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

MICHAEL KIMBRELL,
Petitioner,

vs.

CITY OF LINCOLN CITY,
Respondent,

and

LEE HULLINGER,
Intervenor-Respondent.

LUBA No. 2019-077

FINAL OPINION
AND ORDER

Appeal from City of Lincoln City.

Mike J. Sargetakis, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Oxbow Law Group.

No appearance by City of Lincoln City.

Lee Hullinger, Salem, represented himself.

RUDD, Board Member; ZAMUDIO, Board Chair; RYAN, Board Member, participated in the decision.

REMANDED 01/08/2020

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

Opinion by Rudd.

NATURE OF THE DECISION

Petitioner appeals a city council decision approving a geological hazard report and establishing the required setback for a single-family residence in an identified coastal high hazard area.

FACTS

Intervenor-respondent (intervenor) sought city approval of a geological hazard report as part of his efforts to develop a single-family dwelling on property zoned Single Family Zone R-1-5 (the site). Record 5–6. The site is an irregularly shaped 0.07-acre lot located on a coastal bluff between SW Anchor Avenue to the east and the Pacific Ocean to the west.[1] Record 408. As relevant in this appeal, the dwelling is proposed to include a daylight basement and a cantilevered deck. The cantilevered deck extends a maximum of eight feet past the dwelling. Record 307, 311. The development plan includes excavation of 10 feet of the existing bluff prior to construction of the dwelling.

On April 15, 2019, the planning director approved intervenor's geological hazard report. Record 5. Petitioner appealed the planning director's decision to the planning commission. On July 2, 2019, the planning commission upheld the planning director's decision. Petitioner appealed the planning commission decision to the city council. On August 5, 2019, the city council held a *de novo*

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[1] A 0.07-acre lot is approximately 3,050 square feet in size.

public hearing on the appeal. Record 6. On August 12, 2019, the city council issued its decision approving intervenor's geological hazard report. Record 28. The city council found:

> "[T]he Geotechnical Report in support of development on the subject property complies with the applicable criterion in the Lincoln City Municipal Code. This finding expressly includes the determination of the location of the bluff and the applicable setback as set forth in the record of this proceeding." Record 27.

The city determined that the setback requirement was met based upon the location of the bluff after excavation of the site prior to construction of the dwelling. This appeal followed.

BACKGROUND

Statewide Planning Goal 18 (Beaches and Dunes) is:

> "To conserve, protect, where appropriate develop, and where appropriate restore the resources and benefits of coastal beach and dune areas; and
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> "To reduce the hazard to human life and property from natural or man-induced actions associated with these areas." OAR 660-015-0010(3).

The city implements Goal 18 through its comprehensive plan and the provisions in Lincoln City Code (LCC) 17.47 "Natural Hazards, Beaches and Dunes[.]" LCC 17.47.030.

Lincoln City's Comprehensive Plan (LCP) (1984) includes a "Shoreland, Beaches, Dunes, Estuaries, and Ocean Resources" (Shorelands) goal: "To conserve, protect, and enhance the coastal resources of the city." LCP, Ordinance

No. 2001-08 (June 25, 2001) (2001 Amendments), Ex-B 4. The LCP recognizes that, "The Oregon Coast can be a treacherous environment in which to reside or invest. Active environmental and geological constraints as well as severe winter storms create situations hazardous persons and property" and specific areas within the city have been mapped as hazardous areas. LCP, Ordinance No. 2012-08 (Sept 10, 2012) (2012 Amendments) 1. LCP Shoreland Policy 9 provides:

> "Development in a coastal bluff or dune area shall be permitted only if the geotechnical analysis can demonstrate that the development can be designed to minimize adverse environmental impacts on the site and on adjacent properties by providing protection from geologic hazards, wind erosion, and water erosion caused by ocean flooding and storm waves, and is consistent with the requirements of Shoreland Policies 8, 24, and 25." 2001 Amendments, Ex-B 5.

LCP Shoreline Policy 24 provides:

> "Development activities of all types identified in an ocean beach, coastal bluff and/or dune areas shall not occur until a review is completed by a registered professional engineer qualified to practice geo-technical engineering, or by a certified engineering geologist. The review shall be submitted to the City in a written report and shall consider, as a minimum, the following:
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> "a. The type of proposed use and the adverse effects it might have on the site and the adjacent area. Adverse effects include those which could create a hazard to life, public and private property, and the natural environment.
>
> "b. The method(s) to be employed to protect the site and the surrounding area from adverse consequences created by the use.

> "c. The written report must be prepared by the developer and any expense incurred for review and notification by the City, shall be paid by the developer." 2001 Amendments, Ex-B 7.

These LCP policies have been incorporated into the LCC. Development of a single-family residence within the natural hazard area must be supported by a geotechnical/geological hazard analysis as provided in LCC 17.47.020(B). A geological hazard analysis was needed for the site because most of the site is located in the High Hazard zone or the Active Hazard Zone with a small portion of the site located in the Moderate Hazard zone. Record 13–14. Subject to limited exceptions, LCC 17.47.020(D) requires development to be set back from the bluff.

In the course of performing the geological hazard analysis, intervenor's geologic engineer determined the location of the bluff edge and the rate of bluff erosion, in order to determine the amount and location of the required setback. Intervenor's expert explained that, as depicted on drawings in his report, "The 100' bluff edge is the current bluff edge, the 90' bluff edge is the bluff edge after the 10' deep excavation for the daylight basement lowest floor of the house. We have set back all foundations the appropriate distance from the excavated 90' elevation bluff edge."[2] Record 24. Measuring the setback from the location of the

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[2] Intervenor's geotechnical expert opined that:

> "The proposed cutting of the bluff slope will not have a detrimental impact on bluff stability as it will result in some unloading of the

bluff edge, after excavation of 10 feet of the bluff, enables the residence to be located closer to the ocean than would be possible if the setback were measured from the pre-excavation location of the bluff edge.

FIRST ASSIGNMENT OF ERROR

LCC 17.47.020(D) provides:

> "Bluff Setback. No bluff setback is required for public infrastructure, beach front protective structures, or natural means of beach protection. *The footprint of any other new structure or any horizontal addition requiring at least one footing in ocean bluff areas must be set back from the bluff a distance of at least 60 times the annual erosion rate (determined by the geotechnical analysis) plus five feet.* The bluff, for this purpose, shall be determined by the city through inspection of aerial photos, the most recent LIDAR data, and the dividing line between the active and the high-risk erosion zones identified in the 2004 Priest maps referenced above. If the planning director cannot determine the location of a bluff, the geotechnical analysis, provided at the applicant's expense, shall determine an appropriate site for the structure, if one exists." (Emphasis added.)

In determining the location of the setback line from the bluff, the city determined that there was nothing in the LCC that prohibits alteration of the bluff prior to establishing the applicable edge of the bluff. The city held:

> "Based upon the fact that the code prohibits construction within the setback area (pilings[,] new structures), not permitted development (including grading) of the bluff, no code provision prohibits the

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slope, which increases the factors of safety for the bluff slope stability. [The consulting firm] reviewed the proposed grading and construction and found it to be in general conformance with [the consulting firm's] recommendations." Record 60.

> measurement of the setback for the altered bluff location. The Council knows how to write code and if Council had intended that there be no alteration of the existing bluff the code could have used that 'unaltered bluff' language. Council will not add into the code language which is not there by 'interpretation.' A code amendment is required to make such a change." Record 26.

The city council interpreted the LCC as providing that permitted development, such as grading, can occur prior to establishing the location of the bluff edge. Record 25. Petitioner argues that "[t]he City erred in finding that the bluff edge should be determined by a post-excavation location at 90.'" Petition for Review 7. According to petitioner, LCC 17.47.020(D) expressly prohibits the geologic report from determining the bluff edge based on post-excavation conditions.

The decision on appeal was made by the city council, and petitioner's assignments of error concern the city's interpretation of local enactments. ORS 197.829(1) requires that we affirm a governing body's interpretation of a local land use regulation, unless the interpretation is inconsistent with the express language, purpose, or underlying policy of the regulation, or is contrary to state statue or land use goal. *See Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010) (applying ORS 197.829(1) standard). For the reasons explained below, we agree with petitioner that the city council's interpretation of LCC 17.47.020(D) is inconsistent with the express language of that section and with context provided by other LCC sections.

LCC 17.47.020(D) provides that for purposes of the bluff setback, "The bluff * * * shall be determined by the city through inspection of aerial photos,

the most recent LIDAR data, and the dividing line between the active and the high-risk erosion zones identified in the 2004 Priest maps referenced above." The documents identified by this code section as the resources the city is to consult in order to identify the location of a bluff edge are documents reflecting historic conditions. Determining the bluff edge location based on a hypothetical excavation of the bluff for the purposes of a proposed project is inconsistent with the express language of LCC 17.47.020(D), which requires identification of the bluff edge by reviewing documents reflecting historic conditions in the form of a 2004 map, aerial photos and the most recent LIDAR data.

Context provided by other LCC sections, including LCC 17.47.020(A), also undercuts the city council's interpretation. LCC 17.47.020(A) specifically identifies a limited list of activities that "are exempt" from the requirements of the chapter. The exempted activities are:

> "1. Maintenance, repair, or alterations to existing structures that do not alter the building footprint or foundation;
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> "2. New construction or maintenance, repair, or alterations to existing structures on a portion of the lot that lies outside the coastal erosion zones;
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> "3. *Exploratory excavations under the direction of a registered engineering geologist or geotechnical engineer*;
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> "4. Construction for which a building permit is not required;
>
> "5. Maintenance and reconstruction of public and private roads, streets, parking lots, driveways, and utility lines, provided the work does not extend outside the previously disturbed area;

"6. Activities of emergency responders intended to reduce or eliminate an immediate danger to life or property." LCC 17.47.020(A) (emphasis added).

Intervenor's expert explained that he "set back all foundations the appropriate distance from the excavated 90' elevation bluff edge." Record 24. However, the only excavation exempted under LCC 17.47.020(A) is exploratory excavation under the direction of a registered geologist or geotechnical engineer. Grading is not listed in the exemptions. Given that exemptions to compliance with the chapter are expressly listed, and that list appears to be exclusive, not inclusive, the city's interpretation is inconsistent with the express language of LCC 17.47.020(A). We will not insert what has been omitted. ORS 174.010.

The city council also concluded that "there is nothing in the code prohibiting the lawful alteration of the bluff" and "Based upon the fact that the code prohibits construction within the setback area (pilings[,] new structures), not permitted development (including grading) of the bluff, no code provision prohibits the measurement of the setback from the altered bluff location." Record 26. Although the code definition of "development" does include certain grading, the code does not support the conclusion that the city may, in evaluating the required setback for the construction of a dwelling in a hazard zone, sever the construction of a structure from the associated grading proposed as site preparation for the dwelling.

LCC 17.08.010 defines "[d]evelopment" as:

"1. A piece of land that contains buildings, structures, and other

modifications to the natural environment; or

"2. The alteration of the natural environment through:

"a. The construction or exterior alteration of any building or structure, whether above or below ground or water, and any grading, filling, dredging, draining, channelizing, cutting, topping, or excavation associated with such construction or modification.

"b. The placing of permanent or temporary obstructions that interfere with the normal public use of the waters and lands subject to this code.

"c. The division of land into two or more parcels, and the adjustment of property lines between parcels."

To the extent the city explicitly or implicitly viewed the proposed grading (and excavation) on the site as "construction for which a building permit is not required," we reject that view. LCC 17.47.020(A)(4). The grading (and excavation) at issue in this case are related to construction of a single-family residence for which a building permit is required, and the associated grading activity is not exempt.

The broader context of the LCC also supports the conclusion that the setback must be measured from the location of the predevelopment bluff. "Development of all types, except beach front protective structures and natural means of beach protection * * * may not occur until an engineering geologist * * * completes a review of the project site. LCC 17.47.020(B). Similar to the requirement in LCC 17.47.020(D) that the planning director refer to documents reflecting historic bluff conditions, the material that the code requires be included

in the geologic hazard report supports the conclusion that the setback is to be measured from the existing bluff. The geological hazard report is required to reflect "current conditions." LCC 17.47.020(B). The report must include a site description including, but not limited to, providing the history of the site, including erosion events, conditions of the seaward front of the property and existing human impacts on the site. LCC 17.47.020(B). The report is required to describe the fronting beach, including but not limited to average widths of the beach during summer and winter. LCC 17.47.020(B)(2)(a). The report is required to include an analysis of erosion and flooding potential including "[f]or bluff-backed shorelines, use a combination of published reports, such as DOGAMI bluff and dune hazard risk zone studies, aerial photo analysis, and field work, to assess the potential distance of property erosion." LCC 17.47.020(B)(3)(g). Thus, context supports the interpretation that a bluff edge is to be determined based upon existing conditions.

LCC 17.47.020(D) provides, in part, "If the planning director cannot determine the location of a bluff, the geotechnical analysis, provided at the applicant's expense, shall determine an appropriate site for the structure, if one exists." The city found that:

> "While it is true the language of the Code does not require the City to determine the location of the bluff (from which the setback is measured) from review of the [intervenor's] *proposed* grading plans, the Code does defer to the Geotechnical Report to determine the appropriate site for the structure if there is one." Record 26 (emphasis in original).

We reject that interpretation. First, LCC 17.47.020(D) requires that the planning director be unable to determine the location of a bluff edge before an alternative geological hazard report can be used to determine if and where there is an appropriate site for a structure without reference to the location of a bluff. There is no evidence that the planning director is *unable* to locate a bluff in this case, and the fact that the code requires the planning director first make an effort to determine the bluff location based on the items listed in LCC 17.47.020(D) lends further support to the conclusion that the code requires the location of the bluff edge be determined based upon existing conditions.

Further, the code's variance procedures provide additional contextual support for the conclusion that the setback must be measured from the pre-development bluff edge. Variances may be considered to reduce the building setback if the variance helps lessen the risk of erosion or other hazard.[3] LCC

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[3] LCC 17.68.020 provides:

> "A variance may be granted only in the event that all of the following circumstances exist:
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> "A. Exceptional or extraordinary circumstances apply to the property which do not apply generally to other properties in the same zone or vicinity and result from lot size or shape legally existing prior to the date of the ordinance codified in this title, topography, or other circumstances over which the applicant has no control;

17.47.020(B)(5)(c) expressly identifies an opportunity to include in the geologic hazard report recommendations:

> "c. Consideration of a local variance process to reduce the building setback on the side of the property opposite the ocean, if this reduction helps to lessen the risk of erosion, bluff failure or other hazard."

We agree with petitioner that the city council's interpretation of LCC 17.47.020(D) as allowing the geotechnical report to determine the location of the bluff based on future excavation and grading is inconsistent with the express language of the provision and with context provided by other provisions of the LCC that we discuss above. Accordingly, the city improperly construed LCC 17.47.020(D) to allow the location of the setback to be determined from the altered bluff.

The first assignment of error is sustained.

> "B. The variance is necessary for the preservation of a property right of the applicant which is substantially the same as owners of other property in the same zone or vicinity possess;
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> "C. The variance should not be materially detrimental to the purposes of this title, or to property in the zone or vicinity in which the property is located, or otherwise conflict with the objectives of any city planning policy;
>
> "D. The variance requested is the minimum variance which would alleviate the hardship."

SECOND ASSIGNMENT OF ERROR

One of the appellants below argued that "[Intervenor's] site plans show[] about 8 feet of the house and a footing within the 17[-]foot setback. This would be done by cantilevering from steel beams." Record 176. In his second assignment of error, petitioner argues that "[t]he City erred in finding that the proposed site plan complies with LC[C] 17.47.020[(D)] by approving a site plan where the footprint extends into the required setback." Petition for Review 11.[4] LCC 17.47.020(D) provides:

> "The footprint of any [non-exempt] new structure or any horizontal addition requiring at least one footing in ocean bluff areas must be set back from the bluff a distance of at least 60 times the annual erosion rate * * * plus five feet."[5]

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[4] Although it is not clear whether site plan review is required for the proposed dwelling, the decision references intervenor's "site plan" and the "site plan" referenced by the city planner in conducting her review. Record 24. Site plans are included in the record and submissions from petitioner's expert include a March 15, 2018 "review[] and evaluat[ion of] the site plans and in particular the proposed pile and retaining wall design * * * to determine if the plans conform with the recommendations provided in [the] December 31, 2015 Engineering Geologic Hazards Investigation (HGSA #Y153860) report and evaluate the feasibility of the proposed plans." Record 305, 307, 373, 378.

[5] Intervenor's Geologic Hazard Report included a determination that the average annual erosion rate is 0.2-feet per year. Sixty times the annual erosion rate plus five feet is 17 feet. The footprint of a new structure or a horizontal addition requiring at least one footing in ocean bluff areas must therefore be setback at least 17 feet from the bluff.

LCC 17.08.010 defines "[f]ootprint" as "the square footage of a building that rests, directly or indirectly, on the ground, including, for example, cantilevers[.]"[6]

LCC 17.47.020(D) requires that the footprint of any structure or any horizontal addition requiring at least one footing in ocean bluff areas be built in compliance with the setback requirement. We agree with petitioner that the city erred in approving a geological hazard report that depicts the cantilevered portion of the home and at least one footing as encroaching into the 17-foot setback measured from the existing bluff edge.

The second assignment of error is sustained.

DISPOSITION

Petitioner requests that we reverse, or in the alternative, remand the city's decision. We will reverse a decision when it "violates a provision of applicable

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[6] Petitioner explains that there is no dispute that the proposed building encroaches into the 17-foot setback, citing the following portions of the record:

> "Rec[ord] 155 (Public Hearing testimony 'Commissioner Griffiths asked if projects are allowed to cantilever over the geologic setback; [the Planning Director] said that it is allowed'); Rec[ord] 156 (Geologist testimony stating that 'there is no foundation within the 17 foot setback. There are portions cantilevered, but no foundation'); Petitioner's co-appellant raised this issue in her comments as well, remarking that '[Intervenor's] site plans show[] about 8 feet of the house and a footing within the 17 foot setback.' Rec[ord] 176; *See also*[] Rec[ord] 307 (site plan map, Attachment 1)." Petition for Review 12.

law and is prohibited as a matter of law." OAR 661-010-0071(1)(c). We will remand a decision when "[t]he decision improperly construes the applicable law, but is not prohibited as a matter of law." OAR 661-010-0071(2)(d). LUBA will reverse a land use decision only where the decision is prohibited as a matter of law. *Wood v. Crook County*, 36 Or LUBA 143 (1999). It is not clear to us that approval of a geological hazard report to site a dwelling on the subject property is prohibited as a matter of law. For example, it may be possible for intervenor to submit a modified geologic hazard report to measure the bluff setback from the existing bluff edge and exclude prohibited features from the setback area. Thus, remand is the appropriate remedy.

The city's decision is remanded.