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

DAVID HOLLAND,)
)
 Petitioner,)
)
 vs.)
)
 CITY OF CANNON BEACH,)
)
 Respondent.)

LUBA No. 97-097

FINAL OPINION
AND ORDER

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

AFFIRMED 02/22/99

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 DECISION**

3 This matter is before us on remand from the Court of Appeals.¹

4 **FACTS**

5 The facts in this case are fully set forth in Holland v. City of Cannon Beach, ___ Or
6 LUBA ___ (LUBA No. 97-097, January 7, 1998), slip op 2-5, and are not fully repeated here.
7 Briefly, in 1994, petitioner applied to the city for approval of a 11-lot subdivision on a 4.04-
8 acre parcel zoned RL (low density residential-four dwelling units per acre). The subject
9 property has an average slope of 37 degrees, is crossed by two drainages with associated
10 wetlands, and is partially covered by a stand of Sitka spruce trees. In a limited land use
11 decision, the city denied the application based upon several provisions of its comprehensive
12 plan. Petitioner appealed the denial to this Board, which affirmed the city's decision. After a
13 series of appellate court decisions, the city's initial decision was ultimately remanded on the
14 basis that the city erred in relying upon provisions of its comprehensive plan. Holland v.
15 City of Cannon Beach, 30 Or LUBA 85, rem'd, 138 Or App 340, 908 P2d 838, (1995), rem'd
16 323 Or 148, 915 P2d 407, rev'd and rem'd 142 Or App 5, 920 P2d 562, rev den 324 Or 229
17 (1996). The Court of Appeals instructed us to remand the city for the city "to reconsider
18 petitioner's application" without applying the comprehensive plan provisions that had formed
19 the basis for the city's original denial. Holland I, 142 Or App at 11.

¹The city moves to allow supplemental briefing and/or oral argument on this appeal, for two reasons. First, the city explains that "neither party has extensively addressed" the two bases for denial that are before us. City's Motion 3. Second, the city wishes to brief an issue of "whether geological hazards and slope/densities can be addressed by the City on remand at all." Id. at 2. The city explains that this "issue is likely to be the most contentious and it has not been briefed by either party." Id. Petitioner objects to the city's motion.

The parties have had the opportunity to fully brief this case. That they may have chosen to not "extensively address" an issue in this appeal does not justify providing them an opportunity to further brief the case to overcome that deficiency. Second, while the issue of whether geologic hazards and slopes may be of interest to the parties, it is not before us. Our review is limited to issues raised in the petition for review, which allege error in the challenged decision. The new issue the city desires to review is not a part of the challenged decision, and is not before us. The city's motion is denied.

1 On remand, the city again denied the application, in part based on the city's
2 subdivision development standard (SDS) 16.04.220(A), which allows the city to limit the
3 density of lots based upon site slopes. SDS 16.04.220(A) had not been applied during the
4 initial application process, and petitioner argued that the provision had been implicitly
5 repealed. The city interpreted its code to find that SDS 16.04.220(A) had not been repealed,
6 and determined that the proposed density of petitioner's development exceeded that allowed,
7 based upon its steep slopes. On appeal, we deferred to the city's interpretation of its code,
8 and affirmed the city's denial for failure to satisfy SDS 16.04.220(A). Because we found the
9 city's findings had established one valid basis for denial, we did not reach petitioner's
10 assignments of error challenging the city's alternative basis for denial. Those bases include
11 violation of SDS 16.04.160(E), which limits the length of cul-de-sac streets; and violation of
12 the city's tree preservation ordinance, Cannon Beach Zoning Ordinance (CBZO) 17.70.030.²

13 The Court of Appeals reversed our determination, finding that SDS 16.04.220(A) was
14 not an approval standard for petitioner's application. Holland v. City of Cannon Beach, 154
15 Or App 450, 962 P2d 701, rev den 328 Or 115 (1998). Thus, it remanded the case for this
16 Board to consider whether the city's alternative bases for denial could provide an
17 independent basis to affirm the city's decision. We find that they do.

18 **SECOND ASSIGNMENT OF ERROR**

19 Petitioner asserts the city's finding that the street for the proposed subdivision
20 exceeds the maximum street length for cul-de-sacs misconstrues SDS 16.04.160(E) and is
21 not based upon substantial evidence.

²Petitioner made five assignments of error in his appeal to this Board. The first, fourth and fifth assignments concerned the city's interpretation and application of SDS 16.04.220(A). Our first decision addressed only the first and fourth assignments of error. Since the Court of Appeals determined that SDS 16.04.220(A) was not applicable to this application, the fifth assignment of error, which challenged the evidentiary support for the city's findings regarding SDS 16.04.220(A), could not provide any basis to affirm the city's decision, and we do not address it here. This decision addresses the remaining second and third assignments of error.

1 The city's decision addresses SDS 16.04.160(E) as follows:

2 "Section 16.04.160(E) Design standards – street, dead-end street or cul-de-sac
3 provides that 'dead-end streets or cul-de-sacs, designed to be so permanently,
4 shall not be longer than four hundred feet and shall be provided at the closed
5 end with a turn-around and a property line radius of at least forty feet * * * [.]'

6 "Finding: The council interprets this section so that the method for measuring
7 the length of a cul-de-sac street is from its intersection with the adjoining
8 street to the end of the cul-de-sac, with the measurement taken along the
9 center line of the cul-de-sac street. Applying this methodology to the length
10 of Spruce Court, which is a dead end street terminating in a cul-de-sac, we
11 find that it has a length of 427 feet. This exceeds the maximum length of 400
12 feet." Record 8.

13 Petitioner does not clearly articulate the manner in which he believes the city's
14 interpretation of SDS 16.04.160(E) misconstrues the standard. Petitioner merely states that
15 the city council "reached that conclusion [that the standard was not met] after officially
16 announcing for the first time how * * * the length of a street was to be measured."³ Petition
17 for Review 22. However, from the argument in the response brief, the minutes of the city
18 council proceeding which resulted in the challenged decision, and a letter from petitioner's
19 landscape architect that petitioner quotes, we surmise that petitioner argues that the city's
20 interpretation of how a street is to be measured misconstrues the language of the standard.
21 The city council minutes reflect petitioner's arguments regarding the street length as follows:

22 "* * * [Petitioner's attorney] said the record was clear that the Holland
23 subdivision road, Spruce Court, will not be longer than 400 feet. He said the
24 suggestion was made by [the city planner] that Holland could have submitted
25 a revised plan to show the street length at 400 feet or less but there is no
26 reason to do this since the applicant has said the street will not be longer than
27 400 feet and the Council can make that a condition of approval.

28 "* * * * *

³It is not clear from the petition for review or the record when the city "announced" its "new" interpretation. However, petitioner does not argue, and the facts do not indicate, that the interpretation was announced for the first time in its decision, or that petitioner was not aware of the interpretation, and hence the requirements for satisfying SDS 16.04.160(E), prior to the issuance of the decision. In fact, petitioner cites to the minutes of the city council hearing where both he and his attorney acknowledged the city's methodology for applying the standard.

1 "Regarding the length of the street, Holland said the road will be no longer
2 than 400 feet; there was just a disagreement about how to measure the road
3 length. He said perhaps the city could check on how other jurisdictions
4 measure road length." Record 13-14, 17.

5 The letter from petitioner's landscape architect states, with regard to the proposed road:

6 "There was a question raised about the proposed road length. The plans show
7 a road length of 387', measured to the center of the turn around. It is the
8 applicant's intention to build a road under 400' in length. The final
9 construction documents will show the road with geometrically correct
10 dimensions, not to exceed 400'." Record 26.

11 Petitioner does not explain how the city's interpretation of its street design standards
12 "misconstrues" the language of SDS 16.04.160(E). At most, petitioner points out that the
13 city may apply its street length standards differently than some other jurisdictions, by
14 requiring that the street length be measured from the end of the cul-de-sac rather than from
15 the center of the circle. But see Sully v. City of Ashland, 23 Or LUBA 25, 31 (1992)
16 (concluding that under applicable code language a cul-de-sac turnaround must be included in
17 measuring street length). However, the difference noted by petitioner does not establish that
18 the city's method of measuring the street length misconstrues the language of the standard.
19 The city's interpretation of its code language is entitled to deference. ORS 197.829(1); Clark
20 v. Jackson County, 313 Or 508, 836 P2d 710 (1992). Petitioner has not established that the
21 city misconstrued SDS 16.04.160(E) by requiring that the street length be measured from the
22 end of the street.

23 Petitioner also argues that "[t]he issue of the street length is to be finalized upon final
24 engineering and plat review. To include the requirement that the preliminary plan show a
25 design measurement is contrary to ORS 227.173 and 227.178." Petition for Review 23-24.
26 Petitioner does not explain how he believes the city's requirement that the street length be
27 accurately depicted in the preliminary plan violates either ORS 227.173 or 227.178. Without
28 some explanation from petitioner to substantiate his argument, petitioner's summary
29 argument is insufficient for review.

1 To the extent petitioner's argument can be construed to be that the city misconstrued
2 its code language by evaluating petitioner's street length based upon petitioner's preliminary
3 plan, we disagree. Petitioner cites to SDS 16.04.110 and SDS 16.04.130 to support his
4 argument that "street length is to be finalized upon final engineering and plat review."
5 Petition for Review 23. Petitioner asserts that SDS 16.04.110, which is entitled "Tentative
6 plan – Other information," includes the requirements of a tentative or preliminary plan and
7 does not "mention that exact dimensions must be included." Petition for Review 23, n 7.
8 Contrary to petitioner's assertion, SDS 16.04.110 does not support petitioner's conclusion
9 that "street length is to be finalized upon final engineering and plat review." Petitioner is
10 correct that the "other information" listed in SDS 16.04.110 does not address "exact
11 dimensions". However, that section also does not address the requirement of a plat map, and
12 does not in any way purport to address when street length is to be determined. However,
13 SDS 16.04.100, entitled "Tentative plan – Map contents," requires that the tentative plan
14 proposals include "Locations and principal dimensions for all proposed streets * * *." That
15 applicable provision indicates that street dimensions are required for tentative plan proposals.
16 ⁴

17 Petitioner's reliance on SDS 16.04.130, which includes "Final plat - Map contents" is
18 also misplaced. Petitioner asserts that SDS 16.04.130(B) and (C) "establish that specific
19 measurements are to be submitted at time of final plat [approval]." Petition for Review 23 n
20 7. SDS 16.04.130(B) and (C) address "Existing Conditions" and "Survey Data." Those
21 sections do not address proposed street length requirements and do not negate the

⁴Petitioner also adds that under SDS 16.04.170(B) the "planning commission may approve the tentative plan as submitted or require that it be modified." Petitioner does not establish how this planning commission authority supports his assertion that street length dimensions are required only at the time of final plat. Moreover, the challenged decision is not from the planning commission, but rather from the city council. The authority granted the planning commission under SDS 16.04.070(B) does not compel the city council to allow petitioner to modify the street length, or defer compliance with the street length requirement until the time of the final plat.

1 requirement in SDS 16.04.100 that the preliminary plan map include "principal dimensions
2 for all proposed streets." Nor do they establish that the city's code requires that the street
3 length be finalized at the time of final engineering and plat review. Petitioner has not
4 established that the city misconstrued its code by evaluating the proposed street for
5 compliance with the street length requirements of SDS 16.04.160(E) in its evaluation of the
6 proposed subdivision preliminary plan.

7 Petitioner's primary argument under this assignment of error is that the city's
8 conclusion that the length of the cul-de-sac exceeds 400 feet is not based upon substantial
9 evidence. Petitioner recognizes that the preliminary plan map depicts the street as being 427
10 feet, as measured by the city. However, petitioner asserts that the evidence in the record,
11 cited above, establishes that the proposed street will be less than 400 feet, and that "[t]here is
12 no evidence in the record that contradicts the above identified support." Petition for Review
13 23. Although not expressly stated in the petition for review, petitioner's substantial evidence
14 argument appears to be contingent on the city accepting petitioner's representations and
15 deferring compliance of this standard to the final plat stage, or otherwise conditioning
16 approval on a reduction of the street length. While it may have been permissible for the city
17 to ensure compliance with this criterion by imposing a condition of approval, assuming it is
18 established that the condition can feasibly be met, petitioner has not established that the city
19 was legally required to impose such a condition. The city is not required to condition an
20 approval, rather than deny an application, when the applicant has not established compliance
21 with the code requirements. Shelter Resources, Inc. v. City of Cannon Beach, 27 Or LUBA
22 229, 241-42, aff'd 129 Or App 433, 879 P2d 1313 (1994) (There is no general requirement
23 that the city must apply conditions to modify a proposal so applicable standards are met,
24 rather than deny an application.) See also Decuman v. Clackamas County, 25 Or LUBA 152,
25 155 (1993); Simonson v. Marion County, 21 Or LUBA 313, 325 (1991).

1 Petitioner's plan map, upon which the city based its decision, shows that the proposed
2 street is longer than 400 feet, and thus exceeds the street length allowed under SDS
3 16.04.160(E). Thus, petitioner's own evidence provides substantial evidence that petitioner's
4 proposal does not satisfy SDS 16.04.160(E).

5 The second assignment of error is denied.

6 **THIRD ASSIGNMENT OF ERROR**

7 Petitioner asserts that the city's finding that his proposed subdivision does not satisfy
8 a provision of the city's tree removal ordinance, CBZO 17.70.030, misconstrues the law and
9 is not based upon substantial evidence.

10 CBZO 17.70.030(C), entitled "Tree Removal, Additional Requirements," requires:

11 "The retention of trees shall be considered in the design of major partitions,
12 subdivision or planned developments; placement of roads and utilities shall
13 preserve trees whenever possible. The need to remove trees shall be
14 considered in the review process for major partitions, subdivisions or planned
15 developments."

16 The city's findings on this provision state:

17 "The application includes a tree survey of the site. The tree survey identified
18 263 trees which meet the city's definition of a tree, that is a tree with a
19 minimum diameter of 6 inches at breast height. The applicant estimates that
20 construction associated with the proposed road alignment and utility
21 placement will result in the removal of 108 trees. This is 41% of the site's tree
22 cover. On the eastern 450 feet of the site, which corresponds to the area of
23 grading associated with Spruce Court, there are 206 trees, of which 98 are to
24 be removed by grading activities. Thus, construction of Spruce Court will
25 result in the destruction of 48% of the existing tree cover on the eastern
26 portion of the site. The protection of trees on this site is particularly important
27 because of the site's steep topography and its location in an area of potential
28 geologic hazards. Removal of the number of trees proposed increases the risk
29 of adverse impacts, both on and off-site, associated with the geologic
30 characteristics of the site. Thus the extensive removal of the site's tree cover
31 which is proposed does not meet the standard of this section.

32 "There are alternative subdivision designs which would result in a much
33 smaller impact on the site's tree cover and thus meet the standard's intent of
34 preserving trees whenever possible." Record 9.

1 Petitioner argues first that the city misconstrued this provision by finding it a
2 mandatory approval criterion. Petitioner argues that CBZO 17.70.030(C) "does not create a
3 mandatory standard of design or review. It merely states that the preservation of trees must
4 be considered. It is not a grounds for denial." Petition for Review 25. To support this
5 argument, petitioner relies, at least in part, on a portion of the purpose section of the tree
6 removal ordinance. Petitioner asserts that "the law governing tree removal" is set forth in
7 CBZO 17.70.010. Petition for Review 24. Petitioner specifically cites only CBZO
8 17.70.010(B); however the entire purpose section states:

9 "A. The purpose of this chapter is to establish protective regulations for
10 trees within Cannon Beach in order to better control problems of soil
11 erosion, landslide, air pollution, noise, wind and destruction of scenic
12 values and wildlife habitat.

13 "B. The intent is not to prohibit the removal of trees completely, or to
14 require extraordinary measures to build structures; but the intent is to
15 stop the wanton and oftentimes thoughtless destruction of that
16 vegetation which has a beneficial effect on the value of property, and
17 on the city in general."

18 Petitioner's reliance on CBZO 17.70.010(B), to the exclusion of CBZO 17.70.010(A), avoids
19 the city's identified role within its tree removal ordinance, to consider issues such as soil
20 erosion and landslide, both of which were at issue in this case. The purpose section of the
21 city's tree removal ordinance does not establish that CBZO 17.70.030(C) is not intended as a
22 mandatory approval criterion.

23 Petitioner also appears to assert that CBZO 17.70.030(C) is not a mandatory approval
24 criterion because the criteria for removing trees are set forth in CBZO 17.70.020, which, as
25 petitioner states, "identify five situations relevant to this application, where trees can be
26 removed." Petition for Review 25.

27 Petitioner has misconstrued the city's zoning ordinance provisions. CBZO 17.70.020
28 sets forth the criteria for issuance of a tree removal permit. While petitioner may be correct
29 that removal of trees on his property could satisfy those criteria, those criteria are not

1 relevant to petitioner's subdivision application, which is the subject of the challenged
2 decision. Conversely, CBZO 17.70.030 specifies that "retention of trees shall be considered
3 in the design of * * * subdivisions * * *" and that "the need to remove trees shall be
4 considered in the review process for * * * subdivisions * * *." The code clearly reflects that
5 it is intended to be applied in the review of subdivision applications. Petitioner has not
6 established that the city misconstrued the applicable law in applying CBZO 17.70.030 as an
7 approval criterion.⁵ The city's decision implicitly interprets CBZO 17.70.030 as an approval
8 criterion, and we defer to that interpretation. ORS 197.829(1); Alliance for Responsible
9 Land Use v. Deschutes Cty., 149 Or App 259, 942 P2d 836 (1997), rev dismissed 327 Or 555
10 (1998).

11 Petitioner's substantial evidence challenge addresses only the last paragraph of the
12 city's finding, which states, essentially, that there are other subdivision designs that would
13 have less of an impact on trees and would meet the "standard's intent of preserving trees
14 wherever possible." Record 9. Petitioner argues this statement is based on conjecture, and
15 that "[n]one of the findings or conclusions upon which the city based its holding regarding
16 alternative development proposals which save trees can be supported by the record as a
17 whole." Petition for Review 26.

18 The city does not respond to this argument, and the decision itself does not point to
19 evidence in the record to support the city's conclusion that alternative decisions could reduce
20 the impact on trees. However, that conclusion is not the sole basis upon which the city
21 concludes that petitioner's subdivision proposal does not satisfy CBZO 17.70.030. Petitioner

⁵The city applied CBZO 17.70.030 as an approval criterion during the initial review of petitioner's application. Petitioner appealed the city's application of CBZO 17.70.030, arguing that the city's findings misconstrued the law and were not based upon substantial evidence. We denied petitioner's assignment of error on that issue. Holland I, 30 Or LUBA at 94. In that appeal, petitioner did not challenge the applicability of CBZO 17.70.030 as a mandatory approval criterion. We question whether issues regarding CBZO 17.70.030, which may have been raised and addressed in the first appeal, should be considered in this appeal. Beck v. City of Tillamook, 313 Or 148, 831 P2d 678 (1992). However, the city does not challenge petitioner's authority to raise the issues he does, and so we address them in full.

1 does not challenge the evidentiary support for the city's primary finding on this standard,
2 which concludes, in part

3 "The protection of trees on this site is particularly important because of the
4 site's steep topography and its location in an area of potential geologic
5 hazards. Removal of the number of trees proposed increases the risk of
6 adverse impacts, both on and off-site, associated with the geologic
7 characteristics of the site. Thus the extensive removal of the site's tree cover
8 which is proposed does not meet the standard of this section." Record 9.

9 This unchallenged finding is not dependent upon the alternative conclusion that petitioner
10 does challenge. Thus, regardless of whether the challenged conclusion is supported by
11 substantial evidence in the record, the city has made unchallenged findings that the proposed
12 subdivision does not satisfy CBZO 17.70.030.

13 The third assignment of error is denied.

14 The city's decision is affirmed.⁶

⁶Although not assigned as error, petitioner adds that if the city's decision is affirmed, the city has fully or partially taken his property without just compensation. Petitioner requests an evidentiary hearing to establish damages for this alleged taking. Because petitioner has not assigned a "taking" as an assignment of error, that issue is not before us, and petitioner's motion for an evidentiary hearing on that issue is denied.