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

WES JOHNS,)
)
Petitioner,)
)
vs.)
)
CITY OF LINCOLN CITY,)
)
Respondent.)

LUBA No. 97-235

FINAL OPINION
AND ORDER

On remand from the Court of Appeals.

Gary G. Linkous, Welches, represented petitioner.

Christopher P. Thomas, Portland, represented respondent.

BASSHAM, Board Member; HOLSTUN, Board Chair; BRIGGS, Board Member,
participated in the decision.

AFFIRMED 10/04/99

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

1 Opinion by Bassham.

2 **INTRODUCTION**

3 This appeal is on remand to us from the Court of Appeals. *Johns v. City of Lincoln*
4 *City*, 161 Or App 224, ___ P2d ___ (1999) (*Johns VI*).¹ In *Johns VI*, the court agreed with
5 the city that LUBA had failed to consider arguments in the city's brief filed in *Johns III* in
6 resolving an assignment of error that was raised but not resolved in *Johns I*. Accordingly,
7 the court remanded the case back to LUBA with instructions to reconsider that assignment of
8 error in light of the city's arguments in its *Johns III* brief, along with any other issues that
9 might remain viable. In response to the court's mandate in *Johns VI*, we requested additional
10 briefing from the parties, asking the parties to (1) identify any and all remaining viable
11 issues; and (2) identify the evidence in the record and arguments in the briefs that have
12 already been submitted that are pertinent to those issues. *Johns v. City of Lincoln City*, ___
13 Or LUBA ___ (LUBA No. 97-235, Order on Remand Proceedings, August 20, 1999). Both
14 parties submitted additional briefs.

15 From the parties' briefs, it appears there is only one remaining issue in this case:
16 whether there is substantial evidence to support the city's finding that petitioner's application
17 to construct a residence in an Environmental Quality Overlay (EQ) zone does not comply
18 with the "Natural Hazards" provisions of Lincoln City Zoning Ordinance (ZO) 3.110(4)(e)
19 and 3.120(4)(a).² Petitioner raised this issue in *Johns I* as his fifth assignment of error.

¹The entire chronology includes *Johns v. City of Lincoln City*, 32 Or LUBA 195 (1996) (*Johns I*), *rev'd*
146 Or App 594, 933 P2d 978 (1997) (*Johns II*); *Johns v. City of Lincoln City*, ___ Or LUBA ___ (LUBA No.
97-235, July 2, 1998) (*Johns III*), *aff'd in part, rev'd in part* 157 Or App 7, 967 P2d 894 (1998) (*Johns IV*);
Johns v. City of Lincoln City, ___ Or LUBA ___ (LUBA No. 97-235, January 19, 1999) (*Johns V*), *rev'd* 161
Or App 224, ___ P2d ___ (1999) (*Johns VI*).

²ZO 3.110(4) provides, in relevant part:

"Standards: * * * the following standards will be applied in reviewing an application for any
uses in the EQ Overlay zone:

"* * * * *

1 Accordingly, we now resolve that assignment of error.

2 **FIFTH ASSIGNMENT OF ERROR**

3 The city council adopted five findings addressing natural hazards under ZO
4 3.110(4)(e). Those findings are:

5 "1. The site is located on a bluff overlooking the Pacific Ocean. The bluff
6 already is subject to erosion due to natural causes. Erosion at one site
7 has the potential to and ordinarily does contribute to erosion at
8 surrounding properties on the bluff. Added instability has the
9 potential to and ordinarily does contribute to the rate of erosion. It
10 thus is important that human activity not add to the instability of the
11 bluff, thus increasing the rate of erosion.

"(e) Natural Hazards.

"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 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."

ZO 3.120(4)(a) provides, in part:

"The Director shall review all environmental assessments, included but not limited to environmental reviews, geological hazard reports, and other studies required by Ordinance, to determine if significant adverse impacts will result from the proposed project. * * * [T]he Director shall prepare a written statement with findings authorizing, denying or conditionally approving the project."

- 1 "2. At this particular site, in order to protect the stability of the west bluff,
2 as it relates both to the site and to surrounding properties, any
3 development on the site must not disturb the west bluff. The proposed
4 development, however, will disturb the west bluff both through the
5 installation of structures that will penetrate the west bluff and through
6 direct surface disturbance and vibration during construction. This
7 disturbance of the bluff at the site, in turn, over time will contribute to
8 destabilization and erosion both of the site and surrounding properties
9 on the bluff.
- 10 "3. Trenching, back filling, compacting, and drilling of holes on the site
11 during construction further will contribute to long term destabilization
12 of the site, including the west bluff. Over time, this too will contribute
13 to destabilization and erosion of surrounding properties on the bluff.
- 14 "4. During construction, construction techniques and heavy equipment
15 will create significant vibrations both at the site and at surrounding
16 properties on the bluff. These vibrations at surrounding properties will
17 contribute to destabilization and increased erosion at those properties.
- 18 "5. Each of the factors listed in paragraphs 2 through 4, above,
19 independently will be a significant adverse impact on surrounding
20 properties on the bluff. The applicants have not identified measures
21 that will protect these properties from adverse impacts. The proposed
22 development therefore does not meet the provisions of sections
23 3.110(4)(e)(2) and 3.120(4)(a) of the Zoning Ordinance." Record
24 (*Johns III*) 65.

25 In his petition for review before LUBA in *Johns I*, petitioner challenged findings 2
26 through 4, arguing that they are not supported by substantial evidence. Petition for Review
27 (LUBA No. 96-082) 14-17. Findings 2 through 4 address three types of impacts that the city
28 found will contribute independently to destabilization of the bluff and increased erosion, and
29 hence cause significant adverse impacts: (1) penetration of the west bluff face; (2) surface
30 disturbance of the bluff, including drilling and trenching; and (3) ground vibrations during
31 construction.

32 In resolving that assignment of error in *Johns V*, we looked to the city's response brief
33 filed in *Johns I* to identify any evidence in the record supporting findings 2 through 4.
34 However, the city's response brief filed in *Johns I* fails to supply a single citation to the
35 record to identify evidence supporting the challenged findings. We concluded that, although

1 substantial evidence might exist in the record to support findings 2 through 4, without the
2 city's assistance in locating that evidence we could conclude only that those findings lacked
3 evidentiary support. *Johns V*, slip op 9. As the Court of Appeals noted in *Johns VI*,
4 however, we failed to consider the city's arguments regarding evidentiary support for
5 findings 2 through 4 contained in the city's brief filed in *Johns III*.

6 We have now examined the city's arguments and the citations to evidence contained
7 in the city's *Johns III* brief, and have reviewed the parties' arguments in their other briefs,
8 including the additional briefing we allowed. To place the parties' evidentiary dispute in
9 context, we summarize the pertinent evidence referenced in those briefs.

10 **A. The Evidence**

11 The subject property is located on a 90-foot high bluff above the oceanfront. The
12 slope of the bluff averages 40 degrees, although part of it near the top exceeds 60 degrees.
13 The bluff face is partially vegetated, and is subject to erosion at an average rate of four
14 inches per year. The width of the property from the street to the edge of the bluff is
15 approximately 45 to 50 feet, but due to setback requirements the landward edge of the
16 building envelope is only 25 feet from the edge of the bluff.³ The proposed house design is
17 for a 2,661-square foot structure 36 feet long from east to west. The house will be built on
18 piers sunk into the top of the bluff, which will require drilling 15 holes to a depth of 30 feet,
19 constructing 18-inch diameter concrete piers in each hole, digging north-south and east-west
20 trenches connecting each pier, and installing horizontal structural cross-braces attached to the
21 piers. The finished house will be cantilevered eleven feet over the edge of the bluff.

22 Petitioner hired H.G. Schlicker & Associates to prepare the geologic and
23 environmental review required by ZO 3.110(4)(e) (Schlicker assessment). An independent
24 consulting firm, SRI/Shapiro, was hired to perform a peer review (Shapiro review) on the

³A topographic map identifies the "edge of bluff" as a line corresponding to the 98-foot elevation where the bluff flattens out. Record (*Johns I*) 356.

1 city's behalf. The Schlicker assessment obtained geotechnical assistance from
2 Wright/Deacon & Assoc. Inc. (Wright). The Shapiro review obtained geotechnical
3 assistance from Squier Associates (Squier).

4 Wright submitted a report advising that the pier and cross-bracing substructures
5 should meet the following requirements: (1) the excavations for the cross-braces should not
6 extend to the existing westerly face of the bluff; and (2) "under no circumstances should the
7 existing west bank be removed or compromised." Record (*Johns I*) 321. The Schlicker
8 assessment found that "natural hazards have been addressed and mitigated where necessary"
9 and that the proposed development complies with the requirements of ZO 3.110(4)(e) by
10 adhering to the requirements contained in the assessment. Record (*Johns I*) 335.

11 The city's peer review consultant, Shapiro, found that the proposed development is
12 not expected to create significant adverse impacts provided that certain conditions are met,
13 including compliance with the requirements imposed by Wright. Record (*Johns I*) 315.
14 Shapiro's geotechnical consultant, Squier, also reiterated Wright's recommendation that
15 under no circumstances should the existing west bank be removed or compromised. Record
16 (*Johns I*) 319.

17 After these reports were prepared, petitioner revised the proposal in order to meet an
18 aesthetic quality concern, proposing to build a "beach wall" in the bluff face to hide the
19 substructure from beachgoers' view as the bluff erodes away over time. Record (*Johns I*)
20 309. The beach wall would include seven 24-inch diameter, six-foot tall concrete footings
21 penetrating vertically into the bluff face, topped with ten-foot high posts. Horizontal boards
22 would connect the posts, forming the wall. Three tie-backs at the top of the wall will anchor
23 it to the face of the bluff. Record (*Johns I*) 366-67.

24 At the public hearing before the planning commission, a commission member
25 questioned Schlicker about whether any of the substructure supporting the cantilevered house
26 would penetrate the face of the bluff. After performing some calculations, Schlicker

1 determined that one of the girders in the substructure would extend out from the face of the
2 bluff. Record (*Johns I*) 74-75. The same expert also testified with respect to the beach wall
3 that "because of the protection afforded by the [beach wall] you could go in from the base of
4 that [wall] up and disturb that bluff all you want and still protect it because you are
5 protecting it with the [wall] rather than vegetation." Record (*Johns I*) 173.

6 The city's *Johns III* brief also summarizes the testimony of several opponents with
7 respect to the impacts of the proposed use, particularly the impacts of vibration from
8 construction. A neighbor testified that:

9 "I have personal experience in trying to stabilize the bluff, slow the erosion,
10 and generally protect my house from the inexorable forces of nature. I know
11 how tenuous our hold on the edge really is. I also know from firsthand
12 experience how soft and crumbly the soil of the bluff is, and how once
13 disturbed, it loses what little structural integrity it may have had completely."
14 Record (*Johns I*) 295.

15 Another neighbor testified that:

16 "Any excessive vibration caused by heavy equipment, drilling, and excavation
17 can disturb the bank and lead to loss of property.

18 * * * * *

19 "I have experienced within the past ten years the loss of bank and stairs to the
20 beach. The property owner immediately north of our home was allowed by
21 the city to use dump trucks and heavy equipment to put miscellaneous
22 material over the bank. During the period of this activity the residents of our
23 home reported that the whole house shook. Within a month the bank and
24 stairs were gone." Record (*Johns I*) 261.

25 The immediate neighbor to the subject property testified that:

26 "[O]n Lot 2000 we had a cyclone fence with a gate. The remains can still be
27 seen. Beyond the fence was a large area with picnic tables and chairs with a
28 dog walk. That is gone. I believe some of the loss was contributed by
29 bulldozing that was done on Lot 1900 [the subject property] in 1989." Record
30 (*Johns I*) 158-59.

31 A neighbor who is a civil engineer testified that:

32 "[O]ur lot was the one that lost the stairs down to the oceanfront because of
33 vibration from the next two lots when the City and the owner started to put

1 dirt over the bank. About six weeks after this happened * * * our whole bank
2 slid and we lost our stairs. We went to court and it was proven through a
3 geologist that yes this vibration *et cetera* was probably the cause of the bank
4 moving and we lost about ten feet of bank. The rest of my testimony only is
5 that I am an engineer, a civil engineer registered in Colorado and my work
6 was always in construction. * * * one of the things I would like you to look
7 at, is how they really are going to build that because this area is so fragile, will
8 it stand the construction. First, you start with caissons and they are eighteen-
9 inch in diameter. I don't know if anybody has gone down to where the beach
10 access is to the north about ten blocks, but they are drilling caissons there
11 right now. * * * I stopped to look because I am a construction person and
12 well I think that it didn't shake at my house but for two blocks it shook and it
13 shook bad. Just from them drilling and it is a problem. * * * The next thing
14 they do is you have to backfill that. * * * [Y]ou cannot use any water so that
15 means that mechanical tamping. You either go to use a large tamper or a
16 pogo stick or something which causes more vibration in this fragile part and
17 that is a problem. You also have heavy equipment in there. You are going to
18 have that core drilling outfit. You are going to have concrete trucks. You are
19 going to have a backhoe and whatever else that they are probably going to use
20 to do the work and all of this stuff is over seventeen, eighteen thousand
21 pounds. Some of it may be thirty thousand pounds like a concrete truck * * *"
22 Record (*Johns I*) 181-83.

23 Finally, another person testified that:

24 "I have [been] in the construction business for thirty years and I could just see
25 massive problems for the heavy equipment coming out there shaking and all.
26 * * * [Y]ou just walk down a hundred feet you can see where the whole bank
27 slid down where the heavy equipment came out. * * * [T]hey will come out
28 here with their concrete trucks and they will be shaking that ground and the
29 whole thing will start jumping and as fragile as it is * * *"
30 Record (*Johns I*) 184.

31 **B. The Parties' Contentions**

32 Petitioner argues in his petition for review in *Johns I* and in his supplemental brief
33 that findings 2 through 4 and the city's ultimate conclusion that the proposed use does not
34 comply with ZO 3.110(4)(e) and 3.120(4)(a) are not supported by substantial evidence, in
35 light of the fact that all four of the expert reports concluded that if the proposed house was
36 built according to the specified conditions, there would be no adverse impacts on adjacent

1 properties.⁴ Petitioner contends that the challenged findings rely solely on lay opinions and
2 portions of the expert reports taken out of context. Petitioner argues that this contradicting
3 evidence is not substantial evidence supporting the city's decision, because no reasonable
4 decision maker could conclude from the whole record, as the city did, that the proposed use
5 will result in significant adverse impacts.

6 We noted in *Johns V* that

7 "where the evidence in the record on review is conflicting, such that a
8 reasonable decision maker could reach different conclusions based on that
9 evidence, the choice of which evidence to believe and which conclusion to
10 reach is for the local decision maker. *Younger v. City of Portland*, 305 Or
11 346, 360, 752 P2d 262 (1988); *City of Portland v. Bureau of Labor and Ind.*,
12 298 Or 104, 119, 690 P2d 475 (1984); *Stefan v. Yamhill County*, 18 Or LUBA
13 820, 838 (1990); *Douglas v. Multnomah County*, 18 Or LUBA 607, 617-18
14 (1990). LUBA does not reweigh the evidence or substitute its conclusions for
15 the conclusions reached by the local decision maker in such circumstances.
16 *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 842 P2d 441
17 (1992); *Heceta Water District v. Lane County*, 24 Or LUBA 402, 427 (1993)."
18 Slip op at 7 n 8.⁵

⁴In his supplemental brief, petitioner reiterates his argument that no reasonable person could draw a conclusion contrary to the conclusion of the Schlicker assessment and the other three engineering experts unless that contrary conclusion is supported by expert testimony. Because opponents to the proposed use did not supply their own expert testimony, petitioner argues, there is no credible evidence controverting the conclusions drawn by the four sets of experts. However, we rejected that argument in *Johns V* and the Court of Appeals' opinion in *Johns VI* did not disturb our conclusion. We do not revisit it here.

⁵We also noted in *Johns V* that

"Where a local government decision takes the position that the party with the burden of proof has failed to carry that burden of proof, a petitioner on appeal to LUBA challenging such a decision on evidentiary grounds is required to demonstrate he carried his burden of proof as a matter of law. *Jurgenson v. Union County Court*, 42 Or App 505, 510, 600 P2d 1241 (1979); *Chemeketa Industries Corp. v. City of Salem*, 14 Or LUBA 159, 163 (1985); *Weyerhaeuser v. Lane County*, 7 Or LUBA 42, 46 (1982)." Slip op at 9 n 11.

Because the present case involves denial of an application based on a finding of noncompliance with an approval criterion, petitioner's evidentiary challenge to that finding can prevail only if he demonstrates that he carried his burden of proof before the city as a "matter of law." That standard of review is arguably more stringent than the standard of review applicable to review of a finding of compliance with approval criteria, where the issue is framed as a matter of whether the local government's findings are supported by substantial evidence. However, in the present case we need not determine whether there is a meaningful difference between the two standards of review, because we agree with the city that, even analyzed as a matter of whether there is evidence a reasonable person would believe to support the city's finding of noncompliance, petitioner has not demonstrated reversible error in the city's finding of noncompliance with ZO 3.120(4)(a).

1 We agree with the city that, viewing the record as a whole, the city's conclusion that
2 the proposed use will result in significant adverse impacts is supported by substantial
3 evidence. The contrary conclusions of the four sets of experts, on which petitioner relies,
4 was expressly conditioned on no compromise of the bluff face. Those opinions were formed
5 prior to petitioner's proposal to sink support columns for the beach wall into the bluff face,
6 and prior to the determination that one of the substructures supporting the house will extend
7 out of the bluff face. Although petitioner's environmental consultant testified in a manner
8 that indicated he did not feel these disturbances of the bluff face were significant, the other
9 three sets of experts, including the two geotechnical experts, all agreed that "[u]nder no
10 circumstances should the existing west bank be removed or compromised." A reasonable
11 decision maker could conclude, based on this evidence, that the proposal is inconsistent with
12 the experts' express condition. Stated differently, the city could have reasonably chosen not
13 to believe petitioner's environmental consultant and instead to believe Wright, Squier, and
14 Shapiro when they insisted that the bluff face should not be compromised under any
15 circumstances.

16 Further, although the question is a closer one, we agree with the city that there is
17 substantial evidence in the record to support the city's findings regarding the impact of
18 vibration on the subject property and nearby properties from drilling, trenching, and heavy
19 equipment operation. Petitioner argues that the neighbors' testimony cited in the city's brief
20 regarding potential adverse impacts of vibration resulting from construction of the proposed
21 use has no evidentiary value because it is not based on expert opinion. However, we rejected
22 that categorical argument in *Johns V. Slip op 7*. Petitioner does not cite to any evidence in
23 the record contradicting or undermining the testimony regarding the potential impacts of
24 ground vibration on the bluff. The only consideration of adverse impacts of construction
25 identified in the experts' reports consists of the statement that

26 "The potential for construction impacts on adjacent properties is a concern. In
27 this regard, trench excavation and backfilling is the critical element of

1 construction. Prevention of surficial runoff from entering the trenches, and
2 support of the trenches during construction[,] are important safety
3 considerations." Record (*Johns I*) 319-20, see also Record (*Johns I*) 314
4 (substantially the same statement in Shapiro review).

5 A reasonable person might infer from the reports' silence regarding the potential
6 impacts of vibration on the stability of the bluff, combined with the general conclusion that
7 the proposed use will not cause significant adverse impacts if constructed as conditioned, that
8 potential impacts of ground vibration from construction are not a significant concern.
9 However, even given that inference, the neighbors' testimony quoted above is such that a
10 reasonable decision maker could conclude from the record as a whole that petitioner had
11 failed to demonstrate that construction of the proposed dwelling would not cause significant
12 adverse impacts on the subject property and adjoining property.

13 The fifth assignment of error is denied.

14 The city's decision is affirmed.