BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WALUGA NEIGHBORHOOD ASSOCIATION,
Petitioner,

vs.

CITY OF LAKE OSWEGO,
Respondent,

and

NORTHWEST HOUSING ALTERNATIVES, INC.,
Intervenor-Respondent.

LUBA No. 2008-035

FINAL OPINION
AND ORDER

Appeal from the City of Lake Oswego.

Kevin W. Luby, Elizabeth Lemoine, Tigard, filed the petition for review and argued on behalf of petitioner. With them on the brief was the Luby Law Firm.

Evan P. Boone, Deputy City Attorney, Lake Oswego, filed a response brief and argued on behalf of respondent. With him on the brief was David D. Powell, City Attorney.

Edward J. Sullivan, Carrie Richter, Portland, filed a response brief and Carrie Richter argued on behalf of intervenor-respondent. With them on the brief was Garvey Schubert Barer.

BASSHAM, Board Chair; RYAN, Board Member, participated in the decision.

HOLSTUN, Board Member, did not participate in the decision.

REMANDED 10/01/2008

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 the city's approval of a conditional use permit and development review to build a 45-unit housing development.

FACTS

The subject property is an approximately 30,000-square foot lot in the City of Lake Oswego that is planned and zoned General Commercial (GC). Intervenor applied for a conditional use permit to construct a 45-unit housing unit for "congregate housing," which is identified in the city's code as a type of housing for persons with life-function disabilities. The proposed conditional use would serve individual or two-person households in which at least one member is 62 years old or older. The city development review commission (DRC) approved the application over petitioner's objections, petitioner appealed to the city council, and the city council upheld the DRC's decision. This appeal followed.

MOTION TO TAKE EVIDENCE OUTSIDE OF THE RECORD

Petitioner moves the Board to take evidence outside of the record consisting of documents from a different city planning file and from intervenor's Housing and Urban Development (HUD) application. Petitioner also seeks to depose a representative of another senior housing development regarding the accuracy of intervenor's parking study that evaluated parking at a similar senior housing development.

OAR 661-010-0045(1) provides, in relevant part:

> "Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. * * *"

Petitioner argues that the Board may consider evidence outside of the record because of procedural irregularities during the proceedings below. The purported procedural

irregularity is that the city failed "to validate the factual basis of the study prior to accepting the study as reliable" and failed "to independently verify the information provided in" the study. Motion to Take Evidence Not in the Record 3-4.

Even if petitioner is correct that the parking study relied upon by the city contains factual inaccuracies or that the city should have independently verified the information in the study, neither is a "procedural irregularity" that would warrant taking evidence not in the record. Petitioner essentially challenges the accuracy and conclusion reached by the parking study. While such arguments could be raised in an assignment of error challenging findings relying upon the parking study, merely accepting into evidence a study that may not be accurate is not a procedural irregularity. Furthermore, taking evidence outside of the record is not a proper vehicle for belatedly introducing evidence into the record that could have been submitted below. *Meredith v. Lincoln County*, 44 Or LUBA 821, 826 (2003).

Petitioner's motion to take evidence outside of the record is denied.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the city misconstrued the applicable law by finding that the proposed development qualifies as "congregate housing." Lake Oswego Code (LOC) 50.11.010(1)(A) allows "congregate housing" as a conditional use in the GC zone. LOC 50.02.005 defines "congregate housing" as:

> "Multi-unit housing with self-contained apartments that contain cooking facilities which support independent lifestyles for those that have *life-function disabilities due to age, medical, or mental condition*, which do not require residential care or skilled nursing services. Congregate housing provides varying levels of support services, such as meals, laundry, housekeeping, transportation, and social, recreation, cultural and education activities. The full range of services normally associated with a residential care facility, are not provided in association with congregate housing." (Emphasis added.)

The city's findings state:

> "In interpreting the definition of 'congregate housing,' the Council finds that the definition assumes a correlation between persons 'of age' and life-function disabilities and that age itself (of a certain age) is a life-function disability as

> that term is used in the definition. By listing 'age' as a qualifying criterion separate from 'medical or mental condition,' the * * * code definition of Congregate Housing was intended to include age-limited housing, without requiring an additional showing that each resident of such an age-limited facility has a specific disability. Congregate housing is available, by definition, for persons of a certain age to have an 'independent lifestyle' that does not require 'residential care or skilled nursing services.'" Record 31.

The LOC definition of "congregate housing" requires that the development serve "those that have life-function disabilities due to age, medical, or mental condition." Thus in order to qualify for congregate housing, the occupants must have a life-function disability. The LOC definition states that a qualifying life-function disability may be "due to age." The city interpreted the LOC so that age in itself is a life-function disability and allows occupancy in the proposed development if at least one member of the household is at least 62 years old. Petitioner argues that the mere fact that a person is at least 62 years old does not mean that the person has a "life-function disability" within the meaning of the LOC 50.02.005 definition, and therefore the city misconstrued the applicable law.

Under *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003) and ORS 197.829(1), we must affirm a governing body's interpretation of a local ordinance unless the interpretation is inconsistent with the express language, purpose, or policy of the ordinance.[1] Turning to the express language of the LOC, no party disputes that a "life-function disability" entails some form of diminished capacity to perform daily activities. Under the LOC, there are three potential causes of that disability, one of which is age. The express

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[1] ORS 197.829(1) provides, in relevant part:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

language of the LOC requires a causative element. In other words, age (in this case) must cause the life-function disability because the LOC requires that the disability be "due" to age. The city's interpretation, however, reads that causative element out the definition entirely. Under the city's interpretation there is no requirement or need for any actual diminished capacity to perform daily activities or any evidence of a "life-function disability." The city merely assumes that upon reaching age 62 there is a diminished capacity for performing such daily activities. We agree with petitioner that eliminating the need for any demonstration of an actual life-function disability or causative relationship between age and the purported disability is contrary to the express language of the LOC, which requires a causative element.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the proposed development does not meet the approval criteria for a conditional use. LOC 50.69.010 sets forth the conditional use approval criteria:

> "1. An application for a conditional use shall be allowed if:
>
> "a. The requirements of the zone are met; and
>
> "b. Special conditions found in LOC 50.69.050 to 50.69.085, if applicable, are met; and
>
> "c. The site is physically capable of accommodating the proposed use; and
>
> "d. The functional characteristics of the proposed use are such that it can be made to be reasonably compatible with uses in its vicinity."

According to petitioner, the city failed to make adequate findings supported by substantial evidence to demonstrate compliance with all of the above conditional use approval criteria.

A. Physically Capable of Accommodating the Use

Petitioner first contends that the city did not make adequate findings regarding LOC 50.69.010(1)(c), that the site is "physically capable of accommodating the proposed use," and that any findings the city did make are not supported by substantial evidence. According

to petitioner, having adequate parking is a requirement of the development being physically capable of accommodating the proposed use and the city's findings regarding adequate parking are inadequate. The city found that 20 on-site parking spaces are adequate to accommodate the proposed use. In addition, as discussed below, the DRC and the city council required intervenor to provide off-site overflow parking, if needed.

The city's findings explain that because the residents will be senior citizens, there will be less need for parking spaces than typical single family housing. The findings also explain that the anticipated residents of the development will have a lower income than other senior housing developments. Based on those assumptions, the city compared the proposed development to another nearby senior housing development for which intervenor had a parking study prepared. The parking study determined how many parking spaces were needed to accommodate the other senior housing project and extrapolated that number to the proposed development to calculate the necessary number of parking spaces. The findings further explain that even though 20 spaces are adequate to physically accommodate the development, because the development is in a residential area, the city also required intervenor to provide off-site overflow parking. Record 47-48. Those findings are adequate to explain why the city believes 20 on-site parking spaces and off-site overflow parking is adequate to physically accommodate the proposed use.

Petitioner also argues that the finding that the site is physically capable of accommodating the use is not supported by substantial evidence.[2] The findings show that the

[2] 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 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 188, *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 the 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 (1998); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

city relied primarily upon the parking study from the other senior housing development that shares similar geographic proximity and similar income levels to the proposed development. The findings also state that the parking conflicts for the proposed development will be less than those for the other senior housing development because of better access, closer proximity to commercial services, and additional alternative transportation options. Petitioner argues that the parking study from the other development was neither scientific nor professional and that neighbors to the other development testified that there was not adequate parking at that development. While the city certainly could have relied on such opposition testimony to find that the parking study is unpersuasive and the proposed 20 on-site parking spaces are not adequate, the choice between conflicting evidence belongs to the local decision maker. We cannot say that no reasonable person could rely on the parking study to determine the amount of parking spaces needed to physically accommodate the proposed use.

This subassignment of error is denied.

B. Reasonably Compatible with Uses in the Vicinity

Petitioner argues that the city did not make adequate findings regarding the LOC 50.69.010(1)(d) requirement that the "functional characteristics of the proposed use are such that it can be made to be reasonably compatible with the uses in the vicinity." According to petitioner, the city simply found that the uses in the vicinity are "diverse" and therefore the proposed building is reasonably compatible with the uses in the vicinity. Petitioner argues that "diverse" is not the same as "compatible."

The city's findings state:

> "Although no other structures in the vicinity have a similar Floor Area Ratio (FAR), or a height similar to the proposed structure, that does not render the proposed building to be incompatible with the surrounding area. 'Reasonable compatibility' does not mean 'the same as' the surrounding area but rather that the proposed structure generally fits in with the neighborhood." Record 43.

The findings list a number of additional reasons why the proposed building is reasonably compatible, including that the height and FAR are mitigated by building design, the materials to be used are similar to those in the vicinity, lot coverage is less than the permissible maximum, and the building is located in a transition area between commercial and high density residential and lower density residential neighborhoods. Record 43-44.

It is clear from the findings that the city did more than simply find that the uses in the surrounding neighborhood are diverse. The city explained why even though the proposed building is larger and taller than buildings in the vicinity, it would nonetheless be reasonably compatible with the surrounding vicinity. The "reasonable compatibility" standard is a subjective standard, and the city has significant discretion in determining whether a proposed building meets such a subjective standard. Given the numerous unchallenged reasons the city lists for its conclusion that the proposed building is reasonably compatible with the surrounding vicinity, we cannot say that a reasonable person could not reach that conclusion.

This subassignment of error is denied.

C. Overflow Parking

As discussed earlier, in addition to finding that the proposed development satisfies the on-site parking requirements, the city also imposed a condition of approval requiring intervenor to provide overflow parking off site.[3] Petitioner argues that the condition of approval violates LOC 50.55.010(1)(d), which prohibits off-site parking more than 500 feet from the subject property. Petitioner also argues that it was not given an opportunity to comment on the condition of approval, and that the city made no findings that the condition is feasible.

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[3] As modified by the city council, the condition states:

> "*If resident parking needs exceed the available on-site parking*, transportation shuttles shall be provided to and from the site to the assigned off-site parking area *as needed*, on a daily basis, for use by residents and employees parking at off-site parking location(s)." Record 51 (italics represent city council additions to the condition imposed by the DRC).

LOC 50.55.010(1)(d) prohibits off-site parking more than 500 feet from the property served by the parking. The off-site overflow parking required by the condition of approval will be over 1500 feet from the subject property. The city, however, interpreted LOC 50.55.010(1)(d) to apply only to *required* parking, finding that the LOC 50.55.010(1)(d) "does not prohibit non-required minimum parking spaces being located off site, either more than 500 feet or when used with other parking users on the off-site parking facility." Record 64. The city found that the overflow parking condition of approval was not necessary to address the parking requirements of LOC 50.55.010, but rather were imposed to ensure that the proposed development is reasonably compatible with the uses in the vicinity, pursuant to 50.69.010(1)(d). Under the city's interpretation, the 500-foot restriction does not restrict the overflow parking. Petitioner does not specifically challenge that interpretation. Even if petitioner had challenged that interpretation, we do not see that it is contrary to the express language, purpose, or policy of the LOC.

Petitioner argues that it was not given an opportunity to comment on the condition of approval requiring off-site parking. Petitioner, however, cites no authority for the right to comment on a condition of approval. Generally, participants at a public land use hearing have the right to submit testimony on the proposed development, but do not have the right to review or comment on the actual findings adopted or the conditions of approval that may be imposed in the final decision. The condition of approval that petitioner objects to was imposed, in a slightly different form, by the DRC. Record 261. Intervenor argues that the proposal for overflow parking was discussed early in the hearing process and petitioner in fact submitted extensive objections to the DRC condition in its appeal to the city council. Record 249-52. Even assuming petitioner had a right to comment on the condition requiring off-site parking, petitioner has not demonstrated that the city failed to provide reasonable opportunities to comment.

Petitioner also argues that the city failed to find and the record does not show that providing off-site overflow parking is "feasible." According to petitioner, it is unreasonable to conclude that disabled residents will walk 1,500 feet to the facility across busy streets, or that the proposed shuttle system will be effective. In addition, petitioner argues that the city failed to evaluate the traffic impacts of the shuttle.

Nothing cited to us in the LOC requires a finding that it is "feasible" to provide overflow parking. As discussed earlier, the city found that the overflow parking is intended to ensure that the proposed use would be reasonably compatible with the uses in the vicinity, presumably by reducing on-street parking conflicts, and is not intended to satisfy the minimum number of code-required off-street parking spaces. As conditioned, the overflow parking and shuttles will be used only if resident parking needs exceed the available on-site parking. Where a party raises legitimate issues regarding whether a proposal complies with applicable approval standards, the local government may be required to adopt findings responding to those issues. *Hillcrest Vineyard v. Bd. of Comm. Douglas Co.*, 45 Or App 285, 293, 608 P2d 201 (1980). Here, petitioner cites to no evidence that the shuttle is likely to be ineffective, or that the shuttle will not be available to transport residents who decline to walk the intervening distance, or any reason to believe that the condition requiring overflow parking would be ineffective to ensure compliance with the reasonably compatible standard. Absent some evidence to that effect, we disagree with petitioner that the city was obligated to adopt responsive findings, or that the record does not include substantial evidence supporting the decision.

This subassignment of error is denied.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the city committed a procedural error that prejudiced petitioner's substantial rights by considering a document regarding parking issues that was

submitted after the public hearing had been continued only for design review issues. Petitioner also argues that the city erred by not allowing petitioner to submit evidence rebutting the document.

At the conclusion of the initial evidentiary hearing before the DRC, intervenor requested that the hearing be continued for the purpose of considering amendments to the building design. After the hearing had been continued, but before the rescheduled hearing, intervenor submitted a parking analysis letter from its expert. At the DRC hearing, intervenor did not discuss parking, but the opponents' testimony focused almost exclusively on parking. The DRC closed the hearing, deliberated, and voted to approve the application with additional conditions regarding both design and parking. Petitioner appealed the DRC approval to the city council. On appeal to the city council, petitioner argued that the parking analysis should be stricken from the local record because it was submitted after the record had been closed, except for building design issues. The city council ultimately agreed with petitioner and struck the parking analysis from the materials it considered in making its decision.[4]

On appeal, petitioner argues, essentially, that the city council cannot unring the bell and simply strike the parking analysis from the record after initially accepting and considering it. Petitioner cites to a statement by a city councilor during the appeal proceeding that the councilor found the analysis "useful." According to petitioner, the only appropriate course for the city council was to reopen the evidentiary record to allow petitioner to submit rebuttal evidence.

Other than one councilor's remark that the parking analysis is "useful," petitioner cites to nothing in the decision or the record that the city council in fact considered the

[4] The city council's decision states in relevant part that "because * * * Exhibit F-13 is not necessary to support the Council's decision on appeal, and because the Applicant has consented to the exhibit being stricken, the Council hereby strikes Exhibit F-13 from the record being considered by the Council." Record 22.

analysis in making its final decision. We disagree with petitioner that the *only* permissible option for a decision maker when inappropriate or untimely materials are initially included in the record is to re-open the evidentiary record, allow rebuttal evidence, and consider both the rebuttal evidence and the inappropriate or untimely materials. In such circumstances, we believe it is also permissible for the decision maker to explicitly reject the inappropriate or untimely materials, exclude them from the evidentiary record, and not consider them in making the final decision. That is exactly what the city council did here. Absent some indication that the city council in fact considered the rejected documents in making its decision, we fail to see that the city council's actions constitute procedural error or that any error prejudiced petitioner's substantial rights.

Petitioner also argues that the city council erred in refusing to accept rebuttal evidence that petitioner proffered and in refusing to continue the appeal to allow additional rebuttal evidence. However, any error that may have been committed at the DRC level was cured at the city council level when the parking analysis was stricken from the record. The city council was not required to allow petitioner a continuance or the opportunity to rebut the parking analysis that was excluded from the evidentiary record. As a result of the city council's action, there was nothing to rebut.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

LOC Appendix 50.55(A) establishes the minimum off-street parking space requirements based on the type of use. When the proposed use is not specifically listed, Section H of the Appendix provides:

> "Parking requirements for uses not specifically mentioned in this section shall be determined by the requirements for off-street parking facilities for the listed use which, as determined by the City Manager, is most similar to the use not specifically mentioned, or by a parking study."

The city found that congregate care is not a specifically mentioned use and therefore required a parking study pursuant to LOC Appendix 50.55(A). Intervenor submitted a parking study based on traffic impacts observed at another congregate care facility in the city.

Petitioner argues that the parking study based on the other congregate care facility is so flawed that it cannot constitute substantial evidence. According to petitioner, the parking study is based on "random, unverified, and unsubstantiated parking data" for only a one week period. Petition for Review 18. Petitioner also argues that there is conflicting testimony regarding the accuracy of the parking study, and that the study is additionally flawed because it does not take into account the need for handicapped spaces.

While the city might have agreed with petitioner that the parking study is unreliable or that additional parking is necessary, the choice between conflicting evidence belongs to the city. We cannot say that no reasonable person could have relied upon the parking study to conclude that 20 on-site parking spaces were needed.

The city council determined that under the city's code at least one of the 20 required parking spaces must be a handicapped parking space, and the city ultimately required two handicapped parking spaces. Record 65-66. Petitioner argues that there is no evidence that the parking study specifically evaluated the need for handicapped parking spaces. Intervenor responds that the parking study briefly discussed and proposed two handicapped parking spaces. Record 410. Given the unchallenged finding that the city's code requires only one handicapped parking space and the applicant proposed and the city required two such spaces, we agree with intervenor that petitioner's challenges to the adequacy of the parking study do not provide a basis for reversal or remand.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioner argues that the city did not comply with Goal 4, Policy 4 of the Lake Oswego Comprehensive Plan because it did not require a traffic study. Goal 4, Policy 4 provides:

> "The City shall require that a proposed increase in land use intensity be accompanied by a detailed traffic analysis, using current information, which finds that existing streets and intersections both on and off site will accommodate the projected traffic increases, or necessary improvements can be constructed which are in conformance with the Comprehensive Plan Transportation Map. Mitigation of negative impacts (noise, aesthetics, safety, bicycle and pedestrian mobility) shall be paid for by the developer of the property."

Intervenor responds that petitioner failed to preserve the issue of compliance with Goal 4, Policy 4 during the proceedings before the DRC, and that the city council correctly rejected that issue on appeal of the DRC decision to the city council.

LOC 50.84.035(1) provides that in order to raise an issue before the city council, the appellant must show that the issue was raised with sufficient specificity before the DRC to allow the parties and the DRC to address the issue. Petitioner replies that at least one opponent "called for a traffic study" during the proceedings before the DRC, that much of the public testimony and discussion concerned traffic impacts, and that such testimony is sufficient to raise the issue of compliance with Goal 4, Policy 4.[5]

As intervenor notes, the city council found that the issue of compliance with Goal 4, Policy 4 had not been preserved before the DRC. The city's findings state:

> "Neither staff nor any other person identified this Policy 4 as a regulatory comprehensive plan policy applicable to the proposed development. Appellant did not address this policy in its narrative. At best, there was a generalized concern about the effect of traffic.

[5] Petitioner cites to Record 275, the minutes of the October 1, 2007, DRC hearing, where at the end of her testimony addressing a number of issues an opponent "called for a traffic study."

> "Appellant identified a number of specific Comprehensive Plan policies * * * that they believed were applicable, but did not include this Policy 4.
>
> "Parties did not contend before the DRC that Policy 4 was a regulatory policy, and appellant's statement of appeal did not contend that the traffic impacts of the proposed development require mitigation * * *. Appellant and other interested persons focused testimony and identified criteria on the *parking* impacts to the surrounding residential neighborhood, not the *traffic* impacts upon the street system." Record 34 (emphasis in original).

We agree with intervenor that generalized concerns about traffic and even a general call for a traffic study were not sufficiently specific to put the parties and the DRC on notice that the city should consider whether Goal 4, Policy 4 obligated the city to require a traffic study. Although the opponents cited a number of comprehensive plan policies, petitioner does not dispute that no party before the DRC cited Goal 4, Policy 4 or any other authority that would obligate the city to require a traffic study. A single statement in testimony that calls for a "traffic study" is insufficient to raise that issue, without some explanation for why the proponent believed a traffic study is required. The city correctly concluded that petitioner failed to sufficiently raise the issue of compliance with Goal 4, Policy 4 during the DRC proceedings, and thus that issue was waived under LOC 50.84.035(1).

The fifth assignment of error is denied.

The city's decision is remanded.