BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROBERT RUDELL and WILLIAM RUDELL,
Petitioners,

vs.

CITY OF BANDON,
Respondent,

and

DEPARTMENT OF LAND CONSERVATION
AND DEVELOPMENT, JOCELYN BIRO,
CAROL A. GOULARTE and DAVID H. TJOMSLAND,
Intervenors-Respondents.

LUBA No. 2010-037

FINAL OPINION
AND ORDER

Appeal from City of Bandon.

Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Bill Kloos, PC.

Shala McKenzie Kudlac, Bandon, filed a response brief and argued on behalf of respondent. With her on the brief was Fredrick J. Carleton.

Erin L. Donald, Assistant Attorney General, Salem, filed a response brief and argued on behalf of intervenor-respondent Department of Land Conservation and Development. With her on the brief was John R. Kroger, Attorney General.

Jocelyn Biro, Beaverton, Carol A. Goularte and David H. Tjomsland, Sitka, Alaska, filed a response brief. Jocelyn Biro argued on her own behalf.

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

REMANDED 11/29/2010

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a decision by the city denying an application for a conditional use permit to site a single family dwelling.

FACTS

Petitioners applied for site plan and conditional use approval to construct a 2,490 square foot single family dwelling on their two contiguous lots that together total approximately 8,850 square feet. The property is zoned Controlled Development 2 (CD-2) and is within the city's Shoreland Overlay (SO) zone. The CD-2 zone allows single family dwellings as permitted uses, while the SO zone allows dwellings as conditional uses.

The subject property is located north of Sixth Street at its western terminus. Sixth Street is unimproved for most of the subject property's street frontage along Sixth Street, except for a 15-foot section improved at the southeastern corner. The eastern boundary line of the subject property abuts the western boundary of the South Jetty Sewer Improvement District (LID). The property slopes upward from east to west from a low elevation of 13 feet above mean sea level at the eastern boundary to a high elevation of 17.5 feet at the western boundary, on the slopes of a dune. The western boundary of the property abuts property that is zoned Natural Resource/Open Space, and the beach and Pacific Ocean lie to the west of that property. The property is located outside of the 100-year floodplain based on a Letter of Map Amendment (LOMA) issued by the Federal Emergency Management Agency (FEMA). The soils on the property are fine surface sand over a stable-base sand, and the property contains dune grass, a lodge pole pine tree, and shrub plants.

Petitioners proposed to construct the dwelling on an elevated pile foundation, with a flow through area beneath the dwelling, engineered to FEMA standards for breaking wave and debris impact forces on the piles. The planning commission denied the application, and petitioners appealed the denial to the city council. The city council affirmed the planning

commission's denial of the application and adopted supplemental findings in support of the denial. This appeal followed.

FIRST, TWELFTH, AND FOURTEENTH ASSIGNMENTS OF ERROR

A. Introduction

The petition for review is confusingly organized, with repetitive assignments of error and arguments scattered throughout its 75 pages. We attempt to resolve several related assignments of error in this section by addressing the central question presented in those assignments of error and repeated elsewhere in the petition for review: whether the city correctly determined that petitioners' property and the section of Sixth Street that abuts petitioners' property are located on a "foredune." That is because applicable provisions of the Bandon Municipal Code (BMC) prohibit structures from being located on a foredune. The answer to the question of the location of the foredune resolves or partially resolves the first, twelfth, and fourteenth assignments of error.

B. Location of the Foredune (BMC 17.24.040(D))

BMC 17.24.040(D) provides in relevant part that "[n]o structures shall be located on identified foredunes." Statewide Planning Goal 18 (Beaches and Dunes) contains similar language prohibiting structures on a foredune.[1] BMC 16.42.010 defines "foredune" as "the dune closest to the high tide line that extends parallel to the beach. The foredune can be divided into three sections: the frontal area (closest to water); the top surface; and the lee or reverse slope (backside)." The Statewide Planning Goals do not contain a specific definition of "foredune," although the Goals define "active foredunes," "conditionally stable foredunes," and "older foredunes."[2] Neither the BMC nor the Statewide Planning Goals

[1] BMC 17.24.040(D) implements Statewide Planning Goal 18 (Beaches and Dunes). Goal 18 prohibits residential development on "* * * foredunes which are conditionally stable and that are subject to ocean undercutting or wave overtopping * * *."

[2] The Statewide Planning Goals contain the following definitions:

specify how the boundaries of a foredune are to be identified, and nothing in the Bandon Comprehensive Plan (BCP) or the BMC purport to contain an inventory or other identification of the location of foredunes within the city. The city determines the location of "identified foredunes" as used in BMC 17.24.040(D) on a case by case basis.

Five separate studies addressing the location of the foredune were introduced into the record. Record 295-96. According to petitioners, in preparing the necessary application materials, including site plans and elevation maps, petitioners relied on one of those studies, the New Millennium Consulting study, to identify the location of the foredune and to calculate the necessary setbacks from the foredune on their submitted drawings.[3] Petitioners also hired a surveyor to prepare a survey of the entire property, identify the location of the foredune on the survey, and to locate that foredune with stakes.

Both the planning commission and the city council denied the application in part based on their conclusion that the entire property and that portion of Sixth Street adjacent to the property is located on an "identified foredune." The city council adopted the following findings:

> "**THE PLANNING COMMISSION FOUND**: The applicant has submitted a written report delineating the toe of the foredune. This report was completed by [New Millennium Consulting] for the City of Bandon. * * *
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> "[New Millennium Consulting] mapped the toe of the foredune as being located on the subject property at an elevation of 15.75' (approximately) on

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> "FOREDUNE, ACTIVE. An unstable barrier ridge of sand paralleling the beach and subject to wind erosion, water erosion, and growth from new sand deposits. Active foredunes may include areas with beach grass, and occur in sand spits and at river mouths as well as elsewhere.
>
> "FOREDUNE, CONDITIONALLY STABLE. An active foredune that has ceased growing in height and that has become conditionally stable with regard to wind erosion.
>
> "FOREDUNE, OLDER. A conditionally stable foredune that has become wind stabilized by diverse vegetation and soil development."

[3] The parties sometimes refer to the New Millennium Consulting study as the "Scalici Report" apparently because Michael Scalici, the author of the study, is a principal in New Millennium Consulting.

> the north side and 16' on the southside. This is not consistent with the map submitted within this same report shown as Figure 10 which shows the back edge of the foredune as being 10' west of the 16' contour line. The report written by [New Millennium Consulting] also indicates the 'toe' of the foredune is at an elevation of 16'; the applicant has consistently stated throughout written testimony the structure would be setback 15' from the 'toe' of the foredune. However, when reviewing the maps submitted by the applicant (A02, A03, A04, and A05 (where the roofline extends past the 16' elevation)) it appears the deck would actually be located on the 16' elevation mark, thus no setback is being proposed.
>
> "As previously stated in the original staff report, the City maintains the entire property is located on a foredune, and therefore the **Planning Commission found** this criterion has not been met.
>
> "**THE CITY COUNCIL FURTHER FINDS**: The submitted delineated toe of the foredune is located at the 16' elevation mark. The applicants' own submission shows no setback from the 16' elevation mark as evidenced on the drawings.
>
> "The applicant submitted two separate delineations, each with their own idea of where the location of the 'toe' of the foredune was located. [New Millennium Consulting] stated on the record the delineation was an 'educated guess' and 'subject to interpretation'.
>
> "The Planning Commission has determined the foredune is west of the Local Improvement District. The City Council agrees with this interpretation of the Planning commission and therefore the City Council finds all of the subject property is located on a foredune subject to overtopping and undercutting and therefore approval of this application cannot be granted." Record 13 (emphases in original.)

Petitioners argue that the city's findings are inadequate because they do not explain why the city concluded that the entire property is located on a foredune, and that the findings are not supported by any evidence in the record. According to petitioners, there is some indication in the planning commission decision that planning staff concluded that the entire property is located on a foredune based on the location of the boundaries of the LID that was formed in 2003 and the planning commission relied on that conclusion in its findings.[4] However,

[4] The planning commission's decision, which the city council decision incorporated, also contains the following language in the "Findings of Fact" section:

petitioners point out that the record of the proceedings regarding the LID formation is not included in the record of this appeal and that there is no evidence in this record to support tying the location of the foredune to the LID boundary.

Petitioners also maintain that if the city concluded that the entire property is located on a foredune based on some other evidence in the record, the conclusion is not supported by any evidence in the record. According to petitioners, the only evidence in the record demonstrates that a small portion of the foredune is located on the property between the 16.5 foot and 17 foot elevation line, that the proposed dwelling meets all setback requirements from the foredune, and that almost the entirety of the property is a younger stabilized dune, where residential development is not expressly prohibited. Finally, petitioners argue that to the extent the city concluded in the first paragraph of the findings quoted above that the eastern edge of the foredune (referred to as the "toe" of the foredune) is located at the 16 foot elevation mark, that finding is not supported by the evidence in the record.

The city takes the position that it determined that the entire property is located on a foredune based on FEMA's direction that "the inland limit of the [foredune] occurs at the point where there is a distinct change from a relatively steep slope to a relatively mild slope." Response Brief for City of Bandon 6. The city explains that, relying on the "2002 Background Report, Chronic Coastal Natural Hazards" that is also referred to by the city as the "Shoreland Solutions Report" that is located at Record 313 – 343, the city concluded that the entire property is located on a foredune because the city determined that there is a substantial change in the grade of the property at the 13 foot elevation contour line.[5] The

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> "Previously, the City has determined the east edge of the foredune starts at the west side of the local sewer district boundary for the Jetty. The City still concludes the foredune starts at this determined location." Record 180.

[5] As alluded to in footnote 3, the parties frustratingly refer to some of the same evidentiary reports by two or three different names. For example, the parties refer to the "2002 Background Report, Chronic Coastal Hazards" as the "Shoreland Solutions Report" and also refer to it as the "Marra Report." When briefing an appeal to LUBA, it is in all parties' best interest to use a single, easily recognizable title for an evidentiary

city and DLCD (respondents) also point to the maps located at Record 920-37, which respondents maintain show that over approximately 104 feet the property's elevation changes from 17.5 feet to 13 feet from west to east across the property. Finally, respondents also argue that even if the findings are inadequate, LUBA should affirm the city's decision under ORS 197.835(11)(b), because the evidence in the record clearly supports the city's finding that the property is located on a foredune.[6]

We agree with petitioners that the city's findings are inadequate to explain the city's decision that the entire property is located on a foredune. First, if the city determined the location of the foredune based on the LID boundary, nothing in the record to which we have been directed explains or supports that determination. Second, we do not find anything in the Shoreland Solutions Report that supports the city's conclusion that there is a substantial change in elevation on the property at or near the eastern boundary. The Shoreland Solutions Report assesses the "potential risks to life and property [that chronic hazards] present along the City of Bandon shoreline * * *." Record 313. That report does not purport to identify the precise or even general location of any foredunes within the city, let alone a foredune on petitioners' property. Third, we agree with petitioners that the maps cited by respondents at Record 920-37 do not demonstrate that there is a change in elevation at or near the eastern boundary. The cited maps show that the eastern boundary line of the property is located at approximately the 13 foot elevation line, but do not show elevations of adjacent properties.

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report consistently throughout the briefs because LUBA is almost always less familiar with the record and the proceedings below and could be confused to the parties' detriment if they use multiple names for the same reports.

[6] ORS 197.835(11)(b) provides:

> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

Finally, the city does not explain why, even if the elevation of the area changes at the 13 foot elevation line, it considers any such change a "distinct" change in elevation (using FEMA's definition) or a "substantial" change in elevation (using the definition in the City's brief), or otherwise explain why that change in elevation means that the property is located on a foredune. We also disagree with respondents that the evidence that is cited to us "clearly support[s]" the city's decision.

Finally, the response brief of intervenors-respondents Biro *et al* (Biro) appears to take the position that the western boundary of the LID also defines the eastern boundary of the foredune, and that environmental studies prepared during the proceedings that led to formation of the LID confirm this. The problem with that argument and Biro's response brief in general is that none of the evidence cited in Biro's response brief is part of the record of the present appeal.

Because we agree with petitioners that its finding that the entire property is located on a foredune is inadequate and is not supported by substantial evidence in the record, we need not address petitioners' alternative assignment of error that the city erred in concluding that the toe of the foredune is located at the 16 foot elevation line. On remand, if the city again determines that the entire property is located on a foredune, or locates the eastern edge of the foredune elsewhere on the property, the city must explain the basis for its conclusion and identify evidence in the record that supports that conclusion.

The first, twelfth and fourteenth assignments of error are sustained.

THIRD, FOURTH, FIFTH, AND EIGHTH ASSIGNMENTS OF ERROR

BMC 17.24.040(C) specifies certain limitations on uses in the CD-2 zone and provides in relevant part:

> "Plans shall be reviewed to assess the possible presence of any geologic hazard. If any part of the subject lot is in an area designated as a moderate or severe hazard area on the Bandon Bluff Inventory Natural Hazards Map or if any geologic hazard is suspected, the planning commission shall require a report to be supplied by the developer which satisfactorily evaluates the

> degree of hazard present and recommends appropriate precautions to avoid endangering life and property and minimize erosion. *The burden of proof is on the landowner to show that it is safe to build.*"[7] (Emphasis added.)

Due in part to its conclusion that the entire property is located on a foredune, the city concluded that the petitioners had failed to demonstrate that the dwelling is "safe to build" as required by BMC 17.24.040(C). Record 11-12. However, the city also found independent bases for determining that petitioners had failed to satisfy BMC 17.24.040(C), and we address those bases and petitioners' challenges to those bases below.

A. Fourth Assignment of Error

In the fourth assignment of error, petitioners argue that the application is an application for "needed housing" as defined in ORS 197.303, that BMC 17.24.040(C)'s requirement that the owner show that "it is safe to build" the dwelling is a standard that is not "clear and objective" as required by ORS 197.307(6), and that the BMC 17.24.040(C)

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[7] The remainder of BMC 17.24.040(C) provides:

> "1. The following identifies the reports which may be required:
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> "a. Soils Report. This report shall include data regarding the nature, distribution and strength of existing soils, conclusions and recommendations for grading, design criteria for corrective measures, and options and recommendations covering the carrying capabilities of the sites to be developed in a manner imposing the minimum variance from the natural conditions. The investigation and report shall be prepared by a professional civil engineer currently registered in the state of Oregon.
>
> "b. Geology Report. This report shall include an adequate description, as defined by the city manager or designate, of the geology of the site, conclusions and recommendations regarding the effect of geologic conditions in the proposed development, and opinions and recommendations as to the carrying capabilities of the sites to be developed. The investigation and report shall be prepared by a professional geologist currently registered in the state of Oregon.
>
> "c. Hydrology Report. This report shall include an adequate description, as defined by the city manager or designate, of the hydrology of the site, conclusions and recommendations regarding the effect of hydrologic conditions on the proposed development, and options and recommendations covering the carrying capabilities of the sites to be developed. The investigation and report shall be prepared by a professional civil engineer currently registered in the state of Oregon."
>
> "2. The planning commission may waive any of these reports if it decides that they are irrelevant to the site." (Emphases in original.)

standard may not be applied to deny the application. According to petitioners, the BCP identifies a need for single family dwellings.[8] The city does not dispute that point, and we assume for purposes of our analysis that the proposed dwelling is "needed housing."

ORS 197.307(6) provides:

> "Any approval standards, special conditions and the procedures for approval adopted by a local government shall be clear and objective and may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

Petitioners submitted a soils report, a geology report and a hydrology report as required under BMC 17.24.040(C)(1)(a) – (c). *See* n 7. The city concluded that those reports did not include the required information needed to determine that the dwelling is "safe to build."

Petitioners argue that the requirement set forth in BMC 17.24.040(C)(1)(b) and (c) that an applicant provide a geology report and a hydrology report that "shall include an adequate description, as defined by the city manager or designate," of the geology or hydrology of the site, respectively, is not "clear and objective" and does not give an applicant an idea of what is required in order to satisfy the criterion to demonstrate that "it is safe to build." Moreover, petitioners argue, they provided the required reports that describe the geology and hydrology of the site, both of which concluded that "[the dwelling] is safe to build" using appropriate building techniques, and yet the city concluded that BMC 17.24.040(C) was not satisfied. We understand petitioners to argue that where a standard

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[8] ORS 197.303(1) defines "needed housing:"

> "(1) As used in ORS 197.307, until the beginning of the first periodic review of a local government's acknowledged comprehensive plan, 'needed housing' means housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels. On and after the beginning of the first periodic review of a local government's acknowledged comprehensive plan, 'needed housing' also means:
>
> > "(a) Housing that includes, but is not limited to, attached and detached single-family housing and multiple family housing for both owner and renter occupancy[.]"

requires an applicant to provide certain information, but the standard does not indicate how that information will be used to satisfy an approval criterion that in turn requires an applicant to show that a structure is "safe to build," that informational standard and the approval criterion violate the needed housing statute's requirement for "clear and objective" "approval standards."

We agree with petitioners that the requirement in BMC 17.24.040(C) that a property owner demonstrate that "[the dwelling] is safe to build" is not clear and objective. As we explained in *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 158 (1998), *aff'd* 158 Or App 1, 970 P2d 685 (1999):

> "'Needed housing' is not to be subjected to standards, conditions or procedures that involve subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on (1) the property to be developed or (2) the adjoining properties or community. Such standards, conditions or procedures are not clear and objective and could have the effect 'of discouraging needed housing through unreasonable cost or delay.'"

First, it is not clear from the text of BMC 17.24.040(C) how a property owner wishing to build needed housing on property subject to that code section would go about demonstrating that "it is safe to build" or what additional information that property owner would need to supply in order to convince the city that "it is safe to build." In addition, it is not clear how the information contained in soils, geology, and hydrology reports that an applicant can be required to furnish under BMC 17.24.040(C)(1)(a) – (c) will be used by the city to determine whether an application has satisfied the requirement that "it is safe to build." According to the language of the code section, an applicant must show that the structure will "minimize erosion" and "avoid endangering life and property." That language requires subjective analyses that, if applied to needed housing, are prohibited by ORS 197.307(6). For those reasons, BMC 17.24.040(C) is unclear and subjective and may not be applied to the application. *See also Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370, 402 (2002) (ordinance provision that requires that new dwellings must be within 4 or 5 minutes of

emergency services is unclear and subjective where it is not clear how the response time is measured.)

B. Third, Fifth, and Eighth Assignments of Error

Apparently in determining that petitioners had not satisfied the BMC 17.24.040(C) requirement to demonstrate that the dwelling is "safe to build," the city went a step further and proclaimed that the property is "unbuildable." Record 30. In the third assignment of error, petitioners argue that the city erred in concluding that the property is "unbuildable" because the city's buildable lands study that is a part of the BCP identifies the area in which the subject property is located as potentially suitable for development (*i.e.* buildable), and the city erred in relying on the Shoreland Solutions Report, which is not contained in the BCP, to conclude otherwise. In the fifth assignment of error, petitioners similarly challenge the city's determination that the property is "unbuildable" as not supported by substantial evidence in the record. In the eighth assignment of error, petitioners challenge the city's rejection of the soils report, the geology report, and the hydrology report furnished by petitioners under BMC 17.24.040(C)(1)(a) – (c). *See* n 7. Our disposition of the fourth assignment of error requires that we sustain these assignments of error that challenge alternative bases or theories for the city's conclusion that the dwelling is not "safe to build."

The third, fourth, fifth and eighth assignments of error are sustained.

SIXTH AND SEVENTH ASSIGNMENTS OF ERROR

In the sixth assignment of error, petitioners challenge the city's conclusion that the application failed to satisfy BMC 17.24.010, which provides:

> "The purpose of the CD-2 zone is to protect and enhance the unique character, natural resources and habitat characteristics of the Bandon Jetty and its bluff area, to provide for the development of a coastal village atmosphere, and to exclude those uses which would be inconsistent with the area's character."

Petitioners argue that BMC 17.24.010 is not an approval criterion because it is aspirational and is a generally worded expression of motivation for adopting a regulation. We do not

understand the city's response to dispute petitioners' contention that BMC 17.24.010 is not an approval criterion, and we agree with petitioners that it is not an approval criterion that can provide a basis for denial of the application at issue in this appeal. The city erred in relying on BMC 17.24.010 to deny the application.

In the seventh assignment of error, petitioners challenge the city's determination that the application failed to comply with BMC 17.24.020, which allows single family dwellings as permitted uses in the CD-2 zone. The city council concluded that "all other requirements of this title have not been met and therefore the City Council found this criteria has not been met." Record 8. BMC 17.24.020 allows single family dwellings as long as the other requirements of BMC Chapter 17.24 are met and as long as the dwelling promotes the purpose of the zone. BMC 17.24.020 does not appear to be an independent approval criterion and does not provide an independent basis for the city to deny the application. Because we sustain petitioners' challenges to the city's findings that other provisions of BMC Chapter 17.24 have not been met, we sustain petitioners' challenge under the seventh assignment of error as well.

The sixth and seventh assignments of error are sustained

NINTH ASSIGNMENT OF ERROR

The city denied the application because it determined that petitioners failed to satisfy BMC 17.24.060(B), which provides that "[l]ots shall have a minimum of forty (40) feet of physically accessible street frontage." In the ninth assignment of error, petitioners argue that the property has over 103 feet of street frontage, with 15 feet along the existing developed portion of Sixth Street. The city concluded that because the entire property and the portion of Sixth Street in front of petitioners' property is located on a foredune, BMC 17.24.040(D) prohibits Sixth Street from ever being extended to provide the required 40 feet of street frontage that is physically accessible. Because the city's determination that BMC 17.24.060 is not met is based on its conclusion that the property and Sixth Street are located on a

foredune, our resolution of the first assignment of error in favor of petitioners dictates that the ninth assignment of error be resolved in favor of petitioners.

The ninth assignment of error is sustained.

TENTH AND SECOND ASSIGNMENTS OF ERROR

In the tenth assignment of error, petitioners argue that the city erred in determining that the proposed yard setbacks fail to meet the required specifications of BMC 17.24.070, which provides minimum depths for front, side, and rear yards.[9] In the second assignment of error, petitioners challenge the city's conclusion that the plans submitted at the January 28, 2010 planning commission hearing were not to scale and could not be considered. We understand petitioners to argue that those plans constitute substantial evidence that the proposed yard sizes are sufficient to comply with BMC 17.24.070, and that the city erred in determining otherwise.

The city found in relevant part:

> "**THE PLANNING COMMISSION FOUND**: * * * the applicant has submitted a plot plan showing the foundation line (A02), a main floor plan showing the setbacks for decks, porches and bay window (A04), and a plan showing the roofline (A05). While A02 and A04 show the setbacks, A05

[9] BMC 17.24.070 provides:

> "Except as provided in Section 17.104.060, in the CD-2 zone, yards shall be as follows:
>
> "A. The front yard shall be at least twenty (20) feet.
>
> "B. Each side yard shall be a minimum of five feet, and the total of both side yards shall be a minimum of thirteen (13) feet, except that for corner lots, a side yard abutting a street shall be at least fifteen (15) feet.
>
> "C. The rear yard shall be at least ten (10) feet, except that in such a required rear yard, storage structures (less than fifty (50) square feet), and other non-habitable structures may be built within five feet of the rear property line, provided that they are detached from the residence and the side yard setbacks are maintained. Such structures shall not be used as or converted for habitation, shall not be connected to any sewer system and shall not exceed sixteen (16) feet in height.
>
> "D. Where a side yard of a new commercial structure or bed and breakfast inn abuts a residential use, that yard shall be a minimum of fifteen (15) feet."

does not. *After reviewing these three plans, it appears the roofline extends beyond the decks and baywindow and therefore is extended within the required setbacks. Eaves are allowed to encroach the setbacks 18"*.

"Criterion A has not been met as the roofline (as measured by the scale submitted) encroaches into the required front setback by 2'. The roofline for the east and west property lines appears to meet Criterion B. *The roofline from the north property line encroaches into the setback by 2' and therefore Criterion C has not been met.* * * *

"* * * * *

"**THE CITY COUNCIL FURTHER FOUND**: The City Council determined the plans submitted at the January 28, 2010 Public Hearing was not to scale and could not be considered. The original plans submitted for review with the application were to scale and showed the roofline encroached into the required front and rear setback by 2'. The **City Council** agreed with the Planning Commission and **found** Criteria A and C had not been met * * *." Record 15-16 (Bold in original, italics added.)

Petitioners argue that the revised plan it submitted that is located at Record 581 shows that the proposed yard sizes comply with BMC 17.24.070, and that the roof eaves project into the yard a maximum of 18 inches. Petitioners further argue that, in any event, a different section of the BMC, BMC 17.104.030, governs projections of roof eaves of dwellings into yards and has nothing to do with the BMC 17.24.070 yard requirements. According to petitioners, BMC 17.104.030 confirms that roof eaves are allowed to project into a required yard to a maximum of 18 inches.

The city responds that it properly determined that the plans submitted at the January 28, 2010 hearing at Record 580 to 582 were "not to scale" and chose not to rely on them as evidence to determine whether BMC 17.24.070 was satisfied. However, the city does not explain why scaled plans are necessary to determine whether the eaves project more than 18 inches into the yard setback.[10] Unlike the original plan, which did not provide measurements for the eave projections, and which therefore required extrapolation to determine the extent

[10] In any case, the plans at Record 580-582 state that they are drawn to a scale of one inch equals 10 feet. We do not understand what the city meant by finding that the plans are "not to scale."

of the projection, the revised plan at Record 581 explicitly states that the eaves will project one foot, six inches. If there is some legitimate basis to reject the revised plan, the city does not identify it. If the revised plan is considered, there does not appear to be any reasonable dispute that BMC 17.24.070 yard setback is not violated, given that BMC 17.104.130 expressly allows eaves to project 18 inches into yards. Although the interrelationship, if any, between the section of the BMC governing projections from dwellings into yards and BMC 17.24.070 specifying yard setbacks is not clear to us or explained in the city's decision, on remand, if the city considers projections from eaves to decrease the amount of yard setback available to satisfy BMC 17.24.070, the city should explain its understanding of the interrelationship between BMC 17.24.070 and BMC 17.104.130 and inform petitioners what steps are necessary to obtain approval under the relevant criteria. *Bridge Street Partners v. City of Lafayette*, 56 Or LUBA 387 (2008).

These assignments of error are sustained.

ELEVENTH ASSIGNMENT OF ERROR

The city also concluded that petitioners failed to satisfy applicable criteria governing maximum allowed building height, which is 28 feet in the CD-2 zone.[11] The city concluded:

> "The applicant has stated that the maximum height of the structure will be 26 feet from grade (A06). However, the applicant notes this is a 'minimum' grade. The City requires the applicant to show the highest point of the structure from *the lowest point of* ***native*** *grade*. *Without knowing what native grade is,* the **Planning Commission found** this criterion had not been met.
>
> "* * * The **City Council** agreed with the Planning Commission and **found** this criterion had not been met." Record 16 (Bold in original, italics added).

[11] BMC 17.24.080 provides:

> "In the CD-2 zone, no building shall exceed a height of twenty-eighty (28) feet, except that additional height above twenty-eighty (28) feet but not exceeding thirty-five (35) feet shall be considered a conditional use. Conditional use permits above twenty-eight (28) feet for any use shall be allowed only if the planning commission finds that the increased height does not adversely affect the ocean or river views of existing structures on abutting lots."

BMC 16.42.010 defines "native grade" as "the level of the ground prior to alteration." Given that definition, petitioners argue, the city's findings are inadequate to explain why the city concluded that "native grade" was not known. According to petitioners, no alterations have been performed on the property and the existing contours shown on the plans at Record 581 are identical to the topographical survey contours at Record 992, so that the existing contours demonstrate "native grade," i.e. "the level of the ground prior to alteration." The city responds that the revised drawings at Record 581 and 582 refer to "average grade," while the drawings at Record 935 refer to "minimum grade," but neither refers to "native grade." Given this omission, the city argues, it was not required to rely on the oral testimony of petitioners at the January 28, 2010 hearing that explained what the "native grade" of the property is.

Petitioners also dispute the city's conclusion that in order to satisfy BMC 17.24.080, applicants must show the highest point of the building based on the "*lowest point* of native grade." BMC 16.42.010 describes how building heights on sloping properties are to be measured:

> "'Height of Building or Structure:' means the vertical distance *from the native grade* to the highest point of the roof. On slopes, the height of the structure shall be determined by taking the height of each side of the building *measured from grade at the center of the wall* to the highest point of the roof and divided by the number of measured sides." (Emphases added.)

Under the definitions set forth above, petitioners appear to be correct that the city is incorrect in requiring the building height to be measured from the single *lowest point* of the "ground prior to alteration." Petitioners also argue that if the city's findings are intended to conclude that the building's height was not calculated in accordance with BMC 16.42.010, those findings are inadequate. As noted above, BMC 16.42.010 "Height of Building or Structure" tells an applicant how to measure the height of a structure on sloped property. Petitioners argue that, consistent with the definition of "[h]eight of building or structure" quoted above, the plans at Record 581 and 582 show that the height of each wall was calculated starting

from "the existing level of the ground" below the middle of that wall, i.e. "native grade." According to petitioners, their testimony at the January 28, 2010 planning commission hearing clarified that the building's height was calculated in accordance with BMC 16.42.010.

We agree with petitioners that the city's findings are inadequate to explain its conclusion that the "native grade" of the property is not known and that BMC 17.24.080 is not met. Given the definitions set forth in BMC 16.42.010, petitioners' written explanation at Record 578, the revised plans at Record 581 and 582, as well as the topographic map at Record 992, and their testimony at the January 28, 2010 planning commission hearing, it appears that the native grade of the property is known and that the building's height was calculated in accordance with BMC 16.42.010's definition of "Height of building or structure." On remand, if the city continues to conclude that the height of the building does not satisfy BMC 17.24.080, the city must better explain its reasons for such a conclusion.

This assignment of error is sustained.

THIRTEENTH ASSIGNMENT OF ERROR

In the thirteenth assignment of error, petitioners challenge the city's conclusion regarding BMC 17.92.020, which allows the city to impose conditions of approval on conditional uses. The city concedes that BMC 17.92.020 is not an approval criterion and could not be relied on to deny the application. This assignment of error provides no basis for reversal or remand of the decision.

The city's decision is remanded.