

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RITA THOMAS, SOC, INC. and
PAUL GREINER,
Petitioners,

vs.

CITY OF TURNER,
Respondent,

and

CALPINE CORPORATION,
Intervenor-Respondent.

LUBA No. 2001-170

ORDER

Before us are petitioners' record objection and Calpine Corporation's motion to intervene and record objection.

MOTION TO INTERVENE

Calpine Corporation (intervenor) moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

RECORD OBJECTIONS

Petitioners appeal a May 29, 2001 letter by the city administrator where, pursuant to Turner Land Use Development Code (LUDC) 1.170(2) and 3.200(1), the city administrator determined that intervenor's proposed gas fired turbine electrical generating facility is conditionally allowed in the city's Light Industrial (M-1) zone.¹

¹LUDC 1.170(2) provides, in relevant part:

“* * * An Administrative Decision is a decision by the City Administrator with notification of actions taken provided to the Planning Commission and City Council.

“(a) The City Administrator shall have the initial authority and responsibility to interpret all terms, provisions, and requirements of [the LUDC].”

1 As stated above, both petitioners and intervenor object to the 21-page record the city
2 submitted to LUBA. Petitioners object to the inclusion of all of the items that post-date the
3 May 29, 2001 letter. According to petitioners, those items should not be in the record, as they
4 were not placed before the decision maker during the course of the proceedings leading to the
5 city administrator's decision.

6 Intervenor argues that the record is deficient because it does not include items related
7 to intervenor's proposal.² Intervenor argues that the items it seeks to include in the record
8 should be included because they tend to show that the city administrator's decision was not
9 made in isolation and, in fact, that the city council was involved in decisions pertaining to
10 intervenor's proposal. Intervenor contends that including the requested items in the record at
11 this juncture is appropriate because the items tend to show that the facility had been a major
12 topic of civic discussion within the city for several months both before and after the May 29,
13 2001 letter.³ In response to petitioners' record objection, intervenor argues that the
14 challenged items (1) reflect that the city council was apprised of the city administrator's
15 action, as is required by LUDC 1.170(2)(a); and (2) are necessary for LUBA to undertake a
16 complete review of the city's actions in response to the proposed facility.

17 Petitioners oppose intervenor's objection, contending that intervenor has not argued
18 that the items intervenor asks be included in the record were actually placed before the city

LUDC 3.200(1) provides:

“An Administrative Decision is a decision that correlates the adopted code or ordinance requirements and standards to an individual issue. These interpretations are usually provided by the City Administrator or designee.”

²Attached to intervenor's record objection are copies of most of the items it argues should be included in the record, including (1) correspondence from the Oregon Office of Energy pertaining to an expedited review of the proposed facility; (2) correspondence and minutes of the city council and planning commission regarding intervenor's proposal; (3) articles of incorporation for petitioner SOC, Inc.; (4) correspondence from petitioner Thomas to residents of the City of Turner; (5) correspondence from one of the incorporators of SOC, Inc. to the Oregon Energy Facility Siting Council regarding the proposed facility; and (6) excerpts from local papers and newsletters where intervenor's proposal is discussed.

³Intervenor also contends that the additional items provide necessary background for LUBA to review when it decides a motion to dismiss that intervenor plans to file.

1 during its proceedings on the application, prior to its May 29, 2001 decision. Intervenor also
2 requests a telephone conference to discuss the record objections. The city submitted a letter
3 to LUBA, stating that it will not respond to either party's challenge, and we do not believe
4 that a telephone conference is necessary to resolve the parties' objections. Accordingly, we
5 resolve the record objections as follows.

6 OAR 661-010-0025(1) provides, in relevant part, that the record before LUBA
7 includes:

8 "(a) The final decision including any findings of fact and conclusions of
9 law;

10 "(b) All written testimony and all exhibits, maps, documents or other
11 written materials specifically incorporated into the record or placed
12 before, and not rejected by, the final decision maker, during the course
13 of the proceedings before the final decision maker.

14 "(c) Minutes and tape recordings of the meetings conducted by the final
15 decision maker as required by law, or incorporated into the record by
16 the final decision maker. * * *

17 "(d) Notices of proposed action, public hearing and adoption of a final
18 decision, if any, published, posted or mailed during the course of the
19 land use proceeding[.] * * *"

20 The notice of intent to appeal challenges

21 "that land use decision * * * which is contained in that certain letter from the
22 City Administrator dated May 29, 2001[.] * * * This land use decision
23 interpreted the [LUDC] in such a way [as] to allow a gas fired turbine
24 electrical generating facility in the M-1 (Industrial Zone). * * *"

25 Notice of Intent to Appeal 1.

26 It is clear from the notice of intent to appeal that petitioners challenge a purported
27 decision by the city administrator, and not any action by the city council or other entity.
28 Therefore, those items, if any, that were placed before the city administrator in the course of
29 the proceedings before the city administrator are properly included in the record. In this case,
30 petitioners argue, and intervenor does not appear to dispute, that the only item "placed
31 before" the city administrator within the meaning of OAR 661-010-0025(1)(b) is a letter

1 from intervenor’s attorney, dated May 23, 2001, requesting that the city administrator
2 interpret the LUDC pursuant to the authority granted by LUDC 1.170(2) and 3.200(1). *See n*
3 1.

4 In addition, pursuant to LUDC 1.170(2), the city administrator must inform the city
5 planning commission and the city council that the city administrator has taken actions in
6 accordance with the LUDC. We believe that the June 11, 2001 “Council Update Report” at
7 Record 16 is properly included in the record as a “notice of proposed action [or] final
8 decision mailed * * * during the course of the land use proceeding” because it demonstrates
9 that the May 29, 2001 letter was sent to the city council in accordance with LUDC 1.170(2).
10 OAR 661-010-0025(1)(d). All other items that are included in the record filed by the city are
11 not properly before us.

12 Petitioners’ record objection is sustained, in part. Intervenor’s record objection is
13 denied. We realize that the short record may make it difficult for the Board to perform its
14 review function. However, as we have stated before, items may not be added to the local
15 record that is submitted to LUBA merely because they are relevant or have probative value
16 with regard to the challenged decision. *Home Builders Assoc. v. City of Wilsonville*, 29 Or
17 LUBA 604, 605 (1995). Also, to the extent intervenor contends evidence that is not in the
18 record needs to be considered by LUBA in order to decide a motion to dismiss, that evidence
19 may be attached to the motion to dismiss. If any party objects to our consideration of such
20 evidence in resolving the motion to dismiss, intervenor may file a motion to take evidence
21 not in the record, pursuant to OAR 661-010-0045.⁴

22 The record is settled as of the date of this order. The petition for review is due 21
23 days from the date of this order. Response briefs are due 42 days from the date of this order.

⁴Absent some objection from the parties, LUBA has considered documents attached to motions that challenge the Board’s jurisdiction or petitioner’s standing without requiring that those documents be presented in a motion to take evidence not in the record. *Leonard v. Union County*, 24 Or LUBA 362, 377 (1992); *Hemstreet v. Seaside Improvement Comm.*, 16 Or LUBA 630, 631-33 (1988).

1
2
3
4
5
6
7

Dated this 3rd day of January, 2002.

Anne Corcoran Briggs
Board Chair