BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

COQUILLE CITIZENS FOR RESPONSIBLE GROWTH,
Petitioner,

vs.

CITY OF COQUILLE,
Respondent,

and

JAMES A. SMEJKAL,
Intervenor-Respondent.

LUBA No. 2007-094

FINAL OPINION
AND ORDER

Appeal from City of Coquille.

Daniel J. Stotter, Eugene, filed the petition for review and argued on behalf of petitioner. With him on the brief was Irving & Stotter LLP.

No appearance by City of Coquille.

Daniel A. Terrell, Eugene, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was the Law Office of Bill Kloos, PC.

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

HOLSTUN, Board Chair, did not participate in the decision.

AFFIRMED 10/08/2007

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a city decision approving a conditional use planned use development and a right-of-way variance for an 85-lot residential development.

FACTS

This appeal is before us for the second time. We take the facts from our earlier opinion in *Coquille Citizens for Resp. Growth v. City of Coquille*, 53 Or LUBA 186, 187 (2006) (*Coquille I)*.

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

After we remanded the decision in *Coquille I*, the city conducted a public evidentiary hearing and again approved the application. This appeal followed.

EXHAUSTION OF REMEDIES

In *Coquille I*, we remanded the city's decision based on our decision sustaining four of the petitioner's assignments of error. Petitioner again raises those same assignments of error in this appeal. Intervenor argues that petitioner failed to preserve the arguments made under those assignments of error because it failed to raise them before the city on remand. ORS 197.763(1) and 197.835(3) require a party to raise an issue below in order to preserve that issue before LUBA.[1] ORS 197.825(2)(a) requires that a party exhaust local remedies

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[1] ORS 197.763(1) provides:

> "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

before appealing to LUBA.[2] It is well established that proceedings on remand are continuations of the earlier proceedings, and generally, raising the issues at any stage in the proceedings is sufficient to comply with the "raise it or waive it" requirement of ORS 197.763(1) and 197.835(3). Citing to *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), however, intervenor argues that petitioner must continue to raise the same issues at every stage of the proceeding, including the proceedings on remand, to satisfy the ORS 197.825(2) obligation to exhaust all remedies.

In *Miles*, opponents of a grocery store appealed the planning commission's approval to the city council. The local code required opponents to specify the grounds for their appeal. The opponents in *Miles* listed four grounds for their appeal. After the city affirmed the planning commission's decision, the opponents appealed the decision to LUBA. At LUBA, the petitioners raised assignments of error based on arguments different than the four grounds of appeal specified to the city council in their appeal of the planning commission's decision. LUBA considered an assignment of error that had not been raised before the city council, finding that because the issue had been raised before the planning commission, the petitioners therefore satisfied the raise it or waive it requirement of ORS 197.763(1) and 197.835(3). While the Court of Appeals agreed that raising the issue before the planning commission satisfied the raise it or waive it requirement of ORS 197.763(1) and 197.835(3),

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> 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."

ORS 197.835(3) provides:

> "Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

[2] ORS 197.825(2)(a) provides that LUBA's jurisdiction:

> "Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review[.]"

the Court also held that the exhaustion of remedies requirement of ORS 197.825(2) was applicable.

> "In the land use area, we have applied waiver analysis to issues in other contexts that were initially raised and adequately preserved. * * * Consistently with the exhaustion principle expressed in ORS 197.825(2)(a), and to give that principle force, parties should be required to pursue their available local remedies *and* to present their substantive claims to the local appeal body; their failure to do so should be deemed to be a waiver of those claims. Requiring parties to pursue a local appeal process, without also requiring them to raise issues that they later raise to LUBA as a basis to invalidate the local decision, would permit parties to 'step [] through the motions' of the local appeal process without presenting the substance of their objections to the local body." *Id*. at 508-09 (emphasis in original).

Intervenor argues that *Miles* essentially extends the raise it or waive it requirement to every stage of the proceedings. According to intervenor, because petitioner failed to raise the issues presented in its assignments of error to the city council on remand, it is precluded from raising them before LUBA in this appeal.

Even assuming intervenor is correct that *Miles* properly extends to the present situation, we do not agree that petitioner failed to preserve the issues on remand. Members of petitioner submitted a letter to the city council on remand that in essence renewed the same objections to the city on remand that petitioner made in *Coquille I*. Record 40. While the letter is rather brief, petitioner argues that the city made the same mistakes it made the first time. Petitioner now raises those same issues that they raised in *Coquille I*. Petitioner presented its substantive claims and the substance of its objections to the city. Even if the principle in *Miles* is extended to proceedings on remand, an issue we do not reach, petitioner sufficiently preserved its arguments for our review. We now turn to petitioner's assignments of error.

FIRST AND SECOND ASSIGNMENTS OF ERROR

The subject property has average slopes of 21 percent, with more than half of the property exceeding 30 percent slopes. Coquille Municipal Code (CMC) 17.56.040 permits a transfer of residential density on parcels with 18 to 30 percent slopes, if the resulting total

density is no greater than one dwelling per acre.[3] CMC 17.48.030(2), part of the HZ zone regulations, provides the following method for determining the permissible density on properties with slopes of over 18 percent:

> "*Density shall be determined as a result of comparing the suggested densities established in the Comprehensive Plan and the site specific analysis by a qualified engineering geologist or soils engineer.* Studies by a qualified engineering geologist or soils engineer for one development may be used for another development if a qualified engineering geologist or soils engineer will state that the sites are similar in nature regarding development restrictions. Specific density shall be established after deliberation of the Planning Commission, and testimony from the building official, engineering geologist, soils engineer, or other qualified person. The site inspection shall determine if greater or lesser densities are suitable for the site, and provide recommendation for proper foundation design, storm water drainage or retention facilities, vegetation necessary for retention, and adequate placement of roads. Any geologic hazards identified in the city's geology maps shall be noted and taken into consideration." (Emphasis added.)

CMC 17.48.030(2) requires a comparison of the suggested densities in the comprehensive plan and a site specific analysis prepared by an expert. In *Coquille I*, we remanded the city's decision because the city did not compare the site specific analysis to any suggested densities in the comprehensive plan and instead relied solely on the site specific analysis and density provisions in the CMC. On remand, the city compared the site specific analysis with suggested densities in the comprehensive plan.

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[3] 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:
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> "A. The density transfer is no greater than:
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> "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."

In its first assignment of error, petitioner argues that the comparison was inadequate because the comparison was made by the city rather than the qualified expert who prepared the site specific study. In its second assignment of error, petitioner further argues that there is not substantial evidence in the record to support the city's decision that such a comparison was made by the qualified expert.

Intervenor responds that CMC 17.48.030(2) clearly envisions that the *city* compare the densities suggested in the comprehensive plan with the site specific analysis prepared by the expert. According to intervenor, there is nothing in the text or context of CMC 17.48.030(2) that prohibits the city from conducting the comparison, and certainly nothing in the code suggesting that the expert must make the comparison.

We agree with intervenor that CMC 17.48.030(2) at the least allows the city to make the comparison rather than the qualified expert, and that petitioner has not demonstrated that the city erred in making the required comparison.

The first and second assignments of error are denied.

THIRD ASSIGNMENT OF ERROR

CMC 17.08.170(D) provides:

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

CMC 17.08.170(D) requires that the proposed development be connected to the city's sewer system unless it is "impractical," in which case septic tanks may be used if lot sizes are "adequate." In *Coquille I*, we remanded because the city had allowed intervenor to employ septic tanks without finding that it is "impractical" to connect the subdivision to the city sewer system and without adopting findings regarding the adequacy of lot sizes. Intervenor argued in *Coquille I* that while the city's present sewage capacity may not be sufficient to handle all of the sewage from the proposed 85-unit development at full-buildout, the city

planned to upgrade its facilities by 2011 and that the upgraded facilities would be more than sufficient to serve the subdivision. We held that although that explanation might be sufficient to explain why it would be presently "impractical" to connect the subdivision to the city system, that explanation was not included in the city's findings.

On remand, the city interpreted CMC 17.08.170(D) to mandate that the subdivision be physically connected to the city sewage system, and concluded that the conditions of approval required intervenor to do so. According to the city, CMC 17.08.170(D) is not concerned with the adequacy of the city sewage system, and the fact that the conditions of approval authorize the developer to use temporary septic systems if needed for later phases until the city system is upgraded does not require findings that it is "impractical" to connect to the city system or findings regarding the adequacy of lot sizes.

In the alternative, the city adopted findings that for any such temporary septic systems it would be impractical to use the city system until the system upgrade. With respect to the adequacy of lot sizes to handle a septic system, the city interpreted CMC 17.08.170(D) to allow a developer to make a demonstration of adequate lot size for septic systems either at the time of subdivision application or at the time individual lots are developed. The city noted conditions of approval that require Department of Environmental Quality (DEQ) approval of any septic tanks used temporarily until connection to the city system is available. The decision explains that DEQ approval will require the applicant to establish that the lot sizes are adequate. The city further found that a majority of the proposed lots were of adequate size to accommodate septic tanks, the city sewer system should be available for the later phases of the development, and if necessary a community sewer system could be developed for the entire development in the event the city's sewer system is not developed.

Petitioner challenges the city's alternative findings, but does not directly challenge the city's initial interpretation that CMC 17.08.170(D) requires only connection to the city's

system and is not concerned with the adequacy of the city system or whether a temporary septic system may be used until the city system is upgraded. Intervenor argues that the city's interpretation of CMC 17.08.170(D) is consistent with its plain language and should be affirmed. ORS 197.829(1).

Absent a more focused challenge to the city council's interpretation of CMC 17.08.170(D), we agree with intervenor that we must defer to that interpretation. The city appears to be correct that CMC 17.08.170(D) is not concerned with temporary incapacity in the city's system, or temporary facilities to allow development notwithstanding temporary incapacity in the city system. The exception allowing for individual septic systems under CMC 17.08.170(D) can be reasonably understood to be intended for circumstances where no connection at all to the city system is possible, and where permanent septic systems are necessary.

Because we affirm the city's initial interpretation of CMC 17.08.170(D), we need not address petitioner's challenge to the city's alternative findings regarding impracticality and adequacy of lot sizes.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

CMC 17.62.010 to 17.62.030 set out standards governing development within riparian corridors. According to petitioner, a proposed connector road will be constructed within one of the drainage basins on the property and will require development within a riparian corridor.

In *Coquille I*, we found the following:

> "Although the issue was raised below, the city's findings do not address the riparian corridor standards or explain why those standards need not be addressed. The applicant responds that the riparian corridor requirements are addressed only when an application for subdivision approval is submitted. The applicant argues that planned unit development approval and subdivision approval may be granted together or separately. According to the applicant, he sought and the city granted only planned unit development approval, not

> subdivision approval. Because the riparian corridor requirements are applied at the time of subdivision approval, the applicant argues, the city did not err in failing to apply those requirements.
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> "As the applicant explains, CMC 17.56.040(B) and (C) allow planned development approval to be granted contemporaneously with the preliminary subdivision plat approval or separately. If processed separately, the planned unit development application must include additional information, including a site plan showing the general street circulation pattern, and information on any proposed variances from subdivision requirements. As noted, the applicant sought a variance to subdivision street width requirements. City staff apparently took the position that the riparian corridor requirements will be addressed when the applicant submits 'engineering plans,' apparently meaning when the applicant seeks preliminary subdivision plat approval. Record 95. CMC 17.62.010 to 17.62.030 do not specify when the riparian corridor requirements apply. The staff position may reflect a correct understanding of the relevant code provisions, but it is at least arguable that the riparian corridor requirements should be considered when approving a planned unit development site plan that proposes development within a riparian corridor. Because the issue was raised below and no findings adopted on this point, remand is necessary for the city to interpret the relevant code provisions in the first instance and adopt appropriate findings." 53 Or LUBA at 192-93.

As the quoted portion of *Coquille I* explains, we sustained this assignment of error because the city had not adopted any findings regarding the applicant's argument that, because he was only seeking planned unit conditional use approval and not subdivision approval, the riparian corridor provisions were not applicable approval criteria. We did not sustain the assignment of error because we agreed with petitioner that the riparian corridor provisions were necessarily approval criteria at this stage of the development. We merely remanded the decision to the city to make and explain its interpretation regarding the issue.

On remand, the city interpreted its code to allow planned unit conditional uses to be processed concurrently with subdivision approval or separately from the subdivision proposal. The city further explains that the challenged decision is proceeding on the separate path and that the city is only approving the planned use conditional use and not the subdivision. Petitioner argues that the decision also purports to grant subdivision approval, but the decision itself and the response brief make clear that further subdivision approval will

be necessary in the future and that at that stage the riparian corridor provisions will be applicable. Given the city and intervenor's position, we agree that the riparian corridor provisions are not applicable approval criteria at this stage.[4]

The fourth assignment of error is denied.

The city's decision is affirmed.

[4] The city adopted alternative findings addressing the riparian corridor standards. Because we agree with the city that those provisions are not applicable approval criteria until the subdivision approval stage, we do not consider those findings.