BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CURTIS SORTE, Petitioner, and STEPHEN SCHALLHORN, ANDRA BOBBITT, and RALPH AYLSTOCK, Intervenors-Petitioner, vs. CITY OF NEWPORT, Respondent, and SOUTH SHORE L.P., Intervenor-Respondent.	LUBA No. 93-067 FINAL OPINION AND ORDER

Appeal from City of Newport.

Curtis Sorte, Albany, Fran Recht, Depoe Bay, Ralph Aylstock, South Beach, Andra Bobbitt, Seal Rock, and Stephen Schallhorn, South Beach, filed the petition for review. Curtis Sorte, Fran Recht and Andra Bobbitt argued on their own behalf.

Brett Kenney, Newport, filed a response brief and argued on behalf of respondent. With him on the brief was Minor & Boone.

Lawrence Derr, Portland, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief was Josselson, Potter & Roberts.

HOLSTUN, Referee; KELLINGTON, Chief Referee; SHERTON,

Referee, participated in the decision.

REMANDED 12/10/93

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

The challenged ordinance annexes three parcels containing 88.75 acres, located adjacent to the existing city limits and inside the city's acknowledged urban growth boundary (UGB). The challenged decision also changes the zoning of the subject property.[1] In addition, the challenged decision withdraws the subject property from the Newport Rural Fire Protection District, the Lincoln County Library District, and the Seal Rock Water District.

MOTION TO INTERVENE

South Shore, L.P., moves to intervene in this proceeding on the side of respondent. There is no opposition to the motion and it is allowed.

Stephen Schallhorn, Andra Bobbitt, and Ralph Aylstock move to intervene on the side of petitioner. There is no opposition to the motions, and they are allowed.

Fran Recht moves to intervene on the side of petitioner. Intervenor-respondent objects to the motion, arguing that movant failed to appear during the local

---

[1]The challenged decision describes the change in zoning as follows:

> "* * * Those portion[s] of Parcel I and Parcel II lying west of U.S. Highway 101 and all of Parcel III annexed to the City of Newport [are] hereby rezoned from the existing Lincoln County Residential R-4 to the City of Newport R-4/'High Density Multi-Family Residential.' In addition, those portions of Parcels I and II lying east of U.S. Highway 101 [are] hereby rezoned from the existing Lincoln County Planned Industrial I-P to the City of Newport I-1/'Light Industrial.'" Record 3-4.

proceedings, as required by ORS 197.830(6)(b)(B) and OAR 661-10-050(1).

Under our rules "[s]tatus as an intervenor is recognized when a motion to intervene is filed, but the Board may deny that status at any time prior to issuance of its final order. We previously denied intervenor-respondent's Motion to Deny Intervention of Fran Recht and allowed movant's motion to intervene. Sorte v. City of Newport, ___ Or LUBA ___ (LUBA No. 93-067, Order Allowing Intervention, August 31, 1993). In that order, we concluded it was not possible to determine whether movant was erroneously prevented from making the requisite appearance and, on that basis, allowed the requested intervention. However, we also explained as follows:

> "If movant Recht does not successfully challenge the city's decision to deny her the right to present testimony on her own behalf [at the May 17, 1993 city council hearing], she will not satisfy the ORS 197.830(6) and OAR 661-10-050(1) requirements for an appearance and, therefore, will not have standing to participate in this appeal as an intervenor." Sorte v. City of Newport, supra, slip op at 3.

In this opinion, we reject petitioner's and intervenors-petitioners' arguments that the county erroneously limited testimony at the May 17, 1993 city council hearing. Movant Recht therefore lacks standing in this matter, and her motion to intervene is denied.

FACTS

A public hearing on, and the first reading of, the

disputed ordinance by the city council occurred on December 21, 1992. The city council took action to adopt the ordinance on April 5, 1993. Thereafter, in response to certain concerns expressed by petitioner Sorte, the ordinance was reconsidered at a May 17, 1993 public hearing. The city reaffirmed its April 5, 1993 decision adopting the challenged ordinance, and this appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

The City of Newport Comprehensive Plan (Plan) includes goals, policies, and implementation measures. The Urbanization Goal is "[t]o promote the orderly and efficient expansion of Newport's city limits." Plan 278. The following policy and implementation measure appear under the Plan Urbanization Goal:

> "Policy 2: The city will recognize county zoning and control of lands within the unincorporated portions of the UGB.
>
> > "Implementation Measure 2: A change in the land use plan designations of urbanizable land from those shown on the Lincoln County Comprehensive Plan Map to those designations shown on the City of Newport Comprehensive Plan Map shall only occur upon annexation to the city.
> >
> > "1.) Urban development of land will be encouraged within the existing city limits. Annexations shall address the need for the land to be in the city.
> >
> > "2.) Urban facilities and services must be adequate in condition and capacity to accommodate the additional level of growth allowed in the city's plans. Those facilities must be available or

> can be provided to a site before or concurrent with any annexations or plan changes."

Petitioners and intervenors-petitioner (hereafter referred to collectively as petitioners) argue the city violated its statutory obligation to include in its notices of public hearing a list of all applicable criteria governing the disputed annexation.[2] Petitioners argue that, as a consequence of the city's failure to list the above-quoted implementation measure as an applicable criterion, they are entitled in this appeal to raise the issue of whether the implementation measure applies and, if so, whether the challenged decision violates the implementation

---

[2]ORS 197.763 provides, in relevant part, as follows:

> "* * * * *
>
> "(3) The notice [of hearings] provided by the jurisdiction shall:
>
> "* * * * *
>
> "(b) List the applicable criteria from the ordinance and the plan that apply to the application at issue;
>
> "* * * * *
>
> "* * * * *
>
> "(5) At the commencement of a hearing under a comprehensive plan or land use regulation, a statement shall be made to those in attendance that:
>
> "(a) Lists the applicable substantive criteria;
>
> "* * * * *."

measure.[3]

Petitioners contend the implementation measure expressly applies to annexation decisions, and there is no dispute that the challenged ordinance annexes the subject property. Petitioners point to the second of the two numbered parts of the implementation measure and argue the city has not demonstrated and cannot demonstrate that adequate urban facilities and services to serve the growth allowed under the city's plan are currently available to the subject property.

Intervenor-respondent and respondent (hereafter respondents) concede the local notices of public hearing did not identify the above-quoted implementation measure as an applicable criterion. Respondents also concede the city did not apply the disputed implementation measure in adopting the challenged decision.[4] However, respondents defend these failures by arguing that the cited implementation measure is inapplicable.

Respondents' position that the implementation measure does not apply appears to be predicated on a contention that

---

[3]ORS 197.835(2) limits our scope of review to issues "raised by any participant before the local hearings body as provided by ORS 197.763." However, ORS 197.835(2)(a) provides that issues may be raised at LUBA, even where they were not raised during proceedings below, where the "local government failed to follow the requirements of ORS 197.763 * * *."

[4]Neither do respondents dispute petitioners' contentions that the challenged decision fails to address the requirements specified in the second numbered part of the implementing measure.

the implementation measure applies only where the plan map designation for the subject property is being changed. At oral argument, respondents argued the challenged ordinance does not change the plan map designation for the subject property.[5]

It is not at all clear that the above-quoted plan implementation measure applies only where the plan map is being changed. The unnumbered part of the implementing measure simply states that the designations shown on the county's plan may be changed to the "designations shown on the City of Newport Comprehensive Plan Map * * * only * * * upon annexation to the city." It certainly is not obvious that this language limits the applicability of the implementation measure in the way respondents contend. We also note that while the challenged ordinance does not explicitly change the city plan map designations for the subject property, the decision to annex the property appears to be the event that has the legal effect of changing the effective plan map designation for the subject property from the existing county plan map designation to the existing

[5]In its brief, intervenor-respondent states petitioners did not object below to annexation of the property and limited their objections to the proposed rezoning. However, even if intervenor-respondent is correct about petitioners' position below concerning the annexation, that position was based on an assumption that the criteria applicable to the annexation decision did not include the above-quoted implementation measure. In this appeal, petitioners contend the implementation measure does apply to the annexation decision.

city plan map designation.[6]

There is more than enough uncertainty concerning the applicability of the disputed implementation measure to require that we remand the challenged decision to the county. As the court of appeals explained in Gage v. City of Portland, 123 Or App 269, 274, ___ P2d ___ (1993), with rare exceptions, the obligation to identify ambiguities in arguably relevant criteria and provide any interpretations needed to determine the applicability of those criteria rests with the local government.[7] The applicability of the disputed implementation measure is not for this Board to determine in the first instance. Id.; Weeks v. City of Tillamook, 117 Or App 449, 844 P2d 914 (1992). Neither may

---

[6]There is some uncertainty regarding the comprehensive plan map designation for the subject property. The staff report appearing at Record 6 includes the following:

> "Plan Designation: Currently county designation of 'residential' and 'industrial'; proposed city designations of R-4/'High Density Multi-Family Residential' and I-1/'Light Industrial.'"

However, the challenged ordinance does not purport to adopt new or amended city plan map designations for the subject property. It appears that the city takes the position that annexation is all that is required to effect the desired city plan map designations. If some other action has been taken with regard to the plan map designations for the property, no party has called that action to our attention.

[7]The court of appeals explained those rare exceptions as follows:

> "We do not foreclose the possibility that, in some cases, the local provisions on which a party relies may be so clear in their meaning or so tenuously related to the issues that a remand for a local interpretation would be an empty act." Id.

that interpretive issue be resolved by argument presented in respondents' briefs to this Board. Eskandarian v. City of Portland, ___ Or LUBA ___ (LUBA No. 93-012, October 15, 1993), slip op 15. The initial interpretation regarding the applicability or non-applicability of the disputed implementation measure must be adopted by the city in its decision and, thereafter, would be subject to review by this Board under the deferential standard of review explained in Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992).[8] See Or Laws 1993, ch 792, § 43.

Finally, petitioners also argue that ORS 197.752(1) is violated by the challenged decision.[9] However, that statute simply imposes a general land use planning obligation on local governments that the above-discussed implementation measure may have been adopted, in part, to address. The statute is not an independently applicable approval criterion for the rezoning and annexation decision

---

[8]Petitioners also argue the city's failure to list the implementation measure as an applicable criterion constitutes a procedural error which prejudiced their substantial rights and provides a basis for reversal or remand in and of itself. However, the argument that the city committed a procedural error in failing to list the disputed implementation measure assumes the implementation measure is an applicable criterion. We cannot decide that question until the city has provided the needed interpretation concerning the applicability of the implementation measure.

[9]ORS 197.752(1) provides as follows:

> "Lands within urban growth boundaries shall be available for urban development concurrent with the provision of key urban facilities and services in accordance with locally adopted development standards."

challenged in this appeal, and it provides no independent basis for reversal or remand.

The first and second assignments of error are sustained, in part.

THIRD ASSIGNMENT OF ERROR

Following the city council's April 5, 1993 action adopting the challenged ordinance, petitioner submitted a letter dated April 13, 1993 advancing two objections. First, petitioner objected that he had not been provided notice of, or an opportunity to present oral testimony at, the April 5, 1993 hearing. Petitioner contends he would have presented testimony concerning certain objections advanced in his December 21, 1992 letter to the city council, had he been given the opportunity to which he was entitled. Second, petitioner objected to the city's acceptance of supplemental findings submitted by the applicant at the April 5, 1993 hearing. Petitioners contend the supplemental findings constitute new information that they are entitled to rebut.

With regard to the first objection, the applicant suggested that petitioners' objection be treated as a request for reconsideration of the ordinance and that a public hearing be held to allow petitioner to present the oral argument concerning his objections to the proposal. A hearing was held for that purpose on May 17, 1993. Citing ORS 197.763(7), petitioners argue that because the city

allowed testimony by and on behalf of petitioner, all intervenors-petitioner were entitled to present new testimony on their own behalf.[10] We do not understand petitioners' argument to be based on a right to rebut the testimony submitted by petitioner at the May 17, 1993 hearing.[11] Rather, petitioners argue the reopening of the hearing on May 17, 1993 entitled all parties to submit additional relevant testimony on any relevant topic.

Petitioners misread the right guaranteed under ORS 197.763(7). That statute does not preclude the local government from reopening the evidentiary record for limited purposes after the record is closed, where the circumstances justify such action. Neither does ORS 197.763(7), itself, preclude the local government from limiting the persons who are allowed to participate in that reopened hearing.[12] The statute does provide that where the local government reopens the evidentiary hearing, all parties may raise new issues to

---

[10]ORS 197.763(7) provides as follows:

> "When a local governing body, planning commission, hearings body or hearings officer reopens a record to admit new evidence or testimony, any person may raise new issues which relate to the new evidence, testimony or criteria for decision-making which apply to the matter at issue."

[11]Neither did intervenors-petitioner request a right to rebut the testimony submitted by petitioner at the May 17, 1993 hearing, presumably because their interests in this matter are not adverse.

[12]Other statutory or constitutional provisions may have some bearing on who has a legal right to participate in such reopened hearings, but petitioners do not identify any such provisions.

LUBA which may be implicated by reopening the record.[13] The statute says nothing about rights that other parties in the local proceeding may have to participate in the local proceedings; it relates solely to their right subsequently to raise issues at LUBA.[14]

With regard to the second objection, we have previously held that absent some code provision to the contrary, parties have no "right" to rebut proposed findings. Adler v. City of Portland, 24 Or LUBA 1, 12 (1992). Moreover, we agree with respondents that it is clear the city did not provide the May 17, 1993 hearing for the purpose of allowing rebuttal to the supplemental findings, and committed no error by refusing intervenors-petitioner an opportunity to rebut those proposed findings at that hearing.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Under their final assignment of error, petitioners argue the city erred in conducting certain work sessions concerning the project at issue in this matter. Petitioners

---

[13]For example, a petitioner might be able to raise an issue at LUBA concerning new evidence accepted at the reopened hearing, even though he or she did not raise an issue below concerning that new evidence. The reason for this rule is relatively apparent. Persons who are not allowed to participate in a reopened proceeding cannot not be expected to raise issues concerning new evidence accepted during the reopened proceeding they are not allowed to participate in.

[14]Our understanding of ORS 197.763(7) appears to be consistent with that of the Oregon Supreme Court. See Beck v. City of Tillamook, 313 Or 148, 153, 831 P2d 678 (1992).

contend the city's failure to provide notice of these work sessions, take notes or minutes of the meetings, or disclose the occurrence of the work sessions violates ORS 192.640 and ORS 197.763(2)(a).[15] Petitioners argue as follows:

> "No public notice was provided of the public work sessions that the City conducted each noon before its December 21, [1992] meeting, its April 5, [1993] meeting, and its May 17, [1993] meeting. These work sessions were attended by most or all of the City Council members, the City manager, Planner, Engineer, Fire Chief, Police Chief and sometimes the City Attorney. In part, the purpose of those work sessions was to discuss the annexation and zone change decision which was on the agenda for each of those nights. There were no notes taken and no recording made of the noon sessions. At the public hearings on this matter, the City failed to disclose that they had the noon meetings or what the nature of the information learned and the discussions held at these work sessions was. Thus, [petitioners] were denied a fair right to rebut the information discussed." Petition for Review 15-16.

As an initial point we note there is no general

---

[15]ORS 192.640(1) provides, in part, as follows:

> "The governing body of a public body shall provide for and give public notice, reasonably calculated to give public notice to interested persons including news media which have requested notice, of the time and place for holding regular meetings. * * *"

ORS 197.763(2)(a) provides, in part, as follows:

> "Notice of the hearings governed by this section shall be provided to the applicant and to [certain] owners of record of property on the most recent property tax assessment roll where such property is located * * *
>
> "* * * * *."

prohibition against local government decision makers consulting with staff during the pendency of quasi-judicial proceedings. Flynn v. Polk County, 17 Or LUBA 68, 71 (1988). Such communications need not occur in the presence of the parties. Id.; Dickas v. City of Beaverton, 16 Or LUBA 574, 581, aff'd 92 Or App 168 (1988). Although petitioners may have a right to rebut any factual information received during such consultations that is relied on in support of the decision, see Flynn v. Polk County, supra, petitioners here do not identify any extra record evidence the city may have obtained during such work sessions and do not contend that such extra record evidence is relied upon by the city in support of its decision.

Similarly, respondents argue the city is not required to conduct all of its quasi-judicial decision-making deliberations during the public hearings governed by ORS 197.763. Therefore, according to respondents, the fact the decision makers in this case may have deliberated toward a decision (with or without consultation with city staff) outside the public hearings held in this matter does not necessarily mean a violation of ORS 197.763 occurred.[16] We agree with respondents on this point.

[16]It is not clear whether respondent disputes that the proposal at issue in this appeal was discussed at work sessions attended by the city council and city staff. Respondent does point out that the record submitted by the city in this matter does not support any of petitioners' factual assertions concerning those work sessions.

According to respondents, the possibility of a public meeting law violation at one or more work sessions does not, of itself, provide a basis for reversal or remand by LUBA. We agree. The exclusive forum for enforcement of the public meeting laws is circuit court. ORS 192.680. ORS 192.680(6) provides that "[t]he provisions of [ORS 192.680] shall be the exclusive remedy for an alleged violation of ORS 192.610 to 192.690."

We agree with respondents that petitioners fail to identify anything about the alleged work sessions that provides a basis for this Board to reverse or remand the challenged decision.

The fourth assignment of error is denied.

The city's decision is remanded.