BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PETER STOLOFF,
Petitioner,

vs.

CITY OF PORTLAND,
Respondent,

and

ROGER W. HALLIN, LOLA A. HALLIN
and DUNTHORPE RIVERDALE
SERVICE DISTRICT,
Intervenors-Respondent.

LUBA No. 2005-136

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Christopher P. Koback, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief were Peter F. Stoloff, Peter F. Stoloff, PC, and Davis Wright Tremaine, LLP.

Linly F. Rees, Deputy City Attorney, Portland, filed a response brief and argued on behalf of respondent.

Matthew O. Ryan, Portland, filed the response brief and argued on behalf of intevenors-respondent, Dunthorpe-Riverdale Service District. With him on the brief was Agnes Sowle.

John C. Pinkstaff, Portland, filed a response brief and argued on behalf of intervenors-respondent, Hallin et al. With him on the brief were Timothy V. Ramis, and Ramis Crew Corrigan, LLP.

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

AFFIRMED 04/05/2006

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 decision granting subdivision approval.

FACTS

Intervenors Hallin (intervenors) own 6.78 acres of property in unincorporated Multnomah County but within the City of Portland's urban services boundary in what is known as an "urban pocket." Pursuant to an intergovernmental agreement, the county delegated authority over such urban pockets to the city for certain actions, including subdivision approval.[1] Intervenors originally submitted an application for an 8-lot subdivision. Intervenors subsequently submitted a revised 11-lot subdivision application. On the date the parties believed a final decision was due, the hearings officer issued an interim order restarting the 120-day deadline he believed to be applicable under ORS 227.178. The hearings officer subsequently issued an order approving the subdivision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

ORS 227.178(1) provides that a city must make a final decision regarding certain decisions (including subdivision approval) within 120 days of the application being deemed complete. ORS 227.178(5) provides that the 120-day deadline may be extended at the request of the applicant, but that the total of all extensions cannot exceed 245 days.[2] Under the statute, the final decision must be made, at the latest, 365 days after the application is deemed complete.

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[1] For a more detailed discussion of the jurisdictional issues raised by this intergovernmental agreement, *see Stoloff v. City of Portland*, ___ Or LUBA ___ (LUBA No. 2005-136, Order, January 11, 2006).

[2] ORS 227.178(5) provides:

> "The 120-day period set in subsection (1) of this section may be extended for a specified period of time at the written request of the applicant. The total of all extensions may not exceed 245 days."

In the present case, a 245-day extension was granted, but on the 365th day after the application was deemed complete, as previously noted, the hearings officer issued an interim order restarting the 120-day deadline rather than issuing a final decision. The hearings officer issued the final decision 43 days later. Petitioner argues that the violation of ORS 227.178(5) voids the final subdivision approval.[3]

Respondents dispute that violation of ORS 227.178(5) renders a resulting final decision void. We need not address that argument, because even if petitioner is correct that ORS 227.178(5) renders any final decisions issued after 365 days void, that statute does not apply to the challenged decision. Although the city is the final decision maker in this appeal, under the terms of the intergovernmental agreement the city stands in the shoes of the county and applies the county's substantive law. ORS 227.178 only applies to cities; it does not apply to counties. The corresponding statute applicable to counties does not have a provision corresponding to ORS 227.178(5).[4] Nothing cited to us in the intergovernmental agreement specifies that city decisions issued on behalf of the county under the agreement are subject to statutes like ORS 227.178(5) that apply only to cities. Therefore, because ORS 227.178 is not applicable to the challenged decision and there is no corresponding provision applicable to counties, petitioner's assignment of error provides no basis for reversal or remand.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the city committed procedural error that prejudiced his substantial rights by allowing intervenors to submit a revised application that included

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[3] Respondents argue that this issue was waived, but we agree with petitioner that it was raised below. Record 2369.

[4] ORS 215.427(4) merely provides that the time period for issuing final decisions "may be extended for a reasonable period of time at the request of the applicant." The 245-day limit for cities was added to the statutes applicable to cities at the request of the City of Portland in 2003, but no such provision was added for counties.

"significant changes." According to petitioner, the city should have required intervenors to submit a new application.

While we are inclined to agree with respondents that petitioner's substantial rights were not prejudiced because petitioner had an adequate opportunity to challenge the revised application, we need not reach that issue because in order to prevail on a claim of procedural error a petitioner must identify the procedure allegedly violated. In the present case, petitioner does not identify what procedure was violated by allowing the revised application. While some jurisdictions may have ordinance provisions that prohibit significant revisions to an application under certain circumstances, petitioner has not identified any such local provisions that would limit revised applications. We will not search the city's code to locate such provisions, to determine whether any exist. Petitioner has not established that any procedure was violated.

The second assignment of error is denied.

THIRD, FOURTH, FIFTH, AND SIXTH ASSIGNMENTS OF ERROR

One of the approval criteria for subdivision approval is that adequate sanitary sewer services must be available. The third through sixth assignments of error challenge the hearings officer's conclusion that such services are available. Portland Zoning Code (PZC) 33.652.020 provides:

> "Sanitary Sewer Disposal Service Standards. Sanitary sewer disposal service must meet the standards of this section. Adjustments are prohibited.
>
> "A. Availability of sanitary sewer.
>
> "1. The Bureau of Environmental Services has verified that sewer facilities are available to serve the proposed development[.]"

In the present case, the city does not provide sanitary sewer services to the property. Sanitary sewer services are provided by intervenor Dunthorpe Riverdale Service District (district). Because the district is the sanitary sewer service provider, the city's Bureau of Environmental Services (BES) deferred to the district the determination of whether service is

available to the property. The district completed the certification of public sewer service form verifying that service is available. Record 1261-62. That availability of service is premised on accessing a sewer line located on petitioner's property, which borders the proposed subdivision to the southeast. The district contends that it has an easement across petitioner's property that can be utilized to connect the subdivision, while petitioner argues that the district does not have an easement across his property.

After reviewing all of the conflicting evidence regarding whether the district has an easement over petitioner's property, the hearings officer sided with the district. The hearings officer took into account the district's agreement to use condemnation to acquire the easement if necessary.

> "The * * * district has jurisdiction over sanitary sewer service in this area and responded that service can be provided by the main on [petitioner's property]. In addition, BES has concluded that there is adequate sanitary service based on service providers, [district] and Multnomah County, agreeing to use condemnation to acquire an easement on [petitioner's property] to use the sewer connection, if needed, for the subject site." Record 22.

In addition, the hearings officer imposed a condition of approval that intervenor obtain sanitary sewer access before final plat approval. Record 52.[5]

The parties argue at great length whether the existing easements and applicable property law establish that the district has an easement over petitioner's property; however, that is not the issue before us. The issue is whether PZC 33.652.020A.1 is satisfied. It is well established that, where there is conflicting evidence over whether an approval criterion is satisfied or can be satisfied, a local government may either (1) find that the approval

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[5] Condition of approval 8 states:

> "The applicant shall meet the requirements of [BES and the district] for extending the sewer main and building the pump station. The public sewer extension and pump station requires a Public Works Permit, which must be initiated before final plat approval. In addition, the applicant must provide engineered designs, performance guarantees, and all applicable fees for the sanitary sewer extension and pump station to BES before final plat approval." Record 52.

criterion is satisfied, or (2) find that it is feasible to satisfy the approval criterion and impose conditions necessary to ensure that the criterion will be satisfied. *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447 (1992). In this case, the hearings officer apparently did both – he found that the district had an easement over petitioner's property and also imposed a condition that the district obtain an easement to provide sanitary service to the subdivision. Thus, even if petitioner is correct that the existing easements do not grant the district the ability to connect the proposed subdivision to the existing line on petitioner's property, the finding that the district will condemn the easement if necessary is sufficient to demonstrate that it is feasible to satisfy PZC 33.652.020A.1. If intervenors ultimately cannot satisfy the condition of approval then they will not be able to develop the subdivision.

It is true that, in *Butte Conservancy v. City of Gresham*, ___ Or LUBA ___ (LUBA No. 2005-150, January 26, 2006), we held that a condition of approval to construct necessary access through an adjoining subdivision lot in itself did not establish that such access was feasible when the legal right to construct such access was disputed. However, unlike *Butte Conservancy*, the hearings officer in the present case adopted findings and conditions of approval sufficient to demonstrate that sanitary sewer service is feasible. Although petitioner argues that he will challenge any condemnation proceeding, *Rhyne* does not require absolute certainty, only a finding that compliance with applicable criteria is feasible, and imposition of conditions necessary to ensure compliance. The decision properly finds that PZC 33.652.020A.1 is satisfied or can feasibly be satisfied through the imposition of conditions.

The third through sixth assignments of error are denied.

SEVENTH AND EIGHTH ASSIGNMENTS OF ERROR

Petitioner argues that the hearings officer's conclusion that PZC 33.430.250A.3.b is satisfied is not supported by substantial evidence.[6] PZC 33.430.250A.3.b provides:

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[6] As a review body, we are authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C). Substantial evidence is evidence a

> "There will be no significant detrimental impact on water bodies for the migration, rearing, feeding, or spawning of fish."

Petitioner bases his argument on the allegation that the hearings officer did not address a letter from the director of the Friends of Tryon Creek State Park asserting that the proposed development "presents a very real risk to the park due to the increased impervious surface and associated storm water runoff." Record 2312.[7]

Although the hearings officer does not specifically mention the letter regarding Tryon Creek State Park, the decision does contain detailed findings and conditions of approval addressing impacts of storm water runoff. Record 23-24, 38-39, 45. Petitioner does not address the hearings officer's findings other than to note that the decision requires a culvert to be increased from 12 inches to 18 inches. Petitioner does not explain why the findings and conditions relied upon by the hearings officer fail to establish compliance with the approval criterion. Petitioner does not explain why a reasonable person could not find that the approval criterion is satisfied. A decision maker must address issues raised by opponents regarding approval criteria, but the decision maker is not required to identify and respond to every piece of opposing evidence. There is no question that the hearings officer addressed this approval criterion and the issue of stormwater impacts on Tryon Creek. The mere absence of a reference to the letter does not render the decision devoid of substantial evidence.

The seventh and eighth assignments of error are denied.

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reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Bay v. State Board of Education*, 233 Or 601, 605, 378 P2d 558 (1963); *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, however, we may not substitute our judgment for that of the local decision maker. Rather, we must consider and weigh all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decision maker's conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

[7] Tryon Creek is a fish-bearing stream located to the west across Terwilliger Boulevard from the proposed development.

NINTH ASSIGNMENT OF ERROR

Petitioner argues that the hearings officer's conclusion that PZC 33.665.310A is satisfied is not supported by substantial evidence. PZC 33.665.310A requires that the proposal "[v]isually integrate the development into the surrounding area[.]"

According to petitioner the proposed lots are too small to visually integrate into the surrounding area. The surrounding lots to the east range in size from 30,000 to 40,000 square feet. Three of the proposed lots are 5,000 square feet, three additional lots are 9,000 square feet, and the largest lot is approximately 20,000 square feet.

The hearings officer made detailed findings explaining why the approval criterion is satisfied. Record 31-34. Petitioner does not acknowledge, let alone challenge, those findings. In order to prevail on a substantial evidence challenge, a petitioner must identify the challenged findings and explain why a reasonable person could not reach the same conclusion based on all the evidence in the record. Petitioner has done neither. A reasonable person could reach the conclusion of the hearings officer that PZC 33.665.310A is satisfied.

The ninth assignment of error is denied.

The city's decision is affirmed.