BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PATRICIA LAWRENCE,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent.

LUBA No. 2003-138

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

David J. Hunnicutt, Tigard, filed the petition for review and argued on behalf of petitioner. With him on the brief was Oregonians in Action Legal Center.

Michael E. Judd, Assistant County Counsel, Oregon City, filed the response brief and argued on behalf of respondent.

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

REMANDED 12/23/2002

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 a county decision that verifies petitioner's nonconforming use but restricts the nature and scope of that use.

FACTS

This matter involves petitioner's operation of a go-cart track on her 8.27-acre parcel in the Damascus area of Clackamas County. The operation of the go-cart track has generated substantial opposition over the years from neighbors and has resulted in numerous county enforcement actions. This matter has been before us many times for many reasons. After the Court of Appeals affirmed our decision, in which we remanded a county decision finding that the noncoforming use had been discontinued, the hearings officer again considered the question of the noncoforming use and found that petitioner had a valid nonconforming use. Petitioner appealed that decision to LUBA, and pursuant to a stipulation between the parties, we remanded the case back to the county. *Lawrence v. Clackamas* County, ___ Or LUBA ___ (LUBA No. 2003-065, July 2, 2003). The hearings officer reconsidered his earlier decision and issued additional findings clarifying that decision. In this incarnation, petitioner appeals the county hearings officer's decision that verifies the go-cart track as a valid nonconforming use but restricts the number of participants and vehicles that may use the track and its hours of operation.[1]

FIRST ASSIGNMENT OF ERROR

The major area of contention between the parties is whether the hearings officer was authorized to determine the nature and scope of the go-cart as a business only, as petitioner contends, or to also determine the nature and scope of the nonconforming use as to petitioner and her guests as well, as the county contends. The sixth condition of approval restricts the

[1] A detailed explanation of the procedural and factual history of this case can be found in *Lawrence v. Clackamas County*, 40 Or LUBA 507 (2001), *aff'd* 180 Or App 495, 43 P3d 1192, *rev den* 334 Or 327 (2002).

number of riders on the track at any one time, on any given day, in any given week, and for any given year.[2] In his final decision on remand, the hearings officer clarified his position that condition of approval six applies to the entire nonconforming use, including its use as a business and as a personal use for the benefit of petitioner and her guests. That clarification states:

> "The hearings officer believes that the words in condition of approval 6 are clear on their face. They do not distinguish expressly or implicitly between different classes of riders. The hearings officer did not intend to make such distinctions. Put explicitly, the hearings officer intended the term 'riders' in condition 6 to apply to all persons who ride a go-cart on the track, including residents of the site and their invited guests." Record 3.

According to petitioner, throughout the local proceedings it was clear that petitioner was seeking a determination only with regard to the extent of the nonconforming use as a business, where users pay a fee to use the track. Petitioner's position is that no one, including the county, disputed that petitioner has the right to use the track for personal or non-commercial purposes.[3] Thus, petitioner argues, there was no reason for petitioner to present evidence of the scope of the personal use of the track by residents and their guests. According to petitioner, the hearings officer misconstrued the law by considering personal

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[2] Condition of approval six states:

> "The number of riders/carts shall be restricted as follows * * *
>
> "a. The number of riders/carts on the track at any one time shall not exceed three (3).
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> "b. The number of riders/carts that use the track on any given day shall not exceed ten (10).
>
> "c. The number of riders/carts that use the track in any calendar week shall not exceed twenty (20).
>
> "d. The number of riders/carts that use the track in any calendar year shall not exceed 100." Record 2.

[3] It is not clear from the petition for review or petitioner's counsel's comments at oral argument what the precise nature of that right would be, presumably either a non-business nonconforming use or an accessory use. The county compliance officer who first heard the matter assumed that petitioner did indeed have an established nonconforming use for non-business use of the track. Record (LUBA No. 1998-132) 259-72.

use of the track in determining the scope of the nonconforming use and also erred by limiting the use of the track for noncommercial purposes.

The county responds that the application does not distinguish between business and personal use of the track. The county states that the evidence submitted does not distinguish between personal and business use of the property, making it impractical to distinguish between personal and business use of the track.

We agree with petitioner that an applicant for a local land use approval may take steps to limit the scope of an application. However, the applications for the nonconforming use determinations in this case state that they are for "verification of recreational/commercial go-cart track use as a lawful nonconforming use." *See* Record (LUBA No. 2001-097) 360. Although we agree with petitioner that it was apparently clear to all parties involved in the earlier appeal that the requested determination was limited to the business aspects of the nonconforming use, the language of the application does not request such a restricted determination. By its own terms, the application was not limited to the operation of a business.

In addition, the nature of the evidence presented would make it extremely difficult for the hearings officer to distinguish between business use and non-business use of the track. There was a tremendous amount of confusion regarding what occurred over the past twenty years regarding use of the track in general. From that evidence, it would be difficult or impossible to distinguish between personal and business use of the property. As the county points out, most of the evidence, including that submitted by petitioner, does not clearly distinguish between the different types of users. In light of the conflicting and nonspecific evidence, the hearings officer was only able to determine the total number of users and could not distinguish between types of users. As the hearings officer explained:

> "In the case of [petitioner's] track, the principal land use impacts of the nonconforming use vary in direct proportion to the number of people who ride go-carts on the track and the number of go-carts each one rides. The identity

> of the go-cart driver makes no difference on the impact of go-cart riding based on the record. An increase in the number of rider/cart combinations will increase the amount and/or duration of noise and other impacts on surrounding properties, whether the additional riders reside on the site, are guests of the residents or are paying customers." Record 138.

We do not agree with the hearings officer that the scope of a nonconforming use is determined by its impacts. *See Leach v. Lane County*, ___ Or LUBA ___ (LUBA No. 2003-090/091, November 14, 2003 slip op 20). However, the above-quoted finding demonstrates the difficulty the hearings officer faced in segregating the different types of users of the track. The application itself does not clearly request that the nonconforming use determination be restricted to business or commercial use of the track. The evidence in the record, including the evidence submitted by petitioner, does not distinguish between commercial and personal use. Accordingly, we cannot say the hearings officer erred by failing to distinguish between business and personal use of the track.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In the third condition of approval, the hearings officer restricts the hours of operation of the track as follows:

> "Use of the track by the public is prohibited except during the following times:
>
> "a. Between 5 p.m. and thirty (30) minutes before sundown on weekdays,
>
> "b. Between 9 a.m. and thirty (30) minutes before sundown on holidays, Saturdays and Sundays." Record (LUBA No. 2003-065) 16.

Earlier in his decision, the hearings officer recounts the portions of the record he relied upon in determining the historic hours of operation. *Id*. at 11-12. The portions of the record that the hearings officer relies upon, however, all state that the hours of operation were from 9 a.m. until sunset, weather permitting. Record (LUBA No. 1998-132) 120, 211-224, 281-82, 308-314. Petitioner argues that the condition of approval cannot be based on

substantial evidence when the evidence cited by the hearings officer does not support his finding.

As a review body, we are authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Bay v. State Board of Education*, 233 Or 601, 605, 378 P2d 558 (1963); *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, however, we may not substitute our judgment for that of the local decision maker. Rather, we must consider all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decision maker's conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

Generally, a decision maker is not required to list each item of evidence that is relied upon in making a decision. While petitioner is correct that the evidence the hearings officer cites in the findings is not substantial evidence for his finding that the track operated on weekdays only after 5:00 p.m., the failure of a decision to identify all the evidence that supports the findings is not necessarily fatal as long as we are directed to evidence in the record that does support the findings. *Eckis v. Linn County*, 110 Or App 309, 313, 821 P2d 1127 (1991); *Douglas v. Multnomah County*, 18 Or LUBA 607, 619 (1990); *Ash Creek Neighborhood Ass'n v. City of Portland*, 12 Or LUBA 230, 236-38 (1984).

The county directs us to evidence in the record that supports the hearings officer's finding that operation of the track on weekdays began at 5:00 p.m. rather than 9:00 a.m. Record (LUBA No. 1998-132) 66, 190; Record (LUBA No. 2000-139) 34, 57; Record (LUBA No. 2001-097) 21, 67, 362. The evidence that the hearings officer cites and relies on

is not necessarily inconsistent with the evidence that the county identifies. The evidence that the hearings officer cites states that the track was typically open from 9:00 a.m. to sunset, but that evidence does not make it clear whether it was offered to establish the hours of operation on the weekend, on weekdays, or both. If we consider the evidence in the record that the county identifies in its brief, the hearings officer's findings concerning the hours of operation of the track are supported by substantial evidence.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In the sixth condition of approval, the hearings officer, among other things, restricts the number of riders who may use the track at one time to three. *See* n 2. The hearings officer based this finding on the testimony of a person who identified himself below as "I.M. Neutral" and photographs of the track. According to petitioner, the testimony of a witness who refuses to give his name is inherently suspect and, furthermore, the actual testimony was merely speculation and does not constitute evidence of historic use of the track. The county responds that although the evidence is sparse, in the absence of any conflicting evidence, that was all the hearings officer had to base his decision on and that it was therefore substantial evidence that a reasonable person would rely upon.

We agree with petitioner that testimony from a person unwilling to identify himself is suspect and, absent any corroboration, is not evidence that a reasonable person would rely upon. Moreover, in the present case, the testimony I.M Neutral actually gave would not have amounted to substantial evidence even had he identified himself. The testimony merely states that due to the size of the track that it would be difficult to get more than two carts on the track at a time. The testimony does not address how many riders used the track at any one time when the use became nonconforming or at any other time. Record (LUBA No. 1998-132) 103-107. The only other evidence cited by the hearings officer or directed to us by the county are photographs of the track at Record (LUBA No. 1998-132) 209. Those

photographs however only show an empty track, they do not show any carts on the track. The photographs provide no evidence one way or the other as to how many carts historically used the track at one time. There simply is not any evidence, substantial or otherwise, to which we have been directed that would support this condition of approval.[4]

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

The sixth condition of approval also restricts the number of riders on the track per day, week, and year. *See* n 2. Petitioner argues that the condition of approval is not supported by substantial evidence because it was based on usage of the track for purely business purposes rather than the personal use of petitioner and her guests.

This assignment of error is based on the same arguments we rejected in the first assignment of error. Petitioner concedes that there is substantial evidence in the record to support the imposition of the conditions as to the business use of the track. As we discussed earlier, the hearings officer did not misconstrue the applicable law by failing to distinguish between personal and business use of the track. Therefore, it was not improper for the hearings officer to restrict the total number of riders allowed to use the track based on the evidence presented below. Therefore, there is substantial evidence to support the condition of approval.

The fourth assignment of error is denied.

The county's decision is remanded.

[4] As petitioner's counsel noted at oral argument, the number of carts allowed on the track will be restricted due to safety and liability concerns of petitioner. It may be that it is unnecessary for the county to establish a maximum number in this regard.