

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 TOM SCOTT,
5 *Petitioner,*
6

7 vs.
8

9 CITY OF JACKSONVILLE,
10 *Respondent.*
11

12 LUBA No. 2009-107
13

JAN12'10 PM 2:00 LUBA

14 FINAL OPINION
15 AND ORDER
16

17 Appeal from City of Jacksonville.
18

19 Tom R. Scott, Jacksonville, filed the petition for review and argued on his own
20 behalf.
21

22 Kurt H. Knudsen, Ashland, filed the response brief and argued on behalf of
23 respondent.
24

25 HOLSTUN, Board Member; BASSHAM, Board Chair; RYAN, Board Member,
26 participated in the decision.
27

28 REMANDED

01/12/2010
29

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

NATURE OF THE DECISION

Petitioner appeals a city decision that amends conditions of approval that were attached to a previously issued conditional use permit.

FACTS

The subject property, the Nunan Estate and Carriage House (Nunan Estate), is a 3.10-acre property zoned Historical Core. The Nunan Estate includes the Jeremiah Nunan House, which is a historic building, as well as additional non-historic buildings that are used for a variety of business purposes including lodging, dining, catering, and outdoor events. The Nunan Estate borders residential areas, including petitioner’s property. In 2007, the city approved a conditional use permit (CUP) that authorized the Nunan Estate to host outdoor events such as weddings, parties, and receptions. The CUP included 15 conditions of approval, including conditions 1-4, which limited the number of outdoor events that include amplified music, the permissible sound level of amplified music, the maximum number of guests, and the hours of operation.

In 2009, the Nunan Estate submitted an application to amend the CUP conditions of approval 1-4 regarding outdoor events. The amended conditions of approval increase the number of weddings events allowed per year from 6 to 10 and increase the allowed number of guests from 150 to 200. Record 114, 244.¹ The amended conditions also impose no restrictions on the number of unamplified events, increase the allowable decibel level for amplified events to 68 dBa from 40 dBa, and allow all outdoor music to continue until 10:00 P.M. The planning commission approved the amendments to conditions of approval 1-4 over petitioner’s objections. This appeal followed.

¹ For some reason the record is paginated backwards. The first page of the record is Record 264; the last page of the record is Record 1.

1 **FIRST ASSIGNMENT OF ERROR**

2 The amendment to condition of approval 2 regarding the level of noise permitted on
3 the Nunan Estate states:

4 “The above described outdoor events shall not emit sound greater than a
5 thirty-second average of 68 dBA at the North entrance gate to the Nunan Estate
6 as determined by a Jacksonville Police Officer. In the event of any conflict
7 between this condition and any future City noise ordinance, that ordinance
8 shall override this condition.” Record 244.

9 OAR 340-035-0035 sets out the Oregon Department of Environmental Quality’s
10 (DEQ’s) Noise Control Regulations for Industry and Commerce. Petitioner argues that the
11 amended conditions of approval violate that administrative rule by allowing noise levels
12 greater than the levels allowed by OAR 340-035-0035(1)(b)(B)(i), which provides:

13 “No person owning or controlling a new industrial or commercial noise source
14 located on a previously unused industrial or commercial site shall cause or
15 permit the operation of that noise source if the noise levels generated or
16 indirectly caused by that noise source increase the ambient statistical noise
17 levels, L10 or L50, by more than 10 dBA in any one hour, or exceed the levels
18 specified in Table 8, as measured at an appropriate measurement point, as
19 specified in subsection (3)(b) of this rule, except as specified in subparagraph
20 (1)(b)(B)(iii).”²

21 Table 8 provides that the allowable statistical noise levels in any one hour between 7:00 A.M.
22 and 10:00 P.M. are L₅₀-55 dBA, L₁₀-60 dBA, and L₁-75 dBA.³

² Although the state has suspended administration and enforcement of the noise standards, they are still valid regulations. OAR 340-035-0110 explains:

“In 1991, the Legislative Assembly withdrew all funding for implementing and administering ORS Chapter 467 and the Department’s noise program. Accordingly, the Commission and the Department have suspended administration of the noise program, including but not limited to processing requests for exceptions and variances, reviewing plans, issuing certifications, forming advisory committees, and responding to complaints. Similarly, the public’s obligations to submit plans or certifications to the Department are suspended.”

³ OAR 340-035-0015 provides the following definitions:

“‘Noise Level’ means weighted sound pressure level measured by use of a metering characteristic with an ‘A’ frequency weighting network and reported as dBA.” OAR 340-035-0015(37).

1 The city initially responds that petitioner failed to raise the issue of compliance with
2 OAR 340-035-0035(1)(b)(B)(i) below, and therefore may not raise the issue at LUBA for the
3 first time.⁴ Petitioner responds that he submitted a copy of OAR 340-035-0035, which
4 appears at Record 32-36, and argued at the August 19, 2009 public hearing that the rule
5 applies to the application in this matter. While the act of submitting a copy of OAR 340-035-
6 0035 would likely not in itself be sufficient to preserve the issue for appeal under ORS
7 197.763(1) and 197.835(3), petitioner’s testimony at the public hearing was adequate to
8 preserve the issue.

9 The city next responds that OAR 340-035-0035(1)(b)(B)(i) does not apply because
10 the city has not adopted OAR 340-035-0035(1)(b)(B)(i) as part of its comprehensive plan or
11 land use regulations, and OAR 340-035-0035(1)(b)(B)(i) is therefore not one of the city’s
12 local standards for conditional use approval. Even if that is true, that does not mean the city
13 may grant conditional use approval that authorizes a level of noise that is prohibited by state
14 statutes or administrative rules.⁵ The city also argues that even if OAR 340-035-

“‘Statistical Noise Level’ means the noise level which is equaled or exceeded a stated percentage of the time. An $L_{10} = 65$ dBA implies that in any hour of the day 65 dBA can be equaled or exceeded only 10% of the time, or for 6 minutes.” OAR 340-035-0015(59).

⁴ ORS 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.”

ORS 197.835(3) provides:

“Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.”

⁵ Although petitioner points to no affirmative act by the city that adopts OAR 340-035-0035(1)(b)(B)(i), Environmental Element, Chapter Eight of the City of Jacksonville Comprehensive Plan provides:

“Noise is more than a nuisance, it cannot only harm someone[’s] health through stress and hearing loss, but it can degrade the livability of a community, OAR Chapter 340, Division 35 regulates several types of noise, including * * * [:]”

1 0035(1)(b)(B)(i) were potentially applicable, the rule applies to *new* noise sources, and the
2 challenged conditions of approval apply to *existing* noise sources. See OAR 340-035-
3 0035(1)(b) (“New Noise Sources”). While the city is correct that the subsection of OAR
4 340-035-0035 cited by petitioner applies to new noise sources, the immediately preceding
5 subsection imposes standards for existing noise sources. OAR 340-035-0035(1)(a)
6 (“Existing Noise Sources”).⁶ The standards set out at OAR 340-035-0035 Table 7 and Table
7 8 are identical. Petition for Review Appendix A-22.

8 The city next argues that the noise standards only apply to “Industrial or Commercial
9 Noise Source[s]” and the Nunan Estate is neither industrial nor commercial.⁷ We tend to
10 agree with petitioner that the Nunan Estate events such as weddings, parties, and receptions
11 qualify as commercial noise sources, but we need not resolve that question.⁸ Assuming that

“* * * * *

“industry and commerce

“* * * * *

“Outdoor events.”

⁶ OAR 340-035-0035(1)(a) provides:

“Existing Noise Sources. No person owning or controlling an existing industrial or commercial noise source shall cause or permit the operation of that noise source if the statistical noise levels generated by that source and measured at an appropriate measurement point, specified in subsection (3)(b) of this rule, exceed the levels specified in **Table 7**, except as otherwise provided in these rules.”

⁷ OAR 340-035-0015(23) defines “Industrial or Commercial Noise Source” as

“* * * that source of noise which generates industrial or commercial noise levels.”

OAR 340-035-0015(24) defines “Industrial or Commercial Noise Levels” as

“those noises generated by a combination of equipment, facilities, operations, or activities employed in the production, storage, handling, sale, purchase, exchange, or maintenance of a product, commodity, or service and those noise levels generated in the storage or disposal of waste products.”

⁸ Under the exemptions to the requirements for noise control regulations for industry and commerce, OAR 340-035-0035(5)(f) provides:

1 petitioner is correct that the permissible noise levels set out at OAR 340-035-0035 Table 7
2 apply to the Nunan Estate, we agree with the city that petitioner has not established that the
3 disputed condition of approval is inconsistent with the DEQ standard. The city conditioned
4 its approval on outdoor amplified events not “emitting sound greater than a thirty second
5 average of 68 dBa at the North entrance gate of Nunan Estate * * *.” The “Allowable
6 Statistical Noise Levels in any One Hour” between “7am and 10 pm” as set out in Table 7 are
7 55 dBa 50% of the time (30 minutes), 60 dBa 10% of the time (6 minutes), and 75 dBa 1% of
8 the time (36 seconds). *See* n 3. The city’s standard does not authorize noise levels greater
9 than OAR 340-035-0035, and in fact appears to impose a stricter standard.

10 Finally, under the disputed condition the 68 dBA noise limit is to be measured at the
11 north entrance gate to the Nunan Estate, whereas petitioner contends that under OAR 340-
12 035-0035(3) noise is to be measured at the neighboring noise sensitive property line under
13 DEQ’s administrative rule.⁹ Respondent contends that the required location for measuring
14 noise in the condition is not inconsistent with OAR 340-035-0035(3)(b):

“Sounds not electronically amplified which are created by or generated at sporting, amusement, and entertainment events, except those sounds which are regulated under other noise standards. An event is a noteworthy happening and does not include informal, frequent, or ongoing activities such as, but not limited to, those which normally occur at bowling alleys or amusement parks operating in one location for a significant period of time[.]”

That there is an exemption for “sounds not electronically amplified which are created by or generated at * * * entertainment events,” strongly suggests that the exemption does not apply to amplified sounds and thus such amplified sounds are subject to the rule.

⁹ The choice of the north gate entrance apparently was make it easy for the city police to measure noise without having to enter private property. Under OAR 340-035-0035(3)(b):

“Unless otherwise specified, the appropriate measurement point shall be that point on the noise sensitive property, described below, which is further from the noise source:

“(A) 25 feet (7.6 meters) toward the noise source from that point on the noise sensitive building nearest the noise source;

“(B) That point on the noise sensitive property line nearest the noise source.”

1 “* * * The Nunan Estate Sound Test was conducted on or about July 27, 2009
2 by Respondent’s staff. Planning Commissioners attended the sound test as
3 part of a study session on the topic. Pursuant to that test, when the sound was
4 measured at 75 dBA at the dance floor for a 30 second period, the reading at
5 640 Grove Street, where Petitioner lives, measured a peak of 62 with an
6 average over the 30 seconds at 52. 640 Grove Street is the closest adjoining
7 property and is approximately 60 feet from the noise source. If the sound was
8 averaged over a one hour period, the average would be less, given that there
9 are breaks during music that are not evident during a 30 second sound reading.
10 It should also be noted that the amplified music is directed away from 640
11 Grove Street. Therefore, even if the State rules applied, there has been no
12 showing by Petitioner or any other party that they have been exceeded. * * *

13 “* * * * *

14 “* * * When the reading was measured at [a] peak of 85 [dBa] at the dance
15 floor, the measurement averaged 58 [dBa] at 640 Grove Street and 63 [dBa] at
16 the North Entrance. Importantly, the sound was higher at the North Entrance
17 than at the Petitioner’s property line. As the sound study demonstrates, if the
18 sound at the North entrance were at 68 [dBa], the sound at Petitioner’s
19 property line would be less.” Respondent’s Brief 6-7 (record citations
20 omitted).

21 To summarize, the thirty second average dBa standard imposed by the disputed
22 condition is more stringent than the dBa standards imposed by OAR 340-035-0035 Table 7.
23 And the choice of the north entrance as the measuring point results in more noise protection
24 for adjoining noise sensitive properties than would be the case under OAR 340-035-
25 0035(3)(b). Petitioner has not demonstrated that the amended condition is inconsistent with
26 OAR 340-035-0035.

27 The first assignment of error is denied.

28 **SECOND ASSIGNMENT OF ERROR**

29 Petitioner argues that the city improperly found that the application complies with
30 Jacksonville Municipal Code (JMC) 17.104.050(C)(6) which requires the city to find the
31 proposed use will have “minimal adverse impact upon adjoining properties.”¹⁰ Petitioner

¹⁰ JMC 17.104.050(C)(6) provides:

1 argues the city’s findings concerning JMC 17.104.050(C)(6) are inadequate and that those
2 findings are not supported by substantial evidence.

3 The findings that appear in the planning commission’s decision simply conclude that
4 “the application demonstrates compliance with the conditional use permit approval criteria
5 contained in Section 17.104.050(C).” Record 245. Under ORS 227.173(3) “[a]pproval or
6 denial of a permit application * * * shall be based upon and accompanied by a brief statement
7 that explains the criteria and standards considered relevant to the decision, states the facts
8 relied upon in rendering the decision and explains the justification for the decision based on
9 the criteria, standards and facts set forth.” The fundamental attributes of adequate findings
10 are as follows:

11 “Findings must (1) identify the relevant approval standards, (2) set out the
12 facts which are believed and relied upon, and (3) explain how those facts lead
13 to the decision on compliance with the approval standards. *Sunnyside*
14 *Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 20-21, 569 P2d 1063
15 (1977); *Vizina v. Douglas County*, 17 Or LUBA 829, 835 (1989); *Bobitt v.*
16 *Wallowa County*, 10 Or LUBA 112, 115 (1984). Additionally, findings must
17 address and respond to specific issues relevant to compliance with applicable
18 approval standards that were raised in the proceedings below. *Norvell v.*
19 *Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979); *White v. City*
20 *of Oregon City*, 20 Or LUBA 470, 477 (1991); *Grover’s Beaver Electric v.*
21 *City of Klamath Falls*, 12 Or LUBA 61, 66 (1984).” *Heiller v. Josephine*
22 *County*, 23 Or LUBA 551, 556 (1992).

23 Although ORS 227.173(3) permits the city’s findings to be brief, findings must be
24 more than a bare conclusion that applicable approval criteria are satisfied. To comply with
25 ORS 227.173(3), the planning commission must explain *why* it believes that the Nunan
26 Estate will have “minimal adverse impact upon adjoining properties” with the amended
27 conditions. The bare conclusion that the application complies with the JMC 17.104.050(C)

“The proposed use will have minimal adverse impact upon adjoining properties and the improvements thereon. In making this determination, the commission shall consider, but not be limited to, the proposed location of the improvements on the site, vehicular egress/ingress and internal circulation, pedestrian access, setbacks, height and bulk of buildings, walls and fences, landscaping, screening, exterior lighting and signing[.]”

1 conditional use criteria is not sufficient to provide the “justification for the decision based on
2 the criteria, standards and facts” that is required by ORS 227.173(3).

3 The city’s decision specifically incorporates the findings that are included in the July
4 1, 2009 staff report. Record 245. The staff report includes the following findings regarding
5 JMC 17.104.050(C).

6 “There are no proposed site improvements or changes related to this CUP
7 request. Vehicular egress/ingress and internal circulation will remain the same
8 as already approved, as will pedestrian access, setbacks, height and bulk of
9 buildings, walls and fences, landscaping, exterior lighting and signing.”
10 Record 69.

11 The above findings do not address the impact of amplified music or related crowd noise on
12 nearby residences, which are petitioner’s primary concerns. It is true that the planning staff
13 report goes on to discuss the reasons for amending the conditions to allow a higher level of
14 noise and the staff report discusses a number of measures that have been proposed by the
15 applicant and others to mitigate the increased noise. However, nowhere in the findings that
16 have been called to our attention does the planning commission or planning staff ever relate
17 those mitigation measures to the JMC 17.104.050(C)(6) “minimal adverse impact upon
18 adjoining properties” criterion. Neither do the city’s findings explain why, with those
19 mitigation measures, the city believes the Nunan Estate, with the amended conditions, will
20 comply with the JMC 17.104.050(C)(6) requirement that the use have “minimal adverse
21 impact upon adjoining properties.” Remand is required so that the city can provide the
22 missing explanation.

23 The second assignment of error is sustained.

24 **THIRD ASSIGNMENT OF ERROR**

25 Petitioner argues that the city misconstrued the intent of Jacksonville Comprehensive
26 Plan (JCP) policies “to such a degree that it caused the wrong criteria to be applied to the
27 decision making process.” Petition for Review 12. The city considered policies G(1) and

1 G(2) of the JCP Historic Element in approving the amendments to the conditions of
2 approval.¹¹ The city’s findings state:

3 “The [city] hereby finds that economic vitality is a relevant consideration
4 under CUP criterion #1. The Historic Element, the most important chapter in
5 the [JCP], points up the crucial nature of ensuring the economic viability of
6 the Estate so that this prominent feature can be adequately maintained and
7 preserved. Policies G(1) and (2) of this element support this concept and this
8 request. Also, the Economic Element directly guides the City to ‘support,
9 cooperate, and coordinate with special events * * *’ Record 245.

10 CUP criterion #1 is JMC 17.104.050(C)(1), which requires the city to find that the
11 “proposal is in compliance with the comprehensive plan.” We agree with petitioner that the
12 city likely would have committed error if it interpreted JMC 17.104.050(C)(1) and the cited
13 comprehensive plan policies to allow the city to approve the requested condition amendments
14 notwithstanding that those amendments would result in the Nunan Estate violating one or
15 more of the other JMC 17.104.050(C) approval criteria. However, that is not what the city
16 found. The city merely found that because JMC 17.104.050(C)(1) requires the city to find
17 that the “proposal is in compliance with the comprehensive plan,” it was appropriate under
18 the cited comprehensive plan policies to consider the economic vitality of historic buildings
19 in making its decision. We see no error in the city considering economic impacts on
20 historical uses in making its decision.

¹¹ Policy G(1) provides:

“Promote financial incentives for historic preservation. Implementation measures: Disseminate information on and promote the use of federal, state, and private financial incentive programs for historic preservation. Prepare, recommend and advocate state and local financial incentive programs for the preservation of buildings on the Landmark List. Place plaques, decals, present certificates, or make other official recognition of the structures on the Landmark List.”

Policy G(2) provides:

“Encourage affirmative maintenance of the structural and historical integrity of all resources on the City’s Landmark List.”

1 Petitioner also advances an argument that the decision does not comply with Chapter
2 10 (General Implementation) of the JCP. The city argues, however, that that issue was not
3 raised below and cannot be raised for the first time at LUBA. ORS 197.763(1) and
4 197.835(3). Petitioner has not responded to the city’s waiver argument. Therefore, any issue
5 concerning JCP Chapter 10 is waived. *Cox v. Yamhill County*, 29 Or LUBA 263, 266 (1995).

6 The third assignment of error is denied.

7 **FOURTH ASSIGNMENT OF ERROR**

8 Petitioner argues that the city failed to make a finding a compatibility with the
9 Jacksonville Historic Context Statement as required by the Historic Architectural Review
10 Committee (HARC). JMC 17.36.040(B) provides:

11 “Uses with a precedent in Jacksonville’s Historic Context (after the date of
12 City’s incorporation, October 11, 1860) shall be encouraged. For uses without
13 such a precedent, a finding of compatibility with the Jacksonville Historic
14 Context Statement must be made by HARC.”

15 The city responds that this issue was not raised below and cannot be raised for the
16 first time at LUBA. ORS 197.763(1) and ORS 197.835(3). Petitioner has not responded to
17 the city’s waiver argument. Therefore, the argument is waived.

18 The fourth assignment of error is denied.

19 The city’s decision is remanded.