BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RICHARD L. HARCOURT, Petitioner, vs. MARION COUNTY, Respondent, and LYNN MERRILL and ALLEN MERRILL, Intervenors-Respondent.	LUBA No. 97-028 FINAL OPINION AND ORDER

Appeal from Marion County.

Richard C. Stein, Salem, filed the petition for review and argued on behalf of petitioner. With him on the brief was Ramsay & Stein.

Jane Ellen Stonecipher, Assistant County Counsel, filed a response brief and argued on behalf of respondent. With her on the brief was Michael J. Hansen, County Counsel.

Wallace W. Lien, Salem, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief was Wallace W. Lien, P.C.

GUSTAFSON, Referee; LIVINGSTON, Referee, participated in the decision.

REMANDED 07/31/97

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

Opinion by Gustafson.

NATURE OF THE DECISION

Petitioner appeals the county's approval of a rural-residential subdivision.

MOTION TO INTERVENE

Lynn Merrill and Allen Merrill, the applicants below (intervenors), move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

Intervenors applied to the county for approval of a 23-lot residential subdivision on a 41.79-acre tract designated and planned for rural-residential development. The property is located in the "South Salem Hills Limited Groundwater Area" and in an "Identified Geologic Hazard Area." During the course of the proceedings, and in response both to objections from neighboring property owners and recommendations from intervenors' experts, the proposal was revised to decrease the number of lots proposed to 17.

Following public hearings, the planning commission approved the request with several conditions. The board of county commissioners affirmed the planning commission's decision without further hearings. This appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Petitioner contends the county's findings of compliance with applicable criteria regarding the availability of water, the impact on the surrounding area and appropriate

parcel size are inadequate, and that the county impermissibly deferred decisions on compliance with these criteria.

It is not entirely clear for which criteria petitioner contends the county's decision lacks adequate findings. The petition for review lists numerous general and specific comprehensive plan and ordinance provisions regarding rural-residential subdivisions, some of which do not appear to contain mandatory approval criteria, and some of which do not appear to address availability of water. Nonetheless, it is clear from petitioner's recitations that, with regard to the availability of water, the Marion County Comprehensive Plan (MCCP) Rural Residential Policy No. 9 requires that "[w]hen approving rural subdivisions and partitionings each parcel shall be approved as a dwelling site only if it is determined that * * * there is no significant evidence of inability to obtain a suitable domestic water supply * * *." In addition, Marion County Zoning Ordinance MCZO 128.090 requires that:

> "When a density suffix has been applied to the AR zone the maximum density and minimum lot size shall conform to the density designation. In any case, parcels shall be large enough to provide a stable dwelling site free from flooding, with adequate water supply and waste water disposal facilities, that does not adversely affect adjacent property or the public."

The county's findings do not expressly address these or any other potentially applicable criteria regarding water

availability. Rather, they acknowledge the property's location in the South Salem Hills Limited Groundwater Area, acknowledge concerns expressed by the Oregon Department of Water Resources and opponents, comment on the expert studies submitted by the applicants, and make the following conclusions:

> "* * * Neither of the hydrogeologic reports submitted to the County has sufficient data for the Department [of Water Resources] to make a recommendation on whether or not wells in the marine sediments will be able to provide a long-term water supply for the subdivision. The developer has proposed several modifications such as reducing the number of lots from 23 to 17 and covenants that will prohibit large lawns. This will reduce the demand on the ground water resource, but it is still not clear if there is adequate groundwater available for this level of development in this area.
>
> "* * * * *
>
> "The Planning Commission in reviewing the comments of the State of Oregon Water Resources Department had concerns that the study submitted by the applicant did not sufficiently address all their concerns about the availability of groundwater. They decided that further coordination between the applicant and Water Resources was warranted.
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> "* * * The Planning Commission after holding two public hearings, conducting a site visit to the site and the neighborhood and reviewing the written testimony submitted by both sides, decided that the only remaining issue that was not sufficiently addressed was the issue of availability of water of serve the development. Even though the applicant has submitted a hydrogeologic assessment by a qualified geologist, the findings were not fully accepted by the Water Resources Department. With this issue not fully resolved, the Planning Commission decided to grant

> both conceptual and detail approval but to withhold final platting of the subdivision until the applicant could get a satisfactory review by the State of Oregon Water Resources Department." Record 17-19.

All parties to this appeal acknowledge that the county's findings on "water issues" are, at best, "cursory."[1] Nonetheless, respondent and intervenors urge us to overlook the defects in the findings and affirm the county's decision, based on ORS 197.835(11)(b), which

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[1]ORS 215.416(9) establishes the standard for adequate findings:

> "Approval or denial of a permit, expedited land division or limited land use decision shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

We have previously explained this statutory standard as follows:

> "The county's * * * findings must (1) identify the relevant approval standards, (2) set out the facts relied upon, and (3) explain how the facts lead to the conclusion that the request satisfies the approval standards. Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 20-21, 569 P2d 1073 (1977). See also Penland v. Josephine County, 29 Or LUBA 213 (1995); Reeves v. Yamhill County, 28 Or LUBA 123 (1994); Hart v. Jefferson County, 27 Or LUBA 612 (1994). In addition, when a party raises issues regarding compliance with any particular approval criteria, it is incumbent upon the local government to address those issues. Hillcrest Vineyard v. Bd. of Comm. Douglas Co., 45 Or App 283, 293, 608 P2d 201 (1980); Collier v. Marion County, 29 Or LUBA 462 (1995). When the evidence is conflicting, the local government may choose which evidence to accept, but must state the facts it relies on and explain why those facts lead to the conclusion that the applicable standard is satisfied. Moore v. Clackamas County, 29 Or LUBA 372 (1995)." Mission Bottom v. Marion County, __ Or LUBA __ (LUBA No. 96-057, September 26, 1996), slip op 10, aff'd 145 Or App 486 (1996) (quoting LeRoux v. Malheur County, 30 Or LUBA 268, 271 (1996)).

states:

> "Whenever findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government with direction indicating appropriate remedial action."

ORS 197.835(11)(b) allows us to overlook minor defects in local government findings when substantiating evidence makes the county's decision obvious or inevitable. Marcott Holdings, Inc. v. City of Tigard, 30 Or LUBA 101 (1995). As we explained in Canby Quality of Life Committee v. City of Canby, 30 Or LUBA 166, 177 (1995),

> "While ORS 197.835[(11)(b)] does not require us to piece together evidence which could support the city's unexplained conclusion, it does require us to consider substantiating evidence to support a finding where the city explains the basis upon which it reached its conclusion."

The real question in these assignments of error is not whether the county's findings are adequate to establish compliance with the applicable criteria; they are not. Rather, the question is whether the evidence is sufficiently compelling to allow or require us under ORS 197.835(11)(b) to affirm the county's conclusions despite the inadequacy of its findings.

Intervenors cite to numerous places in the record for evidence to support a conclusion that sufficient water is

available to serve the subdivision. If the county's findings were consistent with those references, it is possible that they could support a finding of compliance with appropriately identified criteria regarding the availability of water. The fundamental problem with intervenors' argument, however, is that the county did not make the findings of compliance that intervenors contend it has made. Notwithstanding intervenors' insistence and characterization of the county's findings, those findings do not establish the availability of water to serve the subdivision. Rather, they expressly find that compliance has not yet been established.

Intervenors' argument is essentially that because the county approved the subdivision, it must have intended to find compliance with all applicable criteria, and, therefore, under ORS 197.835(11)(b) we should overlook its actual findings or read into those findings language of compliance that is not stated. ORS 197.835(11)(b) does not authorize or permit us to disregard the local government's actual findings or to infer that the findings do not mean what they say, based upon citation in intervenors' brief to evidence in the record that could support different findings.

The county has not only failed to establish the availability of water to serve the proposed subdivision, its findings defer any determination on water availability

issues to a later decision to be made by Water Resources. Petitioner argues and--for at least two reasons--we agree that such deferral is impermissible.

First, it is well established that findings cannot defer a determination on discretionary approval criteria to a later stage without providing the same notice and opportunity to be heard as provided in the initial proceeding. See e.g., Foland v. Jackson County, 18 Or LUBA 731 (1990); Kellogg Lake Friends v. Clackamas County, 17 OR LUBA 277 (1989). The county's deferral of a determination on water availability does not provide for any public hearing or formal review of any kind.

Second, the county cannot in any event defer to a state agency the county's obligation to make findings of compliance with its own approval criteria. The county is required to affirmatively find that water is available to serve the proposed subdivision. Its delegation of the resolution of this issue to the Water Resources Department cannot substitute for its own determination of compliance.

Intervenors argue that deferring resolution of water availability issues is permissible and appropriate because the county has determined that it is "feasible" to satisfy those criteria. As intervenors explain, once feasibility of compliance has been established, imposition of conditions is an appropriate means to ensure compliance. See e.g., Thomas v. Wasco County, 30 Or LUBA 302, 311 (1996); Burghardt v.

City of Molalla, 29 OR LUBA 223, 236 (1995). Intervenors have correctly characterized the law; however, that law does not apply to the county's findings in this case. Notwithstanding intervenors' contrary argument, nowhere in the findings does the county make a determination that it is feasible to comply with water availability criteria. Conditions requiring the Water Resources Department to make the determination of water availability is not a determination of feasibility with conditions to ensure compliance.

The county has not found that there is adequate water available to serve the proposed subdivision. Until it can do so, approval of the proposed subdivision cannot be justified. A remand to require affirmative findings of compliance with all approval criteria is not, as intervenors would have us believe, a meaningless exercise.

The first and second assignments of error are sustained.

THIRD ASSIGNMENT OF ERROR

Petitioner contends the county's findings are inadequate to establish compliance with criteria regarding geologic hazards and site stability. Petitioner does not, however, cite to or identify any specific approval criteria regarding site stability. The only relevant criteria petitioner specifies are MCCP Rural Residential Policy No. 9, which requires, in relevant part, that "[w]hen approving

rural subdivisions * * * each parcel shall be approved as a dwelling site only if it is determined that the site * * * is free from natural hazards or the hazard can be adequately corrected * * *"; and MCCP Development Limitation Policy No. 2, regarding construction in an Identified Geologic Hazard Area, which requires a "specific site study by a qualified engineering geologist prior to development."

Neither the county nor intervenors challenge the applicability of these criteria; and while they argue the findings are adequate to satisfy these criteria, they also do not dispute that the findings are somewhat cursory. Intervenors, however, urge us to overlook the deficiencies in the findings by citing to evidence in the record regarding the site's purported geologic stability which, according to intervenors, is "sufficient to meet the mandatory approval criteria in this case." Intervenors' Brief 18.

We agree with petitioner that the findings of compliance with the criteria related to the site's location in a geologic hazard area are inadequate. They do not identify the relevant approval standards, set out the facts relied upon, or explain how the facts lead to the conclusion that the request satisfies the applicable standards. Instead, they merely recite some evidence in the record, then conclude that the standards have been met.

We also decline intervenors' request that we analyze

the evidence cited to us by intervenors to determine whether, in fact, the county's conclusions can be substantiated. As we stated in Marcott Holdings, ORS 197.835(11)(b)

> "authorize[s] this Board to remedy minor oversights and imperfections in local government land use decisions, as a way to eliminate delays resulting from purely technical objections to a written decision. [It does not] require LUBA to perform the responsibilities assigned to local governments, such as the weighing of evidence [and] the preparation of adequate findings. 30 Or LUBA at 122-23.

It is the county's obligation to determine compliance with the mandatory approval criteria, and explain the basis for its determination through its findings. Our authority under ORS 197.835(11)(b) is to correct minor oversights or omissions in those findings. An unexplained and unsupported determination of compliance is not a minor oversight for purposes of ORS 197.835(11)(b). As a review body, our role is to review the findings and conclusions made by the governing body, not to analyze the record and substantiate the county's conclusion for it.

The third assignment of error is sustained.

FOURTH AND FIFTH ASSIGNMENTS OF ERROR

Petitioner contends the county's findings are not based upon substantial evidence in the record. Because we have determined that the county's findings are inadequate, no purpose would be served by reviewing those findings for substantial evidence.

The county's decision is remanded.