BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRED CANN, Petitioner, vs. THE CITY OF PORTLAND, Respondent.	LUBA No. 85-090 FINAL OPINION AND ORDER

Appeal from City of Portland.

Fred Cann, Portland, filed a petition for review and argued on his own behalf.

Kathryn Beaumont Imperati, Portland, filed a response brief and argued on behalf of Respondent City.

Jerard S. Weigler, Portland, filed a response brief and argued on behalf of Respondent Chapman Parent Teachers Association and Chapman School Citizens Advisory Committee. With him on the brief were Lindsay, Hart, Neil & Weigler.

Roger A. Nelson, Portland, filed a Petition for Review and argued on behalf of Peter T. Nortman.

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

AFFIRMED 02/14/86

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

Opinion by Kressel.

NATURE OF THE DECISION

The city approved a conditional use permit for a play shelter at a public school playground in northwest Portland. Neighbors of the school seek reversal of the decision.

FACTS

Portland Public School District No. 1 applied for a conditional use permit to erect a play shelter on a portion of the playground at Chapman School. The shelter will be 24 feet high and will cover a 5000 square foot area. Part of the area to be covered is blacktopped and is used by school children and neighborhood residents for recreation.

The city's hearings officer approved the permit. The approval was subject to the following limitations:

> "A. If practical, basketball hoops shall be removable, and be in place generally during school hours, with some modest provision for their use shortly before and shortly after school hours. If this is not a practical alternative, no basketball hoops shall be installed. If lights are installed in the play structure, they shall be used only to improve visibility on dark days and shall not receive nighttime use. They should not be in use for play purposes beyond 5:00 p.m." Record at 195.

Owners of nearby property appealed the decision to the city council. After a de novo hearing, the council affirmed the hearings officer's decision. However, the final order deletes the limitations imposed by the hearings officer. The approved application provides for installation of lights and four basketball goals within the shelter. The lights will be

controlled automatically. The final order states that "the shut-off time will be between 9 and 10 p.m., based on the neighborhood input and on security considerations." Record at 13.

FIRST ASSIGNMENT OF ERROR OF PETITIONER CANN

Petitioner Cann argues that the city exceeded its jurisdiction when it deleted the limitations imposed by the hearings officer. He contends that the city's decision was more favorable to the permit applicant than the hearings officer action--an allegedly impermissable result because the applicant failed to cross-appeal from the hearings officer's action.[1]

We reject this claim. The city code gives the city council broad latitude in land use appeals. Section 33.114.070(d) provides:

> "Upon review, the Council may affirm, reverse or modify in whole or in part any decision of the Hearings Officer or the Commission. The Council shall accompany its decision with a statement setting forth its findings and the reasons for the decision it reached."

Petitioner argues that the city council's role in a permit appeal is analagous to that of an appellate court. He directs our attention to cases holding that an appellate court may not grant relief more favorable to the respondent than the relief granted by the trial court, unless the respondent files a cross appeal. See e.g., Williams v. Mallory, 284 Or 397, 406-407, 587 P2d 85 (1978). However, we do not believe this principle governs interpretation of the city code.

ORS 227.180(1) authorizes a city council to prescribe the procedure for permit appeals. A council may, but need not, base its procedural rules on the appellate model described by petitioner. As we read the Portland code, the filing of an appeal gives the city council broad authority to affirm, reverse or modify the decision in issue. The council is not limited to consideration of particular issues or specific claims of error. Since we find no language in the code supporting the restrictive interpretation advanced by petitioner, we hold that the council was free to delete the provisions endorsed by the hearing officer, even though there was no cross-appeal. ORS 227.180(1). See Menges v. Board of County Commissioners of Jackson County, 290 Or 251, 257-61, 621 P2d 562 (1980); Bienz v. City of Dayton, 29 Or App 761, 776, 566 P2d 904 (1977). See also Neely v. SAIF, 43 Or App 319, 323, 602 P2d 1101 (1979).

This assignment of error is denied.

FIRST ASSIGNMENT OF ERROR OF PETITIONER NORTMAN

The standards for approving the proposal require a determination "...that the use at the particular location is desirable to the public convenience and welfare and not detrimental or injurious to the public health, peace or safety, or to the character and value of the surrounding properties." Section 33.106.010 Portland Municipal Code. In this assignment of error, Petitioner Nortman claims that certain findings relevant to the quoted standards are not supported by

substantial evidence in the record. The claim is directed at the following portion of the city's order:

> "The structure will not be detrimental or injurious to the public welfare or to the character and value of surrounding properties because the play structure is 150 feet away from the nearest residences. The play structure will not encourage any more noise than is normally associated with the existing playground use. The applicant, the school district, has stated that lights and noise associated with playground use will be controlled by limiting the hours of use of the property." Record at 16.

Petitioner states that "[b]ecause these findings are not supported by substantial evidence in the whole record, the council's decision is not supported by substantial evidence in the record." Petition of Nortman at 9 (emphasis added). We disagree.

This claim arises under ORS 197.835(8)(a)(C). The statute authorizes LUBA to grant relief where the local government "made a decision not supported by substantial evidence in the whole record." As we have noted in other cases, a decision can withstand attack under this statute even if particular findings in the decision lack the necessary factual support. Thus, one who alleges that particular findings are factually unsupported by the record, as in this case, is entitled to reversal or remand of the decision only if (1) the allegation is correct and (2) the unsupported findings are pivotal, i.e., they constitute the legal foundation for the decision. Bonner v. City of Portland, 11 Or LUBA 40, 52-52 (1984). See also Lima v. Jackson County, 56 Or App 619, 625, 643 P2d 355 (1982); Johnson v. Employment Division, 56 Or App 454, 457-8, 642 P2d 329 (1982).

Petitioner Nortman's challenge under ORS 197.835(8)(a)(C) directs our attention to one portion of the city's final order. Even if the challenged portion is disregarded, however, the remaining findings are adequate to support the city's determination that the proposed shelter satisfies section 33.106.010 of the code. The findings not challenged on substantial evidence grounds state that (1) the area is densely populated and has limited recreational facilities, (2) the proposal will partially alleviate the deficiency, (3) similar play shelters in the school district have not had negative impact on the character and value of surrounding properties, (4) the shelter will enhance the usability of the playground and therefore make the neighborhood a more attractive place to live, (5) automatic shut-off of the lighting system will discourage late-night uses of the covered area and (6) enforcement of noise regulations will ensure that noise from the covered area does not exceed allowable limits.

Taken together, the unchallenged findings are adequate to support the conclusion that the proposed play shelter at Chapman school is "desirable to the public convenience and welfare and not detrimental or injurious to the public health, peace or safety, or to the character and value of the surrounding properties." Section 33.106.010, Portland Municipal Code. See Lee v. City of Portland, 57 Or App 798, 646 P2d 662 (1981). Under the code, the city could weigh the overall benefits and harms of the proposal in determining

whether the standards were satisfied. The final order reflects this weighing process.

Given the foregoing, we must deny the substantial evidence challenge.[2]

SECOND ASSIGNMENT OF ERROR

Petitioner Nortman next contends that certain of the city's findings are "...insufficient as a matter of law to support the conclusions of the Council because they are too general." Petition at 11. The findings in question read as follows:

> "This type of play structure is not detrimental to the character and value of surrounding properties because school and playground uses are normally accepted uses in residential neighborhoods." Record at 16.
>
> "...proximity to schools and playgrounds is conventionally thought to enhance the value and marketability of residential property." Record at 16.
>
> "Other similar play shelters throughout the school district, have not negatively impacted the character and value of surrounding property." Record at 16.

Petitioner Nortman claims that these findings are "...too vague and not probative enough to justify that portion of the Council's decision that the proposed play structure, at its proposed location, will not be detrimental or injurious." Petition at 12. However, the three findings challenged in this assignment of error must be considered in the context of the entire decision. When the findings (summarized previously) are considered in toto, they are adequate to support the decision.[3] Lee v. City of Portland, supra.

This assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner Nortman contends next that the city failed to evaluate the proposal in terms of certain policies in the comprehensive plan. However, the final order does address two of the policies petitioner says were disregarded. The pertinent findings state:

> "Goal 3 -- NEIGHBORHOODS: A covered playcourt for basketball will provide an amenity for students and community members. It will also enhance the quality of life in the area and will continue to be supportive of the neighborhoods goal.
>
> "GOAL 8 -- ENVIRONMENT: The request will not significantly impact the air or water resources, no designated open space is affected, and the proposed use will not increase noise levels in the area; therefore, the request is not in conflict with this goal and associated policies.
>
> "the school district will restrict the hours of use so that there is no late-night use of the play area. Existing city noise regulations will also, if necessary, provide a mechanism for enforcing noise control on the property.
>
> "this site is not within an area of hazard as reflected on the city's land hazard and landslide maps." Record at 18.

Petitioner does not explain why these findings are insufficient. No further discussion is therefore warranted.

The remaining plan policy cited by petitioner Nortman is "to preserve and retain historical structures and areas throughout the City." Goal 3.4, Portland Comprehensive Plan. The final order does not address this policy. However, we agree with respondents that the omission is not error.

The city's brief provides the text of the historic preservation policy. The text indicates that the policy is to

be carried out by creation of a Landmarks Commission and designation of historic landmarks, historic districts and historic conservation districts. Although Chapman School and nearby residences have been ranked in the city's historic resource inventory, the structures have not been designated as landmarks. Petitioner does not contend that they are within the coverage of the protective ordinances described in the Historic Preservation Policy. We conclude that the city was not obligated to address the policy in this case.

This assignment of error is denied.

The city's decision is affirmed.

FOOTNOTES

1

The petition filed by Peter T. Nortman also raises this issue.

2

The thrust of Petitioner Nortman's first assignment of error is that the city erred when it stated that the shelter "will not encourage any more noise than is normally associated with the existing playground use." We interpret the finding to mean that the shelter will not significantly increase the noise level at the playground. Another portion of the final order expressly makes this point. Record at 20. There is substantial evidence in the record to support this finding. A representative of the applicant stated:

> "The District has seventeen (17) covered play sheds on sites scattered throughout the City. There are no indications that there is any difference in reports of noise, vandalism or attracting undesirables from those sites having no covered play sheds. In fact, schools with adjacent parks generally benefit highly from the increased availability of the usable area." Record at 26.

Although opponents of the proposal offered contrary evidence on the noise question, the city could choose to give greater weight to the applicant's evidence. Menges v. Board of County Commissisons of Jackson County, 290 Or 251, 263-66, 621 P2d 562 (1980); Homebuilders Assoc. of Portland v. Metropolitan Service District, 54 Or App 60, 63, 633 P2d, 1320 (1981).

3

We have difficulty understanding the legal under-pinning of the vagueness challenge presented in this assignment of error. Petitioner Nortman does not cite legal authority in support of the challenge. Lee v. City of Portland, 57 Or App 798, 646 P2d 662 (1981), points out that ORS 277.173(2) requires only a "brief statement" explaining the critera, facts, and justification for the decision. The statutory test is met in this case. If petitioner intends to challenge the sufficiency of the findings on some other basis, his failure to specifiy that basis prevents us from going further. Apalategui v. Washington County, ___ Or LUBA ___ (No. 85-043, February 7, 1986).