BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NYLA JEBOUSEK,	)	
	)	
Petitioner,	)	LUBA No. 97-182
	)	
vs.	)	FINAL OPINION
	)	AND ORDER
CITY OF NEWPORT,	)	
	)	
Respondent.	)	

On appeal from the City of Newport.

Nyla L. Jebousek, Springfield, filed the petition for review and argued on her own behalf.

Elizabeth A. Fetsch, Newport, filed the response brief and argued on behalf of respondent. With her on the brief was Minor & Boone.

HOLSTUN, Board Chair.

AFFIRMED 04/06/99

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals the city's approval of a lot-line adjustment.

FACTS

This matter is on remand to us from the court of appeals. Jebousek v. City of Newport, 155 Or App 365, 963 P2d 116 (1998) (Jebousek III). We repeat the relevant facts and procedural history from our earlier opinion:

> "The subject property is an undeveloped parcel in the city's Low Density Single-Family Residential (R-1) zone. The property borders a flag lot to the south and west, and a street to the north. The western half of the property is flat, but the eastern half drops down a slope of undetermined steepness. In December 1995, the owner of the subject property applied to the city for a lot-line adjustment with the flag lot that increased the east-west width of the subject property, thus increasing the portion of the property that is flat and enabling the owner to construct a wider home than otherwise possible on the flat area. After a local appeal, the city approved the lot-line adjustment in May 1996.
>
> "Petitioner appealed that decision to us, and we affirmed in a memorandum opinion. In Jebousek v. City of Newport, 147 Or App 100[, 935 P2d 452] (1997) [Jebousek I], the Court of Appeals reversed and remanded our decision because the city's original decision did not address petitioner's argument that the city was required to apply Goal 1, Policy 3 of the Natural Features component of the city's comprehensive plan (Goal 1, Policy 3). The text of Goal 1, Policy 3 provides:
>
> > "'Where hazardous areas have not been specifically identified but there is a reason to believe that a potential does exist, a site specific investigation by a registered geologist or engineer shall be required prior to development.'
>
> "We remanded the decision to the city to give it an opportunity to interpret Goal 1, Policy 3 and to apply it or not apply it in a manner consistent with the city's interpretation.
>
> "On remand, the city council interpreted the entirety of Goal 1, including Policy 3, as not constituting applicable approval standards, and again denied petitioner's appeal, thus approving the lot-line adjustment."

Jebousek v. City of Newport, ___ Or LUBA ___ (LUBA No 97-182, April 9, 1998) slip op 4-5 (footnotes omitted) (Jebousek II). In Jebousek II, we affirmed the city's interpretation that Goal 1, Policy 3, by its terms, is not a mandatory approval criterion, and declined to decide the merits of petitioner's second and third assignments of error, which challenged two of the city's alternative dispositions in case Goal 1, Policy 3 was determined to be a mandatory approval criterion. The Court of Appeals reversed our decision, finding that the city's interpretation of Goal 1, Policy 3 was "clearly wrong" under the standard articulated in Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 217, 843 P2d 992 (1992). Jebousek III, 155 Or App at 367. In so doing, the court stated:

> "It follows that a remand to LUBA is necessary to decide petitioner's assignments of error that, given its disposition of the interpretative question, it did not decide on their merits. One of those assignments of error is directed against the city's alternative finding that there is no basis for belief that potential hazards are present, which petitioner challenges as being unsupported by substantial evidence in the whole record. It is necessary for us to make * * * [a point] in connection with that assignment. * * * [W]e emphasize that the question under policy 3 is whether there is reason to believe that a potential does exist, not whether there is in fact a hazard or a potential hazard." 155 Or App at 367-68 (emphasis in the original).

In accordance with the court's remand, we now address the arguments and assignments of error we did not resolve in Jebousek II.

SECOND ASSIGNMENT OF ERROR

In the challenged decision, the city makes the following alternative findings regarding Goal 1, Policy 3:

> "Even if Goal 1 were applicable to the property in question, there is no substantial, probative evidence in the record to provide a reason to believe that a potential hazard does in fact exist. Policy 3, Goal 1 refers to situations in which there 'is reason to believe that a potential does exist.' This is not an identified hazard, and no evidence was presented to show that a hazard does exist, or is even likely. * * *" Supplemental Record 9.

> "There is no evidence to indicate that the downward slope to the East does in fact create a geologic hazard. However, if there were reason to believe that any such hazard did exist, reconfiguring the lot to allow future construction to

> take place away from the hazard would certainly reduce any such hazard, not increase it. This is a legal lot of record, and the owner would be entitled to construct a single family residence upon it, as it is now configured. Expanding the boundary to the West would ameliorate a hazard, were there one." Supplemental Record 10.

> "The [city] finds that there is no reliable, substantial evidence sufficient to give the Council 'reason to believe that a potential (hazard) does exist.' At most, there was an indication of a slope on the subject property. * * *" Supplemental Record 10.

Petitioner argues that the above-quoted findings are not supported by substantial evidence, arguing that all of the evidence in the record is contrary to the city's findings and shows that there is reason to believe a potential hazard exists on the subject property. Petitioner cites to the planning department staff report, which states that "[t]he land is relatively flat except for the easterly half of the property, which drops off drastically." Record 21. Petitioner submits that this comment in the staff report is evidence that the area in question is "geologically unstable." Petition for Review 9. In any case, petitioner argues, the applicant has the affirmative burden of demonstrating compliance with applicable criteria. It is not petitioner's burden, we understand petitioner to argue, to demonstrate that there is a reason to believe a potential hazard exists, but rather the applicant's burden to prove the opposite. In the absence of that evidence, petitioner submits, the city's finding of compliance with Goal 1, Policy 3 is not supported by substantial evidence in the record.

In Jebousek III, the court reminded us and the parties that the issue under Goal 1, Policy 3 is whether there is reason to believe a potential hazard exists, not whether a hazard or potential hazard in fact exists. 155 Or App at 368. Some of the findings quoted above are directed at whether a hazard or potential hazard in fact exists. Other language in those findings address the correct standard: whether there is reason to believe a potential hazard exists. We need not address petitioner's initial argument that the staff report comment constitutes "reason to believe" a potential hazard exists, because we agree with petitioner that the absence of detracting evidence on a criterion for which the applicant bears the burden of

proof does not constitute substantial evidence of compliance with that criterion. Berg v. Linn County, 22 Or LUBA 507, 510-11 (1992). Thus, the city's finding that there is no reason to believe a potential hazard exists is not supported by substantial evidence.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

In the challenged decision, the city interprets Goal 1, Policy 3 as not requiring a site-specific geologic investigation until development is proposed, even where there is reason to believe that a potential hazard exists on the property:

> "Even if Goal 1 (including but not limited to Policy 3) did apply, and even if there were reason to believe that a geologic hazard does exist, the Policy does not require a site-specific investigation at this time (by reason of a lot line adjustment). In general, under implementing provisions of other ordinances, if there were reason to believe that a hazard did exist, such a site-specific investigation would be carried out at the time the property was developed by the construction of improvements thereon. The site-specific investigation would involve an evaluation of the nature and method of construction of the improvements, and the steps which are to be taken to deal with any geologic or other natural hazards which are found to exist on the site. Typically, restraints might be imposed as to the method of construction, drainage, foundation requirements, location, setback and other matters of a similar nature. It would be very difficult to carry out such an evaluation where insufficient information about a specific intended improvement is available. A lot line adjustment, by its nature, does not usually cause information to be presented respecting the nature of improvements which would be constructed on the subject property, and such information is not required and, if provided, is not binding upon the applicant." Supplemental Record 10.

Accordingly, the city concludes that if the "evidence did show a potential hazard, it would not be dealt with at this time as part of a lot line adjustment but, rather, as part of a specific evaluation of a proposed improvement to be made." Supplemental Record 11.

Petitioner argues that the city's interpretation of Goal 1, Policy 3 is "clearly wrong," because Policy 3 requires that the site-specific investigation be carried out prior to development. According to petitioner, requiring an investigation "at the time of development" does not comply with the terms of Policy 3. Petition for Review 10.

The city responds, and we agree, that the city's interpretation of Goal 1, Policy 3 is well within the discretion afforded it by ORS 197.829(1) and Clark v. Jackson County, 313 Or 508, 515, 836 P2d 710 (1992). Essentially, the city finds that Policy 3 is not applicable in the present context involving a lot-line adjustment, because that lot-line adjustment does not constitute "development" within the meaning of that provision. Rather, the city finds that, if Policy 3 applies, it applies when specific development is proposed for city approval.

Petitioner appears to understand the city as finding that a site-specific investigation will not be required until development has already been approved and construction has commenced. If that were the city's interpretation, we might agree with petitioner that the city has misconstrued Goal 1, Policy 3. However, even if some of the language in the above-quoted finding could be read to support petitioner's characterization of the city's interpretation, the finding taken as a whole indicates that the city considers that Policy 3 will apply, if it applies, at the stage where the city is considering "the method of construction, drainage, foundation requirements, location, setback and other matters of a similar nature." Supplemental Record 10. As the city points out, that stage occurs under the city's ordinances when the city is evaluating a specific development proposal, typically a building permit, and prior to approval of that development.

Petitioner does not explain why the city's application of Policy 3 in the course of evaluating a specific development proposal and prior to approving that proposal is inconsistent with the terms of Policy 3. The only argument on this point we find in the petition for review is contained in the summary of facts, where petitioner states that "examination of whether a potential hazard exists might be performed during the building permit process, which is ministerial and not appealable." Petition for Review 4-5. We understand petitioner to contend that Policy 3 cannot be applied in the building permit process because a decision approving a building permit is not a land use decision that can be appealed to LUBA. ORS 197.015(10)(b)(A). If that is petitioner's argument, it provides

little assistance. First, if Policy 3 is applied in the context of a building permit process, the resulting decision could be a land use decision appealable to LUBA. ORS 197.015(10)(a).[1] Second, petitioner fails to explain why the appealability of a decision in which the city has applied Policy 3 has any significance in deciding whether the city's interpretation of Policy 3 is consistent with the terms of that provision. Third, petitioner's apparent view that the city must apply Policy 3 in proceedings prior to evaluation of specific development proposals fails to explain, in the usual case, what those proceedings might consist of. Unlike the present case, not all development proposals are preceded by a separate application to adjust a lot line. For the foregoing reasons, we affirm the city's interpretation of Goal 1, Policy 3.

The third assignment of error is denied.

CONCLUSION

We affirm the city's alternative finding regarding Goal 1, Policy 3, for the reason explained in the third assignment of error. Therefore, the city's error described in the second assignment of error, which involves lack of evidentiary support for a separate alternative finding regarding Policy 3, provides no basis to reverse or remand the challenged decision.

The city's decision is affirmed.

[1]The exclusion from the definition of a "land use decision" at ORS 197.015(10)(b)(B) only excludes building permits that are "issued under clear and objective standards." Sullivan v. City of Ashland, 27 Or LUBA 411, 413 (1994).