

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

MJ NAJIMI,
Petitioner,

vs.

CITY OF CANNON BEACH,
Respondent.

LUBA No. 2020-118

FINAL OPINION
AND ORDER

Appeal from City of Cannon Beach.

Dean N. Alterman filed the petition for review and argued on behalf of petitioner. Also on the brief were Erica N. Menze and Alterman Law Group PC.

William K. Kabeiseman filed a response brief and argued on behalf of respondent. Also on the brief was Bateman Seidel Miner Blomgren Chellis & Gram, P.C.

RYAN, Board Member; RUDD, Board Chair; ZAMUDIO, Board Member, participated in the decision.

AFFIRMED 06/21/2021

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

NATURE OF THE DECISION

Petitioner appeals a decision by the city council denying a building permit for a single-family dwelling.

FACTS

Petitioner owns two lots zoned Residential Medium Density (R2), located in the Cannon Beach Preservation Subdivision (the Subdivision), a four-lot planned development (PD). In 2015, the city approved the tentative PD plan for the Subdivision under the provisions of Cannon Beach Municipal Code (CBMC) 17.40.040(B). In 2016, the city approved the final PD plan for the Subdivision under CBMC 17.40.040(C) and the final plat for the Subdivision under CBMC 16.04.210. Petitioner subsequently purchased Lots 1 and 3 of the Subdivision and, in 2020, applied for a building permit for a dwelling on Lot 1. The building official issued petitioner a building permit. Neighbors appealed the building official's decision to the planning commission, which reversed the building official's decision and denied the building permit on two grounds. We discuss those grounds later in our resolution of the assignments of error. Petitioner appealed the planning commission's decision to the city council, which held a hearing on the appeal. At the conclusion of the hearing, the city council voted to affirm the planning commission's decision and deny the building permit. This appeal followed.

1 **INTRODUCTION**

2 The city denied petitioner’s application. Generally, only one valid basis is
3 required for denial of an application and, where LUBA has affirmed one basis
4 for denial, any error committed with respect to alternative or independent bases
5 for denial does not provide a basis for reversal or remand. *Wal-Mart Stores, Inc.*
6 *v. Hood River County*, 47 Or LUBA 256, 266, *aff’d*, 195 Or App 762, 100 P3d
7 218 (2004), *rev den*, 338 Or 17 (2005). For the reasons explained below, we deny
8 the fourth assignment of error and conclude that at least one of the city’s bases
9 for denial is valid—that the turret is not a projection that may exceed the 28-foot
10 height limit in CBMC 17.14.040(E). Because we deny the fourth assignment of
11 error, the city’s decision must be affirmed. In that circumstance, LUBA typically
12 does not address challenges directed at other, alternative bases for denial.
13 However, due to the posture of this appeal and the other bases for denial,
14 resolution of additional issues may be useful if, in the future, petitioner files a
15 new building permit application. We therefore also resolve the issues presented
16 in the first, second, and third assignments of error, so that the parties will have a
17 more complete resolution by LUBA of the appeal.

18 **FIRST AND THIRD ASSIGNMENTS OF ERROR**

19 One basis for the city council’s denial of the building permit was its
20 conclusion that the Subdivision fails to comply with CBMC 17.40.030(A), which
21 applies “to all developments for which a [PD] permit is required” and provides:

22 “In all residential developments, a minimum of forty percent of the

1 total area shall be devoted to outdoor living area. Of this area,
2 twenty-five percent of the outdoor living area may be utilized
3 privately by individual owners or users of the [PD]; a minimum of
4 seventy-five percent of this area shall be common or shared outdoor
5 living area.”

6 The Subdivision is 25,000 square feet. The city council concluded that the
7 Subdivision fails to provide the 7,500 square feet of common open space required
8 by CBMC 17.40.030(A). Record 45.

9 In the third assignment of error, petitioner argues that the city council
10 exceeded its jurisdiction in applying CBMC 17.40.030(A) to an application for a
11 building permit for a dwelling in a previously approved PD. Petitioner argues that
12 the plain language of CBMC 17.40.030 makes it clear that its standards apply
13 only to “developments for which a [PD] permit is required.” Petitioner argues
14 that CBMC 17.40.030(A) is not a standard that applies to petitioner’s application
15 for a building permit, because no PD permit is required to construct a single-
16 family dwelling and because a PD permit was approved for the Subdivision
17 several years ago.

18 In the first assignment of error, petitioner maintains that the city’s
19 decisions in 2015, approving the tentative PD plan, and in 2016, approving the
20 final PD plan and the final plat, conclusively resolved the issue of whether the
21 Subdivision satisfies CBMC 17.40.030(A), and the city may not revisit those
22 conclusions in considering whether to approve the building permit. Petitioner
23 points out that, under CBMC 17.40.050(A), the city may issue a PD permit only
24 if “the location, design, size and uses [of the PD] are consistent with the

1 comprehensive plan, development map or ordinance.” Petitioner also points to
2 findings from the city’s 2016 decision approving the final PD plan that both the
3 final PD plan and the final plat conform with the approved tentative PD plan and
4 that the final PD plan provides the location of common open space and provides
5 sufficient detail “to indicate fully the development’s ultimate operation and
6 appearance.”¹ Record 267, 273.

7 The city responds that CBMC 17.92.010 allows the city to review an
8 application for a building permit for compliance with the standards in CBMC
9 17.40.030. CBMC 17.92.010(A)(1) requires petitioner to obtain a development
10 permit for the dwelling, and CBMC 17.92.010(C)(1) requires the city to
11 determine whether “the work described in an application for a development
12 permit and the plans, specifications, and other data filed with the application
13 *conform to the requirements of this title*, and any conditions imposed by a
14 reviewing authority.” (Emphasis added.) As the city’s argument goes, because
15 CBMC 17.40.030(A) is part of CBMC title 17, the city may review whether the
16 entire Subdivision conforms to all of the PD standards in CBMC chapter 17.40
17 in considering whether to approve petitioner’s building permit application.

¹ CBMC 17.40.040(C)(1) requires an applicant for a PD permit to file a final plat that “shall conform in all major respects with the approved” tentative PD plan. CBMC 16.04.210(A) requires the city to approve a final plat for a subdivision if the final plat “conforms to the tentative plan and applicable conditions have been met.”

1 There are two problems with the city's response. First, the CBMC
2 provisions on which the city relies in its brief are not cited or relied on in the city
3 council's decision. We will not consider arguments that are raised for the first
4 time in the response brief.

5 Second, and more importantly, the city's response fails to give any effect
6 to the three prior city decisions that concluded that CBMC 17.40.030 was met:
7 the 2015 decision approving the tentative PD plan and the 2016 decisions
8 approving the final PD plan and the final plat. The city concedes that petitioner's
9 building permit application complies with the final plat. Response Brief 15.

10 In *Safeway, Inc. v. City of North Bend*, 47 Or LUBA 489 (2004), we
11 reversed the city's denial of an application for parking lot improvements that
12 were intended to implement a previous site plan approval for a gas station and
13 associated parking. The city council denied the parking lot improvement
14 application after agreeing with the intervenor that the city had miscalculated the
15 lot area in the previous site plan review and, as a result, miscalculated the required
16 number of parking spaces to be constructed. We concluded that the city's attempt
17 to correct that miscalculation by denying the subsequent application for
18 construction of the improvements was "nothing short of a collateral attack on the
19 correctness of the [prior] decision." *Safeway*, 47 Or LUBA at 501. Similarly,
20 here, the city's attempt to correct what it has essentially concluded may have been
21 a mistake in the final PD plan and the final plat is nothing short of a collateral
22 attack on the correctness of those decisions.

1 The first and third assignments of error are sustained, in part.²

2 **FOURTH ASSIGNMENT OF ERROR**

3 The maximum height for structures with pitched roofs in the R2 zone is 28
4 feet. CBMC 17.14.040(E). The city council found that the building permit
5 application failed to satisfy CBMC 17.14.040(E) because a turret included on the
6 building plans exceeds 28 feet in height. CBMC 17.90.080 excepts from the 28-
7 foot height limit “[p]rojections such as chimneys, spires, domes, elevator shaft
8 housings, towers, wind generators, aerials, flagpoles and other similar objects not
9 used for human occupancy.” Petitioner argued below that the turret is such a
10 projection. In the fourth assignment of error, petitioner argues that the city
11 council’s decision is not supported by substantial evidence in the record. As
12 petitioner explains, the original building plans included a turret measuring
13 approximately 10 feet by six feet, with windows on all sides, that was accessed
14 via a staircase. After the building official reviewed the plans and concluded that
15 the turret could be used for human occupancy and exceeded the 28-foot height
16 limit, petitioner submitted revised plans that removed the staircase and instead
17 showed a hatch access.

18 The city council interpreted CBMC 17.90.080 as follows:

19 “The City Council finds that the turret is not of ornamental or

² A portion of the second subassignment of error under petitioner’s first assignment of error contains arguments similar to those resolved in our discussion of the second assignment of error.

1 utilitarian character, containing windows and although not
2 providing direct access, accessible through ladder access, which
3 could possibly be used as an observation deck, not in-keeping with
4 the intent of the CBMC. *The City Council specifically interprets the*
5 *list of uses allowed to exceed the height limit to involve decorative*
6 *or functional projections, but not ones that allow persons to spend*
7 *extended periods of time in them. [Petitioner] asserts that the turret*
8 *would be ‘more in the nature of a storage area,’ but a storage area,*
9 *such as an attic or a loft, would also allow persons to spend*
10 *extended periods of time in it. Each of the examples in the list in*
11 *CMBC 17.90.080 would not allow a person to spend an extended*
12 *period of time in it. Accordingly, the Council concludes that the*
13 *turret as proposed does not meet the terms of the exception in*
14 *CBMC 17.90.080.” Record 45 (emphasis added).*

15 Based on that interpretation, the city council concluded that the proposed turret
16 is not a “projection” that is exempt from the 28-foot height limit because it is a
17 space that may be accessed and used for extended periods of time for human
18 occupancy, and it is therefore not similar to “chimneys, spires, domes, elevator
19 shaft housings, towers, wind generators, aerials, [and] flagpoles.” CBMC
20 17.90.080.

21 Petitioner does not challenge that interpretation. Rather, petitioner’s
22 argument focuses on the lack of evidence in the record that the space could be
23 accessed via a ladder. While the evidence of ladder access may be sparse, the city
24 council did not rely on evidence that the turret could be accessed via a ladder to
25 conclude that CBMC 17.90.080 does not exempt the turret from the height limit.
26 The city council relied on its interpretation of CBMC 17.90.080 as not extending
27 to features that can be occupied and used by humans for extended periods of
28 time—regardless of how they are accessed—to conclude that the turret is not a

1 projection entitled to exemption from the height limit. Absent any challenge to
2 that interpretation, petitioner's arguments do not provide a basis for reversal or
3 remand of the decision.

4 The fourth assignment of error is denied.

5 **SECOND ASSIGNMENT OF ERROR**

6 In the second assignment of error, petitioner argues that the city's decision
7 adopted a moratorium on development in the Subdivision without complying
8 with the procedures in ORS 197.520(1) and without demonstrating a need for the
9 moratorium, as required by ORS 197.520(3).³ Petitioner's argument is based on
10 the following city council finding:

11 "Turning to the Common Outdoor Living Area, the City Council
12 finds that, although the [PD] Chapter 17.40 does not define
13 Common Outdoor Living Area, the intent is not to have driveways
14 as part of the Common Outdoor Living Area. The Council finds that
15 at least 7,500 square-feet of the 25,000 SF [Subdivision] must be
16 provided as common shared open space. If the driveway easements
17 are removed from the calculations provided in Exhibits C-6-8, the
18 [Subdivision] has provided only 5,138 SF of common shared open
19 space.

20 "*Until the Home Owners Association can provide the 2,362*
21 *additional square-feet of common shared open space or each owner*
22 *provides 591 SF of common shared open space, through an*
23 *easement benefiting all owners of the [Subdivision], the City will not*
24 *approve a building permit for any properties of the [Subdivision]."*
25 Record 45 (emphasis added).

³ The second subassignment of error under petitioner's first assignment of error includes a similar argument.

1 The city responds, and we agree, that the city’s decision is not a moratorium on
2 development. We have explained that “denial of [an] application for a permit
3 because the city concluded the application was not consistent with the [local
4 code] does not come within the definition of a moratorium, and is allowed under
5 ORS 197.524(2).” *GPA 1, LLC v. City of Corvallis*, 73 Or LUBA 339, 349
6 (2016). We conclude above that the city properly denied the building permit
7 application because the turret failed to satisfy the height limitation in CBMC
8 17.14.040(E). That is a permissible basis for denial. However, we emphasize that,
9 as explained in our resolution of the first and third assignments of error, the city
10 has no authority to apply the PD standards to an application for a building permit
11 for a lot in the Subdivision, and it may not deny a building permit application that
12 otherwise complies with the applicable building permit standards for failure of
13 the Subdivision or an individual lot in the Subdivision to provide common open
14 space.

15 The second assignment of error is denied.

16 The city’s decision is affirmed.