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

MAX MOINI,)
)
Petitioner,)
)
vs.) LUBA No. 99-076
)
CITY OF FAIRVIEW,) FINAL OPINION
) AND ORDER
Respondent.)

Appeal from City of Fairview.

David R. Nepom, Portland, filed the petition for review and argued on behalf of petitioner.

Christopher A. Gilmore and Pamela J. Beery, Portland, filed the response brief and argued on behalf of respondent. With them on the brief was Beery & Elsner.

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

REMANDED 09/28/99

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

1 Opinion by Bassham.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the city's approval of a conditional use and design review permit
4 authorizing a waste transfer facility on land within the city's M-2 (General Manufacturing)
5 zone.

6 **FACTS**

7 On November 12, 1998, 12 Mile Disposal (applicant) filed an application with the
8 city for a "reload" or waste transfer facility on a five-acre lot within the city's M-2 zone. A
9 waste transfer facility is not specifically listed as either a permitted or conditional use in the
10 M-2 zone. However, the M-2 zone permits any use that is permitted in the M-3 (Light
11 Manufacturing) zone. The M-3 zone allows as a conditional use the "[c]ollection, recycling,
12 sorting or baling of previously used materials such as rags, paper, metal, glass or plastics."
13 Fairview Municipal Code (FMC) 19.80.040(C).

14 The subject property is accessed from Blue Lake Road (N.E. 223rd Avenue) to the
15 west. The surrounding parcels to the north, east, and south are vacant parcels zoned F-2
16 (Agricultural District). Across Blue Lake Road is property zoned A-1-B (Apartment
17 Residential-Business Office District) with some existing residences. Fairview Creek is a
18 Class 1 creek supporting a native cutthroat trout population that, it is anticipated, will be
19 placed on the endangered species list. Fairview Creek runs through the parcel to the south of
20 the subject property, and cuts through subject property's southwest corner.

21 The applicant proposes to construct a 60 by 76 foot "reload" building in the eastern
22 third of the property, with truck parking and a truck wash in the center of the parcel.¹ The
23 reload building would accept waste from up to 35 trucks per day with 80,000-pound capacity
24 each. The waste will be reloaded onto larger trucks for ultimate disposal off-site. All

¹The applicant also proposes to locate an office building for its staff in the western third of the property. The office building is a permitted use in the M-2 zone, and is not directly challenged in this appeal.

1 transfers and reloads would occur within the reload building. No waste would remain on site
2 longer than 24 hours. The waste would consist of 90 percent construction debris, five
3 percent commercial and residential garbage, and five percent yard debris. The construction
4 debris and garbage would be taken to two separate landfills for disposal. The yard debris
5 would be taken to a third facility for composting.

6 The planning commission conducted a public hearing, and denied the application
7 based on concerns regarding wind-blown debris, runoff into the creek, and impacts on nearby
8 residential property. The applicant appealed to the city council, which approved the
9 application, imposing conditions of approval and adopting findings in support of approval.

10 This appeal followed.

11 **FIRST ASSIGNMENT OF ERROR**

12 Petitioner challenges the city's conclusion that the proposed waste transfer facility is a
13 "recycling center" allowed in the M-2 zone, on the grounds that the city's conclusion is
14 contrary to the terms of its ordinance, and is not supported by adequate findings and
15 substantial evidence.

16 FMC 19.80.040(C) allows the "[c]ollection, recycling, sorting or baling of previously
17 used materials such as rags, paper, metal, glass or plastics." Petitioner argues that "yard
18 debris" is not among nor similar to the five types of recyclable material described in FMC
19 19.80.040(C). Further, petitioner argues that even if yard debris is a recyclable material
20 within the meaning of FMC 19.80.040(C), yard debris comprises only five percent of the
21 material the proposed facility will handle. Petitioner submits that because 95 percent of the
22 materials that the proposed facility will handle consists of non-recyclable waste, the facility
23 is not a recycling center but rather a waste transfer facility that is not allowed as either a
24 permitted or conditional use in the M-2 zone. Consequently, petitioner argues, the city's
25 conclusion that the proposed facility is a recycling center misconstrues the applicable law
26 and is not supported by substantial evidence. Alternatively, petitioner argues that the city's

1 findings fail to explain why the proposed facility constitutes a recycling center allowed in the
2 M-2 zone.

3 The city responds that petitioner failed to raise any issue below regarding whether the
4 proposed facility is allowed in the M-2 zone, and thus has waived that issue. ORS
5 197.763(1).² The city notes that the notices of hearing the city provided specifically stated
6 that the M-2 zoning allows for waste reload/recycling facilities. Record 38, 132. According
7 to the city, throughout the city's proceedings the city took the position that the proposed
8 facility was a conditional use allowed in the M-2 zone. The city argues that petitioner does
9 not cite to evidence that any participant raised an issue below disputing the city's
10 characterization of the proposed use. Further, the city argues that petitioner has not
11 demonstrated any procedural error or violation of ORS 197.763 that would allow him to raise
12 new issues before LUBA, pursuant to ORS 197.835(4).

13 At oral argument, petitioner cited to testimony by opponents that the proposed use
14 was a "garbage business" or "disposal business" that was not appropriate in the area given its
15 proximity to residential uses. Petitioner argues that this testimony was sufficient to comply
16 with the requirement, at ORS 197.763(1), that "issues shall be raised and accompanied by
17 statements or evidence sufficient to afford the governing body * * * and the parties an
18 adequate opportunity to respond[.]" According to petitioner, the comments that the proposed
19 use is a garbage or disposal business not appropriate for the area are sufficient to apprise the
20 city that opponents questioned whether the proposed use was a conditional use allowed in the
21 M-2 zone pursuant to FMC 19.80.040(C). We disagree.

²ORS 197.763(1) provides:

"An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

1 Nothing in the cited testimony suggests a challenge to the city's conclusion that the
2 proposed facility is a conditional use allowed in the M-2 zone, much less raises an issue
3 regarding that conclusion in a manner sufficient to afford the city and parties an opportunity
4 to respond. We conclude that the issue of whether the city misconstrued the applicable law
5 in concluding that the proposed use is a conditional use allowed in the M-2 zone pursuant to
6 FMC 19.80.040(C) has been waived. ORS 197.763(1).

7 Further, we conclude that petitioner has waived any issues regarding the sufficiency
8 of evidence or adequacy of findings regarding the city's conclusion that the proposed use is
9 an allowed use in the M-2 zone. In Lucier v. City of Medford, 26 Or LUBA 213, 216
10 (1993), we held that

11 "In order to preserve the right to challenge at LUBA the adequacy of the
12 adopted findings to address a relevant criterion or the evidentiary support for
13 such findings, a petitioner must challenge the proposal's compliance with that
14 criterion during the local proceedings. Once that is done, the petitioner may
15 challenge the adequacy of the findings and the supporting evidence to
16 demonstrate the proposal complies with the criterion. The particular findings
17 ultimately adopted or evidence ultimately relied on by the decision maker
18 need not be anticipated and specifically challenged during the local
19 proceedings."

20 In the present case, FMC 19.190.040(A) provides that the city may approve a
21 conditional use provided the applicant demonstrates that "[t]he use is listed as a conditional
22 use in the underlying zone or approved by the planning commission for consideration as a
23 conditional use." However, neither petitioner nor any other party to the proceedings below
24 challenged whether the proposal complied with FMC 19.190.040(A). Consequently,
25 petitioner may not now challenge the adequacy and evidentiary support for the city's finding
26 that the proposed reload building is an allowed conditional use. Lucier, 26 Or LUBA at 216.

27 The first assignment of error is denied.

1 **SECOND ASSIGNMENT OF ERROR**

2 Petitioner argues that the city's findings of compliance with the conditional use
3 criteria at FMC 19.190.040(B), (D), and (F) are inadequate and are not supported by
4 substantial evidence.³

5 In combined argument under all three criteria, petitioner contends that the findings
6 fail to address issues raised below regarding whether the site is suitable, whether the
7 proposed use will alter the character of the surrounding area, and whether it is likely to create
8 a nuisance. Petitioner cites to testimony that the site is unsuitable, given that the doors of the
9 reload facility will be open frequently, and the strong east winds common to the Columbia
10 Gorge area could blow some of the waste from the facility onto nearby property. Petitioner
11 also argues that the city's findings fail to address issues raised regarding waste-related odor
12 and vermin that, according to petitioner, could create conditions constituting a nuisance, and
13 alter the character of the neighborhood. Petitioner points to evidence that, while the trucks
14 will be washed every day, the reload building itself will never be washed down, due

³FMC 19.190.040 provides in relevant part:

"The planning commission may approve an application for a conditional use after a public hearing; provided the applicant * * * demonstrates that the proposed use also satisfies the following criteria:

* * * * *

"(B) The characteristics of the site are suitable for the proposed use considering size, shape, location, topography, existence of improvements and natural features.

* * * * *

"(D) The proposed use will not alter the character of the surrounding area in a manner which substantially limits, impairs, or precludes the use of surrounding properties for the primary uses listed in the underlying zone.

* * * * *

"(F) The proposed use will not result in use of the land for any purpose which may create or cause to be created any public nuisance, including but not limited to, air, land, or water degradation, noise, glare, heat, vibration or other considerations which may be injurious to public health, safety and welfare."

1 apparently to concerns regarding runoff. Petitioner submits that the transfer and temporary
2 storage of putrescible waste and yard debris in a building that is never washed down will
3 cause odors and attract vermin in a manner that may cause a nuisance, and that the city erred
4 in failing to address these issues.

5 Similarly, petitioner contends the city failed to address concerns raised regarding
6 possible runoff from the truck washing facility into Fairview Creek. Finally, petitioner
7 argues that the city's findings fail to address the impact of noise from trucks entering and
8 leaving the property on adjacent residences.

9 The city responds that it made adequate findings, supported by substantial evidence,
10 that the proposed facility complies with FMC 19.190.040(B), (D), and (F). With respect to
11 FMC 19.190.040(B), the city found:

12 "The site is well suited to a waste transfer facility for many reasons. It is
13 relatively level with ample room for truck maneuvering and parking. Property
14 to the northeast and South either agricultural or unimproved and wooded. Site
15 grading can be easily accomplished to control storm water and normal vehicle
16 discharge through the use of oil water separators and filters. It is one of the
17 few available sites where necessary building and paving areas can be situated,
18 while retaining generous space for buffering landscaping along Blue Lake
19 Road and the other boundaries. Trees along the south offer a natural buffer."
20 Record 28-29.

21 With respect to FMC 19.190.040(D), the city found:

22 "Impact on neighboring properties will be minimal because the new 12 Mile
23 Disposal Facility will be well screened and will be self-contained in nature.
24 Waste will not stay on site for more than 24 hours. The waste will be
25 transferred in an enclosed structure 750 [feet] from NE 223rd Avenue. The
26 type of equipment used and process of waste handling is proposed to not
27 involve significant noise to neighbors. A 50 [foot] setback with berm and
28 evergreen trees will be provided along the NE 223rd Avenue frontage. A
29 maximum six-foot high chain link fence with vertical slats will be installed
30 along side and rear boundaries and east of the office building. Beside the
31 fence will be sight obscuring trees." Record 29.

32 With respect to FMC 19.190.040(F), the city concluded:

1 "No public nuisance will result from this development. Numerous features
2 described herein will lessen visual, acoustic, environmental and other types of
3 impact (see Conditions).

4 "Reasonable conditions and requirements have been imposed on this project
5 to insure the health, safety and welfare of the community." Record 29.

6 Where specific issues are raised concerning compliance with an approval criterion,
7 the findings supporting the decision must respond to those issues. Norvell v. Portland Area
8 LGBC, 43 Or App 849, 853, 604 P2d 896 (1979); Heiller v. Josephine County, 23 Or LUBA
9 551, 556 (1992). The city does not contend that the above-quoted findings respond to the
10 specific issues raised below regarding whether wind-blown debris, odors, runoff from truck-
11 washing, and noise impact on adjacent residences from trucks entering and leaving the
12 property may affect compliance with applicable approval criteria. Accordingly, we agree
13 with petitioner that the city's findings of compliance with FMC 19.190.040(B), (D), and (F)
14 are inadequate insofar as they fail to address those issues.

15 Because remand is necessary for the city to adopt adequate findings addressing the
16 issues raised below regarding the identified debris, odors, runoff, and noise impacts, there is
17 no point in resolving petitioner's substantial evidence challenges to the city's findings.

18 The second assignment of error is sustained, in part.

19 The city's decision is remanded.