BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PAUL CONTE,
Petitioner,

vs.

CITY OF EUGENE,
Respondent,

and

OAKLEIGH MEADOW CO-HOUSING LLC,
Intervenor-Respondent.

LUBA No. 2018-042

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Paul Conte, Eugene, filed the petition for review and argued on his own behalf.

Lauren A. Sommers, Assistant City Attorney, Eugene, filed a response brief on behalf of respondent.

Zack P. Mittge, Eugene, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Hutchinson Cox Coons DuPriest Orr & Sherlock PC.

RYAN, Board Chair; BASSHAM, Board Member; ZAMUDIO, Board Member, participated in the decision.

AFFIRMED 10/15/2018

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a hearings officer's decision approving an application for final planned unit development approval.

BACKGROUND

The development that is the subject of this appeal has a lengthy procedural history, which we briefly summarize here only to the extent necessary to understand our decision.[1] Beginning in 2015, intervenor sought to develop a planned unit development (PUD) on its property. In connection with that development, intervenor applied for tentative planned unit development approval (TPUD Application).[2] The city's initial approval of that TPUD Application made a few trips up and down the appellate ladder before landing back before the hearings officer in early 2017. On June 5, 2017, the hearings officer approved the TPUD Application for a third time (2017 Tentative PUD Decision).

The 2017 Tentative PUD Decision imposed a new condition of approval, Condition 20. Condition 20 is central to this appeal, and provided:

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[1] We recently summarized that history in *Conte v. City of Eugene*, __ Or LUBA __ (LUBA No. 2017-063, Jan 11, 2018). We refer to that decision in this opinion as LUBA No. 2017-063.

[2] As we discuss in our resolution of the third assignment of error, intervenor also applied for a Willamette Greenway permit concurrently with the TPUD Application.

> "Prior to the occupancy of any dwelling in the PUD, the applicant shall improve Oakleigh Lane to ensure a minimum of 20 feet of paving width, in any areas where the paving width is currently less than 20 feet within the existing right-of-way. The applicant shall obtain any necessary permits for the required street improvements, and shall provide documentation of compliance upon completion." Record 12.

Condition 20 was intended to ensure compliance with Eugene Code (EC) 9.8320(5), which requires that the PUD provide "safe and adequate" transportation systems to nearby areas. Petitioner appealed the 2017 Tentative PUD Decision to LUBA, and LUBA affirmed the decision. *Conte v. City of Eugene*, __ Or LUBA __ (LUBA No. 2017-063, Jan 11, 2018), *aff'd* 292 Or App 625, 425 P3d 494 (2018).

While the TPUD Application was traveling up and down the appellate ladder, intervenor applied for final planned unit development approval (FPUD Application), pursuant to EC 9.8365, which requires in relevant part that the final PUD "conform[]" to the conditions imposed in the approved tentative PUD. We set out and discuss EC 9.8365 later. In July 2016, the hearings officer approved the FPUD Application (2016 Final PUD Decision). However, the 2016 Final PUD Decision did not address conformance with Condition 20, which was not imposed until the following year, in the 2017 Tentative PUD Decision. Petitioner appealed the 2016 Final PUD Decision to LUBA. In an unpublished June 2017 opinion, LUBA granted the parties' stipulated motion for voluntary remand and remanded the 2016 Final PUD Decision.

In early 2018, the hearings officer held a hearing on the remand of the 2016 Final PUD Decision. The hearings officer reopened the record and allowed new written evidence and argument to be presented, including evidence and argument related to Condition 20.[3] In April 2018, the hearings officer re-approved intervenor's FPUD Application (2018 Final PUD Decision). Petitioner appealed the 2018 Final PUD Decision to LUBA, and that is the decision that is before us.

MOTION TO STRIKE

After oral argument, petitioner filed a motion to strike two statements by intervenor's attorney during oral argument before LUBA.[4] Intervenor disputes petitioner's characterization of intervenor's attorney's statements.

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[3] During the proceedings on remand, intervenor submitted a letter to demonstrate that the final PUD conformed to Condition 20, stating:

> "[W]e hereby formally confirm in writing that [Oakleigh Meadows is] aware of the new condition of approval 20 imposed by the Eugene Planning Commission in its 2017 Final Order on Remand, and will conform to the same prior to occupancy." Record 29.

[4] During the September 13, 2018 oral argument before LUBA, intervenor's attorney made the following two statements, as quoted by petitioner in his Motion to Strike:

> (1) "The Court of Appeals already affirmed that determination"; and
>
> (2) "Frankly, the letter didn't require. I'm sorry, the condition didn't require any kind of action at all before final plat approval." Motion to Strike 1-2 (citing LUBA oral argument at 31:28, 35:00).

OAR 661-010-0040(1) provides that LUBA "shall not consider issues raised for the first time at oral argument." *See also* ORS 197.835(2)(a) (LUBA's review is confined to the record). LUBA focuses its review on the issues framed in the briefs, the evidence cited in the record, and the portions of the oral argument that discuss those issues and evidence. *Claus v. City of Sherwood*, 62 Or LUBA 67 (2010); *NAAVE v. Washington County*, 59 Or LUBA 153, 156 (2009). Given the difficulty of resolving the parties' disputes regarding the characterization of the two statements made at oral argument, petitioner's motion to "strike" the two statements can only be meaningfully addressed as a request that LUBA confine its review to the issues framed in the briefs, the evidence cited in the record, and the portions of the oral argument that discuss those issues and evidence. So framed, the request is granted. LUBA will ignore all statements made at oral argument, by any party, that go beyond the issues framed in the briefs and the evidence cited to us in the record.

Petitioner argues that the first statement is "false" because, according to petitioner, in *Conte v. City of Eugene*, 292 Or App 625, 425 P3d 494 (2018), the Court of Appeals did not address the arguments made by petitioner in the present appeal. Motion to Strike 1. Petitioner argues that the second statement represents a new "issue" that was not presented in Oakleigh Meadows' response brief, and that was raised for the first time at oral argument.

FIRST ASSIGNMENT OF ERROR

EC 9.8365 provides the only approval criterion for an application for a final planned unit development:

> "**Final Planned Unit Development Approval Criteria**. The planning director shall approve, approve with conditions, or deny a final PUD application. Approval shall include a finding that the final PUD plan conforms with the approved tentative PUD plan and all conditions attached thereto." (Emphases in original).

Thus EC 9.8365 obligates the city to determine that the final PUD plan conforms with the approved tentative PUD plan and all conditions imposed in the tentative PUD. In his first assignment of error, petitioner argues that the hearings officer's decision is "not supported by substantial evidence in the whole record" and that the decision "improperly construed the applicable law." ORS 197.835(9)(a)(C) and (D). Petition for Review 14. Petitioner's first assignment of error includes three arguments that we address below.

First, we understand petitioner to argue that in adopting Condition 20 in the 2017 Tentative PUD Decision, the city failed to adopt findings that satisfaction of the condition was feasible. The hearings officer rejected petitioner's same argument made below, concluding in relevant part that "the final PUD stage is not an opportunity to re-argue the merits of the tentative PUD decision." Record 14.

The city and intervenor each respond that the hearings officer correctly concluded that petitioner's argument is an impermissible collateral attack on both the 2017 Tentative PUD Decision, and on LUBA's decision in LUBA No.

2017-063. We agree. *See Bauer v. City of Portland*, 38 Or LUBA 715, 720-21 (2000) (LUBA will not consider challenges to an approved preliminary PUD application in an appeal of a final PUD).

To the extent that petitioner challenges the adequacy of Condition 20 to demonstrate satisfaction with a tentative PUD approval criterion, EC 9.8320(5)(b), that argument is an impermissible collateral attack on our decision in LUBA No. 2017-063, which specifically rejected petitioner's arguments implicating EC 9.8320(5)(b).[5] If petitioner disagreed with any aspect of our decision in LUBA No. 2017-063, petitioner was obligated to seek Court of Appeals' review of the aspects of the decision that he disagreed with.[6] *See Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992) (issues that LUBA resolves in remanding a decision cannot be relitigated in a subsequent appeal of the decision on remand); *Wetherell v. Douglas County*, 60 Or LUBA 131 (2009) (issues that could have been, but were not, raised in a first appeal of a decision that LUBA remands cannot be raised in an appeal of the decision on remand.)

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[5] In LUBA No. 2017-063, we rejected petitioner's argument that Condition 20 was inadequate to demonstrate compliance with EC 9.8320(5)(b). Slip op at 11-19.

[6] Our decision was appealed to the Court of Appeals, and petitioner intervened in that appeal. The court affirmed our decision. 292 Or App 625, 425 P3d 494 (2018). Petitioner did not file a separate opening brief or otherwise challenge any aspect of our decision except our order denying a motion to intervene.

Petitioner next argues that the city is required to "ensure that Condition 20 will eventually be fulfilled" by "requir[ing] * * * bonding and/or permitting for the required street improvement." Petition for Review 19. Petitioner also argues that after Condition 20 was imposed in the 2017 Tentative PUD Decision, intervenor was required to submit new or amended "final maps and supplemental materials" as supplements to its FPUD Application. Petition for Review 37. In support of his argument, petitioner relies on the application requirements for a final planned unit development at EC 9.8360, which requires as relevant here:

> "Planned Unit Development, Final Plan Application Requirements. In addition to the provisions in EC 9.7010 Application Filing, the following specific requirements apply to PUD final plan applications:
>
> "(1) Applications shall contain final maps and supplemental materials required to demonstrate compliance with tentative plan conditions of approval.
>
> " * * * * *
>
> "(4) Public improvements as required by this land use code or as a condition of tentative plan approval have been completed, or:
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> "(a) A performance bond or suitable substitute as agreed upon by the city has been filed with the city finance officer in an amount sufficient to assure the completion of all required public improvements; or
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> "(b) A petition for public improvements and for the assessment of the real property for the improvements has been signed by the property owner seeking the

> subdivision, and the petition has been accepted by the city engineer."

The hearings officer rejected petitioner's argument. The hearings officer noted that the application requirements in EC 9.8360 are not approval criteria, and that the failure to satisfy application requirements can only serve as a basis to deny an application if the required information is necessary to demonstrate compliance with an applicable approval criterion. *Le Roux v. Malheur County*, 32 Or LUBA 124, 129 (1996) (the fact that application requirements may not have been satisfied provides no basis for remand unless the failure to satisfy the requirements resulted in non-compliance with at least one mandatory approval criteria). The hearings officer also concluded that maps and supplemental drawings are not required to be submitted in order to demonstrate compliance with EC 9.8365, and concluded that because Condition 20 requires the paving of Oakleigh Lane to be completed "[p]rior to occupancy" rather than prior to final PUD approval, EC 9.8360(4) did not require submittal of a performance bond or completion of the paving work prior to final PUD approval. Record 14. Further, the hearings officer also imposed the identical language in Condition 20 as a condition of the 2018 Final PUD Decision, to be satisfied "[p]rior to the occupancy of any dwelling." Record 17. We agree with the city and intervenor that the hearings officer's interpretation of EC 9.8360 is correct.

Petitioner has not established that the hearings officer erred in deciding that the FPUD Application conforms to the approved 2017 Tentative PUD

Decision and all conditions imposed, consistent with EC 9.8365. Accordingly, petitioner has not established a basis for reversal or remand of the decision.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In three sections that we treat as subassignments of error, petitioner argues that the city committed procedural errors during the proceedings on remand that prejudiced his substantial rights. ORS 197.835(9)(a)(B) requires LUBA to reverse or remand a land use decision if a local government "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]"

1. First Subassignment of Error

ORS 227.181(1) provides in relevant part:

> "Pursuant to a final order of [LUBA] under ORS 197.830 remanding a decision to a city, the governing body of the city *or its designee* shall take final action on an application for a permit, limited land use decision or zone change within 120 days of the effective date of the final order issued by the board." (Emphasis added.)

Petitioner cites ORS 227.181 and argues that the remand proceedings were not "lawfully established by elected officials or their designated party." Petition for Review 39. We understand petitioner to argue that on remand the 2016 Final PUD Decision should have been taken up by the city council, not the hearings officer. Petitioner argues that the error violated petitioner's substantial rights.

The city and intervenor respond, and we agree, that nothing in ORS 227.181 dictates the procedures that a local government must follow upon remand. *Friends of Jacksonville v. City of Jacksonville*, 189 Or App 283, 288, 76 P3d 121 (2003) (ORS 227.181 provides for procedures relevant to the initial determination on a land use application before the local government, and not procedures to be followed following LUBA's review). The city's final PUD permit review procedure is a "Type II" process that does not involve the city council or the planning commission. EC 9.7055; 9.7210; 9.7215; 9.7220(4); 9.7600 *et seq*. After remand of the 2016 Final PUD Decision by LUBA, the city was not required to follow any procedures except those required by the EC.

More importantly, petitioner has failed to explain how the procedure the city followed prejudiced his substantial rights. Petitioner had the opportunity to present evidence and argument to the hearings officer and presented approximately 850 pages of written testimony and evidence along with oral testimony at the hearing. Petitioner has not demonstrated that a hearing before the city council would have provided any better or different opportunity to present evidence and argument.

The first subassignment of error is denied.

2. Second Subassignment of Error

Petitioner next argues that the city's proceedings on remand allowed "*post facto* submission of the required 'approved tentative PUD plan.'" Petition for Review 44. To the extent we understand the argument, it is that the city

committed a procedural error in failing to require intervenor to submit a new FPUD Application, after the city's initial decision approving the TPUD Application was remanded by LUBA, because according to petitioner, after the remand, there no longer existed an "approved tentative PUD plan" within the meaning of EC 9.8365.

We reject petitioner's argument for two reasons. First, while remand of a local government decision approving a permit means that the permit decision is no longer "effective," that does not necessarily mean the permit application is no longer "approved" by the local government within the meaning of EC 9.8365. Remand of a decision can occur for any number of reasons having little to do with the substance of an approval. Petitioner's argument reads the word "approved" in EC 9.8365 to mean "effective," in violation of ORS 174.010.

Second, petitioner has not established how any procedural error that may have occurred prejudiced his substantial rights. Absent any showing of prejudice, petitioner's arguments do not provide a basis for reversal or remand.

The second subassignment of error is denied.

3. Third Subassignment of Error

Petitioner argues that the remand proceedings "failed to update the application completeness review and apply the code requirements for a valid application." Petition for Review 40. Intervenor responds initially that petitioner failed to preserve the issue of whether the city committed a procedural error by failing to require a new completeness review. ORS

197.835(3); *Torgeson v. City of Canby*, 19 Or LUBA 511, 519 (1990) (alleged procedural error cannot be assigned as a basis for reversal or remand where no objection is raised below). Petitioner has not responded to intervenor's argument. We have reviewed the record pages petitioner cites in his preservation section, and we do not find that petitioner objected to the city's alleged procedural error. Record 36-39, 68, 75, 79-81, 924-28. Accordingly, we agree with intervenor that petitioner failed to preserve the issue of whether the city committed a procedural error by failing to require a new completeness review.

However, even if the issue was not waived, we agree with the city and intervenor that the city was not required to follow the procedures applicable to an initial application in a proceeding on remand, including completeness review. *East Lancaster Neigh. Assn. v. City of Salem*, 30 Or LUBA 147, 154 (1995), *aff'd* 139 Or App 333, 911 P2d 1283 (1996). Petitioner has not identified anything in the EC that requires the city to engage in a second completeness review when a decision is remanded.

The third subassignment of error is denied.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In his third assignment of error, petitioner argues the city erred by approving the FPUD Application because according to petitioner, the

Willamette Greenway Permit that was approved concurrently with the city's initial approval of the TPUD Application has expired.

The city and intervenor respond, and we agree, that an effective Willamette Greenway Permit is not an approval criterion for a final PUD application. As noted above, the only approval criterion for a final PUD application is EC 9.8365, which requires the city to approve the final PUD if it "conforms with the approved tentative PUD." Here, the hearings officer determined intervenor's final PUD application conforms to the approved tentative PUD plan. Record 16. Therefore, as explained above, the sole approval criterion is met. Accordingly, petitioner's argument provides no basis for reversal or remand.

In the alternative, the hearings officer also concluded that the Willamette Greenway Permit has not expired. EC 9.7340(4) provides:

> "Unless the decision specifies otherwise, a Willamette Greenway permit approval shall expire 18 months after the *effective date of approval* unless actual construction or alteration has begun under a required permit, or in the case of a permit not involving construction or alteration, actual commencement of the authorized activity has begun." (Emphasis added.)

As we explained in *Friends of Metolius v. Jefferson County*, 31 Or LUBA 160, 163 (1996), the date of final approval includes "subsequent appeals of that approval." Here, the Willamette Greenway Permit was applied for and approved concurrently with the TPUD Application, which has been subject to appeal since that time. The hearings officer adopted our reasoning in *Friends of*

Metolius and concluded that the Willamette Greenway Permit has not expired. We conclude that the hearings officer correctly interpreted the phrase "the effective date of approval" to mean the time after final approval, when the approval can no longer be appealed to any local or appellate tribunal. Accordingly, the hearings officer correctly concluded that the Willamette Greenway Permit has not expired.

The third assignment of error is denied.

The city's decision is affirmed.