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

COQUILLE CITIZENS FOR RESPONSIBLE GROWTH,
JESSICA BRYAN, TOM CLUNIE, DAVID HARVEY,
STUART WEINGER, GERRY BARROW,
JUDY POPE, and WILL POPE,
Petitioners,

vs.

CITY OF COQUILLE,
Respondent.

LUBA No. 2006-111

FINAL OPINION
AND ORDER

Appeal from City of Coquille.

Daniel J. Stotter, Eugene, filed the petition for review and argued on behalf of petitioners.

No appearance by City of Coquille.

Daniel A. Terrell, Eugene, filed an amicus brief on behalf of James Smejkal. With him on the brief was the Law Office of Bill Kloos.

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

REMANDED 12/28/2006

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

1

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city decision approving a conditional use planned unit
4 development and a right-of-way variance for an 85-lot residential development.

5 **FACTS**

6 The subject property is an 85-acre vacant parcel zoned Residential (R). The subject
7 property has average slopes of 21 percent, with slopes on more than half of the property
8 exceeding 30 percent, and is therefore also subject to a Hazards Overlay Zone (HZ). The
9 applicant submitted an application for a residential planned unit development, which is a
10 conditional use in the R zone. The applicant proposes 85 residential lots clustered in less
11 steep areas on the property, and proposes to retain steeper slopes in common areas of the
12 development. The applicant also applied for a right-of-way variance from street width
13 requirements in a portion of the development with steeper slopes.

14 The planning commission approved the applications over petitioners' objections.
15 Petitioners appealed the decision to the city council, which also approved the applications.
16 This appeal followed.

17 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

18 The subject property has average slopes of 21 percent, with more than half of the
19 property exceeding 30 percent slopes. Coquille Municipal Code (CMC) 17.56.040 permits a
20 transfer of residential density on parcels with 18 to 30 percent slopes, if the resulting total
21 density is no greater than one dwelling per acre.¹ CMC 17.48.030(2), part of the HZ zone

¹ CMC 17.56.040 provides:

“It is recognized that certain areas of future development may fall into the Hazards Overlay Zone. The city will allow development at densities higher than the underlying zone by the transfer of density of identified hazard areas to suitable areas. The transfer will be allowed under the following conditions:

“A. The density transfer is no greater than:

1 regulations, provides the following method for determining the permissible density on
2 properties with slopes of over 18 percent:

3 *“Density shall be determined as a result of comparing the suggested densities*
4 *established in the comprehensive plan and the site specific analysis by a*
5 *qualified engineering geologist or soils engineer. Studies by a qualified*
6 *engineering geologist or soils engineer for one development may be used for*
7 *another development if a qualified engineering geologist or soils engineer will*
8 *state that the sites are similar in nature regarding development restrictions.*
9 *Specific density shall be established after deliberation of the planning*
10 *commission, and testimony from the building official, engineering geologist,*
11 *soils engineer, or other qualified person. The site inspection shall determine if*
12 *greater or lesser densities are suitable for the site, and provide*
13 *recommendation for proper foundation design, storm water drainage or*
14 *retention facilities, vegetation necessary for retention, and adequate placement*
15 *of roads. Any geologic hazards identified in the city’s geology maps shall be*
16 *noted and taken into consideration.” (Emphasis added.)*

17 The city determined that a one-acre lot density is permissible, based on a geotechnical report
18 submitted by the applicant’s engineering geologist.² However, petitioners contend that the
19 city failed to conduct the comparison required by CMC 17.48.030(B), between the
20 “suggested densities established in the comprehensive plan” and the “site specific analysis by
21 a qualified engineering geologist or soils engineer.”

22 Petitioners are correct that the city’s findings do not determine whether there are
23 “suggested densities established in the comprehensive plan” or compare such densities with
24 those set out in a site-specific analysis. Although the city has not appeared to defend its

“1. Eighteen percent (18%) to thirty percent (30%) slopes—one dwelling per
 acre.

“2. Thirty percent (30%) slopes—one dwelling per two acres.

“B. That the land from which the transfer is made will remain as common open space,
 with the exception of the commercial harvesting of trees.”

² The city’s findings state, in relevant part:

“As previously noted, the average slope is 21% which allows for the one lot per acre density.
The applicant submitted geological and hydrological information on the property indicating
the project can support the intended level of development. A reduction in the density is
unnecessary.” Record 28.

1 decision, and the applicant did not intervene in the appeal, the applicant did file an *amicus*
2 brief. The applicant responds that petitioners have not asserted that the comprehensive plan
3 establishes any “suggested densities,” and the applicant argues that in fact the comprehensive
4 plan does not establish any densities, suggested or otherwise.³ According to the applicant,
5 the only specific density requirements in the city’s land use legislation are found in the CMC.
6 The applicant argues that the city found, and petitioners do not dispute, that a one-acre
7 density is consistent with applicable CMC requirements. Because the comprehensive plan
8 does not include any specific “suggested densities,” the applicant argues, there is nothing to
9 compare and therefore the city’s failure to conduct the comparison required by
10 CMC 17.48.030(B) is not a basis for reversal or remand.

11 We are inclined to agree with the applicant that if the comprehensive plan does not
12 provide any “suggested densities” then the city’s failure to conduct the comparison required
13 by CMC 17.48.030(B) is harmless error, if it is error at all. However, CMC 17.48.030(B)
14 seems to indicate that the comprehensive plan “establishes” “suggested densities” for at least
15 some lands within the city. It seems unlikely, but the city might regard comprehensive plan
16 language such as that quoted in n 3 to constitute a “suggested density” for purposes of
17 CMC 17.48.030(B), or other more specific language elsewhere in the plan or one of its

³ The applicant argues that the only comprehensive plan language discussing density is a general “statement of direction”:

“Density Patterns. Residential density in Coquille should be variable due to variances in topographic features. Since topographic characteristics are the primary factors influencing the ability of the land to support higher density populations in some areas of the city, areas capable of supporting larger density populations should reflect these higher densities. The core area of the city is such an area where higher density development should occur.

“Another factor affecting density levels in the city is the cost feasibility of both development and the provisions of full city services. Lot size requirements through zoning ordinances and the ability of the city to extend services are the tools available for the city to ensure development at density levels commensurate with the land’s ability to support such development.” Comprehensive Plan 54.

1 appendices or amendments.⁴ The city’s decision does not adopt the interpretation or provide
2 the explanation set out in the *amicus* brief. In the absence of some explanation in the
3 decision or from the city, we cannot agree with the applicant that it is appropriate to overlook
4 the city’s failure to adopt findings that either conduct the comparison required by CMC
5 17.48.030(B) or explain why no such comparison is required.

6 The first and second assignments of error are sustained.

7 **THIRD ASSIGNMENT OF ERROR**

8 CMC 17.08.170(D) provides:

9 “Sanitary Sewers. Sanitary Sewers shall be installed and connected to
10 existing mains. In the event it is impractical to connect the subdivision to the
11 city trunk sewer system, the planning commission may authorize the use of
12 septic tanks if lot areas are adequate, considering the physical characteristics
13 of the area. * * *”

14 Petitioners argue that the city’s decision does not include adequate findings
15 addressing compliance with CMC 17.08.170(D). According to petitioners, the decision does
16 not address whether “it is impractical to connect the subdivision to the city trunk system” or
17 whether the proposed development’s “lot areas are adequate, considering the physical
18 characteristics of the area” for using septic tanks.

19 The city found, in relevant part:

20 “* * * the applicant understands the City may not have the capacity to provide
21 sanitary services for the entire project. The applicant is willing to install
22 temporary in-ground facilities, or, postpone certain phases until such
23 improvements are in place. This option can be placed as a condition of
24 approval. In either event, engineered water and sewer plans must be
25 submitted. These plans must conform to City Public Works Standards and be
26 approved prior to construction.” Record 29.

27 Condition of approval H4 states:

⁴ We note that the comprehensive plan inventory appears to include the subject property within an area identified as the “least suitable” for residential development, and assumed that such lands would develop at a density of one dwelling unit per acre. Comprehensive Plan Inventory 130, 136, Record 354.

1 “The developer shall have the option of installing temporary in-ground
2 sanitary facilities, or, postponing the development of certain phases until
3 adequate City sanitary service becomes available. Temporary facilities
4 including lot sizes shall conform to county health department requirements.
5 An agreement shall be in place stipulating the temporary facilities shall be
6 abandoned when City services become available.” Record 33.

7 The applicant explains that the city’s present sewer capacity is limited and cannot
8 accommodate sewage from the entire proposed 85-unit development, but that the city has
9 entered into an agreement with the state Department of Environmental Quality to construct a
10 new sewage plant in 2010 or 2011, after which it is expected that any septic systems installed
11 under Condition 4H will be replaced with city sewer.

12 The city made no findings regarding whether it is “impractical” to connect the
13 subdivision to the city system, or whether “lot areas are adequate, considering the physical
14 characteristics of the area.” The explanation provided in the *amicus* brief, if part of the city’s
15 findings, might well suffice to explain why it is “impractical” to connect at least some of the
16 subdivision to the city system. It may also be the case that the lot size for each of the
17 clustered 85 lots is adequate to accommodate septic systems, considering the physical
18 characteristics of the area. However, the city made no finding to that effect and we are not
19 cited to anything in the record that would support such a finding. Consequently, we agree
20 with petitioners that the city’s findings are inadequate and not supported by substantial
21 evidence.

22 The third assignment of error is sustained.

23 **FOURTH ASSIGNMENT OF ERROR**

24 Petitioners challenge the city’s failure to address CMC 17.62.010 to 17.62.030, which
25 set out standards governing development within riparian corridors. According to petitioners,
26 a proposed connector road will be constructed within one of the drainage basins on the
27 property and will require development within a riparian corridor.

1 Although the issue was raised below, the city’s findings do not address the riparian
2 corridor standards or explain why those standards need not be addressed. The applicant
3 responds that the riparian corridor requirements are addressed only when an application for
4 subdivision approval is submitted. The applicant argues that planned unit development
5 approval and subdivision approval may be granted together or separately. According to the
6 applicant, he sought and the city granted only planned unit development approval, not
7 subdivision approval. Because the riparian corridor requirements are applied at the time of
8 subdivision approval, the applicant argues, the city did not err in failing to apply those
9 requirements.

10 As the applicant explains, CMC 17.56.040(B) and (C) allow planned development
11 approval to be granted contemporaneously with the preliminary subdivision plat approval or
12 separately. If processed separately, the planned unit development application must include
13 additional information, including a site plan showing the general street circulation pattern,
14 and information on any proposed variances from subdivision requirements. As noted, the
15 applicant sought a variance to subdivision street width requirements. City staff apparently
16 took the position that the riparian corridor requirements will be addressed when the applicant
17 submits “engineering plans,” apparently meaning when the applicant seeks preliminary
18 subdivision plat approval. Record 95. CMC 17.62.010 to 17.62.030 do not specify when the
19 riparian corridor requirements apply. The staff position may reflect a correct understanding
20 of the relevant code provisions, but it is at least arguable that the riparian corridor
21 requirements should be considered when approving a planned unit development site plan that
22 proposes development within a riparian corridor. Because the issue was raised below and no
23 findings adopted on this point, remand is necessary for the city to interpret the relevant code
24 provisions in the first instance and adopt appropriate findings.

25 The fourth assignment of error is sustained.

1 **FIFTH AND SIXTH ASSIGNMENTS OF ERROR**

2 CMC 17.64.110 sets out the standards for a variance. The city adopted findings
3 addressing each of the CMC 17.64.110 standards and explaining why each standard is met.
4 Record 25-27. Petitioners challenge those findings, arguing that they are inadequate.

5 While the city’s findings regarding the variance approval criteria are relatively brief,
6 petitioners do not discuss any of the findings or make any attempt to explain why they
7 believe those findings are inadequate. The findings set forth the applicable variance criteria,
8 the facts relied upon, and an explanation why the city believes the criteria are satisfied. If the
9 findings have defects warranting remand, it is incumbent on petitioners to point them out to
10 us. In the absence of any focused challenge to the city’s variance findings, these assignments
11 of error must fail.

12 The fifth and sixth assignments of error are denied.

13 The city’s decision is remanded.