

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

GREGORY J. WETHERS,)
)
 Petitioner,)
)
 vs.)
) LUBA No. 90-121
 CITY OF PORTLAND,)
)
 Respondent,) FINAL OPINION
) AND ORDER
)
 and)
)
 ROBERT HANSEN and CARL TROY NASH,)
)
 Intervenor-Respondent.)

Appeal from City of Portland.

Gregory J. Wethers, Portland, filed the petition for review and argued on his own behalf.

Ruth Spetter, Portland, filed the response brief and argued on behalf of respondent.

No appearance by intervenors-respondent.

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

REMANDED 04/05/91

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

This appeal challenges a city ordinance which amends the city's comprehensive plan (plan) and zoning map designations for a block located in North Portland.

MOTION TO INTERVENE

Robert Hansen and Carl Troy Nash move to intervene in this proceeding on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property, Block 20, is bounded by N. Webster on the north, N. Alberta on the south, N. Williams on the east and N. Vancouver on the west. The requested plan and zoning map changes initially included Block 19, which adjoins Block 20 to the north, as well as other property located across N. Vancouver to the west. Those additional properties were to be improved to provide additional parking. However, in response to opposition to the requested additional parking, the application was amended to include only Block 20.

The city's decision changed the plan map designations for Block 20 from Neighborhood Commercial and Medium-Density Multifamily residential to General Commercial. Corresponding zone map changes from Neighborhood Commercial (C4) and Medium Density Multifamily Residential (R1) to General Commercial (C2) were approved. The block is

improved with two buildings and a 22 space parking lot. The plan and zone map amendments will allow one of the existing buildings on Block 20 to be used to house offices for the State Department of Human Resources (DHR) to serve residents in North and Northeast Portland. That building formerly housed DHR until DHR moved to another building in 1985. DHR now needs additional office space and wishes to move back to the building on Block 20, which is presently vacant.

APPLICABLE APPROVAL CRITERIA

Plan map amendments are governed by policy 10.3 Plan policy 10.3 provides, in relevant part:

"* * * The applicant [for a plan map amendment] must show that the requested change is: (1) consistent [with] and supportive of the appropriate Comprehensive Plan goals and policies; (2) compatible with [the] land use pattern established by the Comprehensive Plan Map; (3) in the public interest to grant the petition; the greater the departure from the Comprehensive Plan Map designation, the greater the burden of the applicant; and (4) that the [public] interest is best served by granting the petition at this time and at the requested locations. * * *"

The standards that must be satisfied to rezone property are set forth in Portland City Code (PCC) 33.102.015, which provides in relevant part:

"Approval or disapproval of rezoning of property shall be determined using the following criteria. Three major sets of conditions must be met before rezoning may be approved. If all conditions are satisfied, the rezoning request will be approved. The conditions are:

"(1) The proposed rezoning must be to the maximum

Comprehensive Plan Map designation * * *

"* * * * *

"(2) It must be found that services adequate to support the proposed industrial or commercial use or the maximum residential density allowed by the proposed rezoning are presently available or can be reasonably made available, (consistent with the Comprehensive Plan Public Facilities Policies) by the time the proposed use qualifies for a certificate of occupancy or completion from the Bureau of Buildings. For the purpose of this requirement, services include:

"(a) Water supply;

"(b) Sanitary sewage disposal;

"(c) Stormwater disposal;

"(d) Transportation capabilities;

"(e) Police and fire protection.

"* * * * *

"* * * * *." (Emphasis added.)

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR

Petitioner contends the city failed to consider that uses other than the proposed DHR offices would be allowed under the C2 zone applied to Block 20 and failed to consider the transportation effects from those other potential uses.

When rezoning property, there may be circumstances in which the city may not limit its analysis to the use proposed and must consider the possible impacts of other uses allowed under the zone to be applied. As the Court of Appeals explained in Younger v. City of Portland, 86 Or App

211, 215, 739 P2d 50 (1987), rev'd on other grounds 305 Or 346 (1988), other more intensive uses permissible under the proposed zone may have to be considered

"[u]nder circumstances where the proposed use is not among the more intensive ones in the zone or if there is little assurance that the proponent will carry out its intention to use the property in the proposed manner or for a comparably intensive use * * *."

Petitioner does not claim there is any reason to question that the property will be used in the manner proposed. Neither does petitioner contend the proposed use of the property is not among the more intensive uses allowed in the C2 zone. To the contrary, petitioner contends "the traffic impact and street usage anticipated by the DHR is far beyond any normal C2 usage." Petition for Review 6. We conclude the city committed no error by failing to consider the potential impacts of other uses allowable in the C2 zone.

Petitioner next contends the city's decision is contrary to overwhelming evidence that plan goal 6 (Transportation) and plan policy 6.2 are violated by the proposal.¹

¹Plan goal 6 provides as follows:

"Promote an efficient and balanced urban transportation system, consistent with the Arterial Streets Classification Policy, to encourage energy conservation, reduce air pollution, lessen the impact of vehicular traffic on residential neighborhoods, and improve access to major employment and commercial centers."

It is not clear what evidence petitioner refers to and petitioner offers no argument in support of his position that the evidence overwhelmingly demonstrates the cited plan goal and policy are violated. Apparently, petitioner relies on his own testimony that Block 20 is not conveniently located for persons who use public transportation and a city Office of Transportation memorandum which is critical of the initial application.

As the city notes, petitioner's contention concerning public transportation is contradicted by other evidence in the record that the site is well served by public transportation. Record 142. The Office of Transportation's May 21, 1990 memorandum expresses concern that the initial proposal might violate policies concerning auto-oriented commercial uses and uses which attract a significant volume of traffic from outside the neighborhood. However, that memorandum addresses the applicant's original proposal, which also proposed significant off-street parking.² The application was subsequently amended to eliminate the proposed parking on Block 19 and the property west of Block

Plan policy 6.2 provides as follows:

"Create and maintain regional and City traffic patterns that protect the livability of Portland's established neighborhoods while improving access and mobility within commercial and industrial areas."

²The memorandum stated that the parking originally proposed was "more than three times the amount required by the [PCC]." Record 143.

20. The Office of Transportation ultimately supported the amended proposal.

Without additional argument from petitioner, we do not agree that the cited evidence demonstrates that plan goal 6 or policy 6.2 are violated by the decision.

The first, second and third assignments of error are denied.³

FOURTH AND FIFTH ASSIGNMENTS OF ERROR

Petitioner alleges the city's findings concerning plan goals 5 (Economic Development) and 6 (Transportation) are inadequate because they are conclusory.⁴ Petitioner also contends there is no evidence to support the city's conclusion that "the majority of auto trips generated by the site should be local, rather than through trips." Petition for Review 7.

Our review of these assignments of error is hampered somewhat by petitioner's failure to provide any argument in support of his allegations. The city's findings concerning plan goals 5 and 6 are as follows:

³Petitioner also contends the city should have prepared a trip generation study or traffic pattern analysis in support of its decision. However, petitioner cites no plan or PCC provision requiring that such a study or analysis be prepared. Therefore, the city's failure to prepare such a study or analysis does not, by itself, constitute a basis for reversal or remand.

⁴Plan goal 6 is quoted supra at n 1. Plan goal 5 provides as follows:

"Increase the quantity and quality of job opportunities through the creation of an environment which promotes and supports business and industry and attracts new investment."

Goal 5--Economic Development: The request is consistent with the general policies and objectives of this Goal in that it may act as a catalyst for further economic development in the area."

Goal 6--Transportation: Reducing the area of the zone change request allows a finding of compliance with this goal. The potential impact of C-2 style trip generation from the site to the surrounding street system is reduced, as only one block will have permanent commercial zoning. Because this use is a 'neighborhood provision of governmental services,' the majority of auto trips generated by the site should be local, rather than through trips. Therefore, the proposal is not in direct conflict with the ASCP.

"The applicant and DHR have indicated a willingness to implement a parking and transit incentive management plan, involving van pools, carpooling, inter-agency shuttles, and bus rider incentives, to make-up for any shortfall in parking supply." Record 88.

Although the first clause of the above quoted finding addressing plan goal 5 is conclusory, the second clause expresses a reason why the city believes plan goal 5 is supported by the proposal, i.e., "the project may act as a catalyst for further economic development in the area."⁵ We do not agree that this portion of the city's findings concerning plan goal 5 is impermissibly conclusory.

With regard to the findings addressing plan goal 6, we do not agree that the findings, taken as a whole, are

⁵The city contends there is a great deal of testimony in the record that by occupying a now vacant building and providing additional jobs and services to the community, the proposal will act as such a catalyst.

impermissibly conclusory. The specific finding quoted by petitioner, "the majority of auto trips generated by the site should be local, rather than through trips," does state a conclusion.⁶ However, the challenged finding is but one of the findings adopted by the city addressing plan goal 6, and petitioner does not explain why it is critical to the city's decision concerning plan goal 6. The city points out the decision imposes a condition that a parking and transit incentive plan be implemented, and the city contends that plan will reduce traffic impacts regardless of the origin of that traffic. Other findings discuss the reduction of the request to include only Block 20 and the corresponding reduction in expected trip generation impacts.

Because petitioner fails to develop any arguments in support of his fourth and fifth assignments of error, they are denied.

SIXTH ASSIGNMENT OF ERROR

Petitioner contends the Humbolt Neighborhood Association's letter endorsing the application was written at a time when it was not known that existing housing on Block 19 would be demolished for additional parking under the original proposal, making the continuing validity of that endorsement questionable.

⁶The city contends there is testimony in the record supporting this conclusion, but does not identify where in the record that testimony appears.

Petitioner does not explain why the Humbolt Neighborhood Association letter of support is necessary to demonstrate compliance with one or more approval standards. Assuming it is, the city points out that under the amended application the existing housing on Block 19 is unaffected by the city's decision, and petitioner offers no other reason to question the continuing support of the neighborhood association. We agree with the city, and conclude petitioner's questions concerning the Humbolt Neighborhood Association's endorsement provide no basis for reversal or remand.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

Petitioner contends the city's findings that the project is in the public interest at this time and location do not identify the evidence those findings are based upon or indicate that conflicting evidence was also considered. We assume petitioner is challenging the city's findings of compliance with criteria (3) and (4) of plan policy 10.3, quoted supra, which require that the proposal be "in the public interest" and "that the interest is best served by granting the petition at this time and at the requested locations."

The city adopted the following findings:

In the Public Interest: The proposal is in the public interest in that it will help to stabilize the residential uses and generate other

appropriate commercial development in this area.

"In the Public Interest at This Time and Location:

The applicant contends that the project is needed here and now to spur development in the neighborhood. The applicant will provide 30 additional housing units over the next 3 years, and assist in the development of the Albina Community Plan and rezoning to provide additional multifamily units in the vicinity." Record 89-90.

With regard to the finding that the project is "in the public interest," the city does not contend that the finding identifies the evidence relied upon in reaching the finding. However, the city contends the finding is supported by a great deal of evidence in the record. The city specifically cites a letter from the Housing Authority of Portland which states:

"The Housing Authority of Portland supports the * * * request for a zone change and Comprehensive Plan Map amendment to develop and renovate the site at N. Williams Avenue, N. Vancouver, and N. Alberta Streets for the offices of the State Department of Human Resources (DHR).

"The proximity of the proposed multi-service center to our development located at N. Vancouver and N. Sumner will be of significant benefit to our residents. The Iris Court development consists of 54 units for low income families and 54 units for low income elderly/disabled. The ease of accessibility to the services provided by DHR would go a long way in assisting our residents with the basic needs as well as involving them in job training and employment search activities.

"As you know, the Portland Police Bureau has designated the Iris Court development as one of its three Community Policing Demonstration sites. One of the components of this model is linking residents to community services and resources

which can improve the quality of their lives and thereby eliminate vulnerability to criminal activity. The location of the proposed DHR will make it a natural partner in this demonstration project." Record 149.

The record also includes a letter from the North/Northeast Economic Development Task Force supporting the proposal and stating that the increased public services to the neighborhood "should foster revitalization of the community." Record 148.

Findings must identify relevant approval standards, identify the evidence which is believed and relied upon, and explain why that evidence supports a conclusion that the legal standard is met. McNulty v. City of Lake Oswego, 14 Or LUBA 366, 373 (1987); Bobbit v. Wallowa Co., 10 Or LUBA 112, 115 (1984). In several parts of the petition for review, petitioner erroneously contends the city is legally obligated to identify and discuss evidence that conflicts with the evidence the city ultimately relies upon. Although it may be that without such an explanation this Board on review will be unable to determine that the findings are supported by substantial evidence (i.e., evidence a reasonable person would rely upon to support the decision), there is no automatic requirement that the city discuss in its findings the evidence it chooses not to believe. Cope v. City of Cannon Beach, 15 Or LUBA 546, 552 (1987); Ash Creek Neighborhood Ass'n, 12 Or LUBA 230, 237 (1984).

We agree with petitioner that the city's finding

concerning whether the proposal is in the public interest is technically defective, in that it does not identify the evidence upon which the city relies. However, the applicable standard, "in the public interest," is open ended and subjective. ORS 197.835(9)(b) provides that this Board shall overlook defective findings of compliance with approval standards where the local government is able to identify evidence "which clearly supports" the decision that the standard is met. We conclude the evidence quoted above is adequate to clearly support a decision that the proposal is in the public interest.⁷

With regard to the requirement plan policy 10.3 that the proposal be "in the public interest" "at this time and in the requested locations," we agree with petitioner that the first finding quoted above is defective.⁸ However, the city's conclusion that the standard is met does not rely solely on the disputed finding. It also relies on the condition of approval requiring the applicant to "provide 30 additional housing units over the next 3 years, and assist

⁷Petitioner essentially repeats this part of the seventh assignment of error in the eighteenth assignment of error. We reject the eighteenth assignment of error for the same reason we reject this portion of the seventh assignment of error.

⁸Actually the statement, "the applicant contends that the project is needed here and now to spur development in the neighborhood," is not a finding at all because it is simply a statement of what the applicant contends, not what the city believes. Hershberger v. Clackamas County, 15 Or LUBA 401, 403 (1987). The statement is also inadequate as a finding because it does not identify or discuss evidence that the project is needed now or that it will spur development in the neighborhood.

in the development of the Albina Community Plan and rezoning to provide additional multifamily units in the vicinity." Record 90. That basis for concluding the standard is met is not challenged under this assignment of error. Accordingly the defective finding of compliance with plan policy 10.3 criterion 4 provides no basis for remand.

The seventh assignment of error is denied.

EIGHTH ASSIGNMENT OF ERROR

Petitioner contends the city failed to address "evidence that the overwhelming majority of nearby affected homeowners did not approve of the applicant's request." Petition for Review 8.

Respondent disputes petitioner's suggestion that the project is opposed by an "overwhelming majority of nearby affected homeowners." More importantly, petitioner does not explain why he believes the city was obligated to adopt findings addressing such opposition.

The eighth assignment of error is denied.

NINTH ASSIGNMENT OF ERROR

Petitioner contends the city failed to apply the maximum zoning allowed under the plan map designation.⁹

Respondent points out the plan map designation for the subject property was changed to General Commercial.

⁹As noted earlier in this opinion, with exceptions not applicable in this appeal, PCC 33.102.015(1) requires that proposed rezonings be "to the maximum Comprehensive Plan designation." Plan policy 10.7 imposes the same requirement.

According to the plan map, the C2 zoning map designation is the maximum zoning allowed under that plan map designation.

The ninth assignment of error is denied.

TENTH THROUGH THIRTEENTH ASSIGNMENTS OF ERROR

Petitioner contends the city failed to adopt any findings addressing plan policies 2.16 and 2.11 and plan objectives 5.1(A) and 5.14(B).¹⁰ Petitioner points out a

¹⁰Plan policies 2.11 and 2.16 and plan objectives 5.1(A) and 5.14(B) provide as follows:

"2.11 Commercial Centers

"Expand the role of major established commercial centers which are well served by transit. Strengthen these centers with retail office, service and labor-intensive industrial activities which are compatible with the surrounding area. Encourage the retention of existing medium and high density apartment zoning adjacent to these centers."

"2.16 Strip Development

"Discourage the development of new strip commercial areas and focus on future activity in such areas to create a more clustered pattern of commercial development."

"5.1 Business Retention and Recruitment

"* * * * *

"A. Give priority to programs and projects which retain existing jobs and capture the City's share of new jobs and investment in the region.

"* * * * *."

"5.14 Land Use

"* * * * *

"B. Promote the concentration of commercial activities in established districts and strips.

plan map amendment must be shown to be "consistent [with] and supportive of appropriate Comprehensive Plan goals and policies * * *." Plan policy 10.3. Petitioner contends the city failed to adopt any findings addressing these plan policies, despite considerable discussion below concerning the appropriateness of the proposal and its potential impacts.

The city does not claim the cited policies are not applicable approval standards. See Bennett v. City of Dallas, 96 Or App 645, 773 P2d 1340 (1989). Neither does the city contend that it did adopt findings addressing these policies. Respondent simply contends the proposal is highly desirable and merely represents DHR returning to its old location.

Although we have no reason to question the desirability of providing DHR with needed office space, respondent offers no basis for us to overlook the city's failure to adopt findings addressing the cited plan policies and objectives. Without such findings we are unable to determine whether the city considered the cited policies and objectives and, if so, why it believed the proposal is consistent with and supportive of those planning standards.¹¹

"* * * * *"

¹¹Although there is evidence in the record which might be adequate to constitute substantial evidence in support of such findings, the evidence cited by the parties is not adequate to "clearly" demonstrate the proposal is consistent with and supportive of those policies, so that we might

The tenth through the thirteenth assignments of error are sustained.

FOURTEENTH THROUGH SIXTEENTH ASSIGNMENTS OF ERROR

In assignments of error fourteen, fifteen and sixteen, petitioner contends the proposal will destroy existing housing and violates plan policies favoring preservation and utilization of existing housing stock.

As the city points out, the proposal to construct parking on Block 19 would have required demolition of existing housing on that block. However, that aspect of the proposal was eliminated. Under the challenged decision, no existing housing will be removed.¹²

The fourteenth, fifteenth and sixteenth assignments of error are denied.

SEVENTEENTH ASSIGNMENT OF ERROR

Criterion 2 of plan policy 10.3 requires that the city show the requested plan map change is "compatible with the land use pattern established by the Comprehensive Plan Map * * * [.]". The city's finding concerning this criterion is as follows:

"Compatible with Land Use Pattern: The proposal will be compatible with the existing land use pattern. It will provide a neighborhood service. The improvement to the site will reinforce the

overlook the city's failure to adopt findings addressing those standards under ORS 197.835(9)(b).

¹²In fact, as noted earlier in this opinion, the approval is conditioned on DHR constructing additional housing in the vicinity.

stability of this area." Record 89.

Petitioner contends the above quoted findings are conclusory and inadequate.

We agree with petitioner. The above findings do not identify what land use pattern is established by the comprehensive plan map, why the proposal is consistent with that land use pattern or what evidence the city relied upon in reaching its conclusion that the criterion is met.

The seventeenth assignment of error is sustained.

NINETEENTH ASSIGNMENT OF ERROR

The city apparently has a plan policy requiring that "any loss of existing housing units or potential housing be replaced when a Comprehensive Plan Map amendment is granted."¹³ Record 145. The challenged decision imposes the following condition:

"Within three years, the applicant will construct 30 housing units somewhere in the vicinity of this project." Record 93.

Petitioner challenges the above condition on two bases. First, petitioner contends the 30 units required is inadequate to mitigate the 75 existing and potential units that will be lost due to the city's decision granting the plan and zoning map amendments. Second, petitioner contends the city has no reason to expect the condition will be

¹³It is not clear from the record or the parties' arguments whether this policy had been adopted at the time the challenged decision was made. For purposes of this opinion, we assume the policy applies.

satisfied and should have required a performance bond.

As originally proposed, the plan and zoning map amendments would have required mitigation for the loss of 75 potential and existing housing units. However, as noted earlier in this opinion, the application was amended to exclude Block 19 and the property west of the subject property. As amended, mitigation for the loss of 30 potential units resulting from application of the new plan and zoning map designations to Block 20 is all that is required by the plan policy.

With regard to petitioner's contentions that the condition may not be satisfied, we are provided no reason to suspect the applicant is either unwilling or unable to comply with the condition. If the condition is not satisfied, the city contends it has authority to take appropriate action to enforce the condition or revoke the approval granted by the challenged decision. We will not speculate that the condition will not be satisfied or enforced.

The nineteenth assignment of error is denied.

TWENTIETH ASSIGNMENT OF ERROR.

Petitioner argues the city failed to address an Arterial Streets Classification Policy which he contends requires that "new land uses and major expansions of existing land uses which attract a significant volume of traffic trips from outside the neighborhood areas should be

discouraged along a Neighborhood Collector Street, as provided by the Comprehensive Plan and Zoning Code." Petition for Review 13.

Under ORS 197.835(2), our scope of review is limited to issues which were raised "before the local hearings body." See also ORS 197.763. The city contends petitioner never raised before the city the issue he seeks to raise in this assignment of error.

Petitioner does not identify in the record where he raised the above issue. Neither does petitioner contend the city failed to follow the procedural requirements of ORS 197.763. Having failed to raise the issue before the city, he may not do so for the first time at LUBA. ORS 197.763(1); 197.835(2); Boldt v. Clackamas County, ___ Or LUBA ___ (LUBA No. 90-147, March 12, 1991).

The twentieth assignment of error is denied.

In summary, we sustain petitioner's tenth through thirteenth and seventeenth assignments of error. The remaining assignments of error are denied.

The city's decision is remanded.