

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

3 CAROL KNAPP,
4 *Petitioner,*

5
6 vs.

7
8 CITY OF JACKSONVILLE,
9 *Respondent,*

10
11 and

12
13 PETER BRITT GARDENS
14 MUSIC AND ARTS FESTIVAL,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2015-010

18
19 FINAL OPINION
20 AND ORDER

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22 Appeal from City of Jacksonville.

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24 Carol Knapp, Jacksonville, filed the petition for review and argued on
25 her own behalf.

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27 No appearance by City of Jacksonville.

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29 Timothy L. Jackle, Medford, filed the response brief and argued on
30 behalf of intervenor-respondent. With him on the brief was Foster Denman
31 LLP.

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33 RYAN, Board Member; BASSHAM, Board Chair, participated in the
34 decision.

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36 HOLSTUN, Board Member, did not participate in the decision.
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AFFIRMED

10/27/2015

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

NATURE OF THE DECISION

Petitioner appeals a decision by the city approving improvements to an existing parking lot.

FACTS

The challenged decision is the city’s decision on remand from *Knapp v. City of Jacksonville*, __Or LUBA __ (LUBA No. 2014-041, October 14, 2014) (*Knapp I*). We explained intervenor-respondent Britt Gardens Music and Arts Festival’s (Britt’s) proposal in detail in *Knapp I* and we summarize the relevant portions of the proposal here.

Britt hosts a series of outdoor summer music concerts each year. In 2014, Britt applied to improve an unpaved parking lot located at the intersection of Pine Street and First Street that is currently used for parking buses. The application seeks to construct eight handicapped parking spaces, served by a central circulation aisle, with a new access onto First Street. Britt proposes to construct the handicapped parking lot on top of an unspecified amount of fill. The paved portion of the parking lot extends approximately 50 feet from the sidewalk on First Street, with a five-foot wide “bump out” in the center aisle to provide space for cars to maneuver out of the southern-most stalls. The parking lot is proposed to be placed on top of fill, and capped by retaining

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1 walls. Additional fill is proposed to slope down from the retaining walls to
2 form terraces on three sides. *Knapp I* Record 36, 38.

3 Jacksonville Development Code (JDC) 18.20.040(A) applies to the
4 proposal and provides:

5 “* * * [E]xisting landforms shall be retained to the greatest extent
6 possible by limiting the cut-and-fill disturbance area to within
7 twenty-five (25’) horizontal feet of foundations *or* twenty (20’)
8 horizontal feet from the edge of the shoulder of driveways and
9 roads.” (Emphasis added.)

10 JDC 18.20.040(A) is framed in the disjunctive, and accordingly an applicant
11 must demonstrate that a cut and fill disturbance area is either (1) “within
12 twenty-five (25’) horizontal feet of foundations” or (2) “twenty (20’) horizontal
13 feet from the edge of the shoulder of driveways and roads.”

14 In *Knapp I*, petitioner argued that the city council’s decision failed to
15 address compliance with JDC 18.20.040(A), and argued that the proposed fill
16 violated the second alternative, the 20-foot limit from the edge of the shoulder
17 of driveways and roads. We agreed with petitioner that the city council’s
18 decision did not include findings addressing JDC 18.20.040(A), and we
19 remanded the decision in order for the city to address JDC 18.20.040(A). On
20 remand, the city council adopted findings concluding that the application
21 complies with JDC 18.20.040(A). This appeal followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 The city council concluded that the proposed parking lot improvements
3 comply with JDC 18.20.040(A) because the “cut-and-fill disturbance area [is
4 limited] to within twenty-five (25’) horizontal feet of foundations * * *.”
5 *Knapp II* Record 21. In reaching that conclusion, the city council applied the
6 JDC definitions of “foundation” and “structure” to the proposal. The
7 disposition of this assignment of error depends on whether the city council
8 correctly concluded that the parking lot is a “structure” and the retaining wall is
9 a “foundation” as those terms are defined and used in the JDC.

10 JDC 18.38.010 defines “foundation” as “[p]rimary support for a structure
11 through which the imposed load is transmitted to the footing or earth.” JDC
12 18.38.010 defines “structure” as relevant here as “[t]hat which is built or
13 constructed, an edifice or building of any kind, or any piece of work artificially
14 built up or composed of parts joined together in some definite manner. * * *”

15 The city council concluded that the parking lot is a structure within the
16 meaning of JDC 18.38.010 because it is constructed with three inches of
17 paving and with aggregate base fill to level the parking lot to the level of the
18 street. The city council concluded that the retaining walls are the “foundation”
19 of the parking lot “structure” because they are “primary support for [the
20 parking lot] through which the imposed load is transmitted to * * * the earth.”

1 *Knapp II* Record 21, 25.¹ Based on the evidence in the record that showed that
2 the cut-and-fill area is limited to within 25 horizontal feet of the retaining
3 walls, the city council concluded that the parking lot complies with JDC
4 18.20.040(A). *Knapp II* Record 25.

5 In her first assignment of error, petitioner argues that the city's
6 conclusion that the parking lot is a "structure" as defined in JDC 18.38.010 is
7 not supported by substantial evidence in the record. Petitioner argues that
8 Britt's site plan includes the notation "Lot Coverage - Structures: 0 square
9 feet," and argues that the notation is evidence that Britt takes the position that
10 the parking lot is not a structure. Britt responds that the notation on the site
11 plan that states "Lot Coverage - Structures: 0 feet" is located on the portion of
12 the site plan that identifies surfaces that alter the drainage pattern for the site,
13 and is not evidence that Britt took the position below that the parking lot is not
14 a structure. We agree with Britt that the notation in the site plan does not
15 undermine the city's decision that the cut-and-fill disturbance area is within 25
16 feet of the "structure['s]" "foundation," as those terms are defined in the JDC,

¹ The record of this appeal includes the record in *Knapp I*. We cite to record pages for LUBA No. 2015-010 as "*Knapp II* Record XX" and record pages for *Knapp I* as "*Knapp I* Record XX."

1 and that finding is supported by substantial evidence in the record. *Knapp II*
2 Record 25, 62-67.

3 Petitioner also argues that the city’s decision improperly construes the
4 applicable law because it is inconsistent with a provision of the city’s building
5 code at Code of Jacksonville (COJ) Title 15, Buildings and Construction.² COJ
6 15.01.020 provides in relevant part:

7 “No building or structure including residential shall be used or
8 occupied and no change in the existing occupancy classification of
9 a building or structure or portion thereof shall be made until all
10 planning requirements and public works improvements are
11 complete and approved by the public works director, or his
12 designee, and the building official has issued a certificate of
13 occupancy. If an applicant believes that a certificate of occupancy
14 has been unreasonably withheld, they may appeal to the City
15 Council for relief by filing their reasons in writing with the City
16 Recorder.”

17 Petitioner argues that under COJ 15.01.020 a “structure” is something that
18 requires a certificate of occupancy. Because a parking lot does not require a
19 certificate of occupancy, petitioner argues, it is therefore not a “structure” for
20 purposes of any city code provision, including JDC 18.38.010

21 Britt responds that COJ 15.01.020 is not an applicable approval criterion
22 and is not particularly helpful or relevant context for determining, under the

1 JDC definition of “structure,” whether the parking lot is a structure for
2 purposes of JDC 18.20.040(A). We agree with Britt. COJ 15.01.020 is part of
3 the Buildings and Construction section of the COJ, and petitioner has not
4 identified its relevance to the application. The JDC and COJ serve different
5 purposes, and something that is a “structure” as defined under the JDC may not
6 necessarily also be a structure under the COJ, or vice versa. In addition, the
7 staff report adopted by the city council as findings responds to the same
8 argument by petitioner below, and explains that “[a] certificate of occupancy is
9 issued for structures that are habitable. A parking lot is not a habitable structure
10 under the building code definition; but it is a structure. * * *” *Knapp II* Record
11 25. We understand the city to have concluded that the parking lot does not
12 cease to be a structure under the development code merely because there will
13 not be a certificate of occupancy issued for the parking lot under the building
14 code, since it is not a building and will not be inhabited. Petitioner does not
15 challenge that finding or otherwise explain why it is incorrect.

16 Finally, petitioner argues that the city’s decision that the application
17 complies with JDC 18.20.040(A) because cut-and-fill disturbance areas are

² ORS 197.835(9)(a)(D) requires that LUBA reverse or remand a land use decision if the local government “[i]mproperly construed the applicable law[.]”
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1 limited to within 25 horizontal feet of the foundations is inconsistent with the
2 city's decision in *Knapp I*. According to petitioner, the city changed its
3 interpretation of JDC 18.20.040(A) between *Knapp I* and *Knapp II*. Petition for
4 Review 14-15. Britt responds that petitioner's characterization of the city's
5 decision in *Knapp I* is incorrect, and that the city did not adopt any
6 interpretation of any of the relevant provisions of JDC 18.20.040(A) in *Knapp I*
7 or find that either of the alternatives set out in JDC 18.20.040(A) are met.

8 We agree. In *Knapp I*, a portion of petitioner's assignment of error
9 argued that the city's findings were inadequate to demonstrate compliance with
10 the second part of JDC 18.20.040(A). We remanded the city's decision because
11 the city did not adopt any findings addressing JDC 18.20.040(A). The city did
12 not interpret the criterion in any way and the city certainly did not find that the
13 second alternative set out in JDC 18.020.040(A) must be applied here. On
14 remand, the city was free to conclude that either the first or the second
15 alternative in JDC 18.20.040(A), or both, are satisfied. Accordingly, the city's
16 decision in *Knapp II* is not inconsistent with *Knapp I* in any way.

17 The first assignment of error is denied.

18 **SECOND ASSIGNMENT OF ERROR**

19 JDC 18.38.010 defines "foundation" as "[p]rimary support for a structure
20 through which the imposed load is transmitted to the footing or earth." Relying
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1 on that definition and the evidence submitted by Britt, the city council found
2 that the retaining walls are the “foundation” of the parking lot “structure”
3 because they are “[p]rimary support for [the parking lot] through which the
4 imposed load is transmitted to * * * the earth.”

5 In her second assignment of error, petitioner argues that the city’s
6 finding that the retaining walls are a “foundation” as defined in JDC 18.38.010
7 and within the meaning of JDC 18.20.040(A) improperly construes the
8 applicable law. Petitioner argues that the retaining wall can only transmit the
9 imposed load to the earth if the asphalt and fill are fixed to the retaining wall
10 with nails, straps, or bolts. However, nothing in the definition of “foundation”
11 includes such a requirement. Petitioner also argues that the city’s conclusion
12 that the retaining walls are a “foundation” is inconsistent with JDC
13 18.16.040(B)(7) and JDC 18.20.080(C)(4)(a). Briefly, those sections of the
14 city’s design standards governing development within each of the city’s
15 Historic Development Units each include the phrase “retaining wall.”³

³ JDC 18.16.040(B)(7) provides fence and wall design standards and provides in relevant part that “[t]hese standards do not apply to a device used to buttress earth, such as a retaining wall or riprap.”

JDC 18.20.080(C)(4)(a) provides as relevant that on all cut slopes on areas classified as Hillside Residential and Special Protection Lands “[s]teep cut
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1 Petitioner also argues that the city’s conclusion is inconsistent with statements
2 in the staff report that are attributed to an explanation from the building official
3 that “[a] retaining wall is a foundation if something is built on it. A retaining
4 wall is not a foundation if it is freestanding by itself and nothing is built upon
5 it.” Record 25. We understand petitioner to argue, in essence, that something
6 that is a retaining wall cannot also be a foundation, and that the two terms are
7 mutually exclusive. Petitioner argues that because the retaining wall is used to
8 buttress earth, control erosion, and provide slope stability, it cannot also meet
9 the definition of a “foundation” in JDC 18.38.010.

10 Britt responds, and we agree, that the city’s conclusion that the retaining
11 walls are a foundation within the meaning of JDC 18.20.040(A) and JDC
12 18.38.010 properly construes those code sections. The retaining wall provides
13 primary support for the parking lot by transmitting the loads imposed by the
14 parking lot to the earth. *Knapp II* Record 51. Moreover, the code sections cited
15 by petitioner and set out at n 4 are not relevant context or particularly useful for
16 determining whether the retaining walls are a “foundation” within the meaning
17 of JDC 18.38.010 and 18.20.040(A). Similarly, statements by the building
18 official expressing his understanding of the circumstances under which a

slopes shall be retained with stacked rock, retaining walls, or functional
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1 retaining wall can be a foundation are not “applicable law” within the meaning
2 of ORS 197.835(9)(a)(B) and do not demonstrate that the city council
3 improperly construed the applicable law. *See Priest v. Marion County*, 19 Or
4 LUBA 231, 234-35, *aff’d* 103 Or App 131, 796 P2d 401 (1990) (affirming
5 county’s conclusion that a structure that is a boat can also be a “dock” or a
6 “boathouse” under the applicable county code provisions and the dictionary
7 definitions of those words.)

8 Also in her second assignment of error, petitioner argues that the city’s
9 decision is not supported by substantial evidence in the record. Petitioner
10 argues that the city erred in relying on the testimony and evidence submitted by
11 a civil engineer in favor of the application because that engineer is on Britt’s
12 board of directors. According to petitioner, that engineer’s service on Britt’s
13 board of directors calls into question the credibility of her testimony and
14 evidence. Petitioner also points to statements in the record from another
15 engineer retained by Britt that call the retaining wall a retaining wall, and do
16 not call it a foundation, and argues that the statements by the engineer calling it
17 a retaining wall mean that the city’s decision that the retaining wall is a

equivalent to control erosion and provide slope stability when necessary.”

1 “foundation” within the meaning of JDC 18.38.010 and JDC 18.20.040(A) is
2 not supported by substantial evidence in the record.

3 Britt responds that the city council properly relied on evidence from
4 Britt’s two engineers to conclude that the retaining wall is a “foundation” as
5 defined in JDC 18.38.010, because that evidence demonstrates that the walls
6 “provide[] support for the parking lot by resisting the lateral earth slide of the
7 fill * * *.” *Knapp II* Record 51. We agree with Britt that the city council could
8 reasonably conclude, based on evidence provided by two engineers in support
9 of the application, that the retaining wall provides support for the parking lot
10 and transmits its imposed load to the earth, and is a “foundation.” Statements in
11 the record labeling or referring to the retaining walls as such do not prove that
12 the retaining walls are not “foundation[s]” as that term is defined in the JDC.
13 Stated differently, something called a retaining wall can be a foundation or it
14 can be only a retaining wall. Moreover, we think the city council could
15 reasonably rely on the expert testimony of a civil engineer who is also a Britt
16 board member. Her participation on Britt’s board of directors does not, in itself,
17 call her professional credibility into question.

18 The second assignment of error is denied.

1 **THIRD ASSIGNMENT OF ERROR**

2 In petitioner’s third assignment of error, she argues that the city erred in
3 failing to determine that the second alternative set out in JDC 18.20.040(A) is
4 satisfied: that the cut-and-fill disturbance area is within 20 horizontal feet of
5 the edge of the shoulders of driveways and roads. However, as we explained
6 above, the two requirements are alternatives, and the city is not required to find
7 that both alternatives are met. We have sustained the city’s finding that the first
8 alternative is met, and therefore, petitioner’s third assignment of error provides
9 no basis for reversal or remand of the decision.

10 The city’s decision is affirmed.