BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DOUGLAS TERRA, LESLIE TERRA,
GARY F. EDMUNDSON, LEE MOORE,
CAROL MOORE, JAMES L. KENNISON
and MARJORIE L. WEESNER,
Petitioners,

and

FRAN RECHT,
Intervenor-Petitioner,

vs.

CITY OF NEWPORT,
Respondent,

and

VISTA LAND CORPORATION,
Intervenor-Respondent.

LUBA No. 2000-195

FINAL OPINION
AND ORDER

Appeal from City of Newport.

Corinne C. Sherton, Salem, filed the petition for review and argued on behalf of petitioners. With her on the brief was Johnson and Sherton.

Fran Recht, Depoe Bay, represented herself.

Robert W. Connell, Newport, filed a response brief and argued on behalf of respondent. With him on the brief was Minor, Bandonis and Connell.

Douglas R. Holbrook, Newport, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Litchfield and Carstens.

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

AFFIRMED 08/21/2001

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a city decision approving a conditional use permit for a 101-unit hotel on land zoned for residential use.

FACTS

The challenged decision is the city's decision on remand from this Board. *Terra v. City of Newport*, 36 Or LUBA 582 (1999) (*Terra I*).[1] In that decision, LUBA sustained eight assignments of error by petitioners and intervenor-petitioner, and remanded the decision to the city for further proceedings.

The city's code does not specify procedures for proceedings on remand. After extensive negotiations, petitioners, intervenor-petitioner and intervenor-respondent (Vista) agreed in writing to the procedures that would govern the remand proceedings. The stipulated procedures specified that any "new evidence" must be submitted to the city by April 3, 2000, and any rebuttal evidence must be submitted by May 1, 2000. Further, the agreement provided for a hearing before the city council no earlier than May 22, 2000, and specified the following:

> "At the City Council hearing, no new written evidence will be accepted. Each side will get one hour to make oral presentations, with the applicant going first. Each side can reserve some time for rebuttal. Oral presentations will be limited to the authors of previously submitted written evidence summarizing and explaining their submittals and argument by the parties or their attorneys." Record 706.

The city council approved the stipulated procedure. At the July 17, 2000 city council hearing, Vista's witnesses testified first, followed by petitioners and intervenor-petitioner, and concluded with rebuttal by both sides. During the testimony of Vista's witnesses, petitioners objected that several of those witnesses had introduced new evidence as part of

[1]A recitation of the facts regarding the subject property and the proposed development underlying the city's decision in *Terra I* is not necessary for resolution of the issues in this case.

their presentations. After the testimony of all of the parties concluded, the city council addressed petitioners' objections. The city council ultimately decided to allow the parties 14 days to submit objections identifying the new evidence they contended was submitted in violation of the stipulated procedures, and then to allow parties seven days to submit a response to any such objections. The city council would then decide whether to accept the challenged evidence.

The parties accordingly submitted their objections identifying new evidence, and filed responses to each others' objections. The city council deliberated on August 21, 2000, and made an oral determination that no new evidence had been submitted in violation of the stipulated procedures, thereby accepting all evidence presented at the July 17, 2000 hearing. The city council continued its deliberation to September 5, 2000, at which it made an oral decision to again approve Vista's application. On November 6, 2000, the city council adopted a final written decision addressing the grounds for remand in *Terra I*. This appeal followed.

ASSIGNMENT OF ERROR

Petitioners argue that the city erred in determining that no new evidence was submitted by Vista's witnesses at the July 17, 2000 hearing, and in accepting such new evidence without offering petitioners an opportunity for rebuttal. In doing so, petitioners argue, the city "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights" of the petitioners. ORS 197.835(9)(a)(B). Petitioners contend that the right to rebut evidence placed before the local government decision maker is one of the substantial rights referred to in ORS 197.835(9)(a)(B). Because the city denied petitioners the opportunity to rebut evidence relevant to approval standards, petitioners argue, their substantial rights were prejudiced. *Jackman v. City of Tillamook*, 29 Or LUBA 391, 402-03 (1995); *Mazeski v. Wasco County*, 26 Or LUBA 226, 233 (1993).

According to petitioners, the oral presentations of three of Vista's expert witnesses included information that is not found in the previously submitted written materials. Before discussing the disputed testimony, we address the parties' arguments regarding the stipulated procedure.

Petitioners apparently read the stipulated procedure to unambiguously prohibit mention of any new facts or presentation of new evidence as part of the July 17, 2000 hearing that was not specifically set forth in previous written submissions. Vista, on the other hand, argues that the stipulated procedure prohibits new *written* evidence, but does not clearly prohibit introduction of new oral evidence at the hearing. To the extent the procedure constrains the introduction of new oral evidence, Vista argues, it allows submission of additional supportive facts in the course of "explaining" previous written submittals.

The city council apparently agrees with Vista's view of the stipulated procedure.[2] The council's decision describes the procedure as allowing the parties to "explain and

---

[2]The city's findings state, in relevant part:

> "On or about March 21, 2000, at a duly convened City Council meeting, the Council approved the procedure governing presentation of evidence and argument on remand. That procedure was agreed to by the parties, and limited the scope of the remand hearing to the assignments of error sustained by LUBA; allowed new written evidence to be submitted by a date certain with written rebuttal allowed thereafter by a date certain; and provided that no new written evidence would be allowed at the remand hearing, although oral presentations would be allowed. Finally, oral presentations were limited to the authors of previously submitted written evidence *summarizing and explaining their submittals* and argument by the parties or their attorneys.
>
> "On April 2, 2000, Applicant Vista Land and intervenor-petitioner Fran Recht introduced evidence pertaining to the matters remanded by LUBA. On May 1, 2000, Petitioner Terra and intervenor-petitioner Recht (as designated in the LUBA appeal) submitted counter-evidence. On July 17, 2000, the Newport City Council held *an evidentiary hearing* to allow argument by the parties to *explain and introduce testimonial evidence*, limited solely to the issues remanded by LUBA. * * *
>
> "In response to objections interposed by the parties concerning 'new evidence,' the Council continued the hearing to August 21, 2000, at which time the parties' respective written objections and rebuttal thereto would be considered. On August 21, 2000, the Council considered the same, and while noting that some purported elements of 'new evidence' may not be relevant to the issues at hand, allowed all evidence into the record, *as consistent with*

introduce testimonial evidence" during the hearing, which suggests that the city council does not view the scope of "explanation" to be limited to the evidence previously introduced. The city council ultimately concluded that the alleged new evidence was acceptable as part of the explanation of previously submitted written evidence. The parties dispute whether the city's decision expresses a reviewable interpretation of the stipulated procedure, and whether that interpretation is entitled to deference under the standard of review at ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). We need not resolve that dispute, because we agree with Vista that even under a less deferential standard of review, or in the absence of a reviewable interpretation, the stipulated procedure is not reasonably interpreted to limit discussion of evidence at the hearing to a recitation of specific facts or evidence set forth in previous written submittals.

As Vista points out, the stipulated procedure clearly bars new written evidence at the hearing, but is more equivocal regarding the permissible scope of oral testimony.[3] The procedure does not state or necessarily imply, as petitioners contend, that witnesses' summaries and explanations must be limited to discussion of the facts already set forth in previous written submissions.[4] In our view, the procedure constrains introduction of new evidence, but is not reasonably read to prohibit discussion of new facts or evidence in the course of explaining previously submitted written evidence.

---

the stipulated and adopted procedure, which allowed explanation and summaries of previous submittals and argument. * * *" Record 15-16 (emphases added).

[3]We repeat the pertinent text of the stipulated procedure:

> "At the City Council hearing, no new written evidence will be accepted. Each side will get one hour to make oral presentations, with the applicant going first. Each side can reserve some time for rebuttal. Oral presentations will be limited to the authors of previously submitted written evidence summarizing and explaining their submittals and argument by the parties or their attorneys." Record 706.

[4]If that was the intent of the parties that drafted the procedure, then those parties have an unreasonably optimistic faith in human nature, specifically in the ability of non-attorney expert witnesses to explain technical matters in an adversarial setting to lay decision makers, while complying with an ambiguous evidentiary restriction.

It is important to recognize that petitioners had an opportunity at the July 17, 2000 hearing to offer oral rebuttal to anything presented at the July 17, 2000 hearing. What petitioners allege was denied them was an opportunity to generate and present, through some later evidentiary proceeding, additional *written* evidence rebutting the "new evidence" that was allegedly submitted orally at the hearing. It is also worth noting that much if not all of the disputed oral testimony was submitted in response to objections raised by petitioners and intervenor-petitioner in their written rebuttal, regarding the sufficiency or accuracy of Vista's previously submitted written evidence. Under petitioners' view of the stipulated procedure, the only permissible evidentiary response to those criticisms would be a reiteration of the evidence already set forth in previously submitted written exhibits. Such a limited response would serve little or no purpose. Petitioners' view of the stipulated procedure would convert the nature of the city council hearing, which all parties appear to agree was intended to be an evidentiary hearing, albeit a limited one, into a nonevidentiary hearing. Accordingly, we conclude that the stipulated procedure allows the authors of previously submitted written evidence to explain that evidence by orally providing additional information, in response to petitioners' and intervenor-petitioner's written rebuttal of that evidence.

With that understanding of the stipulated procedure, we turn to the parties' arguments regarding the disputed testimony. Petitioners challenge the oral testimony of three Vista witnesses: (1) a land use consultant who testified regarding the identification and character of the relevant neighborhood, for purposes of demonstrating compliance with Newport Zoning Ordinance (NZO) 2-5-3.015(A)(4); (2) an engineer who testified regarding the proposed stormwater drainage system, for purposes of demonstrating compliance with Newport Comprehensive Plan (NCP) Public Facilities General Policy 4; and (3) an engineer who testified regarding whether pertinent areas of the subject property are within a hazard zone, for purposes of demonstrating compliance with NZO 2-4-6.025(D)(1).

A. Identity and Character of the Neighborhood

In *Terra I*, the Board remanded the decision in part for the city to identify the pertinent "neighborhood" for purposes of NZO 2-5-3.015(A)(4), and to adopt adequate findings regarding the "character" of the neighborhood.[5] On remand, Vista submitted Vista Remand Exhibit 1 (Exhibit 1), which argues that the pertinent neighborhood is the Agate Beach Neighborhood in which the subject property is located. Exhibit 1 refers to and attaches a copy of the Agate Beach Neighborhood Plan. Record 572. Exhibit 1 also argues that the proposed hotel is consistent in size, height, form, color and material with other buildings in the neighborhood, with specific examples. Record 572-74. Petitioners argue that, in five instances, the oral testimony of the author of Exhibit 1 went beyond explaining the evidence in Exhibit 1:

1. Testimony regarding the process and timing of the development of the Agate Beach Neighborhood Plan. Record 116.

2. Testimony that Agate Beach is "primarily an area of absentee owners," with many vacation rentals in the area. Record 117.

3. Testimony that cited four additional examples of buildings with pitched roofs, similar to the proposed hotel, than were cited in Exhibit 1. Record 118.

4. Testimony that the proposed hotel can meet the applicable 35-foot height limitation. Record 119.

5. Testimony that the hotel's controlled entrances are typical of hotels and bed and breakfast facilities, and similar to an assisted living facility within the neighborhood. Record 119.

Vista responds that items 1, 2, and 4 are irrelevant to identifying either the boundaries or the character of the pertinent neighborhood and, therefore, to the extent their acceptance violates the stipulated procedure, that violation provides no basis for remand. We agree. To

---

[5]NZO 2-5-3.015(A)(4) allows approval of a conditional use based on a finding that:

> "The proposed use is consistent with the overall development character of the neighborhood with regard to building size, height, color, material, and form."

obtain remand based on improper acceptance of evidence, petitioners must demonstrate, *inter alia*, that the evidence is at least potentially relevant to an approval criterion. *Jackman*, 29 Or LUBA at 402-03. Petitioners have not demonstrated that items 1, 2 and 4, even assuming they were improperly accepted, are potentially relevant to NZO 2-5-3.015(A)(4).

With respect to item 3, Vista argues, and petitioners do not dispute, that three of the four examples of buildings with pitched roofs are cited in Exhibit 1, under slightly different names. Vista argues that petitioners have not demonstrated why mention of an additional example, the Driftwood Motel, violates the stipulated procedure. We agree. As explained above, the stipulated procedure does not prohibit discussion of additional facts or evidence in the course of explaining previously submitted evidence. With respect to item 5, the consultant's testimony was in response to petitioners' criticism that Exhibit 1 fails to address whether the hotel's controlled entrance is consistent with other residential and resort structures in the neighborhood that tend to have individual entrances for each unit. Record 245. As explained above, the stipulated procedure allows a witness to orally explain previously submitted evidence by citing additional facts in response to criticisms of that evidence.

B. Stormwater Drainage System

Petitioners argue that LUBA remanded the city's decision in *Terra I* for inadequate findings regarding the feasibility of serving the subject property with adequate storm drainage, as required by NCP Public Facilities General Policy 4.[6] On remand, Vista's

[6]Public Facilities General Policy 4 of the city's comprehensive plan provides in relevant part:

> "Essential public services should be available to a site or can be provided to a site with sufficient capacity to serve the property before it can receive development approval by the city. For purposes of this policy, essential services shall mean:
>
> "* * * * *
>
> "[C.] Storm Drainage"

engineer submitted a two-page document, Vista Remand Exhibit 7 (Exhibit 7), describing the proposed storm drainage system. Record 672-73. Petitioners and intervenor-petitioner submitted written rebuttal objecting that Exhibit 7 is insufficient to demonstrate that the proposed storm drainage system is adequate. Record 191-92, 249-50. The engineer then testified orally at the July 17, 2000 city council hearing. Petitioners argue that, in five instances, the engineer's oral testimony went beyond "explaining" the evidence in Exhibit 7.

1. Exhibit 7 generally discusses the use of detention ponds in the proposed stormwater drainage system and states that roof runoff will be piped through a detention pond. Record 672. The engineer's oral testimony specifies the potential location of detention ponds, and mentions that runoff from parking areas (in addition to roof runoff) will pass through a detention pond. Record 123.

2. Exhibit 7 discusses water flows from the proposed storm drainage system and concludes that no additional water will flow into the creek than flowed into the creek before construction work began. Record 672. The engineer's oral testimony states that stormwater will be "stored on site in either detention basins or in detention ponds with a controlled outlet so that the rate of flow or rate of discharge into the Creek doesn't increase." Record 123.

3. Exhibit 7 states that "[t]rapped catch basins or similar equipment" have been successfully used on projects in the Newport area and throughout the state. Record 673. The engineer's oral testimony indicates that the proposed stormwater system is of a type typically used for commercial development in the Newport area and the Willamette Valley. Record 123.

4. In response to criticism that Exhibit 7 does not address potential landslide conditions, the engineer's oral testimony states that the stormwater system could be designed to address "movements that might be possible due to the landslide conditions" that were identified by Vista's geologist. Record 123.

5. Exhibit 7 generally describes the use of catch basins in the proposed stormwater system. Record 672-73. The engineer's oral testimony specifies the number and location of catch basins and how the basins would be maintained. Record 123-24.

Vista responds that the city council correctly determined that acceptance of the disputed oral testimony is consistent with the stipulated procedure. We agree. Each of the

five instances appears to involve circumstances where the engineer responded to criticisms of Exhibit 7 by citing additional supportive facts. For example, in the first cited instance, Exhibit 7 provided a general description of the proposed stormwater drainage system, including use of detention ponds. In response to criticism that Exhibit 7 did not specify the location of potential detention ponds, the engineer's oral testimony does just that. As we understand the stipulated procedure, that testimony is consistent with the procedure.

C. Development in the V-Zone

In *Terra I*, LUBA's remand was based in part on NZO 2-4-6.025(D)(1), which requires that the lowest horizontal structural member of the lowest floor of newly constructed buildings in the "V-zone" of a Coastal High Hazard Area be elevated to or above the base 100-year flood level.[7] On remand, Vista submitted Exhibits 14 and 15, which consist of an engineer's study and cover letter that provide a detailed study of the subject property. Record 290-92. The study concludes that no development is proposed within the V-zone, if properly delineated, and recommends that FEMA maps be updated to reflect the study's conclusions. Intervenor-petitioner responded by arguing that the city cannot rely on the engineer's study because FEMA has not yet accepted the proposed revision to its maps. Record 192. Intervenor-petitioner also questioned the study's estimate that the 100-year ocean wave height is 37.3 feet, arguing that the estimate should be higher. Record 193. The city's decision interprets NZO 2-4-6.020(C) to allow the city to consider site specific studies prior to a formal map revision by FEMA, and accepts the study's conclusions. Record 43.

[7]According to the city's decision, a "V-zone" is a designation of the Federal Emergency Management Administration (FEMA) that describes the expected wave height from the ocean with respect to a "base flood" level. Record 41. The subject property is apparently within an unnumbered V-zone on FEMA maps, which means that base flood elevations and flood hazards have not yet been determined for the property. *Id.* In the city's earlier decision, it assumed that the V-zone on the subject property was similar to a V-zone determined by a detailed study south of the subject property, resulting in a "base flood" level of 31 feet.

Petitioners argue that at the July 17, 2000 hearing, the engineer's testimony included the following new evidence to support Vista's argument that the city should rely upon the study:

1. Testimony that the study has been reviewed and approved by Baker Engineers, who are technical reviewers for FEMA. Record 142.

2. Testimony that the study will be published by FEMA as a "proposed revision" in a few weeks. Record 142.

3. Testimony that FEMA has accepted a 100-year wave height of 37.3 feet. Record 145.

Petitioners do not challenge the city's interpretation of NZO 2-4-6.020(C), to allow the city to rely on the study's conclusions prior to a formal map revision by FEMA.[8] Be that as it may, each of the disputed points of testimony appears to be in response to intervenor-petitioner's rebuttal objections to Exhibits 14 and 15. As we understand the stipulated procedure, such testimony is permissible.

D. Conclusion

For the foregoing reasons, we conclude petitioners have not demonstrated that the city violated the procedures applicable to the matter before it.

The assignment of error is denied.

The city's decision is affirmed.

[8]In fact, petitioners do not challenge the adequacy of, or the evidentiary support for, any of the city's findings of compliance with applicable criteria. Petitioners explain that, if petitioners' procedural assignment of error prevails, the city must reopen the record on remand, allow rebuttal, and adopt new or additional findings. In that case, petitioners argue, no purpose would be served by making assignments of error challenging the findings and evidentiary support for the present decision. *But see Mill Creek Glen Protection Assoc. v. Umatilla Co.*, 88 Or App 522, 526-27, 746 P2d 728 (1987) (on appeal of a decision on remand, only issues that could not have been raised in the first appeal may be raised in the later appeal); *DLCD v. Douglas County*, 37 Or LUBA 129, 143 (1999) (same); *Schatz v. City of Jacksonville*, 23 Or LUBA 40, 48, *aff'd* 113 Or App 675, 835 P2d 923 (1992) (same).