BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

7TH STREET STATION, LLC,
Petitioner,

vs.

CITY OF CORVALLIS,
Respondent.

LUBA Nos. 2007-140 and 2007-141

FINAL OPINION
AND ORDER

Appeal from City of Corvallis.

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.

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

RYAN, Board Member; HOLSTUN, Board Chair, participated in the decision.

BASSHAM, Board Member, did not participate in the decision.

REMANDED 11/21/2007

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

1 Opinion by Ryan.

2 **NATURE OF THE DECISION**

3 In LUBA No. 2007-140, petitioner appeals a decision by the city approving 4 petitioner's application to remove a Planned Development overlay from petitioner's 5 property. In LUBA No. 2007-141, petitioner appeals a decision by the city changing the plan 6 and zone map designations for the property.

7 **FACTS**

8 The subject property is a 5.4-acre site located in the city of Corvallis. In August, 9 2003, the zoning map designation for the subject property was changed from General 10 Industrial (GI) to Medium-High Density Residential (MHDR) with a Planned Development 11 (PD) overlay, and the comprehensive plan map designation for the site was changed from GI 12 to MHDR.

13 In March, 2007, petitioner applied to remove the PD overlay from the subject 14 property pursuant to the provisions of Corvallis Land Development Code (LDC) 3.33.50.b. 15 LDC 3.33.50.b implements a Land Conservation and Development Commission (LCDC) 16 Order issued during the city's periodic review in 2004. The LCDC Order directed the city to 17 allow property owners to apply to remove the PD overlay from certain residentially-zoned 18 property because the PD overlay contained standards that were not clear and objective as 19 required by Goal 10 and ORS 197.303 and 197.307.[1]

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[1] The LCDC Order provided in relevant part:

> "Work Tasks 11 and 12 are approved, subject to the adoption of the following specific revisions to the [LDC] within 90 days following any final appellate judgment on review of Corvallis' periodic review:
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> "* * *
>
> "(2) To provide a process where a property owner may request and the City must approve the removal of a PD or PD overlay zone from residentially zoned property where the residentially zoned property does not have a Detailed Development Plan or a

The planning director approved petitioner's application, and the director's decision was appealed to the city council. In Order 2007-82, the decision appealed in LUBA No. 2007-140, the city council approved petitioner's application to remove the PD overlay, and determined that its approval required that the property be rezoned from MHDR to GI and the property's comprehensive plan map designation be changed from MHDR to GI. In Ordinance 2007-19, the decision appealed in LUBA No. 2007-141, the city removed the MHDR zoning and plan designations and applied the GI zone and plan designations to the subject property. These appeals followed.

REPLY BRIEF

Petitioner moves to file a reply brief to address new matters it alleges are raised in the response brief. Respondent objects to the reply brief, arguing that the reply brief does not address "new matters" as required by OAR 661-010-0039. We believe the reply brief is warranted to respond to "new matters" raised in respondent's brief regarding the effect of the city's 2003 decision to rezone the property, and the reply brief is allowed.

FIRST ASSIGNMENT OF ERROR

A. First Subpart

In the first subpart under its first assignment of error, petitioner challenges the city's decision in Order No. 2007-82 that the property must be redesignated and rezoned to GI. Petitioner argues that that decision is essentially a condition of approval that is prohibited as a matter of law, because the city council did not have the authority to impose the condition in deciding on petitioner's request to remove the PD overlay, and the condition serves no legitimate planning purpose. Petitioner also argues that the city's decision in Ordinance No.

Conceptual Development Plan that includes a Detailed Development Plan on any part of the site." Record 261-66.

2007-19, the decision that actually rezoned and redesignated the property, is also prohibited as a matter of law.[2]

As explained above, in 2004, LCDC ordered the city to develop a process for owners of residentially zoned property subject to a PD overlay to apply to remove the overlay from their properties. *See* n 1. In response to the order, the city enacted LDC 3.33.50.b, which provides in relevant part:

> "All Residential PD Overlay designations that exist on sites without an active Detailed Development Plan on any part of the site, and that were established at the request of a property owner, shall be allowed to be removed by the property owner, at his/her discretion, in accordance with the Administrative Zone Change procedures of Section 2.2.50 of Chapter 2.2 – Zone Changes."

Thus the language of LDC 3.33.50.b requires the city to approve an applicant's request to remove the PD overlay if the criteria set forth in the code section are met. Petitioner argues that the application met the requirements of LDC 3.33.50.b, and that that part of Order No. 2007-82 is correct and should be affirmed.

Respondent does not dispute that the requirements of LDC 3.33.50.b were met. Rather, respondent answers that the city did not impose a condition of approval on petitioner's application to remove the PD overlay, but rather, "implement[ed] a condition [of approval] that was already in place through a prior order * * *," that is, the city's 2003 decision redesignating and rezoning the property to MHDR with a PD overlay. Response Brief 3. Respondent asserts that at the time the city approved the plan and zone changes in 2003, the city deferred review of the applicable approval criteria for the plan and zone change, including compatibility criteria, to the planned development review process,

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[2] The appealed decisions were adopted one day apart and contain identical findings. Record 12-20.

because, it reasoned, the planned development review process would allow public review of the compatibility criteria that applied to the plan and zone change.[3] Respondent explains:

> "In short, so long as the Planned Development Overlay zone existed on the site, the City Council could rely upon the required public review of the Planned Development compatibility criteria to ensure that the compatibility criteria for the [plan and zone changes] were met." Response Brief 6.
>
> "* * * * *
>
> "In 2003 the city council did not find that the application for the Comprehensive Plan map designation or the zoning district met all of the relevant criteria * * *. Instead, the City Council deferred its review." Response Brief 9.

Respondent asserts that the decision to apply the PD overlay in the 2003 proceeding was, in essence, a condition of the city's approval of the 2003 plan and zone change that was necessary to ensure that all of the plan and zoning map amendment criteria were satisfied. According to the city, when the PD overlay was removed, it became necessary for the property to revert to its pre-2003 zoning.

First, we disagree with respondent that the city's 2003 decision deferred review of compatibility criteria that governed the comprehensive plan and zoning map amendments. That decision contained specific findings that the type of development allowed under the MHDR designation would be compatible with surrounding development. Record 307-09. The city's contention that the city failed to find the proposed comprehensive plan and zoning map amendments satisfied the compatibility criteria in 2003 is simply not supported by any language in the 2003 decision. It is true that the city's 2003 decision seems to take some comfort that compatibility would again be addressed in planned development review. But

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[3] The Planned Development review criteria in effect at the time of the 2003 decision included all of the nine compatibility factors that the applicant was required to show compliance with in order to change the plan and zone designations for the property in 2003, and in addition included site design review criteria. *Former* LDC 2.5.40.04.a.

the city did not defer any required findings in approving the requested plan and zoning map amendments in 2003.

We also disagree with respondent's characterization of the 2003 rezoning of the property as "conditional." Nothing in the language of the city's 2003 decision indicates that the decision to rezone the property was conditioned on any future event occurring. While it may be true that future *development* of the property was conditioned on the satisfaction of conditions, including compatibility review through the planned development review process, the comprehensive plan and zoning map designations for the property were in fact changed in 2003.

We agree with petitioner that what the city did in this case is somewhat analogous to conditioning its approval of the removal of the PD overlay on a change in the zoning of the property. In general, conditions of approval must support a legitimate planning purpose, and the local government must have authority under its land use regulations to impose a condition. *Davis v. City of Bandon*, 28 Or LUBA 38, 48 (1994). We assume for purposes of this decision that the city's concerns about the compatibility of development on the subject property with adjoining and nearby properties is a legitimate planning concern. However, other than its theory explained above, which we reject, respondent does not attempt to explain under what authority the city required that the property be rezoned, as a condition of removal of the planned development overlay. We are unaware of any authority that would allow the city to unilaterally require that petitioner's property be rezoned, as a condition of granting its request for removal of the PD overlay. The application met all of the requirements of LDC 3.33.50.b, and the city had no lawful basis for imposing, in its resulting approval decision, a condition that the property's comprehensive plan and zoning map designations be changed.

The first subpart under the first assignment of error is sustained.

B. Second Subpart

In the second subpart under the first assignment of error, petitioner argues that the part of the decision in Order No. 2007-82 that approved removal of the PD overlay should be affirmed, but that both the part of the decision in Order 2007-82 that ordered the property to be rezoned and redesignated GI, and Ordinance No. 2007-19 in its entirety should be reversed.

Petitioner relies on OAR 661-010-0071(1)(a) and (c) in arguing that the part of Order 2007-82 that ordered the property to be rezoned and redesignated GI and Ordinance No. 2007-19 should be reversed, while the remaining unchallenged parts of Order 2007-82 should be affirmed.[4] Petitioner contends the disputed requirement for rezoning exceeds the city's jurisdiction in approving petitioner's request for removal of the planned development overlay, and that the requirement and the actual rezoning accomplished in Ordinance No. 2007-19 are prohibited "as a matter of law."

The difficulty with petitioner's argument is that our rules are generally written to set out LUBA's options regarding disposition of "the decision" on review, not parts of "the decision." With one exception that does not apply here, our rules do not expressly authorize LUBA to affirm in part and reverse or remand in part.[5]

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[4] OAR 661-010-0071(1) provides:

> "The Board shall reverse a land use decision when:
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> "(a) The governing body exceeded its jurisdiction;
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> "(b) The decision is unconstitutional; or
>
> "(c) The decision violates a provision of applicable law and is prohibited as a matter of law."

[5] OAR 661-010-0073(2) states an exception to the OAR 661-010-0073(2)(a) requirement that LUBA remand where findings are insufficient to support the decision. *See* n 6 below. That exception is set out in ORS 197.835(11)(b). Under that statute, LUBA is authorized to affirm part of a decision in cases where the parties identify relevant evidence that clearly supports a part of a decision.

Relying on *DLCD v. Columbia County*, 117 Or App 207, 843 P2d 996 (1992), a number of our decisions have questioned whether LUBA has authority to affirm an ordinance in part and remand or reverse an ordinance in part. *City of Damascus v. City of Happy Valley*, 51 Or LUBA 150, 164-65 (2006); *Morsman v. City of Madras*, 45 Or LUBA 16, 21 n 6, *aff'd in part, rev'd in part on other grounds*, 191 Or App 149, 81 P3d 711 (2003); *Welch v. City of Portland*, 28 Or LUBA 439, 451 n 12 (1994). Petitioner does not acknowledge or argue that those cases were wrongly decided. Neither does petitioner attempt to distinguish or argue that those cases should not be controlling here. Therefore, we decline petitioner's invitation to affirm Order 2007-82 in part and reverse in part.

We believe remand of Order No. 2007-82 is the appropriate disposition in this case. Under OAR 661-010-0071(2)(d), the county improperly interpreted applicable law to allow it to require that the property's plan and zoning map designations be changed to GI, in ruling on petitioner's request to remove the PD overlay.[6] We therefore remand Order No. 2007-82 so that the county can adopt an order that removes the PD overlay, without unlawfully requiring that the property's plan and zoning map designations be changed.

SECOND ASSIGNMENT OF ERROR

In its second assignment of error, petitioner argues that the city erred in adopting Ordinance No. 2007-19 for a number of reasons. Petitioner argues that in adopting that

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[6] OAR 661-010-0073(2) provides:

> "The Board shall remand a land use decision for further proceedings when:
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> "(a) The findings are insufficient to support the decision, except as provided in ORS 197.835(11)(b);
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> "(b) The decision is not supported by substantial evidence in the whole record;
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> "(c) The decision is flawed by procedural errors that prejudice the substantial rights of the petitioner(s); or
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> "(d) The decision improperly construes the applicable law, but is not prohibited as a matter of law."

1 ordinance, the city failed to follow various statutory and local procedures for amending the
2 plan map designation and zoning for the property. Specifically, petitioner argues that the city
3 failed to comply with statutory provisions that require notice to the Department of Land
4 Conservation and Development of a proposed post-acknowledgement plan amendment at
5 least 45 days before the first evidentiary hearing on adoption. Petitioner also argues that the
6 city failed to comply with statutory and local provisions that require public hearings
7 regarding zone changes and plan amendments, and that the city failed to provide the required
8 notices in adopting the ordinance under applicable statutes and the LDC. Finally, petitioner
9 argues that the city failed to address mandatory approval criteria for the plan and zone
10 changes, and that there is not substantial evidence in the record to support the decision in
11 Ordinance No. 2007-19 to change the plan and zone designations.
12 The city makes no recognizable response to petitioner's arguments. We agree with
13 petitioner that the city failed to follow the applicable statutory and local procedures for
14 adopting the plan and zoning map amendments, and that the city failed to address mandatory
15 approval criteria. Those failures require that Ordinance 2007-19 be remanded.
16 Ordinance 2007-19 is remanded.