BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CHARLES WIPER, INC.,
Petitioner,

vs.

CITY OF EUGENE,
Respondent.

LUBA Nos. 2002-131 and 2002-132

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioner. With him on the brief was the Law Office of Bill Kloos, PC.

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

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

REMANDED (LUBA No. 2002-131)	03/03/2003
DISMISSED (LUBA No. 2002-132)	03/03/2003

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

In LUBA No. 2002-131, petitioner appeals a city decision that rejects petitioner's conditional use application to construct 172 housing units. In LUBA No. 2002-132, petitioner appeals a letter from a city planner that rejects his request to reconsider the decision appealed in LUBA No. 2002-131.

MOTION TO DISMISS

For the reasons explained in *Wiper v. City of Eugene*, ___ Or LUBA ___ (LUBA No. 2002-131, Order, December 10, 2002), LUBA No. 2002-132 is dismissed.

FACTS

The subject property is tax lot 300, a 72-acre parcel. The northern 700 feet of tax lot 300 is zoned Public Lands (PL) and the remainder is zoned Suburban Residential (RA). Much of the property is occupied by a cemetery and related facilities that were established in 1928. Cemeteries are allowed as a conditional use in all city zones. The subject property is generally surrounded by residential uses.

In 1995, petitioner sought and obtained a conditional use permit (CUP) masterplan that recognized various existing cemetery uses and facilities, and sought conceptual approval to expand certain other uses. The 1995 CUP masterplan was reduced to a conditional use agreement between petitioner and the city. The agreement includes an eight-sheet set of final approved plans.

The 1995 plans depict the main cemetery structures and burial areas occupying the northern and middle portions of the property. The plans also depict a 15-acre area at the southern periphery of the property, south of an internal road (Cathedral Way). The southern 15-acre area is currently wooded and undeveloped. The 1995 CUP plan contemplates removal of most of the trees in the 15-acre southern area, with the exception of isolated stands and a vegetative buffer along the southern property line. The 1995 CUP plan also

contains the notation "future cemetery lawn" and "proposed irrigation" for the 15-acre southern area. In approving the 1995 CUP masterplan, the hearings officer discussed the proposed use of this area:

> "This proposal involves developing the wooded southern area of the site into cemetery lawns with relatively few trees. A finding can be made at this point, conceptually, that [the proposal] can be accomplished * * * in a manner that is compatible with the existing surrounding residential uses. * * * The area requiring further study is the southwest corner of the site and along the entire southern periphery of the site. The applicant proposes a vegetative buffer of varying widths and preservation of certain trees. Also proposed, however, is a fence and the location of tombs within this buffer area. Additionally, there is the complication of the wetlands area in the southwest corner of this site. One approach might be to require as a condition of approval the retention of a 100 foot buffer area along the entire southern boundary but this may not be necessary with more detail made available concerning the vegetation that exists and will be retained in the buffer area and proposed location of the tombs and fence. Without that information, if the buffer is to be less than 100 feet in depth, it is impossible to determine whether the proposed use will be compatible with the adjacent residences.
>
> "It is acknowledged that the cemetery use proposed, open lawns and tombs, do not have substantial adverse operating characteristics. At the same time, to be reasonably compatible, the cemetery use must be designed to recognize the existing wooded character of this area of Eugene to the extent of allowing a meaningful buffer area between the cemetery use and the residential uses.
>
> "In that the approval is for a two phased development, with the southern portion being developed only after development of the area of the cemetery within the proposed roads, there will be adequate time to address the details of the buffer area and for the applicant to seek approval of a plan in that regard." Record 435.

On April 8, 2002, petitioner filed the subject application with the city for a conditional use permit to construct a 172-unit Controlled Income and Rent (CIR-CUP) residential development on the 15-acre portion of the property south of Cathedral Way. The accompanying narrative takes the position that that portion of the property is not master planned for cemetery use under the 1995 CUP. On April 23, 2002, the city notified petitioner that the application was incomplete, and provided petitioner with a list of requested information, including a revised legal description that includes only the affected

15-acre portion. By August 15, 2002, petitioner had submitted the requested information. Petitioner indicated a willingness to submit additional information as the city's review moved forward; however, petitioner requested that with the material submitted the city consider the application complete.

On September 13, 2002, the city planning director sent a letter to petitioner rejecting the CIR-CUP application, and refunding a portion of the application fee. The September 13, 2002 letter takes the position that the area on which petitioner proposes to construct housing is subject to the 1995 CUP. The letter states, in relevant part:

> "The City cannot address the conflicts between your proposed CIR-CUP application and the existing CUP for the site through the completeness review process because the City is not in a position to notify you of 'exactly what information is missing' from your application. There are numerous options for addressing the conflict between an existing CUP and a proposed new use on the same site. The City cannot presume that you would pursue any one option and the option chosen would dictate what additional information is needed. Further, the completeness review process is not designed to allow an applicant to submit what amounts to a new application. To establish a CIR development on the Rest-Haven site, you would need to submit a very different plan, application and narrative statement that would constitute a new application. Therefore, your application has been rejected by the City to allow you to reformulate your approach to your proposal in a way that addresses the existing CUP for the site." Record 4.

The city's September 13, 2002 letter advised petitioner that the letter is the city's final land use decision, appealable to LUBA. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner contends that the city violated its code and applicable statutes in rejecting petitioner's CIR-CUP application without completing the conditional use hearing process. According to petitioner, nothing in the city's code authorizes the planning director to reject or refuse to process a conditional use permit application for any of the reasons stated in the September 13, 2002 letter. Petitioner cites to *Doumani v. City of Eugene*, 35 Or LUBA 388

(1999), for the proposition that a local government cannot require, as a condition for processing an application, something that is not expressly provided for under the local code.[1]

Petitioner also argues that the city's action is inconsistent with ORS 227.178(2), which prescribes the manner in which permit applications are deemed complete.[2] According to petitioner, under ORS 227.178(2)

> "[the] City must evaluate an application upon receipt and, within 30 days, inform the applicant of exactly what information is missing. The applicant then has two options. The first is that the applicant can provide the missing information to the City. If the applicant does that, then the City is to deem the application complete when it receives the missing information. Alternatively, the second option is that the applicant can refuse to submit the missing information. In that instance, the City is to deem the application 'complete' on the thirty-first day after the City received the application. The choice of whether or not to submit additional information is entirely up to the applicant. Regardless of which route an applicant decides to take, ORS 227.178(2)

---

[1] In *Doumani*, the city rejected a site review application because it was signed by the prospective purchaser of the property rather than the owner. Nothing in the city's code required that the owner sign the application. Instead, the city relied on a code provision that allowed the city prescribe the manner of application, and the fact that signature line on its site review application form asked for the signature of the "owner," as a basis to reject the application. LUBA disagreed that the city's code provided a sufficient basis for the city to reject the application, simply because it was not signed by the owner.

[2] ORS 227.178 provides, in relevant part:

> "(1) Except as provided in subsections (3) and (4) of this section, the governing body of a city or its designee shall take final action on an application for a permit * * * including resolution of all appeals under ORS 227.180, within 120 days after the application is deemed complete.
>
> "(2) If an application for a permit * * * is incomplete, the governing body or its designee shall notify the applicant of exactly what information is missing within 30 days of receipt of the application and allow the applicant to submit the missing information. The application shall be deemed complete for the purpose of subsection (1) of this section upon receipt by the governing body or its designee of the missing information. If the applicant refuses to submit the missing information, the application shall be deemed complete for the purpose of subsection (1) of this section on the 31st day after the governing body first received the application.
>
> "(3) If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the city has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

> directs the City to deem the application complete (regardless of whether or it is in fact complete) and then to process the application." Petition for Review 17-18.

Petitioner contends that ORS 227.178(2) mandates an interactive process whereby the applicant attempts to submit a complete application, and if the local government feels it needs additional information to make a decision, it may request that information. According to petitioner, the statute does not authorize the city to reject an application it believes to be incomplete. On the contrary, petitioner argues, the statute contemplates that the city must make a decision on the application, even if the applicant refuses to supply information the city has requested, and even if as a result of the missing information the city decides to deny the application. Petitioner contends that the city misunderstands its role under ORS 227.178(2), in apparently believing that it needs to have before it all information it deems necessary to *approve* the application.

Further, petitioner argues that the city's summary termination of the statutory process deprived petitioner of the opportunity to address the city's concerns. Petitioner notes that the planning director suggested in her September 13, 2002 letter that petitioner has a number of options for addressing the alleged conflict between the 1995 CUP and the CIR-CUP. Petitioner agrees, and notes that such options would potentially include (1) demonstrating that there is no conflict and thus no need to amend the 1995 CUP, or (2) amending the 1995 CUP to allow the proposed housing, either by shrinking the footprint of the CUP masterplan or by changing the text and plans to allowing housing. Petitioner argues that the second option might be done as a separate application to amend the 1995 CUP, or by combining it with the CIR-CUP application. A third option, petitioner argues, is the one apparently preferred by the planning director: to abandon the CIR-CUP application and start over with a new combined application to amend the 1995 CUP and to approve the requested CIR

housing.[3] Petitioner argues that the planning director's decision effectively forces petitioner to exercise the third option discussed above, without giving petitioner the opportunity to make a case for any of the other options. Further, petitioner argues, the planning director's decision essentially prejudges the merits of the CIR-CUP application, without any opportunity for hearing or to address the planning director's views of the merits. Petitioner notes in this regard that, under the city's code, the decision maker on a conditional use application is the hearings officer, not the planning director.

Finally, petitioner argues that the planning director's decision is inconsistent with ORS 197.307(6), which requires that:

> "Any approval standards, special conditions and the procedures for approval adopted by a local government shall be clear and objective and may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

According to petitioner, the procedure the planning director followed, in summarily rejecting petitioner's CIR application without allowing a decision on the merits of the application, is unclear and subjective, and has the effect of discouraging needed housing through unreasonable cost or delay. Petitioner contends that the planning director's decision is based on no code provisions or standards at all, and therefore reflects the height of discretion.

The city responds that it has implicit authority under its code to reject a permit application that would require a modification to an approved CUP, and that its decision to reject the CIR-CUP application is consistent with ORS 227.178(2). According to the city, Eugene Code (EC) 9.718 requires adherence to approved CUP plans. EC 9.772(2) provides a specific procedure for modifying approved CUP plans, and requires that "modifications to

---

[3] Petitioner notes that any new application would be governed by the code standards in effect at the time the application is submitted. ORS 227.178(3). *See* n 2. According to petitioner, shortly after petitioner filed its CIR-CUP application the city amended its CIR regulations to impose more difficult standards for CIR development.

the approved final plans shall be governed by the following procedures."[4] In the city's view, the CIR-CUP application clearly proposes development that requires modification to the 1995 CUP final plans. The city argues that its code implicitly prohibits a CUP holder from circumventing the required CUP modification process by requesting city approval of an application to establish a different use on the CUP site. Therefore, the city argues, its code implicitly authorizes rejection of an application that seeks to modify a CUP by means other than the CUP modification process.

With respect to *Doumani*, the city argues that careful consideration of that case supports the city's action. According to the city, *Doumani* stands for the proposition that the city may reject an application for reasons authorized by its code. The city argues that because EC 9.772 implicitly prohibits applications that in effect seek to circumvent the prescribed CUP modification process, the city's rejection is authorized by its code.

With respect to ORS 227.178(2), the city agrees with petitioners that that statute does not authorize the city to reject a permit application. However, the city argues, it relied not on

---

[4] EC 9.722(2) provides in relevant part:

> "a. By Planning Director. Applications for modifications shall be submitted by the property owner or applicant. * * * If a modification is minor, *i.e.* it results in insignificant changes in the outward appearance of the development and impact on surrounding properties, it may be considered by the planning director. These modifications * * * may be approved by the planning director upon a finding that the changes:
>
> "1. Are consistent with the conditions of the original approval, and
>
> "2. Result in insignificant changes in the outward appearance of the development and impact on the surrounding properties, and
>
> "3. Remain consistent with applicant permit criteria. * * *
>
> "b. By Hearings Official. Modifications that are major in nature and do not meet the standards for a minor modification shall require approval of the hearings official. * * * The hearings official may deny, modify, or approve the modification request. Approval of a major modification shall require a finding by the hearings official that the proposal and modification meet the applicable criteria [for conditional use permits] set out in [EC] 9.702 of this code. * * *"

the statute but on its code as the basis for rejecting petitioner's CIR-CUP application. Further, the city argues that its action is consistent with the statute. The problem with the CIR-CUP application, the city contends, is not that it was incomplete, but that it requested something the city could not consider: approval of a new CUP for a portion of a site already subject to an approved CUP. In order to review that request, the city contends, petitioner must file an application to modify the 1995 CUP in some way. The city agrees with petitioner that the requisite modification could take a number of different forms, but argues that it was in no position to inform the applicant "exactly what information was missing," as ORS 227.178(2) requires. Under these circumstances, the city argues, rejecting the CIR-CUP application was consistent with ORS 227.178(2).

Questions regarding what types of applications a development proposal requires are often resolved at a pre-application conference. We are informed that the city has a voluntary process for pre-application conferences, but petitioner did not request such a conference. That point aside, the disagreement between the parties boils down a dispute over the permissible range of responses under the city's code and applicable statutes, when the city official who receives a permit application believes that development proposed in the application requires an additional or a different type of application than the one submitted. We disagree with the city that the city's code answers that question. The city may or may not be correct that approval of the proposed development requires prior modification of the 1995 CUP pursuant to EC 9.718 and 9.772; however, neither of those code provisions purport to authorize the city to reject a permit application for failure to seek such a modification.

More importantly, we agree with petitioner that the city's summary rejection of the permit application is inconsistent with ORS 227.178(3). That statutory provision is part of a larger set of provisions beginning at ORS 227.160 prescribing standards for processing permit applications. In relevant part, ORS 227.175 provides that the city must establish a

consolidated procedure by which an applicant may, at the applicant's option, apply at one time for all permits or zone changes needed for a development project.[5] Further, the hearings officer or the appropriate review body must hold at least one public hearing on the application, or render a decision on the application without holding a hearing, pursuant to ORS 227.175(10). In turn, ORS 227.178(1) and (2) specify the process by which the application is deemed complete, and requires that, with limited exceptions, the city must make a decision on the application within 120 days from the date the application is deemed complete. Under ORS 227.178(2), even if the city believes it needs more information to render a decision, the applicant can effectively force the city to render a decision based on the information submitted. Here, there is no dispute that applicant invoked that option, and the application became "complete" for purposes of the statute. Having a "complete" application before it, the city was required by ORS 227.175 and 227.178 to render a decision approving or denying the application within the prescribed period. Under the statute, that decision must be made by the hearings officer or a designate, either after a public hearing or after following the procedures for a decision without a hearing. Nowhere does that statutory

---

[5] ORS 227.175 provides, in relevant part:

> "(1) When required or authorized by a city, an owner of land may apply in writing to the hearings officer, or such other person as the city council designates, for a permit or zone change, upon such forms and in such a manner as the city council prescribes. * * *.
>
> "(2) The governing body of the city shall establish a consolidated procedure by which an applicant may apply at one time for all permits or zone changes needed for a development project. The consolidated procedure shall be subject to the time limitations set out in ORS 227.178. The consolidated procedure shall be available for use at the option of the applicant no later than the time of the first periodic review of the comprehensive plan and land use regulations.
>
> "(3) Except as provided in [ORS 227.175(10)], the hearings officer shall hold at least one public hearing on the application.
>
> "(4) The application shall not be approved unless the proposed development of land would be in compliance with the comprehensive plan for the city and other applicable land use regulation or ordinance provisions. The approval may include such conditions as are authorized by ORS 227.215 or any city legislation."

scheme suggest that city planning staff may reject an application because it believes more information is necessary or because it believes approval of the proposal requires that the applicant file an additional or different application. On the contrary, it is reasonably clear under that statutory scheme that, once a permit application is filed "upon such forms and in such a manner as the city council prescribes" and that application becomes "complete," the city *must* follow the procedures prescribed in ORS 227.175 and render a decision on the merits of that application.[6]

It may well be, of course, that under the present circumstances the hearings officer will find that the information submitted does not support approval and the hearings officer will deny the application. We understand the city to argue that there is no point in expending additional time and money on the required statutory procedures, once the city has determined that the permit application cannot be approved in its current state. The problem with that argument is that both the statute and code require that a hearings officer, not the planning director, render a decision on a permit application, after a hearing or other procedure that affords the applicant and others the opportunity to present evidence and argument to the hearings officer. It might be that if the planning director had allowed the present application to come before the hearings officer, the hearings officer would have disagreed with the planning director's view of the code, or with the planning director's view that the proposed development can only be approved if the applicant submits a new application that includes an application to modify the 1995 CUP. We do not know, because the planning director's decision effectively denied petitioner the opportunity to argue that point before the only person who, under the statute and code, can make a decision on the permit application.

[6] We do not understand the city to argue that it rejected the CIR-CUP application because it was not filed "upon such forms and in such a manner as the city council prescribes" or because the application was incomplete.

In sum, we agree with petitioner that the city's action in rejecting the CIR-CUP application is not authorized by its code and is inconsistent with the city's statutory obligations under ORS 227.175 and 227.178.

The first assignment of error is sustained, in part.[7]

SECOND ASSIGNMENT OF ERROR

In a December 10, 2002 order, the Board resolved petitioner's record objections, sustaining some of those objections and denying others. The order also denied a contingent motion to take evidence outside the record, in order to establish by deposition exactly what documents were placed before the planning director. Petitioner's overarching record objection was that the city had failed to establish that any document in the record, other than the September 13, 2002 letter, was "placed before" the planning director, and thus properly in the record. OAR 661-010-0025(1)(b). We rejected that overarching argument, but sustained petitioner's objection with respect to certain documents that the city made no effort to show were placed before the planning director.

In the second assignment of error, petitioner renews its objections to the record, and argues that the Board should reconsider the portion of our December 10, 2002 order that denied petitioner's objections. Petitioner also renews its contingent motion to take evidence outside the record. Petitioner argues that, if the Board reconsiders its order and sustains petitioner's overarching objection, then there is no evidence at all supporting the planning director's decision, and thus that decision must be remanded for that additional reason.

Even assuming that petitioner's request for reconsideration of our December 10, 2002 order is timely and properly asserted in an assignment of error, petitioner offers no substantial reason to reconsider our ruling. Accordingly, we reject that request, as well as

[7] The city's brief does not respond to petitioner's arguments under ORS 197.307(6). Given our disposition of the first assignment of error on other grounds, we do not reach or resolve those arguments.

petitioner's contingent motion to take evidence, for the reasons expressed in our order.[8] Petitioner's evidentiary challenge under this assignment of error is premised on our granting petitioner's request for reconsideration and striking nearly all documents from the record. With elimination of that premise, this assignment of error provides no basis for reversal or remand.

The city's decision in LUBA No. 2002-131 is remanded.

LUBA No. 2002-132 is dismissed.

[8] On February 5, 2003, one day prior to oral argument, petitioner filed its second motion to take evidence not in the record, pursuant to OAR 661-010-0045. The motion requests that the Board consider an e-mail between petitioner's attorney and the city's attorney, if the Board deems the content of the e-mail relevant to resolving the second assignment of error. The e-mail purports to establish that petitioner's attorney conferred with the city's attorney regarding the content of the record, prior to filing record objections, a point that the city apparently disputed in its response brief. Given our disposition of the second assignment of error, petitioner's second motion to take evidence is denied as moot.