BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAVID HOLLAND,	)	
	)	
Petitioner,	)	
	)	LUBA No. 97-097
vs.	)	
	)	FINAL OPINION
CITY OF CANNON BEACH,	)	AND ORDER
	)	
Respondent.	)	

Appeal from City of Cannon Beach.

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

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

GUSTAFSON, Chief Administrative Law Judge; HANNA, Administrative Law Judge, participated in the decision.

AFFIRMED 01/07/98

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

Opinion by Gustafson.

NATURE OF THE DECISION

Petitioner appeals the city's denial of his application for an 11-lot subdivision.

STATEMENT OF FACTS

In September 1994 petitioner applied for approval of an 11-lot subdivision on a 4.04-acre parcel zoned RL (low density residential-four dwelling units per acre). The subject property has an average slope of 37 degrees, is crossed by two drainages with associated wetlands, and is partially covered by a stand of large Sitka spruce trees.

The hearing notices for both the planning commission hearing on the application, and the subsequent city council (council) appeal hearing following the planning commission's denial, listed as approval criteria the city's subdivision design standards (SDS) 16.04.150 through 16.04.230. The staff report for the planning commission hearing discussed compliance with each of those design standards. With regard to SDS 16.04.220(A),[1] the staff report noted that the city

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[1]SDS 16.04.220(A) provides:

"In the evaluation of subdivisions or partitioning requests, the planning commission may require limitations on density of lots based on the percent of slope, according to the following guidelines:

"Slope	Density
"0-9%	Limited by zoning ordinance
"10-24%	4 dwellings per acre
"25-35%	1 dwelling unit per acre

"Over 35% Density determined by site investigation"

attorney had previously concluded that this standard was no longer applicable.[2]

The planning commission denied the application for failure to comply with several comprehensive plan policies. Its decision did not discuss the applicability of or compliance with SDS 16.04.220(A) or any other of the SDS sections listed in the hearing notice. On petitioner's local appeal, the council upheld the planning commission denial, again on the basis that the application failed to comply with several comprehensive plan policies. Like the planning commission, the council did not apply or discuss any of the SDS provisions listed in the hearing notice.

Petitioner appealed that decision. After a series of appellate decisions that we collectively denote Holland I, the council's decision was ultimately remanded to the city on the basis that the city erred in using the pertinent comprehensive plan policies as approval criteria.[3] The remand from the

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[2]The staff report states with regard to SDS 16.04.220(A):

> "In a September 30, 1993 letter to John Williams, Bill Canessa, the city attorney, concluded this standard was no longer applicable in light of amendments made to the former Comprehensive Plan General development Policy 8." Holland I Record 184.

The city included the Holland I record in the record of the proceedings on remand. The two records are separately paginated, however, so we cite to the Holland I record as "Holland I Record __" and to the record in the present appeal as "Record __."

[3]Holland v. City of Cannon Beach, 30 Or LUBA 85, remanded 138 Or App 340 (1995), reversed and remanded 323 Or 340, reversed and remanded 142 Or App 5, rev den 324 Or 229, remanded __ Or LUBA __ (LUBA No. 95-049, November 5, 1996) (Holland I).

Court of Appeals instructed us to remand the decision to the city "to reconsider petitioner's application" without applying the comprehensive plan provisions that had formed the basis for the city's original denial. Holland I, 142 Or App at 11.

While the decision in Holland I was making its way up and down the appellate ladder, the city considered the applicability of SDS 16.04.220(A) on two occasions of which we have been made aware. First, in May 1995, two months after the denial in Holland I, the council approved an unrelated subdivision application (the Chapman Point subdivision) with a finding that SDS 16.04.220(A) was not applicable, "per the September 30, 1993 letter" from the city attorney. Record 237. Second, later in 1995, petitioner applied for a partition with respect to a portion of the subject property. In February 1996 the council determined that SDS 16.04.220(A) had not been impliedly repealed, and was applicable to petitioner's partition application. The council denied that application on the basis that, under SDS 16.04.220(A), the subject property was too steep to permit the number of dwellings petitioner had requested. On appeal, we affirmed the city's interpretation as not clearly wrong. The Court of Appeals affirmed that decision and it is collectively denoted here as Holland II.[4]

[4]Holland v. City of Cannon Beach, ___ Or LUBA ___ (LUBA No. 96-060, October 21, 1996), aff'd 144 Or App 622, 928 P2d 364, rev den 324 Or 560, 931 P2d 99 (1996) (Holland II).

When the decision at issue in Holland I returned to the council on remand in April, 1997, the hearing notice listed as approval criteria SDS 16.04.150 through 16.040.230 "as those sections existed at the time of the original application."[5] Record 346. The staff report cited and discussed SDS 16.04.220 as an approval criterion, and the council applied it in the challenged decision. The decision addresses the applicability of SDS 16.04.220(A) as follows:

> "The September 30, 1993 letter from Bill Canessa to John Williams concluded that the provisions of Section 16.04.220 had been impliedly repealed. It was not until its February 20, 1996 order denying the Holland minor partition request [the decision at issue in Holland II] that the council determined that adoption of Ordinance 92-11 did not impliedly repeal section 16.04.220(A) and that in fact it constituted a review criterion for partitions and subdivision applications. The latter council interpretation is adopted by this council in this order."

The decision concludes that, because the average slope on the subject property exceeds 35 percent, the proposed density of the subdivision does not comply with SDS 16.04.220(A), which the council determined would permit no more than one dwelling unit per acre.

This appeal followed.

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[5]The parties do not dispute that the proceedings on remand are essentially a continuation of the same proceedings, rather than a new application. See Corbett/Terwilliger Neigh. Assoc. v. City of Portland, 25 Or LUBA 601, 606-07 (on remand, city properly applied ordinances in effect during the initial proceeding, where the original proposal is fundamentally the same). The hearing and decision on remand involved the same application submitted in November, 1994, processed under the same local application number. Petitioner had a full opportunity on remand to submit evidence and argument with respect to SDS 16.04.220(A). See, e.g., Record 342 (petitioner's proposals respecting SDS 16.04.220(A)).

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the city erred in applying SDS 16.04.220(A) as an approval criterion, because at the time he submitted the application in November, 1994, SDS 16.04.220(A) was not an applicable standard for a proposed subdivision.

Pursuant to ORS 227.178(3), the standards applicable to petitioner's subdivision are those in effect on the date the application is submitted, i.e. September, 1994.[6] As explained above, when the application was filed in 1994, the hearing notices listed SDS 16.04.150 through 16.040.230 as applicable criteria. The planning commission staff report also specifically listed SDS 16.04.220(A) as an applicable criterion, but noted that the city attorney had concluded in 1993 that the provision had been impliedly repealed.

However, neither the planning commission's initial decision in January, 1995, nor the council's decision in March, 1995 considered any of the subdivision design standards at SDS 16.04., including SDS 16.04.220(A). The council's first consideration of SDS 16.04.220(A) with respect to this application occurred on remand. The decision on remand

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[6]ORS 227.178(3) provides that:

> "If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the city has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

essentially denies that the council ever adopted or endorsed the city attorney's 1993 interpretation, or, to the extent the city acted on that interpretation, the council's decision in Holland II reverses it.

Petitioner contends that the planning commission staff adopted the city attorney's interpretation that SDS 16.04.220(A) had been impliedly repealed, and that the staff interpretation is sufficient to establish that SDS 16.04.220(A) was not one of the applicable "standards and criteria" for purposes of ORS 227.178(3). Consequently, petitioner argues, the city cannot revisit that determination on remand.[7]

We disagree that the initial staff interpretation in this case was sufficient to establish that SDS 16.04.220(A) is not an applicable criterion for purposes of ORS 227.178(3). The staff interpretation was not the basis for the council's denial. Petitioner does not cite any authority for the proposition that the staff interpretation or the city attorney's 1993 interpretation is binding on the city. For purposes of ORS 227.178, the city identified SDS 16.04.220(A)

[7]Petitioner characterizes this argument at various points in his brief as an application of the "law of the case" doctrine, and cites authority for the proposition that the law of the case doctrine applies to "former decisions made in the same cause upon the same state of facts." Huszar v. Certified Realty Co., 272 Or 517, 522, 538 P2d 57 (1975). However, it is clear that the council's decision appealed in Holland I made no explicit or implicit decision regarding the applicability of SDS 16.04.220(A), and thus made no "law" on the matter for purposes of the "law of the case" doctrine. This is consistent with the Court of Appeals' broad remand to the city to "reconsider the application" under all of the applicable criteria. Holland I, 142 Or App at 11.

as an approval criterion at the time the application was filed, and during the course of proceedings on this application the council never expressly determined that SDS 16.04.220(A) is not an applicable approval criterion.

Nonetheless, petitioner argues that in the subsequent Chapman Point decision the council adopted without any discussion the city attorney's interpretation that SDS 16.04.220(A) had been impliedly repealed. We understand petitioner to contend that the lack of discussion or explicit interpretation demonstrates that that interpretation was implicitly in effect prior to the Chapman Point approval, and thus was in effect in September, 1994 when petitioner submitted the application. Accordingly, petitioner asserts that ORS 227.178(3) binds the city to that interpretation.

However, even if petitioner's first proposition is correct, that the city could implicitly adopt an interpretation, and that the Chapman Point approval demonstrates the council had so implicitly adopted the city attorney's interpretation, we disagree with petitioner's second proposition that ORS 227.178(3) binds the city to that interpretation.

As a general matter, local governments may interpret their ordinances to determine which provisions constitute approval criteria, and we accord that interpretation significant deference. Holland II, slip op 2-3. Local governments may also change existing interpretations in the

course of ongoing proceedings. See Wicks v. City of Reedsport, 29 Or LUBA 8, 19 (1995); Heceta Water District v. Lane County, 24 Or LUBA 402, 419 (1993); see also Marquam Farms Corp. v. Multnomah County, ___ Or LUBA ___ (LUBA No. 95-254, December 5, 1996), slip op 16, aff'd 147 Or App 368 (1997) (the county is not bound by a hearings officer's previous legal interpretation of a local ordinance where the county determines that the earlier interpretation is incorrect).[8] Thus, even if the interpretation that SDS 16.04.220(A) had been impliedly repealed was "in effect" in September 1994, the council is not constrained from changing that interpretation if it determines it to be incorrect.

Notwithstanding, petitioner argues that Davenport v. City of Tigard, 121 Or App 135, 854 P2d 483 (1993), compels a contrary conclusion when the question involves an interpretation of which "standards and criteria" were applicable on the date that the application is submitted for purposes of ORS 227.178(3). At issue in Davenport was the city's approval of a development application on the basis of a map amendment that was not acknowledged at the time the application was submitted. We remanded under ORS 227.178(3). Davenport v. City of Tigard, 25 Or LUBA 67 (1993). The

[8]One limitation not applicable in this case is that where the new interpretation is significantly different from a previously established interpretation, the local government may be required to afford the applicant an opportunity to present evidence and argument responsive to the new standard. Wicks, 29 Or LUBA at 19; Heceta Water District, 24 Or LUBA at 419. As noted above, petitioner had ample opportunity on remand to submit evidence and argument responsive to the new standard.

applicants appealed, arguing that we erred in concluding that the amended map amendment constituted "standards and criteria" within the meaning of ORS 227.178(3). The Court of Appeals affirmed, agreeing with us that the amended map constituted a standard or criteria for purposes of ORS 227.178(3). The court's conclusion includes a discussion of two issues relevant here.

First, in response to an argument that the court should defer to the city's interpretation that the amended map was an applicable standard within the meaning of ORS 227.178(3), the court held that the meaning of "standards and criteria" as used in ORS 227.178(3) is a question of state law, and thus the court need not defer to the city's interpretation of that term or an interpretation of its ordinances, if that interpretation is contrary to or misapplies ORS 227.178(3). 121 Or App at 140.

Second, the court went on to conclude that the city was correct that the amended map constituted a standard or criteria for purposes of ORS 227.178(3):

> "We conclude that the term "standards and criteria" as used in ORS 227.178(3) and ORS 215.428(3), is not limited to the provisions that may be characterized as 'approval criteria' in a local comprehensive plan or land use regulation. * * * <u>The role that the terms play in the two statutes is to assure both proponents and opponents of an application that the substantive factors that are actually applied and that have a meaningful impact on the decision permitting or denying an application will remain constant throughout the proceedings</u>. * * * That protective purpose of the statute would not be served by our adoption of the restrictive meaning that petitioners would give the term. The statutes

> do not refer only to the local provisions that the local government must apply in acting on an application; it also includes provisions, like the amendments here, that the government does apply and that have a meaningful impact on its decision." 121 Or App at 141 (emphasis in original omitted; emphasis added).

We understand petitioner to argue from the emphasized language above that the interpretation of any "substantive factor" that has a meaningful impact on the decision must remain constant throughout the proceedings, and that because the city's reinterpretation of the applicability of SDS 16.04.220(A) was such a "substantive factor," ORS 227.178(3) binds the city to apply the interpretation it held when petitioner's application was submitted.

Petitioner's argument extends Davenport beyond anything it, or ORS 227.178(3), requires. Under petitioner's view, the city would be unable to make any new substantive interpretations, or reverse an existing incorrect interpretation, if that would impact the ultimate decision. Submission of the application would "lock in" all existing interpretations of its ordinances, correct or incorrect, as of the date the application is submitted. Petitioner's reading of Davenport and ORS 227.178(3) is inconsistent with the fundamental premise that a local government is not bound by a past interpretation, when it determines that that interpretation is incorrect. See, e.g., Marquam Farms Corp. v. Multnomah County, ___ Or LUBA ___ (LUBA No, 95-254, December 5, 1996), slip op 16-17; Reeder v. Clackamas County,

20 Or LUBA 238, 244 (1990); Okeson v. Union County, 10 Or LUBA 1, 5 (1983).

Thus, regardless of whether the city had interpreted SDS 16.04.220(A) as inapplicable during the course of the initial proceedings in this case, we conclude that ORS 227.178(3) does not prevent the council from reversing its prior interpretation and applying its new interpretation in the proceedings on remand.

The remaining question is what standard we apply in reviewing the council's interpretation that SDS 16.04.220(A) had not been impliedly repealed. As Davenport suggests, when a city interprets its ordinance in such a manner that it effectively interprets the meaning of the term "standards and criteria" in ORS 227.178(3), we need not defer to that interpretation. 121 Or App at 140. The appropriate standard of review in that instance is whether the city's interpretation is reasonable and correct, at least insofar as it interprets or applies ORS 227.178(3).

By itself, the city's determination that SDS 16.04.220(A) had not been repealed does not implicate ORS 227.178(3). Accordingly, that determination is subject to a deferential standard of review, and we affirm it as not clearly wrong. Holland II, slip op 3. What does implicate ORS 227.178(3) is the city's determination that it could apply its new interpretation in the present case during the proceedings on remand. That determination is consistent with our conclusion above that ORS 227.178(3) does not prevent the city from reversing a previous interpretation and applying the new

interpretation in the current proceeding. Accordingly, we affirm the city's interpretation as reasonable and correct.

The first assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner argues that SDS 16.04.220(A) is "void for vagueness" and "thus its application to petitioner's subdivision request violates petitioner's right to due process." Petition for Review 28.

Petitioner's argument has three related themes. The first is that the use of the word "may" in SDS 16.04.220(A) means that the city can (and did) apply SDS 16.04.220(A) in an arbitrary manner.[9] Petitioner contends, without citation to specific authority, that use of the word "may" in an ordinance without standards for when the option is to be invoked is a denial of equal protection and due process.

We disagree that an ordinance granting some discretion to local decision makers is impermissibly vague on its face. Absent a showing that vague approval standards in a local code have in fact led to a policy unlawfully discriminating in

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[9]For ease of reference, we repeat the text of SDS 16.04.220(A):

> "In the evaluation of subdivisions or partitioning requests, the planning commission may require limitations on density of lots based on the percent of slope, according to the following guidelines:
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> "Slope — Density
>
> "0-9% — Limited by zoning ordinance
> "10-24% — 4 dwellings per acre
> "25-35% — 1 dwelling unit per acre
> "Over 35% — Density determined by site investigation"
> (Emphasis added.)

favor of some persons against others, those standards will not be found to deny equal protection or due process. See Towry v. City of Lincoln City, 26 Or LUBA 554 (1994). Petitioner has not demonstrated that the city has a policy of discriminating in favor of some persons against others.

Further, the key to determining whether an approval standard is unconstitutionally vague is whether a reasonable applicant could understand what must be done to comply with the standard. See Larsson v. City of Lake Oswego, 26 Or LUBA 515, 522, aff'd 127 Or App 647, rev den 320 Or 110 (1994). We have held that a subjective criterion such as "compatibility with scenic views" is not impermissibly vague, because it adequately informs applicants of the basis on which applications will be granted or denied. See, e.g., Marineau v. City of Bandon, 15 Or LUBA 375, 378 (1987). In the present case, a reasonable applicant could easily understand that the city could require through SDS 16.04.220(A) that the applicant reduce housing density in accordance with the steepness of the slope.

Petitioner's second theme is that the city gave petitioner no warning that SDS 16.04.220(A) is an applicable approval criterion. Petitioner argues that development standards for properties containing slopes of greater than 20 percent are governed by city's zoning ordinance (CBZO), section 17.50, and that nowhere in the city's plan or in CBZO 17.50 is there any indication that SDS 16.04.220(A) is also

applicable. However, petitioner's argument is belied by the fact that the original proceeding notice listed numerous sections of SDS 16.04., including SDS 16.04.220(A), as approval criteria. That petitioner's application satisfies the standards at CBZO 17.50 does not mean that the city cannot also require that the application satisfy the criteria at SDS 16.04, or that such a requirement is "arbitrary."

Petitioner's third theme involves the decision's use of a conclusion from a study in the record that the subject property is "susceptible to landsliding," a conclusion the decision uses to support a finding that SDS 16.04.220(A) should be applied. Record 6. Petitioner argues that this selective use of language is "arbitrary" because it ignores the study's ultimate conclusion that the subdivision can be built safely at proposed densities. Petitioner argues that the city has "taken language out of context, applied it to an arbitrary standard and reached a conclusion without support in the record." Petition for Review 34.

We disagree that the city's use of selected statements in the cited study amounts to a deprivation of due process. There is substantial evidence in the record to support the finding that the subject property is susceptible to landslides. We do not understand that the decision's use of that finding as an additional justification to apply SDS 16.04.220(A) compels the city to also accept the study's ultimate conclusion that the subdivision can be built safely

at proposed densities. Whether or not the proposed subdivision can be built safely at proposed densities has nothing to do with whether SDS 16.04.220(A) should apply and, if so, whether the proposed density complies with it.

In sum, we conclude that SDS 16.04.220(A) and the city's application of it to petitioner's subdivision request was not unconstitutional for any of the reasons cited to us.

The fourth assignment of error is denied.

We need not resolve petitioner's second, third, and fifth assignments of error, which respectively challenge the two other bases for denial stated in the decision, and raise a substantial evidence challenge to a finding that the proposed subdivision would adversely affect adjacent property. Petitioner is required to demonstrate compliance with each applicable standard under the city's land use ordinances, and, we conclude, the city correctly determined that petitioner's application fails to comply with SDS 16.04.220(A). On appeal of a denial of a land use application, the city need only establish the existence of one adequate basis for denial. Baughman v. Marion County, 17 Or LUBA 632, 636 (1989).

The decision is affirmed.