BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOHN RIVERA,
Petitioner,

vs.

CITY OF BANDON,
Respondent.

LUBA No. 99-144

FINAL OPINION
AND ORDER

Appeal from City of Bandon.

Daniel Kearns, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Reeve, Kearns, P.C.

Frederick J. Carleton, Bandon, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 09/28/2000

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 a city council decision that denies his request for a conditional use permit to allow a single family dwelling to exceed a building height limit that is imposed by the City of Bandon Zoning Ordinance (BZO).

INTRODUCTION

The central questions in this appeal are (1) whether petitioner's nearly completed single family dwelling is taller than the maximum building height permitted by the BZO and (2) if so, whether petitioner should be granted a conditional use permit to exceed that height limit. The parties in this appeal agree that the disputed dwelling measures 33 feet from the top of the foundation footings to the top of the roof. With one exception discussed later in this opinion, the parties also agree that under the BZO the height of the dwelling is to be measured from original or native grade to the top of the roof.[1] However, as will become clear later in this opinion, petitioner and the city agree on little else.

Petitioner contends the current surface grade of the property is also the original or native grade. Petitioner argues the native grade is 15 feet above mean sea level. According to petitioner, the foundation footings are located approximately five feet below native grade at 10 feet above mean sea level and the fill that has been placed around the foundation and foundation walls simply reestablishes the native grade. *See* Record 183 (which visually depicts current surface grade and the grade on surrounding properties). If petitioner is correct, (1) the subject dwelling measures 28 feet from the current surface grade level, making it exactly as tall as the maximum building height permitted by the BZO; (2) no conditional use permit is required; and (3) the city erred in requiring petitioner to seek a

[1]The exception is whether the method of measuring the height of the dwelling is governed by the 1988 or 1991 version of the BZO. If the 1988 version applies, height is measured from native grade or the floodplain level, whichever is higher. If the 1991 version of the BZO applies, height is measured from native grade.

conditional use permit. *See Recovery House VI v. City of Eugene*, 150 Or App 382, 387-88, 946 P2d 342 (1997) (LUBA has jurisdiction to review whether city correctly required applicant to seek conditional use approval where applicant contended the use was permitted outright).

The city contends that the foundation footings rest on native grade at approximately 10 feet above mean sea level. If the city is correct, the house is 33 feet tall, and a conditional use permit is required under the BZO to allow the dwelling to exceed the 28-foot height limit imposed by the zoning ordinance. In that event, the city did not err in requiring petitioner to seek a conditional use permit under the BZO, and we must consider petitioner's additional challenges concerning the merits of the city's decision denying petitioner's application for a conditional use permit.

FACTS

A. Original Permit Approval and Original Building Plans

1. 1990 Conditional Use Permit

On December 20, 1990, the city planning commission granted petitioner's request for conditional use approval for a single family dwelling in the Controlled Development Zone 2 (CD-2) zone.[2] On December 21, 1990, the planning director sent petitioner a letter advising him of the planning commission's decision approving the conditional use permit.[3] On December 28, 1990, petitioner responded with a one-page handwritten letter in which he

[2]Single family dwellings are permitted outright in the CD-2 zone. BZO 3.610. However, the subject property is also subject to the Shoreland Overlay (SO) zone. Where the SO zone applies in the CD-2 zoning district, residential uses require conditional use approval. BZO 4.420. Petitioner originally sought approval for a gift shop as well, but that aspect of the application was abandoned.

[3]Petitioner's conditional use permit application did not include building plans because petitioner "did not want to make formal plans until he found out if he could" construct a dwelling on his property. Record 451. The planning director's letter advised petitioner that he was required to submit "professional quality building plans" for planning commission approval and that those plans must show "[a]ll elevations." Record 448. The planning director's letter also stated the dwelling was subject to a "height limitation [of] 28 feet." *Id.*

stated that he was "seeking an architect designer" and would "submit building plans." Record 447.[4]

2. 1991 Building Plans

In 1991, petitioner submitted professional building plans for a dwelling with a partially enclosed parking area on the ground level and two living levels above the parking area (a total of three levels). Record 415-45. The plans show the floor of the parking area at native grade or ground level, and the dwelling is 28 feet high, measured from the floor of the parking area. Record 416, 421. As far as we can tell, the plans do not indicate the elevation of the native grade above mean sea level. However, an architect's drawing of the proposed dwelling shows what appears to be a level driveway access from the house onto Sixth Street, which the parties agree is located at approximately 10 feet above mean sea level. These plans were approved by the planning commission on November 21, 1991.

B. Development Between 1991 and 1994

Construction of petitioner's dwelling took a critical turn after the planning commission approved the building plans on November 21, 1991. Although the details of precisely when, why and how the decision was made are unclear, sometime early in 1992 petitioner and city building inspection officials decided the foundation proposed in the 1991

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[4]The December 28, 1990 letter also includes the following sentence:

> "Enclosed is a plot plan \ natural elevation of 15 feet on the very east and north side of the lot sloping to elevation of 12 feet on west side of the lot tapering to Sixth St. elevation." Record 447.

The "plot plan" referenced in the letter is not included in the record. The copy of the December 28, 1990 letter that is included in the record was submitted by petitioner during subsequent proceedings in 1998. The city maintains the original of this letter is not in the city's files and appears to question whether the December 28, 1990 letter was really sent to the planning director in 1990. For purposes of this opinion, we assume petitioner sent the letter to the planning director in December 1990.

approved plans should be modified. The modified foundation is what petitioner refers to as a stem-wall foundation.[5] Construction of the foundation apparently began sometime in 1992.

Contemporaneously with this turn of events, petitioner contends that he graded the property, removing approximately five feet of soil from the subject property and lowering its elevation five feet below native grade to 10 feet above mean sea level.[6] According to petitioner the footings therefore are located five feet *below* native grade, and the concrete slab floor of the parking area, which is supported by the concrete blocks that rest on these footings, is located at native grade. In summary, although the parties do not always use consistent numbers, it is undisputed that the change to the stem-wall foundation added approximately five feet to the gross height of the disputed dwelling. Petitioner contends the extra five feet were added below native grade, leaving the dwelling exactly as tall as permitted under the BZO. The city contends the extra five feet were all added above native grade, making the height of the dwelling 33 feet above native grade, or five feet too tall.

1. 1993 Revised Plans

Petitioner's architect produced revised foundation plans in June 1993. Record 398-99. Although these plans were not submitted to the planning commission for approval, petitioner contends approval of a change in foundation approach is a construction detail that did not require further review and approval by the planning commission.[7] However,

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[5]The stem-wall foundation consists of a number of courses of concrete blocks which rest on concrete footings. The concrete slab floor of the parking area is therefore elevated above the footings and rests on the concrete blocks. The originally proposed at-grade foundation is shown at Record 421. The new stem-wall foundation design is shown at Record 399.

[6]The city disputes this contention and contends there is no evidence that would support petitioner's position that overburden was removed from the subject property and stored off-site and later brought back to the subject property. This is the critical factual dispute between the city and petitioner. The city contends the native grade of the subject property is 10 feet above mean sea level.

[7]We do not understand the city to dispute this point. However, the city does argue that city building officials may only approve such construction detail changes if the change results in a dwelling that remains in compliance with the maximum building height specified in the BZO. Stated differently, the city takes the position that building permit officials may not approve a design change that results in a dwelling that exceeds the 28-foot high maximum that is imposed by the BZO and was specified in the 1990 conditional use permit.

petitioner contends city building officials approved the revised plans.[8] The State of Oregon took over responsibility for building inspections from the city on October 6, 1994.

The revised foundation plans that appear at Record 399 and Supplemental Record 4 include notations at the lower left corner that the footings are located at "Nat. Gr." or native grade. This notation is at odds with petitioner's contention that the concrete slab floor of the parking area is located at native grade.

2. 1994-95 Further Revised Plans

Sometime later, the 1993 revised foundation plans apparently were further revised.[9] Record 479. One drawing showing this further revision of the foundation plan includes notes at both the lower left and lower right corners indicating the footings are located at native grade. *Id*. The record also includes three full-size versions of this further revised foundation plan. LUBA Oversize Exhibits 5, 6 and 7. Two of those oversize exhibits, LUBA Oversize Exhibits 5 and 6, include the same entries concerning the location of native grade as the reduced copy that appears at Record 479. The entry at the lower left corner of the third oversize exhibit, LUBA Oversize Exhibit 7, also indicates the footings are located at native grade, but the entry at the lower right corner indicating that the footings are located at native grade has been whited out. Above it a new entry has been added, which indicates that native grade is located at the concrete slab floor of the parking area.[10]

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[8]The city disputes this contention. Petitioner relies on the Inspection Record Card that was posted on the subject property. That Inspection Record Card includes an entry attributed to MAB (city building inspector Mark A. Bergquist) that indicates he approved the revised foundation on May 21, 1994. Record 159. Petitioner relies on this entry to support his contention that the city approved the revised plans. The city contends that if the entry and initials are compared with other entries by MAB, it is obvious "[t]hat this is a sloppily forged entry * * *." Respondent's Brief 5; Record 159, 161. Moreover, the city contends there is nothing about these revised plans that would have caused the city to question whether the distance from the footings to the peak of the roof exceeds 28 feet.

[9]The city contends this revision was prepared in 1994 or 1995, after the state took over building inspection duties from the city.

[10]The city suggests that petitioner made this change to hide the fact that the proposed dwelling was now more than 28 feet tall, measured from native grade. Petitioner disputes the suggestion.

C. Development After 1994

In 1996, the Coquille Indian Tribe began construction of Heritage Place, a retirement facility, on its property that adjoins the subject property. Prior to construction of Heritage Place, the tribe's property was extensively graded.[11] In advance of that grading, an excavation plan was prepared. Although that excavation plan was prepared for the adjoining tribal property, it also shows petitioner's property and the excavation plan shows the 10-foot elevation as being located adjacent to and upgrade from petitioner's property.[12] Record 414.

In 1998, a new city planner determined that petitioner's house is too tall.[13] The planner took the position that petitioner must either submit an application for a conditional use permit to authorize the dwelling to exceed 28 feet in height or remove the top part of the dwelling to make it comply with the 28-foot height limit. Petitioner submitted an application for conditional use approval, but petitioner maintained that his house is only 28 feet tall, making a conditional use permit unnecessary. Supplemental Record 1.

The planning commission determined that petitioner's dwelling exceeds the 28-foot height limit. The planning commission also found that the criterion that must be satisfied to approve the requested conditional use permit was not met and denied the requested conditional use permit.[14] On appeal, the city council affirmed the planning commission's decision, and this appeal followed.

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[11]Petitioner contends this grading was not done with surgical precision and that his property was affected by grading on the tribe's property. According to petitioner, this grading makes it impossible to accurately determine today where the native grade on petitioner's property was located in 1990.

[12]Petitioner argues the 1992 excavation plan postdates petitioner's excavation of his property. In response, the city points out the excavation plan does not disclose any stored overburden on the tribe's property and argues that the excavation plan therefore lends support to its position that the 1990 native grade on petitioner's property was located at or below 10 feet above mean sea level, like the immediately adjacent portion of the tribe's property.

[13]Apparently by 1998, the city had experienced a complete turnover in planning staff and none of the planning staff associated with the original 1990 conditional use approval remained as city employees.

[14]We discuss the conditional use criterion that must be met to approve a dwelling that exceeds 28 feet in height under the second assignment of error below.

MOTION TO STRIKE

After the city filed its response brief, petitioner filed a motion to strike 11 separate parts of the respondent's brief, alleging those parts of the respondent's brief include allegations of fact that are not supported by the record. Although we do not grant motions to strike briefs or portions of briefs in such circumstances, we do not consider allegations of fact where the party alleging those facts fails to identify evidence in the record that supports those allegations of fact. *Hammack & Associates, Inc. v. Washington County*, 16 Or LUBA 75, 78, *aff'd* 89 Or App 40, 747 P2d 373 (1987).

Items 1-2 and 4-10 include allegations of fact. The respondent's brief does not include record citations to support those allegations of fact and at oral argument respondent did not identify evidence in the record supporting those allegations of fact. Accordingly, we do not consider the portions of the respondent's brief identified in items 1-2 and 4-10 of the motion to strike.

Item 3 of the motion to strike concerns the Inspection Record Card that was posted on petitioner's property and the city's contention that an entry on that card indicating a city building official approved petitioner's building plans on May 21, 1994, is a "sloppily forged entry." Record 159; *see* n 8. Petitioner contends "[t]here is no factual foundation or evidence in the record for this assertion * * *." Motion to Strike 1.

The argument or conclusion in the city's response brief is based on the Inspection Record Card entry itself when compared with other entries on other documents in the record. The facts that support the city's argument or conclusion are therefore in the record, and we have no basis for refusing to consider the argument. Although it is unnecessary for us to determine whether we agree with the city's argument that the entry was forged, we agree with the city that there are anomalies between that entry and other entries made by the same

city building official that could reasonably support a conclusion that the same person did not write both entries.[15]

Item 11 concerns LUBA Oversize Exhibit 7, which is discussed above. Petitioner objects to respondent's characterization of that oversize exhibit as "doctored." We understand the city's reference to that oversize exhibit as taking the position that the entry on the plan showing native grade at the level of the footings on that oversize exhibit has been whited out and a new entry has been added to show native grade as being located at the parking area level. That is what the document shows and we have no basis for refusing to consider the city's point. We assign no particular importance to the city's choice of the term "doctored."

FIRST ASSIGNMENT OF ERROR

Under his first assignment of error, petitioner argues the city erred in concluding that his house exceeds 28 feet in height and erred in requiring that he seek a conditional use permit. The first assignment of error includes four subassignments of error, which we address separately.

A. Native Grade

In the challenged decision, the city council relied on a planning staff report in concluding that the native grade on petitioner's property is located at 10 feet above mean sea level. Record 20-21; 106-08. That staff report in turn relies on four items of evidence: (1) topographic maps; (2) flood maps; (3) the 1992 Heritage Place excavation plan; and (4) petitioner's original house plan.

1. Topographic Maps

The staff report refers to two topographic maps. The first is a reduced copy of a larger 1973 topographic map. Record 377. That map is not readable. However, the staff

[15]The entry attributed to MAB in Record 159 (the disputed Inspection Record Card) differs from the entries attributed to MAB on Record 161 in letter and number formation and date and month separators.

report also explains that planning staff enlarged the map at Record 377 and added lot and block lines to the enlarged map. Record 378. The subject property is located at the approximate center of that map and the staff report accurately reports that the enlarged topographic map shows the subject property is no higher than 10 feet above mean sea level.

2. Flood Maps

The record includes two Flood Insurance Rate Maps. According to the city, the floodplain delineated on those maps is located at 12 feet above mean sea level. The first flood map, dated 1998, shows petitioner's property as being located within the floodplain. Record 375; LUBA Oversize Exhibit 15. The second flood map, dated 1984, shows petitioner's property as being located just outside the floodplain. Record 376. The city contends the 1984 map shows the same floodplain location as shown on the 1998 map, but that the 1984 map inaccurately locates the roads, making petitioner's property appear as though it is outside the floodplain. The city contends these maps show petitioner's property is lower than 12 feet above mean sea level.[16]

3. Heritage Place Excavation Plan

As previously noted, the Heritage Place excavation plan is based on a 1992 topographic survey and shows the property immediately adjacent to petitioner's property as being located at 10 feet above mean sea level. LUBA Oversize Exhibit 13.[17] The city points out that while the topographic map was prepared for the adjoining property, it in fact shows petitioner's property as well and shows that the elevation of petitioner's property is no more

[16]Petitioner provides an excerpt from the United States National Map Accuracy Standards which states the flood maps have an accuracy level equal to + or - one-half the contour interval. Petition for Review 20. The maps do not identify the contour interval, but petitioner argues the city relied on the maps to a degree that their accuracy level does not warrant.

[17]The record also includes a reduced version of this map at Record 414. The reduced version appears to show existing grade in dashed lines and proposed finished grade in solid lines.

than 10 feet above mean sea level.[18] The city further contends that had petitioner removed the top five feet of his property during 1991 and 1992, as he claims, the stored overburden would be shown on this 1992 topographic map. The city contends the topographic map shows no evidence of the alleged overburden.

4. Petitioner's Original House Plan

Petitioner's original 1991 house plan shows a house on a level lot with two driveways. Record 415. One of those driveways is the driveway that has actually been constructed onto Lincoln Avenue. The alternative driveway, which was not built, is shown as connecting with Sixth Street. The staff report takes the position that the alternative driveway appears to rise approximately one foot from Sixth Street. The staff report goes on to state that Sixth Street is located approximately nine feet above mean sea level, making petitioner's property approximately 10 feet above mean sea level.[19]

5. Petitioner's Arguments

Petitioner's criticism of the evidence that the city relied on in finding the native grade of his property is approximately 10 feet above mean seal level falls into two categories. First, petitioner argues the evidence cited by the city is unreliable. Second, petitioner identifies other evidence in the record that he contends is sufficient to demonstrate the native grade is 15 feet above mean sea level.

Petitioner's first argument, that the city evidence is unreliable for the reasons we have already noted in our discussion above, asks us to scrutinize the evidence the city relied upon more closely than is appropriate under ORS 197.835(9)(a)(C). In reviewing land use

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[18]As noted earlier, petitioner argues the reason this topographic map does not show his property as being located at 15 feet above mean sea level is that it postdates his excavation of his property to 10 feet above mean sea level in 1991 and 1992.

[19]Petitioner criticizes the city's reliance on this architect's drawing, arguing "[t]he drawing was a depiction of a house design and was never intended to depict actual grades on the site." Petition for Review 22. Petitioner also contends "[t]here is no indication that the architect had ever seen [petitioner's] lot, and, even if he had, an architect is not a credible witness as to topography and surveying matters." *Id*.

decisions under the substantial evidence standard imposed by ORS 197.835(9)(a)(C), this Board recognizes that decision makers enjoy some discretion in selecting the evidence they choose to believe from among conflicting and disputed evidence in the record. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988). To find that a land use decision is not supported by substantial evidence, we must find that the evidence in the record, viewed as a whole, is such that the decision maker could not reasonably make the critical findings of fact upon which the challenged decision is based.

In this case, had the city relied exclusively on any one of the above-described items of evidence, we might be more inclined to agree with petitioner's argument that such evidence is sufficiently questionable that it would not have been relied upon by a reasonable decision maker to find the 1990 native grade was 10 feet above mean sea level. However, when the topographic maps, flood maps, Heritage Place excavation plan and petitioner's 1991 house plan are viewed together, we agree with the city that a reasonable person could rely on that evidence to conclude that the native grade on petitioner's property was approximately 10 feet above mean sea level in 1990. Although that evidence is less than overwhelming, it is clearly evidence that a reasonable person might accept in support of the challenged finding concerning the elevation of native grade.

Petitioner's second category of argument under the first subassignment of error faults the city for not assigning more weight to (1) the letter petitioner wrote to the city in 1990 claiming the native grade was 15 feet above mean sea level; (2) the city's review and approval of the stem-wall foundation revision; and (3) three 1989 photographs which petitioner claims show "substantial gorse growth and the rise of the native grade up from Sixth Street." Petition for Review 24. We discuss the significance of items one and two in more detail later in this opinion and conclude that their evidentiary value is far less significant than petitioner argues. The three 1989 photographs, in our view, are insufficient

to show that the city's finding lacks the requisite substantial evidentiary support. Record 165-67. At most they show substantial gorse growth on the property; they do not clearly show that the elevation of the subject property is higher than Sixth Street.[20]

6. Conclusion Regarding Subassignment of Error 1

The evidence cited by the city and described in subsections 1-4 above constitutes substantial evidence in support of the city's decision that the subject property is located approximately 10 feet above mean sea level. Neither petitioner's criticism of that evidence nor the other evidence cited by petitioner demonstrates that that evidence is unreliable or that a reasonable person would not rely on that evidence.

The first subassignment of error is denied.

B. City's Failure to Object in 1990 to Petitioner's Claim that Native Grade is Located at 15 Feet Above Mean Sea Level

As previously noted, the city advised petitioner in a December 21, 1990 letter that the planning commission had approved his application for a conditional use permit to construct a dwelling. Record 448. That approval expressly referred to a "height limitation [of] 28 feet." It was further conditioned on planning commission approval of "professional quality building plans" to, among other things, identify "[a]ll elevations * * *." Petitioner responded immediately to that letter with a handwritten letter to the planning director dated December 28, 1990. Record 447. As we have already noted, the December 28, 1990 letter refers to an enclosed "plot plan" that is not included in the record and takes the position that a portion of the subject property is 15 feet above mean sea level. *See* n 4. In that December 28, 1990 letter, petitioner also promises to seek the services of an "Architect Designer" and to submit building plans in the future. Record 447.

Petitioner argues that by failing to respond to petitioner's representation in the December 28, 1990 letter concerning the elevation of the subject property, the city waived

[20]The photograph at Record 167 appears to show an adjoining property rather than the subject property.

any right to assert the actual native grade is 10 feet above mean sea level. According to petitioner the city may not fail to respond to the December 28, 1990 letter and then, many years later, take a position contrary to petitioner's concerning the level of the native grade on the subject property.

There are two problems with petitioner's argument under this subassignment of error that make his argument untenable. First, petitioner's position in the letter is, on its face, nothing more than an expression of opinion. Second, the plot plan referenced in the letter, which might lend some support to petitioner's expression of opinion, is not in the record. The letter does nothing more than express an unsupported opinion that was to be verified by professional building plans at a later date. If petitioner is suggesting the city was legally obligated to object to his unsupported opinion concerning the elevation of the subject property's native grade, and waived its right to disagree with that expression of opinion by failing to object to it in December 1990, we reject the suggestion. We agree with the city that there was nothing in petitioner's December 28, 1990 letter that the city was obligated to object to.

Finally, the untenability of petitioner's argument under this subassignment of error is made even clearer by the revised foundation plans petitioner's architect later submitted, which with one unexplained exception, show native grade at the level of the stem-wall footings (10 feet above mean sea level), rather than at the parking floor level (15 feet above mean sea level). These plans not only fail to support the opinion petitioner expresses in his December 28, 1990 letter, they contradict it.

The second subassignment of error is denied.

C. Reliance on City Building Inspector Approval of Petitioner's Revised Plans in 1994

Petitioner nominally recognizes in the third subassignment of error that the relevant question in this appeal is whether his house is too tall. As we have already explained, to answer that question the city is required to locate the elevation of the native grade of

petitioner's property. Petitioner appears to argue that the city building officials' conduct in this matter prior to the state assuming responsibility for building inspections in 1994 somehow estoppes the city in this proceeding from finding that the native grade of the subject property is located at 10 feet above mean sea level.

We are not sure whether petitioner is arguing that the city is estopped from taking the position that native grade is located at 10 feet above mean sea level, or that the city is estopped from taking the related, dependent position that the house is too tall as measured from native grade. In either case, we reject petitioner's estoppel argument.

The Oregon Supreme Court has recognized that, subject to limitations, "an estoppel may be raised against government entities." *Coos County v. State of Oregon*, 303 Or 173, 181, 734 P2d 1348 (1987). The elements that must be proved to establish estoppel by conduct are as follows:

> "The elements of equitable estoppel in Oregon were set out by this court in *Oregon v. Portland Gen. Elec. Co.*, 52 Or 502, 528, 95 P 722 (1908):
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> > "'To constitute estoppel by conduct there must (1) be a false representation; (2) it must be made with knowledge of the facts; (3) the other party must have been ignorant of the truth; (4) it must have been made with the intention that it should be acted upon by the other party; [and] (5) the other party must have been induced to act upon it * * *.'
>
> "Courts generally have held that the misrepresentation must be one of existing material fact, and not of intention, nor may it be a conclusion from facts or a conclusion of law. The party seeking estoppel must demonstrate not only reliance, but a right to rely upon the representation of the estopped party. Reliance is not justified where a party has knowledge to the contrary of the fact or representation allegedly relied upon. The facts creating an estoppel must be proved by a preponderance of the evidence." *Coos County v. State of Oregon*, 303 Or at 180-81 (citations omitted).

We seriously question whether *any* of the elements of estoppel are satisfied in this case. At most the dealings between petitioner and the city building inspectors demonstrate there may have been some confusion about the precise elevation of the native grade of the

subject property.[21] Specifically it is questionable that the conduct of city building officials is such that it can be inferred (1) that they knew that native grade was located at 10 feet above mean sea level, (2) that they made representations to that effect to petitioner with an intention that petitioner rely on such representations or (3) that petitioner was induced to rely on any such representations, if they were made. Moreover, as the city argues, for petitioner's estoppel theory to be potentially available here the city building officials would have to have authority to authorize a dwelling in excess of 28 feet in height. Unless the building officials had such authority, petitioner would not be entitled to rely on any allegedly false representations that the building officials approved of the taller structure in any event. *Holdner v. Columbia County*, 123 Or App 48, 53, 858 P2d 901 (1993). The city argues its building officials have no such authority under city regulations, and we do not understand petitioner to dispute that point.

Petitioner next raises a related issue. Petitioner suggests city building officials may have been negligent in failing to notice that the redesigned dwelling, incorporating the stem-wall foundation design, exceeded the 28-foot height limit. According to petitioner, such negligence would provide a basis for finding the city liable for damages that petitioner may incur if the city seeks a mandatory injunction to remove the portion of the dwelling that exceeds the height limit and a court grants such a mandatory injunction.[22]

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[21]We discussed the 1991 approved plans, 1993 revisions to those plans and the further revisions to those plans in 1994 and 1995 in our discussion of the facts. We do not repeat that discussion here. At most, those revised plans might have been such that petitioner and city building officials should have realized that the revised building plans would result in a dwelling that is more than 28 feet in height measured from native grade.

[22]Having adopted a zoning ordinance, the city has a duty of reasonable care in reviewing building plans and construction pursuant to those plans to ensure they comply with the zoning ordinance and any permits that are approved pursuant to that zoning ordinance. *See Brennen v. City of Eugene*, 285 Or 401, 407-09, 591 P2d 719 (1979) (discussing the duty of reasonable care imposed on local officials charged with administering locally adopted regulations). Where building permit officials fail to exercise such reasonable care "to avoid the foreseeable risk of injuries occasioned by the issuance of a permit which is later revoked," a local government may be liable for damages for such injuries. *Dykeman v. State*, 39 Or App 629, 634, 593 P2d 1183 (1979).

The short answer to petitioner's suggestion is that the challenged decision does not require that petitioner's dwelling be lowered to conform to the BZO and the city has not yet sought a mandatory injunction to require compliance with such a requirement. Although any alleged negligence on the city's part in reviewing petitioner's building plans might be relevant in such proceedings, or in a tort claim by petitioner against the city in the event of such proceedings, such alleged negligence is not relevant here. We have no reason to consider whether the city building officials' failure to realize that the revised building plans might result in a dwelling that exceeded maximum height under the BZO constitutes negligence, and we specifically do not consider that question here. Neither is it within our jurisdiction to consider whether any such negligence might leave the city wholly or partially responsible for the cost of removing part of petitioner's dwelling to make it comply with the BZO.

The relevant questions under this subassignment of error are (1) whether native grade of the subject property is located at 10 feet above mean sea level and (2) whether the dwelling exceeds 28 feet in height when measured from native grade. The answers to those questions are not affected by petitioner's allegations of negligence on the part of the city building officials, even if we were to assume the city building officials were negligent.

This subassignment of error is denied.

D. Application of the 1991 Version of the BZO Rather than the 1988 Version

The maximum building height in the CD-2 zone is set by BZO 3.670.[23] The 1988 version of BZO 3.670, which was in effect when petitioner submitted his application for a conditional use permit to authorize residential use of his property, measured building height "from the floodplain or native ground elevation, whichever is higher."[24] According to

[23]BZO 3.670 was formerly codified as 3.870. We cite exclusively to BZO 3.670 in this opinion to avoid confusion.

[24]The 1988 version of BZO 3.670 provides:

petitioner, the elevation of the floodplain on petitioner's property is either 12 feet or 13 feet.[25] Assuming the 1988 version of BZO 3.670 applies to petitioner's house, even if the city is correct that native grade is located at 10 feet above mean sea level, petitioner argues the house is too tall by only two or three feet, rather than the five feet the city assumed was the case.[26]

The city responds that petitioner's 1990 conditional use permit was reviewed according to the standards in effect at that time. However, because petitioner did not submit detailed building plans at that time, there was no dwelling of any particular height to review in 1990 to determine whether it met height limitations. According to the city, the 1990 conditional use approval was for a concept residence only.[27] The minutes support that view of the planning commission's action:

> "In the CD-2 zone, no building shall exceed two stories or a height of 28 feet, whichever is lower, except that additional stories or any height above 28 feet but not exceeding 35 feet shall be considered a conditional use. Conditional use permits above 28 feet for any use shall be allowed only if the Planning Commission finds that the increased height does not adversely affect the ocean or river views of existing structures. Height shall be *measured from the floodplain or native ground elevation, whichever is higher*." (Emphasis added.)

[25]The staff report states "the flood water elevation in the area of this property is projected to be at an elevation of 12 [feet]." Record 107. The staff report does not explain whether this means the floodplain on the subject property is at 12 feet above mean sea level, nor does it identify the information the staff relied upon in making the statement. Petitioner states that the flood map appearing at Record 375 "appears to indicate a 13-foot floodplain level." Petition for Review 36.

[26]Petitioner argues that under ORS 227.178(3), the 1990 conditional use permit must be reviewed under the standards in effect when the 1990 permit application was submitted. As relevant, ORS 227.178(3) provides:

> "If the application [for a permit] was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the city has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

[27]We are uncertain what kind of conceptual plans the planning commission reviewed in 1990. If they are in the record no party has identified them. The minutes note that the planning commission was concerned whether the design petitioner proposed for the parking level was properly considered a separate story or not. If so, the proposed design would be three stories and require a conditional use permit under BZO 3.670. If the parking level was not properly viewed as a separate story, the proposed design included only two stories. Record 450. Apparently the planning commission believed the concept design was shorter than the maximum 28-foot height limitation in the CD-2 zone, but there is no indication that whether that height was measured

> "Mrs. Densmore moved that we approve a residence for Mr. Rivera on the Jetty as long as he brings a set of plans that do not exceed the height limitation, has a coastal village look, piers can be out of concrete or something like that; an anti-remonstrance agreement for streets and an approved DEQ permit.
>
> "Mr. Brace objected that we do not have a plan now. Mr. Ward says you usually have the application and then a plan review at the same time, but in this case you approved the use and are asking for a plan review, at a later time.
>
> "Mrs. Schamehorn seconded the motion. The vote was 3 to 1 abstention (Mr. Brace)." Record 451.

The planning director's December 21, 1990 letter advising petitioner of the planning commission's decision substantially reflects the above discussion and vote. *See* n 3 and related text.

According to the city, BZO 3.670 was amended after the conditional use permit authorizing residential use of the subject property was granted in 1990. As amended on October 8, 1991, BZO 3.670 measures building height from native ground level or grade.[28] Petitioner did not submit the detailed plans that were required by the 1990 conditional use permit for approval until October 31, 1991. As we have already indicated, those plans showed a house that measured 28 feet in height, measured from native grade.

In this circumstance, we agree with the city that the plans submitted by petitioner in 1991 and thereafter are subject to the 1991 BZO. Had petitioner submitted the detailed

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from the floodplain or native grade played any part in the planning commission's deliberations in 1990. Record 450-51.

[28]As amended in 1991, BZO 3.670 provides:

> "In the CD-2 zone, no building shall exceed a height of 28 feet, except that additional height above 28 feet but not exceeding 35 feet shall be considered a conditional use. Conditional use permits above 28 feet for any use shall be allowed only if the Planning Commission finds that the increased height does not adversely affect the ocean or river views of existing structures on abutting lots."

The definitions of "Height of building or structure" and "Grade (ground level)" make it clear that building height is measured from "native ground level" with additional specific directions on how to make that measurement that we need not discuss here. BZO 1.200(19) and (22).

building plans in 1990 as part of his initial conditional use permit and had those plans identified the floodplain level as being at 12 or 13 feet above mean sea level and showed a house that was 28 feet tall measured from the floodplain level, his argument under this assignment of error might have merit. However, that is not the case here, and ORS 227.178(3) does not obligate the city to apply the 1988 version of BZO 3.670 when it approved petitioner's separate permit application for approval of his detailed building plans in 1991. Neither does ORS 227.178(3) require that the city apply the 1988 version of BZO 3.670 in this decision considering whether petitioner's subsequently revised building plans violate BZO 3.670.

This subassignment of error is denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner's 33-foot high dwelling may be approved, provided the planning commission finds "that the increased height does not adversely affect the ocean or river views of existing structures on abutting lots." BZO 3.670. Heritage Place, a three-story retirement facility, is the only property with an existing structure that abuts petitioner's house and enjoys a view of the ocean. Heritage Place is located some distance from the beach and ocean and enjoys a panoramic view of the ocean. Petitioner's house is one of many houses that are a part of that panoramic view from Heritage Place toward the ocean. Record 55-69; 165-82. There does not appear to be any dispute that some portions of the disputed dwelling at least partially block some of the view of the ocean from Heritage Place. However, petitioner contends that the portion of the dwelling that exceeds 28 feet in height does not "adversely affect the ocean * * * view," within the meaning of BZO 3.670.

Petitioner contends the top five feet of the disputed dwelling are made up of the part of the house that extends from the eave of the roof to the top of the roof.[29] According to petitioner, this is the part of the house that may not adversely affect the ocean view under BZO 3.670. Petitioner argues the part of the house below 28 feet is permitted outright and may not be considered by the city in applying BZO 3.670. Moreover, petitioner argues the ocean view at issue in BZO 3.670 is the view of the *water* in the ocean. We understand petitioner to argue that the view from Heritage Place across the *intervening lands* to the edge of the ocean is not to be considered. We also understand petitioner to argue that the view of the *sky* above the ocean, down to the horizon, is not to be considered. In summary, petitioner contends the city is only to consider (1) the view of ocean water from Heritage Place and (2) whether that view of the ocean water is blocked by the top five feet of the house.

The challenged decision expressly agrees with petitioner's understanding that BZO 3.670 requires that the city council limit its analysis to the part of the dwelling that exceeds 28 feet.[30] The challenged decision does not expressly interpret the operative language in BZO 3.670, "that the increased height does not adversely affect the ocean or river views of existing structures on abutting lots." Petitioner argues that this failure to interpret what is meant by "adversely affect the ocean * * * view" requires that we remand the city's decision. We do not agree. The city's explanation of what it means to "adversely affect the ocean * * * view," is implicit in the findings quoted below and that interpretation is adequate for

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[29]The city does not dispute this contention.

[30]The city council explained:

> "The Council is looking only at the conditional use request for reviewing the portion that exceeds 28 feet. The visual impact of that excess above 28 feet is what is at issue." Record 25.

Respondent does not dispute petitioner's contention that the portion of the house from the eave of the roof to the top of the roof makes up the top five feet of the dwelling.

review. *Alliance for Responsible Land Use v. Deschutes Cty*., 149 Or App 259, 266, 942 P2d 836 (1997), *rev dismissed* 327 Or 555 (1998).

The city's findings addressing BZO 3.670 are as follows:

> "*The Council finds that there are impacts on the west side of Heritage Place where the angled roof on Mr. Rivera's house impedes the view of the ocean and river.* The Council finds that the total view of the river and ocean is not impacted. However, from the main dining room of the Heritage Place facility, there is a considerable interference with the ocean and river views, which adversely impacts the view. *Further, the council finds that from different angles from different windows of the first and second floors, the additional five feet of building height does adversely impact the view.*
>
> "The Council finds that the view impact is of the kind that is within the discretion of Council to deny the appeal. There are arguably houses with as much impact on the ocean and river view as this house, *but there are spaces and areas where the impact of the additional height of Mr. Rivera's house is the sole impediment to the view*.
>
> "The [C]ouncil interprets BZO 3.670 as protecting more view than simply that which is available from the perimeter of the property. View impacts are also determined from what reasonably can be expected to be observed from the inside of a structure. (Since the ordinance protects the view from abutting properties with existing structures not vacant properties.)" Record 26 (emphases added).

The city apparently takes the position that the relevant question under BZO 3.670 is whether the view of the ocean water from any perspective within Heritage Place is impeded by the top five feet of petitioner's house. Under that view, the view of the ocean is "adversely affected" and BZO 3.670 is not satisfied if any part of the view of the ocean water is blocked by the top five feet of petitioner's house and the top five feet of petitioner's house represent the "sole impediment." Record 26. While the city might have adopted a more or less stringent interpretation of BZO 3.670, we cannot say the interpretation that the city council adopted is clearly wrong. *Huntzicker v. Washington County*, 141 Or App 257, 261, 917 P2d 1051, *rev den* 324 Or 322 (1996); *Zippel v. Josephine County*, 128 Or App 458, 461, 876 P2d 854, *rev den* 320 Or 272 (1994); *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 843 P2d 992 (1992).

Petitioner argues the above findings are not supported by substantial evidence. Petitioner first argues that the view of the ocean water from the third floor of Heritage Place is unimpeded by the top five feet of petitioner's house, because the ocean water can be seen above the top of the roof. We do not understand the challenged decision or response brief to take a contrary position on this first point.

Petitioner next argues that from the first and second floors the view of the ocean is either unimpeded by petitioner's house or, where impeded, the visual impediment is solely attributable to the part of the house that is below the eave of the roof. In particular, petitioner argues that where the roof of the house might block the view of the ocean, that view is in fact blocked by more distant houses or vegetation, so that the roof blocks the view of those more distant houses and vegetation, rather than the view of the ocean water from Heritage Place.

Petitioner claims his position concerning the view of the ocean water from Heritage Place is supported by the pictures that appear at Record 55-69, 174, 178 and 180-82; drawings at Record 70-71; and a video tape that is included in the record. Our review of the photographs, videotape and drawings is not *de novo*. We review the cited evidence only to determine whether the city council could reasonably have reached the factual conclusion it reached, based on this evidence. *See Tigard Sand and Gravel, Inc. v. Clackamas County*, 149 Or App 417, 424-25, 943 P2d 1106, *adhered to* 151 Or App 16, 949 P2d 1225 (1997) (LUBA's review for substantial evidence does not include reweighing the evidence); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 587-88, 842 P2d 441 (1992) (same).

We cannot say, based on our review of the evidence, that petitioner's assessment of what the pictures in the record show is accurate. Neither can we say that the city's contrary findings, emphasized above, are not supported by substantial evidence.[31] We readily agree

[31]We do agree with petitioner that the record does not support the city's findings that any "river view" is impacted by any part of petitioner's house. We also have some question whether the view of the ocean water from the first floor dining room is impeded by the top five feet of petitioner's dwelling, as the city found, since none of the photographs taken from the first floor indicate whether they were taken from the dining room.

with petitioner that the evidence in the record clearly shows that the top five feet of his house block at most a tiny sliver of ocean water view from a few locations on the first and second floors of Heritage Place. However, the photographs at Record 58-61, 63-64, and 176-77 either are inconclusive or seem to show that a small part of the sloped roofline on petitioner's house blocks a tiny sliver of ocean water view. Our review of the videotape included in the record yields a similar conclusion. We believe a reasonable person could conclude from these photographs that at least a very small sliver of the ocean water view from some perspectives on the first and second floors of Heritage Place is blocked by the top five feet of petitioner's house. Therefore, we conclude the challenged decision is supported by substantial evidence. *Dodd*, 317 Or at 179; *Younger*, 305 Or at 351-52.

The second assignment of error is denied.

THIRD AND FOURTH ASSIGNMENTS OF ERROR

In his third assignment of error, petitioner argues the challenged decision amounts to an unconstitutional taking of his property under Article I, section 18, of the Oregon Constitution and the Fifth Amendment to the United States Constitution. In his fourth assignment of error, petitioner argues he was denied due process in this matter.

Petitioner's arguments under these assignments of error proceed from the same faulty premise, *i.e.*, that the challenged decision necessarily means the top five feet of his house must be removed. The challenged decision simply establishes the elevation of the native grade on petitioner's property and that his house is too tall. Petitioner speculates that the challenged decision will inevitably lead to a subsequent judicial proceeding to force petitioner to remove the top part of his dwelling. The record in this case lends some support to that speculation. However, there is no way to know whether petitioner's speculation on this point is accurate. Just as importantly, we do not agree with petitioner's implicit

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However, we do not believe the finding concerning the view from the first floor dining room is critical to the city's decision.

suggestion that the city's decision in this appeal, if it is affirmed, will make it inevitable that the city would prevail in such a judicial enforcement proceeding or that petitioner's constitutional arguments could not be raised in defending against such an enforcement proceeding.

The third and fourth assignments of error are denied.

FIFTH ASSIGNMENT OF ERROR

Under his final assignment of error, petitioner argues the "adversely affect" standard imposed by BZO 3.670 is void for vagueness under Article I, section 20, of the Oregon Constitution and the Fourteenth Amendment to the United States Constitution. We reject the argument. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515, 522, *aff'd* 127 Or App 647, 874 P2d 99 (1994); *Marineau v. City of Bandon*, 15 Or LUBA 375, 378 (1987); *see Anderson v. Peden*, 284 Or 313, 324-26, 587 P2d 59 (1978) (rejecting argument that vague land use legislation required prior rulemaking before being applied in individual cases).

The fifth assignment of error is denied.

The city's decision is affirmed.