BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROGER GRAHN,
Petitioner,

vs.

CITY OF YAMHILL,
Respondent,

and

YAMHILL COUNTY SCHOOL DISTRICT,
Intervenor-Respondent.

LUBA No. 2017-070

FINAL OPINION
AND ORDER

Appeal from City of Yamhill.

Steve C. Morasch, Vancouver, filed the petition for review and argued on behalf of petitioner. With him on the brief was Landerholm PS.

Walter R. Gowell, McMinnville, filed a response brief and argued on behalf of respondent. With him on the brief was Haugeberg, Rueter, Gowell, Fredericks & Higgins, P.C.

J. Kevin Shuba, Salem, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Garrett Hermann Robertson PC.

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

REMANDED 10/26/2017

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 approves a variance for gymnasium and career technical education (CTE) center buildings.

MOTION FOR REPLY BRIEF

Petitioner moves to file a reply brief to address waiver issues raised in intervenor-respondent's response brief. There is no opposition to the motion, and it is allowed.

FACTS

The proposed gymnasium and CTE center would be constructed on an existing school site. The proposed buildings would be located in the city's R-2 Single-Family Residential Zone and would be 43.5 feet tall. The maximum allowable building height in the R-2 zone is 35 feet. Because the proposed gymnasium and CTE center would exceed the maximum 35-foot building height, intervenor-respondent school district sought a variance.

The City of Yamhill standards for granting variances are what are generally referred to as "traditional variance standards." Yamhill Municipal Code (YMC) 10.100.030.[1] *JCK Enterprises, LLC v. City of Cottage Grove*, 64

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[1] YMC 10.100.030 provides:

> "'The Planning Commission may grant a variance when it appears from the application, and the facts permitted at the public hearing, and by investigation that:

Or LUBA 142, 146 (2011); *Bates v. City of Cascade Locks*, 38 Or LUBA 349, 351-52 (2000). Among those traditional variance standards are the requirements that the applicant demonstrate that the variance is required to avoid "unnecessary, unreasonable hardships or practical difficulties," that "[t]here are exceptional or extraordinary circumstances or conditions applying

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> "(A) There are unnecessary, unreasonable hardships or practical difficulties which can be relieved only by modifying the requirements of this title, and is the minimum relief to relieve the hardship; and
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> "(B) There are exceptional or extraordinary circumstances or conditions applying to the land, buildings, or use referred to in the application, which circumstances or conditions do not apply generally to the land, buildings, or uses in the same zone; however, nonconforming land, uses, or structures in the vicinity shall not in themselves constitute such circumstances or conditions; and
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> "(C) That granting the application will not be materially detrimental to the public welfare or be injurious to property or improvements in the neighborhood of the premises; and
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> "(D) That such variance is necessary for the preservation and enjoyment of the substantial property rights of the petitioner; and
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> "(E) That the granting of the application will not, under the circumstances of the particular case, adversely affect the health or safety of persons working or residing in the neighborhood of the property of the applicant; and
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> "(F) That granting of the application will be in conformance with the intent and purpose of this title and any officially adopted Comprehensive Plan."

to the land, buildings, or use referred to in the application" that do not apply generally to other properties and buildings in the area, and that the variance be "necessary for the preservation and enjoyment of * * * substantial property rights[.]" YMC 10.100.030(A), (B) and (D); *see* n 1. We first describe below the documents and testimony that the school district and petitioner submitted during the local proceedings before turning to petitioner's first assignment of error where he argues the city erroneously accepted new evidence and argument from the school district at a time when petitioner contends the school district was limited by statute to legal argument only.

A. The Applicant's Pre-Hearing Submittal

The application appears at Record 112-14. The application includes a drawing of the proposed domed structures that shows the proposed height and the maximum height allowed under the Yamhill County Zoning Ordinance without a variance. The application includes no evidence addressing the variance approval criteria.

The application is supported by an April 23, 2017 memorandum submitted by the school district's architect, which also does not directly address the variance criteria, but takes the position that variances for school buildings are common in residential zones. Record 103-04. The memorandum also notes that the city's water system may have insufficient flow to meet state firefighting standards, but that the applicant is working with the city fire chief to address this potential problem. *Id.*

B. The May 2, 2017 Planning Commission Hearing and Decision

The initial evidentiary hearing on the requested variance was held before the planning commission on May 2, 2017. The planning staff report explains that the proposed domed roof "is the most cost effective roofing structure for the type of facilities being built[.]" Record 106. The planning staff report briefly addresses all of the variance criteria. Record 107.

The May 2, 2017 hearing minutes indicate that petitioner Grahn testified as follows:

> "Roger Grahn of Yamhill, a builder and contractor stated that he believes the dome design is excessive and unnecessary and believes there are many alternative building systems other than a domed building. Grahn doesn't believe that all of the variance criteria can be met when there are alternative buildings options." Record 95.

The planning commission's written decision approving the variance was issued May 2, 2017. Record 89-91.

C. Petitioner's May 11, 2017 Appeal of the Planning Commission Decision

In his local appeal, petitioner argued the planning commission's finding "that the dome roof is highly effective" is not supported by substantial evidence and even if it is highly effective that is not sufficient to demonstrate compliance with "the unreasonable hardship or practical difficulty requirement of the code." Record 80. The appeal also takes the position that "cost [savings] is insufficient to meet the hardship requirement of the code to grant a height variance." Record 81. The appeal further takes the position that the school

district's desire to construct a cheaper building design is insufficient to comply with the YMC 10.100.030(D) substantial property right criterion. Record 81; *see* n 1.

D. The June 7, 2017 City Council Hearing

1. Petitioner's June 6, 2017 Letter

Prior to the *de novo* June 7, 2017 city council hearing, petitioner's attorney submitted a letter dated June 6, 2017. Record 76-77. That letter took the position that the domed structure would not be cheaper to construct than a conventional, non-domed building, and that cost alone is an insufficient basis for finding the variance criteria are met. The letter then reiterated the positions taken in the May 11, 2017 appeal statement, and stated: "if the school district submits any new evidence at the [June 7, 2017] hearing, the appellant is entitled to hold the record open for at least seven days to respond to any new evidence submitted by the school district. See ORS 197.763(6)." Record 76.

2. Architect's June 6, 2017 Memorandum

Prior to the June 7, 2017 city council hearing, the school district's architect submitted a memorandum in which the architect took the position that the 35-foot building height standard was an unreasonable restriction on school buildings. Record 78. The architect also took the position that even a building with a traditional (non-domed) design would exceed the 35-foot building height. *Id.* The architect additionally took the position that the city's method of measuring building height conflicted with the method employed by the Oregon

Structural Building Code. *Id.* The architect further took the position that the lower cost domed structure was proposed to be consistent with the bond measure that authorized limited funding to construct the structure and that construction of a more traditional design would cost approximately $430,000 more, and the extra cost would constitute an undue hardship. *Id.* Finally, the architect pointed out the proposed building would be sited within the existing school's footprint, making an acquisition of a new site unnecessary, thus satisfying the "extraordinary circumstances" criterion. Record 79.

3. Testimony at the June 7, 2017 City Council Hearing

Petitioner in his opening testimony at the June 7, 2017 hearing largely repeated his prior position that a domed structure would not be cheaper than traditional alternative design and that traditional alternatives could be built within the 35-foot building height limitation. Record 65. The school district reiterated its prior testimony, but also argued that the domed structure would be "extremely fire safe, highly rated for earthquake, tornado and hurricane safety," and could "also be used in an emergency as a local safety shelter." Record 66. The school district's architect again took the position that a more traditional design would also require a variance, and that the lower cost domed structure was required to construct a building within the funding limit authorized by the voter-approved bond for the project. Record 67. The fire chief testified that a Type I building such as the proposed domed structure would be constructed of less combustible material and would require a fire flow of only 1,500 gallons

per minute, where as a conventional design with conventional materials would require a fire flow of 4,000 gallons per minute. *Id.* In rebuttal, petitioner took the position that fire safety is "irrelevant" in applying the variance criteria. Record 68.

At the conclusion of the June 7, 2017 city council public hearing, the city attorney stated:

> "[T]he public hearing would be open for 7 days for additional written testimony, and another additional 7 days for rebuttal of written testimony. The public hearing may be closed at the end of the 14-day period at which time the City Council will meet and make a decision on the Variance Permit Case[.]" Record 68.

4. The Open Record Period

Although the city attorney took the position that "the public hearing would be open for 7 days for additional written testimony," in the words of ORS 197.763(6)(c), we understand the city to have left "the record open for additional written evidence, arguments or testimony" for 14 days, pursuant to ORS 197.763(6)(c).[2] In doing so, the city made it unnecessary for any party to file a written request for an opportunity to respond to new evidence submitted

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[2] ORS 197.763(6)(c) provides:

> "If the hearings authority leaves the record open for additional written evidence, arguments or testimony, the record shall be left open for at least seven days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the hearings authority shall reopen the record pursuant to subsection (7) of this section."

during first seven-day period—the first seven days were designated for additional written evidence, and the second seven days were designated for rebuttal of that additional written evidence. During the first seven days of the open record period, only the petitioner submitted additional written testimony, a June 14, 2017 letter from his attorney. Petitioner's attorney's June 14, 2017 letter makes several points. First, the letter disputes the school district's contention that traditional construction of the gymnasium without a domed roof would exceed the 35-foot building height limit. Second, the letter contends the reduced cost that might be achievable with the domed structure is not sufficient to satisfy the YMC 10.100.030(A) "unnecessary, unreasonable hardships or practical difficulties" standard, the YMC 10.100.030(B) "exceptional or extraordinary circumstances" standard, nor the YMC 10.100.030(D) requirement that the variance be "necessary for the preservation and enjoyment of * * * substantial property rights[.]"

5. The Second Seven-Day Period

Only the school district submitted documents during the second seven-day period, a June 20, 2017 letter. The school district's submittal includes a five-page letter from the school district's attorney, which addresses the variance approval criteria in some detail. Record 13-17. Attached to that letter are a number of evidentiary documents which we list and briefly describe below.

1. A May 11, 2017 memorandum from Interface Engineering regarding Oregon Fire Code requirements and the

shortcomings of the city's current water system to supply the minimum fire flow of 1,500 gallons per minute at a pressure of 20 pounds per square inch. The memo addresses a number of steps that could be taken to allow construction of the proposed school buildings, notwithstanding the substandard city water system, and includes a number of supporting worksheets. Record 18-36.

2. A February 23, 2017 memorandum from Interface Engineering describing a hydrant flow test on the school district property, with attached supporting documentation. Record 37-41.

3. A March 23, 2017 memorandum from Interface Engineering describing another hydrant flow test on the school district property, with attached supporting documentation. Record 42-48.

4. A June 20, 2017 memorandum from the school district's architect, which in part responds to petitioner's attorney's June 14, 2017 letter, but also includes evidence of the benefits associated with domed structures. Record 49-50.

5. An undated letter from the school district superintendent describing the survey the school district conducted following a failed bond measure in 2014, and how the school district arrived at the domed design as a more economical way to provide the desired athletic and classroom space needed at a cost that the voters would support through a bond issue. Record 51-52.

FIRST ASSIGNMENT OF ERROR

Petitioner argues the school district's attorney's June 20, 2017 submission represented the applicant's final legal argument and, as such, erroneously included evidence that the school district should have submitted much earlier during the city's consideration of the school district's variance

application. The city accepted that evidence on June 21, 2017, and rendered its decision on June 22, 2017, without giving petitioner an opportunity to rebut that evidence. Petitioner contends that in doing so the city committed a procedural error that prejudiced petitioner's substantial rights, warranting remand under ORS 197.835(9)(a)(B).[3]

A. Preservation of Error

The school district initially argues that because petitioner could have but failed to object to the city's consideration of the school district's June 20, 2017 letter with attachments, which was received by the city on June 21, 2017, this assignment of error should be denied. Generally, a party assigning procedural error must have entered a timely objection to the procedural error below, if there was a reasonable opportunity to do so. *Mason v. Linn County*, 13 Or LUBA 1 (1984), *aff'd in part rev'd in part on other grounds*, *Mason v. Mountain River Estates, Inc.* 73 Or App 334, 698 P2d 529, *rev den* 299 Or 314 (1985). However, in this case the only opportunity the petitioner may have had to enter an objection to receipt of the evidence on June 21, 2017, was one day later, at the city council's June 22, 2017 regular city council meeting when the city council adopted its final decision. The city council meeting offered no formal opportunity for the parties to lodge procedural objections, and the

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[3] ORS 197.835(9)(a)(B) provides that LUBA is to reverse or remand a land use decision if a local government "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]"

record had closed on June 21, 2017, one day before the city council took final action. Record 9-10. Given the circumstances in this appeal, petitioner was not required to object to the city's procedural error. *Brome v. City of Corvallis*, 36 Or LUBA 225, 234, *aff'd Schwerdt v. City of Corvallis*, 163 Or App 211, 987 P2d 1243 (1999); *see Horizon Construction, Inc. v. City of Newberg*, 114 Or App 249, 252-53, 834 P2d 523 (1992) (an opportunity to object to *ex parte* contact disclosures after the record closed at the meeting where final action was taken was ephemeral and inadequate).

B. Failure to Provide Petitioner an Opportunity to Rebut

ORS 197.763 governs quasi-judicial land use proceedings. While it sets out a relatively structured step-by-step procedure for quasi-judicial hearings and post-hearing actions, local governments sometimes deviate slightly from rigid adherence to the proscribed procedures, most frequently to avoid delays that might prevent the local government from issuing its final decision within the statutory deadlines for final decisions on applications for permits. ORS 215.427 (counties); 227.181 (cities). So long as the deviation from statutory procedures does not deny a party a substantial right the party has under the statutes, such deviations are permissible. *Van Nalts v. Benton County*, 42 Or LUBA 497, 506 (2002).

Under ORS 197.763(6)(a), if prior to the close of the *initial* evidentiary hearing a party requests an opportunity to submit additional evidence, a local government is obligated to either (1) continue the hearing or (2) leave the

record open for at least seven days to allow "for additional written evidence, arguments or testimony[.]"[4] As noted above, in his letter to the city council prior to the city council's June 7, 2017 hearing in this matter, petitioner asserted a right under ORS 197.763(6)(a) to an additional seven days to respond to any evidence that might be submitted by the school district at the June 7, 2017 hearing. However, at the time petitioner made that request, he had no such right under ORS 197.763(6)(a), because the planning commission's May 2, 2017 hearing was the *initial* evidentiary hearing in this matter, not the city council's subsequent June 7, 2017 hearing following petitioner's appeal. Nevertheless the city *may* grant a request for a continued hearing or open record period to submit additional evidence, even in circumstances where it may not be legally obligated to do so. ORS 197.763(4)(b); *Rice v. City of Monmouth*, 53 Or LUBA 55, 58-59 (2006). And in that circumstance, the city is obligated to carry out the continued hearing in accordance with ORS 197.763(6)(b) or (c). *See* n 2.

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[4] ORS 197.763(6)(a) provides:

> "*Prior to the conclusion of the initial evidentiary hearing*, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing pursuant to paragraph (b) of this subsection or leaving the record open for additional written evidence, arguments or testimony pursuant to paragraph (c) of this subsection." (Emphasis added.)

As we have noted, in granting petitioner's request for an open record period at the end of the June 7, 2017 hearing, the city obviated the need for the school district to request an opportunity to respond to petitioner's additional evidence, as provided in ORS 197.763(6)(c), and established a deadline of June 21, 2017 for the school district to rebut petitioner's new evidence.

Petitioner's June 14, 2017 letter is best characterized as legal argument rather than evidence, as the school district recognizes in its brief.[5] Regardless of the nature of petitioner's June 14, 2017 letter, the school district's right following submittal of that letter was a right to "respond to new evidence submitted during the period the record was left open." ORS 197.763(6)(c); *see* n 2. The "new written evidence" that the school district had a right to respond to was petitioner's June 14, 2017 letter. The right that the school district had under ORS 197.763(6)(c) did not include a right to go beyond that June 14, 2017 letter and offer legal argument and evidence to bolster its case generally in favor of granting the requested variance.

That the school district's June 20, 2017 letter presents *legal argument* that goes far beyond responding to anything in petitioner's June 14, 2017 letter is probably not a basis for remand, since the school district as applicant had a right to final legal argument that is not circumscribed by petitioner's legal

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[5] The school district argues: "[p]ursuant to ORS 197.763(6), petitioner requested an opportunity to submit additional evidence and argument but only submitted argument following the hearing on June 7, 2017." Intervenor-Respondent's Brief 3.

arguments in his June 14, 2017 letter. ORS 197.763(6)(e).[6] We see no reason why the school district could not present (1) its final legal argument along with (2) its response to the arguments and any evidence presented in petitioner's June 14, 2017 letter under ORS 197.763(6)(c).[7] But even if the school district's June 20, 2017 letter is accurately characterized as the applicant's final legal argument under ORS 197.763(6)(e), it may not include any "new evidence." *Freedman v. City of Grants Pass*, 57 Or LUBA 385, 393 (2008); *Brome v. City of Corvallis*, 36 Or LUBA at 234. And if the school district's June 20, 2017 letter is considered the response the school district was entitled to under ORS 197.763(6)(c), any rebuttal evidence attached to that June 20, 2017 letter must be limited to evidence to "respond to new evidence submitted during the period the record was left open." ORS 197.763(6)(c); *Landwatch Lane County v. Lane County*, ___ Or LUBA ___ (LUBA No. 2016-106, May 2, 2017), slip op at 10; *see* n 2.

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[6] ORS 197.763(6)(e) provides:

> "Unless waived by the applicant, the local government shall allow the applicant at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. The applicant's final submittal shall be considered part of the record, but shall not include any new evidence. This seven-day period shall not be subject to the limitations of ORS 215.427 or 227.178 and ORS 215.429 or 227.179."

[7] In fact, petitioner mistakenly characterizes the school district's June 20, 2017 letter as its final legal argument under ORS 197.763(6)(e).

The evidence attached to the school district's June 20, 2017 letter is clearly not limited to a response to the evidence submitted in petitioner's June 14, 2017 letter, even assuming for purposes of this opinion that some of the arguments presented in petitioner's June 14, 2017 letter can be characterized as evidentiary rather than merely legal argument. The city either should have rejected that additional evidence attached to the school district's June 20, 2017 letter, or given petitioner an opportunity to rebut that additional evidence. *Dept. of Transportation v. City of Eugene*, 38 Or LUBA 814, 838 (2000); *Brome v. City of Corvallis*, 36 Or LUBA at 234. The city erred in failing to take one of those courses of action. On remand the city must either reject the evidence attached to the school district's June 20, 2017 letter that goes beyond responding to petitioner's June 14, 2017 letter, or give petitioner an opportunity to rebut that additional evidence, before rendering its final opinion.

The first assignment of error is sustained.

C. Conclusion

Because we sustain the first assignment of error, the challenged decision must be remanded for the city to either (1) identify and reject all evidence included with the school district's June 20, 2017 submittal that goes beyond rebutting petitioner's June 14, 2017 letter or (2) allow petitioner an opportunity to rebut that evidence. Because the evidentiary record will change no matter which course the city chooses, we do not consider the remaining two

assignments of error, both of which challenge the evidentiary support for the challenged decision.

The city's decision is remanded.