BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOHN P. DINGES,
Petitioner,

vs.

CITY OF OREGON CITY,
Respondent,

and

PAUL REEDER,
Intervenor-Respondent.

LUBA No. 2005-021

FINAL OPINION
AND ORDER

Appeal from City of Oregon City.

Peggy Hennessy, Portland, filed the petition for review and argued on behalf of petitioner. With her on the brief was Reeves, Kahn and Hennessy.

Christopher P. Koback, Portland, and William K. Kabeiseman, Portland, filed a joint response brief. With them on the brief were Davis Wright Tremaine, LLP and Garvey, Schubert and Barer. Christopher P. Koback argued on behalf of intervenor-respondent.

BASSHAM, Board Member; HOLSTUN, Board Chair; DAVIES, Board Member, participated in the decision.

AFFIRMED 4/27/2005

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a city council decision approving a residential planned unit development.

MOTION TO INTERVENE

Paul Reeder (intervenor), the applicant below, moves to intervene on the side of the city. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is a narrow rectangular 16.02-acre tract consisting of two tax lots. Tax lot 1700 is zoned Single Family Dwelling (R-10), while tax lot 300 is zoned Single-Family/Manufactured Home Dwelling (R-6). The tract is generally flat, but slopes gently toward two drainage swales on the property that include a one-acre jurisdictional wetland and an unnamed stream that is a tributary of Beaver Creek. The tract is within a Water Resources Overlay district, and is identified on the city Geologic Hazards map as a Wet Soils/High Water Table area. The high water table on the property is caused by a slowly permeable layer of clay covering most of the property at an approximate depth of 33-36 inches.

Intervenor applied to the city for (1) a 67-unit planned unit development (PUD) and (2) a Water Quality Resources determination. The proposed PUD sets aside 26 percent of the site in two open space tracts that include the wetlands and drainage swales. Intervenor proposed collecting stormwater from impervious surfaces, detaining water on-site in a pond, and releasing it into the drainage swales at one-half the pre-development flow rate.

Petitioner appeared before the planning commission and expressed concerns that the proposed PUD would interfere with ground water recharge, which petitioner contended was necessary to supply his well. The planning commission denied the PUD and the associated water resource determination on several grounds. As relevant here, the planning commission found that intervenor failed to comply with Oregon City Municipal Code (OCMC) 17.64.010(C), which

states that the purpose of a PUD is to "protect and enhance public safety," based on the concerns petitioner raised regarding impacts on his well.[1]

Intervenor appealed the planning commission denial to the city commission, which held a public hearing on the record that was compiled by the planning commission. The city commission reversed each of the bases for denial, including the planning commission finding regarding OCMC 17.64.010(C), and approved the applications. This appeal followed.

FIRST ASSIGNMENT OF ERROR

OCMC 17.64.120(A) requires that the proposed PUD be "consistent with the purposes of this chapter set forth in Section 17.64.010 and any applicable goals or policies of the Oregon City comprehensive plan." According to petitioner, OCMC 17.64.120(A) thus requires compliance with the purpose statement at OCMC 17.64.010(C). As noted above, OCMC 17.64.010(C) states as one of the purposes of the PUD chapter the protection and enhancement of "public safety." Petitioner contends that the protection of public safety requires that the PUD applicant demonstrate that the PUD will not adversely impact nearby wells.

The city commission rejected that argument, finding that while OCMC 17.64.010(C) may require clustering of development to avoid natural hazards or development constraints on the site, the purpose statement does not require the PUD applicant to demonstrate that the PUD will not adversely impact off-site wells. In the alternative, the city commission reviewed the evidence and found that there is no connection between storm water discharge from the subject property and the aquifer that supports nearby wells, and thus the proposed PUD cannot adversely affect those wells.[2]

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[1] OCMC 17.64.010(C) states that one of the purposes of the PUD chapter is:

> "To protect and enhance public safety on sites with natural or other hazards and development constraints through the clustering of development on those portions of a site that are suitable for development."

[2] The city commission finding's state:

> "The Planning Commission determined that OCMC 17.64.010(C) required an evaluation of the potential impact of the proposed PUD on storm water runoff and neighboring wells. The [city]

Petitioner first challenges the city's interpretation of OCMC 17.64.010(C). According to petitioner, "protection of 'public safety' necessarily extends to avoiding adverse impacts on nearby wells." Petition for Review 9. The city commission's interpretation to the contrary, petitioner argues, is inconsistent with the clear purpose of OCMC 17.64.010(C), to protect public safety.

Even if the city's interpretation of OCMC 17.64.010(C) is upheld, petitioner contends, OCMC 17.64.160(A) also requires compliance with applicable comprehensive plan goals and policies. Petitioner cites to a comprehensive plan provision requiring that subdivision applicants submit a development impact statement addressing the "effect upon the groundwater supply."[3]

> commission interprets this purpose statement as reiterating one of the benefits of PUD developments: the ability to cluster development on portions of a proposed site that do not contain natural hazards or development constraints. The City Commission rejects the use of a purpose statement as a review criterion and as a means to undertake anything more than clustering on the subject site in response to public safety concerns.
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> "Even if this criterion could be read as broadly as the Planning Commission interpreted, the City Commission finds more persuasive and compelling the substantial evidence in the record demonstrating that the proposed PUD will not appreciatively create a negative impact on the wells on the neighboring properties nor will the proposed housing be adversely affected by being located on top of a high water table because there are adequate construction methods to alleviate the effects of the high ground water on a majority of the site. The City Commission finds more persuasive and compelling the testimony and expertise of [intervenor's] civil and geotechnical engineers and the testimony of the City's own staff experts regarding these issues. The commission finds that the experts' testimony is more credible than that of the neighbors because the neighbors' concerns are speculative and are not supported by technical/expert evidence.
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> "Furthermore, the City Commission finds more persuasive and credible the evidence of [intervenor's] engineers and City's staff experts in the record that the relatively impermeable clay layer naturally existing on this site already prevents nearby wells from being significantly recharged by storm water on this site percolating into the deep ground water aquifer serving the wells. The evidence of storm water sheeting across the site instead of percolating through the soil was persuasive. Therefore, the impervious surfaces resulting from this proposed development will not adversely affect nearby wells, because there is no connection between the storm water on this site and [the] source of water for these wells. The Commission finds that this criterion, if applicable, has been satisfied." Record 5-6.

[3] Petitioner cites to the following comprehensive plan language:

> "High water tables in the Oregon City area were inventoried by the State Department of Geology and Mineral Industries in 1979. A high water table is defined as an area in which groundwater rises within 1.5 feet of the ground surface. A high water table causes water to stand at or near the surface after heavy precipitation. Map VI illustrates the location of high ground water within Oregon City. Subdivisions and requests for major partitions in areas with high groundwater tables are required to file a Development Impact Statement (DIS) which, in part, asks the applicant to locate and take into consideration * * * the effect upon the

According to petitioner, the application failed to address the PUD's effect on the groundwater supply. Petitioner also cites to a comprehensive plan provision requiring that all development within the city comply with applicable state "rules, regulations and standards," and then cites to ORS 536.241(2), which declares that it is the policy of the state to ensure a sufficient water supply.[4]

Finally, petitioner cites to a requirement in the Natural Resources element of the comprehensive plan that the city shall "establish development review procedures" that will preserve the natural function of water resources areas and protect them, by among other things, preserving the "natural retention storage capacity of the land."

Respondents[5] argue that the city commission interpretation of OCMC 17.64.010(C)—that it requires only a clustering of development on the subject site, and does not require consideration of off-site impacts—is consistent with the express language and purpose of the code, and should be upheld under ORS 197.829(1) and *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003).

With respect to the comprehensive plan requirement for a development impact statement addressing impact on ground water, respondents argue that (1) petitioner waived the issue of compliance with that comprehensive plan provision by failing to raise it below; and (2) in any case, the city required intervenor to submit, as part of the water quality resource determination, a development impact statement that addresses impacts on the watershed, drainage patterns, downstream areas and the supply of groundwater.

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watershed in which the project is located; the effect upon the immediate area's storm water drainage pattern of flow; the impact of the proposed development upon downstream areas; and the effect upon the groundwater supply." Oregon City Comprehensive Plan (OCCP) F-35, Natural Hazards, Groundwater.

[4] Petitioner cites to the following comprehensive plan language:

"All development within the City of Oregon City shall comply with applicable state and federal air, water, solid waste, hazardous waste and noise environmental rules, regulations and standards." OCCP, Natural Hazards, Ordinance No. 90-1031.

[5] The city and intervenor filed a joint response brief. We refer to them collectively as "respondents."

With respect to ORS 536.241(2) and the plan provision requiring that development comply with applicable statutes, respondents argue that the policy stated in ORS 536.241(2) is not an environmental rule, regulation or standard, and that no party identified below any applicable state rule, regulation or standard governing groundwater supply.

Finally, with respect to the plan policy requiring the city to develop review procedures to preserve the natural retention storage capacity of the land, respondents contend that the city has done so by applying a water resource overlay zone and requiring development applicants to obtain a Water Resources Determination.

We agree with respondents that the city commission's interpretation of OCMC 17.64.010(C) must be affirmed under ORS 197.829(1) and *Church*. OCMC 17.64.010(C) plainly states that it protects and enhances public safety on sites with natural hazards "through the clustering of development on those portions of a site that are suitable for development." Nothing in OCMC 17.64.010(C) suggests that the reference to "public safety" must extend to off-site impacts of development. Even if it did, OCMC 17.64.010(C) mentions only "clustering of development" as the means to protect and enhance public safety. The proposed PUD clusters development in a manner that leaves approximately 26 percent of the site in its natural condition. Petitioner does not suggest that any further clustering is possible, or explain how further or different clustering could have any effect on groundwater supplies. The city commission's interpretation that OCMC 17.64.010(C) requires no more than clustering development on the subject site in response to on-site public safety concerns is consistent with the express language and purpose of the code provision.

We need not resolve respondents' waiver challenge against the issue of conformance with the comprehensive plan language requiring a development impact statement addressing effects on groundwater supply, because we agree with respondents that intervenor submitted a development impact statement that addresses the effects on the groundwater supply. Intervenor's water quality resources determination application included a detailed water resources report, with supplemental

reports, at Record 477 to 531. The report addresses storm drainage and groundwater in several places, and the supplemental reports respond to concerns raised by neighbors regarding effects on groundwater. The gist of the reports is that the high water table on the property is caused by a low permeable clay layer that shunts most of the rainfall on the property horizontally into the wetlands or drainage basins, where the storm water will be detained and released from the property at half the pre-development rates.[6] Although the reports do not attempt to quantify the impact on the aquifer that presumably lies below the clay layer, much less the impact on petitioner's well, which may or may not draw from the same aquifer, it is reasonably clear that intervenor's experts concluded that post-development hydrology on the property will differ little from pre-development hydrology. Putting aside for the moment the question of whether that conclusion is supported by substantial evidence, it is not accurate to argue, as petitioner does, that intervenor failed to submit a "development impact statement" that addresses, among other things, the effect of development on the groundwater supply.

Turning to ORS 536.241(2), we agree with respondents that that statute merely states a general policy, and does not constitute a "rule, regulation or standard" for purposes of the comprehensive plan language requiring compliance with state and federal standards. Finally, turning to the comprehensive plan language requiring the city to develop review standards to protect,

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[6] Intervenor's water resources report states, in relevant part:

> "The high water table/wet soil is caused by a slowly permeable layer at a depth of approximately 33-36 inches with a permeability rate of 0.06-0.2 inches per hour in the Bornstedt silt loam covering most of the site. The water table in this soil is from 2.0-3.0 feet below ground during the winter and early spring. The wetland areas are composed of Delena silt loam with an extremely low permeability layer at a depth of approximately 2.0 feet. Permeability below the upper 2 feet is <0.06 inches per hour. The water table in the winter and early spring is from ground level to 18 inches below ground.
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> "Groundwater travel in these soils is primarily horizontal, with a horizontal conductivity much greater than 3 times the vertical conductivity, which is the average horizontal conductivity factor for soils without a low conductivity layer in the sub soil. Due to the physical structure of the soil profile, water that infiltrates to the hardpan in lawns, the common areas and buffer areas adjacent to, and up gradient from, the wetland will discharge into the wetland via the same groundwater pathway as currently exists. * * *." Record 493.

among other things, the natural retention storage capacity of the land, we agree with respondents that the city has complied with that directive by adopting an overlay zone and other regulations requiring development applicants to obtain a water quality resource determination. That plan language does not operate as an independent approval criterion.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner challenges the city's alternative finding that there is no connection between the storm water on the site and the source of petitioner's well, as inadequate and not supported by substantial evidence. Petitioner cites to his testimony below, in which he calculated that over five million gallons of rainwater fall on the subject property each year, and speculated that at least some of that rainwater must permeate the clay layer and reach the aquifer that presumably supports his well.[7] According to petitioner, there is no substantial evidence to the contrary that was submitted to the planning commission. Petitioner argues that the only direct evidence from intervenor's experts on whether the PUD would adversely impact petitioner's well was submitted at the city commission hearing, after the close of the evidentiary record before the planning commission.

We sustained, above, the city commission's interpretation of OCMC 17.64.010(C), to the effect that that purpose statement is not concerned with off-site impacts on neighboring wells. As far as OCMC 17.64.010(C) is concerned, that conclusion makes it unnecessary to review petitioner's challenge to the city commission's alternative finding that the existing relatively impermeable clay layer prevents nearby wells from being significantly recharged by storm water from the site. However, the city's alternative finding is potentially relevant to other criteria cited by petitioner, for example the comprehensive plan language requiring a development impact statement addressing impacts to groundwater supply. Accordingly, it is appropriate to resolve petitioner's findings and evidentiary challenge under this assignment of error.

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[7] Intervenor argues that petitioner's self-calculated five-million gallon figure is a gross miscalculation, based on several erroneous assumptions. We find it unnecessary to resolve this dispute.

As discussed above, intervenor submitted a water resources report and supplemental reports to the planning commission that, fairly read, conclude that the relatively impermeable clay layer prevents much if any rainwater from permeating the layer and that, under the proposed stormwater retention system, post-development hydrology will differ little from the pre-development hydrology.[8] While that evidence does not compel the conclusion the city reached—that the proposed PUD will have no significant impact on aquifer recharge rates or petitioner's well—it is evidence a reasonable person could rely upon to reach that conclusion. The contrary evidence that petitioner cites to, his testimony speculating that some portion of the rainfall on the site reaches the aquifer and is necessary to support his well, is not particularly compelling. Even assuming it is evidence a reasonable person could rely upon, where there is substantial but conflicting evidence supporting contrary conclusions, the choice of which evidence to believe is up to the city. *Younger v. City of Portland*, 305 Or 346, 369, 752 P2d 262 (1988).

The second assignment of error is denied.

The city's decision is affirmed.

[8] It is not clear to what extent, if any, the city commission's alternative finding relied upon the testimony of intervenor's experts before the city commission, rather than the evidence submitted before the planning commission. Intervenor argues that there was no additional evidence submitted to the city commission, although his experts clarified certain matters in response to questions from the city commissioners. Even if that clarification inadvertently included additional evidence, intervenor argues, petitioner did not object or request the opportunity to respond. We find it unnecessary to resolve these matters, because we conclude that the evidence submitted before the planning commission is substantial evidence supporting the city commission's alternative finding.