BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TREADMILL JOINT VENTURE and
BOYD IVERSON,
Petitioners,

vs.

CITY OF EUGENE,
Respondent.

LUBA No. 2010-107

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioners.

Emily N. Jerome, City Attorney, Eugene, filed the response brief and agued on behalf of respondent.

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

REMANDED 04/24/2012

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. 2010-107, petitioners appeal a planning commission decision that approves petitioners' application for a planned unit development (PUD), with additional conditions of approval. This appeal is consolidated with LUBA No. 2010-078, which concerns a city staff decision charging petitioners a fee to appeal a hearings official's decision on the PUD application to the planning commission. In a separate final order and opinion issued this date, we bifurcate LUBA No. 2010-078 from LUBA No. 2010-107, and dismiss LUBA No. 2010-078.

FACTS

The procedural posture of this case is unusual, and we describe both the proceedings below and the proceedings before LUBA.

The hearing official approved petitioners' application for phase III of the Rivendell PUD, with six conditions of approval. Under the city's code, an applicant for a PUD can request relief from compliance with applicable development standards, where the applicant shows that proposed noncompliance is consistent with the purposes of the PUD provisions. Eugene Code (EC) 9.8320(11)(k). One purpose of PUD development is to provide for development "at least equal in quality to those that are achieved through the traditional lot by lot development and that are reasonably compatible with the surrounding area." EC 9.8300(2).

The hearing official rejected in whole or part petitioners' requests for relief from three setback standards. Only one such request for relief is at issue in this appeal. Petitioners requested a reduction in the minimum interior yard setback from five feet to three feet for all lots. The hearing official granted the reduction for all lots that will be developed with single story dwellings, but denied it for all lots to be developed with two-story dwellings.

On August 11, 2010, petitioners filed a timely appeal with the city, accompanied by an appeal fee in the amount of $9,268.46. The statement accompanying the appeal challenged the hearing official's resolution of petitioners' requests for relief to adjust the three setbacks, and also included a challenge to the local appeal fee. Pursuant to a fee schedule adopted by the city manager, the local appeal fee is 50 percent of the application fee. Petitioners argued in their appeal statement that an appeal fee set at 50 percent of the application fee is inconsistent with ORS 227.180(1)(c).[1] Based on those arguments, petitioners requested that the city waive or return the appeal fee. City staff took no action on petitioners' request, but issued petitioners a receipt for the appeal fee. On August 30, 2010, petitioners filed with LUBA a self-described "precautionary" appeal of the city staff decision to charge the local appeal fee, attaching to the notice of intent to appeal a copy of the receipt and petitioners' appeal statement. Notice of Intent to Appeal (LUBA No. 2010-078) 1.

Meanwhile, petitioners continued to pursue the local appeal process. The planning commission conducted an on-the-record hearing and, on October 10, 2010, issued a final decision that wholly approved two of the three requested setback reductions. With respect to the reduction from the five-foot interior yard setback, the planning commission agreed with petitioners that the hearing official had erred in limiting the yard setback to lots developed with single-story dwellings, because nothing in the city's code supported a distinction based on single-story or two-story dwellings. The planning commission approved the reduction from five feet to three feet regardless of dwelling type for all lots in the PUD, but added a

[1] ORS 227.180(1)(c) provides in relevant part that

> "The governing body may prescribe, by ordinance or regulation, fees to defray the costs incurred in acting upon an appeal from a hearing officer, planning commission or other designated person. The amount of the fee shall be reasonable and shall be no more than the average cost of such appeals or the actual cost of the appeal, excluding the cost of preparation of a written transcript. * * *"

restriction that required the full setback from all lot lines that border neighboring subdivisions not part of the Rivendell PUD.

With respect to the appeal fee issue, the planning commission accepted into the record petitioners' testimony on that issue, but determined that the issue was beyond its scope of review under Eugene Code (EC) 9.7655(3).[2]

Petitioners appealed the October 10, 2010 planning commission decision to LUBA, and that appeal was assigned LUBA No. 2010-107. Petitioners moved to consolidate LUBA No. 2010-107 with LUBA No. 2010-078, as "closely related" decisions under OAR 661-010-0055. In the meanwhile the city filed a motion to dismiss LUBA No. 2010-078, and opposed consolidation. LUBA allowed consolidation, and took the motion to dismiss LUBA No. 2010-078 under advisement. *Treadmill Joint Venture v. City of Eugene*, 62 Or LUBA 538 (2010).

The consolidated appeals then proceeded to briefing and oral argument. The consolidated petition for review includes two assignments of error. The first assignment of error challenges the planning commission's condition limiting the setback reduction for lots that border neighboring subdivisions. The second assignment of error challenges both the staff decision to charge the local appeal fee at issue in LUBA No. 2010-078, and the

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[2] EC 9.7655 governs appeals from the hearing official to the planning commission, which is the city's final decision maker for the types of land use decisions at issue here, and provides in relevant part:

> "2. The appeal shall be submitted on a form approved by the city manager, be accompanied by a fee established pursuant to EC Chapter 2, and be received by the city no later than 5:00 p.m. of the 12th day after the notice of decision is mailed. The record from the proceeding of the hearings official or historic review board shall be forwarded to the appeal review authority. No new evidence pertaining to appeal issues shall be accepted.
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> "3. The appeal shall include a statement of issues on appeal, be based on the record, and be limited to the issues raised in the record that are set out in the filed statement of issues. The appeal statement shall explain specifically how and hearings official or historic review board failed to properly evaluate the application or make a decision consistent with applicable criteria. The basis of the appeal is limited to the issues raised during the review of the original application."

planning commission's determination that the planning commission lacks review authority to consider petitioners' challenges to the local appeal fee, at issue in LUBA No. 2010-107. At oral argument, the Board asked the parties if they would consent to suspend this review proceeding pending a decision by the Court of Appeals in an appeal of a different city planning commission decision that involved a challenge to the same city appeal fee at issue in the present appeals. The parties consented to suspend the present review proceeding.

On August 17, 2011, the Court of Appeals decided *Willamette Oaks LLC v. City of Eugene*, 245 Or App 47, __ P3d __ (2011), *rev den* 351 Or 586, __ P3d __ (2012) (*Willamette Oaks*), in which the Court held that LUBA erred in remanding a decision to the City of Eugene planning commission to allow the petitioners in that appeal to submit into the local record testimony and evidence challenging the city's local appeal fee. The Court held that under EC 9.7655(3) the planning commission lacked authority to accept new evidence regarding the appeal fee, as well as review authority to consider a challenge to the local appeal fee, and that LUBA had not identified any legal basis to remand the decision to the planning commission for further proceedings on the appeal fee issue. 245 Or App at 56-57.

After the Court's decision in *Willamette Oaks* became final, the parties moved the Board to re-activate these appeals and resolve the various motions and the merits. We now do so.

REPLY BRIEF, MOTION TO STRIKE, MOTION TO TAKE EVIDENCE

Petitioners request permission to file a reply brief to address the city's assertion in its response brief that the city's appeal fee is based on the "average cost" of appeals, consistent with ORS 227.180(1)(c). Relatedly, petitioners move to strike the assertion in the response brief, as not supported by the record. Attached to the motion to strike are three documents related to petitioners' public records request to the city to locate the documents forming the basis for the city's appeal fee.

The city objects to the reply brief, arguing that it is not limited to a "new matter" raised in the response brief, and therefore the reply brief is not warranted under OAR 661-010-0039 (allowing a reply brief confined solely to new matters raised in the respondent's brief). The city also objects that the three documents attached to the motion to strike are not in the record before LUBA. In response to the latter argument, petitioners filed a motion to take evidence under OAR 661-010-0045 to allow LUBA to consider the three documents.

For reasons explained below, the disputed reply brief, the motion to strike and the motion to take evidence all revolve around an issue—whether the city's local appeal fee complies with ORS 227.180(1)(c)—that under the circumstances of this case cannot form a basis for reversal or remand of the challenged decision. That being the case, there is no point in resolving the merits of the disputed motions. The motion to file a reply brief, the motion to strike, and the motion to take evidence are denied.

FIRST ASSIGNMENT OF ERROR

Petitioners challenge the condition imposed by the planning commission limiting the interior yard setback reduction to exclude lot lines that border some neighboring subdivisions. According to petitioners, the planning commission exceeded the permissible scope of the issues presented in the appeal statement, and further that the decision to impose the new condition is not supported by adequate findings or substantial evidence.

EC 9.7655(3) provides that "[t]he appeal shall include a statement of issues on appeal, be based on the record, and be limited to the issues raised in the record that are set out in the filed statement of issues." *See* n 2. Petitioners' appeal stated, in relevant part:

> "**Comment on item 7: Limiting relief re the minimum interior yard setbacks for primary residence**: The limitation on reduced interior yard setbacks to single story dwellings only is described by the Hearing Official without any reference to any standard that requires the limitation. The Staff Report describes this limitation in terms of preventing structures from 'looming' over the adjacent structure. Again, the 'looming' description, which is a staff editorial, is not tied to any of the approval standards." 2010-107 Record 103.

Petitioners contend that the only issue raised in the above statement is a challenge to the hearings official's limitation of the setback reduction to lots with single story dwellings. Under the hearings official's decision, no distinction is drawn with respect to setbacks between lots that are adjacent to other subdivisions and those that are not. In the appeal statement, petitioners argued to the planning commission that the one-story/two-story distinction drawn by the hearings officer has no basis in the city's code, and requested that the condition be removed. Accordingly, petitioners argue, the issues before the planning commission were limited in relevant part to the single-story/two-story distinction drawn by the hearings official, and no issue was raised or could have been raised regarding the effect of reduced setbacks on adjoining subdivisions, because the hearings official adopted no such restrictions. From petitioners' perspective, the planning commission took something away that the hearings officer had granted (a reduced yard setback for lots adjacent to other subdivisions), but no issue had been raised regarding such lots in the appeal statement. Because EC 9.7655(3) limits the issues the planning commission can consider to those "set out in the filed statement of issues," petitioners argue that the planning commission lacked authority to impose an entirely different restriction intended to protect the residents of neighboring subdivisions. *See Smith v. Douglas County*, 93 Or App 503, 763 P2d 169 (1988), *aff'd* 308 Or 191, 777 P2d 1377 (1989) (where the code limited county board review to issues raised in the local notice of appeal, the board lacked authority to consider an additional issue not raised in the local notice).

At petitioners' request, the planning commission took official notice of decisions approving other phases of the Rivendell PUD, which petitioners argued had been approved with the same reduced three-foot yard setback requested in the present application. The planning commission agreed with petitioners that the single-story/two-story distinction drawn by the hearings officer had no basis in the code, and agreed to remove that condition. However, the planning commission went on to find:

> "The decision whether or not to accept the applicant's proposed noncompliance [with the five-foot interior yard setback] should be based on EC 9.8300(2) regarding reasonable compatibility with the surrounding area. Planning Commission, with all available information—including photos and previous decisions—finds the proposal to be reasonably compatible with the surrounding area including the previous Rivendell subdivision. A look at what was allowed in the previous development shows that 3-foot interior yard setbacks were permitted per MDA 01-02. Specifically, the allowance stated that the interior yard setback 'shall be relaxed to require a 6-foot separation between structures for all lots in Rivendell subdivision *except lots which border neighboring subdivisions*.'
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> "* * * Therefore, Planning Commission grants the applicant's request for the minimum interior yard setback for all lots to be reduced from 5 feet to 3 feet for the primary residential structure (with the minimum required distance between buildings being reduced from 10 feet to 6 feet). *Planning Commission notes that, in order to be consistent with the conditions of the previous Rivendell subdivision, a similar restriction regarding lots which border neighboring subdivisions should also be included.* Therefore, Planning Commission modifies the Hearing Official's decision and imposes the following new condition of approval:
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> "A note shall be added to the final plans that states: 'The minimum interior yard setback shall be relaxed from 5 feet to 3 feet for all lots in the PUD, except for * * * all lot lines which border neighboring subdivisions other than Rivendell (e.g. relevant lot lines for Lots 1-8, 15-21, and 41-45). * * *.'" 2010-107 Record 7 (emphasis and underline added).

Petitioners argue that the planning commission lacked authority to impose the underlined portion of the condition, based on the emphasized findings.

The city responds that the planning commission simply gave petitioners what they asked for. According to the city, petitioners requested in the appeal statement that the planning commission take notice of the decisions approving Phases I and II of the Rivendell PUD, specifically to demonstrate that "these earlier phases were approved with the same relief requested here." 2008-107 Record 142. The city argues that the restriction regarding lots that border neighboring subdivisions is taken verbatim from the conditions imposed in the decisions that petitioners requested that the planning commission take official notice of. Further, the city notes that the underlying approval standard is whether the requested reduction is consistent with the purposes of the PUD provisions, including the purpose to

provide for development that is "reasonably compatible with the surrounding area." EC 9.8300(2). The city contends that in considering whether to grant the requested setback reduction the planning commission was entitled to consider whether the reduction provides for development that is reasonably compatible with adjoining subdivisions. Under these circumstances, the city argues, the planning commission did not exceed its authority under EC 9.7655(3) to consider issues not raised in the appeal statement.

We agree with the city up to a point. Where an applicant appeals a hearing official's decision challenging a condition of approval under a standard such as EC 9.7655(3), and the planning commission on appeal agrees that the condition of approval is not authorized by the code and eliminating the condition, we believe the planning commission is entitled to consider the effect of eliminating the condition on the application as a whole. If *eliminating the condition* would affect compliance with an applicable approval standard, then we believe the planning commission could, without running afoul of EC 9.7655(3), go on to consider whether a new or modified condition is necessary to avoid noncompliance created by deleting the original impermissible condition. *See* EC 9.7680 (authorizing the planning commission to "affirm, reverse or modify any decision, determination or requirement of the hearings official," including the authority to change "any of the conditions of the hearings official").

However, as we understand the circumstances here, that is not the case. The hearings officer imposed no conditions regarding setbacks on lots adjacent to other subdivisions, and his rationale for denying the reduction for lots developed with two-story dwellings was not, apparently, based on a concern to protect residents of neighboring subdivisions or ensure compatibility with the surrounding area. There is no apparent connection between the one story/two story distinction challenged in the appeal statement and ultimately rejected by the planning commission and the effect of reduced setbacks on neighboring subdivisions. In other words, eliminating the one-story/two-story condition did not cause or affect

noncompliance with any approval standard. Instead, the planning commission imposed a new condition to address a different perceived code compliance issue that was (1) not addressed in the hearings official's decision and (2) not appealed to the planning commission. We agree with petitioners that in doing so the planning commission exceeded its authority under EC 9.7655(3).

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Under the second assignment of error, petitioners argue that the city's local appeal fee is inconsistent with ORS 227.180(1)(c), and that the planning commission erred in failing to address petitioners' challenge to the fee. The city responds, and we agree, that for the reasons set out in the Court of Appeals' *Willamette Oaks* decision the city planning commission, which is the city's final decision-maker, lacked authority to develop an evidentiary record on, or review at all, petitioners' challenges to the city's appeal fee. Concomitantly, we believe that LUBA has no basis to reverse or remand the planning commission decision to the planning commission for any reason related to the city's appeal fee. Under the circumstances of this case, if petitioners have a right to challenge the city's appeal fee for inconsistency with ORS 227.180(1)(c), that challenge must be brought in another forum, presumably in the circuit court pursuant to a writ of review or a declaratory ruling.

The governing body of the City of Eugene, its city council, has delegated to the city planning commission the authority to render the city's final decision with respect to the type of land use decision at issue here. However, the city council did not delegate all of the city council's powers that the city council might exercise if it were the final decision maker. Specifically, the appeal and hence the planning commission's review is limited to the questions of whether the hearings official (1) "failed to properly evaluate the application" and (2) failed to "make a decision consistent with applicable criteria." EC 9.7655(3). A

challenge to the city's appeal fee does not fall within either element of the planning commission's limited scope of review.

In *Willamette Oaks*, the Court of Appeals distinguished the City of Eugene's local appeal scheme from the scheme at issue in *Young v. Crook County*, 224 Or App 1, 197 P3d 48 (2008). *Young* involved an as-applied challenge to the county's appeal fee that was presented on appeal of a planning commission decision to the county's board of commissioners. Under the county's code the board of commissioners could accept new evidence on appeal, and nothing in the code limited the governing body's scope of review to preclude consideration of the appeal fee challenge. In *Willamette Oaks*, the Court characterized *Young* as standing for the proposition that "when local land use regulations give a party the opportunity to submit evidence to establish a *prima facie* case that an appeal fee violates ORS 227.180(1)(c), the party must take advantage of that opportunity in order for subsequent appellate review bodies to address the merits of the appeal fee challenge." 245 Or App at 56. However, the Court held, "*Young* did not establish a free-standing principle that entitles parties to submit evidence on which to challenge the validity of an appeal fee at the local level without regard to whether the local land use regulations establish a basis on which to do that." *Id.*

Turning to the City of Eugene case before them, the Court noted that EC 9.7655 limits the planning commission's review to the issues presented to the hearings officer and precludes the planning commission from taking new evidence on any issue. The Court concluded that LUBA had not identified any authority by which it can require the planning commission to accept evidence on remand on the appeal fee challenge, or any basis to conclude that the planning commission's review procedures are unlawful. Accordingly, the Court held that LUBA erred in remanding the decision to the planning commission to take evidence on whether the appeal fee violates ORS 227.180(1)(c). Under *Willamette Oaks*, it is clear that because the planning commission lacks authority to accept new evidence, there

is no basis for LUBA to remand a planning commission decision to accept new evidence, on an appeal fee issue or any other issue.

In a footnote, the Court stated that:

> "Because of our resolution of the evidentiary aspect of LUBA's remand order, we do not consider whether the apparent absence of any basis for the planning commission to consider the merits of Willamette Oaks's appeal fee challenge affects LUBA's authority to address the fee challenge." 245 Or App at 57, n 4.

Thus, the Court left open the question of whether the planning commission's limited authority to review the hearings official's decision for error independently affects LUBA's authority to address the appeal fee challenge.

In supplemental briefing, petitioners argue that *Willamette Oaks* is distinguishable, because unlike the petitioners in that case, petitioners do not seek remand to allow petitioners to submit new evidence to the planning commission. According to petitioners, their appeal fee challenge turns on the complete lack of evidence in the record indicating that the city's appeal fee is no more than the average cost of appeals or the actual cost of petitioners' appeal, as required by ORS 227.180(1)(c). However, that argument is a variant of the argument we and the Court of Appeals rejected in *Young*, and we reject it here. As explained in *Young*, petitioners cannot simply allege that the appeal fee is inconsistent with ORS 227.180(1)(c) and thereby place the evidentiary burden on the local government to demonstrate that its appeal fee is consistent with the statute. Petitioners' appeal fee challenge in the present case is, in essence, an evidentiary challenge. For the reasons set out in *Willamette Oaks*, because the city's final decision maker lacks authority to develop an evidentiary record on the basis for the appeal fee, LUBA has no basis to reverse or remand the challenged decision under this assignment of error.

In addition, we believe that because EC 9.7655(3) limits the planning commission's review to addressing errors committed by the hearings official, the planning commission lacks authority to consider other matters such as a challenge to the city's appeal fee. While

the city council presumably has that inherent authority, it was not delegated to the planning commission. For that additional reason, even if petitioners' appeal fee challenge turned on questions of law rather than questions of fact, the planning commission committed no error in failing to address petitioners' appeal fee challenge. As a practical matter, that means that LUBA cannot review challenges to the city's appeal fee in an appeal of a planning commission decision like the one before us.

The second assignment of error is denied.

CONCLUSION

For the reasons set out in the first assignment of error, LUBA No. 2010-107 is remanded.