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

JOHN FREEDOM, ROBERT E. TABER, and)
BRAM D. LARRICK,)
)
 Petitioners,)
)
 vs.)
)
 CITY OF ASHLAND,)
)
 Respondent,)
)
 and)
)
 ALEX JANSEN and LEO JANSEN,)
)
 Intervenor-Respondent.)

LUBA No. 99-030
FINAL OPINION
AND ORDER

Appeal from City of Ashland.

John Freedom, Ashland, filed the petition for review and argued on his own behalf.

No appearance by City of Ashland.

William F. Wilson and John R. Hassen, Medford, filed a response brief. With them on the brief was Hornecker, Cowling, Hassen & Heysell. John R. Hassen argued on behalf of intervenors-respondent.

HOLSTUN, Board Chair; BASSHAM, Board Member; BRIGGS, Board Member, participated in the decision.

AFFIRMED 10/29/99

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city decision granting site review approval.

4 **MOTION TO INTERVENE**

5 Alex Jansen and Leo Jansen move to intervene on the side of respondent. There is no
6 opposition to the motion, and it is allowed.¹

7 **FACTS**

8 The subject property is located in the C-1 Retail Commercial District. The proposed
9 development will demolish an existing motel building and construct a new retail building in
10 its place. Intervenors also propose to convert another existing motel building into 24 studio
11 apartments. The proposal has been designed to preserve one large existing cedar tree on the
12 property as well as a number of other existing trees. However, the proposed development
13 will require removal of a number of trees.

14 **DECISION**

15 The petition for review does not include assignments of error followed by supporting
16 argument, as required by our rules. OAR 661-010-0030(4)(d). Nevertheless, to the extent
17 we are able to discern petitioners' allegations of error from the argument presented in the
18 petition for review, we consider those alleged errors. *Schoonover v. Klamath County*, 16 Or
19 LUBA 846, 848 n 4 (1988); *Standard Insurance Co. v. Washington County*, 16 Or LUBA 30,
20 32-33 (1987). We understand petitioners to argue that the city (1) misinterpreted one of the
21 applicable criteria for site review approval and (2) failed to require that the disputed
22 application comply with that criterion.

23 City of Ashland Land Use Ordinance (ALUO) 18.72.070(C) requires that
24 development comply with the City of Ashland Site Design and Use Standards (SDUS).

¹Intervenor Alex Jansen was the applicant below.

1 SDUS II-C-1 establishes "Basic Site Review Standards" and requires that "[d]evelopment in
2 all commercial and employment zones shall conform to [those] development standards."

3 One of the listed development standards is landscaping standard II-C-1(c)(5), which requires:

4 "Efforts shall be made to save as many existing healthy trees and shrubs on
5 the site as possible."

6 Petitioners appear to argue that, to the extent landscaping standard II-C-1(c)(5) does
7 not unambiguously impose a rigorous standard, the city should have looked to official
8 statements of city policy that favor protection of trees. In support of this argument,
9 petitioners cite a number of city land use regulation and comprehensive plan provisions that
10 petitioners contend should lead the city to interpret landscaping standard II-C-1(c)(5) as
11 imposing a rigorous standard, rather than a less stringent, balancing standard.² We
12 understand petitioners to contend that, had the city properly interpreted and applied
13 landscaping standard II-C-1(c)(5), it would have required that the proposal be modified to
14 save more of the existing trees than will be preserved by the proposal that was approved by
15 the challenged decision.

16 The city's findings addressing landscaping standard II-C-1(c)(5) are as follows:

17 "[Landscaping standard II-C-1(c)(5)] requires that efforts shall be made to save
18 as many existing healthy trees and shrubs on the site as possible. Appellants
19 contend that this requirement has not been satisfied. This SDUS requirement
20 has been interpreted to require a balancing between building design and site
21 improvement requirements with the reasonable retention of the site's
22 significant natural features. This SDUS requirement does not incorporate
23 miscellaneous Comprehensive Plan provisions as approval criteria. The
24 landscaping plan saves a substantial number of the existing healthy trees and
25 shrubs. The Tree Commission approved the proposed plan. The Applicant
26 reconfigured the Site Plan for the express purpose of saving the large existing
27 cedar tree in the rear of the property. As testimony from arborist John
28 Galbraith demonstrated, a number of the large existing trees are already
29 unhealthy and may not survive with or without the proposed development.

²We do not understand petitioners to contend that the cited land use regulation and plan provisions are themselves approval criteria. The city specifically rejected that position in the challenged decision.

1 "The Applicant initially considered a two story design concept as an effort to
2 save some of the large existing trees. Even with a two-story design some of
3 the large existing trees would have been lost. Research developed by the
4 Applicant demonstrates that a two-story design would not meet the building
5 design and site requirements necessary for commercial viability of the project.
6 *The SDUS standard does not require that all existing trees and shrubs be*
7 *saved, but that efforts be made to save existing healthy trees and shrubs. The*
8 *Applicant has made substantial efforts to save the existing healthy trees and*
9 *shrubs. Overall, the proposed application strikes a reasonable balance*
10 *between the building site design requirements and retention of the site's*
11 *significant natural features." Record 12-13. (Emphasis added.)*

12 We have little difficulty agreeing with petitioners that the words of landscaping
13 standard II-C-1(c)(5) could be interpreted to impose a rigorous standard that requires
14 extraordinary efforts to save all existing healthy trees and shrubs. In other words, such an
15 interpretation of landscaping standard II-C-1(c)(5) would not appear to be inconsistent with
16 those policies.³

17 However, the question presented in this appeal is not whether the city council could
18 have adopted petitioners' interpretation of landscaping standard II-C-1(c)(5). The relevant
19 question is whether the city council erred in adopting the interpretation that it did. The city
20 council has significant discretion in how it interprets landscaping standard II-C-1(c)(5). ORS
21 197.829(1); *Clark v. Jackson County*, 313 Or 508, 514-15, 836 P2d 710 (1992).⁴ LUBA
22 must affirm the city council's interpretation of its own legislation unless we conclude that the
23 interpretation is "clearly wrong," or "beyond all colorable defense." *Huntzicker v.*

³For example, one of the plan provisions cited by petitioners provides:

"Trees, especially large trees, enhance the quality of life in Ashland in many ways, providing shade, protection from wind, erosion control, wildlife habitat, sound barriers, air pollution removal and play areas for children, among other things. Ashland has a long history of honoring and protecting its trees, including being named a Tree City, USA each year since 1986. Trees are a fragile resource. The proven benefits of trees can only be maintained through favorable consideration in the political process." Ashland Comprehensive Plan VIII-13.

⁴Under ORS 197.829(1)(a), we must affirm the city council's interpretation unless that interpretation "[i]s inconsistent with the express language of the comprehensive plan or land use regulation."

1 *Washington County*, 141 Or App 257, 261, 917 P2d 1051, *rev den* 324 Or 322 (1996); *Zippel*
2 *v. Josephine County*, 128 Or App 458, 461, 876 P2d 854 *rev den* 320 Or 272 (1994); *Goose*
3 *Hollow Foothills League v. City of Portland*, 117 Or App 211, 843 P2d 992 (1992).

4 Petitioners do not explicitly address the city's interpretation, quoted above, except to
5 fault the city for not reading it to impose a higher standard. For example, landscaping
6 standard II-C-1(c)(5) requires efforts to protect "existing healthy trees," and petitioners do
7 not challenge the city's finding that some of the trees that will be removed are unhealthy.
8 Petitioners do not explain why the city's interpretation of landscaping standard II-C-1(c)(5)
9 to require balancing with other considerations is legally incorrect—they simply express
10 disagreement with that interpretation. Petitioners also do not directly challenge the city's
11 finding that landscaping standard II-C-1(c)(5) requires "substantial" efforts or explain why
12 requiring "substantial" efforts is inconsistent with the standard.⁵ Neither do petitioners
13 explain why the efforts that were made in this case are insufficient to constitute substantial
14 efforts.

15 Under the deferential standard of review that we are required to apply to the city's
16 interpretation of landscaping standard II-C-1(c)(5), we cannot say that the city's
17 interpretation is clearly wrong. Petitioners do not establish that the disputed proposal
18 violates landscaping standard II-C-1(c)(5), as it was interpreted by the city council.
19 Petitioners therefore establish no basis for reversal or remand.

20 The city's decision is affirmed.

⁵As noted earlier, the standard requires that "[e]fforts shall be made to save as many existing healthy trees and shrubs on the site as possible." Landscaping standard II-C-1(c)(5) does not explicitly identify how rigorous or exhaustive the required "efforts" must be.