BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WEST SIDE RURAL FIRE
PROTECTION DISTRICT,
Petitioner,

vs.

CITY OF HOOD RIVER,
Respondent.

LUBA No. 2002-055

ORDER ON RECORD OBJECTIONS

Petitioner challenges an ordinance adopted by the city that annexes certain property into the city. On June 14, 2002, petitioner filed an objection to the record that was filed by the city in this appeal. On July 1, 2002, the city filed a supplemental record that responded to some of the objections raised by petitioner. On July 11, 2002, the parties stipulated to an extension of time for the city to file its response to the remaining objections. On October 17, 2002, the city filed its response.

Petitioner's June 14, 2002 objection contends that the record does not contain three items that were placed before the decision makers during the proceedings below. The first item, minutes from the April 8, 2002 city council hearing, is included in the July 1, 2002 supplemental record. With regard to the second and third items, the initial record identifies those items as difficult-to-duplicate items that will be retained by the city until oral argument (Exhibits A and B).[1] However, petitioner argues that those items are not difficult to duplicate

[1] OAR 661-010-0025 provides in relevant part:

"(2) * * * The [local government] may * * * retain any large maps, tapes, or difficult-to-duplicate documents and items until the date of oral argument. * * *

"* * * * *

"(4) Specifications of Record:

and, therefore, the city should be required to include those items in the main record. The city agrees as to Exhibit B, and has included a copy of that document in the supplemental record.

However, with respect to Exhibit A, the city argues that the document pertains to related proceedings and was erroneously included in the city's record of this appeal. According to the city, Exhibit A was never placed before the city council during the proceedings that led to the present appeal and, therefore, should not have been included in the record.[2] In the absence of some argument by petitioner that the disputed document was placed before the decision maker during the proceedings that led to this appeal, we agree with the city that Exhibit A should not be included in the record.

Finally, petitioner argues that the record erroneously includes a document described as "Findings and Decision" that supports the challenged decision. Record 14-25. According to petitioner, the disputed document was not presented to the city council until after the council adopted the ordinance challenged in this appeal. Petitioner argues that the document should be stricken from the record.

The city does not respond to petitioner's argument that the disputed document was presented after the ordinance challenged in this appeal was adopted. The city does argue that the item may be included in the record because the challenged decision was the result of a legislative proceeding and, therefore, the city may adopt findings in support of its decision

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"(a) The record, including any supplements or amendments, shall:

"* * * * *

"(B) Begin with a table of contents, * * * listing each large map, tape, item or document retained by the [local government] under [OAR 661-010-0025(2).]"

[2] OAR 661-010-0025(1)(b) provides, in relevant part, that the record includes:

"All written testimony and all * * * other written materials specifically incorporated into the record or placed before, and not rejected by, the final decision maker, during the course of the proceedings before the final decision maker."

after the fact. The city contends that only its quasi-judicial decisions must include findings in support of the city's decision at the time the decision is adopted.

The city is mistaken. We understand that the challenged decision was reduced to writing and signed by the city council on April 8, 2002. The challenged decision states, in relevant part:

> "[T]he City Council incorporates by reference the findings of fact and conclusions of law into this Ordinance as if fully set forth herein[.]" Record 3.

Apparently the city takes the position that because the challenged ordinance contains a reference to findings, those findings are incorporated into the decision notwithstanding that the findings were not prepared until after the city council's decision was signed and became final and appealable to LUBA.

Our rules identify a few post-decision documents that may be included in the local government record. Our rules specifically allow inclusion of minutes and transcripts. OAR 661-010-0025(1)(c). Provided those minutes or transcripts are of a meeting or hearing that pertained to and preceded the final decision or are of the meeting or hearing where the final decision was adopted, the fact that the minutes or transcripts were prepared after the challenged decision would not make it improper to include such minutes or transcripts in the record filed with LUBA. Our rules also specifically require that the local government include notices of certain post-acknowledgment land use decisions that are sent to the Department of Land Conservation and Development after the decision is adopted. OAR 661-010-0025(1)(d). In addition, any affidavits of published, posted or mailed notice are to be included in the record and might post-date the decision. However, with those exceptions, our rules do not permit expansion of the record of a land use decision to include documents that were created after the appealed land use decision was reduced to writing, signed and became final for purposes of appeal. Therefore, the subject of petitioner's record objection is only properly included in the record in this appeal if it is properly viewed as part of the challenged decision itself.

It is common practice for a local government to adopt a tentative decision and thereafter adopt findings to support that tentative decision as part of its final written decision. *Citizens for Resp. Growth v. City of Seaside*, 23 Or LUBA 100, 115, *aff'd* 114 Or App 233, 832 P2d 1279, *rev'd and rem'd on other grounds* 116 Or App 275, 840 P2d 1370 (1990). However, as we have already noted, that is not what happened here. In this case the city adopted a *final* decision and only later prepared supporting findings. The Court of Appeals has held that the findings that are required by law to support a quasi-judicial land use decision may not be prepared and adopted *after* the quasi-judicial land use decision is adopted and becomes final for purposes of appeal. *Heilman v. City of Roseburg*, 39 Or App 71, 74-76, 591 P2d 390 (1979). There is no generally applicable statutory, statewide planning goal or administrative rule requirement that *legislative* land use decisions must in all cases be supported by findings. *Riverbend Landfill Company v. Yamhill County*, 24 Or LUBA 466, 472 (1993).[3] However, where a local government wishes to adopt findings to support a legislative land use decision, they must be adopted prior to or at the same time the legislative land use decision is adopted and becomes final for purposes of appeal. Because the disputed findings post-date the appealed decision they are not part of the appealed decision and are not properly included in the record in this appeal.

Petitioner's objections with respect to the April 8, 2002 minutes and Exhibit B are moot, as those items have been included in the city's supplemental record. Petitioner's objection with respect to Exhibit A is denied. Petitioner's objection with regard to the

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[3] However, the Court of Appeals recently clarified that even legislative land use decisions, in some circumstances, may require supporting findings:

> "* * * We note that there are some instances where controlling statutes, rules, or ordinances specifically require findings to show compliance with applicable criteria. Also, to permit LUBA and us to exercise our review functions, there must be enough in the way of findings or accessible material in the record of the legislative act to show that applicable criteria were applied and that required considerations were indeed considered." *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d 962 (2002).

"Findings and Decision" found at Record 14 through 25 is sustained. Petitioner's motion to strike pages 14-25 of the record is allowed.

The record is settled as of the date of this order. The petition for review is due 21 days from the date of this order; the response brief is due 42 days from the date of this order. The Board's final opinion and order is due 77 days from the date of this order.

Dated this 7th day of November, 2002.

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Anne Corcoran Briggs
Board Member