

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 MAUREEN SMITH,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF SALEM,
10 *Respondent,*

11
12 and

13
14 TERRY KELLY and MARY RENTFRO,
15 *Intervenors-Respondents.*

16
17 LUBA No. 2009-093

18 ORDER

19 **MOTION TO DISMISS**

20 The challenged decision approves comprehensive plan map and zoning map
21 amendments to facilitate development of a portion of a golf course into a variety of
22 residential and commercial uses. Intervenors-respondents (intervenors) move to dismiss this
23 appeal, arguing that petitioner failed to either “appear” in the proceedings below, as required
24 by ORS 197.830(2), or “participate” in those proceedings, ORS 197.620(1).

25 ORS 197.830(2) provides:

26 “*Except as provided in ORS 197.620 (1) and (2), a person may petition the*
27 *board for review of a land use decision or limited land use decision if the*
28 *person:*

29 “(a) Filed a notice of intent to appeal the decision as provided in subsection
30 (1) of this section; and

31 “(b) Appeared before the local government, special district or state agency
32 orally or in writing.” (Emphasis added.)

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1 Because the challenged decision is a post-acknowledgment plan amendment (PAPA) subject
2 to the requirements of ORS 197.610 through 197.620, the emphasized language in the above
3 quote applies. ORS 197.620(1) provides:

4 “Notwithstanding the requirements of ORS 197.830(2), persons who
5 *participated* either orally or in writing in the local government proceedings
6 leading to the adoption of an amendment to an acknowledged comprehensive
7 plan or land use regulation or a new land use regulation may appeal the
8 decision to the Land Use Board of Appeals under ORS 197.830 to 197.845.
9 * * *” (Emphasis added).

10 As we explained in *Century Properties, LLC v. City of Corvallis*, 51 Or LUBA 572,
11 576, *aff’d* 207 Or App 8, 139 P3d 990 (2006), the ORS 197.620(1) requirement to
12 “participate” in the proceedings is different from the ORS 197.830(2)(b) requirement to
13 “appear” before the local government. To “appear,” the petitioner need not assert a position
14 on the merits of the proposed land use action, and a bare, neutral appearance, such a simple
15 letter requesting that the local government accept the letter as an appearance and provide
16 notice of the decision, is sufficient to satisfy ORS 197.830(2). However, to “participate” in
17 the proceedings for purposes of ORS 197.620(1), the petitioner must assert some position on
18 the merits. Because the applicable statute requires petitioner to establish that she
19 “participated” in the proceedings below, we do not address intervenors’ arguments that
20 petitioner failed to “appear” during the proceedings for purposes of ORS 197.830(2)(b). If
21 petitioner “participated,” she necessarily “appeared.” If she did not “participate,” then it is
22 irrelevant whether she “appeared.”

23 According to intervenors, petitioner’s only apparent connection with the proceedings
24 below is her signature and address, among approximately 400 others, on a petition submitted
25 into the record by an attorney for a group of citizens who are opposed to the project. The pre-
26 printed petition states, in relevant part:

27 “For over 50 years the Battle Creek golf course property was open space and a
28 golf course. Now the owners are applying for a zone from public amusement
29 (PA) to commercial and residential. They want to develop 150 single-family

1 homes, high-density multi-family units, a hotel, retail commercial, and an
2 assisted living facility on the northern 40+ acres.

3 “Because the *entire* parcel of land plays a significant role in flood mitigation
4 for the City of Salem, including downtown (Mill Creek), as well as Turner, we
5 are asking our city leaders to abide by the city’s own Comprehensive Land
6 Use Plan by keeping the zoning PA. We are asking the city to protect
7 residents’ quality of life by maintaining the Battle Creek property in its
8 entirety as open space.

9 “We, the undersigned, petition against the proposed zone change application.”
10 Record 3525 (emphasis in original).

11 Intervenor explain that the petition was prepared and sponsored by a nonprofit entity,
12 Comprehensive Plan Supporters, and submitted to the city by the attorney for that entity.
13 Based on the names and addresses surrounding petitioner’s signature, intervenors argue, it is
14 likely that the signatures were collected as part of a neighborhood canvassing effort to
15 register support for the position stated in the petition. For the reasons set out below,
16 intervenors argue that petitioner’s signature on the petition and the submission of that petition
17 to the city by the attorney for the nonprofit group sponsoring the petition is insufficient to
18 constitute either an “appearance” for purposes of ORS 197.830(2) or “participation” as
19 required by ORS 197.620(1).

20 In her response to the motion, petitioner argues that she did far more than simply sign
21 a petition. Petitioner states that she submitted written testimony in the proceedings of an
22 earlier, similar proposal to rezone the subject property, and believed (erroneously, it turned
23 out) that the city had incorporated the record of the earlier proceedings into the record of the
24 present zoning application. Petitioner also states that she attended the city council hearing on
25 the present application and was prepared to speak, but the mayor warned the audience that in
26 view of the limited time for testimony participants should not simply repeat others’
27 testimony. Because several opponents stated all the arguments that petitioner would have
28 made, petitioner states that she chose not to speak at the hearing, believing she had already
29 established standing. Petitioner also argues that the city recognized her as a participant,

1 noting that her name is listed among “[t]hose that submitted testimony: (verbal or written)” at
2 Record 100.

3 As noted, we have interpreted ORS 197.620(1) to require at a minimum that the
4 petitioner take a position on the merits. Intervenors argue first that in order to “participate” in
5 the proceedings under ORS 197.620(1) the petitioner must articulate some *individual*
6 position on the merits, and cannot simply join in a position on the merits articulated by
7 others. However, intervenors cite no basis for that view under the statute or in case law, and
8 we disagree that the statute requires that the petitioner advance an individualized position on
9 the merits, distinct from that advanced by others, or that joining in a position on the merits
10 asserted by others is categorically insufficient to “participate.”

11 Intervenors next argue that, while the petition “implies that the application is
12 inconsistent with Salem’s comprehensive plan, there is no explanation specifying how the
13 proposal would be inconsistent. Asserting a position on the merits surely requires something
14 more than a naked articulation of ‘for’ or ‘against.’” Motion to Dismiss 8. Intervenors note
15 that the petition identifies no applicable approval criteria or comprehensive plan provisions,
16 and for that reason is inconsistent with a city council rule that requires that “[t]estimony shall
17 be directed towards the applicable standards and criteria which apply to the proposal.” Salem
18 City Council Rule 19(a)(5). Although the city council did not reject the petition for
19 noncompliance with Rule 19(a)(5), intervenors argue that Rule 19(a)(5) reflects the city
20 council’s view of what is necessary to participate in the proceedings.

21 Whether the above-quoted statements in the petition are sufficient to assert a position
22 on the merits and thus constitute “participation” for purposes of ORS 197.620(1) is a close
23 question. We tend to agree with intervenors that a mere statement in favor or in opposition to
24 the proposal, without *some* explanation why the local government should approve or deny the
25 application, does not suffice to present a position on the merits. However, the petition does
26 more than merely state that the petitioners oppose the application. It argues that the subject

1 parcel “plays a significant role in flood mitigation for the City of Salem” and therefore the
2 city should retain the existing PA zoning, with the suggestion that the comprehensive plan
3 and existing PA zone require “open space” that protects against flooding better than the
4 proposed commercial and residential zoning. That is a coherent, if brief, argument
5 supporting the petitioner’s request that the city should deny the rezoning application.

6 It is true that the petition does not cite any particular comprehensive plan provision or
7 land use regulation, other than the PA zone itself. However, we do not believe that the
8 ORS 197.620(1) requirement that the petitioner “participate” in the proceedings, *i.e.*, take
9 some position on the merits of the application, requires greater specificity. In distinguishing
10 “appearance” from “participation,” the Court of Appeals opinion described participation as
11 “articulating grounds for objecting to the challenged decision.” *Century Properties, LLC v.*
12 *City of Corvallis*, 207 Or App 8, 15, 139 P3d 990 (2006). The above-quoted argument in the
13 petition clearly articulates a ground for objecting to the rezoning application, even if it does
14 not expressly cite any particular approval standards.

15 Similarly, we do not think the existence of a city procedural rule requiring that
16 testimony be directed towards the applicable standards and criterion means that any
17 testimony that does not expressly cite an applicable standard or criteria is necessarily
18 insufficient to constitute “participation” for purposes of ORS 197.620(1). The meaning of
19 “participation” used in ORS 197.620(1) is a matter of state law, and does not turn on the
20 wording of local procedural rules.

21 In sum, we believe that the argument expressed in the petition that petitioner signed
22 is sufficient to present a position on the merits under the reasoning in *Century Properties,*
23 *LLC*, and therefore petitioner has established that she participated in the proceedings below
24 for purposes of ORS 197.620(1). Intervenors’ motion to dismiss is denied.

1 **MOTION TO RECONSIDER ORDER ON RECORD OBJECTIONS**

2 In an order dated December 4, 2009, the Board issued an order resolving the parties'
3 record objections and settled the record, based in part on a three-volume supplemental record
4 submitted by the city on November 30, 2009, which included documents that intervenors had
5 objected were improperly omitted from the record. In that order, we sustained one of
6 petitioner's objections but rejected the others, and ultimately settled the record. Given the
7 timing of the receipt of the supplemental record, our order gave the parties 14 days from the
8 date of the order to file any objections to the content of the supplemental record.

9 On December 18, 2009, petitioner filed a pleading entitled "Objection to the
10 Supplemental Record." However, the December 18, 2009 pleading does not in fact object to
11 the content of the supplemental record, or address the supplemental record at all. In essence,
12 it requests reconsideration of portions of our December 4, 2009 order in which we rejected
13 petitioner's objections to the original record. We therefore treat the December 18, 2009
14 pleading as a motion to reconsider our December 4, 2009 order. The city and intervenors
15 object to the request to reconsider, arguing that petitioner simply repeats or embellishes
16 objections already made to the original record and already rejected in LUBA's December 4,
17 2009 order.

18 Our rules neither provide for nor prohibit a motion to reconsider an order settling the
19 record. However, given the timelines that apply to LUBA's review we do not think a motion
20 to reconsider an order settling the record is appropriate to the extent the motion simply (1)
21 attempts to raise new objections to the record, (2) repeats arguments made in the original
22 objection, or (3) provides new arguments that could have been advanced in the original
23 objections. *See Sequoia Park Condominium Owner's Association v. City of Beaverton*, __ Or
24 LUBA __ (LUBA No. 98-055, 98-059, Order, August 25, 1998) (denying motion to
25 reconsider order settling the record based on argument that should have been made in a
26 response to the record objection); *White Marine Services, Inc. v. City of Portland*, __ Or

1 LUBA __ (LUBA No. 98-066, Order on Motion to Reconsider, June 10, 1998) (denying
2 motion that in essence presents a new, untimely record objection). LUBA will likely reject a
3 motion to reconsider that consists of such arguments.

4 A request to reconsider an order settling the record may be appropriate, in our view,
5 where the party requesting reconsideration argues that LUBA's order was based on a
6 significant misunderstanding of the parties' arguments regarding the record, and the party
7 seeking reconsideration files a timely request to reconsider that succinctly identifies and
8 clarifies the alleged misunderstanding. *See Wal-Mart Stores, Inc. v. City of Central Point*, __
9 Or LUBA __ (LUBA No. 2004-075, Order, October 22, 2004) (granting reconsideration
10 where LUBA misunderstood the parties' arguments).

11 Petitioner's 19-page motion to reconsider includes a number of arguments, most of
12 which seem inappropriate or untimely and do not provide a basis for reconsideration. For
13 example, petitioner seeks clarification regarding the role of the city's legal counsel and
14 intervenor-respondent's counsel in resolving record objections, but does not explain what any
15 lack of clarity in those roles has to do with the content of the record or reconsidering LUBA's
16 order settling the record. However, the motion does include an argument that the Board
17 misunderstood or failed to recognize the nature of one of her objections, and that argument is
18 an appropriate basis for a motion to reconsider. In the motion, petitioner advises the Board
19 that some of her record objections concern documents in the record that allegedly are missing
20 pages or attachments. Petitioner refers to a letter attached to her October 19, 2009 response
21 to intervenor's response to her original objections, in which she requests that the city supply
22 the missing pages. However, we decline to address that objection because we conclude that
23 the objection regarding missing pages or attachments was not timely filed or filed in a
24 manner calculated to bring the objection to the Board's attention.

25 The original record was filed September 11, 2009. In her original objections filed
26 September 25, 2009, petitioner identified 32 documents that she believed were improperly

1 omitted from the record. Intervenors filed a response arguing that petitioner failed to
2 demonstrate that any of the 32 documents were properly included in the record, because most
3 of the documents concern a different 2007 land use application and in any case had never
4 been placed before the decision maker in this proceeding or incorporated into the record by
5 the decision maker. On October 19, 2009, approximately five weeks after the original record
6 was filed, petitioner filed a one-page pleading entitled “Response to Intervenor-
7 Respondent.”¹ Attached to the October 19, 2009 pleading was a copy of an undated letter
8 from petitioner to the city attorney that in relevant part includes a table listing a number of
9 documents, all of which are among the 32 allegedly omitted documents listed in petitioner’s
10 original objections. As petitioner notes in her motion to reconsider, various comments
11 attached to that table include language indicating that petitioner believes that some of the
12 documents previously identified as missing from the record are present in the record,
13 although petitioner alleges that due to copying errors some are missing pages or attachments.²

14 On November 25, 2009, the city filed a response in which it proposed to file a
15 supplemental record to address intervenor’s record objections. With respect to petitioner’s
16 objections, the city agreed with intervenors that petitioner’s original objection to the 32
17 omitted documents should be denied, because those documents had not been placed before

¹ The October 19, 2009 pleading consists of four sentences, and does not actually respond to intervenor-respondent’s response. The pleading states:

“As efficiently as possible, as I asked the City to do, I am working to recover copies, documents missing from the record. I want to clarify and identify all elements of this complex record.

“I am providing items under separate cover as requested by [the city attorney], identif[ying] missing elements of the record.

“I continue to work with the Respondent to recover missing elements submitted in Public Hearings before the Planning Commission November 18, 2008.” Response to Intervenor-Respondent 1.

² As far as we can tell, the documents so identified are the first nine documents in a table on the first and second pages of the letter attached to the October 19, 2009 pleading, and they involve documents at Record 799, 800, 801, 802, 803, 805, 806, 812, and 1024.

1 the decision maker or incorporated into the record by the decision maker. The city did not
2 address the undated letter attached to petitioner's October 19, 2009 response, or petitioner's
3 assertions therein regarding documents in the record with missing pages and attachments.
4 The city subsequently filed a three-volume supplemental record, and we issued an order
5 settling the record on December 4, 2009, rejecting petitioner's original objections with
6 respect to the 32 omitted documents. With respect to petitioner's October 19, 2009 pleading,
7 we noted that the letter attached to the pleading included on pages 3 and 4 what appear to be
8 five new objections to the record, and rejected those new objections as untimely. *Smith v.*
9 *City of Salem*, __ Or LUBA __ (LUBA No. 2009-93, Order, December 4, 2009), slip op 3.
10 However, we did not recognize that the table on pages 1-2 of the letter included new
11 assertions that certain documents petitioner had previously identified as missing from the
12 record were actually in the record, and that petitioner is now objecting that there are pages or
13 attachments missing from those documents.

14 In our view, the new assertions in the letter attached to the October 19, 2009 pleading
15 regarding missing pages or attachments constitute new objections to the record, which were
16 filed more than a month after the record was filed and are therefore untimely. *Id.* In addition,
17 those new objections were not made to LUBA in a manner calculated to bring them to the
18 attention of the Board. If petitioner wished to advise the Board that some of the documents
19 she had previously identified as missing from the record are actually in the record, but
20 allegedly with missing pages, petitioner could have done so in a more straightforward manner
21 than burying that information in a table in a letter addressed to the city and attaching that
22 letter to a mislabeled pleading.

23 The motion to reconsider is denied.

24 **SCHEDULE**

25 The next event in this review proceeding is the filing of the petition for review and
26 response brief(s). The petition for review is due 21 days from the date of this order. The

1 response brief(s) are due 42 days from the date of this order. The Board's final opinion and
2 order is due 77 days from the date of this order.

3 Dated this 27th day of January, 2010.

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8 _____
9 Tod A. Bassham
Board Chair