

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

Aug 30 12 59 PM '84

3 WILLIAM B. MORSE and)
JEAN W. MORSE,)
4)
Petitioners,)
5)
vs.)
6)
CLATSOP COUNTY,)
7)
Respondent.)

LUBA No. 84-026

FINAL OPINION
AND ORDER

8 Appeal from Clatsop County.

9 Richard P. Benner, Portland, filed the Petition for Review
10 and a reply brief, and argued the cause on behalf of
Petitioners.

11 Lawrence R. Derr, Portland, filed a response brief and
12 argued the cause on behalf of Applicant Jeanette Goodrum. with
him on the brief were Weiss, DesCamp, Botteri & Huber.

13 No appearance by Clatsop County.

14 KRESSEL, Referee; BAGG, Chief Referee; DUBAY, Referee;
15 participated in the decision.

16 AFFIRMED 08/30/84

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

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1 Opinion by Kressel.

2 NATURE OF DECISION

3 Petitioners appeal issuance of a development permit
4 allowing construction of a seawall to protect a neighboring
5 residence.

6 FACTS

7 The residence in question is owned by Respondent-Applicant
8 Jeanette Goodrum (hereinafter respondent). It occupies a 30
9 foot high bank overlooking Arcadia Beach, between Cannon Beach
10 and Arch Cape. Arcadia Beach State Park is 150 feet to the
11 north. Petitioners' residence is between respondent's
12 residence and the state park.

13 In February, 1982, an area about 10 feet in width near
14 respondent's north property line slid down to the beach.
15 Subsequently, the material was washed away by wave action. The
16 incident prompted respondent to actively explore methods of
17 bank stabilization. A curtain drain was installed at the top
18 of the bank to reduce the danger of sloughing, but a consulting
19 geologist advised respondent the drain alone would not be
20 sufficient to stabilize the bank.

21 In April, 1982, respondent applied to the State Parks
22 Division for an ocean shores permit to install a 100 foot long
23 riprap revetment at beach level. The revetment would have
24 extended west of the beach zone line onto the public beach.¹
25 The application was denied on August 27, 1982.

26 One year later, respondent applied to the Clatsop County

1 Planning Director for a development permit for construction of
2 a 130 foot long, beach level seawall, east of the beach zone
3 line. The wall was to be constructed of treated lumber planks
4 placed horizontally behind wooden pilings. Portions of the
5 seawall and supporting pilings would be exposed above the sand
6 for most of the length of the beachfront structure.

7 The permit was approved on July 12, 1983. Petitioners
8 appealed the decision to the county planning commission, which
9 conducted a hearing on September 13, 1983. That hearing ended
10 in a tie vote, after which respondent withdrew the permit
11 request.

12 In January, 1984, respondent resubmitted the permit
13 application for the seawall. The new application included a
14 bulkhead of treated lumber, to be installed just below
15 respondent's residence, near the top of the bank.²

16 Planning commission approval for both structures was
17 granted on January 27, 1984. Petitioners again appealed the
18 decision. A hearing by the Clatsop County Board of
19 Commissioners was held on February 29, 1984. On March 14,
20 1984, the county commission entered a final order affirming the
21 planning commission's action and approving the development
22 permit. This appeal followed.

23 FIRST ASSIGNMENT OF ERROR

24 Respondent's proposal to construct shorefront protective
25 structures required evaluation under the following criteria,
26 among others, in the Clatsop County Comprehensive Plan:

- 1 "a. There is a critical need to protect a structure
that is threatened by erosion hazard;
- 2 "b. Impacts on adjacent property are minimized;
- 3 "c. Visual impacts are minimized;
- 4 "d. Access to the beach is maintained;
- 5 "e. Long-term or recurring costs to the public are
6 avoided; and
- 7 "f. Riparian vegetation is preserved as much as
8 possible." Clatsop County Comprehensive Plan
Goal 18, (as amended August 9, 1983).³

9 During the permit hearings, the parties introduced
10 conflicting evidence with respect to the first criterion listed
11 above (erosion hazard). The county commission ultimately
12 decided the criterion was satisfied:

13 "Although conflicting evidence was presented, it is
14 the conclusion of the Board that the evidence of
15 applicant was more persuasive and proved that there is
16 a critical need for the seawall and bulkhead to
17 protect the applicant's residence. Between February
1982 and October 1983, erosion at the base of the
18 slope and sloughing at the top scarp have continued
19 until, at this time, the residence is threatened."
Final Order, Record at 9.

18 Petitioners assign error to this determination on grounds
19 it is unsupported by substantial evidence in the whole record.
20 ORS 197.835(8) (a). They make two related arguments. First,
21 they claim the county's order fails to adequately consider the
22 conflicting evidence and explain why reliance was placed on the
23 evidence of an erosion hazard offered by respondent. They
24 interpret the reference to "the whole record" in ORS
25 197.835(8) (a) (C) to require such explanatory findings. Second,
26 they contend the conflicting evidence in the record so detracts

1 from the evidence favorable to respondent's position that the
2 county's acceptance of that position must be considered
3 unreasonable. Accordingly, the decision is allegedly not based
4 on substantial evidence in "the whole record."

5 As the quoted portion of the final order indicates, the
6 county found there was a pattern of erosion which justified
7 measures to protect respondent's residence. Petitioners
8 concede the record contains evidence supporting that ultimate
9 determination and the related findings of fact made by the
10 county. The evidence includes engineering surveys of the
11 property conducted in February, 1982 and October, 1983. The
12 surveys, as interpreted after a site inspection by an
13 engineering geologist, showed marked sloughing of the upper
14 bank and an average of 3 feet of horizontal erosion at the toe
15 of the bank over the 20 month period. The trend reflected in
16 the surveys and site views is consistent with other evidence as
17 interpreted by respondent's expert witness. This evidence
18 consists of aerial photographs taken over a 26 year period.
19 Respondent's expert interpreted the photographs and survey
20 evidence in the record to indicate that between 1967 and 1983,
21 the total average erosion at the site was 12 feet.⁴

22 The scope of our review of the county's determination is
23 not de novo; we may not substitute our judgment of the facts
24 for that of the local decisionmakers. Rather, our review is
25 limited to whether the decision is supported by substantial
26 evidence in the whole record. ORS 197.835(8)(a)(C); Valley and

1 Siletz Railroad v. Laudahl, 56 Or App 487, 642 P2d 337 (1982),
2 pet. for rev. disp., 293 Or 340 (1984). We are bound by any
3 finding of fact supported by substantial evidence in the whole
4 record. ORS 197.830(11). Substantial evidence consists of
5 evidence a reasonable mind could accept as adequate to support
6 a conclusion. Bay v. State Board of Higher Education, 233 Or
7 601, 605, 378 P2d 558 (1974); Homebuilders Association of
8 Metropolitan Portland v. Metropolitan Service District, 54 Or
9 App 60, 62-63, 633 P2d 1320 (1981).

10 Although petitioners do not dispute that the record
11 contains the evidence of erosion described above, they
12 nonetheless urge us to remand the decision for explanatory
13 findings comparing that evidence with other evidence they claim
14 undermines the county's determination. Some of our prior
15 decisions indicate such findings are necessary where there is
16 conflicting, competent evidence on a material issue. See,
17 e.g., Stephens v. Clackamas County, 8 Or LUBA 172, 177 (1983);
18 Sane Orderly Development v. Douglas County, 2 Or LUBA 196, 206
19 (1981). We note these decisions rely heavily on federal
20 administrative law authorities, rather than on Oregon case law
21 construing the substantial evidence requirement. See,
22 Universal Camera Corp. v. NLRB, 340 US 474, 488 (1951); K.C.
23 Davis Administrative Law Treatise, 3d, §29.03 at 531 (1982).⁵

24 Respondent does not call on us to reconsider our prior
25 holdings that explanatory findings are required where a
26 substantial evidence issue of this sort is raised. Instead,

1 she concedes a comparative analysis of the evidence by the
2 county was warranted in this case. However, respondent
3 maintains the county's analysis in the final order is adequate
4 to withstand petitioners' challenge.

5 The pertinent findings read as follows:

6 "The appellants did not offer either survey or aerial
7 photography analysis to rebut this conclusion. Their
8 testimony was primarily based on erosion rates on
9 their own property, which were not quantified. The
10 opinion of Paul Komar regarding erosion rates was not
11 substantiated by reliable facts. To the extent that
12 the appellant's (sic) property may have experienced
13 less erosion than the Goodrum property, the difference
14 can be attributed to differences between the
15 properties, primarily in the lower elevation and less
16 steep slope from the beach on the Morse property."
17 Record at 7-8.

18 As a threshold matter, we have serious doubt that
19 explanatory findings are required in these circumstances. The
20 authorities we relied on in Stephens and Sane Orderly
21 Development, supra address themselves to the function performed
22 by the reviewing tribunal (here, LUBA), when it examines the
23 "whole record" in the context of a substantial evidence
24 challenge. Those authorities indicate the reviewing tribunal
25 should consider evidence which supports the agency's
26 determination and that which detracts from it before ruling on
27 the challenge. See e.g., Universal Camera Corp. v. NLRB,
28 supra. They do not indicate the agency (here, Clatsop County)
29 must adopt findings which reflect this balancing process. For
30 this reason alone have difficulty accepting petitioners' first
31 challenge.

1 If we assume, arguendo, that explanatory findings in this
2 case are required under ORS 197.835(8)(a)(C), we believe the
3 county's findings are sufficient. They clearly reflect
4 consideration of the evidence on the erosion question offered
5 by opponents of the permit. Moreover, they explain why that
6 evidence was not found persuasive. We do not believe more is
7 required by the statute or holdings such as Sane Orderly
8 Development v. Douglas County, supra.

9 We turn from the adequacy of the findings to petitioners'
10 related claim the county's reliance on the evidence of erosion
11 offered by respondent is unreasonable in light of the
12 conflicting evidence. Assuming we must consider the
13 conflicting evidence in determining whether the decision is
14 supported by substantial evidence in the whole record, ORS
15 197.835(8)(a)(C), we find the challenge unpersuasive.

16 As the final order indicates, the conflicting evidence was
17 based primarily on the extent of erosion observed at
18 petitioners' property, not respondent's property. This
19 evidence does not significantly detract from the site specific,
20 expert testimony and supporting documentation accompanying the
21 county's decision. Although the permit opponents also offered
22 some evidence of minimal erosion at respondent's property,
23 including expert testimony on the question, we cannot say this
24 evidence undermines the county's ultimate determination of
25 reasonableness. The reasonableness standard is considerably
26 more elastic than petitioners contend. Bay v. State Board of

1 Education, supra; Van Gordon v. Oregon State Board of Dental
2 Examiners, 63 Or App 561, 567, 666 P2d 276 (1983); Braidwood v.
3 City of Portland, 24 Or App 477, 480, 546 P2d 777 (1976). See
4 also, Whitaker v. Fair Dismissal Appeals Board, 25 Or App 569,
5 550 P2d 455 (1976) (pointing out that review of whole record
6 for substantial evidence, as described in Universal Camera
7 Corp. v. Labor Board, supra, does not authorize a reviewing
8 court to substitute its judgment for that of the agency as to
9 whether an examination of all the evidence justifies the
10 agency's action).⁶ Accordingly, we reject the challenge.

11 SECOND ASSIGNMENT OF ERROR

12 Petitioners next contend the county misconstrued Statewide
13 Goal 17 (Coastal Shorelands) in approving the development
14 permit.⁷ They direct our attention to Implementation
15 Requirement 6 of the goal, which reads as follows:

16 "Land-use management practices and non-structural
17 solutions to problems of erosion and flooding shall be
18 preferred to structural solutions. Where shown to be
19 necessary, water and erosion control structures, such
20 as jetties, bulkheads, seawalls, and similar
21 protective structures; and fill, whether located in
22 the waterways or on shorelands above ordinary high
23 water mark, shall be designed to minimize adverse
24 impacts on water currents, erosion and accretion
25 patterns."

26 Two arguments are made in connection with the above provision:

(1) the county misapplied the goal by failing to consider a
non-structural solution to the erosion problem suggested by
petitioners, i.e, relocation of respondent's residence further
away from the unstable portion of the bank and; (2) although

1 the county found other non-structural solutions (vegetation and
2 drainage) would not protect the bank and residence, the record
3 does not contain evidence supporting that finding.

4 With reference to the first argument, the following portion
5 of respondent's brief provides sufficient answer.

6 "Implementation requirement (6) of Goal 17 states that
7 land-use management practices and non-structural
8 solutions to problems of erosion shall be preferred to
9 structural solutions, but that when shown to be
10 necessary, structures such as seawalls are permitted
11 subject only to design considerations to minimize
12 adverse impacts. The goal refers to solving erosion
13 problems, not to ignoring the erosion and moving
14 endangered homes out of the way. When it is shown
15 that land-use management practices and non-structural
16 solutions cannot solve the erosion problem, then
17 structural solutions are permitted. The county would
18 have erroneously applied the law if it had engaged in
19 a consideration of the feasibility of moving the house
20 away from the bank." Brief of Respondent Jeanette
21 Goodrum at 11-12 (emphasis added).

22 With regard to the adequacy of vegetation and drainage as
23 alternatives to the approved structural solution, the county
24 found as follows:

25 "5. The applicant has installed a 4' deep curtain
26 drain west of her house to intercept
groundwater. This, as well as gutters are
collected and drained by pipe to the beach. The
1982 slide area was covered with netting and
replanted. These measures were installed prior
to the winter of 1982-83. Upper scarp sloughing
and toe erosion has continued as evidenced by the
1982 and 1983 surveys and visual observation of
exposed slopes. Vegetation and drainage will not
lessen the erosion sufficiently to protect the
applicant's house." Record at 8-9.

Notwithstanding petitioners' assertion to the contrary,
there is substantial evidence in the record to support this
finding. The evidence consists of photographs, expert

1 testimony interpreting surveys of the property and testimony by
2 respondent. The evidence reasonably supports the conclusion
3 that vegetation and drainage had not, and would not, control
4 the erosion problem at the site. City of Roseburg v. Roseburg
5 City Firefighters, Local No. 1489, 292 Or 266, 271, 639 P2d 90
6 (1981).

7 Based on the foregoing, the second assignment of error is
8 dismissed.

9 THIRD ASSIGNMENT OF ERROR

10 This assignment of error reiterates the claim discussed
11 immediately above. No further discussion is necessary. The
12 assignment of error is therefore dismissed.

13 The challenged land use decision is affirmed.

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FOOTNOTES

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The beach zone line separates public from private beach property on the Oregon Coast pursuant to ORS 390.605 et seq.

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Evidently the upper bulkhead was considered a future option when the original proposal was submitted to the county in 1983. Later, as a result of increased erosion at the toe of the slope and sloughing at the top, the upper bulkhead was considered a necessity by respondent and her consulting engineer. The county adopted this view in the final order. Record at 7.

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The criteria were adopted to implement Statewide Goals 17 (Coastal Shorelands) and 18 (Beaches and Dunes).

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Clatsop County's plan and implementing measures have yet to be acknowledged by LCDC for conformance with the statewide planning goals. Consequently, the permit in question is reviewable for conformance with both the state and local restrictions.

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The record also contains statements by another engineering geologist, Joseph Rolater, predicting markedly increased erosion at the site and eventual harm to the Goodrum residence if structural means of bank stabilization were not employed. Supplemental Record at 122-123.

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In Universal Camera Corp., supra, the U.S. Supreme Court considered a provision of the National Labor Relations Act which empowered the reviewing court to assess whether the agency's decision was supported by "substantial evidence on the record considered as a whole." The Court interpreted this provision to require judicial consideration not only of the evidence supporting the agency's determination, but also "...whatever in the record fairly detracts from its weight." 340 US at 488. See also, Jaffe, Administrative Procedure Reexamined: The Benjamin Report, 56 Har. L. Rev. 704, 733 (1943).

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2 Petitioners direct our attention to Miles v. Clackamas
3 County, 48 Or App 951, 618 P2d 985 (1980), but as we see it,
4 the contrast between that case and the present one serves only
5 to buttress respondent's position. In Miles the county relied
6 on unexplained photographs and vague maps to conclude the land
7 in question was unsuitable for farming. The court concluded
8 this was not evidence a reasonable mind would rely on in
9 reaching the conclusion of unsuitability. 48 Or App at 959.
10 Here, the evidence, including expert testimony, is considerably
11 stronger. We believe the county was entitled to rely on it.
12 Valley & Siletz Railroad v. Laudahl, supra.

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9 See Footnote 3, supra.

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CERTIFICATE OF MAILING

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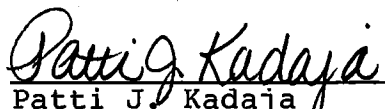
I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 84-026, on August 30, 1984, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 30th day of August, 1984.


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