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NATURE OF THE DECISION

Petitioner appeals a city decision that approves a building permit for a single-family dwelling.

FACTS

The dispute between petitioner and the city over this property has a long history. We set out that history in some detail in our last decision in this matter. *Jebousek v. City of Newport*, 51 Or LUBA 93, 96-100 (2006). The issues that are now before us in this appeal were framed by our last decision in this matter. We remanded a prior building permit decision so that the city could address the potential applicability of (1) Newport Comprehensive Plan Natural Features Section (NFS) Goal 1, Policy 3, which may require that the building permit applicant have a “site specific investigation * * * prepared by a registered geologist or engineer,” and (2) Newport Zoning Ordinance (NZO) § 2-4-7.010, which petitioner believes triggers application of other NZO sections that would require that the building permit applicant obtain a geologic permit prior to or in conjunction with the disputed building permit.

In adopting its decision on remand, the city adopted a number of alternative theories or rationales and petitioner challenges all of those theories and rationales in her petition for review. As we explain below, the city’s findings provide one sustainable rationale for its decision regarding NFS Goal 1, Policy 3 and one sustainable rationale for its decision regarding NZO § 2-4-7.010. We limit our consideration to those rationales and affirm the city’s decision.

1 **THIRD ASSIGNMENT OF ERROR**

2 NZO § 2-4-7 is entitled “Geologic Hazard Areas.” NZO § 2-4-7.010 provides a
3 definition of “Geologic Hazard Area.”¹ Prior to issuing a building permit in an area that
4 qualifies as a geologic hazard area under NZO § 2-4-7, a geologic permit is required. NZO §
5 2-4-7.020.² Where NZO §§ 2-4-7.010 and 2-4-7.020 require a geologic hazard permit, a
6 geologic hazard report must be prepared and submitted to the city. NZO § 2-4-7.025.³ One
7 of the issues on remand was whether the subject property is located in an area “identified by
8 the Soils Conservation Service as having weak foundation soils.” NZO § 2-4-7.010(C). The
9 Soils Conservation Service is now the National Resource Conservation Service (NRCS).

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:

- “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. * * *”

1 The parties agree that according to the NRCS, the subject property is in an area that is
2 designated “59C—Urban Land-Nelscott complex, 0-12 percent slopes.” Record 70.⁴ Based
3 on our review of the NRCS materials cited by the parties, there can be no doubt that the
4 Urban Land-Nelscott complex has characteristics that limit its suitability for some kinds of
5 development.⁵ But the relevant question the city was required to answer on remand was
6 whether NRCS identifies 59C-Urban Land-Nelscott complex as having “weak foundation
7 soils” thus triggering the NZO § 2-4-7.025 requirement for a geologic report and the NZO §
8 2-4-7.020 requirement for a geologic permit.

9 One of the rationales advanced by the city on remand regarding NZO § 2-4-7.010(C)
10 is that the NZO does not define the term “weak foundation soils” and the NRCS soils
11 information for the county that is included in the record also does not define the term “weak
12 foundation soils” and does not use that term in any of the relevant tables that identify soils
13 characteristics. We tend to agree with petitioner that such a narrow and literal reading of
14 NZO § 2-4-7.010(C) and the NRCS soils information, without more, might not be
15 sustainable, even under the deferential standard of review that the city is entitled to receive

⁴ The soil survey explains that little is known about the Urban Land portion of the complex:

“Urban land consists of areas covered mainly by streets, parking lots, buildings, or other impervious surfaces that obscure or alter soil characteristics so that recognition and interpretation are not feasible. Some areas consist of soils that have been so altered that it was not practical to map them separately.” Record 70.

⁵ Although the parties spar over the significance that should be attributed to the lack of knowledge about the Urban Land soils, it is clear that while it is possible to develop on Nelscott soils, those soils have significant limitations that may make them unsuitable for some kinds of development:

“The main limitations for development on the Nelscott soil are the slope, the hazard of erosion, low soil strength, the wetness, and the instability of cutbanks. Building sites should be located in the less sloping areas. Erosion is a hazard in the steeper areas. Only the part of the site that is used for construction should be disturbed. Cutbanks are not stable and are subject to slumping. On sites for access roads, an adequate cut-slope grade and drains are needed to control surface runoff and keep soil losses to a minimum. Areas that have been cut and filled should be seeded or mulched. Properly designing buildings and roads helps to offset the limited ability of the soil to support a load. The wetness can be reduced by installing drainage tile around footings. A plant cover can be established and maintained through applications of fertilizer, seeding, mulching, and shaping of the slopes.” Record 70.

1 under ORS 197.829(1) and *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759
2 (2003) However, the city bolstered that interpretation with a number of other interpretive
3 rationales. One of those rationales relies on Table 9, “Building and Site Development,”
4 which appears in the Soil Survey of Lincoln County Area, Oregon (LC Soil Survey). The
5 Table 9 entry for 59C—Urban Land-Nelscott complex appears at page 196 of the LC Soils
6 Survey and at page 98 of the record. That table rates soils limitations for particular kinds of
7 development. Urban Land soils are not rated, but Nelscott soils are.⁶ Table 9 indicates that
8 Nelscott soils have a “severe” limitations for “[s]hallow excavation,” and “dwellings with
9 basements.” However Table 9 indicates that Nelscott soils have “moderate” limitations for
10 “[d]wellings without basements,” “[s]mall commercial buildings,” “[l]ocal roads and
11 streets,” and “[l]awns and landscaping.”⁷ The city’s findings concerning the significance of
12 Table 9 include the following:

13 “* * * In regard to the specific geologic hazard permit trigger in NZO Section
14 2-4-7.010(c) concerning ‘Areas identified by the Soils Conservation Service
15 as having weak foundation soils’, the city concludes that if a subsequent
16 review authority concludes that the 1997 NRCS Soil Survey of Lincoln
17 County Area, Oregon, does categorize soil by ‘strength’ properties and that a
18 ‘low strength’ soil category may be similar in terminology to ‘weak

⁶ Petitioner argues that the soils on the property should be considered Nelscott Soils rather than Urban Soils. For purposes of this opinion we assume she is correct.

⁷ For some reason, although petitioner claims she submitted the entire LC Soils Survey document to the city, the city included only parts of that document as part of the record. Petitioner did not object to the record filed by the city in this appeal. That record does not include the part of the LC Soils Survey that describes the “severe” and “moderate” ratings in Table 9. The published on-line version of the LC Soil Survey provides the following description:

“Table 9 shows the degree and kind of soil limitations that affect shallow excavations, dwellings with and without basements, small commercial buildings, local roads and streets, and lawns and landscaping. The limitations are considered *slight* if soil properties and site features generally are favorable for the indicated use and limitations are minor and easily overcome; *moderate* if soil properties or site features are not favorable for the indicated use and special planning, design, or maintenance is needed to overcome or minimize the limitations; and *severe* if soil properties or site features are so unfavorable or so difficult to overcome that special design, significant increases in construction costs, and possibly increased maintenance are required. Special feasibility studies may be required where the soil limitations are severe.” LC Soils Survey at page 86.

1 foundation soils’, then the City concludes that soil map unit 59C does not
2 contain limitations on the soil categories in regard to soil strength for
3 dwellings with or without basements as permitted by Building Permit No.
4 11793.

5 “* * * * *

6 “B. Table 9 (entitled ‘Building Site Development’) on page 196 of the
7 1997 NRCS Soil Survey of Lincoln County Area, Oregon, does not
8 identify either of the two soil categories (Urban Land and Nelscott)
9 within the 59C soil map unit as having soil with low strength for
10 dwellings (with or without a basement) as proposed in Building Permit
11 No. 11793 in either of the two soil categories. * * *” Record 30-31.

12 Table 9 does not use the term “weak foundation soils” or the term “soil strength.”
13 But Table 9 does appear to rate soils for unsuitability or limitations for various kinds of
14 development. Given the descriptions of the “slight,” “moderate,” and “severe” ratings in the
15 soil survey, *see n 7*, we believe the city *could have* equated “weak foundation soils” with any
16 rating other than favorable. However, petitioner does not explain why the city necessarily
17 *must* err on the side of caution in interpreting the significance of the Table 9 ratings. We
18 cannot say the city’s less cautious approach in equating “weak foundation soils,” with the
19 “severe” rating, and interpreting the “moderate” rating not to constitute “weak foundation
20 soils” for construction of dwellings without basements is reversibly wrong under ORS
21 197.829(1) and *Church*.⁸

22 The third assignment of error is denied.

23 **SECOND ASSIGNMENT OF ERROR**

24 Under NFS Goal 1, Policy 3 a “site specific investigation by a registered geologist or
25 engineer” is required in certain circumstances.⁹ The city found that NFS Goal 1, Policy 3

⁸ The above findings misread Table 9 to provide a “moderate” rating for dwellings with a basement. However, that error is not material because the disputed dwelling does not have a basement.

⁹ The entire text of Goal 1, Policy 3 is set out below:

1 does not require such a site specific investigation in the particular circumstance presented by
2 this case.¹⁰ However, the city also found that even if NFS Goal 1, Policy 3 did require a site
3 specific investigation in this case, the applicant submitted such an investigation. Petitioner
4 assigns error to both findings.

5 In finding that the geologist report submitted by the applicant was sufficient to
6 comply with the requirement of NFS Goal 1, Policy 3, assuming that policy applies to require
7 a site specific report, the city provided the following explanation:

8 “Should NFS Goal 1, Policy 3 be found by subsequent review authority to be
9 applicable to the Building Permit No. 11793, the city concludes that NFS
10 Goal 1, Policy 3 has been satisfied by the site specific investigation completed
11 by Richard Larrett Engineering Geologist. The applicant for Building Permit
12 No. 11793 has had a site specific investigation completed by an Oregon
13 registered engineering geologist pursuant to NFS Goal 1, Policy 3. The
14 document [is] dated February 12, 2006, entitled ‘Preliminary Site Evaluation
15 for Tax Lot 8900 * * *. Mr. Larrett in his conclusion section of the February
16 12, 2006, report stated: ‘This site and the adjacent area appear stable with no
17 indications of recent mass slope movement or geologic hazards.’ NFS Goal 1,
18 Policy 3 contains no additional requirement other than a site specific
19 investigation be completed by a registered engineer or geologist.” Record 26-
20 27 (footnotes omitted).

21 The site specific investigation completed by Richard Larrett (the Larrett Report) appears at
22 Record 45-57. In one of the omitted footnotes, the city addressed petitioner’s contentions
23 that the Larrett Report is inadequate to satisfy the NFS Goal 1, Policy 3 requirement for a site
24 specific evaluation:

25 “Nyla Jebousek in her written submission * * * makes an unsupported
26 assertion [regarding the] Preliminary Site Evaluation prepared by Richard
27 Larrett to the effect that ‘it does not appear to meet the standards outlined in

“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.”

¹⁰ The petition for review can be read in places to suggest that the Court of Appeals determined that Goal 1, Policy 3 requires a site specific investigation for this property in *Jebousek v. City of Newport*, 155 Or App 365, 367-68, 963 P2d 116 (1998). However, the Court of Appeals simply directed that the city must consider *whether* Goal 1, Policy 3 requires a site specific investigation for this property.

1 the Guidelines for Preparing Engineering Geologic Reports in Oregon State
2 Board of Geologist Examiners as required by NZO [§ 2-4-7.025].’ * * * Ms.
3 Jebousek, however, does not identify how the report does not meet the Oregon
4 State Board of Geologist Examiners (OSBGE) Guidelines. The Guidelines
5 for Preparing Engineering Geologic Reports in Oregon as adopted by the
6 OSBGE are intended to be flexible ‘guidelines’ and not inflexible standards
7 (as evidenced by the repeated use of the word ‘should’ throughout the
8 guidelines rather than use of the word ‘shall’). Furthermore, the OSBGE in
9 the Guidelines state that:

10 “‘This is a suggested guide for the preparation of an
11 engineering geologic report in Oregon. The engineering
12 geologic report should include sufficient facts and
13 interpretation regarding geologic materials, processes, and
14 history to allow evaluation of the suitability of the site for the
15 proposed use. Because of the wide variation in size and
16 complexity of projects and scope of work, the guidelines are
17 intended to be flexible and should be tailored to the specific
18 project. The guidelines are intended to be fairly complete;
19 however, not all items would be applicable to small scale
20 projects or low-risk sites. In addition, some items may be
21 addressed in separate reports prepared by a geotechnical
22 engineer, geophysicist, structural engineer, or hydrologist.’

23 “‘The fact that the report is identified as ‘preliminary’ does not mean it was not
24 prepared consistent with the guidelines as OSBGE Guideline 1 (General
25 Information) * * * states that a report should include ‘Purpose and scope of
26 the report and geologic investigation, including, the proposed use of the site.
27 Also, identify the level of study, i.e. feasibility, preliminary, final, etc.’ Based
28 on a review of the OSBGE Guidelines and the Larrett report, it appears that
29 the report is consistent with the overall OSBGE Guideline categories.”
30 Record 26.

31 Petitioner’s argument under the second assignment of error is as follows:

32 “‘The city erred when it ignored [NFS] Goal 1, Policy 3 * * * and improperly
33 relied on the Preliminary Site Evaluation * * *. It does not appear to meet the
34 standards outlined in the Guidelines for Preparing Engineering Geologic
35 Reports in Oregon prepared by the Oregon State Board of Geologist
36 Examiners as required by NZO [§ 2-4-7.025].” As a Preliminary Site
37 Evaluation it may not have been intended to meet the criteria for a site
38 specific geologic report which is required in order for the city issue a geologic
39 hazard permit. The report itself states that, ‘Additional investigation would be
40 required to confirm these initial observations.’ Recommendations are also
41 made in the report that may or may not have been followed by the developer.”
42 Petition for Review 7.

1 Petitioner appears to be making the same argument to LUBA that she made to the
2 city. However, petitioner ignores the findings that the city adopted to respond to petitioner’s
3 concern about the adequacy of the preliminary geologic study. As we noted in a prior
4 opinion, the connection between the “site specific study” required by NFS Goal 1, Policy 3
5 and the geologic report that may be required by § 2-4-7.025 is not clear to us. It is still not
6 clear to us, and the parties do not provide any focused argument on that issue. However, the
7 city explained why it believes the applicant’s geologic study meets the requirements of § 2-4-
8 7.025, assuming those requirements apply. The city also explained why the fact that the
9 Larrett Report is “preliminary” does not mean it fails to comply with the OSBGE Guidelines,
10 since they expressly recognize that a report may be preliminary. Petitioner apparently
11 disagrees with that finding, but she neither directly challenges the finding nor makes any
12 attempt to explain why it is wrong. Petitioner’s undeveloped observation that the Larrett
13 Report states “[a]dditional investigation would be required to confirm these initial
14 observations,” is not sufficient to establish that the applicant’s report is insufficient to
15 comply with the NFS Goal 1, Policy 3 requirement for a site specific report. Finally,
16 petitioner’s observation that the recommendations in the report “may not have been followed
17 by the developer” has no obvious bearing on whether the Larrett Report is sufficient to
18 comply with NFS Goal 1, Policy 3.

19 The second assignment of error is denied.¹¹

20 The city’s decision is affirmed.

¹¹ We do not consider petitioner’s challenges under the first and fourth assignments of error, in which petitioner alleges the city erred in concluding statutory and administrative rule requirements of clear and objective standards for needed housing preclude application of NFS Goal 1, Policy 3, NZO § 2-4-7.010, NZO § 2-4-7.020, and NZO § 2-4-7.025.