BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JEFF HARRISON, CLEVE ROOPER, DALE HINTZ, LINDA HINTZ, ELIZABETH LORISH, JANE EMRICK, DIANE AMOS, REX AMOS, MINDY HARDWICK, and ROBIN RISLEY,
Petitioners,

vs.

CITY OF CANNON BEACH,
Respondent,

and

JEFF NICHOLSON,
Intervenor-Respondent.

LUBA No. 2015-016

FINAL OPINION
AND ORDER

Appeal from City of Cannon Beach.

Daniel H. Kearns, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Reeve Kearns, PC.

No appearance by City of Cannon Beach.

William L. Rasmussen, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Miller Nash Graham & Dunn LLP.

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

AFFIRMED 09/30/2015

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 approving a zoning map amendment, planned development, and variance.

FACTS

The subject property is .57 acres (approximately 24,800 square feet) with portions that contain slopes greater than 20 percent. Record 179. The property is zoned Residential Medium Density (R-2), and the minimum lot size in the R-2 zone is 5,000 square feet.

In November 2014, intervenor-respondent (intervenor) applied for approval of a planned development, variance, and a zoning map amendment to add a Planned Development Overlay to the subject property, in order to site four dwellings on the property. On December 22, 2014 the planning commission held a hearing on the three applications and at the conclusion of the hearing continued the hearing to January 22, 2015. At the conclusion of the January 22, 2015 hearing, the planning commission recommended that the city council deny the applications. Record 82.

On February 10, 2015, the city council held a hearing on the applications. Intervenor and other participants including petitioner Dale Hintz appeared at the hearing and presented written and oral testimony and evidence regarding the applications. At the conclusion of the hearing, the city council voted to tentatively approve the applications. Record 57-58. At the next city council hearing on March 3, 2015, the city council voted to adopt findings of fact in support of the approvals. Record 27-28. After the city council voted to adopt the findings, some of the petitioners and others testified in opposition to the applications. This appeal followed.

REPLY BRIEF

Petitioners move for permission to file a reply brief to respond to arguments in the response brief that some of the issues raised in the petition for review have been waived. Intervenor does not object to the reply brief. The reply brief is allowed.

FIRST ASSIGNMENT OF ERROR

A. First Subassignment of Error

ORS 227.175(2) requires in relevant part that the city's governing body "establish a consolidated procedure by which an applicant may apply at one time for all permits or zone changes needed for a development project." Cannon Beach Municipal Code (CBMC) 17.92.050 provides:

> "17.92.050 Consolidated application procedure. Where a proposed development requires more than one development permit, or a change in zone designation from the city, the applicant may request that the city consider all necessary permit requests in a consolidated manner. If the applicant requests that the city consolidate his or her permit review, all necessary public hearings before the planning commission shall be held on the same date."

On November 19, 2014, intervenor submitted applications for a planned development, zone map amendment, and variance. The city consolidated the applications. Record 170, 178, 183, 225.

In their first subassignment of error, petitioners argue that CBMC 17.92.050 gives the city only the authority to consolidate the hearings, and that therefore the city council exceeded its jurisdiction in allowing the city council to make the final decision on intervenor's application for a variance. According to petitioners, CBMC 17.84.070 requires the planning commission to make a final written decision on the variance application, with the right of an appeal of

that final decision to the city council.[1] Based on that mandate, petitioners argue, the city council exceeded its jurisdiction when it consolidated the applications and made the final decision on the variance application based on a recommendation from the planning commission.

Intervenor responds, initially, that no party raised the issue raised in the first subassignment of error prior to the close of the initial evidentiary hearing and therefore the issue is outside of LUBA's scope of review. ORS 197.835(3). Unless petitioners or some other party asserted below that the city's consolidated processing of the applications failed to comply with the CBMC provisions governing variance applications, so that the city had "fair notice" that it needed to address that issue, petitioners' issues were not preserved for review in this appeal. *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991).

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[1] CBMC 17.84.070 provides:

> "A. Before the city planning commission may act upon a variance request, notice of a public hearing in the manner prescribed in Sections 17.88.010 through 17.88.040 shall be given.
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> "B. The city planning commission shall review the variance application in accordance with Section 17.88.060.
>
> "C. The city planning commission decision shall be in accordance with Section 17.88.110.
>
> "D. Notification of the planning commission decision shall be in accordance with Section 17.88.130.
>
> "E. The decision of the planning commission may be appealed in accordance with Sections 17.88.140 through 17.88.190."

In their reply brief, petitioners respond that the city's planner raised the issue when he explained to the planning commission and the city council in staff reports and at the hearings that the three applications were consolidated and processed according to a consolidated procedure and that the city council would make the final decision on all three applications. However, the issue raised in the first subassignment of error takes the position that the city's consolidated processing of the three applications violates other provisions of the CBMC that petitioners argue required the planning commission to make the final decision on the variance application. The only "issue," if any, that the city planner's staff reports raised below was that the city used a consolidated procedure to process the applications. For petitioners to preserve their right to assign error to the city's consolidation and processing of the applications, petitioners or some other party must have taken the position that the city's consolidation of the applications violated the CBMC. *Just v. Linn County*, 60 Or LUBA 74, 90-91 (2009). Accordingly, we agree with intervenor that the issue raised in the first subsassignment of error was not raised prior to the close of the initial evidentiary hearing on the applications, and is therefore outside of LUBA's scope of review.

The first subassignment of error is denied.

C. Second and Third Subassignments of Error

Petitioners' second and third subassignments of error contain overlapping and at times repetitive arguments, some of which are also contained in the first subassignment of error. We set the second and third subassignments of error out in this opinion to the extent we understand them.

On January 20, 2015, the city sent notice of the February 10, 2015 city council hearing to petitioners and others.[2] Record 72-78. That notice provided that the city council would hold a public hearing on the zone change application, but did not mention the planned development or variance applications that had been filed concurrently with the zone change application, as we explain above. That notice also included a mistaken reference to a previous "Design Review Board" hearing on the zone change application, which all parties agree had never occurred because the Design Review Board had no involvement in reviewing the applications. Finally, the notice provided that "[n]o new evidence will be considered[]" at the city council hearing. Record 73. In fact, the city council accepted new evidence at the city council hearing.

On January 26, 2015, the city sent an amended notice of the February 10, 2015 city council hearing to petitioners and others that provided that the city council would hold a hearing on all three applications: the planned development, variance and zone change applications. Record 67-71. The amended notice continued the mistaken reference to a previous "Design Review Board" hearing that had never occurred, and again included the statement that no new evidence would be considered.

In their second and third subassignments of error, we understand petitioners to argue that the city committed procedural errors that prejudiced their substantial rights to "prepare and submit their case and a full and fair hearing" when it sent notices that (1) failed to comply with the timing

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[2] The January 20, 2015 notice of city council hearing was sent two days prior to the January 22, 2015 continued planning commission hearing on the applications that was continued from December 22, 2014.

requirements for notices contained in ORS 197.763(3)(f); (2) contained mistaken references to the Design Review Board; and (3) contained statements that no new evidence would be considered at the city council hearing. ORS 197.835(9)(a)(B). *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988).

Petitioners first argue that the city committed a procedural error when it sent the amended notice of the February 10, 2015 city council hearing less than twenty days before the February 10, 2015 hearing. According to petitioners, ORS 197.763(3)(f)(A) required notice of the hearing to be sent not less than 20 days before the hearing.[3] Petitioners next argue that the mistakes in the notices that referenced the Design Review Board, and that stated that no new evidence would be considered at the city council hearing, prejudiced petitioners' ability to prepare and submit their case to the city council, because the mistakes confused petitioners as to what exactly the city council would be deciding. Petitioners Jeff Harrison (Harrison) and Mindy Hardwick (Hardwick) allege that the late amended notice confused them, and because they had other commitments, they did not have the opportunity to prepare and present their

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[3] ORS 197.763(3)(f) provides:

> "The notice [of a quasi-judicial land use hearing] provided by the jurisdiction shall:
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> " * * * * *
>
> "(f) Be mailed at least:
>
> "(A) Twenty days before the evidentiary hearing; or
>
> "(B) If two or more evidentiary hearings are allowed, 10 days before the first evidentiary hearing[.]"

case in person or by proxy at the February 10, 2015 city council hearing.[4] Petition for Review 28. Petitioners support their allegation of prejudice to their substantial rights with affidavits from Harrison and Hardwick that state that the city's notices of the February 10, 2015 city council hearing were not adequate to notify them that the hearing would be the last opportunity for them to participate in the proceedings on the applications, and that they did not have adequate time to prepare for and rearrange their plans in order to personally attend the February 10, 2015 city council hearing.[5]

Intervenor first disputes that ORS 197.763(3)(f)(A) required 20 days' notice of the city council hearing. Because the planning commission had already held an evidentiary hearing on the applications and a second evidentiary hearing was scheduled, intervenor argues, in that circumstance, ORS 197.763(3)(f)(B) allows ten days notice of the hearing. We agree with intervenor that the 20-day notice period required by ORS 197.763(3)(f)(A) applies only when the local government provides a single evidentiary hearing.

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[4] The third subassignment of error refers to possible undisclosed ex parte contacts in arguing that the city's mistakes in the substance and timing of the notices prejudiced petitioners' substantial rights to question the city council about any undisclosed ex parte contacts at the February 10, 2015 hearing, but does not assign error to the decision on the basis that members of the city council failed to disclose any ex parte contacts. Petition for Review 31.

[5] Petitioners move for LUBA to consider the affidavits under OAR 661-010-0045(1) in order to resolve "disputed factual allegations" in the petition for review "concerning * * * procedural irregularities not shown in the record" that petitioners argue warrant remand of the decision. Intervenor does not object to the motion, and we consider the affidavits in connection with petitioners' first assignment of error.

Nothing in ORS 197.763(3)(f) requires the city provide 20 days notice of the second evidentiary hearing held before the city council.

Intervenor also responds that a staff report issued by the city planner on January 15, 2015, that was available prior to the planning commission's continued hearing on the applications clearly explained that the planning commission's action on the applications was a recommendation to the city council and that the city council would make the final decision on all three applications. Record 83. Intervenor also points out that the city issued a staff report to the city council on February 3, 2015, and a legal memorandum on February 4, 2015, that summarized the planning commission's recommendations of denial. Record 47-52. Third, intervenor points to the affidavit of Harrison that reflects that the city planning staff informed Harrison by email on or near January 27, 2015 (14 days prior to the city council hearing) that the city council would be considering all three consolidated applications at the February 10, 2015 hearing. Statement of Jeff Harrison §10. Fourth, intervenor points out that the minutes of the January 22, 2015 planning commission hearing that petitioner Harrison attended reflect that the motion that the planning commission voted on was a motion to "recommend" denial of the applications, rather than a motion to "deny" the applications. Record 82. Finally, intervenor points out that Harrison and Hardwick participated in the city council hearing in writing, and that one of the other petitioners, Dale Hintz, participated orally at the hearing. Record 59-66; Appendix 2 to the Petition for Review, Transcript of February 10, 2015 Hearing at 13-14. For those reasons, intervenor argues, any procedural defects in the substance of the notices were remedied by the staff reports that were available to petitioners, by the planning commission's and city council's proceedings themselves and by

the fact that petitioners Harrison, Hardwick and Hintz in fact participated in the proceedings before the city council. Accordingly, intervenor responds, petitioners had a full and fair opportunity to prepare and submit their case, did submit their case, and received a full and fair hearing.

Although the city's notices of the February 10, 2015 city council hearing contained some errors, petitioners have not established that the mistaken reference to the "Design Review Board" rises to the level of a "procedural error" within the meaning of ORS 197.835(9)(a)(B). Although in fact new evidence was presented at the city council hearing notwithstanding the statements in the notices, petitioners do not assign error to the city council's acceptance of new evidence during the February 10, 2015 city council hearing. And even if we assume it was a procedural error for the notice of hearing to include a statement that no new evidence would be accepted when that statement later turned out to be inaccurate and in fact the city council did accept new evidence during the hearing, petitioners have failed to establish that that procedural error caused petitioners to fail to prepare for and submit their case to the city council. Rather, previous commitments caused petitioners Harrison and Hardwick to fail to attend the February 10, 2015 city council hearing in person. Statement of Jeff Harrison §§10-12; Statement of Mindy Hardwick §§7-8. Petitioner Dale Hintz attended the February 10, 2015 hearing, and petitioners do not attempt to explain how any of the other petitioners were prejudiced by the mistakes in the notices.

The second and third subassignments of error are denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

We set out petitioners' second assignment of error:

> "Respondent misapplied and misinterpreted the applicable law and rendered a decision unsupported by adequate findings or substantial evidence when it construed the city's variance and planned development provisions to allow this development to circumvent the clearly stated slope-density limits for steeply sloped lots. The city's interpretation of these operative code provisions are not entitled to deference under ORS 197.829(1) because it was contrary to the text of the operative code provisions and the underlying purpose and policy they were intended to implement." Petition for Review 33.

We understand the second assignment of error to raise two issues that we discuss below.

A. Variance

Pursuant to CBMC 17.14.040, the minimum lot size for a dwelling in the R-2 zone is 5,000 square feet. Accordingly, the allowed density on the 24,800-square foot subject property is four dwellings.

CBMC 16.04.310 is part of the city's subdivision ordinance that is set out in Title 16 of the CBMC, and sets out design standards for "lots to be created by a partition or subdivision[.]" CBMC 16.04.310 provides that where the average slope of a lot is between 20 and 29.99 percent, the minimum lot size per dwelling unit is 15,000 square feet. As noted, the subject property has slopes that exceed 20%. Accordingly, if a subdivision of the property was proposed under CBMC Title 16, CBMC 16.04.310 would limit the minimum lot size to 15,000 square feet, which, due to the size of the property, would not allow more than one lot.

Concurrently with his planned development and zone map amendment applications, intervenor applied for a variance to CBMC 16.04.310. The city applied the criteria in CBMC 17.84.030, which is part of the city's zoning ordinance that is set out in Title 17 of the CBMC. Record 16-20. The city

council found that variance application satisfies the zoning variance criteria in CBMC 17.84.030 and approved the variance to CBMC 16.04.310.[6] Record 15-19.

[6] CBMC 17.84.030 provides:

> "A. Variances to a requirement of this title, with respect to lot area and dimensions, setbacks, yard area, lot coverage, height of structures, vision clearance, decks and walls, and other quantitative requirements, may be granted only if, on the basis of the application, investigation and evidence submitted by the applicant, all four expressly written findings are made:
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> "1. That a strict or literal interpretation and enforcement of the specified requirement would result in practical difficulty or unnecessary hardship and would be inconsistent with the objectives of the comprehensive plan; and
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> "2. That there are exceptional or extraordinary circumstances or conditions applicable to the property involved or to the intended use of the property which do not apply generally to other properties in the same zone; and
>
> "3. That the granting of the variance will not be detrimental to the public health, safety or welfare, or materially injurious to properties or improvements in the near vicinity; and
>
> "4. That the granting of the variance would support policies contained within the comprehensive plan.
>
> "B. Variances in accordance with this section should not ordinarily be granted if the special circumstances on which the applicant relies are a result of the actions of the applicant, or owner, or previous owners."

In their second assignment of error, we understand petitioners to first argue that the city improperly applied the variance provisions in CBMC 17.84.030 to approve a variance to CBMC 16.04.310's minimum lot size requirements, instead of applying the variance provisions set out in CBMC 16.04.390, part of the subdivision ordinance. Petition for Review 34-37. According to petitioners, the city erred in applying variance criteria in the city's zoning ordinance found in CBMC Title 17 to vary subdivision lot design requirements that are set out in the city's subdivision ordinance found in CBMC Title 16.

Intervenor responds that no party raised that issue prior to the close of the initial evidentiary hearing, and therefore the issue is outside of LUBA's scope of review under ORS 197.835(3). In the reply brief, petitioners respond that the issue was raised at Record 103-05 and Third Supplemental Record 267, and in Harrison's testimony during the January 22, 2015 planning commission hearing. We have reviewed the cited record pages and the transcript of the January 22, 2015 planning commission hearing, and we agree with intervenor that the issue was not raised so that the city had "fair notice" that it needed to address that issue, or at all. *Boldt*, 107 Or App at 623. The letters at Record 103-05 and Supplemental Record 267 do not raise any issue regarding or otherwise challenge the city's consideration of the variance to CBMC 16.04.310 under the variance criteria set out at CBMC 17.84.030 or challenge the city's findings that the variance criteria in CBMC 17.84.030 are met. Accordingly, the issue is waived.

B. Planned Development

We also understand petitioners to argue more generally in the second assignment of error that the city erred in allowing intervenor to apply for a

planned development in order to site four dwellings on the property, and in relying on the planned development provisions in CBMC 17.40 to allow development of the property at the density allowed under the R-2 zone provisions (four dwellings). That is the issue that was raised at Record 103-05 and Third Supplemental Record 267, and in Harrison's testimony during the January 22, 2015 planning commission hearing. We understand petitioners to argue that because the subdivision ordinance would otherwise prohibit the allowed density due to the minimum lot size requirements for properties with steep slopes contained in CBMC 16.04.310, the planned development chapter cannot provide a means to approve intervenor's proposal. Petition for Review 38-41.

CBMC 17.40.010 sets out the purpose of the planned development chapter:

> "A. It is the intent of this chapter to encourage appropriate and orderly development of tracts of land sufficiently large to allow comprehensive planning and *to provide a degree of flexibility in the application of certain regulations which cannot be obtained through traditional lot-by-lot subdivision*. In this manner, environmental amenities may be enhanced by promoting a harmonious variety of uses; the economy of shared services and facilities; compatibility of surrounding areas; and the creation of attractive, healthful, efficient and stable environments for living, shopping or working.
>
> "B. Specifically, it is the purpose of this chapter to promote and encourage the flexibility of design in the placement and uses of buildings and open space, streets and off-street parking areas, and to more efficiently utilize the potential of sites characterized by special features of geography, topography, size or shape.

> "C. It is not the intention of this chapter to be a bypass of regular zoning provisions solely to allow increased densities, nor is it a means of maximizing densities on parcels of land which have unbuildable or unusable areas." (Emphasis added.)

CBMC 17.40.020(A)(1) sets out standards for the size of planned developments and provides:

> "Planned residential development may be established in residential zones on parcels of land which are suitable for and of sufficient size to be planned and developed in a manner consistent with the purposes and objectives of the comprehensive plan and this title. *The site shall include not less than three acres of contiguous land, unless the planning commission finds that property of less than three acres is suitable by virtue of its unique character, topography or other natural features, or by virtue of its qualifying as an isolated problem area*." (Emphasis added.)

CBMC 17.40.030(D)(1) further provides that "the density of a planned development shall not exceed the density of the parent zone * * *[.]" As noted, the R-2 zone minimum density for the subject property is one dwelling per 5,000 square feet.

The city council found that the proposal was eligible for approval as a planned development under CBMC 17.40, even though it is less than 3 acres in size, because the site's "unique * * * topography" qualified it for the "degree of flexibility" that is provided by the planned development chapter. Record 4. The city council also found the application to be consistent with the purposes of the planned development chapter:

> "CBMC 17.40.010 is a statement of intent and not an approval criterion, but if it were, the application would comply with it. The Code indicates that the planned development process can be used at the city's discretion on sites with unique features such as topography to facilitate orderly and harmonious development. Planned developments are not to be used to maximize densities on

> parcels of land which have unbuildable or unusable areas. [Intervenor's] proposal for the subject site is designed to incorporate the unique topography of the site while matching the scale and density of nearby properties." Record 3.

The city council concluded that the application satisfied the standards and criteria in CBMC 17.40. Record 2-12.

In their second assignment of error, we understand petitioners to argue that the city council improperly considered the proposal under the planned development provisions because CBMC 17.40.010(C) provides that "[i]t is not the intention of this chapter to be a bypass of regular zoning provisions solely to allow increased densities, nor is it a means of maximizing densities on parcels of land which have unbuildable or unusable areas." According to petitioners, the city council's approval of the planned development application is inconsistent with CBMC 17.40.010(C) and "bypass[ed] * * * regular zoning provisions solely to allow increased densities on [a] parcel[] of land which ha[s] unbuildable or unusable areas."[7] Also according to petitioners, the city council's approval of the planned development application is inconsistent with other provisions of the city's comprehensive plan and zoning ordinance. Petition for Review 38-40.

Intervenor responds, and we agree, that the city council did not improperly construe the provisions of the planned development chapter when it determined that the proposal was eligible for a planned development, in conjunction with the variance to the slope-density rule, due to the site's unique

[7] We understand petitioners to argue that one of the "regular zoning provisions" that is bypassed is CBMC 16.04.310's slope density limit, which, as noted, in contained in the city's subdivision ordinance, and that the property "ha[s] unbuildable or unusable areas."

topography. We also agree with intervenor that the city council's interpretation of the planned development chapter is not inconsistent with the purposes of the chapter. ORS 197.829(1)(b). One of the purposes of the planned development chapter is to provide the city with flexibility to consider proposals that "cannot be obtained through traditional lot-by-lot subdivision[.]" CBMC 17.40.010(A). Here, the allowed R-2 density "cannot be obtained through traditional lot-by-lot subdivision" due to the slope density limits in the subdivision ordinance.

Moreover, we disagree with petitioners that the proposal is inconsistent with CBMC 17.40.010(C). The property would be allowed to be developed with four dwellings under the "regular zoning provisions" that apply in the R-2 zone. It is a provision of the subdivision ordinance, not the "regular zoning provisions," that decreases the allowed density. The city council's decision allows the property to be developed with four dwellings, and for that reason does not "allow increased densities" in that zone within the meaning of CBMC 17.40.010(C). Second, the city council found that the evidence in the record demonstrates that the steep slopes on the property can be made stable through engineering, so that presumably the property is not "unbuildable or unusable[,]" and petitioners do not challenge those findings.[8] Finally, we also

[8] The city council found:

> "The combination of very steep slopes on the west side of the property and relatively moderate slopes in the central area combine to raise the average slope and thus bring the slope density standard into play, while at the same time leaving flatter areas that could be developed for modest-sized, single-family residences.
>
> "The subject property is larger than most lots in the neighborhood.

do not think that the comprehensive plan provisions and zoning code provisions cited by petitioners at pages 38-40 of the petition for review have much, if any, bearing on the city council's decision to apply the planned development provisions to intervenor's proposal.

The second assignment of error is denied.

The city's decision is affirmed.

"*According to a geological evaluation submitted by applicant's geotechnical engineer * * * the subject property is relatively stable, or can be made so through proper engineering despite steep slopes on portions of the site*." Record 4 (Emphasis added.)