

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

3
4 SCHNITZER STEEL INDUSTRIES, INC.,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF EUGENE,
10 *Respondent,*

11 and

12
13 PACIFIC RECYCLING, INC.,
14 *Intervenor-Respondent.*

15
16 LUBA Nos. 2012-093 and 2012-096

17 ORDER

18
19 **MOTION TO INTERVENE**

20 Pacific Recycling, Inc., the applicant below, moves to intervene on the side of
21 respondent. There is no opposition to the motion, and it is granted.

22 **MOTION TO APPEAR AMICUS**

23 Metro Metals Northwest, Inc. moves to appear amicus. There is no opposition to the
24 motion, and it is granted.

25 **FACTS**

26 In this consolidated appeal petitioner challenges a zoning verification letter and a
27 Land Use Compatibility Statement (LUCS) issued to intervenor Pacific Recycling, Inc.
28 (Pacific). Petitioner objects to the record that was transmitted by the city to LUBA in LUBA
29 No. 2012-96, the LUCS appeal. The city has transmitted two records in the LUCS appeal.
30 Two of petitioner's record objections are resolved by the second LUCS record. One
31 objection remains in dispute. We reject that objection in this order. The relevant facts are set
32 out below.

1 **A. The December 7, 2012 Zoning Verification Letter and LUBA No. 2012-**
2 **093**

3 Pacific submitted a zoning verification request on December 6, 2012. Record (LUBA
4 No. 2012-093) 5. In that zoning verification request, Pacific asked the city to confirm that its
5 proposed use of its property, “Metal Recycling and Processing specifically the installation of
6 a Shredder,” is permitted in the city’s I-3 Heavy Industrial zone. *Id.*

7 In a December 7, 2012 Zoning Verification Letter (December 7 Letter), the City of
8 Eugene “Land Use Supervisor” described Pacific’s proposal as a proposal “to expand its
9 business by installing metal shredding equipment and related improvements.”¹ Record
10 (LUBA No. 2012-093) 1. The Land Use Supervisor concluded that “scrap metal recycling is
11 a permitted use in the I-3 zone, therefore, the project complies with local land use planning
12 requirements.” *Id.*

13 Petitioner appealed the December 7 Letter to LUBA in LUBA No. 2012-093.²
14 Petitioner does not object to the record that the city transmitted in LUBA No. 2012-093.

15 **B. The December 14, 2012 LUCS and LUBA No. 2012-096**

16 Apparently Pacific is seeking an air contaminant discharge permit from the Lane
17 Regional Air Protection Agency. As part of that permit process, on December 14, 2012,
18 Pacific submitted a LUCS (December 14 LUCS) to the city planning department. As
19 ultimately completed by the city, the December 14 LUCS lists the proposed use as “Scrap
20 Metal Recycler (shredder).” Record (LUBA No. 2012-096) 1. In the portion of the LUCS
21 where the city is to indicate if the proposal is compatible with the city’s comprehensive plan

¹ As we explain later, four members of the city’s planning department played a role in the decisions that led to these appeals: (1) the Planning Director, (2) the Permit Review Manager (3) the Land Use Supervisor, and (4) a Land Use Technician.

² ORS 227.160(2)(b) provides that the ORS 227.160(2) definition of “permit” does not include “[a] decision which determines the appropriate zoning classification for a particular use[.]. ORS 227.175(11) requires that such decisions be entered into a public registry and provides that such decisions may be appealed to LUBA.

1 and land use regulations, an “X” is written over a box that appears in front of the following
2 statement: “Yes, the activity or use is allowed outright by (provide reference to the local
3 ordinance).” Following the quoted language is the following handwritten notation: “Table
4 EC 9.24.50 Industrial Zone Land Use,” which we understand to be the required “reference to
5 the local ordinance.” The December 14 LUCS is signed by a Land Use Technician. The
6 December 14 LUCS is the subject of a second appeal, LUBA No. 2012-096.

7 **C. Petitioner’s December 12, 2012 Request for a Zoning Ordinance**
8 **Interpretation**

9 In a December 12, 2012 letter (December 12 Request), petitioner’s attorney disputed
10 the Land Use Supervisor’s conclusion in the December 7 Letter to Pacific that the proposed
11 metal shredding is permitted outright in the I-3 zone.³ Petitioner requested, pursuant to
12 Eugene Code (EC) 9.0040, a planning director interpretation that “[a] metal shredder is not a
13 permitted use in the I-3 Heavy Industrial Zone” and that “[a] Type II Traffic Impact Analysis
14 Review under EC 9.8650 may be required for a metal shredding use” at Pacific’s property.
15 Petitioner’s Record Objection, Exhibit B. As far as we are informed, petitioner’s December
16 12 Request remains pending before the city.

17 **MOTION TO STRIKE**

18 In support of its record objections, petitioner submitted an extra-record affidavit,
19 signed by petitioner’s attorney, in which he describes his recollection of his meeting with
20 members of the city planning department on December 18, 2012. The city moves to strike
21 that affidavit. The city filed a motion pursuant to OAR 661-010-0045, asking that LUBA
22 consider three extra-record affidavits in which the Permit Review Manager, Land Use

³ The first page of the December 12 Request is dated December 11, 2013 but all of the remaining pages are dated December 12, 2013. Most of the parties’ references are to the December 12 date, so we refer to the document as the December 12 Request in this order.

1 Supervisor and Land Use Technician describe their recollection of events on December 7, 14
2 and 18, 2012.

3 Although LUBA is generally limited to the record submitted in an appeal in deciding
4 the merits of an appeal, LUBA may consider extra-record evidence in resolving disputes
5 about the contents of the record, and a motion to consider extra-record evidence for that
6 purpose pursuant to OAR 661-010-0045 is not necessary. *Willamette Oaks, LLC v. City of*
7 *Eugene*, 62 Or LUBA 522, 524 (2010). The city's motion to consider extra-record evidence
8 is unnecessary and we do not consider it further. The city's motion to strike petitioner's
9 affidavit is denied. We have considered all of the affidavits in resolving petitioner's record
10 objection.

11 **RECORD OBJECTION**

12 As relevant here, OAR 661-010-0025 requires that the record in a LUBA appeal must
13 include all documents "placed before, and not rejected by, the final decision maker, during
14 the course of the proceedings before the final decision maker." Petitioner contends its
15 December 12 Request that remains pending before the city was placed before the Land Use
16 Technician, was considered by the Land Use Technician in completing the LUCS and should
17 be included in the record. The city contends petitioner's December 12 Request initiated a
18 separate proceeding from the proceeding that led to the December 14, 2012 LUCS decision.
19 The city also contends that although the Land Use Technician was aware of petitioner's
20 December 12 Request and was aware that the December 12 Request concerned the same
21 property as the December 7 Letter to Pacific, the Land Use Technician did not consider the
22 December 12 Request and based her completion of the December 14 LUCS on the Land Use
23 Supervisor's conclusions in the December 7 Letter to Pacific.

24 With one exception, the parties largely agree on the relevant facts. Pacific submitted
25 the LUCS to the city on December 14, 2012, and requested that the city complete the portion
26 of the LUCS that is reserved for local governments to indicate whether the proposal

1 described in the LUCS is consistent with the local government's comprehensive plan and
2 land use regulations. All parties agree the Land Use Technician was aware of petitioner's
3 December 12 Request and was also aware of the Land Use Supervisor's December 7, 2012
4 Letter to Pacific. The Land Use Supervisor, who is the Land Use Technician's immediate
5 supervisor, was not available on December 14, 2012. Therefore, the Land Use Technician
6 consulted with the Permit Review Manager about how to complete the LUCS. According to
7 the Land Use Technician, she confirmed with the Permit Review Manager that petitioner's
8 December 12 Request for a planning director interpretation "was part of a separate, distinct
9 process and that I could complete the LUCS based on my personal knowledge of the
10 previously issued [December 7 Letter]." Affidavit of Kelly Whitmill 2.

11 When petitioner's attorney arrived at the planning department on December 18, 2012
12 to inquire about the December 14 LUCS, all parties agree that petitioner's attorney met with
13 and discussed the December 14 LUCS with the Permit Review Manager, the Land Use
14 Supervisor and the Land Use Technician, who petitioner refers to collectively as planning
15 "staff." In his affidavit, petitioner's attorney contends that "[s]taff acknowledged to me that
16 the December 12 [Request] had been considered, but they believed they were entitled to rely
17 on the zone verification letter dated December 7 for purposes of completing the LUCS."
18 Declaration of Bill Kloos 1. In their affidavits, the Permit Review Manager, the Land Use
19 Supervisor and the Land Use Technician all dispute that contention. The Land Use
20 Technician's affidavit states:

21 "At no time during my discussions with Mr. Kloos did I tell him that I had
22 'considered' the December 12, 2012 Code Interpretation Request when I
23 signed the LUCS. Rather, I informed Mr. Kloos that I was aware that he had
24 submitted a request for a Planning Director Code interpretation, but that I
25 signed the LUCS based entirely on my knowledge of the [December 7] Zone
26 Verification Letter." Affidavit of Kelly Whitmill 3.

27 The Permit Review Manager's and Land Use Supervisor's affidavits take the same position.
28 Affidavit of Mike McKerrow 3; Affidavit of Katharine Kappa 2.

1 Reasonable persons can often have somewhat different recollections of what precisely
2 was said in a meeting in the past. Although we do not question the claims in petitioner’s
3 attorney’s affidavit, it does not provide a sufficient basis to conclude that the Permit Review
4 Manager’s, Land Use Supervisor’s and the Land Use Technician’s recollections are all
5 erroneous. Just as importantly, we have no sufficient reason to question the Land Use
6 Technician’s assertion that although she was aware of petitioner’s December 12 Request, she
7 did not review that request or consider that request in completing the December 14 LUCS.

8 Finally, in responding to the city’s contention that the city proceedings that led to the
9 December 14 LUCS and the city proceedings initiated by petitioner’s December 12 Request
10 are separate proceedings with different decision makers, petitioner contends the Planning
11 Director is the final decision maker for Planning Director interpretations and also the final
12 decision maker for LUCS decisions. Petitioner contends the LUCS decision was rendered as
13 a Type I decision under EC 9.7040, which provides that Type I decisions are decisions of the
14 Planning Director.⁴ Petitioner contends the fact that the decision was actually rendered by
15 the Land Use Technician, who is authorized to act for the Planning Director, is of no import.⁵
16 We understand petitioner to contend that the December 12 Request was before the Planning
17 Director from the time it was submitted on December 12 and should also be considered to be
18 before the Land Use Technician when she rendered the December 14 LUCS decision on the
19 Planning Director’s behalf.

⁴ EC 9.7040 provides:

Description of Administrative Decisions Type I. Administrative decisions of the planning director follow a Type I process that involves a review based on clear and objective standards. The Type I process does not involve public notice or a public hearing prior to the decision and does not allow for a local appeal of the decision.

⁵ As defined by EC 9.0500, the “Planning Director” is “[t]he person authorized by the city manager to carry out the duties of the city’s planning director under this code, *or the planning director’s designee(s).*” (Emphasis added.)

1 We reject petitioner's central thesis that any document that may have been placed
2 before the Planning Director or one of her designees in one proceeding are also properly
3 viewed as having been placed before the Planning Director or her designee who renders a
4 decision on the Planning Director's behalf in a different, albeit related, proceeding. While
5 the Land Use Technician may render Type I decisions in the name of the Planning Director
6 under the EC, the record of the proceedings that lead to that Type I decision is properly
7 limited to documents that were placed before the Land Use Technician in her consideration
8 of the LUCS. Documents that may have been placed before the Planning Director or
9 another one of her designees in a related proceeding, which were not placed before the Land
10 Use Technician during the Type I LUCS proceeding, are not subsumed into the LUCS record
11 simply because Type I decisions are rendered by the Land Use Technician on the Planning
12 Director's behalf under the EC.

13 For the reasons explained above, we conclude that petitioner has not established that
14 the December 12, 2012 Request had been placed before the Land Use Technician before she
15 completed the LUCS on December 14, 2012. We therefore deny petitioner's remaining
16 record objection.

17 The record is settled as of the date of this order. The petition for review shall be due
18 21 days from the date of this order. The response briefs shall be due 42 days from the date of
19 this order. The Board's final opinion and order shall be due 77 days from the date of this
20 order.

21 Dated this 2nd day of April, 2013.
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26 _____
27 Michael A. Holstun
28 Board Member