

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 VICKIE CROWLEY, MARJORIE
5 FELDMAN, FRANCIS QUINN,
6 and ROBERTA STEWART,
7 *Petitioners,*

8
9 vs.

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11 CITY OF BANDON,
12 *Respondent,*

13
14 and

15
16 PORT OF BANDON,
17 *Intervenor-Respondent.*

18
19 LUBA No. 2005-100

20
21 FINAL OPINION
22 AND ORDER

23
24 Appeal from City of Bandon.

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26 Vickie Crowley, Marjorie Feldman, Francis Quinn, and Roberta Stewart, Bandon, filed the
27 petition for review. Vickie Crowley argued on her own behalf.

28
29 Frederick J. Carleton, Bandon, represented respondent.

30
31 Jerry O. Lesan, Coos Bay, filed a response brief and argued on behalf of intervenor-
32 respondent.

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34 HOLSTUN, Board Member; BASSHAM, Board Member; DAVIES, Board Chair,
35 participated in the decision.

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37 AFFIRMED

10/12/2005

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

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NATURE OF THE DECISION

Petitioners appeal a city decision approving an extension to an existing elevated walkway.

MOTION TO INTERVENE

The Port of Bandon (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is granted.

FACTS

In the late 1980s, intervenor built a structure known as the High Dock on the south edge of the waterfront of the Coquille River Estuary. The High Dock consists of a series of concrete pilings driven into the estuary and a riprap revetment along the pilings capped with a concrete deck that is well above the water level. The south end of the High Dock abuts the north side of Front Street where, more recently, intervenor built the two-story High Dock Building directly on top of the southeast portion of the High Dock, pursuant to a conditional use permit (CUP). The High Dock and High Dock Building are zoned Marine Commercial (C-3), while the estuary itself is in a Water Zone¹

The High Dock Building has a kayak shop on the first floor and the High Dock Bistro on the second floor. The city approved the High Dock Bistro pursuant to a CUP in 2000. A significant portion of the High Dock Building, including a narrow first floor deck or walkway, was built over the water.² That narrow elevated walkway apparently serves as an access walkway that leads to a door to an internal staircase that leads up to the bistro. Currently, the High Dock and the existing elevated walkway on the High Dock Building meet at right angles at a corner of the High Dock

¹ This case is before us for the second time. In *Crowley v. City of Bandon*, 48 Or LUBA 545 (2005), we remanded the city’s decision dismissing petitioners’ local appeal of the planning director’s decision that approved the requested elevated walkway extension. On remand, the city found that petitioners were entitled to a local appeal but denied that appeal on the merits.

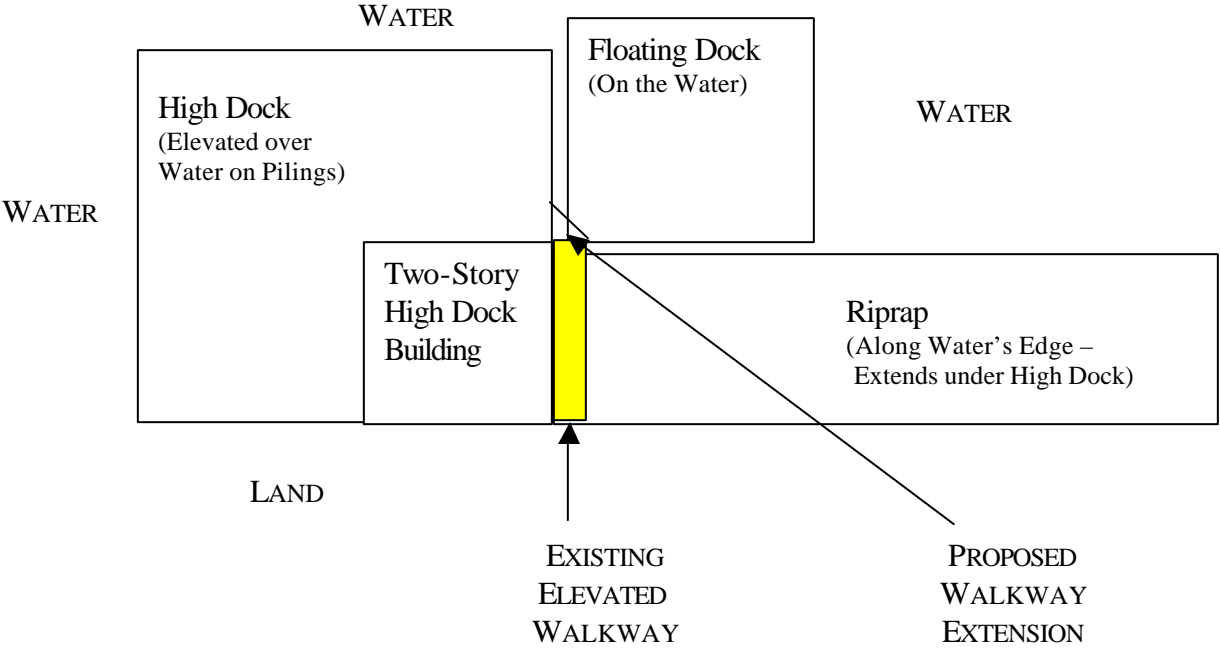
² Although the elevated walkway is sometimes referred to as a deck, we refer to it as a walkway in this opinion.

1 Building that is over the water. Because the High Dock and the elevated walkway meet at the
2 corner of the building, there is no access from the High Dock to the elevated walkway at that point.
3 The challenged decision approves a minor modification to the High Dock Bistro CUP to create a
4 triangular thirty-two square foot area extension to allow access from the deck to the High Dock.

5 The planning director originally approved the minor modification. The city council held a *de*
6 *novo* hearing and affirmed the planning director's decision over petitioners' objections. This appeal
7 followed.

8 While this is a relatively straightforward case, neither the record nor the parties' briefs
9 clearly describe the key features of the High Dock and High Dock Building or include a sketch of
10 the key features. To assist in understanding the important facts, we have created the below sketch,
11 which is not to scale, from the drawing that appears at page 38 of the incorporated record from
12 LUBA No. 2004-133.

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1 **FIRST ASSIGNMENT OF ERROR**

2 Petitioners argue that the city misconstrued the applicable law by interpreting its code to
3 locate the proposed elevated walkway extension in the Marine Commercial zone instead of the
4 Water Zone. According to petitioners, the boundary between the Marine Commercial and Water
5 Zone is the High Dock itself and anything extending over the water must be in the Water Zone. The
6 city’s findings state:

7 “Although [petitioners] claim [the elevated walkway] is over water and is therefore
8 in the Water Zone, the City, [Department of Land Conservation and Development],
9 and the Coos County Circuit Court have repeatedly interpreted the area in question
10 as being part of the [Marine Commercial] zone. The [petitioners’] claim on this
11 particular issue is not considered valid.” Record 18.

12 Bandon Municipal Code 17.104.010 provides the method for determining zone boundaries:

13 “*Unless otherwise specified, zone boundaries are section or subdivision lines, lot*
14 *lines, the ordinary high water line or the center line of streets, alleys, railroad right-*
15 *of-way, or such lines extended. * * **” (Emphasis added.)

16 Although the code would normally make the high water line of the estuary the zone
17 boundary, placing much of the High Dock and High Dock Building in the Water Zone, the code
18 allows for exceptions when “otherwise specified.” The Bandon Comprehensive Plan (BCP)
19 specifically locates the High Dock and High Dock Building out of the Water Zone.³ The circuit
20 court reference in the decision pertains to a circuit court mandamus proceeding involving a proposal
21 to develop a charter boat office on the High Dock north of the High Dock Building. In that case the
22 circuit court held:

23 “It is clear from the Bandon Comprehensive Plan that the High Dock was always
24 part of the shoreland unit 3. It may be ‘counterintuitive,’ as [petitioners] assert, that
25 the High Dock is shoreland since it is supported by pilings driven into a river which
26 is part of the estuary; however, the City’s comprehensive plan has long since been

³ The BCP describes areas that are Estuary Management Units, which require greater protection such as the Water Zone designation, and Shoreland Management Units, which allow varying uses, including those allowed in the Marine Commercial zone. Ordinance 1320, adopted in 1993, specifically places the area in a shoreland management unit.

1 acknowledged as in compliance with the statewide planning goals. The time has
2 passed for raising objections to the language of the plan.

3 “The Relators’ application to add a building to an existing dock which is part of the
4 shoreland unit was properly reviewed by the City as within the shoreland
5 management unit.” Record 46-47.

6 Thus, the circuit court affirmed the city’s interpretation that the High Dock and any construction on
7 the High Dock are considered shorelands rather than estuary and are not in the Water Zone.

8 Under *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003) and ORS
9 197.829(1), we may only overturn a local government’s interpretation of its own ordinances if it is
10 inconsistent with the express language, purpose, or policy of the ordinance, or contrary to a
11 statewide planning goal that the ordinance implements.⁴ Initially, petitioners argue that because the
12 proposed elevated walkway extension is over water, Statewide Planning Goal 16 (Estuarine
13 Resources) applies, and the elevated walkway extension violates the goal. As discussed, the BCP
14 specifically provides that the High Dock and High Dock Building, which are also over water are not
15 part of the estuarine Water Zone. The BCP has been acknowledged to comply with Goal 16, and
16 therefore the fact that the shorelands management unit including the High Dock extends out into the
17 estuary is consistent with the goal. Petitioners do not explain why adding a small elevated walkway
18 extension to the High Dock to allow greater public access to the dock is inconsistent with the
19 relevant text, purpose, or underlying policy of the BCP, and we do not see that it is. If petitioners

⁴ ORS 197.829(1) provides:

“[LUBA] 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:

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

1 are arguing that interpreting the BCP to allow such an elevated walkway extension is contrary to
2 Goal 16, and thus that interpretation cannot be affirmed under ORS 197.829(1)(d), petitioners do
3 not explain why. Petitioners cite nothing in Goal 16 that prohibits extending a small portion of an
4 existing elevated walkway that is located above the estuary.

5 Petitioners argue that the city erred in relying on the circuit court's opinion, because the facts
6 of the circuit court case were much different than the present case. Petitioners argue that the circuit
7 court case only involved building on the High Dock, not any construction out from the High Dock
8 over the water. While we agree with petitioners that the circuit court case did not involve the
9 precise issue here, the court's opinion generally supports the city's interpretation that any
10 construction on the High Dock is also considered part of the Marine Commercial zone. The existing
11 elevated walkway originally approved as part of the CUP also extends over the water. In
12 approving that elevated walkway, the city interpreted its code to not include extensions in the Water
13 Zone. Therefore, the city's interpretation is in accord with both its and the circuit court's prior
14 interpretations.

15 The proposed elevated walkway extension is (1) only 32 square feet in area, (2) raised well
16 above the water, (3) attached to an existing building in the Marine Commercial zone, and (4) serves
17 only to extend an existing elevated walkway to provide greater access to the dock. As far as
18 petitioners have shown, the elevated walkway will have no effect on estuarine resources. We see
19 nothing inconsistent with the language, policy, purpose or the goals in the city's interpretation that
20 the proposed extension of an existing elevated walkway attached to a building in the Marine
21 Commercial zone is also in the Marine Commercial zone.

22 The first assignment of error is denied.

23 **SECOND ASSIGNMENT OF ERROR**

24 Petitioners argue that the city made inadequate findings regarding compliance with the
25 criteria for minor modifications to conditional uses. BMC 17.92.080(B) provides:

1 “A minor modification shall be approved, approved with conditions or denied
2 following the director’s review based on the findings that:

3 “1. No provisions of this title will be violated; and

4 “2. The modification is not a major modification.”

5 Petitioners argue that the decision does not specifically find that “[n]o provisions of this title
6 will be violated” and further argue that the proposal would violate the BMC because such uses are
7 not allowed in the Water Zone. As discussed earlier, the proposed elevated walkway is not in the
8 Water Zone. Therefore, the proposal does not violate the BMC description of uses allowed in the
9 Marine Commercial zone or Water Zone. Petitioners did not raise any other provisions of the
10 BMC that the proposal allegedly violates. Thus, there was no need for the city to address any other
11 provisions of the code.

12 The second assignment of error is denied.

13 **THIRD ASSIGNMENT OF ERROR**

14 Petitioners argue that the city erred in finding that the proposal did not constitute a major
15 modification to the CUP. BMC 17.92.070(B) provides that a modification is major if any of eleven
16 changes have occurred, including:

17 “1. A change in land use;

18 “* * * * *

19 “4. A change in the type of commercial or industrial structures;

20 “5. A change in the type and location of access ways and parking areas where
21 off-site traffic would be affected[.]”

22 Petitioners argue that the proposed elevated walkway constitutes a “change in land use.”
23 “Land use” is defined to mean “the main activity that occurs on a piece of land, or the structure in
24 which the activity occurs * * *.” BMC 16.42.010. According to petitioners, even if the elevated
25 walkway extension does not change the use of the High Dock or High Dock Building, it does
26 change the use of the water in the Water Zone. We reject this theory without further discussion.

1 Petitioners next argue that the proposed elevated walkway extension will be a “change in
2 the type of commercial or industrial structures” on the site. According to petitioners, the proposed
3 elevated walkway extension “significantly expands the use permitted by the original” CUP.
4 Petitioners’ main contention seems to be that the elevated walkway extension will allow greater
5 pedestrian access than was previously possible and access to different areas. Even if this is the
6 case, we do not see that it changes the type of structures involved. The High Dock will still be the
7 High Dock. The High Dock Building will still contain the Bistro and the kayak shop. The elevated
8 walkway will still be an elevated walkway even if it allows pedestrians additional access. We agree
9 with the city and intervenor that the proposal does not change the type of structures involved.

10 Finally, petitioners argue that the proposed elevated walkway extension will result in a
11 change in the “type and location of access ways” that will affect off-site traffic. According to
12 petitioners, because the elevated walkway extension will affect the pedestrian access to and from
13 the High Dock and High Dock Building it is a change under this section. The city’s findings provide:

14 “The proposed [extension] does not change the type or location of accessways nor
15 does it affect the offsite traffic. The Council determined that the provision of this
16 walkway [extension] would affect and improve on-site pedestrian traffic and on-site
17 loading and delivery. Furthermore, the Council determined that the proposal would
18 not affect offsite parking or traffic, and [petitioners] failed to make a viable
19 connection between the proposal and the applicable criteria.” Record 19 (emphasis
20 in original).

21 We understand the city to have found that while the proposed minor extension of an existing
22 elevated walkway will improve internal or “on-site” pedestrian access, it does not constitute “a
23 change in the type and location” of that elevated walkway. We acknowledge that a contrary
24 interpretation of those words in BMC 17.92.070(B)(5) may be possible—because the existing
25 walkway is being extended slightly and therefore the existing elevated walkway will occupy thirty-
26 two additional square feet and permit access to other parts of the High Dock. But the city’s less
27 expansive interpretation of what is required to constitute “a change in the type and location” of the
28 existing walkway is not reversible under ORS 197.829(1) and *Church*.

29 The third assignment of error is denied.

1 **FOURTH ASSIGNMENT OF ERROR**

2 The planning director granted the modification to the CUP, and that decision was affirmed
3 by the city council. The city council expressly found that “the Planning Director has the authority to
4 issue the approval of a Minor Modification.” Record 19. Petitioners argue that the planning
5 director exceeded his authority by issuing the minor modification to the CUP and that only the
6 planning commission may issue such modifications.

7 BMC 17.92.010 describes the authorization to grant or deny conditional uses and provides:

8 “* * * Applications for uses designated in this title as conditional uses may be
9 granted, granted with modifications or denied by the *planning commission* in
10 accordance with the standards and procedures set forth in this chapter.” (Emphasis
11 added.)

12 As discussed earlier, BMC 17.92.080(B) provides the criteria for determining whether a
13 modification is major or minor:

14 “A minor modification shall be approved, approved with conditions or denied
15 *following the director’s review* based on the findings that:

16 “1. No provisions of this title will be violated; and

17 “2. The modification is not a major modification.” (Emphasis added.)

18 According to petitioners, although the planning director must review the proposed
19 modification, only the planning commission may actually approve the proposal. The text of BMC
20 17.92.080(B) is not entirely clear that the “director’s review” includes authority to make the
21 decision as opposed to authority to review and forward a recommendation to the planning
22 commission for it to make a final decision. Any ambiguity, however, is eliminated by BMC
23 17.92.080(C), which is the next subsection in the code and provides:

24 “Procedures for the notice of the *director’s decision* and the appeal process are
25 contained in the zoning ordinance. The *decision* may be appealed as per Section
26 17.124.010.” (Emphasis added.)

27 As BMC 17.92.080(C) makes clear, the planning director makes the decision as to
28 whether a proposed modification is major or minor, and may approve minor modifications if the

1 criteria are met. While petitioners would be correct that the planning director would be exceeding
2 his authority if he attempted to issue the original CUP permit, issuing minor modifications is clearly
3 within his authority.

4 The fourth assignment of error is denied.

5 The city's decision is affirmed.