

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

ERNEST A. GRIFFITH,)
)
Petitioner,)
)
vs.)
) LUBA No. 90-041
CITY OF MILWAUKIE,)
) FINAL OPINION
Respondent,) AND ORDER
)
and)
)
FIRST WESTERN SERVICE CORPORATION,))
)
Intervenor-Respondent.)

Appeal from City of Milwaukie.

Ernest A. Griffith, Milwaukie, filed the petition for review and argued on his own behalf.

No appearance by respondent.

Mark J. Greenfield, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Mitchell, Lang and Smith.

HOLSTUN, Referee; SHERTON, Chief Referee; KELLINGTON, Referee, participated in the decision.

AFFIRMED

06/28/90

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 city decision modifying a condition of approval for Kellogg Lake Apartments.

MOTION TO INTERVENE

First Western Service Corporation moves to intervene in this proceeding on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

In 1987, the area proposed to be developed as Kellogg Lake Apartments lay partially inside city limits and partially outside the city in Clackamas County. The city granted approval of the portion of the project within its jurisdiction on March 15, 1988. The county first approved the county portion of the project on July 13, 1988. The county approved the county portion of the project for a second time on March 13, 1989, following remand of the county's July 13, 1988 decision. Kellogg Lake Friends v. City of Milwaukie, ___ Or LUBA ___ (LUBA No. 88-061, December 22, 1988), aff'd 96 Or App 536 (1989).

Under the city's 1988 decision, the applicant is permitted to build year-round, provided erosion control measures are in place to protect soils and water quality. However, in the county's 1988 and 1989 decisions approving the portion of the project outside the city, a condition was imposed limiting soil disturbance to the months of June

through September.¹

The city annexed the county portion of the project, effective April, 1989, with the understanding that county zoning would remain in effect until the project was completed.² Following the city's annexation of the county portion of the project, intervenor requested that the city modify the county's condition limiting soil disturbance to June through September so that the entire project site could be developed on a year-round basis. The city approved the request, adopting the following condition (modified condition) in place of the county's condition nine:

"Soils disturbance on the site shall be restricted to the dry season (June 1 to September 30) or, the developer shall provide a comprehensive erosion control plan for the site during construction, which plan shall be consistent with the comprehensive erosion control plan utilized in connection with construction of that portion of Kellogg Lake Apartments approved by the City of Milwaukie."

¹In material part, that condition (condition nine) provided as follows:

"Soils disturbance on the site shall be restricted to the dry season (June 1 through September 30). The developer shall submit a comprehensive erosion control plan for the site during construction, with specific erosion control measures for the entire site. This erosion control plan must be approved by the County and the * * * Department of Fish and Wildlife prior to development.* * *" Record 40.

²The city administers county zoning regulations for the subject property under an intergovernmental agreement until city zoning and plan designations are applied.

Prior to its modification by the city, condition nine both limited soil disturbance to a four month period and required a comprehensive erosion control plan. See n 1. As amended by the city decision challenged in this appeal, the limitation of soil disturbance to a designated four month period does not apply, provided the specified comprehensive erosion control plan is utilized for the portion of the project initially approved by the county.

FIRST ASSIGNMENT OF ERROR

"In approving the modification of condition #9 the Planning Commission adopted an additional finding not supported by substantial evidence in the whole record."

SECOND ASSIGNMENT OF ERROR

"In approving the modification of Condition #9, the City relied upon defective findings [and] failed to recite adequate facts and legal conclusions."

Petitioner challenges the following findings adopted by the city in support of its decision to modify condition nine:

"6. Clackamas County approval [of] condition #9 * * * does not reflect [other findings adopted by the hearings officer reflecting county planning staff and Oregon Department of Fish and Wildlife (ODFW) indications that construction could occur during wet months if erosion control plans are used]. County staff have indicated that the stricter language applied by the Hearings Officer in condition #9 may have been in response to neighbor testimony. This assumption is not made clear within the findings." Record 45.

"20. Contrary to the Clackamas County Planning Staff's letter of November 9, 1989, the Planning Commission feels a definite change of circumstances is evident by virtue of the passing of time; construction has already taken place on the original City portion, drainage and erosion control mechanisms are in place, and the former County portion has been annexed to the City." Record 164.³

Petitioner contends the quoted findings are conclusory and unsupported by substantial evidence in the whole record. Petitioner argues finding 20 does not adequately explain what events have occurred since the county originally imposed condition nine or why those events constitute a change in circumstances warranting a change in the condition imposed by the county. In challenging finding 6, petitioner relies on a letter submitted by the county opposing the requested action. In that letter the county contends the hearings officer stated shortly after rendering his July 13, 1988 decision that condition nine "was based primarily on persuasive evidence presented at the hearing." Record 148. Petitioner points out the county also stated in that letter that the applicant had not demonstrated that a "substantial change in circumstances has occurred * * *." Id.

In its decision, the city identifies three criteria governing the requested modification of condition nine. None of the identified criteria require a showing of changed

³Both of the challenged findings were first adopted by the planning commission and subsequently were incorporated by reference in the city council's findings. Record 14.

circumstances.⁴ The city adopted 20 findings in support of its decision that those three criteria are met, including the two findings challenged in this appeal.⁵ Intervenor contends the unchallenged findings comprise the critical findings identifying the relevant approval standards and explaining why those standards are met. Intervenor argues the challenged findings are not essential to the city's decision and provide no basis for remand, even if they are not supported by substantial evidence.⁶

This Board is required to reverse or remand local government land use decisions where those decisions are not supported by substantial evidence. ORS 197.835(7)(a)(C); Sellwood Harbor Condo. Assoc. v. City of Portland, 16 Or

⁴The criteria identified by the city require minimization of erosion within the Willamette River Greenway, preservation of river and stream corridors, and preservation of wildlife habitats. Apparently the same three criteria were applied by the hearings officer in imposing condition nine.

⁵The gist of the eighteen findings not challenged by petitioner is that ODFW presented testimony to the hearings officer that limiting soils disturbance to the four dry months was not necessary if soil erosion plans were prepared and utilized. Additionally, the city's findings explain that the county staff recommendation presented to the hearings officer in 1988 and other findings adopted by the hearings officer are consistent with the ODFW recommendation. Finally, the county's findings identify the applicable approval criteria and find those criteria are met by imposing the modified condition.

⁶Intervenor also contends that there is evidence in the record concerning the experience with development during wet months on the portion of the project originally approved by the city. Intervenor contends the evidence of that success with implementing erosion control plans provides adequate evidentiary support for the city's findings of changed circumstances.

LUBA 505, 513-514 (1988). ORS 197.835(7)(a)(C) does not require that every statement or finding adopted in support of a land use decision must be supported by evidence in the record. A finding not supported by substantial evidence provides no basis for remanding the decision the finding is adopted to support unless the finding is critical to the decision. Cann v. City of Portland, 14 Or LUBA 254, 257 (1986); Bonner v. City of Portland, 11 Or LUBA 40, 52-53 (1984). Therefore, in addition to demonstrating a challenged finding is inadequate or unsupported by substantial evidence, a petitioner must demonstrate the challenged finding is critical to (i.e. necessary to support) the challenged decision. Id.

Petitioner does not argue that approval criteria other than the three criteria identified by the city are applicable to the city's decision. Neither does petitioner challenge the findings adopted by the city explaining why the modified condition is sufficient to assure compliance with those criteria. Rather, petitioner limits his arguments to the adequacy of, and evidentiary support for, findings 6 and 20.

Finding 20 states that changed circumstances warrant a different kind of condition concerning soil disturbance, and apparently was adopted as a response to the concerns expressed by the county that condition nine should be retained. However, the only approval standards identified

by any party are the three approval criteria identified by the city in its decision. See n 4, supra. Those criteria do not require that modifications to conditions of approval be based on changed circumstances. Therefore, finding 20 is surplusage and provides no basis for remand, even if it is not supported by substantial evidence in the record. Cann v. City of Portland, supra; Bonner v. City of Portland, supra.

Finding 6 essentially states the hearings officer either misunderstood or simply failed to incorporate ODFW's recommendation, choosing instead to rely on neighborhood testimony. As in his challenge to finding 20, petitioner fails to explain why finding 6 is necessary to support the city's decision.

Petitioner's failure to explain why finding 6 is critical to the challenged decision may reflect an additional misunderstanding of the statutory requirement that land use decisions be supported by substantial evidence in the record. Where decision makers are presented with conflicting believable evidence, it may be possible for reasonable decision makers to reach opposite conclusions, and for either conclusion to be supported by substantial evidence. Younger v. City of Portland, 305 Or 346, 360, 752 P2d 262 (1988); Douglas v. Multnomah County, ___ Or LUBA ___ (LUBA No. 89-086, January 12, 1990), slip op 12.

In this case, the city applied the same criteria that

were applied by the hearings officer and, based largely on the same evidence relied upon by the hearings officer, concluded the modified condition was sufficient to assure compliance with the approval criteria. Although petitioner challenges the city's speculation in finding 6 about how the hearings officer determined condition nine was necessary, the hearings officer's decision is not the decision before this Board for review. Petitioner does not challenge the city's findings explaining how the condition it imposed satisfies the controlling criteria. In the absence of argument explaining (1) how the city's findings addressing the substantive requirements of the three approval criteria are inadequate or are not supported by substantial evidence, or (2) how the findings petitioner does challenge are necessary to show the approval criteria are met, we have no basis for reversal or remand of the city's decision.

The first and second assignments of error are denied.

The city's decision is affirmed.