BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NYLA L. JEBOUSEK,
Petitioner,

vs.

CITY OF NEWPORT,
Respondent.

LUBA No. 2005-089

FINAL OPINION
AND ORDER

Appeal from City of Newport.

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

Robert W. Connell, Newport, filed the response brief and argued on behalf of respondent. With him on the brief was Minor, Bandonis, Connell and Haggerty, PC.

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

REMANDED 01/20/2006

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 city approval of a building permit to construct a single-family dwelling in a lot in the city's Residential R-1 zone.

INTRODUCTION

City of Newport Zoning Ordinance (NZO) § 2-4-7 is entitled "Geologic Hazard Areas." NZO § 2-4-7.010 provides a definition of "Geologic Hazard Area."[1] Prior to issuing a building permit in a geologic hazard area, a geologic permit is required. NZO § 2-4-7.020.[2] Where NZO §§ 2-4-7.010 and 2-4-7.020 require a geologic hazard permit, a geologic hazard report must be prepared and submitted to the city.[3] Petitioner believes the disputed property is within a geologic

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[1] NZO § 2-4-7.010 defines geologic hazard area as follows:

> "**Geologic Hazard Areas**. The following areas are considered geologically hazardous and are therefore subject to the requirements of this section:
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> "A. Any area within the geologic setback area as herein defined.
>
> "B. Areas that are defined as geologically hazardous in the document entitled Environmental Geology of Lincoln County, Oregon, prepared by the Oregon Department of Geology and Mineral Industries.
>
> "C. Areas identified by the Soils Conservation Service as having weak foundation soils.
>
> "D. Any other documented geologic hazard area on file in the office of the City of Newport Building Official."

[2] NZO § 2-4-7.020 provides in relevant part:

> "**Geologic Permit Required**. Prior to the issuance of any building permit, any mobile home siting permit, any grading permit, any removal of any vegetation, any excavation over 50 cubic yards, or any other human alteration within a geologic hazard area as defined in [NZO §] 2-4-7.010, a geologic permit is required. The geologic permit may be applied for prior to or in conjunction with a building permit, grading permit, or any other permit required the city."

[3] NZO § 2-4-7.025 provides in relevant part:

> "**Geologic Report Guidelines**. In order to obtain a geologic permit, the applicant shall present to the City a geologic hazard report prepared by a registered engineering geologist. The report shall be prepared consistent with standard geologic practices and shall, at a minimum, contain the items outlined in the 'Guidelines for Preparing Engineering Geologic Reports in Oregon,' prepared by the Oregon State Board of Geologist Examiners. * * *"

hazard area and that the city should have required a geologic hazard report and a geologic hazard permit under the above NZO requirements.

The City of Newport Comprehensive Plan includes a number of Goals. Goal 1 of the Natural Features component of the plan is "[t]o protect life and property, to reduce costs to the public, and to minimize damage to the natural resources of the coastal zone that might result from inappropriate development in environmentally hazardous areas." Goal 1, Policy 1 requires site specific investigations by a registered geologist or engineer in areas of known hazards. Outside areas of known hazards, Goal 1, Policy 3 requires "a site specific investigation by a registered geologist or engineer" where "there is reason to believe that a potential [hazard] does exist."[4] Petitioner contends that there is reason to believe a geologic hazard exists on the subject property and that the city erred by issuing a building permit without the site specific investigation required by Goal 1, Policy 3.[5]

FACTS

This appeal has a long history. There have been three earlier rounds of appeals. We described those prior rounds of appeal in some detail in our October 24, 2005 order in which we denied respondent's motion to dismiss this latest appeal. Because the history of this matter is important in understanding why we deny respondent's jurisdictional challenge in this appeal and sustain petitioner's single assignment of error, we repeat the description of the three prior rounds of appeals that we set out earlier set out in our October 24, 2005 order in this appeal.

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[4] The entire text of Goal 1, Policy 3 is set out below:

> "Where hazardous areas have not been specifically identified but there is reason to believe that a potential [hazard] does exist, a site specific investigation by a registered geologist or engineer shall be required prior to development."

[5] It is not clear to us whether the "site specific investigation by a registered geologist or engineer," which is required by Goal 1, Policy 3, is the same thing or in some way different from the geologic report that is described in NZO § 2-4-7.025, and the parties do not address that question.

A. The First Round of Appeals

In a memorandum opinion dated October 29, 1996, LUBA affirmed a city decision that approved a lot line adjustment for the subject property. The Court of Appeals remanded our memorandum opinion. *Jebousek v. City of Newport*, 147 Or App 100, 935 P2d 452 (1997). The basis for the Court of Appeals' remand to LUBA is set out below:

> "Petitioner contends that the slope of the affected property 'drops off drastically,' and that development on it would pose a landslide risk. She therefore argues that, as part of this decision, the city was required to, but did not, apply Goal 1 of the Natural Features component of the city's comprehensive plan. The goal requires minimization of 'damage to the natural resources of the coastal zone that might result from inappropriate development in environmentally hazardous areas.' Policy 3 of the goal, which petitioner specifically contends is applicable and was not followed by the city, provides:
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> > "'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.'
>
> "Petitioner maintains that she raised the issue of 'environmental hazards and site specific investigation' at each level of the city's decision-making process and that the city did not address the issue. We emphasize that this opinion pertains directly only to the city's asserted failure to address the issue. We do not suggest anything about the merits of petitioner's substantive position, except that it is not outside the range that the city could have found meritorious had it considered it or should it do so later as a consequence of our remand." 147 Or App at 102.

In accordance with the Court of Appeals' decision, we remanded the city's lot line adjustment decision in an unpublished opinion dated June 17, 1997.

As a result of the first round of appeals, the city's lot line adjustment decision was remanded to the city to address petitioner's Goal 1, Policy 3 argument.

B. The Second Round of Appeals

In its decision following our June 17, 1997 remand, the city interpreted Goal 1, Policy 3 to establish a general policy rather than an approval standard for individual land use permit decisions. Petitioner appealed that decision to LUBA. LUBA affirmed the city's interpretation. *Jebousek v.*

City of Newport, 34 Or LUBA 340 (1998). Because LUBA affirmed the city's interpretation that Goal 1, Policy 3 did not establish an approval standard for individual permit decisions, LUBA did not consider other assignments of error, in which petitioner (1) asserted an evidentiary challenge to "the city's finding that there is no reason to believe the subject property has a potential for geologic hazard" and (2) challenged city findings that even if Goal 1, Policy 3 is an approval standard, it applies at the time of development rather than to lot line adjustments. 34 Or LUBA at 346-47.

Petitioner appealed LUBA's decision in the second round of appeals to the Court of Appeals. The Court of Appeals reversed and remanded LUBA's decision:

> "Petitioner argues to us that the city and LUBA erred in a number of respects. Her principal contention is that the city's interpretation that [Goal 1, Policy] 3 is precatory only and is not an approval standard was erroneous. We agree. The provision is not subject to any reasonable reading except that it requires a particular action under particular circumstances as a condition of approving particular applications. The city's interpretation is 'clearly wrong.' *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 843 P2d 992 (1992).
>
> "It follows that a remand to LUBA is necessary to decide petitioner's assignments of error that, given its disposition of the interpretive question, it did not decide on their merits. One of those assignments 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. * * * [W]e emphasize that the question under [Goal 1, 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." *Jebousek v. City of Newport*, 155 Or App 365, 367-68, 963 P2d 116 (1998) (court's emphases).

C. The Third Round of Appeals

Following the Court of Appeals decision in the second round of appeals, LUBA sustained petitioner's assignment of error in which she challenged the adequacy of the evidentiary support for the county's finding that there is no reason to believe a potential hazard exists on the subject property. *Jebousek v. City of Newport*, 36 Or LUBA 124, 127-28 (1999). LUBA next considered a separate interpretive issue that LUBA did not address in its decision in the second round of appeals. The city adopted an interpretive finding to the effect that even if Goal 1, Policy 3

did establish approval standards for individual permit decisions, it did not establish approval standards for lot line adjustment decisions. We quoted the city's interpretive finding:

> "'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.'" 36 Or LUBA at 128 (record citation omitted).

In deferring to the city's interpretive finding that the potential applicability of Goal 1, Policy 3 would be addressed at the time development is proposed, we explained:

> "[The city's interpretive] finding taken as a whole indicates that the city considers that [Goal 1] 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.' 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." 36 Or LUBA at 129 (record citation omitted).

We went on to reject petitioner's concern that the building permit that would follow the lot line adjustment would not be a land use decision that is appealable to LUBA. 36 Or LUBA 130, n 1 (noting that building permits are excluded from LUBA's review jurisdiction only if they are issued pursuant to "clear and objective standards").

Petitioner appealed our decision in the third round of appeals to the Court of Appeals. After quoting the city's interpretive finding that is quoted immediately above, the Court of Appeals affirmed LUBA's decision:

> "Petitioner now argues to us that LUBA erred in rejecting her challenge to the city's interpretation of Policy 3. We agree with LUBA's understanding of the substance of the city's interpretation and with LUBA's conclusion that, *as so understood*, the interpretation is not reversible under *Clark* [*v. Jackson County*, 313 Or 508, 836 P2d 710 (1992).]" *Jebousek v. City of Newport*, 163 Or App 126, 129, 986 P2d 1244 (1999) (court's emphasis).

With the above history as background, we turn first to the city's contention that LUBA does not have jurisdiction to consider this appeal of the city's decision to approve a building permit for the subject property.

JURISDICTION

As noted above, petitioner was concerned that the building permit that might ultimately be issued following the lot line adjustment for the disputed property would be viewed as a building permit issued under clear and objective standards. Such building permits are not land use decisions and therefore are not appealable to LUBA. ORS 197.015(10)(b)(B).[6] Apparently petitioner's fears were well founded, because respondent moved to dismiss the present appeal, arguing that "the final decision at issue was a decision to issue a building permit under clear and objective standards." Respondent's Motion to Dismiss for Lack of Jurisdiction and Motion to Strike 1. In our October 24, 2005 Order in this appeal, we rejected that argument:

> "To the extent the city suggests that Goal 1, Policy 3 is a clear and objective standard, within the meaning of ORS 197.015(10)(b)(B), or is not a discretionary standard, within the meaning of ORS 197.015(12), we reject the suggestion. Goal 1, Policy 3 requires the city to determine whether 'there is a reason to believe that a potential [hazard] does exist' and, if so, to require 'a site specific investigation by a registered geologist or engineer * * * prior to development.' Without expressing any view here regarding whether the city correctly determined that 'there is no reason to believe that a potential hazard does exist,' that is a subjective and discretionary standard; it is not a clear and objective standard." Slip op at 6.

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[6] LUBA has exclusive jurisdiction to review land use decisions. ORS 197.825(1). Under ORS 197.015(10)(a)(A)(iii) a final city decision that applies a land use regulation falls within the statutory definition of "land use decision." The challenged building permit is a final city decision that applies the city's zoning ordinance, which is a land use regulation. However, ORS 197.015(10)(b)(B) provides that a "land use decision" does not include a local government decision that "approves or denies a building permit issued under clear and objective land use standards[.]"

Respondent continues to argue in its response brief that the challenged building permit falls within the exception to the statutory definition of land use decision for building permits that are governed by "clear and objective standards." Respondent repeats some of the arguments it raised in its prior motion to dismiss that we have already considered and rejected. We reject those arguments here without further discussion. In addition to the arguments we have already considered and rejected, respondent adds two more arguments in the response brief.

First, respondent contends that '[n]owhere does Petitioner say * * * that there was an exercise of judgment or discretion in how Goal 1, Policy 3 was interpreted or applied." Respondent's Brief 6. However, in responding to the city's prior motion to dismiss, petitioner did argue that applying Goal 1, Policy 3 requires the exercise "of factual judgment and is not a ministerial act." Petitioner's Response to Respondent's Motion to Dismiss 3. While it would have been preferable for petitioner to reassert that position in the petition for review, it is likely that given what LUBA said in its October 24, 2005 Order, petitioner simply viewed that issue as one that LUBA had already resolved in her favor. Petitioner's failure to reassert that position in the petition for review is not reversible error.

A second new argument in the response brief is that the evidentiary record that supports the building permit in this matter is such that even if application of Goal 1, Policy 3 might require the exercise of discretion in other factual contexts, it did not require the exercise of discretion in this case. We reject the argument. Whether the disputed building permit qualifies for the "clear and objective" standards exception to LUBA's jurisdiction depends on the wording of the standards themselves, not the quality or quantity of the evidence in the record. We remain of the view that determining whether "there is a reason to believe that a potential [geologic hazard] does exist" under Goal 1, Policy 3 is a discretionary determination and results in the building permit being a land use decision subject to our review. It is not clear how city building officials are supposed to go about determining whether there is reason to believe a geologic hazard exists on a site that lies outside of identified hazard areas. If other NZO sections provide guidance in making that determination under

Goal 1, Policy 3, no one has called them to our attention. Making the determination required under Goal 1, Policy 3 requires the exercise of discretion and the disputed building permit is not removed from the statutory definition of land use decision by ORS 197.015(10)(b)(B). The disputed building permit is a land use decision and is subject to appeal to LUBA.[7]

FIRST ASSIGNMENT OF ERROR

The precise nature and scope of petitioner's first assignment of error is not clear. That lack of clarity is attributable, in part, to the procedure the city followed in granting the disputed building permit and in part to the decision itself. The city provided no notice or hearing before issuing the building permit and the evidentiary record is meager. The decision itself is brief and includes few findings. We read the first assignment of error to assert an evidentiary challenge but also to include a challenge to the adequacy of the city's findings to explain why a geologic report and geologic permit are not required under NZO §§ 2-4-7.010, 2-4-7.020, and 2-4-7.25 and to challenge the adequacy of the city's findings to explain why a site specific geologic investigation is not required under Goal 1, Policy 3.

Petitioner's challenge under Goal 1, Policy 3 is easily resolved in petitioner's favor. Notwithstanding that the city's prior failure to address Goal 1, Policy 3 was the basis for our remand at the end of the second round of appeals, and notwithstanding that our decision sustaining the city's decision at the end of the third round of appeals was based on the city's interpretation that Goal 1, Policy 3 would apply at the time the building permit was issued, there is nothing in the record or the building permit decision itself that establishes that Goal 1, Policy 3 was even considered by the person who approved the building permit. For that reason alone, the city's decision must be remanded. On remand the city must address Goal 1, Policy 3 and explain why it

[7] The parties do not offer any additional focused argument on whether the disputed building permit may qualify as a limited land use decision, as ORS 197.015(12)(b) defines that term. While we left open the possibility that the building permit might qualify as a limited land use decision in our October 24, 2005 order, the answer to that question would not affect our jurisdiction or our resolution of the issues presented in this appeal, and we do not consider that question further here.

believes that policy applies or does not apply to require a site specific geologic investigation in this case.

Petitioner's contention that the decision should be remanded for failure to consider NZO §§ 2-4-7.010, 2-4-7.020, and 2-4-7.25 presents only a slightly closer question. It is reasonably clear from the building permit that the city did consider whether the subject property is within a known geologic hazard area as defined by NZO 2-4-7.010(A), (B), (D). *See* n 1. The following notation appears at the bottom of the building permit checklist:

> "A. Not subject to coastal erosion; B. Not defined as geologically hazardous in the document entitled Environmental Geology of Lincoln County, Oregon, prepared by DOGAMI; C. Not identified as geologically hazardous area in documents on file in the office of the building official.
>
> "VM 3/10/05" Record 2."

We understand the above note to have been added to the checklist to explain that the subject property does not qualify as a geologic hazard area under NZO 2-4-7.010(A), (B) or (D). We do not understand petitioner to challenge those findings. However petitioner does challenge the city's failure to explain why the subject property does not qualify as a geologic hazard area within the meaning of NZO 2-4-7.010(C), under which "[a]reas identified by the Soils Conservation Service as having weak foundation soils" are considered as geologic hazard areas.[8] There is nothing on the checklist or in the record that establishes that the city considered this possibility. For that reason we sustain this part of petitioner's assignment of error as well. On remand the city must consider whether, prior to issuing the disputed building permit, a site specific investigation by a registered geologist or engineer is required under Goal 1, Policy 3 and whether the National Resource Conservation Service identifies the soils on the property as weak foundation soils, which would trigger the requirement for a geologic hazard report and a geologic permit under NZO §§ 2-4-7.010, 2-4-7.020, and 2-4-7.25.

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[8] The National Resource Conservation Service was formerly known as the U.S. Soil Conservation Service.

The first assignment of error is sustained.

MOTION FOR EVIDENTIARY HEARING

Petitioner has filed three motions requesting that LUBA consider evidence outside the record. The extra-record evidence is offered to support her position concerning NZO §§ 2-4-7.010, 2-4-7.020, and 2-4-7.25 and Goal 1, Policy 3. The last such motion was filed at oral argument. As we explained in our November 30, 2005 Order on Motion to Take Evidence, LUBA review is generally limited to the local record and our authority to accept and consider evidence outside the local record is specifically limited by ORS 197.835(2)(b) and OAR 661-010-0045.[9] Petitioner argues that LUBA can consider the proffered evidence to resolve "other procedural irregularities not shown in the record." Petitioner confuses procedural error, which may provide a basis for reversal or remand under ORS 197.835(9)(a)(B), and "other procedural irregularities not shown in the record," which may provide a basis for LUBA to consider extra-record evidence under ORS 197.835(2)(b). The thrust of petitioner's arguments before LUBA has been that the city either ignored or improperly applied NZO §§ 2-4-7.010, 2-4-7.020, and 2-4-7.25 and Goal 1, Policy 3 to the facts of this case. We have already agreed with petitioner that the city's findings are inadequate to demonstrate that the building permit was issued in compliance with those NZO and plan provisions. As we explained in our November 30, 2005 order, it is the city's obligation to adopt required findings and ensure that any critical findings concerning those provisions are supported by substantial evidence. When the city fails to adopt the required findings, and petitioner appeals that decision to LUBA, remand is appropriate. Petitioner's motion in essence asks LUBA to go further and consider extra-record evidence that petitioner believes will show that the circumstances that require a site specific geologic study under those provisions are present here.

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[9] ORS 197.835(2)(b) provides:

> "In the case of disputed allegations of standing, unconstitutionality of the decision, ex parte contacts, actions described in subsection (10)(a)(B) of this section or other procedural irregularities not shown in the record that, if proved, would warrant reversal or remand, the board may take evidence and make findings of fact on those allegations. * * *"

That determination is for the city to make in the first instance. Petitioner's motion to consider evidence outside the record is denied.

As we have noted, notwithstanding the prior history of this appeal, the city provided no notice to petitioner that it was considering approval of the disputed building permit. Neither did the city provide petitioner notice of the building permit itself, at the time it was issued. When petitioner became aware of activity on the property and discovered the building permit, she filed this appeal under ORS 197.830(3)(b).[10] The city contends that it was not legally obligated to provide petitioner (1) prior notice of its consideration of the building permit application, (2) an opportunity for an evidentiary hearing or (3) notice of the building permit decision itself. The city may be correct in some or all of these contentions. *See Tirumali v. City of Portland*, 41 Or LUBA 231, 240, *aff'd* 180 Or App 613, 45 P3d 519, *rev den* 334 Or 632 (2002) (holding that not all building permit decisions that fall within LUBA's jurisdiction as land use decisions are also statutory "permits" that require a hearing or notice of the decision and an opportunity for local appeal).[11] However, given the probability petitioner will file a fifth LUBA appeal to challenge any building permit the city may issue following this remand within 21 days after she becomes aware of the building permit, it would seem that some kind of notice to petitioner and opportunity to comment

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[10] ORS 197.830(3) provides:

> "If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416 (11) or 227.175 (10), or the local government makes a land use decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:
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> "(a) Within 21 days of actual notice where notice is required; or
>
> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

[11] We say the city may be correct, because the prior LUBA and Court of Appeals decisions in this matter clearly establish that, at a minimum, the Goal 1, Policy 3 requirement will be considered by the city at the building permit stage. Although we need not and do not decide the question here, those prior decisions, in and of themselves, may well be sufficient to obligate the city to at least give petitioner an opportunity to comment on the building permit before it is issued.

would be prudent, even if the city is not legally required to do so. Similarly, given the possibility that the city will again issue the building permit without providing any opportunity for petitioner to submit evidence or argument, it would seem prudent for petitioner to take appropriate steps immediately to (1) provide the city any evidence or argument that she believes supports her position concerning NZO §§ 2-4-7.010, 2-4-7.020, and 2-4-7.25 and Goal 1, Policy 3, and (2) request that such evidence and argument be considered in the event the city elects not to provide her any opportunity to present evidence or argument when it again considers whether to approve the building permit.

The city's decision is remanded.