

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

3
4 PAUL REEDER,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF OREGON CITY,
10 *Respondent.*

11
12 LUBA No. 99-141

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Oregon City.

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19 Gregory S. Hathaway and E. Michael Connors, Portland, filed the petition for review.
20 With them on the brief was Davis Wright Tremaine. E. Michael Connors argued on behalf of
21 petitioner.

22
23 Edward J. Sullivan and Marnie Allen, Portland, filed the response brief. With them
24 on the brief was Preston Gates & Ellis. Marnie Allen argued on behalf of respondent.

25
26 BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,
27 participated in the decision.

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29 AFFIRMED

3/17/2000

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31 You are entitled to judicial review of this Order. Judicial review is governed by the
32 provisions of ORS 197.850.
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NATURE OF THE DECISION

Petitioner appeals the city’s denial of an application for a zone change and preliminary plan approval for a planned unit development (PUD).

FACTS

Petitioner, the applicant below, filed two separate applications: one for a zone change from R-10 Single-family Dwelling District to R-8 Single-family Dwelling District, and one for approval of a preliminary plan for a 41-lot single-family residential PUD. The proposed PUD assumes an approved R-8 zone. On March 22, 1999, the city staff filed a staff report recommending that the planning commission approve the zone change and deny the proposed PUD. On May 10, 1999, the planning commission denied both the proposed zone change and proposed PUD. On May 19, 1999, petitioner appealed the planning commission’s order. The city scheduled the appeal hearing before the city commission on June 16, 1999. On June 4, 1999, petitioner sent a letter to the city requesting a continuance of the appeal hearing. On June 11, 1999, petitioner’s legal counsel sent a letter reaffirming the request for a continuance due to his unavailability on June 16, 1999. The city responded that the city commission would decide the request for continuance at the June 16 meeting. At that meeting, the city commission considered and denied the request for continuance. Petitioner’s land use consultant appeared on petitioner’s behalf, but declined to address some of the legal issues involved in the appeal. On consideration of petitioner’s appeal of the planning commission’s denial of the proposed zone change and proposed PUD, the city commission affirmed both denials. The city commission’s order became final on August 6, 1999.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner assigns error to the city commission’s decision to deny petitioner’s request

1 for continuance of the appeal hearing, arguing that, under the circumstances, the city
2 commission’s denial is “inconsistent with the applicable procedures in a manner that
3 prejudiced the substantial rights of [p]etitioner and denied [p]etitioner his due process rights
4 required by law.” Petition for Review 11. Petitioner argues that in light of the substantial
5 prejudice to petitioner’s ability to adequately present his case this Board should remand
6 under ORS 197.835(9)(a)(B) and (E) for a new hearing before the city commission.¹

7 The parties agree that the city commission has discretion in determining whether to
8 grant a request for a continuance of a land use hearing. The parties further agree that, in
9 considering a continuance request, the local government must evaluate the particular
10 circumstances of the request and balance the due process rights of the moving party against
11 the potential prejudice to the other parties involved, including the local jurisdiction.

12 Article I, section 11, of the Oregon Constitution and the Sixth Amendment to the
13 United States Constitution guarantee a criminal defendant the right to counsel, including a
14 “right to choose one’s counsel.” *State v. Zaha*, 44 Or App 103, 106, 605 P2d 306 (1980).
15 However, neither of these rights is absolute. Where a criminal defendant requests a
16 continuance of a previously scheduled hearing in order to secure counsel, a court will
17 balance the criminal defendant’s right to counsel with any prejudice the delay may cause to

¹ ORS 197.835(9) provides in part:

“In addition to the review under subsections (1) to (8) of this section, the board shall reverse or remand the land use decision under review if the board finds:

“(a) The local government or special district:

“* * * * *

“(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;

“* * * * *

“(E) Made an unconstitutional decision[.]”

1 the defendant himself or herself and the “destruction of the orderly processes of justice.”
2 *Zaha*, 44 Or App at 103; *State ex rel Frohnmayer v. Consumer Sounding Board*, 114 Or App
3 41, 43-44, 834 P2d 467, *rev den* 314 Or 574 (1992). In both civil and criminal contexts,
4 appellate courts review a trial court’s denial of requests for continuance for an “abuse of
5 discretion.” *State v. Mack*, 57 Or 565, 568, 112 P 1079 (1911) (“[t]he granting or refusing of
6 a continuance rests in the sound discretion of the trial court, and its determination should not
7 be disturbed, unless manifestly wrong and arbitrary, involving an abuse of such discretion”);
8 *Brant v. Brant*, 161 Or App 299, 302, 985 P2d 229 (1999) (stating standard); *Consumer*
9 *Sounding Board*, 114 Or App at 43-44 (same); *State v. Hickey*, 79 Or App 200, 203, 717 P2d
10 1287 (1986).

11 We do not understand petitioner to allege that he has a right to have legal counsel or
12 other particular individuals present his case to the city commission in this land use
13 proceeding.² However, petitioner does have a right to an on-the-record hearing before the
14 city commission under OCMC procedures that are designed to ensure that such hearings
15 provide petitioner a fair opportunity to prepare his case, because the OCMC specifically
16 grants petitioner that right.³ Moreover, OCMC 17.50.120(E) specifically grants petitioner a
17 right to request that the previously scheduled hearing be continued.⁴ Having granted

² Article I, section 11, of the Oregon Constitution does not apply in an administrative civil proceeding. *Gildroy v. MVD*, 315 Or 617, 621, 848 P2d 96 (1993). We are aware of no statutory or Oregon City Municipal Code (OCMC) provisions granting petitioner a right to be represented by counsel or other individuals.

³ OCMC 17.50.190(F) provides that appeal hearings must comply with the procedural requirements of OCMC 17.50.120. OCMC 17.50.120 provides the procedures the city will employ in conducting a quasi-judicial hearing, including: the general order of the proceeding; *ex parte* contacts, conflicts of interest or bias disclosure; and requests for continuance.

⁴ OCMC 17.50.120(E) provides:

“Requests for continuance and to keep open the record: The Commission or Board, as the case may be, may continue the hearing from time to time to allow the submission of additional information or for deliberation without additional information. New notice of a continued hearing need not be given so long as the Commission or Board establishes a time certain and location for the continued hearing. Similarly, the decision maker may close the hearing but keep open the record for the submission of additional written material or other

1 petitioner a right to request a continuance, the city is obligated to reasonably balance the
2 reasons petitioner offers for granting such a request with any prejudice the requested delay
3 may pose for the applicant, the city and any other parties. *Brant*, 161 Or App at 302 (the
4 propriety of the denial of a motion for continuance depends on the particular circumstances
5 of the case and the reasons presented to the court at the time the request is denied). The
6 city’s decision concerning the requested continuance is reviewable by LUBA for an abuse of
7 discretion.⁵

8 Petitioner argues that the city should have considered that the request was made in
9 good faith, that petitioner facilitated granting a continuance by making the request and
10 explanation in advance, and that petitioner specifically offered to waive the 120-day rule to
11 accommodate the schedules of the city commission and other parties.⁶

12 We consider whether the city abused its discretion in denying the requested
13 continuance. The challenged decision states the basis for the denial of petitioner’s
14 continuance request:

15 “The applicant requested a setover of this matter to a date certain in the future
16 because the applicant’s counsel could not be present. The City Commission
17 denied the setover because other parties were present, as was the full
18 Commission, and were prepared to proceed. A setover is addressed to the
19 sound discretion of the City Commission and the Commission determines
20 that, in the absence of compelling circumstances, the Commission desires to
21 keep its calendar current and decide appeals as expeditiously as possible.
22 These principles are best served by proceeding with the case at the first appeal
23 hearing. Accordingly, the setover is denied.” Record 15.

documents and exhibits. The Commission or Board may limit the factual and legal issues that
may be addressed in any continued hearing or open-record period.”

⁵We note that we are borrowing this standard of review from the judicial context. However, the parties do not cite, and we have not found, any administrative law cases addressing the standard of review for denial of a request for a continuance in an administrative proceeding.

⁶ ORS 227.178, the “120-day rule” applicable in this case, requires the city to take a final action on an application within 120 days after the application is deemed complete. ORS 227.178(4) allows the applicant to request extension of the 120-day period for a reasonable period of time.

1 Although we agree with petitioner that the opportunity to adequately present his case
2 is a legitimate reason to request a continuance, in these circumstances we cannot say that the
3 city commission abused its discretion by not allowing the continuance. An appeal hearing
4 conducted by the city commission is “on the record and the issues under consideration” are
5 “limited to those listed in the notice of appeal.” OCMC 17.50.190(F). The city
6 commissioners had reviewed the record and the issues submitted by petitioner in his notice of
7 appeal. Record 51. The city commission could reasonably determine that it was “prepared
8 to proceed.” Record 15. Petitioner was represented at the hearing and was provided the
9 opportunity to argue the issues raised in his appeal based on the record.

10 The city commission decided that it was in its interest to “decide appeals as
11 expeditiously as possible” and that that interest would be “best served by proceeding with the
12 case at the first appeal hearing.” Record 15. The city’s decision is consistent with the
13 overarching statutory interest in resolving land use appeals in a timely manner. *See* ORS
14 227.178 (120-day rule). ORS 197.805 provides that “time is of the essence in reaching final
15 decisions in matters involving land use.” On judicial review of a LUBA final order, ORS
16 197.855(4) prohibits the Court of Appeals from granting a continuance because of “lack of
17 diligent preparation or attention to the case by * * * any party.” Likewise, ORAP 4.70
18 provides that “[n]o continuance or extension shall be granted as to * * * the time specified by
19 these rules for filing the petition and the briefs or the time set for oral argument.” Viewed in
20 this context, we do not believe that the city commission abused its discretion in denying
21 petitioner’s request for a continuance.⁷

22 The first assignment of error is denied.

⁷ We note that although petitioner cites ORS 197.835(9)(a)(E) at Petition for Review 11, which requires this Board to reverse an unconstitutional local government decision, petitioner does not develop a cognizable constitutional argument. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

1 **SECOND ASSIGNMENT OF ERROR**

2 Petitioner contends that the city made a decision that is not supported by substantial
3 evidence in the record and failed to make adequate findings in denying petitioner’s zone
4 change application. A petitioner challenging a city's denial of the petitioner’s land use
5 application on evidentiary grounds bears the burden of demonstrating that only evidence
6 supporting the application can be believed and that, as a matter of law, such evidence
7 establishes compliance with each of the applicable criteria. *Jurgenson v. Union County*
8 *Court*, 42 Or App 505, 510, 600 P2d 1241 (1979).

9 OCMC 17.68.020 provides the applicable criteria for a zone change in this case.
10 OCMC 17.68.020(A) requires the proposed zone change to be consistent with the goals and
11 policies of the comprehensive plan. In denying the zone change request, the city commission
12 determined that three sets of goals and policies were not met. Record 18. Although
13 petitioner argues the city’s findings are not supported by substantial evidence, petitioner does
14 not attempt to satisfy his burden of demonstrating that, as matter of law, evidence that
15 supports the application establishes compliance with each of the applicable criteria.
16 *Jurgenson*, 42 Or App at 510.

17 The second assignment of error is denied.

18 The city’s decision is affirmed.