BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GERALD POE and STEPHANIE POE,
Petitioners,

vs.

CITY OF WARRENTON,
Respondent,

and

TERRY MILLER,
Intervenor-Respondent.

LUBA No. 2012-029

FINAL OPINION
AND ORDER

Appeal from City of Warrenton.

Blair J. Henningsgaard, Astoria, filed the petition for review and argued on behalf of petitioners.

No appearance by City of Warrenton.

Ronald L. Miller, Long Beach, Washington, filed the response brief and argued on behalf of intervenor-respondent.

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

REMANDED 08/16/2012

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 city council decision approving, for the third time, a conditional use permit and site design permit application for a mixed-use, two-story building in a commercial zone.

MOTION TO INTERVENE

Terry Miller, the applicant below, moves to intervene on the side of the respondent. There is no opposition to the motion and it is granted.

FACTS

Two previous LUBA decisions have remanded the city's decisions that approved the conditional use permit and site design permit application. *Poe v. City of Warrenton*, 63 Or LUBA 20 (2011) (*Poe I*) and *Poe v. City of Warrenton*, __ Or LUBA __ (LUBA No. 2011-069, December 20, 2011) (*Poe II*). In *Poe I*, we described the subject property and the proposal:

> "The subject property is a vacant lot in the city that is zoned General Commercial (C-1). Intervenors-respondents (intervenors) applied for a conditional use permit and site design review to construct a two-story building containing 12 mini-storage units and six garages on the ground floor, and six apartments on the second floor." *Id*. at 21.

Following our decision in *Poe II*, on December 28, 2011 intervenor requested that the city hold a hearing on remand. The city held a hearing on March 27, 2012, and at the conclusion of the remand hearing adopted a decision, supported by additional findings, that again approved the application. This appeal followed.

SECOND ASSIGNMENT OF ERROR

LUBA remanded the decision in *Poe II* in part for the city to identify evidence in the record that supports the city's conclusion that the conditional use permit criteria at Warrenton Development Code (WDC) 4.4.3.A(4) are met and to adopt adequate findings explaining that

conclusion.[1] In a portion of their second assignment of error, petitioners argue that the city committed a procedural error that prejudiced their substantial rights when the city refused petitioners' request made during the March 27, 2012 remand hearing to respond to new evidence.[2] Some of the evidence that petitioners requested the opportunity to respond to was included in a March 21, 2012 staff report, and some of the evidence was introduced at the March 27, 2012 hearing.

A. March 21 Staff Report (Storm Water System Evidence)

The record includes a staff report dated March 21, 2012, six days prior to the remand hearing. Record 33-45. According to petitioners, the March 21, 2012 staff report included new evidence regarding intervenor's proposed system of dry wells to dispose of storm water, and at the remand hearing petitioners requested but were denied the opportunity to respond to that new evidence. We understand petitioners to argue that the city relied on that evidence in deciding to approve the applications.

We understand intervenor to respond that petitioners could have responded to the new evidence included in the staff report prior to or at the remand hearing. Accordingly, we understand intervenor to argue, the city did not commit a procedural error in denying petitioners an additional opportunity to respond to the new evidence contained in the staff report. We agree with intervenor on that point. Even if the staff report was not available during the entire minimum period required by ORS 197.763(4)(b), petitioners have not demonstrated that its unavailability during part of that period prejudiced their substantial

[1] WDC 4.4.3.A(4) requires the city to find that "[p]ublic facilities and services are adequate to accommodate the proposed use."

[2] Under ORS 197.835(9)(a)(B), LUBA is authorized to reverse or remand a land use decision if the decision maker "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]"

rights.[3] Petitioners have not demonstrated that they lacked opportunity during the March 27, 2012 remand hearing to adequately respond to any issues raised or evidence presented in the March 21, 2012 staff report. *Tri-River Investment Co. v. Clatsop County*, 37 Or LUBA 195, 214 (1999). Accordingly, this subassignment of error is denied.

B. March 27, 2012 Remand Hearing (Adequacy of Fire Services Evidence)

Petitioners argue that the city erred in denying petitioners the opportunity to respond to new evidence that intervenor submitted at the March 27, 2012 hearing regarding the adequacy of fire services and water flow from nearby fire hydrants to the property. That new evidence is found at Record 108-124. According to petitioners, at the remand hearing intervenor submitted a letter with attachments that included diagrams of potential alternative construction methods that, intervenor argued to the city, demonstrate that fire services to the property are adequate. Petitioners requested the opportunity to respond to that evidence and the city denied the request. The city relied on that evidence to determine that WDC 4.4.3.A(4) is satisfied with regard to adequacy of fire services.[4]

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[3] ORS 197.763(4)(b) provides in relevant part:

> "Any staff report used at the hearing shall be available at least seven days prior to the hearing. If additional documents or evidence are provided by any party, the local government may allow a continuance or leave the record open to allow the parties a reasonable opportunity to respond. * * *"

[4] The city found in relevant part:

> "Fire Flow: In February, 2012, the Fire Chief performed flow tests at three fire hydrants in the vicinity of the subject property. From those fire flow tests, Fire Chief Ames concluded 'there does not appear to be adequate available fire flows for the project to move ahead, even with the allowed reduction for approved automatic sprinkler as spelled out in Appendix B of the 2010 Oregon Fire Code.' * * *
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> "The conclusions of the fire chief regarding available fire flow led the applicant to inquire whether alternative building construction designs and methods could overcome that deficiency. Attached is a February 17, 2012 letter from the city's building official * * * to the applicant stating that '[i]t was found that there are methods to build this structure that would not require fire sprinklers and be in full compliance with Oregon building codes. A design professional is required by Oregon state law to draw up your final design and resubmit them for another plan review before you start building.' *Diagrams of the potential alternative*

Intervenor provides no response to the argument. The minutes of the hearing indicate that the city may have believed that since the hearing was being held on the 90th day after intervenor had requested in writing that the city take action on his application after our remand in *Poe II*, the city was obligated to make a final decision on the application at the hearing and therefore denied petitioners' request to leave the record open for an additional seven days to respond to the new evidence.[5] Record 16. However, the fact that the city believed it was making a decision on the last day allowed by the ORS 227.181 for such a decision does not absolve the city from following the procedures applicable to quasi-judicial hearings, including giving all parties the opportunity to respond to new evidence submitted at the hearing. ORS 197.763(4)(b); *Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d 23 (1973). *See* n 3. The city could have rejected the new evidence and avoided the procedural conundrum that it apparently believed it faced. Alternatively, the city could have

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construction methods are included in the record. Provided the building design satisfies the building code for fire separation, according to the Building Official, the existing fire flow would be adequate." Record 12 (emphasis added).

[5] ORS 227.181 provides in relevant part:

"(1) Pursuant to a final order of the Land Use Board of Appeals under ORS 197.830 remanding a decision to a city, the governing body of the city or its designee shall take final action on an application for a permit, limited land use decision or zone change within 90 days of the effective date of the final order issued by the board. For purposes of this subsection, the effective date of the final order is the last day for filing a petition for judicial review of a final order of the board under ORS 197.850 (3). If judicial review of a final order of the board is sought under ORS 197.830, the 90-day period established under this subsection shall not begin until final resolution of the judicial review.

"(2)(a) In addition to the requirements of subsection (1) of this section, the 90-day period established under subsection (1) of this section shall not begin until the applicant requests in writing that the city proceed with the application on remand.

"(b) The 90-day period may be extended for a reasonable period of time at the request of the applicant."

left the record open for petitioners to respond to the new evidence under ORS 197.763(4)(b).[6]

In addition, we note that a transcript of the March 27, 2012 hearing attached to the petition for review as Appendix 4 makes clear that although the applicant requested in writing on December 28, 2011, that the city begin the proceedings on remand, the hearing was scheduled on the day that it was held, 90 days after December 28, 2011, *at the applicant's request*. Petition for Review App 4, page 1-2. In that case, we think that such a request is reasonably viewed as a request to extend the 90-day deadline under ORS 227.181(2)(b). *See* n 5.

There appears to be no dispute that the city accepted new evidence at the hearing and relied on that evidence in approving the application, or that the city denied petitioners' request to respond to that new evidence. We agree with petitioners that the city erred in denying petitioners the opportunity to respond to the new evidence that was submitted at the March 27, 2012 hearing regarding the adequacy of fire services and water flow to the property. On remand, the city must allow petitioners an opportunity to respond to that new evidence.

C. Storm Water System Condition of Approval

In *Poe II*, we sustained petitioners' assignment of error that argued that the evidence in the record did not support the city's determination, if it made one, that the storm water drainage system in the area can accommodate the proposed use. *Poe II*, slip op 14. We explained that although the city imposed a condition of approval that provided in relevant part that "storm water from structure shall be kept on site," it was not clear whether that condition of approval was intended to be the city's present determination that WDC

[6] We note that failure to comply with the requirement to take final action under the 90-day deadline at ORS 227.181 is not subject to the mandamus remedy set out in ORS 227.179.

4.4.3.A(4) was met with respect to storm water drainage or whether the condition intended to defer that determination to a future decision-making process.

In the challenged decision, the city imposed an additional condition of approval that provides in relevant part that the applicant is required to submit a final storm water plan "bearing the stamp of a professional engineer * * * [that meets] the original condition of approval regarding storm water imposed by the Planning Commission. The city will outsource the review of this plan to a third party registered professional engineer to review such plans, and the applicant shall reimburse the city for all out of pocket expenses associated with the third party review." Record 13. In a subassignment of error, petitioners argue that the city erred in deferring a determination of compliance with WDC 4.4.3.A(4) to a process that does not allow an opportunity for public participation, by deferring review of the storm water plan to later engineering review. However, we disagree that the city has, in imposing the additional condition of approval, impermissibly deferred its required findings of compliance with WDC 4.4.3.A(4) with respect to the adequacy of the city's storm water system. Rather, we understand the city to have determined, based on the evidence that intervenor submitted that storm water will be kept on the property with a system of dry wells, that WDC 4.4.3.A(4) is satisfied with respect to the capacity of the city's storm water system to handle increased run off from the property. That the city required engineering review of the final engineered storm water plans does not change that conclusion.

The second assignment of error is sustained, in part.

FIRST ASSIGNMENT OF ERROR

On remand, the city adopted findings that various provisions of WDC 4.4.3.A are satisfied. Petitioners challenge those findings in their first assignment of error.

A. WDC 4.4.3.A(2) Operating Characteristics

WDC 4.4.3.A(2) requires the city to determine that that "[t]he location, size, design and operating characteristics of the proposed use are such that the development will be

compatible with, and have a minimal impact on, surrounding properties." After our remand in *Poe II*, intervenor introduced a letter into the record from a former mayor, Gramson, that expressed the author's opinion regarding the "operating characteristics" of the proposed mixed-use building and its compatibility with the surrounding properties. The city quoted portions of the letter and adopted findings based in part on reliance on the letter that the proposed use will be compatible with and have a minimal impact on surrounding properties.[7] The city found:

> "The city concurs with this testimony presented by Mr. Gramson, and finds that the * * * proposal meets WDC 4.4.3.A(2). The drawings and photographs showing the location and size of the development have been previously reviewed; testimony both for and against the operating characteristics of this development have been heard; and after due consideration of the proposed use the City finds that it will be compatible with and have a minimal impact on surrounding properties." Record 10.

Petitioners argue that the findings are inadequate because the findings do not address concerns raised by project opponents regarding lighting, noise and visual interference and that there is no evidence in the record to support the city's finding that the operating

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[7] The findings quote the letter in relevant part as follows:

> "* * * The nearby structures are not particularly aesthetically pleasing, some more than others. The mobile home park to the south is very unattractive. * * * The * * * project would be a welcome addition to the area landscape. The duplex apartments [the applicant] built and owns in Warrenton are neat and well maintained. * * * [A]n abutting neighbor and property owner, has spoken highly of these duplex units as an enhancement to the area. In my opinion his * * * project would have no adverse impact on the surrounding properties, and would in fact eliminate the potential for far greater impacts from most of the out right uses allowed at the site.
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> "* * * Nothing about these [12 mini-storage units and six apartments] is unique or significantly different from other like units. They will necessarily involve some vehicle traffic as pointed out above and some minimal noise created by the persons coming and going. There are no nearby structures or residents which or who will be affected by these operating characteristics. Existing vegetation will provide some screening to the east and west. There are however, residences fronting on 5th Avenue across the alleyway to the south. It is my opinion the 'operating characteristics' of the project units will have little or no impact on the persons occupying these neighboring residences or other properties in the area." Record 10.

characteristics of the proposed use will be compatible with the surrounding properties. Although intervenor offers no focused response to the argument and although the findings could certainly be clearer, we understand the city to have found that the operating characteristics of the proposed apartment use of the property are generally like the surrounding and nearby residential uses and for that reason, the residential uses on the property will not impact on surrounding properties. We understand the city to have found that the mini-storage use is a low-impact commercial use, compared to other commercial uses that could be built on the property. Compatibility considerations nearly always involve subjective judgments about impacts, and we think the city's findings are adequate to explain why WDC 4.4.3.A(2) is satisfied.

This subassignment of error is denied.

B. WDC 4.4.3.A(3) Excessive Traffic and Street Capacity

WDC 4.4.3.A(3) requires the city to determine that (1) the "use will not generate excessive traffic, when compared to traffic generated by uses permitted outright," and (2) "adjacent streets have the capacity to accommodate the traffic generated." In *Poe II*, we sustained petitioners' assignment of error and remanded the decision for evidence regarding how many trips the proposed use will generate and whether the capacity of the adjacent streets was sufficient to accommodate the increased trips. On remand, the city concluded that the proposed uses would generate approximately 34 daily trips and that Jetty Street, Ridge Road and Pacific Drive, the affected streets, have the capacity to absorb the additional trips. Record 26.

In a portion of their first assignment of error, petitioners argue that the city's findings fail to address their argument that Jetty Street does not meet minimum city standards for street improvements and that no pedestrian or parking facilities exist on Jetty Street. However, WDC 4.4.3.A(3) is not concerned with the condition of the affected streets or the lack of improvements to them but rather is concerned with the capacity of the streets to

handle the additional traffic. Accordingly, petitioners' argument provides no basis for reversal or remand of the decision.

This subassignment of error is denied.

C. WDC 4.4.3.A(4) Adequate Public Facilities

As noted, WDC 4.4.3.A(4) requires the city to find that "[p]ublic facilities and services are adequate to accommodate the proposed use." As explained above, the city concluded that fire services are adequate to accommodate the proposed use. In a portion of their first assignment of error, petitioners argue that there is not substantial evidence in the record to support the city's conclusion that fire services are adequate to serve the property and that the city's findings are inadequate. Petitioners point to a letter in the record and testimony from the city's fire chief that the hydrant next to the subject property flows at a maximum of 670 gallons per minute (gpm) and that 1,500 gpm is the minimum allowable fire flow for a commercial building.[8] Petitioners argue that a letter from the building official that the city relied on that opines that the building could be designed in a way that would not require fire sprinklers and comply with the *building code* is not substantial evidence that fire services are adequate to the property, where that letter does not address or refute the fire chief's testimony that 1,500 gpm is the minimum allowable fire flow for a commercial building and that the closest fire hydrant supplies 670 gpm. Intervenor provides no focused response to the arguments.

The city's conclusion that WDC 4.4.3.A(4) is satisfied is based in part on the new evidence and proposed construction methods that intervenor presented during the hearing regarding the availability of fire services, that petitioners were improperly denied the opportunity to respond to. Record 108-110. Although we tend to agree with petitioners that

[8] That testimony posits that extending an existing 8" water line from Pacific Street to 4th Street might achieve adequate flows and suggests an engineering study to specifically confirm this.

the proposed alternative construction methods found at Record 108-110 and the building official ‘s letter at Record 82 speak only to building code compliance and do not address the issue identified in the fire chief’s testimony that 1,500 gpm is the minimum allowable fire flow for the building, it would be premature to resolve petitioners’ subassignment of error because we agree with petitioners that the city committed a procedural error that prejudiced their substantial rights in refusing to allow them to respond to new evidence. On remand the city must give petitioners the opportunity to respond to the evidence that intervenor introduced at the March 27, 2012 hearing. Based on all the evidence in the record, the county should then adopt new or revised findings as necessary to establish compliance with WDC 4.4.3.A(4) regarding the adequacy of fire services. Because new evidence and findings will be generated on this issue, there is no point in resolving petitioners’ challenge to the existing evidence regarding the adequacy of fire services.

The city’s decision is remanded.