

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 NORMAN C. MARTIN and JUDY C. MARTIN,
5 Trustees under Declaration of Trust dated
6 November 29, 1991,
7 *Petitioners,*
8

9 vs.

10 CITY OF DUNES CITY,
11 *Respondent.*
12

13 LUBA No. 2002-074
14

15 FINAL OPINION
16 AND ORDER
17

18
19 Appeal from City of Dunes City.
20

21 Norman C. Martin and Judy C. Martin, Florence, filed the petition for review and
22 argued on their own behalf.
23

24 Emily N. Jerome, Eugene, filed the response brief and argued on behalf of
25 respondent. With her on the brief was Harrang Long Gary Rudnick PC.
26

27 BRIGGS, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,
28 participated in the decision.
29

30 REMANDED

12/11/2002

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

NATURE OF THE DECISION

Petitioners, the applicants below, appeal a city decision denying their application for a minor partition.

REPLY BRIEF

Petitioners move to file a reply brief. The city did not file an objection to the reply brief and we allow the reply brief.

MOTION TO STRIKE

Petitioners attached numerous appendices to their petition for review. The city moves to strike appendices C, D, E, F, G, H, I, J, and L. The challenged appendices, except for appendix E, are not part of the record and are not subject to official notice. Appendix E is a copy of portions of the Dunes City Code (DCC). We may take official notice of local land use regulations. *Sunburst II Homeowners v. City of West Linn*, 18 Or LUBA 695, 698, *aff'd* 101 Or App 458, 790 P2d 1213 (1990). The motion to strike is granted as to appendices C, D, F, G, H, I, J, and L.

FACTS

In December 2001, petitioners partitioned an approximately 7.5-acre property abutting Salal Street into three smaller parcels. Parcel Two is approximately two acres in size and is landlocked. In order to provide access to Parcel Two, petitioners recorded a 20-foot-wide easement across Parcel Three from Salal Street to Parcel Two. The current case involves an application to partition Parcel Two into two approximately one-acre parcels. The proposed partition proposes to provide access to both parcels by way of the 20-foot easement. Petitioners have constructed a logging road in the general vicinity of the easement to access timber located on their property.

1 The planning commission recommended denial of the partition. The application and
2 the planning commission recommendation were then forwarded to the city council. The city
3 council held a hearing and decided to deny the partition. This appeal followed.

4 **ASSIGNMENTS OF ERROR**

5 Generally in LUBA appeals, it is clear what the local government's decision consists
6 of, what the result of the decision is, and what findings have been adopted to support the
7 decision. That generality, however, does not apply in the present case. A fundamental issue
8 in this case is what actually is the city's decision. The parties agree that the city council
9 voted to deny the partition application on May 14, 2002, issued a notice of decision denying
10 the application on May 29, 2002, and at some later date issued unsigned draft minutes of the
11 May 14, 2002 hearing. The parties disagree on which of these documents, alone or in
12 combination, constitutes the city council's decision.

13 Petitioners understand the notice of decision to be the city's decision and attack that
14 decision on procedural, evidentiary, and substantive legal grounds.¹ The city argues that the
15 actual decision is contained in the minutes of the May 14, 2002 city council hearing.
16 According to the city, those minutes explain that petitioners' application is denied, adopt the
17 findings of fact and conclusions of law from the May 2, 2002 staff report, and supply
18 additional grounds for denial.² The city contends that in addition to denying the partition
19 application for the same reasons expressed in the staff report, the city council also denied the
20 application because the easement is not 50 feet wide and is sited in an inappropriate location.
21 The city relies upon comments made by the mayor during the May 14, 2002 hearing as

¹ Petitioners challenge the decision on procedural grounds for failing to comply with the requirements for limited land use decisions; on evidentiary grounds for including inaccurate statements and not basing the decision on substantial evidence; and on substantive legal grounds for misapplying riparian protection standards and for exercising jurisdiction over an Oregon Department of Forestry-approved logging road.

² The May 2, 2002 staff report serves as the recommendation of denial from the planning commission. The city states that while the city council adopted the findings of fact and conclusions of law from the staff report, they did not adopt the recommendation.

1 described in the draft minutes to support its argument that the basis for denial includes the
2 failure to comply with city code standards pertaining to access widths and that the proposed
3 access does not minimize impacts on drainage ways located on Parcel Three. DCC
4 155.089(C)(3)(c) and 156.124(D)(1).³ Record 21.

5 We do not agree that the minutes clearly state the basis or bases for denial of the
6 partition application. While the issues of easement width and location were discussed, the
7 city council appeared to be just as concerned with the fact that petitioners were seeking to
8 partition a parcel that had just been partitioned the year before and that development of the
9 logging road occurred without any city consultation or approval. Furthermore, even if the
10 minutes are clear on these points, we agree with petitioners that draft minutes cannot be the
11 city's final decision in this case.

12 In limited circumstances, the minutes of a hearing may constitute the local
13 government's final decision. *See, e.g., Weeks v. City of Tillamook*, 113 Or App 285, 287-88,
14 832 P2d 1246 (1992). For minutes to serve as a local government's final decision, they must
15 at least be final, adopted by the decision maker, and signed by the decision maker. OAR 661-
16 010-0010(3). Finally, while it is common for local governments to adopt tentative decisions
17 and subsequently adopt findings to support the tentative decision as part of the final written
18 decision, a local government may not adopt supporting documentation after the decision is
19 adopted and final. *Heilman v. City of Roseburg*, 39 Or App 71, 74-76, 591 P2d 390 (1979);

³ DCC 155.089(C)(3)(c) provides:

“The minimum width of roadway easements shall be 50 feet.”

DCC 156.124(D) provides in relevant part:

“Within the riparian corridor setback, grading or the placement of structures or impervious surfaces shall not be allowed except for the following, and provided that they are designed to minimize intrusion into the riparian area:

“(1) Streets, roads, and paths[.]”

1 *West Side Rural FPD v. City of Hood River*, ___ Or LUBA ___ (LUBA No. 2002-155, Order
2 on Record Objections, November 7, 2002).

3 In this case, we have no way of knowing whether the draft minutes included in the
4 record and cited by the city as part of the decision were approved, revised, or rejected. The
5 May 14, 2002 minutes are clearly marked as “DRAFT” minutes and are not signed by any of
6 the city councilors even though signature lines are provided. Just as important, they were
7 prepared *after* the notice of decision was sent out announcing that a final decision had been
8 made and the 21-day period to appeal the city’s decision under ORS 197.830(9) commenced.
9 Therefore, the draft minutes of the May 14, 2002 hearing cannot be part of the city’s final
10 decision.

11 The notice of decision states that the city council adopted the planning commission’s
12 revised findings of fact and conclusions of law. The planning commission apparently adopted
13 the May 2, 2002 staff report as its findings of fact and conclusions of law. The staff report
14 sets out the approval criteria of DCC 155.031(B), which provides:

15 “Recommendation for approval [by the planning commission] must include
16 affirmative findings that:

17 “(1) The minor partition complies in all respects to the partitioning
18 requirements and purpose of this chapter, the Comprehensive Plan,
19 and the laws of the state.

20 “(2) The minor partition does not impede the future best use of the
21 remainder of the property under the same ownership or adversely
22 affect the safe and healthful development of such remainder or any
23 adjoining land or access thereto.” Record 30.

24 The staff report concludes that DCC 155.031(B) is not met in this case, apparently for
25 three reasons. The staff report first appears to find that the access requirements are not met
26 because the logging road does not comply with city standards. The staff report then addresses
27 lot dimensional requirements. DCC 155.084 requires each lot to have at least 60 feet of
28 frontage on a street. The staff report notes that neither proposed parcel has frontage on a

1 street.⁴ The staff report then addresses residential land use requirements under the
2 comprehensive plan and notes that no provisions for utilities were submitted as required by
3 policy H6. The staff report’s conclusions of law are as follows:

4 “(1) The minor partition does not comply in all respects to the partitioning
5 requirements with regard to access.

6 “(2) The minor partition does impede the future best use of the remainder
7 of the property under the same ownership and adversely affect the safe
8 and healthful development of such remainder or any adjoining land or
9 access thereto.” Record 32.

10 ORS 227.173(1) and (3) require a local government to base approval or denial on
11 standards and criteria set forth in the zoning ordinance, accompanied by a statement that
12 explains the relevant criteria, states the facts relied upon, and explains the justification for the
13 decision based on the criteria and facts set forth. Findings of noncompliance with applicable
14 criteria must, at a minimum, suffice to inform the applicant either what steps are necessary to
15 obtain approval or that it is unlikely that the application will be approved. *Commonwealth*
16 *Properties v. Washington County*, 35 Or App 387, 400, 582 P2d 1384 (1978); *Eddings v.*
17 *Columbia County*, 36 Or LUBA 159, 162 (1999). The city’s decision does not come close to
18 satisfying these requirements. We cannot tell from the staff report what the bases for denial
19 of the partition application were. The conclusions of law merely repeat the approval criteria
20 and state that they are not met. We are left to speculate from the findings of fact what might
21 constitute the grounds for denial. Certain provisions of the DCC appear to not be satisfied,
22 but it is unclear which if any of these requirements may be or were grounds for denial.

23 Due at least in part to the uncertainty regarding what actually constitutes the city’s
24 decision, petitioners’ assignments of error are not particularly focused. Because the city’s
25 decision is not supported by adequate findings, as discussed above, no purpose would be
26 served by attempting to address petitioners’ assignments of error in detail. On remand, the

⁴ At oral argument, counsel for the city conceded that this requirement was not actually a basis for denial.

1 city should adopt adequate findings setting forth the city's bases for its decision. In so doing,
2 the city may wish to consider petitioners' other concerns raised in their assignments of error.
3 The portion of the first assignment of error that alleges the decision is not supported by
4 adequate findings is sustained. We do not reach petitioners' other assignments of error.
5 The city's decision is remanded.