BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ARLINGTON HEIGHTS
HOMEOWNERS ASSOCIATION,
Petitioner,

vs.

CITY OF PORTLAND,
Respondent,

and

OREGON HOLOCAUST MEMORIAL COALITION,
Intervenor-Respondent.

LUBA No. 2001-099

ORDER

MOTION TO ALLOW REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to respondent's and intervenor-respondent's (collectively respondents') motion to dismiss this appeal for lack of jurisdiction. We allow the motion and consider the reply brief. *See Boom v. Columbia County*, 31 Or LUBA 318, 319 (1996) (reply brief allowed where respondent challenges petitioner's standing and LUBA's jurisdiction).

MOTION TO DISMISS

Carlsen v. City of Portland, 36 Or LUBA 614 (1999) (*Carlsen I*) was our initial decision in this matter. *Carlsen I* was remanded to us by the Court of Appeals. *Carlsen v. City of Portland*, 169 Or App 1, 8 P3d 234 (2000) (*Carlsen II*). Following the Court of Appeals' remand in *Carlsen II*, we issued our final decision in *Carlsen v. City of Portland*, 39 Or LUBA 93 (2000) (*Carlsen III*), in which we remanded the city's decision based on a number of inadequacies in the city's findings. This appeal concerns the city council's decision following our remand in *Carlsen III*.

The challenged decision grants approval for intervenor to site, in Washington Park, a memorial to the victims of the Holocaust. The city moves to dismiss this appeal, arguing that *Carlsen II* and *Carlsen III* addressed and resolved petitioner's arguments concerning whether the disputed proposal is a permitted use in the city's Open Space zone and whether the Washington Park Master Plan (park master plan) constitutes a conditional use master plan under the city's zoning ordinance. Petitioner's two assignments of error in this appeal concern the park master plan and the memorial siting criteria, which do not constitute the kind of land use decision making criteria that are described in the statutory definition of "land use decision."[1] For that reason, the city argues that we do not have jurisdiction to review the challenged decision and must dismiss the appeal.

We rejected a similar argument in *Carlsen III*. All issues that the petitioner raised in *Carlsen I* concerning the city's zoning ordinance were resolved in the city's favor by *Carlsen II* and *III*. Nevertheless, LUBA did not dismiss the appeal or transfer the appeal to circuit court as the petitioner had requested in the event LUBA concluded that it did not have jurisdiction. We explained that under our statutory authority to review land use decisions for compliance with "applicable law," LUBA had jurisdiction to consider whether the appealed decision complied with the memorial siting policy and park master plan, even if those documents were not comprehensive plans or land use regulations. *Carlsen III*, 39 Or LUBA at 98-100.

For similar reasons, we deny respondents' motion to dismiss this appeal. On remand, the city did not adopt a decision that was limited to responding to the issues we identified in *Carlsen III* regarding the park master plan and the memorial siting criteria. Had the city so

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[1]If the challenged decision is a land use decision, LUBA has exclusive jurisdiction to review the decision. ORS 197.825(1). As relevant here, the city's decision is a land use decision if it is "final" and it "concerns the * * * application of" "[t]he [statewide planning] goals," "[a] comprehensive plan provision" or "[a] land use regulation." ORS 197.015(10)(a)(A). There is no dispute that the challenged decision is final. However, there is also no dispute that the park master plan and memorial siting criteria are not comprehensive plan provisions or land use regulations. *Carlsen II*, 169 Or App at 16; *Carlsen III*, 39 Or LUBA at 106-07.

limited its decision, respondents' motion might have merit. What the city actually did following our remand is readopt its prior decision with additional findings that are included in that decision and distinguished from the prior decision by italic type.[2] Therefore, the challenged decision applies the city's zoning ordinance and, for that reason alone, the Court of Appeals' decision in *Carlsen II* already has established that the challenged decision is a land use decision.[3]

Respondents appear to be correct that the petition for review includes no argument that the challenged decision violates the statewide planning goals or the city's comprehensive plan, the zoning ordinance or any other city land use regulation. Respondents also appear to be correct that in the current posture of this case, any such arguments have been waived under *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), even if they were presented in the petition for review. However, just because petitioner may be barred in this appeal from continuing to challenge the part of the city's supplemental decision applying the city's zoning ordinance does not mean that the supplemental decision does not apply the zoning ordinance. The supplemental decision does apply the zoning ordinance and, for that reason, is a land use decision. For essentially the same reasons that that we provided in *Carlsen III*, we therefore have jurisdiction to consider petitioner's arguments related to the park master plan, the memorial siting criteria and the procedures the city followed on remand in considering those issues.

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[2]As petitioner notes, the original decision was nine pages long, the supplemental decision is 20 pages long. Record 1-9; Remand Record 10-29. The supplemental decision includes the following:

> "*The language appearing in this Supplemental decision in regular type is the language of the City Council's initial decision which was the subject of the prior LUBA review. The language appearing in italics has been added by the City Council in response to the issues remanded by LUBA. <u>The combined language constitutes the Council's supplemental decision and responds to LUBA's remand</u>*." Remand Record 10 (italics in original, underlining added).

[3]Based on our conclusion in *Carlsen III* that the city correctly applied its zoning ordinance to determine that the disputed park master plan is not a conditional use master plan, it is also a land use decision for that reason.

SAIF v. Shipley, 326 Or 557, 955 P2d 244 (1998), cited by respondents in their response to petitioner's motion to take evidence not in the record, does not alter our conclusion that we have jurisdiction over this appeal.[4] The jurisdictional question in *Shipley* was determined by the nature of the claim. Where the nature of the claim changed during the administrative proceedings to a medical services dispute, the Supreme Court concluded that the Workers' Compensation Board lost jurisdiction over the claim. Here, by contrast, the question of our jurisdiction does not turn on the nature of the issues presented by petitioner. Rather the question of our jurisdiction turns on the nature of the *decision* that is appealed. As relevant in this appeal, the question is whether the challenged decision applies a land use regulation. As we have explained, the challenged decision does apply a land use regulation. Because it does so, it is a land use decision subject to our review for compliance with "applicable law." *Carlsen III*, 39 Or LUBA at 99.

The motion to dismiss is denied.

MOTION TO TAKE EVIDENCE NOT IN THE RECORD

A. Introduction

Our evidentiary scope of review is generally limited to the local record. ORS 197.835(2)(a). ORS 197.835(2)(b) does provide that we may consider evidence that is not in the record and make any required findings of fact where there are "procedural irregularities not shown in the record that, if proved, would warrant reversal or remand * * *."

Petitioner contends that there are such disputed allegations of fact, which, if resolved in petitioner's favor, would warrant reversal or remand. In petitioner's first assignment of error, petitioner argues that the city erred by failing to provide it with an opportunity to present argument and evidence to the city council, following LUBA's remand in *Carlsen III*.

[4]Petitioner moves to strike the additional jurisdictional arguments because they were not presented in respondent's original motion to dismiss. Petitioner contends, correctly, that such additional arguments are not specifically allowed by our rules. Nevertheless, because they concern the issue of our jurisdiction, a question that will almost certainly arise in any appeal of our decision in this matter, we elect to consider those additional arguments.

In support of the first assignment of error, petitioner advances three separate legal theories. The motion for evidentiary hearing is based on respondents' response to two of those legal theories. We discuss those legal theories below and address petitioner's arguments concerning certain disputed factual allegations surrounding those legal theories.

B. Right to Rebut Findings Prepared by Intervenor-Respondent

Petitioner contends the findings that the city adopted in this case were drafted by intervenor-respondent.[5] Citing *DLCD v. Crook County*, 37 Or LUBA 39 (1999), petitioner contends it had a right to rebut those proposed findings and that the city erred by failing to provide an opportunity to rebut the proposed findings.

DLCD v. Crook County is inapposite. In that case the county elected to conduct a hearing on remand and failed to provide notice of the hearing to the petitioner who had prevailed in the initial appeal to LUBA. In those proceedings on remand, the applicant was permitted to submit a "Supplemental Burden of Proof Statement," which included additional evidence as well as proposed findings. The county's error in that case was allowing a hearing following remand where the applicant was permitted to submit argument and evidence, without taking appropriate steps to provide the petitioner the same opportunity.

Returning to the facts in this case, petitioner's underlying premise that it has a right to rebut proposed findings is incorrect. *Sorte v. City of Newport*, 26 Or LUBA 236, 244-45 (1993); *Adler v. City of Portland*, 24 Or LUBA 1, 12 (1992). Petitioner has no right to rebut findings that may have been proposed by intervenor following our remand in *Carlsen III*. It

[5]Petitioner bases this contention on a March 8, 2001 letter from the city to the parties that indicates that one of the city councilors asked that intervenor prepare revised findings to respond to the issues LUBA identified in *Carlsen III*. Citing discussion on pages 31 and 32 of the remand record and communications from the city attorney's office on pages 33 and 34 of the remand record, the city contends it is clear that the city attorney prepared the findings. The city further argues that "assuming for the sake of argument the [intervenor] prepared a draft set of findings, the record is clear that the findings that were ultimately presented to and adopted by the [City] Council originated with the City Attorney's Office." Respondent's Brief 25. The city further clarifies in an affidavit attached to respondents' response to petitioner's motion to take evidence that an attorney in the city attorney's office asked the attorney for intervenor to prepare draft findings and then edited those findings before sending the findings to the city council.

therefore follows that an evidentiary hearing is unnecessary to establish whether intervenor drafted the findings the city adopted on remand, and gave them to the city attorney. Even if petitioner can establish that such is the case, it would provide no basis for reversal or remand.

C. Right to Present Argument and Evidence to Respond to New and Changed Interpretations

In *Gutoski v. Lane County*, 155 Or App 369, 963 P2d 145 (1998), the Court of Appeals agreed with LUBA that "in certain limited situations" it might be reversible error for a local government to refuse to reopen its local evidentiary hearing to allow "additional evidence and/or argument responsive to the decisionmaker's interpretations of local legislation * * *." 155 Or App at 373. The Court of Appeals went on to provide the following explanation of the circumstances in which this obligation might be present:

> "* * * We also agree with LUBA, however, that *at least* two conditions must exist before it or we may consider reversing a land use decision on that basis. First, the interpretation that is made after the conclusion of the initial evidentiary hearing must either significantly change an existing interpretation or, for other reasons, be beyond the range of interpretations that the parties could reasonably have anticipated at the time of their evidentiary presentations. Second, the party seeking reversal must demonstrate to LUBA that it can produce specific evidence at the new hearing that differs in substance from the evidence it previously produced and that is directly responsive to the unanticipated interpretation." 155 Or App at 373-74 (emphasis in original; footnote omitted).

As petitioner recognizes, whether the principle described in *Gutoski* even applies in this case is an issue that we may or may not have to reach in our decision on the merits.[6] For purposes of this order we will assume that *Gutoski* applies. We will further assume the first

[6]The procedural posture in *Gutoski* was different from the present appeal. In *Gutoski*, the county's initial decision had been remanded for failure to apply a relevant comprehensive plan policy. The county *provided* an evidentiary hearing following LUBA's remand and adopted a new decision. In doing so, the petitioners argued the county interpreted the plan policy in a way that they could not have anticipated. The petitioners contended they could not know what evidence and argument to present until the meaning of the policy was known. Here, the alleged error was the city's failure to provide *any* opportunity for petitioner to present argument or evidence following remand in *Carlsen III*. Petitioner's third legal theory under the first assignment of error is based on this difference and petitioner's position that it enjoys a broader right under *Morrison v. City of Portland*, 70 Or App 437, 689 P2d 1027 (1984) to present argument and additional evidence following a LUBA remand, a right that petitioner argues is not affected by *Gutoski*.

Gutoski condition (significant change in an existing interpretation or an interpretation that could not be anticipated) is not an issue.[7] Given these assumptions, the question becomes whether petitioner has sufficiently identified the "specific evidence" that petitioner would have provided to the city if it had been given a chance and that such "specific evidence" would directly respond to the "unanticipated interpretation." *Id*.

Petitioner submitted a letter to the city in which it requested an opportunity to present argument and evidence to city council. The city rejected that request without considering it on the merits. Remand Record 31-32. Therefore, to the extent petitioner was required to make such a request locally to preserve its right to argue error under *Gutoski*, petitioner did so.

However, there is no requirement under *Gutoski* that petitioner must move for an evidentiary hearing at LUBA so that it can actually present to LUBA the same evidence that it would submit to the city if given a chance.[8] We agree with petitioner that the burden to comply with the second *Gutoski* condition is essentially a burden to describe or identify the evidence that petitioner *would* submit to the city. There is no reason why the required demonstration under the second *Gutoski* condition cannot be met by including in the petition for review a description of the evidence that petitioner would submit to the city if given a chance. Petitioner included such a description in the petition for review and has elaborated somewhat on that description in the motion for evidentiary hearing.[9] Petitioner and respondents simply disagree about whether petitioner's descriptions of that evidence are

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[7]We caution the parties that these assumptions should not be taken as any indication of our position concerning whether one or more of petitioner's arguments that the challenged decision includes significantly changed or unforeseeable interpretations actually demonstrates compliance with the first *Gutoski* condition.

[8]Petitioner argues that such a burden should not be imposed under *Gutoski*. Petition for Review 21 n 14; Petitioner's Motion to Take Evidence Not in the Record 3 n 4.

[9]Presumably the evidence that petitioner would have submitted to the city was either contained in the May 24, 2001 letter that it sent to the city, which the city rejected, or was to be submitted at the hearing if petitioner was successful in its attempts to obtain a hearing on remand. We assume that evidence is what petitioner describes in its petition for review and motion for evidentiary hearing.

adequate to satisfy the second condition under *Gutoski*. That is essentially a question of law. Because we agree with petitioner that it is only required to *describe* the evidence to LUBA, not actually present that evidence to LUBA, we do not agree an evidentiary hearing is warranted.

The motion to consider evidence not in the record is denied.

ORAL ARGUMENT

Our October 26, 2001 order suspended this appeal and cancelled oral argument. By separate letter issued this date, oral argument is rescheduled for December 6, 2001. Pursuant to ORS 197.840(b), the statutory deadline for the Board to issue its final opinion and order in this matter is extended to December 14, 2001.

Dated this 26th day of November, 2001.

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Michael A. Holstun
Board Member