BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROBERT STEPHENS, Petitioner vs. MULTNOMAH COUNTY; SPENCER H. VAIL, Respondents.	LUBA No. 83-110 FINAL OPINION AND ORDER

Appeal from Multnomah County.

Arden E. Shenker, Portland, filed the Petition for Review and argued the cause on behalf of petitioner. With him on the brief were Tooze, Kerr, Marshall & Shenker.

Spencer H. Vail, Portland, filed a brief and argued the cause on his own behalf.

No appearance by Multnomah County.

DUBAY, Referee; BAGG, Chief Referee participated in the decision.

REMANDED 02/17/84

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1983, ch 827.

Opinion by DuBay.

NATURE OF THE DECISION

Petitioner appeals from a county order approving a permit to store and transfer portable toilet wastes from one tank truck to another truck or to a storage tank.

FACTS

The permit applicant is in the business of renting portable toilets. The units are stored on the subject property and taken to and from the site by a truck. Tank trucks pump out the portable toilets at the point of use so the toilets themselves are empty when returned to the site and when stored. The waste in the tank trucks is taken to a sewage treatment plant for unloading, but sometimes the tank trucks are parked on the site, either because the trucks do not have a full load or the truck arrives late at night and cannot be unloaded until the following morning.

The site is in an area of northeast Portland shown on the comprehensive plan as General Industrial. It is zoned Urban General Manufacturing (GM). However, there are residential uses nearby, and properties to the south and east of the applicant's property are zoned for low density residential use (LR-40). The Columbia Slough drainage canal abuts the northern boundary of the site.

Storage of the portable toilets is a permitted use in the GM Zone. However, the storage and transfer of the waste material is classed as a Community Service Use which requires a

special permit. The property was used for both storage of the portable units and the transfer of wastes without special permits for seven or eight months before the hearings so the neighbors had some knowledge of the use and its effect on the neighborhood prior to the hearings. Both the planning commission and the board of commissioners, upon appeal from the planning commission, approved the application for the Community Service Use subject to various conditions. This appeal followed.

FIRST ASSIGNMENT OF ERROR

To approve a Community Service Use, the county is required by its ordinance to find the proposal is consistent with the character of the area. The findings acknowledge the complaints of neighbors about noise associated with the transfer operation and propose a condition to protect the neighborhood. The condition imposes a limit on hours of operation "to insure greater compatibility of the proposed use with surrounding residential uses." Findings of Fact 8D. Record 11. Petitioner claims the county recognized the noise problem by imposing the condition, and that is inconsistent with the requirement of a finding of consistency with the character of the neighborhood. Petitioner notes, too, that evidence of odor sufficient to interfere with sleep was unrebutted and not mentioned in the findings.

We understand this assignment of error to argue the county misconstrued the code provision which requires a finding of

consistency with the character of the neighborhood. Petitioner claims the proper construction of the code requires a finding of consistency without any special measures to reduce or eliminate impacts. We further understand this assignment to allege error because there is not substantial evidence to support a finding of consistency with the neighborhood.

The findings describe the area as follows:

"Character of the Area:

> This property is on the border of a transition from single family residential to industrial uses. Properties to the north and west are zoned and used for industrial purposes. Those to the south and east are designated industrial on the comprehensive plan, but are zoned single family residential in recognition of the existing land use. They were designated that classification as a result of a strategy of Cully/Parkrose Community Plan Policy No. 21. That states, "viable clusters of housing should be protected until such time as the entire clusters can change (to industrial)."

Although the term consistency is not defined in the plan, there was considerable testimony of noise and odor being considered objectionable by residents in the area and consequently inconsistent with residential use. The county apparently recognized that noise associated with the operation was sufficient to interrupt sleep. The county made a finding to that effect, Record 11, and the Board understands this finding to be a recognition that considerations of noise bear on whether or not the use is consistent with the character of the area.

However, rather than find whether the proposal is

consistent with the character of the area or not, the county simply imposed a condition limiting the hours of operation "from 6:00 a.m. to 10:00 p.m., to allow sufficient time to the surrounding property owners for uninterrupted sleep." The Board believes it is necessary for the findings to include a statement whether the proposal is consistent or not and an explanation how the condition limiting hours makes the use consistent with the character of the area.

The findings are also deficient on the issue of odor. A petition signed by all but two residents who live within 500 feet of the property was submitted to the county. The petition states the air around the operation to be offensive, causing annoyance and discomfort. One neighbor said the pumping of wastes from one truck to another exhausts the odor from the trucks. He further stated he must close the windows when the wind blows from northeast to east (Record at 115). It is clear the county was presented with complaints of annoyance and interference with normal residential uses by many residents in the area. Those complaints in evidence of bad smells were made contemporaneously with complaints of noise which were mentioned in the findings. Odor, however, was not mentioned in the findings. There are no findings to give us a clue how the county viewed the issue of odor as consistent or not with the character of the neighborhood.

One reason for findings is to assist a reviewing agency in the performance of its function to determine whether the

criteria were properly applied in the case at hand. Green v. Hayward, 275 Or 693, 552 P2d 815 (1976). Without findings on a subject relevant to an applicable criterion, after being brought before the county by a substantial number of complaining residents, there is no way to determine whether the county properly complied with the ordinance. The conclusion of no additional impact on the surrounding area is a conclusion that appears to be made without consideration of all relevant facts. The county must include findings stating what it believes to be the facts about odor from the proposed waste transfer operation and whether such odor, if any, is consistent with the area. Phillips v. Coos Cty, 4 Or LUBA 73 (1981). This assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioner claims the county erred in finding the waste storage and transfer operation does not create hazardous conditions or adversely affect natural resources in the area. A Community Service Use permit requires such findings. The county found:

> "There is a potential of contamination of the ground water system and/or slough if the transfer and dilution is not handled in an appropriate manner. However, that transfer and dilution is required to be conducted in a manner controlled by DEQ. If so handled, no hazardous conditions should result."

Petitioner argues the applicable ordinance requires unconditional findings of no hazard. This view does not recognize a finding conditioned upon compliance with Department

of Environmental Quality (DEQ) regulations as meeting the ordinance requirements. The condition includes within it a finding that no hazardous conditions should result if the operation is conducted in a manner controlled by DEQ. We understand this finding to be a statement there will be no hazardous conditions, and this finding is founded on the assumption DEQ regulations will be followed. If we are mistaken, and the county has not made an unequivocal finding of no hazardous conditions, this issue will be clarified on remand.

We reject petitioner's argument that conditions may not be used to ensure compliance with ordinance criteria. Petitioner cites us to no authority to suggest that a local government may not impose conditions so as to make an otherwise objectionable use not objectionable. Therefore, contrary to petitioner's view, the manner in which the county made a finding that no hazardous conditions would result is appropriate. The error, if one exists here, is one of choice of the word "should" for "will." This error may be corrected on remand. It remains to be seen if this finding, even read as an unequivocal statement of no hazard, is supported by substantial evidence.

The finding assumes both storage and transferring are regulated by the DEQ. The county staff stated at the hearing that although the storage tank is required to be installed in accordance with DEQ regulations, the transfer of waste is not a regulated transfer operation. There was no evidence otherwise. DEQ regulation of transferring waste was a fact

relied upon in making the decision. Without substantial evidence to support that fact, the basis for the conclusion that no hazardous conditions should result cannot stand.[1]

Petitioner also alleges evidence should have been considered that DEQ had charged the applicant with violation of DEQ regulations at other places regarding handling of waste. Petitioner asserts that evidence is relevant to show DEQ regulations will not be followed in the future by the applicant. In land use permit applications, evidence of prior land use violations is not generally considered as grounds for a denial, at least where there are no specific standards authorizing denial for such reasons. See generally 3 Anderson, American Law of Zoning, Section 19.24 (1977). Such evidence of prior violation does not show there will be repeated violations nor is it proper to punish the applicant for previous acts if an enforcement agency has already done so. Pokoik v. Silsdorf, 390 NYS2d, 49, 358 NE2d 874 (1976). Such evidence of DEQ enforcement actions, particularly at other locations, was properly excluded by the Board.[2]

Therefore, because the county made a finding there could be possible contamination of natural resources preventable by regulations the evidence shows as non-existing, this assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Petitioner here claims the findings are mistaken to the extent they show compliance with the Cully/Parkrose Community

Plan. In particular, petitioner points out two strategies of the housing choice section of the plan. Those two provisions are as follows:

> "3. The existing residential neighborhoods should be protected from encroachment of compatible uses.
>
> "4. The housing north of the Union Pacific Railroad tracks is subjected to significant aircraft noise impacts and should be phased out in the long term through rezoning to industry. Viable clusters of housing should be protected until such time as the entire cluster can change. These clusters will be labeled as conversion units on the community land use plan and zoning map. The zoning code will outline criteria for converting the cluster when deemed desirable."

There are other provisions of the Cully/Parkrose Plan relating specifically to the area in which the subject property is located. One of those specific provisions note it is a development objective of the area "to maintain a viable residential neighborhood environment and buffered from encroaching industrial development until such time as the neighborhood decides it should convert to industrial uses."

Petitioner says the buffering provisions in the ordinance, together with the limitation and hours of operation, will not protect the neighborhood from noise and odor nor from contamination resulting from mishandling of the waste. Such claims are another way of stating the allowance of the application is inconsistent with the residential character of the surrounding neighborhoods as discussed in Assignments of Error 1 and 2. The discussion there regarding aspects of the applicant's operation alleged to be inconsistent with the

character of the neighborhood adequately disposes of the issues raised in this assignment of error and will not be repeated.

The decision is remanded for further proceedings for the reasons above set forth. Should the county desire to proceed with this matter further, it will have to include in its proceedings consideration of the issues we found to be inadequately or mistakenly considered herein.

FOOTNOTES

---

1 Finding 5 notes the DEQ said the proposed operation would have no adverse impact on the natural resource or Columbia Slough. That finding does not preclude Finding 7 which states there is a potential for contamination of the ground water and the slough if the transfer and dilution are not conducted in an appropriate (i.e., regulated by DEQ) manner.

---

2 We do not mean to hold evidence of prior violations should be disregarded in all cases. Where such evidence shows impossibility of performance as distinguished from propensity to not perform, there may be a basis for consideration. But that question is not before us now.