listed." (Ellipsis in original.)

1 it.

2 Likewise, this Board is not entitled to substitute its
3 judgment of the evidence in the record for that of the
4 governing body. Rather, if there is substantial evidence in
5 the whole record to support the city's decision, LUBA will
6 defer to it, notwithstanding that reasonable people could
7 draw different conclusions from the evidence. Adler v. City
8 of Portland, 25 Or LUBA 546, 554 (1993). Where the evidence
9 is conflicting, if a reasonable person could reach the
10 decision the city made, in view of all the evidence in the
11 record, LUBA will defer to the city's choice between
12 conflicting evidence. Bottum v. Union County, 26 Or LUBA
13 407, 412 (1994); McInnis v. City of Portland, 25 Or LUBA
14 376, 385 (1993); Mazeski v. Wasco County, 28 Or LUBA 178,
15 184 (1994), aff'd, 133 Or App 258, 890 P2d 455 (1995).
16 Moreover, in challenging a local government's determination
17 of noncompliance with an applicable approval standard on
18 evidentiary grounds, petitioner must demonstrate he
19 sustained his burden of proof of compliance with the
20 applicable standard as a matter of law. Horizon
21 Construction, Inc. v. City of Newberg, 28 Or LUBA at 641.

22 Petitioner cites to substantial evidence in the record
23 that the site can accommodate 11 units, provided adequate
24 design and construction techniques are used. However, the
25 evidence in the record also reveals that the site is heavily
26 wooded, is significantly constrained by steep ravines,

1 slopes and stream corridors, and that development would
2 require elimination of 41% of the site's trees for roads and
3 utilities, and 48% of the trees along another portion of the
4 site, as well as substantial filling and culverting of the
5 site's stream corridors. Based on all the evidence in the
6 record, petitioner has not established that a reasonable
7 person could not reach the same conclusion as did the city,
8 or that, as a matter of law, Policy 5 is satisfied.

9 The second assignment of error is denied.

10 **THIRD ASSIGNMENT OF ERROR**

11 Petitioner contends the city misapplied the
12 requirements of CBZO 17.70.030 and CBCP General Development
13 Policy 15 (Policy 15), regarding tree removal.

14 The city determined that the application fails to
15 comply with CBSO 17.70 030(c) and Policy 15. CBSO
16 17.70.030(c) states:

17 "The retention of trees shall be considered in the
18 design of major partitions, subdivisions or
19 planned developments; placement of roads and
20 utilities shall preserve trees whenever possible.
21 The need to remove trees shall be considered in
22 the review process for major partitions,
23 subdivisions or planned developments."

24 General Policy 15 states:

25 "The City shall regulate the removal of trees in
26 order to preserve the City's aesthetic character,
27 as well as to control problems associated with
28 soil erosion and landslide hazards."

29 Petitioner asserts that the zoning ordinance recognizes
30 the need to remove trees. He also argues that compliance

1 with numerous design standards requires removal of trees,
2 and that the city's refusal to consider any design variances
3 dictates the removal of more trees than might otherwise have
4 been necessary. According to petitioner,

5 "[t]he applicant requested variances from some of
6 the street standards but was refused. The result
7 of meeting the applicable standards as written
8 dictated loss of more trees. The city should not
9 be allowed to ignore those [street] standards and
10 rely solely upon the general policies of its
11 comprehensive plan as a basis to deny the
12 application." Petition for Review 33.

13 The city made detailed findings, based on evidence in
14 the record, that the proposed development would not
15 adequately protect the site's three significant features,
16 including a large stand of trees and two streams.
17 Petitioner disagrees with the city's interpretation and
18 evaluation of evidence necessary to comply with CBZO
19 17.70.030. However, petitioner does not dispute the city's
20 findings regarding Policy 15. Instead, petitioner reasons
21 that the city should not be allowed to rely on Policy 15 to
22 deny the application because he has proposed a road
23 configuration mandating tree removal in order to satisfy
24 other street design standards.

25 The city is not mandated to grant variances to street
26 standards when the site characteristics preclude compliance
27 with them, based on petitioner's proposed design.
28 Satisfaction of some criteria does not excuse an applicant
29 from complying with other applicable criteria.

1 Petitioner's disagreement with the criteria upon which
2 the city evaluated his application is not a basis for remand
3 or reversal. Petitioner has not established that the city's
4 interpretation of CBSO 17.70.030 and Policy 15 are legally
5 wrong, or that there is not substantial evidence in the
6 record to find that the proposed development does not
7 satisfy those approval criteria.

8 The third assignment of error is denied.

9 **FOURTH ASSIGNMENT OF ERROR**

10 Petitioner contends, summarily, that none of the
11 findings or conclusions upon which the city based its denial
12 are supported by the record as a whole. Petitioner does not
13 address the applicable comprehensive plan policies, but
14 asserts that "the [petitioner] addressed each standard
15 contained in the Cannon Beach Zoning Code and its
16 subdivision ordinance applicable to the proposed 11 lot
17 subdivision." Petition for Review 34.

18 There is evidence in the record from which a reasonable
19 person could conclude that the application satisfies the
20 applicable subdivision ordinance criteria. However, there
21 is also conflicting evidence from which an equally
22 reasonable person could conclude, as the city did, that one
23 or more of those criteria are not satisfied. Petitioner has
24 not established, as a matter, of law, that each subdivision
25 ordinance standard has been satisfied.

26 Moreover, as stated above, in order to reverse or

1 remand the city's denial of a discretionary application,
2 petitioner must determine, as a matter of law, that all
3 approval criteria are satisfied. Regardless of whether the
4 application could satisfy some, or even all, of the
5 subdivision ordinance criteria, there is substantial
6 evidence in the record, upon which the city relied, to
7 determine that the proposed development fails to comply with
8 several comprehensive plan policies.

9 The fourth assignment of error is denied.

10 The city's decision is affirmed.⁴

⁴Petitioner concludes that, if LUBA affirms the city's decision, the city's decision amounts to a taking of petitioner's property, and petitioner requests an evidentiary hearing to determine the amount of damages. We lack jurisdiction to conduct an evidentiary hearing following the issuance of our final opinion. Moreover, petitioner did not raise this issue before the city and has not established the city has taken his property. See Larson v. Multnomah County. 25 Or LUBA 18 (1993).