BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BAO YI GU,
Petitioner,

vs.

CITY OF BANDON,
Respondent.

LUBA No. 2018-004

FINAL OPINION
AND ORDER

Appeal from City of Bandon.

Frederick A. Batson, Eugene, filed the petition for review and argued on behalf of petitioner. With him on the brief were Joshua K. Smith and Gleaves Swearingen LLP.

Shala McKenzie Kudlac, Bandon, filed a response brief and argued on behalf of respondent. With her on the brief was Carleton Law Offices.

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

REMANDED 06/27/2018

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a city council decision that denies his application for a conditional use permit to allow his single-family home to be used as a vacation rental dwelling.

FACTS

Petitioner's property is zoned Controlled Development 1 (CD-1), a zone that allows single-family dwellings as a use permitted outright and allows vacation rental dwellings (VRDs) as a conditional use. Petitioner received approval to construct a 2,686-square-foot single-family dwelling on October 20, 2016. The city approved a zoning clearance on November 14, 2016, which allowed construction to begin. On July 21, 2017, petitioner filed his application for a conditional use permit to use the dwelling as a VRD. A certificate of occupancy was issued for the completed dwelling on August 17, 2017. One day later, on August 18, 2017, petitioner's conditional use permit application was deemed complete. On October 26, 2017, the planning commission approved the conditional use permit. On November 6, 2017, the planning commission's decision was appealed to the city council. Prior to the December 4, 2017 city council public hearing on the appeal, petitioner submitted written testimony in support of the application. Record 48-73.

After the planning staff presentation, the mayor explained the procedure the city would follow:

> "[The mayor] continued with reading from the Rules of Hearing, and called for testimony, explaining the applicant and/or his agent would be given ten minutes initially, followed by the appellants, who would be given fifteen minutes; the applicant would then have an additional five minutes for rebuttal. She also noted that anyone not officially speaking for the applicant or the appellants would be allowed to speak for two minutes." Record 18.

Petitioner and his representative were given ten minutes to present the applicant's opening case to the city council. When the timer sounded at ten minutes, petitioner was told his time was up. Petitioner's representative's wife asked if she could give her two minutes to petitioner to complete his opening statement and was told she could not.

The local appellants were then given 15 minutes to present their case. When the timer sounded they were told their time was up. However, one of the local appellants was thereafter allowed to continue presenting the local appellants' case during the time reserved for persons other than the applicant or the appellants. And persons other than the applicant or the appellants were allowed three minutes rather than two minutes, as the mayor had stated earlier.

Petitioner's representative was then told he would be allowed five minutes for rebuttal. However, petitioner's representative was given approximately ten minutes for rebuttal. At the end of petitioner's rebuttal, the public hearing was closed. The city council deliberated for approximately 30 minutes and voted to deny the application. This appeal followed.

INTRODUCTION

There are eight criteria for conditional use approval. Bandon Municipal Code (BMC) 17.92.040(A) through (H).[1] As explained below, the city council found the proposal does not comply with BMC 17.92.040(G). There are

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[1] BMC 17.92.040 provides:

"Approval standards for conditional uses.

"The approval of all conditional uses shall be consistent with:

"A. The comprehensive plan;

"B. The purpose and dimensional standards of the zone except as those dimensional standards have been modified in authorizing the conditional use permit;

"C. That the site size and dimensions provide adequate area for the needs of the proposed use;

"D. That the site size and dimensions provide adequate area for aesthetic design treatment to mitigate possible adverse effect from the use of surrounding properties and uses;

"E. The characteristics of the site are suitable for the proposed use considering size, shape, location, topography and natural features;

"F. All required public facilities and services have adequate capacity to serve the proposal, and are available or can be made available by the applicant;

"G. The proposed use will not alter the character of the surrounding area in a manner which substantially limits, impairs, or precludes the use of surrounding properties for the permitted uses listed in the underlying zoning district;

"H. All other requirements of this title that apply."

additional special conditional use criteria for vacation rental dwellings. BMC 17.92.090(K).[2] Under BMC 17.92.090(K), VRDs are limited to "*existing*

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[2] BMC 17.92.090(K) provides:

> "Vacation Rental Dwellings. [VDRs] are a conditional use in the CD-1 and CD-2 and CD-3 zones, and are subject to the requirements of this chapter. A dwelling may only be eligible for VRD status provided that it is an existing single-family detached dwelling, and that less than 30% of the dwellings on property within 250 feet of the subject property are VRD's.
>
> "All [VRDs] shall comply with the following provisions.
>
> "1. No more objectionable noise, smoke, dust, litter or odor is emitted from the VRD than a normal neighborhood dwelling;
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> "2. VRDs without private beach access have written permission from all persons with an interest in a private beach access to be used by the VRD or positive action to notify renters of the location and required use of public beach access points will be taken;
>
> "3. VRDs using a joint access driveway shall assure that any other private access does not object to the proposed [VRD] using the private access;
>
> "4. Dwellings will be maintained at or above the level of surrounding dwellings in the neighborhood, including landscaping, signage and exterior maintenance;
>
> "5. VRDs shall have one off-street parking space for each bedroom in the VRD, but in no case have less than two off-street parking spaces.
>
> "6. There are provisions for regular garbage removal from the premises;

single-family detached dwelling[s.]" (Emphasis added.) Among other things the city must find that the VRD will: (1) be no noisier than a dwelling that is not used as a VRD (BMC 17.92.090(K) criterion #1), (2) be maintained at a level that equals or exceeds surrounding dwellings (criterion #4), (3) have an off-street parking space for each bedroom (criterion #5), (4) have a designated local management person (criterion #7), and (5) be limited to three persons per bedroom with a maximum of ten persons (criterion #10).

Petitioner's dwelling has five bedrooms and therefore the proposed VRD could qualify for occupancy by up to ten persons. However, petitioner only requested approval for up to eight occupants. As required by criterion #5, petitioner proposed providing five off-street parking spaces. In the documents submitted to the city council, petitioner took the position that the proposal

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7. There shall be a designated local management person immediately available to handle complaints and problems as they arise. The name and contact information of the designated local management person shall be kept on file in the Police Department.

"8. Compliance with all reporting and accounting requirements of the transient occupancy tax ordinance shall be done. (Amended during 2000 codification.)

"9. If the VRD activity ceases for a period of one year, as determined by the transient occupancy tax receipts, the VRD permit becomes null and void with no further proceedings.

"10. Occupancy of any VRD shall not exceed 3 people per bedroom up to a maximum of 10 people."

complies with all the conditional use criteria as well as the special criteria applied to VRDs.[3] Record 48-73.

FIRST ASSIGNMENT OF ERROR

The city council did not find that the proposal fails to comply with any of the BMC 17.92.090(K) special VRD criteria. The city council denied the application based on one of the general conditional use approval criteria, BMC 17.92.040(G). *See* n 1. Again, that criterion requires that the city council find:

> "The proposed use will not alter the character of the surrounding area in a manner which substantially limits, impairs, or precludes the use of surrounding properties for the permitted uses listed in the underlying zoning district[.]"

The relevant city council's findings are relatively brief, and we set them out below:

> "2.4 The Council finds that the surrounding area and surrounding properties are those nearby and fronting on Spinnaker Drive.
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> "2.5 The Council finds that representative nearby homes on Spinnaker Drive have a habitable square footage of 1,296, 1,404, 1,512, and 1,782 and are single story manufactured homes. The applicant's home is [a] two-story site-built home with a square footage of 2,686. * * * The average of the five homes identified is 1,501 sq. ft. compared to 2,682 sq. ft. (3,550 when including the garage and porch areas) for the proposed [VRD].

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[3] A policeman present at the hearing was asked by a city councilor if there had been very many noise complaints regarding VRDs in the city and he testified "that there were very few." Record 25.

"2.6 The proposed occupancy of the VRD is a maximum of eight persons. The proposed VRD has five bedrooms. The proposed VRD has five parking spaces available for guests.

"2.7 The Council finds the evidence and testimony submitted by the appellants to be compelling in the determination of neighborhood impacts (Item 4.1.4 of the record). The Council finds that the applicant did not provide substantial evidence addressing Criterion G of BMC 17.92.040 as part of the application materials or during the public hearing.

"2.8 The Council finds that the proposed VRD is substantially larger than the surrounding properties, allowing for higher occupancies, greater trip generation, greater noise, and greater parking demand than experienced by smaller homes in the area.

"2.9 The Council finds that the proposed use of a VRD in a home substantially larger than those in the neighborhood will result in increased negative impacts which will alter the character of the surrounding area in a manner which will substantially limit, impair or preclude the use of surrounding properties for the permitted uses in the CD-1 zone, primarily single-family dwellings and manufactured dwellings." Record 12.

In his first assignment of error petitioner challenges the adequacy of the above findings to establish that his proposal does not comply with BMC 17.92.040(G). As we have explained many times, the general requirement for adequate findings was summarized in *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). To be sufficient, findings must "(1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the decision[.]" *Id.* Moreover, as

we explained in *Ontrack, Inc. v. City of Medford*, 37 Or LUBA 472, 477 (2000):

> "While findings of noncompliance with an applicable approval standard need not be as exhaustive or detailed as those necessary to establish compliance, the city's findings must adequately explain its conclusion that the standard is not met. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351, 371 (1994). At a minimum, such findings must inform the applicant of the steps necessary to gain approval of the application, or of the reasons why the application cannot gain approval under the relevant approval criteria, as the local government understands them. *Boehm v. City of Shady Cove*, 31 Or LUBA 85, 89 (1996); *Ellis v. City of Bend*, 28 Or LUBA 332, 334 (1994)."

As explained in more detail below, the city council's findings largely rest on the fact that petitioner's dwelling is larger than the surrounding dwellings, a fact that is not directly relevant in applying BMC 17.92.040(G). Further, the city council's findings provide little in the way of guidance on how the city council believes petitioner might condition or change the VRD proposal to comply with the relevant criteria and secure approval of the conditional use permit.

During the proceedings below, opponents and the city council expressed concern that because the application for a conditional use permit to allow VRD use was submitted before the dwelling was completed, petitioner planned from the beginning to use the dwelling for a VRD and the VRD therefore did not qualify as an "existing single-family detached dwelling," as required by BMC

17.92.090(K).[4] *See* n 2. While the city council's written decision does not find that petitioner's dwelling does not qualify as an "existing single-family detached dwelling," it is clear from the recording of the city council meeting that some of the city councilors were troubled by the timing of the house construction and the application for the VRD conditional use permit.[5]

The city council's concern that petitioner's dwelling is site-built rather than a manufactured home has no relevant bearing that we can see on whether the proposed VRD complies with BMC 17.92.040(G). The clearly dominant concern in the city council's findings was the size of the dwelling compared to neighboring dwellings (findings 2.5, 2.8 and 2.9). The city council went so far in finding 2.5 as to include the garage and porch area of petitioner's dwelling to make the discrepancy seem even larger, while failing to include the garage and porch areas of other dwellings in the neighborhood. However, a single-

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[4] The record indicates the planning department apparently considers the "existing" dwelling requirement to be met so long as the dwelling has been constructed and has been issued a certificate of occupancy when the conditional use permit is issued to allow a dwelling to be used as a VRD. Record 24.

[5] The city is apparently currently considering adopting an ordinance that would require that a single-family dwelling have been used as an owner-occupied dwelling or long-term rental dwelling for five years before it would be eligible for a conditional use permit to allow VRD use of the dwelling. Petition for Review 25. That change of law would apply to future applications for VRD approval but would not apply to petitioner's application. ORS 227.178(3)(a) (complete permit application is subject to the laws in effect when the application was first submitted).

family dwelling with 2,686 square feet of floor area is allowed outright in the CD-1 zone. No conditional use approval would be required for petitioner's family to occupy the 2,686 square foot dwelling. And no conditional use approval would be required for petitioner to enter a long-term lease of the five-bedroom dwelling with another family or a group of unrelated lessees. The size of the dwelling, in and of itself, has no direct bearing on whether the proposal to use that dwelling as a VRD might violate BMC 17.92.040(G).

Finding 2.8 does reference evidence submitted by opponents. Those opponents stated concerns about traffic, noise and on-street parking. As noted, finding 2.8 concludes the larger dwelling will result in "higher occupancies, greater trip generation, greater noise, and greater parking demand than experienced by smaller homes in the area." Record 12.

Apparently, the existing residences in the area currently generate a fair amount of on-street parking, which can disrupt traffic flow in the neighborhood. It is not apparent to us how the disputed VRD could have any impact on on-street parking, since it is required by BMC 17.92.090(K)(5) to provide five off-street parking spaces and the VRD occupants would be required to use the off-street parking spaces. Since the house has five bedrooms and BMC 17.92.090(K)(10) allows up to three persons per bedroom, that could make the larger house available to far more VRD occupants than the other smaller houses in the neighborhood with fewer bedrooms. But BMC 17.92.090(K)(10) places an absolute limit on VRD occupants at ten, and

petitioner is only seeking approval for up to eight occupants at a time. The existing houses in the neighborhood apparently are a mixture of two and three-bedroom houses. The three-bedroom houses could qualify for as many as nine occupants under BMC 17.92.090(K)(10). Therefore, the size of the dwelling and its five bedrooms do not necessarily mean the proposed VRD would have any more occupants than other homes in the neighborhood if they were allowed to be used as VRDs, as the city council seems to have assumed. The city council's almost exclusive focus on the size of petitioner's dwelling is misplaced.

If the proposed VRD were occupied by eight people with five cars it could easily generate more traffic than if petitioner's home was occupied by his family with fewer cars. But as the city council recognized below, petitioner's dwelling could be occupied by a number of unrelated individuals on a long term rental basis and if so could easily generate as much traffic as an eight-occupant VRD use. [6] If the city council's concern is that petitioner's dwelling is more likely to generate traffic that would alter the character of the neighborhood if it is used as a VRD—as opposed to being leased on a long

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[6] For example, alluding to Bandon's famous golf course, the city council discussed the possibility that petitioner could enter a long-term lease with "ten [golf] caddies" and that such an arrangement could easily result in what a city councilor described as a "party house" which might have greater impacts than the proposed VRD. Record 21-22.

term basis or used by petitioner as a single-family dwelling—the city council needs to better explain its reasoning and the basis for that concern.

Returning to the standard the city relied on to deny petitioner's conditional use permit application, we agree with petitioner that the city council's findings appear to inappropriately rely on the square footage of the house that has been constructed. As we have noted, that 2,686-square-foot dwelling could be occupied by petitioner's family or leased on a long-term basis to another family or group of unrelated individuals without conditional use approval. In that event there could be impacts of various kinds on neighboring property. The question the city council needs to address more directly than it has is whether petitioner's proposal to instead use that dwelling as a VRD, with the conditions and limitations petitioner has agreed to in the application, will "alter the character of the surrounding area in a manner which substantially limits, impairs, or precludes the use of surrounding properties for the permitted uses in the underlying zoning district[.]" BMC 17.92.040(G). The city council's conclusion that the proposed VRD would result in such an alteration of the character of the surrounding area is not adequately explained by the findings the city adopted to support that conclusion. Again, it is the VRD *use*, not the 2,687-square-foot dwelling with five bedrooms, for which petitioner seeks conditional use approval.

Finally, petitioner also includes an evidentiary challenge under the first assignment of error. Petitioner argues the record does not include evidence that

clearly supports the city council's decision. ORS 197.835(11)(b).[7] We agree with petitioner on that point, and for that reason the city council's decision must be remanded for better findings. ORS 197.835(11)(b) only permits LUBA to affirm a decision that is supported by inadequate findings where the issue of whether the proposal complies or does not comply with the applicable criteria is obvious. *Terra v. City of Newport*, 36 Or LUBA 582, 589 (1999); *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101, 122 (1995). It is not obvious that the proposed VRD complies with BMC 17.92.040(G). However, we also agree with the city that petitioner has not established that his proposal complies with BMC 17.92.040(G) as a matter of law, as he must to prevail in an evidentiary challenge of a decision that denies permit approval. *Jurgenson v. Union County Court*, 42 Or App 505, 510, 600 P2d 1241 (1979). BMC 17.92.040(G) is a relatively subjective standard and there is little evidence in the record regarding whether the proposed VRD might "alter the character of the surrounding area" in a way that would violate BMC 17.92.040(G).

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[7] ORS 197.835(11)(b) provides:

> "Whenever the 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, [LUBA] 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."

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioner contends the city council committed a procedural error in allowing the permit opponent appellants below more time than it should have to present their arguments. Specifically, petitioner contends that two of the local appellants were improperly allowed to present arguments during the time that was allowed for non-appellant opponents and that instead of the two minutes the mayor indicated they would be allowed, non-appellant opponents were allowed three minutes. Petitioner contends this misallocation of time is particularly egregious here, since the city council cut petitioner and his representative off mid-sentence when their opening 10 minutes expired and denied petitioner's representative's wife's request to allow petitioner to use her two minutes to complete his testimony.

Even though neither petitioner nor the city have provided LUBA with copies of the "rules" that petitioner believes the city council misapplied in allocating time, we will assume for purposes of this opinion that the city council allowed the local appellants and other opponents more time to present their arguments than they were entitled to under the city's rules.

Our review of the recording of the city council hearing discloses that the city council strictly held petitioner and his representative to ten minutes for their opening argument. But the city council also strictly limited the applicants to 15 minutes for their opening argument. However, as petitioner argues, the

local appellants were then allowed to extend their argument as non-appellant parties, in apparent contravention of the city's rules. It is also clear from the recording that the city allowed non-appellant party opponents more time to present their argument than allowed under the rules.

As we noted earlier, the city council allowed petitioner's representative ten minutes rather than the five minutes he was entitled to under the city's rules to present rebuttal. And from our review of the recording, he was allowed as much time as he wished to present rebuttal. As a result, it is far from clear to us that the city council's uneven administration of the time limits resulted in any prejudice to petitioner's substantial rights.

In any event, even if the city council committed an error, the city council's error in allocating time for argument was at most a procedural error. As we have explained many times a party must preserve procedural error by entering an objection to the procedural error below. *Confederated Tribes v. City of Coos Bay*, 42 Or LUBA 385, 391-92 (2002); *Torgeson v. City of Canby*, 19 Or LUBA 511, 519 (1990); *Mason v. Linn County*, 13 Or LUBA 1, 4 (1984), *aff'd in part, rem'd in part* 73 Or App 334, 698 P2d 529, *rev den* 299 Or 314 (1985). As we have already noted, petitioner's representative was allowed as much time as he wanted to present rebuttal testimony after the local appellants and other opponents had testified. At no point during that rebuttal did petitioner mention or object to the uneven application of time limits by the city council. After petitioner was allowed an opportunity for rebuttal, the

public testimony phase of the appeal closed, and the city council began its deliberations. Only late in the city council deliberations when petitioner's representative attempted to interrupt the city council's deliberations and was told that the pubic hearing phase had concluded, did petitioner's representative complain that opponents had been given more time to present their arguments. The mayor responded at that time that the opponents were given more time because there were far more of them. Petitioner's representative did not elaborate on his complaint about time for argument.

The time for petitioner or his representative to complain about the way the city council imposed time limits on the parties presenting argument at the December 4, 2017 city council hearing was at the time the city failed to impose those limits or during the time petitioner's representative was allowed for rebuttal, prior to close of the evidentiary phase of the proceeding. If he had done, so the record suggests to us the city council would have allowed petitioner equal time to avoid any prejudice to his substantial rights. Petitioner did not do so, and his complaint during the deliberative phase was both inadequate and untimely. Because petitioner failed to enter an adequate and timely objection, even if the city council committed a procedural error in the way it enforced time limits for argument, petitioner may not raise that procedural error for the first time at LUBA.

Finally, petitioner argues the city council's failure to be more evenhanded in the way it imposed time limits is evidence that the city council

was biased, and that petitioner therefore was not provided with an opportunity to be heard by an impartial decision, as is required under *Fasano v. Washington County Comm.*, 264 Or 574, 588, 507 P2d 23 (1973). Petitioner also cites to the city council's concern that his dwelling does not qualify as an "existing" dwelling and that statements made by certain city councilors suggest the city council may have prejudged the application.

We do not understand the only statement that petitioner identifies with any precision to establish that that any one city councilor, much less a majority of the city council, prejudged petitioner's application. [8] At the very most the city council's action could be said to suggest an appearance of bias, which is insufficient to amount to disqualifying bias. *Columbia Riverkeeper v. Clatsop County*, 267 Or App 578, 610, 341 P3d 790 (2014) (citing *1000 Friends of Oregon v. Wasco Co. Court*, 304 Or 76, 85, 742 P2d 39 (1987)).

The second assignment of error is denied.

The city's decision is remanded in accordance with our resolution of the first assignment of error.

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[8] "[Prior to the hearing] Council Member Hundhausen stated that 'she immediately told the Mayor [the VRD] would not work here.'" Petition for Review 26.