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

WES JOHNS,)
)
Petitioner,)
) LUBA No. 97-235
vs.)
) FINAL OPINION
CITY OF LINCOLN CITY,) AND ORDER
)
Respondent.)

Appeal from City of Lincoln City.

Gary G. Linkous, Welches, filed the petition for review and argued on behalf of petitioner.

Christopher P. Thomas, Portland, filed the response brief and argued on behalf of respondent. With him on the brief was Moskowitz & Thomas.

HANNA, Board Member, participated in the decision.

AFFIRMED 07/02/98

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

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the city's denial of his application
4 to site a single family dwelling on an oceanside bluff
5 protected by an Environmental Overlay Zone (EQ zone).

6 **FACTS**

7 This is the second time this matter has been before us.
8 Johns v. Lincoln City, ___ Or LUBA ___ (LUBA Nos. 96-082 and
9 96-083, November 18, 1996) (Johns I), rev'd 146 Or App 594,
10 933 P2d 978 (1997) (Johns II).¹ The focus of this appeal is a
11 procedural matter involving the scope of two local notices of
12 appeal. In remanding our first decision, the Court of Appeals
13 described the procedural history of the case:

14 "Although the proposed location of the dwelling is
15 in a residential zone, the area is also part of an
16 environmental quality overlay zone. As such, the
17 city's zoning ordinance makes the dwelling proposal
18 reviewable under aesthetic resource and natural
19 hazards standards, instead of being permitted
20 outright pursuant to the residential zoning. The
21 city planning director approved petitioner's
22 application. Two separate groups of opponents, the
23 Morfitts and the Darnells, appealed the director's
24 decision to the planning commission pursuant to
25 section 9.040 of the city's zoning ordinance. * * *

26 "Although the two notices of appeal differed in the
27 amount and content of their specificity, * * * the
28 city attorney considered that both sufficed to raise
29 issues that could be considered on appeal. * * * The
30 city attorney concluded his written advice by
31 preparing two detailed questions of his own that he

¹The parties stipulate that all issues raised in Johns I that were not decided by LUBA or the Court of Appeals, are preserved for review at the Court of Appeals.

1 considered to be before the commission, based on his
2 interpretation of the respective notices.

3 "The commission proceeded to apply the two
4 provisions and to consider the two questions that
5 the city attorney had prepared. On the basis of one
6 or both of the provisions and questions, the
7 commission reversed the director's decision and
8 denied petitioner's application. Petitioner
9 appealed to the city council, which affirmed the
10 planning commission. * * *

11 "Petitioner then appealed to LUBA, contending, inter
12 alia, that the notices of appeal failed to raise the
13 issues on which the denial of his application was
14 based and failed to meet the specificity
15 requirements of section 9.040."² Johns II, 146 Or
16 App at 596-97.

17 In our opinion, we held in relevant part that ZO 9.040(1)
18 does not prohibit an appellant from raising issues beyond
19 those indicated in the local notice of appeal. The Court of
20 Appeals disagreed, interpreting ZO 9.040(1) as limiting the
21 issues an appellant can raise on appeal to those "reasonably
22 discernible from the notice itself." 146 Or App at 603
23 (emphasis in original). The court noted that ZO 9.040 does
24 not require that the notice of appeal contain voluminous

²Zoning Ordinance (ZO) 9.040(1) states, in relevant part:

"A decision of the Planning Department on the issuance of an administrative permit or discretionary action concerning a land use matter may be appealed to the Planning Commission by an affected party by filing an appeal with the Planning and Community Development Director within ten (10) days of the mailing of the decision. The Notice of Appeal that is filed with the City shall indicate the interpretation that is being appealed and the basis for the appeal. The notice shall indicate in what respects the decision being appealed is a discretionary decision involving a land use matter. The matter at issue will be a determination of the appropriateness of the interpretation of the requirements of the Ordinance. * * *"
(Emphasis added.)

1 detail or that "interstices in their meaning cannot be filled
2 by common sense readings and reasonable extrapolations from
3 what they say." Id. at 602. However, the court concluded
4 that in this case the city attorney essentially rewrote in
5 toto the two notices. The court commented:

6 "The fact that the city attorney rewrote the notices
7 does not mean, in itself, that a sufficiently clear
8 meaning could not be found in them in the absence of
9 his clarifying exercise. It does mean, however,
10 that the questions decided in the local appeals did
11 not come from the notices and that the city did not
12 ascertain whether any cognizable questions, or what
13 questions, could be ascribed to the notices in the
14 absence of the city attorney's elaborations." Id.
15 at 603 (emphasis in original).

16 The court concluded that

17 "[a] remand to the city is necessary to determine
18 whether either or both of the notices of appeal meet
19 the specificity requirements of the ordinance as we
20 interpret it and to decide only those questions that
21 it may conclude have been adequately raised." Id.

22 In a footnote, the court commented that the city's
23 determination on remand

24 "must be based on the documents that have already
25 been filed. We note that there is a much greater
26 possibility that the Darnells have specified a
27 reviewable issue than that the Morfitts have.
28 However, any decision of that question by LUBA or us
29 must, of course, await a later day." Id. at 603, n2
30 (emphasis in original).

31 On remand, the planning commission reviewed the Morfitt
32 and Darnell notices of intent to appeal, and concluded that
33 the bases the city had cited in its original decision to deny
34 petitioner's application were not reasonably discernible on
35 the face of either notice. The planning commission then

1 interpreted ZO 9.040(1) to allow the city, where the bases for
2 appeal were not clear on the face of the notice, to review the
3 issues raised in the record to determine whether, in light of
4 the record, it is reasonably apparent what criteria and issues
5 the notice is intending to raise. As an alternative, the
6 planning commission interpreted ZO 9.040(1) to allow the city
7 to raise any issue it wanted to at the appeal hearing, as long
8 as petitioner had notice of those issues.³ The planning
9 commission then entered an order finding that, under its
10 interpretative methodology, the Morfitt notice and the Darnell
11 notice raised the issues under ZO 3.110(4)(c) and ZO
12 3.110(4)(e), respectively, on which the city based its
13 original decision. The planning commission adopted its
14 findings, conclusion and order in the Darnell appeal without
15 any changes, and adopted the findings, conclusion and order in
16 the Morfitt appeal with one minor change, with the result
17 that, under either appeal, the planning director's decision
18 was reversed and petitioner's application denied.

³The planning commission's alternative resolution was based on a footnote in the Court of Appeals' opinion that stated:

"We emphasize that there is no question in this case about the scope of the issues that the reviewing bodies may consider if a hearing is initiated other than by a party's notice. We imply no answer to that question. We also imply no view as to whether the reviewing body may raise questions of its own, beyond those specified in the notice. The only question we consider in this part of our discussion is what a party may raise at the hearing under the circumstances and the ordinance provision in question." 146 Or App at 602, n1 (emphasis in original).

1 Petitioner appealed the planning commission order to the
2 city council. The city council reviewed the record before the
3 planning commission, which itself had before it only the
4 record of the original proceedings. The city council
5 concluded, first, that both the Morfitt and Darnell notices,
6 read on their faces, reasonably raised the respective bases
7 for appeal under ZO 3.110(4)(c) and ZO 3.110(4)(e). As an
8 alternative, the city adopted the planning commission's
9 interpretation of ZO 9.040(1) and adopted, with modifications,
10 the planning commission's interpretative methodology allowing
11 the city to consider the notices in light of issues raised in
12 the record.⁴ Accordingly, the city made findings and
13 conclusions, and adopted the planning commission's order, with
14 modifications, thus denying petitioner's appeal.

15 This appeal followed.

16 **FIRST ASSIGNMENT OF ERROR**

17 Petitioner argues that the city impermissibly
18 reinterpreted ZO 9.040 after the Court of Appeals had already
19 made an interpretation, and applied its reinterpretation in
20 making the challenged decision. Petitioner contends that the
21 challenged decision thus improperly construes the applicable
22 law, and is subject to reversal or remand under ORS
23 197.835(9)(a)(D).

⁴The city also agreed with the planning commission's alternative holding that ZO 9.040(1) permitted the city to raise issues on its own during appeal hearings, as long as petitioner had notice of what issues the city would raise.

1 Petitioner's first assignment of error is nominally
2 directed at the city council's alternative application of its
3 interpretative methodology, allowing it to consult the record
4 when a notice of appeal does not clearly state a basis for
5 appeal. However, the bulk of petitioner's argument is
6 directed at the city council's primary conclusion that both
7 the Morfitt and Darnell notices reasonably raise, on their
8 faces, the issues under which the city decided those appeals.
9 Petitioner argues strenuously that the bases for appeal on
10 which the city denied his application are not "reasonably
11 discernible" on the face of either notice. Accordingly, we
12 address petitioner's contention that neither notice adequately
13 raises the issues under ZO 3.110(4)(c) and (e) under which the
14 city denied petitioner's appeal.

15 The challenged decision describes, first, the Darnell
16 notice and appeal:

17 "8. On June 23, 1995, Louis and Colleen Darnell
18 filed a notice of appeal to the Planning
19 Commission of the Planning Director's decision.
20 The substance of the Darnell notice of appeal
21 was as follows (bold face material is from the
22 Planning Department's printed Notice of Appeal
23 form):

24 **"The interpretation that is being appealed and**
25 **the basis for the appeal.**

26 "1. Environmental assessment does not
27 [protect] adjoining property and does not
28 relate to the unbuildable nature of the
29 land.

1 ''Indicate in what respects the decision being
2 appealed is a discretionary decision involving
3 a land use matter.

4 ''1. The Planning Director has interpreted
5 the finding of EA & this is only an
6 interpretation.''' Record 51.

7 The city concluded with respect to the Darnell notice:

8 **"Council Findings and Conclusions.** Based on its own
9 review of the notices of appeal, the Council
10 believes it was reasonably clear that the Darnell
11 notice of appeal intended to assert that the
12 environmental assessment did not provide sufficient
13 mitigation measures to protect adjoining properties
14 from the proposed project--'Environmental assessment
15 does not protected [sic] adjoining property * * *.'
16 This was particularly true given that the proceeding
17 in which the notice of appeal was filed was an
18 environmental assessment review proceeding and that
19 an environmental assessment is supposed to explain
20 the methods that will be employed to minimize the
21 natural hazard-related losses associated with a
22 project and to explain the environmental
23 consequences the project and the protective measures
24 will have on surrounding properties. * * * " Record
25 78-79 (emphasis added).

26 Thus, the city found the Darnells' notice reasonably
27 clear on its face and described the scope of the notice as
28 invoking concerns about compliance with the environmental
29 assessment standards at ZO 3.110(4)(e)(2), the standards under
30 which the city ultimately denied petitioner's application in
31 the Darnell appeal.⁵

⁵ZO 3.110(4)(e) provides:

"(1) Development of all types, except rip-rap beach front protective structures and natural means of beach protection, in hazard areas identified on the Comprehensive Plan Map shall not occur until a review is completed by a qualified engineer or qualified engineering geologist. The review shall be prepared at

1 Petitioner disagrees, arguing that the Darnell notice
2 mentions only a concern that the environmental assessment did
3 not protect adjoining property and the unbuildable nature of
4 petitioner's lot, and that it is not "reasonably discernible"
5 from the Darnell notice that it invokes concerns about
6 compliance with the environmental assessment standards at ZO
7 3.110(4)(e)(2). Petitioner contends that the Darnell notice
8 does not mention the specific issues under which the city
9 ultimately decided that petitioner's application did not
10 comply with ZO 3.110(4)(e)(2): "issues of erosion,
11 disturbance of the bluff, trenching, filling, compacting and
12 drilling holes, and vibration from heavy equipment." Petition
13 for Review at 9.

the developer's expense. All costs incurred by the City to review the development shall be the responsibility of the applicant. The review shall include but is not limited to erosion control, vegetation removal, slope stabilization, and other items necessary to satisfy the requirements of the Comprehensive Plan.

"(2) The review completed shall be submitted to the City as a written report and shall consider as a minimum, the following:

"(a) An explanation of the degree the hazard affects the property use in question.

"(b) An explanation of the method(s) to be employed to minimize the losses associated with the hazard.

"(c) An explanation of the environmental consequences the development and the protective measure will have on the surrounding properties.

"(3) If structures to protect shore lands, beaches and dunes, or flood areas are proposed, Comprehensive Plan Shoreland Policy 4, 22, and 23 shall also apply."

1 The Court of Appeals remanded the decision to the city to
2 determine whether "either or both of the notices of appeal
3 meet the specificity requirements of the ordinance as we
4 interpret it and to decide only those questions that it may
5 conclude have been adequately raised." 146 Or App at 603. In
6 order to meet the specificity requirement that the court found
7 in ZO 9.040(1), "[t]he issues must be reasonably discernible
8 from the notice itself." Id. (emphasis in original). The
9 court emphasized that there is a "much greater possibility
10 that the Darnells have specified a reviewable issue than that
11 the Morfitts have." Id. at 603, n2 (emphasis in original).
12 We review the city's conclusion that the Darnell notice is
13 reasonably construed to raise issues of compliance with the
14 environmental assessment standards at ZO 3.110(4)(e)(2) in
15 light of the scope and terms of remand indicated by the Court
16 of Appeals.

17 We agree with the city that where the Darnells' notice of
18 appeal states "[e]nvironmental assessment does not [protect]
19 adjoining property and does not relate to the unbuildable
20 nature of the land" it clearly raises the issue of the
21 adequacy of the environmental assessment with respect to
22 mitigation of the impact of the proposal on adjoining
23 properties, as required by ZO 3.110(4)(e)(2). We disagree
24 with petitioner that ZO 9.040(1) or the court's opinion
25 requires the Darnells to go beyond invoking the issue of
26 compliance with ZO 3.110(4)(e)(2) and describe the precise

1 ways in which the environmental assessment is inadequate to
2 protect adjoining properties. The Darnells' notice
3 sufficiently apprised petitioner that the Darnells were
4 concerned that the environmental assessment was inadequate and
5 that the development and its protective measures did not
6 adequately protect adjoining properties, as required by ZO
7 3.110(4)(e)(2).

8 We conclude that the city has fulfilled the mandate
9 required by the Court of Appeals, and accordingly affirm the
10 city's decision denying petitioner's appeal insofar as it
11 involves the Darnell appeal and issues raised therein.

12 We need not reach petitioner's arguments directed at the
13 adequacy of the Morfitt notice and the city's denial of
14 petitioner's appeal based on the Morfitt appeal and the
15 criteria at ZO 3.110(4)(c). The Darnell and Morfitt appeals
16 were separate appeals, resulting in separate planning
17 commission decisions that separately, and independently,
18 resulted in denial of petitioner's application. Petitioner
19 appealed the Darnell and Morfitt orders separately to the city
20 council, where they were consolidated for the council's
21 review, and there affirmed on separate and independent
22 grounds. Petitioner is required to establish compliance with
23 each criteria under ZO 3.110. On review of a local
24 government's denial of a development permit, the local
25 government is required to establish only one basis for denying
26 petitioner's application. R/C Pilots Assoc. v. Marion County,

1 ___ Or LUBA ___ (LUBA No. 96-250, 96-256, October 2, 1997),
2 citing Baughman v. Marion County, 17 Or LUBA 632, 636 (1989).
3 The city has established in the Darnell appeal that petitioner
4 failed to comply with ZO 3.110(4)(e)(2)(c). Accordingly,
5 there is no reason to review the city's conclusions regarding
6 the Morfitt appeal and compliance with ZO 3.110(4)(c).

7 Further, we need not reach petitioner's nominal argument,
8 directed at the city council's alternative holding under its
9 interpretative methodology, allowing it to consider the notice
10 of appeal in light of the issues raised in the record.
11 Because we affirm, above, the city's primary reason for
12 denying petitioner's application, any error the city committed
13 in its alternative holding does not provide a basis to reverse
14 or remand the challenged decision.

15 The first assignment of error is denied.

16 **SECOND ASSIGNMENT OF ERROR**

17 Petitioner argues that the city committed a procedural
18 error and made a decision not supported by substantial
19 evidence, when it made the challenged decision without having
20 a copy of the transcript of the planning commission hearing as
21 required by ZO 9.040(4).⁶

⁶ZO 9.040(4) states:

"(4) Review on the Record.

"(a) If an appeal is confined to the record of the proceeding, the record shall include:

1 The parties agree that the challenged decision is a
2 limited land use decision. We are required to reverse or
3 remand a limited land use decision where, inter alia, the
4 decision is not supported by substantial evidence in the
5 record, or where the local government commits a procedural
6 error that prejudices the substantial rights of the
7 petitioner. ORS 197.828(2)(a) and (d).

8 With respect to the city's alleged procedural error,
9 petitioner argues that the failure to obtain a transcript of
10 the planning commission hearing prejudiced his substantial
11 rights because, without that transcript, he could not make

"(i) All exhibits, materials, pleadings, memoranda, stipulations and motions submitted by [a] party and received or considered in reaching the decision under review.

"(ii) The final order and findings of fact adopted in support of the decision being appealed.

"(iii) The request for an appeal filed by the appellant.

"(iv) The minutes of the public hearing.

"(v) The transcript of the hearing below.

"(b) After receipt of transcript and all fees required therefor, a hearing shall be set and public notice shall be provided indicating the date, time and place of the review and the issues that are the subject of the review pursuant to Section 9.020(2)(b) of the Zoning Ordinance.

"(c) The reviewing body shall make its decision based upon the record after first granting the right of argument, but not the introduction of additional evidence, to parties to the hearing.

"(d) In considering the appeal, the reviewing body need only consider those matters specifically raised by the appellant.

"(e) The appellant shall bear the burden of proof."

1 arguments to the city council that he wanted to make.⁷ The
2 transcript petitioner refers to is apparently the transcript
3 of the oral argument conducted before the planning commission
4 on remand. We do not understand petitioner to contend that
5 the record before the city council is missing the transcript
6 of the original evidentiary hearing before the planning
7 commission in 1995.⁸

8 Although petitioner describes the arguments he wanted to
9 make to the city council, he does not explain why the absence
10 of the transcript precluded his making those arguments to the
11 city council, and thus prejudiced his substantial rights. The
12 gist of those arguments appear to be that the Darnells and
13 Morfitts could have, but did not, specify various concerns
14 regarding the proposed development in their notices of appeal.

⁷Petitioner describes the arguments he would have made to the council, had it had the transcript of the planning commission hearing before it:

"Petitioner wanted to point out that he had argued that the common scheme of the neighborhood would indicate that if the Morfitts were concerned about the wood retaining wall or cantilevered decks they would have included it in their notice of appeal. Also, if the Darnells were worried about vibrations, or penetration of the bluff with a retaining wall, or the use of concrete pilings for a foundation, they would have indicated this in their notice of appeal. Petitioner points out that not only were many of the issues listed in the Planning Director's Notice of Approval, the photographs of the surrounding community used in the hearing below indicate that retaining walls and construction activities similar to petitioner's application were carried on in the neighborhood, and were part of the common scheme. He sees no reason why the Darnells or Morfitts, if they were objecting to his project, could not have specified these items if they were opposed to them." Petition for Review 12 (citations to record omitted).

⁸The city responds to the second assignment of error by arguing that the city impliedly interpreted ZO 9.040(2) as not requiring the transcript of a planning commission hearing when that hearing is not an evidentiary hearing. Our disposition of the second assignment of error makes it unnecessary to reach the city's argument.

1 What is missing is any explanation why the absent transcript
2 of oral argument before the planning commission precluded
3 petitioner from making those arguments.

4 Although it is not at all clear, it is possible that
5 petitioner is arguing that the transcript would show that
6 during oral argument before the planning commission on remand
7 he offered photographs of the neighborhood into the record,
8 apparently to bolster his argument that retaining walls and
9 other features objected to in his development were common in
10 the neighborhood, and hence features that the Darnells and
11 Morfitts knew about and could have specifically objected to in
12 their notices. The planning commission rejected those
13 photographs, apparently because its review was, pursuant to
14 the Court of Appeals' mandate, on the record of the original
15 proceeding. Thus, petitioner may be contending that the
16 absence of the transcript prevented his making arguments based
17 on the rejected photographs.

18 To the extent we understand petitioner's argument, we
19 disagree that it demonstrates any prejudice to petitioner's
20 substantial rights and thus a basis to reverse or remand the
21 challenged decision. Petitioner appealed the issue of the
22 planning commission's rejection of his photographs to the city
23 council, the city council affirmed the planning commission on
24 that point, and petitioner has not appealed that issue to us.
25 Petitioner has not identified any reason why the absence of
26 the transcript or the photographs for that matter precluded

1 him from making any argument to the city council. We
2 therefore reject petitioner's argument based on allegations of
3 procedural error.

4 Petitioner's substantial evidence challenge under ORS
5 197.828(2)(a) is even more obscure. Petitioner states that,
6 without the transcript, "it is impossible for the City Council
7 to have made a decision based on substantial evidence in the
8 whole record." Petition for Review 12. Petitioner goes on to
9 argue that, given the "evidence" cited in the arguments
10 petitioner wanted to make,⁹ and the planning commission's
11 finding that neither notice of appeal is clear on its face,
12 "the City Council reviewing the record from below could not
13 have substantial evidence to support the finding that the
14 notices of appeal raised" the issues the council found that
15 they did. Petition for Review 13.

16 We disagree with petitioner's first contention. The
17 planning commission hearing on remand was on the record of the
18 original proceeding and thus a transcript of that hearing
19 could not include any evidence, only argument. It follows
20 that the absence of that transcript could have no possible
21 bearing on whether the record contains substantial evidence
22 supporting the city council's decision.

23 To the extent we understand petitioner's second
24 contention, we disagree that the record lacks substantial

⁹Petitioner does not explain what "evidence" is contained in the arguments he recites on page 12 of the Petition for Review.

1 evidence supporting the city's determination that the Darnell
2 notice of appeal raises on its face the issues the council
3 found that it did. It is not even clear to us that the city's
4 determination presents a substantial evidence question. As
5 the Court of Appeals has framed the scope of remand in this
6 case, what issues are raised on the face of the Darnell notice
7 of appeal is more aptly characterized as an interpretative
8 exercise or conclusion of law rather than a finding of fact.

9 To the extent the city's determination is a finding of
10 fact that must be supported by substantial evidence in the
11 record, petitioner cites no evidence in the record that
12 undermines the city's conclusion. The planning commission's
13 conclusion that both notices are not clear on their faces is
14 not "evidence" of any sort, but merely a conclusion that the
15 city council could, and did, disagree with. Even if
16 petitioner had cited countervailing evidence in the record,
17 the "existence of evidence in the record supporting a
18 different decision shall not be grounds for reversal or
19 remand if there is evidence in the record to support the final
20 decision." ORS 197.828(2)(a). We conclude that petitioner
21 has not established with respect to the Darnell notice of
22 appeal that the record lacks substantial evidence supporting
23 the challenged decision.¹⁰

¹⁰As noted in our discussion of the first assignment of error, the city need only establish one adequate basis, supported by substantial evidence in the record, in order to deny petitioner's application. Our conclusion that there is substantial evidence in the record supporting the city's decision regarding the Darnell notice of appeal makes it unnecessary to

1 The second assignment of error is denied.

2 The city's decision is affirmed.

address petitioner's arguments with respect to the city's conclusions about the Morfitt notice of appeal.