BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CHARLES WIPER, INC.,
Petitioner,

vs.

CITY OF EUGENE,
Respondent.

LUBA Nos. 2002-131 and 2002-132

ORDER

Before the Board are the city's motion to dismiss LUBA No. 2002-132, petitioner's objections to the record in LUBA No. 2002-131, and a motion to strike a portion of petitioner's reply to the city's response to petitioner's record objections.

MOTION TO DISMISS

The decision appealed in LUBA No. 2002-131 is a September 13, 2002 letter from the city planning director rejecting petitioner's conditional use permit application (hereafter, CIR-CUP application) to construct controlled income and rent housing on part of a larger unit of property that contains a cemetery. The September 13, 2002 letter rejects petitioner's permit application on the grounds that it fails to address alleged conflicts between the proposed use and an existing conditional use permit that governs the cemetery (Rest Haven CUP). That letter concludes with the following:

> "Based on statements in your application material, the City recognizes that you disagree with the conclusion described in this letter. To facilitate quick resolution to this disagreement, you should consider this letter to be a final land use decision, appealable to the Land Use Board of Appeals." Record (LUBA No. 2002-131) 7.

Petitioner's attorney responded with a September 16, 2002 letter, requesting that the city reconsider its rejection of the CIR-CUP application. Petitioner offered to provide

supplemental evidence to the city to address the alleged conflicts between the proposed use and the existing Rest Haven CUP.

On September 23, 2002, a city associate planner responded, rejecting petitioner's request to reconsider the September 13, 2002 letter. The September 23, 2002 letter states, in relevant part:

> "In your recent letter to the Planning Director * * * you requested that the City reconsider its rejection of the CIR-CUP application for Cathedral Park. The City has considered your request, and stands by the rejection as a final land use decision in this matter.
>
> "We understand that you are eager to receive the City's response to your request; therefore, in [the Planning Director's absence] I am sending this response to you. The City's September 13, 2002 rejection of the CIR-CUP application is the final decision in this matter." Motion to Dismiss, Ex C.

The decision appealed in LUBA No. 2002-132 is the associate planner's September 23, 2002 letter. Petitioner filed timely appeals of both letters to LUBA. On October 10, 2002, LUBA consolidated LUBA Nos. 2002-131 and 132 for our review, as they are closely related decisions.

The city moves to dismiss LUBA No. 2002-132, on the grounds that the September 23, 2002 letter is not a land use decision subject to LUBA's jurisdiction. According to the city, the September 23, 2002 letter identifies the September 13, 2002 letter as the city's final decision on petitioner's permit application and, therefore, the September 23, 2002 letter cannot be the final decision on the application. The city also contends that its code has no express provisions for reconsideration of decisions. Therefore, the city argues, the September 23, 2002 letter does not concern the application of any comprehensive plan provision or land use regulation, and is not a "land use decision" as defined at ORS 197.015(10).[1] The city also argues that the September 23, 2002 letter is not land use

[1] ORS 197.015(10)(a)(A) defines "land use decision" in relevant part to include:

> "A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

decision because the city associate planner who signed the September 23, 2002 letter is not authorized to make land use decisions. The city requests that LUBA No. 2002-132 be dismissed.

In the alternative, the city argues that LUBA No. 2002-132 should be bifurcated from LUBA No. 2002-131, in order to keep the records of the two decisions separate and distinct. The city notes that the record in LUBA No. 2002-131 has already been filed. According to the city, the record in LUBA No. 2002-132 will consist at most of a few documents that postdate the decision in LUBA No. 2002-131.

Petitioner responds that the September 23, 2002 letter is a land use decision. According to petitioner, notwithstanding the absence of any code provisions that expressly authorize reconsideration, the city in fact considered the merits of the reconsideration request and made a decision to stand by its September 13, 2002 decision. Petitioner contends that the September 23, 2002 decision is a final decision on his reconsideration request.

The September 23, 2002 letter is, or appears to be, a *final* decision on petitioner's reconsideration request. However, petitioner does not identify any statewide planning goals, comprehensive plan provisions or land use regulations that the September 23, 2002 decision applied or should have applied. The closest petitioner comes is to argue that, in considering his reconsideration request, the associate planner necessarily applied the same standards the planning director applied in rejecting petitioner's application. Petitioner contends that if the September 13, 2002 rejection of petitioner's application is a land use decision, which the city does not dispute, then the September 23, 2002 decision that reconsiders that rejection is also a land use decision for the same reason.

"(i) The goals;

"(ii) A comprehensive plan provision;

"(iii) A land use regulation[.]"

In *Bowen v. City of Dunes City*, 28 Or LUBA 324, 331 (1994), we found that a decision denying reconsideration of an earlier decision was not itself a land use decision, because the local government's plan and code contained no provisions for reconsideration, and the decision did not involve the application of any goals, comprehensive plan provisions or land use regulations. In *Hausam v. City of Salem*, 40 Or LUBA 234, 237-38, *rev'd and rem'd on other grounds* 178 Or App 417, 37 P3d 1039 (2001), the local code contained no procedures or standards to address requests for reconsideration, but did expressly authorize the local government to entertain a request for reconsideration. In that circumstance, we held, a decision denying a request for reconsideration is an exercise of the local government's authority under its land use regulations, and is thus a land use decision.

In the present case it is undisputed that the city's code contains no express authorization to reconsider land use decisions, so the rationale described in *Hausam* has no application. Notwithstanding that lack of express authorization for city planning staff to reconsider previously adopted land use decisions, if city planning staff nevertheless reconsidered a previously adopted land use decision, and in the process applied one or more statewide planning goals, a comprehensive plan provision or a land use regulation, the reconsidered decision would be a land use decision once it became final.

However, we do not understand the city's September 23, 2002 letter to be such a decision. Although the September 23, 2002 letter states that "[t]he City has considered your request," the import of that statement is not that the city has granted the reconsideration request and reconsidered the merits of the September 13, 2002 decision. It is reasonably clear that the September 23, 2002 letter summarily denies the reconsideration request without reconsidering the merits of the September 13, 2002 decision. At best, the reference to the city having "considered your request" means that the associate planner considered petitioner's *arguments* for reconsideration stated in petitioner's September 16, 2002 request.

However, nothing in petitioner's September 16, 2002 request cites to a statewide planning goal, comprehensive plan provision or land use regulation.

Accordingly, we agree with the city that we lack jurisdiction over the September 23, 2002 decision. LUBA No. 2002-132 will be dismissed as part of our final opinion and order in this consolidated appeal.

MOTION TO STRIKE REPLY MEMORANDUM

On November 25, 2002, petitioner filed a reply to the city's response to petitioner's record objection. The city now moves to strike section 1 of that reply, arguing that it simply elaborates on arguments made in petitioner's record objection. According to the city, LUBA's practice is to allow reply memoranda only when they are limited to new issues raised in a response memorandum. *Frevach Land Company v. Multnomah County*, 38 Or LUBA 729, 732 (2000).

We agree with the city that section 1 of petitioner's November 25, 2002 reply memorandum does not address any new issue raised in the city's response. Therefore, we will disregard section 1 of petitioner's reply.

RECORD OBJECTIONS

Petitioner objects to the accuracy of the record filed in LUBA No. 2002-131, arguing that it (1) includes items that were not placed before the final decision maker, contrary to OAR 661-010-0026(2)(b), and (2) is not organized in inverse chronological order, as required by OAR 661-010-0025(4).

A. Items Included in the Record

The record includes 25 items, and seven oversized exhibits (A through G). Item 16 is the CIR-CUP application that the city rejected in its September 13, 2002 decision. Items 1 through 15 postdate the CIR-CUP application, and appear to be related to that application. Items 17 through 25 predate the CIR-CUP application, and appear to concern the 1995 Rest

Haven CUP, and a 1999 tree felling permit. Similarly, oversize exhibits D, F and G appear to relate to the 1995 and 1999 decisions rather than the present decision.

Petitioner objects to the inclusion of any item in the record that was not "placed before" the planning director, the final decision maker in this case. OAR 661-010-0025(1)(b). According to petitioner, it is not clear that any item in the record, other than the decision itself, was before the planning director. Petitioner states that its legal counsel physically inspected the city's file on the CIR-CUP application on October 1, 2002, and at that time the city's file did not include items 17 through 25, or oversize exhibits D, F and G. Petitioner expresses its suspicion that the city has bolstered its record after the fact with selected documents from the Rest Haven CUP file and the tree permit file and that those documents were not before the planning director when she made her decision.

Petitioner requests that at least items 17 through 25, and oversize exhibits D, F and G, be removed from the record. In the alternative, petitioner argues that the entire planning files from the 1995 Rest Haven CUP and 1999 tree permit decisions be included in this record. Contingent on the city's responses to petitioner's record objections, petitioner moves to take evidence not in the record pursuant to OAR 661-010-0045, by means of the depositions of two city planners, in order to establish what documents were before the final decision maker.

The city responds, first, by expressing its understanding that petitioner does not dispute inclusion of items 1 through 16, and oversize exhibits A, B, C and E. Even if the city misunderstands petitioner on this point, the city argues, any objection to these documents should be denied, because petitioner does not advance any specific challenges to these items. In a reply, petitioner clarifies that it objects to items 3 through 16, and exhibits A, B, C and E, based on its larger argument that the city has failed to demonstrate that any of the record documents, other than the decision itself, were before the final decision maker.

The September 13, 2002 letter states that, after reviewing the CIR-CUP application and certain other materials, including the application materials for the Rest Haven CUP, the

city determined that it cannot accept the CIR-CUP application, because the CIR-CUP application failed to address alleged conflicts with the Rest Haven CUP. Although the city does not come out and say it, we understand the city to take the position that the planning director reviewed items 3 through 16, and exhibits A, B, C and E, which are all documents related to the CIR-CUP application found in the city's file on that application, in making the September 13, 2002 decision to reject the application. Petitioner offers no reason to conclude otherwise. Accordingly, we conclude that items 3 through 16, and exhibits A, B, C and E, are properly part of the record.

Second, the city points out that the September 13, 2002 decision specifically refers to items 18-20 and 25, and quotes from exhibit D. Therefore, the city argues, it is apparent that the planning director reviewed those documents in reaching her decision. Again, petitioner offers no basis to conclude otherwise. We agree with the city that items 18-20, 25 and exhibit D are properly part of the record.

Item 17 and exhibit F are the 1999 tree felling permit and an associated map, respectively. Items 21-24 consist of a staff memorandum, hearings officer minutes, staff notes, and a letter, all related to the 1995 Rest Haven CUP. Exhibit G is a site plan related to the 1995 Rest Haven CUP. The planning director's September 13, 2002 decision does not refer to these documents, and the city advances no reason to believe the planning director reviewed them in the course of reaching her decision. The city's position on whether these documents were placed before the planning director is, at best, ambivalent. In most circumstances, and certainly under the facts of this case, the city is in the best position to know what documents were actually placed before the final decision maker. Given the city's failure to demonstrate otherwise, we conclude that items 17, 21-24 and exhibits F and G are not properly part of the record.

Petitioner's objections to items 17, 21-24 and exhibits F and G are sustained. Petitioner has not established that an evidentiary proceeding under OAR 661-010-0045 is

warranted to establish the content of the record, and therefore petitioner's contingent motion under that rule is denied.

B. Inverse Chronological Order

The record is organized based on document date, that is, the most recent dated documents appear first and the oldest dated documents appear last. Petitioner contends that the "inverse chronological order" requirement at OAR 661-010-0025(4)(a)(E) means that the record should be arranged in the order in which documents entered the record, not according to the date the documents were created. Applying that principle, petitioner argues, the last item in the record should be the 2002 CIR-CUP application, not the items from the 1995 Rest Haven CUP, which presumably "entered" the record only when the planning director reviewed them.

Petitioner is generally correct that the purpose of the OAR 661-010-0025(4) requirement that the record be arranged in "inverse chronological order" is "to facilitate review by requiring that the record be arranged in a coherent order reflecting the chronological progress of the application or proceedings." *Sequoia Park Condo Assoc. v. City of Beaverton*, 34 Or LUBA 808, 812 (1998). As we noted in that case, in the usual course of events, document date and date of entry into the record will generally coincide, allowing organization by document date to fulfill the purpose of OAR 661-010-0025 to facilitate review. However, we stated that:

> "* * * Our rule does not require that a local government blindly apply a document date principle of organization when doing so requires separation of documents that were submitted together. Where document date and date of entry into the record conflict as organizational principles, the purpose of OAR 661-010-0025(4) is better served by organizing the record in the order in which documents were received in the proceedings below. * * *" *Id.*

Petitioner is therefore correct that the purpose of OAR 661-010-0025(4) would have been

better served by organizing the record by date of entry, rather than document date.[2] However, petitioner does not allege that the present organization of the record hampers its or our review, or explain why the present organization is anything more than a technical violation of our rules. OAR 661-010-0005 (technical violations of LUBA's rules not affecting the substantial rights of the parties shall not interfere with the review of a land use decision or limited land use decision). The record includes approximately two dozen items, and it is difficult to see why a different organization is necessary for the parties' use or our review.

Petitioner's objection to the organization of the record is denied.

Record items 17 and 21-24 and exhibits F and G shall be considered stricken from the record, and the Board shall not consider these items and exhibits in its review. With that understanding, the record in LUBA No. 2002-131 is settled, as of the date of this order. The petition for review shall be filed within 21 days, and the response brief filed 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 10th day of December, 2002.

Tod A. Bassham
Board Member

[2] In addition, a date of entry organization might have helped clarify when the 1995 Rest Haven CUP documents were "placed before" the final decision maker.