BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

VINCENT DIMONE and
DEBRA DIMONE,
Petitioners,

vs.

CITY OF HILLSBORO,
Respondent.

LUBA No. 2002-150

EDWARD DAVIS,
Petitioner,

vs.

CITY OF HILLSBORO,
Respondent.

LUBA No. 2002-151

ORDER

MOTION TO INTERVENE

ZoeAnne Arrington, the owner of the property that is at issue in this consolidated appeal, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

RECORD OBJECTIONS AND MOTION FOR EVIDENTIARY HEARING

Petitioners object to the record that was filed by the city. They also move for an evidentiary hearing and seek to depose the city council, city planning staff and members of the law firm that serves as the city attorney. We briefly set out the key events that set the

stage for petitioners' record objections and motions for evidentiary hearing before turning the parties' arguments.[1]

This dispute began when the city planning commission adopted a resolution to initiate a process that led to rezoning intervenor's recently annexed property from its county zoning designation to the city's Station Community Commercial-Multi Modal (SCC-MM) zoning designation. The requested rezoning was referred to the city's Planning and Zoning Hearings Board (PZHB). The PZHB held a public hearing and voted to deny the requested rezoning on April 26, 2001. Intervenor-respondent appealed that decision to the city council; the planning commission did not separately appeal. The city council held a partial *de novo* public hearing on June 5, 2001. On July 3, 2001, the city council voted to reverse the PZHB and adopted Ordinance 5040, which approved the SCC-MM zoning.

Petitioners appealed Ordinance 5040 to LUBA. On December 11, 2001, LUBA affirmed the city council's decision. *Dimone v. City of Hillsboro*, 41 Or LUBA 167 (2001). In doing so, LUBA rejected petitioner Davis's fourth assignment of error and part A of petitioners Dimone's first assignment of error. In those assignments of error petitioners challenged the evidentiary support for a city finding. That finding can be read to state that rezoning the subject property to SCC-MM is needed, at least in part, to correct a shortage of commercially zoned land. We rejected petitioners' arguments under those assignments of error, concluding that it did not matter whether the evidentiary record established that there was a shortage of commercially zoned land, because the disputed finding that such a shortage exists was only one of several reasons the city gave for its rezoning decision.

Our decision in *Dimone* was appealed to the Court of Appeals, and the court disagreed with our resolution of the above-noted assignments of error. *Dimone v. City of Hillsboro*, 182 Or App 1, 47 P3d 529 (2002):

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[1] Petitioners Dimone and petitioner Davis request oral argument on their motions. The Board does not believe oral argument is necessary to resolve the motions, and the requests are denied.

1 "* * * Respondents may be correct that a need for commercial property is not
2 a prerequisite to applying the SSC-MM zone to this property. The problem
3 with respondents' argument, however, is that it appears from the record before
4 us that the city's decision to impose this zone was based, in part, on its
5 determinations that there was such a need and that allowing commercial uses
6 on this property helps satisfy that need. The city's findings addressing the
7 need for commercially zoned land gave no indication that the discussion was
8 not necessary to its decision or was intended as surplusage or simply as an
9 observation. The city's findings supporting the rezoning are stated in terms
10 demonstrating the city council's belief that each of the reasons for its decision
11 contributed to its ultimate decision. Were the city's findings to have stated
12 clearly its understanding of the significance of the need issue and, in so doing,
13 advised LUBA and us of the relative importance of the issue to its decision,
14 our conclusion might be different. Based on the existing record, we must
15 conclude that the need for commercial property in this area played a role in
16 the city's decision.

17 "In reviewing a local government decision, we are limited to the findings and
18 conclusions that the local government actually made. * * * If the city believes
19 that the need for commercial land is irrelevant to its decision to apply the
20 SCC-MM zone on remand, it can say so." 182 Or App at 13-14 (citations
21 omitted).

22 Following the Court of Appeals' remand, LUBA issued a final opinion on September
23 12, 2002 that remanded Ordinance 5040, so that the city could respond to the error identified
24 by the Court of Appeals. Following the Court of Appeals' decision, the city council met with
25 the city attorney in executive session on at least two occasions.[2] On September 18, 2002,
26 petitioners and intervenor-respondent were provided a draft ordinance that was prepared to
27 respond to the Court of Appeals' remand. Petitioners and intervenor-respondent were given
28 an opportunity to provide written comment on the draft ordinance and the city's planned

[2] Petitioners allege that executive sessions were held on June 18, 2002 and on September 17, 2002. The city states that:

"* * * In the course of reacting to the remand, the council conducted three executive sessions to consult with legal counsel regarding the pending remand or structuring the findings in light of the anticipated second appeal. * * *" Response to Record Objections and Evidentiary Motion 3.

procedures for adopting the ordinance on remand.[3] Aside from this limited opportunity for written comment, no public hearing was held to accept additional evidence or legal argument from the parties. On October 15, 2002, the city council adopted Ordinance 5200. On November 5, 2002, petitioners appealed Ordinance 5200 to LUBA.

A. Record of Prior LUBA Appeal

Petitioners object that the record should be supplemented to include the record of the prior LUBA appeal concerning Ordinance 5040. The city agrees to the requested record supplement.

Because all parties to this appeal were also parties in the prior LUBA appeal, they already have copies of the record of that appeal. The record in the prior LUBA appeal shall be considered part of the record of this appeal. The city need not file and serve another copy of that record. The record in the prior appeal shall be cited as "Record." The record in this appeal shall be cited as "Remand Record."[4]

B. Remaining Record Objections and Motions for Evidentiary Hearing

Petitioners seek to have the remand record supplemented to include the complete record of the executive sessions that were held following the Court of Appeals' decision in this matter, including all written and oral communications from the city attorney and city planning staff. Alternatively, petitioners move for an order pursuant to OAR 660-010-0045(1), which authorizes LUBA to consider evidence that is not included in the record. In support of this evidentiary motion, petitioners seek to depose city planning staff, the city

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[3] The city initially took the position that petitioner Davis was not entitled to submit written comments on the draft ordinance, but apparently petitioner Davis's written comments were sent to the city by petitioners Dimone and were considered by the city.

[4] Petitioners Dimone appear to also object that the record that was compiled by the Court of Appeals in its decision in this matter should also be made part of our record in this appeal. Respondent and intervenor-respondent do not respond to this part of petitioners' record objection. We are aware of no legal authority that would authorize us to make the Court of Appeals' record part of our record in this appeal. We therefore deny that part of petitioners Dimone's objection. However, to the extent there are documents in the Court of Appeals record that are subject to official notice, any party who wishes that LUBA take such official notice may file an appropriate motion.

1 attorney and the city councilors themselves to discover all oral and written communications
2 that may have occurred during those executive sessions.

3 The answer to petitioners' record objection is simple and straightforward. Under
4 OEC Rule 503(2) and ORS 40.225(2) confidential communications between the city attorney
5 and city council in furtherance of seeking and providing legal services are privileged, and the
6 city asserts the privilege. LUBA has no authority to order that privileged attorney/client
7 communications be made part of the public record of this appeal. The authority cited by the
8 city for the disputed executive sessions includes ORS 192.660(1)(h).[5] We have previously
9 held that LUBA has no authority to order the city to include any transcripts or minutes that
10 may have been prepared of executive sessions. *McCrary v. City of Talent*, 28 Or LUBA 773,
11 774 (1994). If the city had discussions with the city attorney or others in those executive
12 sessions that go beyond the discussions that are authorized by law, petitioners' exclusive
13 remedy is to file suit in circuit court. ORS 192.680(2).

14 Petitioners' legal theory for requesting that LUBA require the city to produce a
15 written record of those executive sessions pursuant to OAR 660-010-0045(1), even though it
16 may not be part of the public record before LUBA, is that such city council contacts with the
17 city attorney constitute impermissible *ex parte* contacts that should have been publicly
18 disclosed.[6] As respondent and intervenor-respondent correctly note, we have already
19 resolved that question adversely to petitioners as well. In *Richards-Kreitzberg v. Marion*
20 *County*, 31 Or LUBA 540, 541 (1996) we explained that contacts between a county

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[5] ORS 192.660(1) lists the authority for holding executive sessions. ORS 192.660(1)(h) provides:

> "To consult with counsel concerning the legal rights and duties of a public body with regard to current litigation or litigation likely to be filed."

[6] As relevant, OAR 661-010-0045(1) provides:

> "[LUBA] may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning * * * *ex parte* contacts * * * or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. * * *"

1 governing body and its attorney were not *ex parte* contacts, even where the county was the
2 permit applicant:

> 3 "[P]etitioners allege that there were impermissible *ex parte* contacts between a
> 4 county commissioner and an attorney representing Marion County regarding
> 5 the conditional use application. Petitioners assert that because the applicant in
> 6 this proceeding was Marion County * * *, any contact between an attorney for
> 7 the county and a county decision maker regarding the application at issue
> 8 amounts to an impermissible *ex parte* contact. Petitioners are mistaken. ORS
> 9 215.422(4) provides that 'communication between county staff and the
> 10 planning commission or governing body shall not be considered an *ex parte*
> 11 contact * * *.' Thus, even if the alleged contacts occurred, there would be no
> 12 basis for reversal or remand on this issue."[7]

13 Petitioners Dimone attach to their motion a fifteen-page paper by a law professor.
14 That paper was also submitted to the city during its proceedings on remand and it discusses
15 *ex parte* communications in agency proceedings. Remand Record 73-87. In that paper, the
16 law professor discusses legal issues that have arisen in a number of different federal, state
17 and local administrative contexts where the propriety of private contacts between an agency
18 attorney and the agency decision maker have been questioned as inconsistent with
19 constitutional due process protections, statutory requirements and bar disciplinary rules.
20 Those concerns are heightened where the agency adjudication approximates judicial
21 adjudication, as where sanctions are imposed. The discussions and conclusions in that paper
22 notwithstanding, we are not presented with a sufficient case here, as the arguments of the
23 parties now stand, to depart from or limit our holding in *Richards-Kreitzberg*.

24 Not surprisingly, the circumstance that presents the most concern with the fairness of
25 administrative proceedings is where the agency attorney represents the agency as an advocate
26 before the agency decision making body and, in addition to that position as an advocate for
27 the agency, consults privately with the agency decision making body in his or her capacity as

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[7] ORS 215.422(4) applies only to counties. However, ORS 227.180(4) is identically worded and applies to cities. It provides as follows:

> "A communication between city staff and the planning commission or governing body shall not be considered an *ex parte* contact * * *."

1 legal counsel for the agency decision maker. If that were the case in this appeal, it might be
2 that an issue could be presented in this appeal that petitioners have due process rights under
3 the Fifth and Fourteenth Amendments of the United States Constitution that would either
4 prohibit such conduct or require that additional steps be taken to protect those due process
5 rights, notwithstanding ORS 227.180(4).[8] However, it does not appear that such a situation
6 is presented here.

7 Although petitioners at several places suggest that the city's attorney has served from
8 the beginning of this matter as both (1) an advocate for the rezoning application and (2) a
9 confidential legal counsel and advisor to the city council as decision maker, the city attorney
10 disputes that characterization of its role in this matter.[9] The city attorney characterizes its
11 role in this matter as being limited to defending Ordinance 5040, which the city council
12 adopted on July 3, 2001, and providing legal advice to the city council following the Court of

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[8] We note that the article that petitioners rely on focuses on the federal Administrative Procedures Act and Oregon and other state administrative procedures acts and stops short of concluding, as a general rule, that federal due process guarantees would be violated if an agency lawyer both advocated for an agency in a contested case proceeding and advised the agency decision maker in private. In view of our disposition of petitioners' motions for evidentiary hearing, we need not and do not reach or decide that question here.

[9] The city attorney explains its position as follows:

> "Petitioners dissemble in their contention that the City was represented in the evidentiary hearings on the rezoning or that its attorneys were engaged to advocate on behalf of the rezoning application at the local governmental level. As noted in the proceedings below, the City was represented by Preston Gates & Ellis LLP in the [LUBA] and judicial appeal proceedings alone and in structuring the decision on remand. Its attorneys defended the decision, and did not prosecute the application. Although petitioners' attorneys know this, and cite no evidence to the contrary, they persist in misstating the facts." Response to Record Objections and Evidentiary Motion 2 n 1 (record citation omitted).

The city attorney took a similar position in its September 26 memorandum to the city council:

> "* * * I strongly disagree with the substance and tenor of the arguments raised by the attorneys for Mr. and Mrs. Dimone and Mr. Davis[.] Again, these parties reason from the perspective that the rezoning decision has not been made and that the nature of the remand is to take the proceedings back to the application stage. Instead, the Council is rejustifying a decision previously made.
>
> "My legal engagement is to defend that decision and advise you on legal issues around the justification. (I was not asked to and did not advocate on behalf of the City during the public hearing on this rezoning.) Communications with your attorneys about the rejustification and legal risks need not be public and are not unethical. * * *" Remand Record 32.

1 Appeals' decision on how to respond to that remand and the procedures to follow in adopting
2 a decision on remand. While most of petitioners' arguments and requests for city disclosures
3 and discovery are directed at the executive sessions, the city attorney concedes that it advised
4 the city council in private about how to respond to the Court of Appeals decision and how the
5 city might appropriately limit the opportunity for parties in those remand proceedings to
6 participate.[10]

7 In summary, the focus of petitioner's arguments in support of their motion that we
8 should consider evidence outside the record is their belief that the city attorney may have
9 influenced the city council to decide the matter in the way that it ultimately did and to follow
10 the limited procedure that was followed on remand. However, we do not understand the city
11 attorney to dispute that it did precisely what petitioners allege that the city attorney did on
12 remand. What the city does dispute is that the city attorney ever served as an *advocate* for
13 the rezoning application before the city council prior to its adoption of Ordinance 5040.[11]
14 Simply stated the city attorney takes the position that its role has been limited to defending
15 Ordinance 5040 before LUBA and advising the city council in responding to the issue that

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[10] The city attorney explains:

> "If, for the sake of argument, the executive sessions were improperly held, then petitioners' sole remedy is circuit court review. ORS 192.680(6) provides that this review is the 'exclusive remedy for an alleged violation of ORS 192.610 to 192.690.' ORS 192.685 creates an additional remedy for imposition of civil penalties by the Oregon Government Standards and Practices Commission. But the decision made after an improper executive session can be [voided] only by a circuit court. LUBA lacks jurisdiction to grant relief based upon conducting executive sessions about the remand or anticipated appeal.
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> "* * * If a[n] evidentiary record was required, and the full panoply of procedures for conducting a quasi-judicial land use hearing applies to the drafting [of a decision] with findings, then the decision was wrongfully made. There was no hearing provided or landowner notice. There was no evidentiary record created or relied upon. Without waiving any privilege, the City stipulates that legal issues about the procedures and structure of the findings on remand were discussed with its counsel." Response to Record Objections and Evidentiary Motion 7.

[11] For that matter, the city contends it is something of a stretch to characterize the city planning staff as an advocate in this matter. Although the planning commission is the named applicant, the planning commission did not appeal the PZHB's denial of the application to the city council; intervenor-respondent property owner filed that local appeal to the city council.

formed the basis of the Court of Appeals' remand. Although parts of petitioners' arguments in support of their request that we consider evidence outside the record can be read to take the position that the city attorney did serve in an advocate's role in support of the rezoning application prior to the city council's adoption of Ordinance 5040 on July 3, 2001, petitioners cite nothing in the record to support that suggestion. The city attorney expressly took the position during the remand proceedings that it did not serve in an advocate's role prior to the adoption of Ordinance 5040. *See* n 9. The city attorney repeats that position in its response to the motions for evidentiary hearing. Petitioners do not directly challenge the city attorney's assertions in their motions for evidentiary hearing. Petitioners' unsupported suggestions that the city attorney may have played an advocate's role prior to the adoption of Ordinance 5040 are not sufficient to justify considering evidence outside the record or ordering the requested discovery to seek evidence that the city attorney may have played such an advocate's role despite its clear position during the local proceedings and on appeal that it did not do so.

Petitioners' motion that we accept and consider evidence outside the record under OAR 661-010-0045 is denied.

The record shall be considered settled on the date of this order. The petition for review shall be due 21 days from the date of this order. The respondents' briefs shall be due 42 days from the date of this order. The Board's final opinion and order shall be due 77 days from the date of this order.

Dated this 6th day of February, 2003.

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Michael A. Holstun
Board Member