BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KAREN M. SCHWERDT, KRISTIN M. KENT,
ROD R. EDEL, MICHAEL G. TAYLOR,
ANDREA TAYLOR and EDWARD R. EPLEY,
Petitioners,

vs.

CITY OF CORVALLIS,
Respondent,

and

THE OREGON STATE BOARD
OF HIGHER EDUCATION,
Intervenor-Respondent.

LUBA No. 99-201

FINAL OPINION
AND ORDER

Appeal from City of Corvallis.

William H. Sherlock, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Hutchinson, Anderson, Cox, Coons and DuPriest.

James K. Brewer, Corvallis, filed a response brief and argued on behalf of respondent. With him on the brief was Fewel and Brewer.

Kathryn A. Lincoln, Assistant Attorney General, Salem, filed a response brief and argued on behalf of intervenor-respondent.

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

AFFIRMED 06/08/2000

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

Petitioners appeal a city decision approving (1) a modification to the Oregon State University (OSU) Physical Development Plan and (2) a development plan for a hotel/conference facility.

MOTION TO INTERVENE

The Oregon State Board of Higher Education (intervenor), the applicant below, moves to intervene on the side of the city. There is no opposition to the motion, and it is allowed.

FACTS

We previously remanded a city decision concerning the disputed hotel/conference facility. *Brome v. City of Corvallis*, 36 Or LUBA 225 (*Brome*), *aff'd Schwerdt v. City of Corvallis*, 163 Or App 211, 987 P2d 1243 (1999).[1] In *Brome*, petitioners argued the disputed facility is a type of commercial use that is not allowed in the OSU District. However, the city found that the disputed facility could be approved as "a 'civic use' allowed in the OSU District." 36 Or LUBA at 237. The city reached that conclusion because "University Services and Facilities" are listed as permissible civic use types. *Id* at 238. Corvallis Land Development Ordinance (LDO) 3.0.30.02.1.b defines "University Services and Facilities" as follows:

> "Services and facilities customarily associated with a major university. Typical uses include housing facilities, classrooms, research facilities, recreational amenities and parking facilities."

[1]Two of the petitioners in *Brome*, Richard L. Brome and Norman R. Fraser, are not petitioners in this appeal of the city's decision on remand. We nevertheless refer to petitioners in both appeals as "petitioners."

The city found that "the proposed hotel/conference facility [falls] within the University Services and Facilities use type because such facilities [are] 'customarily associated' with major universities." *Brome*, 36 Or LUBA at 239.

In their fourth assignment of error in *Brome*, petitioners first argued that the city erred in concluding the disputed hotel/conference facility could be approved as a "University Services and Facilities" "civic use" type. We rejected that part of petitioners' fourth assignment of error. Petitioners also included an evidentiary challenge under the fourth assignment of error in *Brome*. We rejected petitioners' evidentiary challenge, concluding that "a reasonable person could conclude, based on the evidence in the record, that hotel/conference facilities are customarily associated with major universities * * *." 36 Or LUBA at 242.[2]

Although we rejected petitioners' fourth assignment of error in *Brome*, we sustained petitioners' second assignment of error, relating to new evidence that was submitted on behalf of the applicant on the day the city council rendered its decision. As we explained in *Brome*, written argument with attached evidence was received by the city on October 5, 1998.[3] In making its decision on that same day, the city relied in part on that attached evidence. However, the city failed to provide petitioners an opportunity to rebut the evidence. We concluded that failure was error.

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[2]In rejecting petitioners' evidentiary challenge, we rejected petitioners' specific arguments that the city erred in relying in part "on the existence of uses such as sports and entertainment facilities and fast-food franchises in the OSU District." 36 Or LUBA at 241. We also rejected petitioners' argument that the city could not rely on evidence "regarding hotel/conference facilities connected with other universities * * * without evidence that the listed hotels were built long ago." *Id.*

[3]Those documents consisted of (1) a September 24, 1998 letter from the Oregon State University Department of Intercollegiate Athletics and (2) an October 5, 1998 letter from the Oregon Department of Justice. Both letters were submitted on behalf of the applicant. The October 5, 1998 letter included two attachments. The first attachment is a document entitled "HISTORICAL PERSPECTIVE: DEVELOPMENT OF UNIVERSITY CONFERENCE CENTERS." The second attachment is a list entitled "Colleges/Universities with Hotels on Campus," which lists a total of 56 colleges and universities and gives (1) the state in which each college or university is located, (2) the hotel name, (3) a phone number and (4) the number of rooms in the named hotel. Record 121-34, 254-67.

Our disposition of the second and fourth assignments of error established that the city's findings were sufficient to demonstrate that the disputed hotel/conference facility could be approved as a "University Services and Facilities" "civic use" type. However, because petitioners were improperly denied an opportunity to rebut some of the evidence that the city relied upon in finding that the proposal qualifies as a "University Services and Facilities" "civic" use type, a remand was required to allow petitioners an opportunity to rebut that evidence.

Following our decision in *Brome*, the city provided petitioners an opportunity to rebut the October 5, 1998 documents. Thereafter, the city again found that the disputed hotel/conference facility is a use that is "customarily associated with a major university," within the meaning of LDO 3.0.30.02.1.b. Accordingly, the city concluded the disputed facility qualifies as a "University Services and Facilities" "civic use" type and adopted the challenged decision. This appeal followed.

ASSIGNMENT OF ERROR

Petitioners' single assignment of error is as follows:

> "The new information relied on by the City to justify its decision to transform what is clearly a commercial hotel use to a civic use on OSU property does not qualify as substantial evidence to support a finding of compliance with [LDO] 2.5.10." Petition for Review 4.[4]

Before turning to petitioners' specific evidentiary arguments, we note that petitioners appear to argue the city must adopt findings establishing that the proposal is both a "civic use," and that the use is "customarily associated with a major university," and that those findings must be supported by substantial evidence. The question of whether the disputed

[4]Petitioners explain that LDO 2.5.10, which is the background section of the Planned Development chapter of the LDO, "does not permit changes in uses specified by the underlying district." The argument that follows the assignment of error takes the position that the city's finding that the disputed facility is properly viewed as a use that is "customarily associated with a major university" is not supported by substantial evidence. Although it is not entirely clear, we understand petitioners to argue the city erred by permitting a use that is not "specified by the underlying district."

facility may properly be viewed as a "civic use," assuming it is the kind of facility that is customarily associated with a major university," was resolved adversely to petitioners in *Brome*. 36 Or LUBA at 237-40. Petitioners may not continue to raise that issue in this appeal. *Beck v. City of Tillamook*, 313 Or 148, 154, 831 P2d 678 (1992). The only question that is presented in this appeal of the city's decision on remand is whether the city's findings that the disputed hotel/conference center is properly viewed as a use that is "customarily associated with a major university" are supported by substantial evidence.

Petitioners' arguments challenge the city's reliance on the above-noted list of 56 colleges and universities. *See* n 3. Petitioners argue:

> "* * * Petitioners contacted all of the hotels and universities listed by intervenor and found that 50 percent of the information on the list is flat out wrong and the remainder is misleading. As explained to the City Council at the December 6, 1999 hearing, of the 56 hotels identified by the Intervenor, at least 12 had no affiliation with the university they were allegedly associated with. At least 11 of the hotels were in fact dorms/residence halls that were owned and operated by the university for student housing during the school year and for conference groups and continuing education in the summer months. These types of facilities do not belong on the Intervenor's list as examples of universities with associated hotels. Most of the remaining hotels are restricted strictly to conference/education use or otherwise limited so as not to compete with the private sector.
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> "Thus, of the 56 universities that Intervenor claimed had hotels associated with them, none * * * were actually involved in the kind of 99 year lease arrangement that would allow a commercial hotel corporation like Hilton to enjoy virtually unlimited control over both the hotel facility and its customer base.
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> "In fact, the universities owned the hotels that were associated with universities. A few were operated by a management company but with the financial and final operational decisions and control retained by the university. In the present situation, [Oregon State University] does not retain control of the operation and receives incentive fees for volume of sales." Petition for Review 6-7 (record citations omitted).[5]

[5]Petitioners' rebuttal evidence appears at Record 77-80.

Petitioners go on to argue that the city should assume that intervenor's list is exhaustive and that the remaining 33 universities represent a very small percentage of the "1200 larger universities and colleges in the United States * * *." Petition for Review 7. Petitioners contend that in view of the issues they raised about the list of 56 universities and colleges with hotels on campus, the city erred by failing to specifically address those issues in its findings. *Norvell v. Portland Area LGBC*, 43 Or App 849, 852-53, 604 P2d 896 (1979); *Blosser v. Yamhill County*, 18 Or LUBA 253, 264 (1989); *McCoy v. Linn County*, 16 Or LUBA 295, 302 (1987), *aff'd* 90 Or App 271, 752 P2d 323 (1988).

There are three problems with petitioners' arguments. The first problem is that they are based, in large part, on petitioners' view that only examples of *privately* owned and operated hotels that are associated with major universities are relevant in determining whether the proposed hotel/conference facility is properly viewed as a use that is "customarily associated with a major university," within the meaning of LDO 3.0.30.02.1.b. Petitioners offer no reason why hotel/conference facilities associated with major universities must be strictly segregated, for purposes of making the finding required by LDO 3.0.30.02.1.b, according to the particular details of the ownership and operating relationships between other major universities and the hotels with which they are associated. The document submitted by intervenor that appears at pages 130-32 and 263-65 of the record specifically recognizes that colleges and universities use several different approaches to secure contiguous overnight accommodations for visitors to university conference and meeting facilities.[6] Petitioners' view that only hotel/university relationships with similar

[6]That document explains that during the 1950's, '60's and '70's "the Kellogg Foundation provided grants to schools to build on-campus hotel facilities to augment their outreach and continuing education programs." Record 130, 263. Another cited approach is to make college or university residence halls available to visitors, during summers or year-round. A third cited approach is to issue tax-exempt revenue bonds, allowing the university to construct and operate a hotel on university-owned property in competition with private sector hotels. A fourth cited approach, and the approach taken here, is to lease university owned property to a hotel developer and operator and to share in income through the lease.

ownership and operating characteristics should be considered under LDO 3.0.30.02.1.b might be a permissible approach. However, it is clear that the city did not adopt that view.[7] We do not believe the city erred in applying LDO 3.0.30.02.1.b in the manner that it did.[8]

A second problem with petitioners' arguments in this appeal is that petitioners approach the evidentiary question as though the list of 56 universities and colleges with hotels, and petitioners' rebuttal evidence, is the *only* relevant evidence supporting the city's finding that hotel and conference facilities such as the one proposed here are customarily associated with major universities. The record includes other, unchallenged testimony and documentary evidence that support the challenged findings.[9]

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[7]One of the city councilors took the position that "there was little distinction between allowing residence hall use for conferences during the summer or a university directly or indirectly owning a hotel." Record 59.

[8]We also agree with respondent that the city was not obligated to assume that the lists submitted by the applicant are exhaustive, in the sense they are comprehensive lists of *all* universities and colleges with which hotels are associated.

[9]The record also includes a second list, "Examples of University Campuses with Hotels." Record 135. This second list was included in the record sometime before the city's original October 5, 1998 decision and was not one of the late-filed documents that led to our remand in *Brome*. There is some overlap between that list and the list of 56 universities and colleges with hotels, but there are 14 universities and colleges included on the list at record 135 that do not appear on the list at record 133-34. In addition, the record includes testimony by Dr. Paul Risser, the president of Oregon State University, and Sylvia Moore, the Oregon State University Director of Conferences and Special Events. Dr. Risser testified that "over 50 public and private universities have lodging facilities on or adjacent to their campuses." Record 351. Ms. Moore testified

> "that Virginia Tech is co-sponsoring a conference with Promus Collegiate Collection to discuss this very issue of attracting hotels to university campuses, how to develop those hotels, and how to foster public and private partnerships in order to best use tax payers' money. She explained that Double Tree Inns and Marriott are both developing hotels on university properties." Record 360.

We also note that respondent and intervenor also claim the city council relied in part on its own experiences on the campuses of major universities in concluding that hotel/conference facilities are customary on such campuses. Record 246-47. It appears to us that only one councilor cited personal experience with other major universities. It is unclear whether that comment was offered as "evidence," and petitioners do not respond to the claim. In view of the questionable propriety of a member of the city council offering evidence in a quasi-judicial land use proceeding over which the council is presiding, we decline respondent's and intervenor's invitation to assume that the city councilor's comment was relied upon as evidence by the city council.

Finally, like petitioners, we are somewhat puzzled that the city did not make more of an effort in the findings supporting its decision on remand to explain why it found the evidence that was offered by petitioners on remand unpersuasive. However, we reject petitioners' argument that the city committed reversible error by failing to adopt findings specifically addressing the evidence that petitioners submitted on remand. The city council was obligated to adopt findings addressing the relevant "issue" of whether the disputed hotel/conference facility is properly viewed as a use "customarily associated with a major university." *Norvell*, 43 Or App at 852-53; *Blosser*, 18 Or LUBA at 264; *McCoy*, 16 Or LUBA at 302. The city adopted findings addressing that issue. However, the city does not necessarily commit reversible error by failing to adopt findings specifically addressing the "evidence" that was submitted by petitioners. *See Douglas v. Multnomah County*, 18 Or LUBA 607, 619 (1990) ("It may be in certain circumstances that a local government will improve its chances on appeal to [LUBA] if it explains why certain evidence that would lead to different findings and a different decision was not relied upon. However, such findings are not necessary so long as LUBA can conclude that a reasonable decision maker could decide as the local government did in view of all of the evidence, both that supporting the decision and that detracting from the decision.")

When the evidence in the entire record is considered as a whole, we continue to believe that a reasonable person could conclude, as the city did, that hotel/conference facilities are customarily associated with major universities and that the proposal therefore may be approved.

The city's decision is affirmed.