BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON SHORES CONSERVATION COALITION
and CATHERINE WILEY,
Petitioners,

vs.

CITY OF BROOKINGS,
Respondent,

and

U.S. BORAX, INC.,
Intervenor-Respondent.

LUBA No. 2008-172

FINAL OPINION
AND ORDER

Appeal from City of Brookings.

Courtney Johnson, Portland, filed the petition for review and argued on behalf of petitioners. With her on the brief were Christopher Winter, Ralph O. Bloemers and CRAG Law Center.

John B. Trew, Coquille, filed a response brief and represented respondent. With him on the brief was Trew & Cyphers LLP.

Timothy V. Ramis, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief were Damien R. Hall and Jordan Schrader Ramis PC.

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

AFFIRMED 02/24/2009

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a decision by the city approving an extension of time to implement a previously approved Master Plan of Development.

MOTION TO INTERVENE

U.S. Borax, Inc., the applicant below, moves to intervene on the side of the respondent in the appeal. There is no opposition to the motion and it is granted.

FACTS

In August, 2005, the city approved intervenor's application for a Master Plan of Development (MPoD) on intervenor's 553-acre property located on the east side of Highway 101, across from Samuel Boardman State Park. The development, known as "Lone Ranch," consists of single family housing, attached housing, a commercial area, and a college campus site. Under Brookings Land Development Code (BLDC) 17.70.120, intervenor was required to submit a Detailed Development Plan or secure first phase development approval within four years of final approval, unless the city granted an extension to those time frames.

In April, 2008, intervenor applied for an extension of the Lone Ranch MPoD. The planning commission denied the requested extension, and intervenor appealed the decision to the city council. The city council approved the extension. This appeal followed.

FIRST ASSIGNMENT OF ERROR

In the first assignment of error, petitioners argue that the city committed a procedural error that prejudiced petitioners' substantial rights. ORS 197.835(9). At the close of the July 16, 2008 city council hearing on the requested extension, the city council left the record open for additional submissions, described in the minutes as follows:

> "Mayor Anderson closed the public comment portion of the public hearing * * * and presented the following timeline and process to be used for submitting testimony * * * regarding this matter:

> "1. From Thursday, July 17, 2008 to no later than 4:30 p.m., Wednesday, July 23, 2008, anyone who has participated in this hearing proceeding is allowed to submit additional written testimony and/or evidence. No additional testimony will be accepted after this time.
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> "2. From Thursday, July 24, 2008, to no later than 4:30 p.m., Wednesday, July 30, 2008 anyone who has participated in this hearing may provide written rebuttal only to testimony and/or evidence submitted during the prior seven days. No new evidence will be accepted after this time.
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> "3. From Thursday, July 31, 2008, to no later than 4:30 p.m., Wednesday, August 6, 2008 the applicant will be allowed to submit written argument to the testimony and/or evidence submitted during the first two seven day periods. No new evidence may be submitted during this period." Record 140 (emphases in original).

Petitioners argue that the city erred in accepting a letter on July 31, 2008 from a Department of Land Conservation and Development (DLCD) representative. Record 65. Petitioners argue that the city erred in accepting that letter because the letter was accepted after the deadline set out for rebuttal of testimony or evidence submitted during the previous seven day open record period. Petitioners also argue the DLCD representative had not previously participated in the hearing and the city left the record open only to persons who had previously participated in the hearing. Petitioners argue that the city's acceptance of the letter after July 30, 2008 prejudiced their substantial rights because the city relied on the DLCD representative's opinion set forth in the letter in its findings, and petitioners did not have the opportunity to respond to the letter.

Intervenor responds that an unsigned but identical version of the letter was accepted into the record on July 30, 2008, within the rebuttal period time frame set out by the city. Record 63-64. We agree with intervenor that the letter was properly accepted by the city during the second open record period described above, and that the city did not err in accepting the letter during that time frame. The fact that the city accepted a signed but otherwise identical version of the same letter one day later does not change the fact that the letter was properly submitted into the record within the required time frame.

The letter was submitted by the planning director as an attachment to a letter to the city council and planning commission from the planning director. We do not see that it was error for the city to accept the letter even though the letter was from a person who had not previously participated in the hearing, because the letter was submitted by the planning director as an attachment to a report to the city council and planning commission, and the planning director had previously participated in the hearing.[1] We do not understand petitioners to allege that the letter contained new evidence that petitioners were entitled to rebut. *See Rice v. City of Monmouth*, 53 Or LUBA 55, 60 (2006), *aff'd* 211 Or App 250, 154 P3d 786 (2007) (there is no unlimited right to rebuttal). Neither do we understand petitioners to argue that the city's acceptance of the letter violated ORS 197.763, or any other applicable statute, code, or ordinance provision. *See Wetherell v. Douglas County*, __ Or LUBA __ (LUBA No. 2007-133, February 12, 2008, slip op 5-9) (discussing relationship between ORS 197.763(6)(a), (b) and (c)). Accordingly, petitioners' first assignment of error provides no basis for reversal or remand of the decision.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

BLDC 17.70.120 provides:

> "If the applicant has not submitted a [Detailed Development Plan (DDP)] for the planned development or the first phase within four years from the date of approval, the MPoD shall expire. *Where the planning commission finds that conditions have not changed, the commission may, at its discretion, extend the period for two additional years* per extension, subject to applicable hearing and notice requirements. If after the approval of the first DDP, construction has not been started or at any time construction has lapsed for a period of three years, the MPoD will expire." (Emphasis added.)

The city interpreted the phrase "conditions have not changed" to mean:

[1] Because we deny the first assignment of error, we need not address whether the city could properly limit persons who were entitled to submit testimony during the open record period to those who had previously participated in the hearing.

> "This is the criterion to be used in deciding to approve or deny the requested extension of time. There is a range of testimony in the record regarding the interpretation of what constitutes a 'change in conditions.' Some have suggested that it refers only to changes in the physical conditions of the subject property (such as landslides or loss of legal access.) Others argue that virtually any change requires denial of the application. After considering the testimony and comments as well as the staff reports, the City Council interprets the phrase 'conditions have not changed' to mean that if there are facts that have changed that were relied upon in the findings supporting the initial approval, and those changed facts would lead to a different conclusion, then there has been a change in conditions." Record 8.

We understand the city to have found that under BLDC 17.70.120, conditions have "changed" if the changed condition is such that the city would have denied the MPoD, rather than approved the MPoD, if the changed condition had been present when the MPoD was originally approved. To overturn the city council's code interpretation, petitioners must demonstrate that the city's interpretation of the phrase "conditions have not changed" is inconsistent with the express language, purpose or policy of the provision. ORS 197.829(1). LUBA reviews that interpretation under a somewhat deferential standard of review. *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992); *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003).

Petitioners argue first that the city council's interpretation of the word "conditions" in BLDC 17.70.120 as referring to "facts that have changed that were relied upon in the findings supporting the initial approval" is inconsistent with the express language of the provision, which uses only the word "conditions" with no limitation such as the one adopted by the city. Petitioners also argue that the city's interpretation contradicts the purpose and policy of the provision, which, according to petitioners is to set a time frame for action on a MPoD except in unusual circumstances.

Intervenor responds that the city's interpretation of the relevant phrase gives meaning to the entire provision found at BLDC 17.70.120 and is consistent with the purpose of the provision, to allow an extension of an approval without the necessity of expending resources

and time subjecting the already approved development to the same process a second time, when the circumstances that led to the initial approval remain the same.

BLDC 17.70.120 allows an extension of an initial MPoD approval in certain circumstances. Given the complexity of planning and developing a master planned development such as Lone Ranch and the resources required to be expended by the city and the applicant in order to secure approval of such a development, it makes sense that the city would allow an approval of such a development to be extended for an additional two years if no facts on which the city relied in granting the initial approval have changed. Petitioners have not demonstrated that the city's interpretation of the phrase "conditions have not changed" is inconsistent with the express language, purpose or policy of BLDC 17.70.120. ORS 197.829(1).

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In their third assignment of error, and in sub-assignments of error, petitioners argue that the city's findings in support of its determination that conditions have not changed are inadequate and are not supported by substantial evidence in the record.

A. Lone Ranch Water Supply

One of the review criteria for the initial approval of the MPoD required the city to find that adequate facilities and infrastructure, including water, are available to serve the proposed development, and that existing water supplies for adjacent properties will not be negatively affected at each phase of development.[2] In their second subassignment of error,

[2] BLDC 17.70.070 provides in relevant part:

> "The planning commission shall approve an application for MPoD upon finding that the following approval criteria are met:
>
> " * * * * *

petitioners argue that the city's findings in support of the extension are inadequate because as originally approved development was to be served by on-site wells and the development now will be served by city water. Petitioners argue that the evidence in the record shows that the city's water supply is inadequate to serve the development, and that a new law enacted in 2008 limits the ability of the city to secure new water rights to meet increased demand. Thus, petitioners argue, conditions have changed since the initial approval.

The city found that the approved MPoD is required to be served by city water, not on-site wells. Record 8-9. The city also considered and rejected petitioners' argument that a new law that limits the ability of the city to secure new water rights to meet the demand for water necessarily means that conditions have changed, under the city's interpretation of BLDC 17.70.120. The city concluded that the evidence in the record supports the city's determination that the city has sufficient water to supply the development. Petitioners do not explain why the city's findings are inadequate regarding its conclusion that conditions have not changed with respect to the water supply. In addition, there is substantial evidence in the record to support the city's conclusion that it can supply water to the development. Accordingly, this subassignment of error is denied.

B. Adjacent Water Supply

In initially approving the MPoD, the city imposed a condition of approval (condition 23) that requires that prior to construction of any phase of the MPoD, the applicant must show that an adjacent water supply, the Rainbow Rock Condominiums water source, will not be negatively affected.[3] In their first subassignment of error, petitioners argue that evidence

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> "C. The proposed MPoD will demonstrate that adequate utilities and infrastructure are available or can reasonably be made available at each phase. The proposed MPoD will further demonstrate that existing utility services and water supplies for adjacent properties will not be negatively affected at each phase[.]"

[3] Condition 23 states:

in the record shows that the water supply of the Rainbow Rock Condominiums has been negatively affected by pre-development activities on the property. Specifically, petitioners argue that an access road constructed for geotechnical testing in 2004 deposited silt in the Rainbow Rock inlet pond and that led to increased turbidity of the water supply. Record 663-64.

The city found that condition 23 remains enforceable against the applicant and that the condition continues to be sufficient to ensure protection of the Rainbow Rock water supply. The city concluded that, under their interpretation of BLDC 17.70.120, there has been no change in the facts that the city relied on in the initial approval to find that BLDC 17.70.070(C) was met. Record 8-9. The record indicates that the construction activities that affected the Rainbow Rock water supply occurred prior to the MPoD being approved in August, 2005. Record 663-64. In fact, it seems likely those activities and their effects could have contributed to the city's decision to impose condition 23. Petitioners do not explain how construction activities that occurred prior to the initial approval of the MPoD are a "change in conditions" under the city's interpretation of BLDC 17.70.120. Moreover, even if a portion of those activities occurred after the initial MPoD approval, we do not see that a single incident that affected the Rainbow Rock water supply requires a different conclusion than the one reached by the city about the efficacy of condition 23.[4]

Petitioners also point out that since the MPoD was approved in 2005, the Rainbow Rock water supply has been designated by the Oregon Department of Environmental Quality

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> "Prior to construction of any phase that may adversely affect the quality or quantity of water available through the existing Rainbow Rock Service Association (RRSA) surface water supply system, the applicant shall demonstrate how the water and water supply system will not be negatively affected. Each DDP shall evaluate the impact of development on the existing RRSA surface water system, unless RRSA has previously discontinued use of the system." Record 568.

[4] We might reach a different conclusion if petitioners had identified additional instances of negative effects on the water supply that occurred after the initial approval of the MPoD.

(DEQ) as a public water system. Petitioners argue that DEQ's recognition of the Rainbow Rock water supply is a "change in conditions." However, petitioners do not explain why the designation as a public water supply has any bearing on the facts that led to the city's initial approval of the MPoD and the imposition of condition 23. Condition 23 appears to recognize that the Rainbow Rock water supply deserves special additional safeguards, independent of whether it is now a public water supply.

Petitioners do not point to any facts that have changed that the city relied on in its initial approval to determine that the relevant approval criterion was met. Accordingly, this subassignment of error is denied.

C. Infrastructure Costs

In their third subassignment of error, petitioners argue that the city's findings that conditions have not changed are inadequate and are not supported by substantial evidence in the record because there is no evidence that intervenor has paid for any of its share of infrastructure costs. Petitioners also argue that the fact that a cost-sharing agreement between intervenor and the city is in draft form is a "change in conditions," and that the existence of a lease agreement with the development's electricity supplier under which the electricity supplier agreed to pay the costs to construct and connect electrical lines to the property is a "change in conditions," within the meaning of BLDC 17.70.120.

We disagree with petitioners that there is no evidence in the record to support the city's findings regarding the amount of intervenor's contribution to infrastructure costs. Intervenor points to testimony from intervenor's representatives and city planning staff regarding intervenor's contribution. That evidence is substantial evidence to support the city's conclusion there has been no change of conditions regarding intervenor's share of infrastructure costs. Moreover, petitioners do not explain why, under the city's interpretation of the relevant approval criterion, the fact that the cost-sharing agreement is in draft form or

the existence of the lease with the electric cooperative that has been in place since 1977 constitutes a change in the facts that would call the initial approval decision into question.[5]

In responding to the argument below, the city found:

> "There is testimony * * * that there is evidence in the record that the City has borne an unexpected portion of the cost for the creation of infrastructure necessary to serve the Lone Ranch site. [The testimony] states that this unexpected financial burden of the City constitutes a change in conditions.
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> "The City Council finds that during the original approval of the MPoD, [intervenor] committed to pay for its share of the costs of infrastructure and that [intervenor] remains bound to that commitment. The City Council finds that there is evidence that [intervenor] has acted in accordance with this commitment as [intervenor] has contributed two million dollars on infrastructure to date. Moreover, when the City informed [intervenor] of its share of costs for the extension of a section of the water and sewer mains to the property which it had paid for, [intervenor] has agreed to pay its share. City staff and [intervenor] have also negotiated a draft agreement designating each [party's] proportionate share. These facts support our finding that there has been no change in conditions regarding this issue." Record 11.

Petitioners do not explain why the above-quoted findings are inadequate to explain why conditions have not changed, under the city's interpretation of BLDC 17.70.120. This subassignment of error is denied.

D. Review Criteria for the MPoD

In response to the argument below that the MPoD had been amended in certain respects, in the final part of its decision, the city adopted "catch-all" findings that addressed the review criteria for MPoDs "to demonstrate that conditions used to approve the Lone

[5] In response to the argument below, the city found:

> "Concerns have been raised that under the lease that allows the Co-op's electrical lines, the Co-op is required to provide electrical infrastructure at its expense and that this is a major change in costs. The City Council finds that the lease has been in place for decades and no aspect of the findings supporting the MPoD required any particular cost split for electrical infrastructure, this matter was not part of the approval. Therefore, we find no change in conditions." Record 12.

Ranch Master Plan have not changed." Record 14. Petitioners argue that those findings are conclusory and inadequate because they offer no legal analysis.

The city listed each review criterion that it had found was satisfied when the initial MPoD was approved, noted that the Lone Ranch MPoD was found to be consistent with that criterion when it was approved, that no change to the plan was being requested, and that the city was only considering a request for a two-year extension of the initial approval. Record 14-15. The city then found that "conditions have not changed." *Id*.

The city's findings rely on its interpretation of the phrase "conditions have not changed" in BLDC 17.70.120. As we explained above under the second assignment of error, the city's interpretation of that provision is not inconsistent with the express language, purpose or policy of the provision. Although the city probably did not need to adopt the findings that appear at Record 14-15, other findings adopted by the city explain why it determined that conditions have not changed, under its interpretation of BLDC 17.70.120. Accordingly, the fourth subassignment of error provides no basis for reversal or remand of the decision.

The city's decision is affirmed.