

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

3
4 JEFF HARRISON, MINDY HARDWICK,
5 COLLEEN TOOMEY, PHILIP MORTON,
6 LUCINDA HAYES, SUE GLARUM,
7 JIM MORTON, JUDY MORTON,
8 DALE HINTZ and LINDA HINTZ,
9 *Petitioners,*

10
11 vs.

12
13 CITY OF CANNON BEACH,
14 *Respondent,*

15
16 and

17
18 JEFF NICHOLSON,
19 *Intervenor-Respondent.*

20 LUBA No. 2016-033

21
22
23 FINAL OPINION
24 AND ORDER

25
26 Appeal from City of Cannon Beach.

27
28 Sean T. Malone, Eugene, filed the petition for review and argued on
29 behalf of petitioners.

30
31 William K. Kabeiseman, Portland, filed a response brief and argued on
32 behalf of respondent. With him on the brief was Garvey Schubert Barer PC.

33
34 William L. Rasmussen, Portland, filed a response brief and argued on
35 behalf of intervenor-respondent. With him on the brief was Miller Nash
36 Graham & Dunn LLP.

37
38 RYAN, Board Member; HOLSTUN, Board Chair; BASSHAM, Board

1 Member, participated in the decision.

2

3

AFFIRMED

08/23/2016

4

5

6

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

NATURE OF THE DECISION

Petitioners appeal a decision by the city granting final approval of a planned development.

FACTS

The planned development (PD) at issue in this appeal was the subject of our decision in *Harrison v. City of Cannon Beach*, 72 Or LUBA 182 (2015). As we described in that decision, in 2014 intervenor-respondent Jeff Nicholson (intervenor) sought and received preliminary approval of a PD to create four residential lots on a .57-acre parcel, portions of which contain steep slopes. After we affirmed the city’s decision granting preliminary approval of the PD, intervenor applied for final plan approval of the four-lot PD and submitted various plans and drawings, along with a final plat. The planning commission held a hearing on the application, and recommended denial to the city council. The city council held a hearing on the application and voted to approve the final plan with conditions. This appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Cannon Beach Municipal Code (CBMC) 17.40.040 sets out the city’s planned development procedures. CBMC 17.40.040(C) is titled “Final Approval,” and CBMC 17.40.040(C)(1) provides:

“Within one year after concept approval or modified approval of a preliminary development plan, the applicant shall file with the planning department a final plan for the entire development or, when submission in stages has been authorized, for the first unit of

1 development. *The final plan shall conform in all major respects*
2 *with the approved preliminary development plan.* The final plan
3 shall include all information included in the preliminary plan, plus
4 the following: the location of water, sewerage and drainage
5 facilities; *detailed building and landscaping plans and elevations;*
6 the character and location of signs; plans for street improvements
7 and grading or earth moving plans. *The final plan shall be*
8 *sufficiently detailed to indicate fully the ultimate operation and*
9 *appearance of the development.* Copies of the legal documents
10 required by the commission for dedication or reservation of public
11 facilities, or for the creation of a nonprofit homes association,
12 shall also be submitted.” (Emphases added.)

13 Petitioners’ first and second assignments of error challenge the city council’s
14 conclusion that the final plan satisfies CBMC 17.40.040(C)(1).

15 **A. First Assignment of Error**

16 In their first assignment of error, petitioners first argue that the
17 information submitted with the final plan application failed to include “detailed
18 building and landscaping plans and elevations” that are required by CBMC
19 17.40.040(C)(1). Also according to petitioners, intervenor’s final plan
20 submissions did not include enough detail to allow the city council to conclude
21 that the plans “indicate fully the ultimate operation and appearance of the
22 development.” Petitioners argue that the phrase “sufficiently detailed to
23 indicate fully the ultimate operation and appearance of the development”
24 requires the final plan application to show what the homes to be constructed on
25 each of the lots will look like.¹

¹ We understand petitioners to argue that the city council improperly construed CBMC 17.40.040(C)(1) and that the city council’s decision is not

1 Intervenor and the city (together, respondents) respond first with a
2 description of and record citation for each plan submitted by intervenor,
3 including a Detailed Building Plan, a Grading Plan, a Living Retaining Wall
4 Plan and Profile, a Tree Retention and Revegetation Plan, Lot Setbacks, and an
5 Isometric Sketch. Intervenor-Respondent’s Response Brief 10-11. According to
6 respondents, the submitted plans provide detailed information about the
7 location and size of the building envelopes for homes, dwelling heights
8 (Record 167, 170); the location of trees (Record 207, 401-402), utilities
9 (Record 170), grading (Record 400), the location of the driveway (Record 170),
10 and the location and height of the living retaining wall (Record 406).
11 Respondents respond that the plans submitted with the final plan application
12 included sufficiently detailed information to “indicate fully the ultimate
13 operation and appearance of the development.”

14 The city council found that the final plan application materials were
15 “sufficiently detailed to indicate fully the operation and appearance of the
16 development,” and rejected petitioners’ proffered interpretation of the phrase as
17 requiring detailed plans and drawings regarding the appearance of the homes to
18 be built on the lots:

19 “A conceptual sketch submitted by the applicants at the 1/28/16
20 Planning Commission hearing shows four residences on the
21 property. Although the City Council understands that it could

supported by substantial evidence in the record. ORS 197.835(9)(a)(C) and (D).

1 interpret this provision to require a greater level of detail, the City
2 Council believes that, with the information that it has, as well as
3 the conditions being placed on the plan, the proposed final plan is
4 sufficiently detailed to indicate fully the development's ultimate
5 operation and appearance." Record 6.

6 The city council also imposed several conditions of approval related to the
7 appearance of the homes to be built on the lots, including limiting the types of
8 exterior materials (wood siding or shingles), roofing materials (composition,
9 wood shake or shingle with a pitch), concrete or masonry use limitations,
10 direction of main entrances, maximum building height and the size of the
11 homes. Record 13-15.

12 Under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 259,
13 243 P3d 776 (2010), the city council is entitled to deference when it adopts
14 interpretations of its land use regulations.² We agree with respondents that the

² ORS 197.829(1) provides:

“[LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

“(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

“(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

“(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

1 city council’s interpretation of the requirement that “[t]he final plan shall be
2 sufficiently detailed to indicate fully the ultimate operation and appearance of
3 the development,” as not requiring the level of detail urged by petitioners, is
4 not inconsistent with the text of the provision, or its context. In addition, we
5 agree with respondents that the materials submitted with the final plan
6 application are substantial evidence in the record that supports the city
7 council’s conclusion. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d
8 608 (1993) (substantial evidence is evidence a reasonable person would rely on
9 in making a decision).

10 The first assignment of error is denied.

11 **B. Second Assignment of Error**

12 CBMC 17.40.040(C)(1) requires “[t]he final plan [to] conform in all
13 major respects with the approved preliminary development plan.” The city
14 council concluded that the final plan conforms in all major respects with the
15 approved preliminary development plan. The city council concluded that the
16 building setbacks shown on the final plan differed from the approved
17 preliminary plan because of a condition of approval of the preliminary plan
18 approval that changed the proposed setbacks, and thus the new setbacks
19 conform with the approved preliminary plan. The city council next found that

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

1 the changes and refinements shown in conceptual sketches submitted with the
2 final plan application do not fail to “conform in * * * major respects” with the
3 approved preliminary plan, because the city did not rely on the earlier sketches
4 in approving the preliminary plan. Finally, the city concluded that intervenor’s
5 reallocation of the total limit on habitable space imposed as a condition of
6 approval of the preliminary plan did not mean that the final plan fails to
7 conform in any major respects with the preliminary plan. Record 5-6.

8 In their second assignment of error, petitioners argue that the city council
9 erred in concluding that “[t]he final plan [conforms] in all major respects with
10 the approved preliminary development plan.” Some of petitioners’ arguments
11 under the second assignment of error are dependent on their arguments under
12 the first assignment of error regarding whether intervenor’s application
13 materials provided enough detail to show the city council what the
14 development will look like, and for the reasons explained above we reject those
15 arguments. Petition for Review 22-24.

16 Petitioners also argue that the city council failed to interpret the phrase
17 “in all major respects,” and request a remand for the city to interpret that
18 phrase. However, the city council’s findings contain an implied interpretation
19 of the phrase “in all major respects” that is more than adequate for review.
20 *Alliance for Responsible Land Use v. Deschutes Cty.*, 149 Or App 259, 266-67,
21 942 P2d 836 (1997). That interpretation is that the phrase excludes changes
22 that do not qualify as “major,” such as the changes identified by the city

1 council in its findings (to setbacks and refinements in conceptual sketches) that
2 petitioners argued were “major.”

3 Finally, we understand petitioners to argue that a sketch at Record 164
4 that shows the living retaining wall in detail is evidence that the final plan does
5 not “conform in all major respects” to the approved preliminary plan.
6 Petitioners argue that a sketch introduced with the final plan shows for the first
7 time the retaining wall “in [a] meaningful manner.” Petition for Review 25.

8 The preliminary plan showed a common driveway with a retaining wall,
9 and a condition of preliminary plan approval approved the retaining wall and
10 required it to be a “‘living wall’ design as shown in the documents submitted
11 by” intervenor.³ Record 12, 431. We do not understand petitioners to take the
12 position that the retaining wall was not a part of the approved preliminary plan.
13 The retaining wall was approved as part of the preliminary plan, and petitioners
14 identify no changes to it. Accordingly, petitioners’ argument provides no basis
15 for reversal or remand.

16 Petitioners also argue that a house that is shown on the same sketch as
17 placed on stilts is “a significant change from the prior submission.” Petition for
18 Review 25. Respondents respond, and we agree, that the stilts feature was
19 shown in application materials submitted as part of the preliminary plan

³ According to intervenor, the living retaining wall includes “areas of topsoil built into the wall and designed to sustain local vegetation.” Record 168.

1 approval and thus the sketch showing the stilts feature is not a change at all.
2 Record 681-82.

3 The second assignment of error is denied.

4 **THIRD ASSIGNMENT OF ERROR**

5 CBMC 17.40.040(C)(4) provides for a public hearing before the city
6 council on an application for final approval of a PD, and provides in relevant
7 part:

8 “After such hearing, the city council shall determine whether the
9 proposal conforms to the permit criteria set forth in Section
10 17.40.050 and to the planned development regulations, and may
11 approve or disapprove the application and the accompanying
12 development plan or require changes or impose conditions of
13 approval as are in its judgment necessary to ensure conformity to
14 such criteria and regulations.”

15 Petitioners’ third assignment of error is difficult to follow. We understand
16 petitioners to argue that the final plan includes changes to the appearance of the
17 development, and therefore the city erred in failing to determine whether the
18 final plan conforms to the permit criteria at CBMC 17.40.050. If that is
19 petitioners’ argument, it is related to and dependent on its argument in the
20 second assignment of error that the final plan does not conform “in all major
21 respects” with the approved preliminary plan. We rejected that argument in our
22 resolution of the second assignment of error.

23 More problematic for petitioners is their assertion that the city
24 determined that the CBMC 17.40.050 permit criteria did not apply to final plan
25 approval. The city adopted the following findings:

1 “[CBMC 17.40.050 was] addressed by the City Council at the
2 preliminary plan approval stage in March 2015. The Council
3 determined that the proposal met these criteria and that decision
4 was upheld on appeal by [LUBA]. The proposed final plan before
5 the Council now is in all materials respects the same as the
6 preliminary plan with even greater detail; so the City Council’s
7 earlier findings at pages nine through eleven of Order No. PD 14-
8 01 are still applicable and are incorporated herein by reference.
9 None of the new information received during the proceedings of
10 PD 15-01 alters the Council’s assessment that these criteria are
11 met. The detailed development plans submitted by KPFF in the
12 record and the conditions of approval attached to this decision
13 governing building envelope, maximum habitable space, building
14 height, and design will further ensure compliance with the
15 location, design, and size requirements of CBMC 17.40.050.
16 These criteria are met.” Record 8-9.

17 Those findings explain that the city council concluded that the final plan is the
18 same as the approved preliminary plan, so the findings the city adopted in
19 approving the preliminary plan’s conformance with CBMC 17.40.050 remain
20 applicable. The city incorporated those earlier findings by reference.

21 Then, the findings further conclude that the final plans, together with
22 conditions of approval, “will further ensure compliance with the location,
23 design, and size requirements of CBMC 17.40.050. These criteria are met.” The
24 city council applied the criteria at CBMC 17.40.050 to the submitted final
25 plans and determined the criteria are met. Petitioners’ argument that the city
26 determined that CBMC 17.40.050 did not apply to final plan approval is simply
27 incorrect.

28 Absent any focused challenge to the findings the city council did adopt
29 that conclude that the final plan conforms to the permit criteria at CBMC

1 17.40.050, petitioners’ argument provides no basis for reversal or remand of
2 the decision.

3 The third assignment of error is denied.

4 **FOURTH ASSIGNMENT OF ERROR**

5 CBMC 17.40.040(C)(4) provides:

6 *“After final concept approval by the planning commission, the*
7 *planned development application will be sent to the city council*
8 *for consideration for final approval. A public hearing as specified*
9 *in Chapter 17.88 shall be held on each such application. After such*
10 *hearing, the city council shall determine whether the proposal*
11 *conforms to the permit criteria set forth in Section 17.40.050 and*
12 *to the planned development regulations, and may approve or*
13 *disapprove the application and the accompanying development*
14 *plan or require changes or impose conditions of approval as are in*
15 *its judgment necessary to ensure conformity to such criteria and*
16 *regulations. The decision of the city council shall be final.”*
17 (Emphasis added.)

18 During the proceedings before the city council, petitioners argued that the city
19 council lacked jurisdiction to make a decision on the application because,
20 according to petitioners, the planning commission “denied” the application.
21 Based on that denial, the planning commission thus did not give “final concept
22 approval” of the application pursuant to CBMC 17.40.040(C)(4), a step that
23 petitioners argued is required in order to trigger the city council’s jurisdiction
24 to make a decision on the application. Stated differently, according to
25 petitioners the city council only has jurisdiction to consider a planning
26 commission recommendation of approval of an application; whereas the
27 planning commission has jurisdiction to deny an application, and that denial

1 will be the city’s final decision if it is not appealed. Thus, petitioners’ argument
2 goes, intervenor was required to appeal that recommendation to the city
3 council. In their fourth assignment of error, petitioners repeat their contentions
4 and argue that the city council lacked jurisdiction to make the decision, absent
5 an appeal by intervenor to the city council. The city council adopted findings
6 addressing this argument.⁴ The city council interpreted CBMC 17.40.040(C)(4)

⁴ The city council found:

“The City Council rejects this assertion and interprets its code to provide the City Council with the authority to make this decision. Reading CBMC 17.40.040.C.3 and 4 in context, the Planning Commission is not required to hold a hearing, nor is it empowered to make a final decision. The Council notes that other code provisions such as 17.80.020 explicitly authorize the Planning Commission to approve or deny applications, but the PUD stage three procedure is not structured in the same manner. Under CBMC 17.40.040.C.4, the City Council is required to hold a hearing and is the body that has the ultimate authority to ‘approve or disapprove’ the application. The Council acknowledges that the provision is inartfully drafted, but interprets the text and context to allow the Council to hear this matter.

“ * * * * *

“Second, the language in CBMC 17.40.040.C.4 supports this procedure:

“4. After final concept approval by the planning commission, the planned development application will be sent to the city council for consideration for final approval. A public hearing as specified in Chapter 17.88 shall be held on each such application. After such hearing, the city council shall determine whether the proposal conforms to

1 in context with CBMC 17.40.040(C)(3) and with other provisions of the
2 CBMC that authorize the planning commission to approve or deny an
3 application. The city council interpreted CBMC 17.40.040(C)(3) and (4) and
4 concluded that those provisions do not grant final decision making authority to
5 the planning commission on an application for final planned development
6 approval. Instead, the city council concluded, CMBC 17.40.040(C)(4) requires
7 the city council to hold a hearing on the application for final approval and gives
8 the city council the authority to make the final approval or denial decision

the permit criteria set forth in Section 17.40.050 and to the planned development regulations, and may approve or disapprove the application and the accompanying development plan or require changes or impose conditions of approval as are in its judgment necessary to ensure conformity to such criteria and regulations. The decision of the city council shall be final.’

“Nearly all of subsection 4 can be read as requiring a City Council hearing on each final plan application. The only potentially conflicting language is in the first sentence: ‘After final concept approval by the planning commission, the planned development application will be sent to the city council ...’ Reading this sentence as giving the Planning commission final decision-making authority conflicts with the rest of the paragraph. The text is silent as to what happens if the Planning Commission votes to deny a stage three request; or even if the Planning Commission has the authority to do anything other than approve the request. The City Council’s interpretation of this text – that the Planning Commission makes a recommendation and forwards it to the City Council for a final decision – avoids some of the procedural problems associated with the interpretation urged by Mr. Harrison.” Record 3-4.

1 based on the planning commission’s recommendation. The city council also
2 relied on a condition of approval imposed in the preliminary approval stage
3 that provides that “the final plan will be reviewed by the planning commission,
4 who will make a recommendation to the City Council regarding compliance of
5 the final plan * * *” as additional support for its interpretation.

6 Petitioners argue that the city council’s interpretation is inconsistent with
7 the plain meaning of the word “approval” in the first sentence of CBMC
8 17.40.040(C)(4). Petition for Review 38. Respondents respond that the city
9 council’s interpretation of the relevant provisions of the CBMC is not
10 inconsistent with all of the express language of the relevant provisions, and is
11 plausible and that LUBA must affirm the city council’s interpretation under
12 ORS 197.829(1) as interpreted in *Siporen*. We agree with respondents that the
13 city’s interpretation is not inconsistent with the express language of the
14 relevant CBMC provisions, and is plausible.

15 The fourth assignment of error is denied.

16 **FIFTH ASSIGNMENT OF ERROR**

17 CBMC 17.40.080(A) provides:

18 “The applicant shall agree in writing to be bound, for himself and
19 his successors in interest, by the conditions prescribed for
20 approval of a development. *The approved final plan and stage*
21 *development schedule shall control the issuance of all building*
22 *permits and shall restrict the nature, location and design of all*
23 *uses.* Minor changes in an approved preliminary or final
24 development plan may be approved by the code enforcement
25 officer if such changes are consistent with the purposes and
26 general character of the development plan. All other

1 modifications, including extension or revisions of the stage
2 development schedule, shall be processed in the same manner as
3 the original application and shall be subject to the same procedural
4 requirements.”

5 During the proceedings below, petitioners argued that CBMC 17.40.080(A)
6 requires a “stage development schedule” for development of the four lots. The
7 city council considered the argument and interpreted CBMC 17.40.080(A) in
8 the context of other CBMC provisions that refer to a “stage development
9 schedule:”

10 “Several code provisions reference a ‘stage development
11 schedule.’ For example, two of the submittal requirements [at]
12 CBMC 17.40.040.B.1 provide:

13 “c. A stage development schedule demonstrating that the
14 developer intends to commence construction within
15 one year after the approval of the final development
16 plan and will proceed diligently to completion.’

17 “d. If it is proposed that the final development plan will
18 be executed in stages, a schedule thereof will be
19 required.’

20 “CMBC 17.40.040.B.2 provides:

21 “[T]he commission may, in its discretion, authorize
22 submission of the final development plan in stages
23 corresponding to different units or elements of the
24 development. It may do so only upon evidence assuring
25 completion of the entire development in accordance with the
26 preliminary development plan and stage development
27 schedule.’

28 “CBMC 17.40.080.A provides:

29 “* * * The approved final plan and stage development
30 schedule shall control the issuance of all building permits

1 and shall restrict the nature, location and design of all uses.
2 Minor changes in an approved preliminary or final
3 development plan may be approved by the code
4 enforcement officer if such changes are consistent with the
5 purposes and general character of the development plan. All
6 other modifications, including extension or revisions of the
7 stage development schedule, shall be processed in the same
8 manner as the original application and shall be subject to the
9 same procedural requirements.’

10 “The text and context of these provisions indicate that a planned
11 development schedule is only required for multi-stage
12 developments. Every quoted passage section above that includes
13 the phrase ‘stage development schedule’ is preceded by the word
14 ‘stage’ with the exception of CBMC 17.40.040.B.1.d, which states
15 explicitly that if the development is proposed in stages, then a
16 development schedule will be required. The text of CBMC would
17 be meaningless if a development schedule was required for single
18 stage developments by other provisions in the Planned
19 Development Code. Because the subject application is a single
20 stage development, no development schedule is required.” Record
21 10-11.

22 In their fifth assignment of error, petitioners argue that the second sentence of
23 CBMC 17.40.080(A) requires the city to impose a schedule for development of
24 the four lots. Petitioners do not address the city’s interpretation, quoted above,
25 of all of the provisions of the CBMC that the city council determined were
26 relevant to petitioners’ argument. We also do not understand petitioners to
27 dispute the city council’s conclusion that the application proposes a single
28 stage development. Accordingly, petitioners’ arguments provide no basis for
29 reversal or remand of the decision. In addition, even if petitioners did challenge
30 the city council’s interpretation of all of the relevant provisions of the CBMC,
31 we would affirm that interpretation. ORS 197.829(1); *Siporen*.

- 1 The fifth assignment of error is denied.
- 2 The city's decision is affirmed.