BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAVID DODDS, Petitioner, vs. CITY OF WEST LINN, Respondent, and MATRIX DEVELOPMENT CORP., Intervenor-Respondent.	LUBA No. 98-025 FINAL OPINION AND ORDER

Appeal from City of West Linn.

Peggy Hennessy, Portland, filed the petition for review and argued on behalf of petitioner. With her on the brief was Reeves, Kahn & Eder.

No appearance by respondent.

Michael C. Robinson, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Stoel Rives LLP.

GUSTAFSON, Board Chair; HANNA, Board Member, participated in the decision.

AFFIRMED 09/09/98

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 decision, on remand from LUBA, approving a 61-unit planned development on 11.54 acres in the city's Low Density Residential (R-10) and Medium Density Residential (R-4.5) zones.

MOTION TO INTERVENE

Matrix Development Corporation (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property consists of two gently sloping ridge tops, flanked by steep-sided drainages. Under the applicable zoning, approximately 105 dwellings could be developed on the property. However, one-third of the 11.54-acre property is developmentally constrained due to the presence of wetlands and riparian areas in the drainages. In 1996 intervenor applied to the city for a 61-unit planned unit development on the subject property. The city approved the application, allowing intervenor a variance from the applicable lot coverage requirements.

In Dodds v. City of West Linn, ___ Or LUBA ___ (LUBA No. 97-096, August 29, 1997) (Dodds I), we rejected petitioner's assignment of error directed at the approved variance from lot coverage requirements, but remanded the decision on other grounds, in particular because the city had failed to identify

the boundaries of the wetland and riparian transition area required by city's Community Development Code (CDC) 30.100(C)(1). On remand, the city identified the transition boundary as the top of the nearest clearly defined bank, which the city found to be an old manmade Cat track. The new boundaries significantly increased the size of the transition area, resulting in a reduction in the lot size for many of the units in the proposed planned development.

Pursuant to CDC 30.100(C)(3), the city required intervenor to dedicate the transition area to the city. The approved development plan allows cantilevered decks and balconies on some of the approved building envelopes to extend into the city-owned transition area, and allows construction of rear steps in the transition area if steps otherwise cannot be provided and are required by the Uniform Building Code. The city's approval on remand became final January 15, 1998.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the city erred in approving the application on remand without taking into account how the reduced lot sizes affect the variance from lot coverage requirements previously approved by the city and upheld in Dodds I.

The maximum lot coverage in the R-4.5 and R-10 zones is 40 and 35 percent, respectively. In the prior proceeding, intervenor requested a variance from those maximums up to 90

percent lot coverage. Record II-649.[1] The staff report recommended approval of the variance for the reasons stated in intervenor's application. Record II-946. The city then approved the requested variance from the maximum lot coverage in each zone, but did not specify any new maximum lot coverage. Record II-12.

Petitioner argues that the prior variance was based on the proposal before the city at that time, which contemplated a smaller transition area and hence larger lot sizes. Petitioner contends that the smaller lot sizes approved in the present decision necessarily result in larger variances from the lot coverage requirements than were initially approved, and the city is therefore required to revisit whether intervenor is entitled to a variance from the lot coverage requirement.

Intervenor responds, first, that the validity of the variance granted in the prior proceeding was resolved in Dodds I, that petitioner failed to appeal LUBA's decision in Dodds I, and thus that issue cannot be raised in this appeal. Beck v. City of Tillamook, 313 Or 148, 153, 831 P2d 678 (1992). In Beck, the court held that issues resolved before LUBA may not raised again in subsequent proceedings, either on remand or before LUBA. Intervenor contends that our decision

[1]The record of the prior proceeding is incorporated into the record of the decision on remand, but paginated separately. We follow the parties in citing the record of the prior proceeding as "Record II" and the record of the proceedings on remand as "Record I."

in Dodds I precludes petitioner from raising any issue regarding the variance granted in the prior proceeding. In the alternative, intervenor argues that during the proceedings on remand petitioner failed to raise the issue of whether the variance should be revisited with sufficient specificity to allow the city and parties an opportunity to respond. ORS 197.763(1).[2]

Petitioner replies that the issue it raises in the current appeal is not the same as the issue resolved in Dodds I, and thus our review is not precluded by the rule announced in Beck. According to petitioner, the issue resolved in Dodds I was whether the variance complied with the standards at CDC 75.060 and 95.040, while the current issue is whether, given the significant lot size reduction resulting from the city's actions on remand, the city is required to revisit its earlier variance approval. Petitioner notes that the city did not impose the dedication condition in the prior proceeding, and that its imposition in the proceedings on remand created the lot size reduction and concomitant larger variances that, according to petitioner, require the city

[2]ORS 197.763(1) states:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

revisit the variance. Further, petitioner argues that because the city did not impose the dedication condition during the remand proceedings until after the close of the evidentiary hearing, petitioner had no opportunity to raise any issues created by the dedication condition, and his failure to raise such issues during the evidentiary hearing on remand does not preclude him from raising them on appeal.

We agree with petitioner that Dodds I did not resolve the issue raised in the current appeal, and thus petitioner is not precluded from raising that issue. Beck, 313 Or at 156 (the issue of bias during the hearing on remand is not precluded by the prior decision finding no bias during the first hearing; the two issues are not identical, and the issue of bias in the second hearing could not have been decided during the first appeal). The issue raised in the current appeal was not and could not have been raised or decided in our earlier decision, and thus is not precluded from our review. We also agree with petitioner that he had no opportunity to raise any issues regarding a condition of approval that was not imposed until after the close of the evidentiary hearing, and thus has not waived issues regarding that condition. Beck v. City of Happy Valley, 27 Or LUBA 631, 637 (1994).

Intervenor argues next that petitioner has not cited any provision in the city's code or elsewhere that is violated by the city's failure to revisit the variance after approving on remand smaller lot sizes and hence larger lot coverage.

Intervenor contends that the variance approved in the prior proceeding allowed up to 90 percent lot coverage, and that petitioner has not established, or even alleged, that the lot coverage approved in the challenged decision exceeds 90 percent, or otherwise violates or is inconsistent with the variance.

At oral argument, petitioner disputed that the city had approved a variance of up to 90 percent lot coverage, or an open-ended variance from the lot coverage maximum. According to petitioner, the city approved an indeterminate lot coverage variance based on the proposal before it at the time, which contemplated relatively modest variances. Because the challenged decision necessarily approves significantly larger variances, petitioner argues that the decision and the variance conflict, and thus the city must revisit the issue and make new findings that the larger lot coverage still complies with the CDC variance standards.

We disagree with petitioner. Generally, unless required by LUBA's remand or local provisions, a local government is not required to repeat on remand procedures applicable in the initial proceeding. East Lancaster Neigh. Assoc. v. City of Salem, 30 Or LUBA 147, 154 (1995), aff'd 139 Or App 333 (1996). Nothing in our decision in Dodds I or anything in the CDC cited to us requires the city to revisit the lot coverage variance. Petitioner may be correct that where a decision on remand is inconsistent with a condition imposed in a prior

proceeding, the city is required to harmonize the two. However, petitioner has not established in the present case that the challenged decision is inconsistent with the variance. Intervenor contends, and we agree, that the city granted the variance in terms and based on rationales that do not suggest an intent to confine lot coverage to the relatively modest percentages originally proposed. In approving the variance, the city noted that severe terrain prevented intervenor from developing the number of units it was entitled to under the applicable zoning, and that intervenor's variance request was the minimum variance necessary to alleviate that hardship. Record II-22. It is not clear whether the city approved a variance allowing up to 90 percent coverage lot coverage, as intervenor originally requested, or an open-ended variance, as intervenor now suggests. However, even if the former is the case, petitioner has not demonstrated that the challenged decision approves lot coverage greater than 90 percent or that the decision is otherwise inconsistent with the variance.

The first assignment of error is denied.

SECOND AND THIRD ASSIGNMENTS OF ERROR

In the second assignment of error, petitioner argues that the city misconstrued CDC 30.100(C)(1) in identifying the top of the bank, and thus the transition area boundary, as a manmade Cat track rather than the natural top of the slope or drainageway. In the third assignment of error, petitioner

contends that the city's finding that the top of the bank corresponds with the manmade Cat track is not supported by substantial evidence in the record.

CDC 30.100(C)(1) requires the city to identify a transition area bordering wetland/riparian areas, extending 25 feet from the wetland/riparian boundary or "the top of the nearest clearly defined bank," whichever is greater. In the challenged decision, the city interpreted the phrase "top of the nearest clearly defined bank" to mean the point where "the contour lines first begin to widen out, indicating a less steep bank." Record I-22. The city derived that interpretation in part from the stated purpose of CDC 30.100(C)(1), to protect the riparian vegetative corridor. The city applied that interpretation to the present case, and determined that the "nearest clearly defined bank" on the subject property is an old manmade Cat track following the ridge contours below the ridge crests, where riparian vegetation tends to end.

Petitioner contends that the city's interpretation of CDC 30.100(C)(1) is inconsistent with the express terms of that provision, and thus that LUBA need not defer to that interpretation. ORS 197.829(1).[3] Petitioner argues, based on

[3]ORS 197.829(1) provides:

> "The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:

comments by a geologist in the record, that the phrase "top of the nearest clearly defined bank" means that point where there is a "distinct change in slope at the top of the slopes that define the valley of the wetland and drainageway." Petition for Review 9 (emphasis in original, quoting testimony at Record I-141). Moreover, petitioner argues that the term "bank" can only refer to a natural slope and not a manmade slope.

We agree with intervenor that petitioner's explication of CDC 30.100(C)(1) in no way demonstrates that the city's interpretation is inconsistent with the express terms of that provision. The city's interpretation, that a midslope break in contour intervals can constitute the "top of the bank," is within the range of plausible constructions denoted by the express terms of that provision. Nor does CDC 30.100(C)(1) expressly or impliedly limit itself to banks formed purely by natural processes. The city's interpretation of CDC 30.100(C)(1) is not inconsistent with the express terms of

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"(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

"(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

"(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

"(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

that provision, and, accordingly, we defer to the city's interpretation. ORS 197.829(1)(a).

With respect to petitioner's substantial evidence challenge, petitioner relies on testimony from a certified geologist, quoted above, that the top of the bank is higher up the slope than the line delineated by the applicant and accepted by the city. Petitioner contends that, given this undisputed expert testimony, no reasonable person could conclude that the transition area boundary approved by the city extends to the "top of the nearest clearly-defined bank," as required by CDC 30.100(C)(1).

Petitioner's substantial evidence challenge is a variant of its interpretative challenge, and fares no better. The testimony relied upon is in support of an interpretation of CDC 30.100(C)(1) that the city did not adopt. Evidence supporting a different interpretation of CDC 30.100(C)(1) that the city rejected is not relevant to whether substantial evidence supports the city's determination, based on its understanding of CDC 30.100(C)(1), that the top of the bank is located where the contour lines first begin to widen, and riparian vegetation ends. There is substantial evidence in the record to support the city's conclusion that the line delineated is located at the top of the nearest clearly defined bank, as the city interprets that phrase.[4]

[4]Petitioner makes two alternative arguments that are not well-developed. First, petitioner suggests that the wetland/riparian areas are natural

The second and third assignments of error are denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner argues that the city erred in allowing the applicant to extend cantilevered balconies over the transition area and place rear steps in the transition area, if steps otherwise cannot be provided and are required by the building code.[5] Petitioner contends that, pursuant to the dedication condition in the challenged decision, the city will own the transition area, and that the city cannot lawfully approve any encroachments into the territory or airspace of the dedicated area.

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resources protected by Goal 5 and that the city cannot interpret CDC 30.100(C)(1) or apply it in ways that fail to provide protection to natural resources. Petitioner does not contend that the wetland/riparian areas on the subject property are listed in the city's Goal 5 inventory, or that the city's action otherwise affects an acknowledged Goal 5 resource. Petitioner's point seems to be that wetlands are natural resources of a type that can be protected by listing on a Goal 5 inventory, and thus the city cannot interpret or apply CDC 30.100(C)(1) in any way that fails to protect such natural resources. However, where a land use decision does not affect an inventoried Goal 5 resource, the local government is not required to consider whether the property should be included on its inventory or otherwise whether the decision is consistent with Goal 5. See Larson v. Wallowa County, 23 Or LUBA 527, 539, aff'd, rev'd on other grounds 116 Or App 96 (1992). Petitioner's argument regarding Goal 5 provides no basis to reverse or remand the challenged decision.

Second, petitioner argues that the challenged decision approves a hammerhead turnaround that encroaches partially into the transition area. Petitioner argues that encroachment of the turnaround into the transition area is unnecessary and imprudent, but does not explain how the challenged decision violates any provision of the CDC or other authority in approving the turnaround. Limited development is permitted in the transition area. CDC 30.100(D).

[5]Petitioner refers to condition 39, which provides:

> "Any decks attached to the dwelling units shall cantilever over the transition area and may not be supported by any structure located in the transition area except rear steps to the units may be allowed pursuant to condition of approval 10, above." Record I-54.

Condition 10 prohibits rear steps unless no other exit will satisfy building code requirements.

Intervenor makes a number of responses, but the dispositive one is its argument that petitioner has not cited to any authority prohibiting the city from approving encroachments into the transition area, even where the transition area is dedicated to the city. Petitioner acknowledges that the city may essentially grant an easement in the transition area to the applicant for any encroachments; however, petitioner contends that the purpose of the transition area is to protect the wetland resources in the drainageways, and that that purpose mandates no development in the transition area. Petitioner's argument is contrary to CDC 30.100(D), which allows limited development in the transition area, and fails to demonstrate any basis to reverse or remand the challenged decision.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioner argues that the city erred in imposing conflicting conditions of approval. Condition 36 requires the relocation of five building envelopes so that they are outside the city-approved transition area. Petitioner contends that the relocation of those building envelopes will necessarily decrease the length of the driveway for those dwellings, violating the 20-foot minimum length requirement imposed in condition 20.

Intervenor responds that petitioner has cited no authority allowing reversal or remand of a decision because of

conflicting conditions and that, in any case, petitioner's thesis that conditions 36 and 20 conflict is based solely on speculation. Intervenor argues that the five building envelopes extended only minimally into the transition area, and that it can easily modify the building envelopes to eliminate the encroachment without modifying the driveway length.

We agree with intervenor that petitioner has not demonstrated any necessary conflict between conditions 36 and 20. Petitioner has not established that complying with condition 36 requires moving the entire building envelope back from the transition area, or, even assuming movement is required, that doing so necessarily reduces associated driveways below 20 feet in length.

The fifth assignment of error is denied.

The city's decision is affirmed.