

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

3
4 BRUCE W. STEWART,)
5))
6 Petitioner,)
7))
8 vs.))
9) LUBA No. 96-001
10 CITY OF BROOKINGS,)
11) FINAL OPINION
12 Respondent,) AND ORDER
13))
14 and))
15))
16 BROOKINGS-HARBOR SCHOOL)
17 DISTRICT 17C,))
18))
19 Intervenor-Respondent.)

20
21
22 Appeal from City of Brookings.

23
24 Bruce W. Stewart, Brookings, filed the petition for
25 review and argued on his own behalf.

26
27 No appearance by respondent.

28
29 John C. Babin, Brookings, filed the response brief and
30 argued on behalf of intervenor-respondent. With him on the
31 brief was Babin & Keusink.

32
33 GUSTAFSON, Referee; HANNA, Referee, participated in the
34 decision.

35
36 AFFIRMED 06/27/96

37
38 You are entitled to judicial review of this Order.
39 Judicial review is governed by the provisions of ORS
40 197.850.

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the city's approval of a temporary
4 conditional use permit for a kindergarten in a residential
5 zone.

6 **MOTION TO INTERVENE**

7 Brookings-Harbor School District 17C (intervenor), the
8 applicant below, moves to intervene on the side of
9 respondent. There is no opposition to the motion, and it is
10 allowed.

11 **FACTS**

12 Intervenor applied to the city for a temporary
13 conditional use permit to use an existing single-family
14 residential dwelling on district-owned property for
15 kindergarten classes. The subject property is zoned multi-
16 family residential (RR-3). In addition to the dwelling
17 proposed for the kindergarten, the subject property includes
18 a duplex and another single-family residence. The district
19 plans to remove the latter for reasons unrelated to the
20 kindergarten. The duplex is presently being used for two
21 residences.

22 The subject property is adjacent to other residentially
23 zoned and developed properties to the west and north.
24 Property to the south and east is zoned Public/Open Space
25 (P/OS) and includes at least 50 acres of district-owned
26 property, on which the district high school, junior high

1 school, grade school, athletic fields and administrative
2 offices are located. The subject property is immediately
3 across Fern Street from the athletic fields and
4 administrative offices.

5 The planning commission denied the district's
6 application, in part because it failed to meet minimum lot
7 size requirements. However, when the application was
8 presented to the planning commission, the subject property
9 consisted of two separate lots. The proposed kindergarten
10 was on an approximately 9,500-square-foot lot, and was
11 separated from a 29,600-square-foot lot by an access and
12 utility easement that serves as a driveway to the residence
13 immediately north of the property.

14 Following the planning commission's decision, and prior
15 to the city council's de novo appeal hearing, the district
16 applied for and obtained a lot line adjustment to create a
17 single lot from the two separate lots. That lot line
18 adjustment was not challenged.

19 On appeal, the city council reversed the planning
20 commission decision and approved the temporary permit, which
21 is scheduled to expire in June, 1997.

22 **ASSIGNMENT OF ERROR**

23 The Brookings Land Development Code (BLDC) allows
24 educational uses as conditional uses in residential zones,
25 subject to compliance with the conditional use criteria in
26 BLDC Chapter 140. In a single assignment of error,

1 petitioner assigns error to the city's findings of
2 compliance with four approval criteria. Petitioner argues
3 the findings with respect to each criterion are inadequate
4 and not based upon substantial evidence in the record. We
5 address each criterion separately.

6 **1. BLDC 140.050(C)(1)**

7 BLDC 140.040(C)(1) requires a finding that "[t]he
8 proposal is in compliance with the Comprehensive Plan." The
9 city's findings of compliance with this criterion state:

10 "Although the City's Comprehensive Plan contains
11 no policies relating directly to the provisions of
12 schools, the proposed project is in compliance
13 with the City's Comprehensive plan in that it
14 supports the school district's temporary need to
15 expand its classroom facilities to meet an
16 unexpected increase in kindergarten enrollment."

17 Petitioner claims this finding is inadequate and not
18 supported by substantial evidence in the record, because the
19 proposed conditional use violates the city's Goal 10 housing
20 plan. Petitioner argues:

21 "Goal 10 calls for 'Provision of varied housing
22 which is safe, sanitary and adequate for all
23 residents of the community.' Under Goal 10,
24 Financial Means, it assumes 'an increase from 27%
25 to 35% of the population with low to moderate
26 incomes.' Removing four affordable dwelling units
27 from the city's housing supply at a time of
28 'crisis-level need' for such housing is clearly
29 inconsistent with the basic thrust of Goal 10."
30 Petition for Review 7.

31 The city does not dispute that during the local
32 proceedings, petitioner raised the applicability of city
33 Goal 10 generally, and the Financial Means policy

1 specifically. However, the city's findings do not discuss
2 the applicability of the goal or policy, other than to
3 conclude that no comprehensive plan goals or policies are
4 applicable. In the absence of a local interpretation, we
5 are authorized to determine whether the city's decision is
6 correct. ORS 197.829(2).

7 As an initial factual matter, petitioner's argument is
8 based on an incorrect premise: although the district-owned
9 property on which the proposed kindergarten is located
10 includes four dwellings, the challenged conditional use
11 permit directly affects only one of those dwellings. The
12 inquiry, therefore, is whether the removal of one house from
13 the city's housing stock violates city Goal 10. In his
14 petition for review, even petitioner acknowledges that
15 removal of one house might not violate the goal. Petition
16 for Review 7.

17 Furthermore, regardless of the number of dwellings
18 affected, we find no mandatory approval criteria stated in
19 either city Goal 10 generally, or the Financial Means policy
20 specifically. Rather, the goal and policy are the city's
21 aspirational declarations regarding the provision of
22 adequate housing, which do not constitute independent
23 approval criteria. Ellison v. Clackamas County, 28 Or LUBA
24 521 (1995); Neuharth v. City of Salem, 25 Or LUBA 267
25 (1993).

26 We find no violation of BLDC 140.040(C)(1) in the

1 city's failure to apply city Goal 10 or the Financial Means
2 policy to the challenged decision.

3 Petitioner also challenges compliance with city Goal 10
4 implementation measures 1 and 2. The district responds that
5 petitioner did not raise compliance with these
6 implementation measures before the city. Petitioner does
7 not establish those issues were raised below, and therefore
8 has waived the right to raise them for the first time before
9 this Board. ORS 197.835(3).¹

10 The first subassignment of error is denied.

11 **2. BLDC 140.050(C)(2)**

12 BLDC 140.050(C)(2) requires a finding that:

13 "The site for the proposed use is adequate in size
14 and shape to accommodate said use and all yards,
15 spaces, walls, and fences, parking, loading,
16 landscaping and other features required by this
17 code."

18 For a conditional use in the R-3 zone, BLDC 124.010 requires
19 that the subject lot be a minimum of 10,000 square feet.

20 Petitioner's sole contention under this subassignment
21 is that that lot size is effectively inadequate to meet the
22 BLDC 124.010 standard, and therefore the findings of
23 compliance with BLDC 140.050(C)(2) are inadequate and not
24 supported by substantial evidence. Petitioner explains that

¹Even if the applicability of these policies had been raised below, they are, by their express language, aspirational policies which contain no mandatory approval criteria applicable to this conditional use permit request.

1 only 9,500 square feet of the lot are west of the access and
2 utility easement and, on that basis, argues that "while the
3 lot line adjustment may give the appearance on paper of
4 meeting the minimum size standard, it realistically offers
5 nothing that would benefit classroom operations." Petition
6 for Review 10. Petitioner further contends that the city's
7 findings do not explain how property east of the easement
8 would contribute to kindergarten operations, and that the
9 easement would be detrimental to the classroom's operations
10 and the children's safety.

11 With respect to this criterion, the city found:

12 "1. The proposed use is allowed as a conditional
13 use in the R-3 Zone pursuant to Section
14 124.010 of the Land Development Code. The
15 proposed use is on a 0.90 acre parcel which
16 is greater than the 10,000 sq. ft. minimum
17 required by the code and the district will
18 provide a sight obscuring fence and is thus
19 in compliance with the provisions of Section
20 124.

21 "2. The subject site has sufficient size to
22 accommodate the proposed use as a
23 kindergarten class facility with a play area.
24 The site also provides the opportunity to
25 establish on site, segregated off-street
26 automobile parking and bus loading/off
27 loading areas. The conditions of approval
28 require the applicant to submit a parking
29 plan using the areas in front of the
30 classroom facility and duplex areas." Record
31 8.

32 This Board can grant relief only if petitioner
33 demonstrates that the city has not established compliance
34 with an applicable legal standard. See Dorgan v. City of

1 Albany, 27 Or LUBA 64 (1994). In this case, petitioner has
2 not established that the alleged inadequacies in the
3 findings relate to any applicable approval criteria. The
4 specific concerns petitioner raises regarding the effective
5 use of the property are not within the scope of the inquiry
6 required under BLDC 140.050(C)(2) and BLDC 124.010.

7 With regard to his substantial evidence claim, in
8 essence, petitioner disagrees with the city's conclusion
9 that the proposal satisfies BLDC 140.050(C)(2).
10 Disagreement is not grounds for relief.

11 Substantial evidence is evidence a reasonable person
12 would rely on in reaching a decision. City of Portland v.
13 Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475
14 (1984); Bay v. State Board of Education, 233 Or 601, 605,
15 378 P2d 558 (1963); Carsey v. Deschutes County, 21 Or LUBA
16 118, aff'd 108 Or App 339 (1991). However, in reviewing a
17 local decision for substantial evidence, we may not
18 substitute our judgment for that of the local decision
19 maker. Rather, we must consider and weigh all the evidence
20 in the record to which we are directed, and determine
21 whether, based on that evidence, the local decision maker's
22 conclusion is supported by substantial evidence. Younger v.
23 City of Portland, 305 Or 346, 358-60, 752 P2d 262 (1988);
24 1000 Friends of Oregon v. Marion County, 116 Or App 584,
25 588, 842 P2d 441 (1992). If there is substantial evidence
26 in the whole record to support the city's decision, LUBA

1 will defer to it, notwithstanding that reasonable people
2 could draw different conclusions from the evidence. Adler
3 v. City of Portland, 25 Or LUBA 546, 554 (1993). Where the
4 evidence is conflicting, if a reasonable person could reach
5 the decision the city made, in view of all the evidence in
6 the record, LUBA will defer to the city's choice between
7 conflicting evidence. Mazeski v. Wasco County, 28 Or LUBA
8 178, 184 (1994), aff'd 133 Or App 258, 890 P2d 455 (1995);
9 Bottum v. Union County, 26 Or LUBA 407, 412 (1994); McInnis
10 v. City of Portland, 25 Or LUBA 376, 385 (1993).

11 Petitioner's disagreement with the city's decision, or
12 with the evidence upon which the city relied, does not
13 establish that the decision is not based upon substantial
14 evidence.

15 This subassignment of error is denied.

16 **3. BLDC 140.050(C)(3)**

17 BLDC 140.050(C)(3) requires a finding that

18 "The site for the proposed use relates to streets
19 and highways adequate in width and degree of
20 improvement to handle the quantity and kind of
21 vehicular traffic that would be generated by the
22 proposed use."

23 In finding compliance with this criterion, the city
24 found:

25 "Fern Ave., in the area adjacent to the subject
26 site, currently handles most of the bus traffic
27 generated by the existing school facilities as
28 well as automobile traffic generated by the school
29 complex. With the ability to place bus and auto
30 loading and off-loading areas on the subject site,

1 there will be minimal disruption of traffic on
2 Fern Ave. The guarded crosswalk will provide some
3 degree of traffic disruption for a brief period
4 four times a day. With the provision for a flow
5 through area for parents dropping off or picking
6 up students, the need for the crosswalk may be
7 greatly diminished. The proposed classroom
8 facility will not have a significant adverse
9 impact on the traffic handling ability of Fern
10 Avenue." Record 9.

11 Petitioner objects at length to the loading and parking
12 areas proposed by the district to accommodate cars and
13 busses entering and leaving the site. However, none of
14 petitioner's concerns regarding on-site loading and
15 unloading relate to the applicable approval criteria
16 challenged here, which focus only on the adequacy of the
17 streets to handle the traffic generated by the kindergarten.

18 Petitioner also argues Fern Street is inadequate to
19 handle the quantity and kind of traffic generated by the
20 kindergarten because it is narrower than the street on which
21 the existing kindergarten/elementary school is located,
22 where the district acknowledges a safety problem exists.
23 Petitioner argues that because of this existing safety
24 problem, and because Fern Street is narrower, the proposal
25 should "be subjected to exacting scrutiny." Petition for
26 Review 12. Petitioner argues the district has effectively
27 acknowledged the safety problem "inherent in this proposal"
28 because it proposes to have a crosswalk safety guard to
29 ensure the student safety. Petition for Review 12.

30 Petitioner cites no authority supporting his request

1 that the proposal be subjected to exacting scrutiny, and we
2 find none. Rather, the city's decision must be based upon
3 adequate findings and supported by substantial evidence. As
4 explained above, in reviewing a city's decision for
5 substantial evidence, we do not substitute our judgment for
6 that of the local decision maker. Rather, we consider and
7 weigh all the evidence in the record to which we are
8 directed, and determine whether, based on that evidence, the
9 local decision maker's conclusion is supported by
10 substantial evidence. Younger, 305 Or at 358-60, 752 P2d
11 262 (1988); 1000 Friends of Oregon v. Marion County, 116
12 Or App at 588.

13 Petitioner does not explain why a different safety
14 problem at an elementary school with many more students and
15 busses necessarily means that a narrower street will
16 increase the safety problems for the relatively small number
17 of students who will attend the kindergarten. Neither has
18 petitioner established that there is an inherent safety risk
19 because the district proposes to provide a crossing guard.
20 Petitioner acknowledges that Fern Street is routinely used
21 for bus traffic, and that there are presently no other bus
22 stops or loading areas along the street that would increase
23 congestion on Fern Street when combined with traffic
24 generated by the proposed kindergarten. In addition, in
25 district has provided evidence of the amount of traffic to
26 be generated by the proposed kindergarten. Petitioner does

1 not challenge that evidence.

2 None of the facts or presumptions upon which
3 petitioner's argument is based compels a conclusion that the
4 city's findings are not based upon substantial evidence in
5 the record. Petitioner has not established either that the
6 findings are inadequate or that there is not substantial
7 evidence in the record that Fern Street is adequate to
8 accommodate the traffic to be generated by the proposed
9 kindergarten.

10 Finally, petitioner complains that the city improperly
11 deferred compliance with a mandatory approval criterion by
12 imposing a condition of approval requiring the district to
13 develop a parking/loading plan. We disagree.

14 A local government may find compliance with an
15 applicable criterion by either (1) finding that the
16 criterion is satisfied; or (2) finding that it is feasible
17 to satisfy the criterion and imposing conditions necessary
18 to insure compliance. Thomas v. Wasco County, LUBA No.
19 95-098 (01/12/96). The city could have merely determined
20 the feasibility of compliance with BLDC 140.050(C)(3), then
21 imposed a condition to ensure that compliance. However, in
22 this case, the city did more than that. The city actually
23 found compliance with BLDC 140.050(C)(3) by determining,
24 based upon substantial evidence, that Fern Street is
25 adequate to accommodate the traffic generated by the
26 kindergarten. It then went a step further by requiring that

1 a parking and loading plan be in place to ensure student
2 safety. The extent to which this condition even relates to
3 the approval criterion is questionable. It in no way defers
4 compliance with BLDC 140.050(C)(3).

5 This subassignment of error is denied.

6 **4. BLDC 140.050(C)(4)**

7 BLDC 140.050(C)(4) requires a finding that

8 "The proposed use will have minimal adverse impact
9 upon the adjoining properties and the improvements
10 thereon. In making this determination, the
11 commission shall consider, but not be limited to,
12 the proposed location of the improvements on the
13 site, vehicular egress/ingress and internal
14 circulation, pedestrian access, setbacks, height
15 and bulk of buildings, walls and fences,
16 landscaping, screening, exterior lighting and
17 signing."

18 In finding compliance with this criterion, the city
19 concluded:

20 "The proposed temporary classroom facility will
21 have minimum impact on the surrounding residential
22 uses. The greatest potential for adverse impacts
23 is from noise generated by the loading and
24 unloading of busses and from autos stopping to
25 pick up or drop off children at the facility. The
26 school district has stated that there will be no
27 more than two busses at the facility at any given
28 time. By placing the bus loading area in front of
29 the duplex units, the busses will be at least 120
30 feet from any of the surrounding residences (two
31 garages will be slightly closer) while the
32 vehicles stop to load or unload. The automobile
33 drive through loading area will be closer to the
34 surrounding houses but will not generate the same
35 level of noise as the busses.

36 "The district has stated that there will be one 15
37 minute recess period during the morning and

1 afternoon class. With the required fence around
2 the play area, noise and visual impacts generated
3 by the recess periods will be minimal." Record 9.

4 Several conditions of approval also specify requirements for
5 fencing and paving.

6 Petitioner objects that the temporary kindergarten will
7 "introduce to a quiet residential neighborhood a level of
8 vehicular traffic and congestion inconsistent with the
9 character of that neighborhood." Petition for Review 16.
10 Petitioner further argues that the kindergarten will cause
11 adverse affects due to removal of landscaping, paving of
12 lawns, increased safety hazards, and a "total change in the
13 character of the neighborhood." Petition for Review 17. On
14 these bases, petitioner argues the findings are inadequate
15 and not supported by substantial evidence.

16 Petitioner does not explain how he believes the
17 findings are inadequate. Petitioner has not established
18 either that the city failed to interpret or apply relevant
19 provisions of the local code or that it failed to state the
20 facts relied on by the local government. Cf. Penland v.
21 Josephine County, 29 Or LUBA 213 (1995). The record
22 reflects conflicting evidence and perceptions regarding the
23 impact the proposed kindergarten will create. That
24 conflict, however, does not render the findings inadequate.
25 See Moore v. Clackamas County, 29 Or LUBA 372 (1995) (while
26 a local government is required to identify in its findings
27 the facts it relies upon in reaching its decision, it is not

1 required to explain why it chose to balance conflicting
2 evidence in a particular way, or to identify evidence it
3 chose not to rely on).

4 Nor does conflict regarding facts in the record compel
5 a conclusion that the findings are not based upon
6 substantial evidence. As stated above, where the evidence
7 is conflicting, if a reasonable person could reach the
8 decision the city made, in view of all the evidence in the
9 record, LUBA will defer to the city's choice between
10 conflicting evidence. Mazeski, 28 Or LUBA 178 at 184;
11 (1995); Bottum, 26 Or LUBA at 412; McInnis v. City of
12 Portland, 25 Or LUBA at 385. There is substantial evidence
13 in the record to support the city's conclusion that the
14 proposed temporary kindergarten will have a minimal adverse
15 effect on the surrounding area.

16 This subassignment of error is denied.

17 The city's decision is affirmed.