BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HAYDEN ISLAND, LTD.,
Petitioner,

vs.

CITY OF PORTLAND,
Respondent,

and

HAYDEN ISLAND CONDOS, LLC,
Intervenor-Respondent.

LUBA No. 2003-148

FINAL OPINION
AND ORDER

Appeal from City of Portland.

G. Frank Hammond and Richard G. Lorenz, Portland, filed the petition for review and argued on behalf of petitioners. With them on the brief was Cable Huston Benedict Haagensen and Lloyd LLP.

Linly F. Rees, Deputy City Attorney, Portland, filed a response brief and argued on behalf of respondent.

Phillip E. Grillo and Kelly S. Hossaini, Portland, filed a response brief, and Kelly S. Hossaini argued on behalf of intervenor-respondent. With them on the brief was Miller Nash LLP.

HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member, participated in the decision.

REMANDED 02/12/2004

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a city adjustment committee decision.[1]

FACTS

Intervenor-respondent Hayden Island Condos, LLC (intervenor) is seeking city approval to construct a residential condominium building on property that adjoins petitioner Hayden Island Associates' office building. Intervenor sought adjustments to applicable building height limits, pedestrian standards and landscaping standards.[2] Those adjustments were approved administratively by the Bureau of Development Services (BDS), without a public hearing.[3] Although petitioner did not appeal that BDS decision to the city's adjustment committee, a neighborhood association did.

The seven-member adjustment committee scheduled a public hearing for August 5, 2003 and rescheduled that public hearing for August 12, 2003, because a quorum of the adjustment committee was not present on August 5, 2003. With a quorum of four members, the adjustment committee conducted a public hearing on August 12, 2003 and continued that hearing to August 19, 2003. There was no request at the August 19, 2003 hearing that the record be held open or that

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[1] The City of Portland has created a number of review bodies to administer its comprehensive plan, zoning ordinance and other land use regulations. Portland City Code (PCC) 33.710. One of those review bodies is the adjustment committee. PCC 33.710.070.

[2] An adjustment, like the more commonly used variance, allows the city in certain circumstances to approve development proposals that deviate from applicable approval criteria.

[3] ORS 227.175(3) imposes a general rule that a city must provide a public hearing before it makes a decision on a land use permit. However, ORS 227.175(10)(a)(A) provides the following exception:

> "The hearings officer or such other person as the governing body designates may approve or deny an application for a permit without a hearing if the hearings officer or other designated person gives notice of the decision and provides an opportunity for any person who is adversely affected or aggrieved, or who is entitled to notice under [ORS 227.175(10)(c)], to file an appeal."

ORS 227.175(10)(a)(D) requires that a local appeal under ORS 227.175(10)(a)(A) must be to "a *de novo* hearing."

the hearing be continued. The adjustment committee closed the record, deliberated and reached a decision. The adjustment committee voted 4 to 0 to deny the appeal of the pedestrian and landscaping standards adjustments. The adjustment committee voted 2 to 2 on a motion to sustain the appeal of the height adjustment. That motion, if passed, presumably would have ultimately resulted in an adjustment committee decision to deny the height adjustment. However, the adjustment committee applied an adjustment committee rule that provides (1) tie votes result in a failure of the motion and (2) failures to pass a motion to allow an appeal have the legal consequence of denying the appeal.[4]

The adjustment committee determined that because it rejected the appeal of all three adjustments, the BDS decision would be revised by staff to reflect the subsequent proceedings before the adjustment committee and the adjustment committee's decision to sustain the BDS decision. On August 28, 2003, without any additional vote by the adjustment committee, the adjustment committee's decision was signed by the chair of the adjustment committee and mailed to the parties. This appeal followed.

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[4] The adjustment committee has adopted ten hearing procedure rules for appeals of permit decisions that are rendered initially by BDS staff without a hearing. Two of those rules are as follows:

> "9. After the record is closed to all parties, Committee members will discuss and vote on the request. In the case of a tie vote on any motion, that motion will fail. If no motion to approve an appeal is passed, that appeal is denied.
>
> "10. If the Committee's decision overturns the [BDS] staff's administrative action, the adoption of new or revised findings will be required. At the time of its decision, the Committee will announce when the revised findings will be considered. No additional testimony will be taken, but interested parties can attend." Petition for Review Appendix D.

FIRST AND SECOND ASSIGNMENTS OF ERROR

A. Petitioner's Argument

In its first two assignments of error, petitioner makes overlapping arguments. PCC 33.710.030(D) establishes the number of votes that are required for review bodies to take action.[5] Because there were four members of the seven-member adjustment committee present when it voted on the appealed adjustments on August 19, 2003, three votes were required to take action on those appeals under PCC 33.710.030. There is no dispute that more than three votes were cast to deny the appeals of the pedestrian and landscaping standards adjustments. However, there is also no dispute that only two votes were cast in support of the motion to deny the appeal of the height adjustment. As noted above, to resolve the tie vote on the height adjustment, the adjustment committee relied on its procedural rule number 9.[6] *See* n 4.

We understand petitioner to contend that an adjustment committee decision to deny the appeal of the height variance is an "action" of the adjustment committee, which requires three votes under PCC 33.710.030 when there is a four-member quorum present. Petitioner argues that because three votes were not cast to deny the appeal of the height variance, the adjustment committee erroneously rejected that appeal. Petitioner also contends the city's denial of the height adjustment appeal based on a 2 to 2 vote resulted in an impermissible shifting of the applicant's burden of demonstrating compliance with adjustment approval criteria to the opponents of the

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[5] As relevant, PCC 33.710.030 requires "[a] majority of the members present must vote affirmatively in order to take action."

[6] PCC 33.710.030(C) authorizes city review bodies to adopt rules:

> "**Officers and rules**. Each commission, committee, or board elects its own presiding officers and adopts rules of procedure that are necessary to fulfill its duties. The rules of procedure must be in writing and comply with the Oregon Public Meetings law, Statutory land use hearing requirements, and this Title."

We are not sure what procedure the adjustment committee follows in adopting its rules, but its rules are not part of the PCC and are not adopted by the city council.

requested height adjustment and a failure of the city's statutory obligation to provide a *de novo* appeal.

As we noted earlier, under ORS 227.175(10)(a)(A) and (D), once the BDS administrative decision was appealed, the city was obligated to provide an appeal to a review body and a *de novo* review by that body. Although ORS 227.175(10)(a)(A) and (D) do not expressly say so, those statutes implicitly require that the reviewing body that is assigned the responsibility for providing the *de novo hearing* must make a *decision* at the conclusion of the hearing. We agree with petitioner that making a decision on an appeal of an administratively issued adjustment requires the adjustment committee "to take action," within the meaning of PCC 33.710.030(D). *See* n 5.

We tend to agree with intervenor and the city that the record demonstrates that the adjustment committee provided a *de novo* hearing, in the sense that a new evidentiary record was compiled by the adjustment committee. There also does not appear to have been any conscious attempt by the adjustment committee to improperly shift the burden of proof.[7] However, we agree with petitioner that the required number of votes was not cast to deny the appeal of the height adjustment and that the adjustment committee's rule is simply inconsistent with PCC 33.710.030 in a case, such as this one, where the adjustment committee is *required* by ORS 227.175(10)(a)(A) and (D) to provide a *de novo* review of the BDS administrative decision.

The city and intervenor attempt to characterize the adjustment committee's 2 to 2 vote as a "failure" to take action. However, if the adjustment committee's decision is viewed in that way, the city's decision in this matter is inconsistent with ORS 227.175(10)(a)(A) and (D). A failure to act on the local appeal is inconsistent with those statutes, because the adjustment committee is required to provide a *de novo* review of the BDS decision. In *Lawrence v. Clackamas County*, 164 Or App 462, 469, 992 P2d 933 (1999), the Court of Appeals observed in a case where the local

[7] We understand petitioner to argue that the improper shifting of the burden of proof is a legal consequence of the adjustment committee's application of its rule to the tie vote that occurred in this matter on the motion to deny the local appeal of the height adjustment.

appellate body gave a staff administrative decision "considerable deference," "[t]hat is not *de novo* review." A tie vote that adopts no position one way or the other on the merits of the local appeal of the height adjustment and completely defers to the BDS decision based on an adjustment committee procedural rule is not *de novo* review either.

The city's and intervenor's reliance on our decision in *Derry v. Douglas County*, 28 Or LUBA 212 (1994), *rev'd on other grounds*, 132 Or App 386, 888 P2d 588 (1995), is misplaced. *Derry* is similar to the present case, in that the Douglas County zoning ordinance provided that a tie vote of the board of county commissioners had the legal effect of leaving the appealed planning commission decision in place as the county's final decision. However, *Derry* is also different from the present case in one important way; the planning commission decision that was the subject of that appeal was rendered after a public hearing, and the board of county commissioners was under no statutory obligation under ORS 227.175(10)(a)(A) and (D) to provide a *de novo* appeal.

We agree with petitioner that it was error for the adjustment committee to deny its appeal of the height adjustment without a majority vote to do so. In relying on its rule to give its tie vote the legal effect of denying the appeal of the height adjustment, the adjustment committee failed to provide the *de novo* appeal that is required by ORS 227.175(10)(a)(A) and (D).

B. Waiver

Under ORS 197.763(1) and 197.835(3) a petitioner at LUBA may not raise issues that were not raised below prior to, or at the conclusion of, the final evidentiary hearing. We agree with petitioner that because the issue that is at the heart of the first two assignments of error did not arise until *after* the close of the final evidentiary hearing, it was not waived under ORS 197.763(1) and 197.835(3). *DLCD v. City of Warrenton*, 40 Or LUBA 88, 95-96 (2001). Petitioner could not object *before* the close of the final evidentiary hearing where the tie vote that gave rise to the objection occurred *after* the close of the final evidentiary hearing. The city points out that the city provided notice before the adjustment committee hearing that its procedural rules provide for denial

of an appeal in the event of a tie. Respondent's Brief 4. We understand the city to argue that petitioner should have anticipated that the adjustment committee vote might result in a deadlock and therefore should have raised any concerns with the disputed rule in a precautionary objection before the close of the final evidentiary hearing.

We do not agree that ORS 197.763(1) and 197.835(3) require petitioner to (1) anticipate that the adjustment committee might reach a tie vote after the record is closed and (2) enter a precautionary objection before the conclusion of the adjustment committee's public hearing to preserve its right to challenge the adjustment committee rule at LUBA. Petitioner did not waive its right to raise the issues presented under the first two assignments of error under ORS 197.763(1) and 197.835(3).

Before ORS 197.763(1) and 197.835(3) were adopted, LUBA required that a petitioner who asserts procedural error at LUBA must have raised the procedural error below.[8] As we have explained, this obligation to object to procedural errors overlaps with, but exists independently of, ORS 197.763(1) and 197.835(3). *Confederated Tribes v. City of Coos Bay*, 42 Or LUBA 385, 393 (2002); *Simmons v. Marion County*, 22 Or LUBA 759, 774 n 8 (1992). This broader requirement to object to procedural errors is potentially relevant here because, unlike ORS 197.763(1) and 197.835(3), objection to procedural errors that occur after the close of the final evidentiary hearing may be required to avoid waiving the right to assign error based on a procedural error at LUBA, if the parties are given an opportunity to object to procedural errors after the close of the final evidentiary hearing. *But see Mazeski v. Wasco County*, 26 Or LUBA 226, 232-33 (1993) (petitioner did not waive right to assert procedural error at LUBA where petitioner had no reason to know the county court would consider evidence submitted after the planning commission

[8] We have some question whether the adjustment committee's decision to apply its rule and deny the local appeal of the height adjustment, instead of delaying action until a majority vote could be mustered on the question of the height adjustment appeal, is accurately characterized as a *procedural* error. Petitioner does not question the city's and intervenor's characterization of the error as procedural, and we therefore do not consider that question further on our own.

record closed and the county code and notice stated the county court decision would be based on the planning commission record). The relevant question is whether petitioner was afforded an opportunity to object to the adjustment committee's decision to apply its rule to deny the appeal of the height adjustment after the record in this matter was closed.

The petitioners in *Confederated Tribes* and *Simmons* clearly had opportunities to object to the procedural errors they attempted to raise at LUBA and failed to do so. Here, the adjustment committee's rules, which were read prior to the adjustment committee hearing, expressly state that after the adjustment committee closes the record and begins its deliberations, "[n]o additional testimony will be taken" and parties' participation at that point is limited to a right to "attend" the proceeding. *See* n 4. The adjustment committee's rule therefore makes it relatively clear that there was no right under the committee's rules to object to procedural errors that might occur after the record is closed. But for the actual events at the August 19, 2003 adjustment committee hearing, it would be relatively easy to conclude that petitioner had no opportunity after the record closed to object to the adjustment committee's application of its rule to reject the appeal of the height adjustment based on the tie vote and the disputed rule.

At its August 19, 2003 hearing, after the adjustment committee had closed the record and voted on the appeals, one adjustment committee member stated the committee would need to come back at a later date and adopt findings. Intervenor-Respondent's Brief App A-1. Other committee members questioned whether that was necessary since the adjustment committee adopted no changes to the BDS decision. *Id*. A staff person stated that the adjustment committee's decision needed to reflect the adjustment committee's decision to affirm the BDS decision. *Id*. at A-2. It is relatively clear from the transcript attached to intervenor's brief that the adjustment committee agreed that the BDS decision would be revised to reflect that the adjustment committee conducted a hearing and rejected the appeal leaving the BDS decision in place without substantive change. *Id.* At that point, a person identified only as an "[a]udience [m]ember" requested that the adjustment committee's decision reflect the tie vote on the height adjustment and reflect that the appeal of that

adjustment was denied based on the adjustment committee rule. In response to that request, an adjustment committee member said "[y]eah, that's fine." *Id*.

Based on the above exchange between the adjustment committee members and the unnamed audience member, the city and intervenor argue it is clear the city would have considered an argument that the adjustment committee rule should not be applied to the tie vote to deny the local appeal of the height adjustment, if the argument had been made after the adjustment committee adopted its decision. Before considering that question, we note that the parties apparently agree that the record does not show that petitioner was among the opponents of the height variance in the audience on August 19, 2003. However, we also do not understand petitioner to concede that it was not present on August 19, 2003. Petitioner only concedes that the *record* does not show that petitioner was present. We conclude it does not matter for purposes of our resolution of the waiver question whether petitioner was actually present on August 19, 2003. The question is whether the parties who were present, whoever they may be, were given an opportunity to object to the adjustment committee's decision to apply its rule and deny the appeal of the height adjustment based on its 2 – 2 vote.

Although the question is a reasonably close one, we do not agree with the city and intervenor that the opponents of the height adjustment were given such an opportunity. Although the adjustment committee responded to an opponent's concern that the final written decision reflect the tie vote, that does not necessarily mean the adjustment committee would have considered an objection that the adjustment committee should reconsider or reverse the decision it had just adopted. It is at least equally possible the adjustment committee would have responded to that kind of objection by citing rule 10, *see* n 4, and refusing to consider additional testimony or objections that were offered to elicit a different adjustment committee decision on the height adjustment appeal. That the adjustment committee considered late expressions of concern about the scope or content of the *findings* does not necessarily mean the adjustment committee would revisit its *decision* based

on expressions of concern about the adjustment committee's rules after the public portion of the adjustment committee proceedings had concluded.

In a case with some similarities to this one, LUBA concluded that a petitioner waived its right to object to late disclosure of *ex parte* contacts after the close of the evidentiary hearing, because petitioner was present at the meeting where the *ex parte* contacts were disclosed, and we determined objections were still possible even though the evidentiary hearing had closed. *Horizon Construction, Inc. v. City of Newberg*, 23 Or LUBA 159, 163 (1992). The Court of Appeals reversed our decision on this point and explained:

> "Arguably, the city could have reopened and extended the proceedings, if an objection had been made on December 17. However, we are unwilling to assume that that would have occurred, given that the meeting was not one at which either additions to the record or public participation, by way of objections or otherwise, were scheduled to be entertained. We are also not impressed by the city's argument that additional evidence and comment on other matters were in fact received at the meeting. Petitioner and the other proponents were utterly unprepared for the eventuality that a response would be necessary or could be made to the council member's belated disclosure." *Horizon Construction, Inc. v. City of Newberg*, 114 Or App 249, 254, 834 P2d 523 (1992).

The disputed tie vote in this case was more foreseeable than the late *ex parte* contact disclosure in *Horizon*. However, the real question under the Court of Appeals' analysis in *Horizon* is whether a petitioner has a real opportunity to object at the time the error that gives rise to the objection occurs. The Court of Appeals agreed with the petitioner in *Horizon* that the right to object after the record was closed in that case was "ephemeral." 114 Or App at 252-53. While the transcript attached to intervenor's brief suggests there might be more reason to suspect that the opportunity to assert the objection here was perhaps less ephemeral, it does not establish that there was a sufficiently real opportunity to object to justify a conclusion on our part that there was such an opportunity. Therefore, even if we assume the alleged error that underlies the first and second assignments of error is a procedural error, the failure of any party to raise that alleged error after the record was closed and after the adjustment committee voted to deny the appeals does not preclude raising that alleged error at LUBA.

The first and second assignments of error are sustained.

THIRD ASSIGNMENT OF ERROR

In its third assignment of error, petitioner alleges the adjustment committee failed to adopt findings. More precisely, petitioner alleges it was error for the adjustment committee decision to be signed by the adjustment committee chair and issued without ever being approved by a majority vote of the adjustment committee.

The adjustment committee decision appears to deviate from the BDS decision only in that it includes an additional section entitled "Procedural History" that describes the adjustment committee proceedings, including the tie vote on the height adjustment and the adjustment committee rule that the committee relied on to deny the appeal of the height adjustment. Record 43-44. We do not understand petitioner to allege that the written decision that was later prepared, signed by the adjustment committee chair and sent to the parties differs in substance from the adjustment committee's decision. As a matter of substance, it appears that the adjustment committee decision that was issued in writing is identical to the BDS decision.

In *Schaffer v. City of Happy Valley*, 44 Or LUBA 536, 543-47 (2003), we discuss some of the problems that may arise where others are assigned the task of reducing a decision maker's decision to writing and issuing the decision. There are a number of differences between the decision that we remanded in *Schaffer* and the adjustment committee decision in this case that might justify a different result here. However, because the adjustment committee decision must be remanded in any event under our resolution of the first two assignments of error, and the adjustment committee's decision on remand will likely render the allegations of error under the third assignment of error moot, we do not consider petitioner's third assignment of error.

The city's decision is remanded.