

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

3
4 MOLLY JACOBSEN,
5 *Petitioner,*

6
7 vs.

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9 CITY OF WINSTON,
10 *Respondent,*

11
12 and

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14 DON JENKINS and JOELL JENKINS,
15 *Intervenor-Respondents.*

16
17 LUBA No. 2006-162

18
19 FINAL OPINION
20 AND ORDER

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22 Appeal from City of Winston.

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24 Jannett Wilson, Eugene, filed the petition for review and argued on behalf of
25 petitioner. With her on the brief was the Goal One Coalition.

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27 Douglas M. DuPriest, Eugene, filed a response brief and argued on behalf of
28 respondent. With him on the brief were Zack P. Mittge and Hutchinson, Cox, Coons,
29 DuPriest, Orr & Sherlock, P.C.

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31 Corinne C. Sherton, Salem, filed a response brief and argued on behalf of intervenor-
32 respondents. With her on the brief was Johnson & Sherton, PC.

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34 RYAN, Board Member; BASSHAM, Board Member, participated in the decision.

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36 HOLSTUN, Board Chair, did not participate in the decision.

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38 AFFIRMED

10/10/2007

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

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NATURE OF THE DECISION

Petitioners Molly Jacobsen and Dana Jacobsen appeal a city decision adopting legislative amendments to the city’s comprehensive plan, zoning ordinance, and subdivision ordinance.

MOTION TO DISMISS

Respondents move to dismiss one of the petitioners, Dana Jacobsen, from the appeal. Respondents argue that petitioners have not asserted or established that Dana Jacobsen has standing under ORS 197.830(2) or OAR 661-010-0030(4)(a) to appeal the city’s decision, and move to dismiss him from the appeal. Respondents point out that petitioners’ statement regarding standing set forth in the petition for review states that “[p]etitioner Molly Jacobsen testified during the public comment period for the decision. * * * Therefore, petitioner Molly Jacobsen has standing to petition LUBA for review.” Petition for Review 1. Petitioners have not responded to respondents’ motion to dismiss Dana Jacobsen from the appeal.

ORS 197.830(2) allows a person to petition LUBA for review of a land use decision if the person timely files a notice of intent to appeal and “appeared before the local government, orally or in writing.” OAR 661-010-0030(4) requires the petition for review to state the facts that establish a petitioner’s standing. Petitioners have not alleged or established that Dana Jacobsen has standing under ORS 197.830(2) or OAR 661-010-0030(4) to petition LUBA for review. Respondents’ motion to dismiss Dana Jacobsen from the appeal is granted.

FACTS

In May, 2006, the city began a process to amend its comprehensive plan, zoning ordinance, and subdivision ordinance, and the city sent notice to the Department of Land Conservation and Development (DLCD) that the city intended to hold public hearings on the proposed legislative amendments. The city attached its first draft of the proposed

1 amendments to the notice to DLCD. Additional drafts were subsequently produced and a
2 public work session was held regarding the proposed amendments. Petitioner attended the
3 public work session. The planning commission also held a public hearing on the proposed
4 amendments. Following that public hearing, the planning commission prepared a fifth draft
5 of the proposed amendments and forwarded it to the city council for review.

6 The city provided notice that two public hearings would be held regarding the
7 proposed amendments. At the first public hearing before the city council on July 17, 2006,
8 petitioner testified concerning the proposed amendments. Based on testimony provided at
9 the first public hearing and a letter from intervenors' attorney submitted shortly after the first
10 public hearing that suggested alternate language for one of the proposed amendments, city
11 staff prepared the sixth draft of the proposed amendments.

12 The city council then held the second public hearing on August 7, 2006. Neither
13 petitioner nor any other members of the public testified at the second public hearing. At that
14 hearing, city staff presented the most recent draft of the proposed amendments. At the
15 conclusion of the second hearing, the city council voted to make the changes suggested by
16 city staff, and closed the public hearing on the proposed amendments. The next day, the city
17 prepared the seventh draft of the proposed amendments incorporating the language suggested
18 by city staff at the second public hearing.

19 At the next city council meeting on August 21, 2006, the city council reviewed a
20 memorandum from planning staff regarding proposed changes to the standards for mobile
21 home park development. At that meeting, the city held the final reading of the ordinance and
22 approved the amendments as set forth in the seventh draft and including the proposed
23 changes to the standards for mobile home park development. During the public comment
24 portion of that final city council meeting, petitioner objected to the final draft of the proposed
25 amendments that the city adopted. This appeal followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 Petitioner argues that the city erred by not providing notice of the applicable approval
3 criteria and not providing findings or substantial evidence in support of the decision. The
4 public notice provided by the city for both the planning commission and city council public
5 hearings stated:

6 “[T]he adoption of the proposed legislative amendments to the City of
7 Winston Comprehensive Plan, to add public facility policies; legislative
8 amendments to the Zoning Ordinance that generally will add new definitions,
9 modify development standards, modify design standards, [and] update notice
10 requirements; and legislative amendments to the Subdivision Ordinance to
11 modify application requirements, easement requirements and block standards.
12 The legislative amendments will also re-adopt previous amendments to the
13 zoning ordinance that allow minor text corrections, identify administrative
14 decisions, alter extension time lines, add text on nonconforming uses, identify
15 ministerial actions, and amend development approval and notice procedures,
16 implement certain corrections and updates and also re-adopt previous
17 amendments to the Subdivision Ordinance changing actions from quasi-
18 judicial to administrative and subsequent changes in duties from the Planning
19 Commission to the City Administrator.” Record 596, 656.

20 Petitioner argues that the city erred by not providing notice of the approval criteria
21 for the legislative amendments in the notice of the public hearings. Petitioner appears to be
22 confusing the notice requirements for legislative decisions with those for quasi-judicial
23 decisions. ORS 197.763(3)(b) requires a local government to “[I]ist the applicable criteria
24 from the ordinance and plan that apply to the application at issue,” but this only applies to
25 “quasi-judicial land use hearings.”¹ There is no similar notice requirement for public

¹ ORS 197.763 provides in part:

“The following procedures shall govern the conduct of quasi-judicial land use hearings conducted before a local governing body, planning commission, hearings body or hearings officer on application for a land use decision and shall be incorporated into the comprehensive plan and land use regulations:

“(3) The notice provided by the jurisdiction shall:

“(a) Explain the nature of the application and the proposed use or uses which could be authorized;

1 hearings involving legislative land use decisions.² The fact that the city does not provide
2 notice of the approval criteria for their legislative decision does not provide a basis for
3 reversal or remand.

4 Petitioner also argues that the city erred because the decision does not adopt findings
5 demonstrating that the challenged decision complies with the applicable approval criteria. It
6 is well established that absent a specific legal requirement for findings in support of a
7 legislative decision, except where LUBA cannot perform its review function to determine
8 whether a particular criterion is satisfied without such findings, the failure of a decision
9 maker to adopt findings in support of a legislative decision is not a basis in itself for reversal
10 or remand. *Witham Parts v. ODOT*, 42 Or LUBA 435, 450-51 (2002), *aff'd* 185 Or App
11 408, 61 P3d 281 (2002); *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or
12 LUBA 560, 563-64 (1994). Here, petitioner has not identified any legal standard requiring
13 that the challenged decision be supported by findings or that additional findings are required
14 for LUBA to perform its review function. The fact that the city may not have adopted
15 findings explaining how the decision complies with any applicable approval criteria is not a
16 basis for reversal or remand.

17 The argument in support of petitioner's first assignment of error also appears to argue
18 that the decision does not comply with Statewide Planning Goal 2 (Land Use Planning).
19 Petitioner appears to argue that because the city made changes to the drafts of the proposed
20 amendments after petitioner had testified at the first public hearing, the city violated Goal 2

“(b) List the applicable criteria from the ordinance and the plan that apply to the application at issue * * *.”

² ORS 192.640(1) provides that regarding public meetings in general:

“The governing body of a public body shall provide for and give public notice, reasonably calculated to give actual notice to interested persons including news media which have requested notice, of the time and place for holding regular meetings. The notice shall also include a list of the principal subjects anticipated to be considered at the meeting, but this requirement shall not limit the ability of a governing body to consider additional subjects.”

1 by not allowing petitioner the opportunity to review and comment on those changes. We
2 address petitioner's arguments regarding Goal 2 in the second assignment of error below.

3 The first assignment of error is denied.³

4 **SECOND ASSIGNMENT OF ERROR**

5 Petitioner argues that the city violated Goal 2 by not providing an opportunity for
6 petitioner to review and comment upon the proposed ordinances because the city accepted
7 new information during the course of the proceedings. According to petitioner, she was not
8 given an opportunity to review and comment upon a staff memorandum and a letter from
9 intervenors' attorney.

10 Petitioner first argues that she did not see a staff memorandum that was submitted
11 into the record three days before the first public hearing before the city council on July 17,
12 2006 until it was passed out at the first public hearing. Petitioner also argues that the staff
13 memorandum was generated in response to information outside of the record. We agree with
14 respondents that there is no legal requirement that city staff submit into the record all the
15 information they considered in drafting a memorandum to the city council. There is also no
16 reason that the city could not consider a staff memorandum submitted three days before a
17 public hearing. Finally, even if we assume petitioner could not have reviewed the
18 memorandum prior to the first public hearing, there is no reason she could not have
19 responded to it in writing afterwards or with testimony at the second public hearing on
20 August 7, 2006. The city did not violate Goal 2 by accepting the staff memorandum.

21 Petitioner also argues that the city erred by accepting the letter from intervenors'
22 attorney and not allowing petitioner an opportunity to review and comment on the letter. The
23 letter was submitted between the first public hearing and the second public hearing.
24 Petitioner apparently believed that the record was closed after the first public hearing, but

³ Because of our disposition of the first assignment of error, we need not consider respondents' waiver arguments.

1 does not direct us to anything in the record that establishes that the record was closed. In
2 fact, it does not appear that the record was closed, and petitioner could have reviewed the
3 record or attended the second public hearing on August 7, 2006 if she was concerned about
4 any submittals into the record or possible changes to the proposed ordinance. Petitioner
5 argues that because she obviously would have wanted to comment on intervenors' attorney's
6 letter, and the city presumably knew this, that the city was obligated to contact petitioner and
7 inform her that additional materials had been submitted into the record. Petitioner provides
8 no authority for this proposition, and we are aware of none. If petitioner wished to make
9 sure that nothing else was submitted into the record before the record was closed, it was her
10 responsibility to review the record on file at the city and attend all the hearings. The city did
11 not violate Goal 2 by accepting the letter from intervenors' attorney.

12 The second assignment of error is denied.

13 The city's decision is affirmed.