

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

3
4 NANCY EVANS,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF BANDON,
10 *Respondent,*

11
12 and

13
14 JEFF MCELRATH,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2016-034

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from City of Bandon.

23
24 Nancy Evans, Bandon, filed the petition for review and argued on her
25 own behalf.

26
27 Frederick J. Carleton, Bandon, filed a response brief and argued on
28 behalf of the respondent. With him on the brief were Shala McKenzie Kudlac
29 and Carleton Law Offices.

30
31 Mark C. Hoyt, Salem, filed a response brief and argued on behalf of
32 intervenor-respondent. With him on the brief was Sherman, Sherman, Johnnie
33 & Hoyt LLP.

34
35 HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board
36 Member, participated in the decision.

37
38 AFFIRMED 10/12/2016

1
2
3

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

NATURE OF THE DECISION

Petitioner appeals a city council decision that grants conditional use approval to construct a single family dwelling in the 100 year floodplain.

FACTS

The city’s decision follows our remand in *Pennock v. City of Bandon*, 72 Or LUBA 379 (2015). The below-quoted portions of our decision in *Pennock* set out the relevant facts and the basis for our remand:

“The subject property is located in the South Jetty area of the city. That area of the city was initially developed with individual septic systems. Primarily due to high groundwater in the area, many of those private septic systems failed. To eliminate the ensuing health hazard, the city sought and was awarded a grant from the U.S. Department of Agriculture Farmers Home Administration to provide a public sewer system in the South Jetty area. As relevant here, the federal government conditioned the grant on city agreement not to extend the sewer system to allow development of undeveloped properties in the South Jetty area outside the local improvement district.

“To comply with the sewer funding condition, the city adopted Resolution 95-12. As relevant, Resolution 95-12 states ‘[t]he City of Bandon shall not provide sewer service to any new structures within the 100-year floodplain in the South Jetty area in order to control and/or restrict above ground development, except within the [South Jetty Sewer] Improvement District boundaries.’ It is undisputed that the subject property is within the South Jetty area’s 100-year floodplain and outside the [South Jetty Sewer] Improvement District boundaries. Petitioners contend that by approving the proposed development on a private septic system, the city decision is inconsistent with the above prohibition in Resolution 95-12.” *Pennock*, 72 Or LUBA at 385-86 (footnote and citation omitted).

1 “BMC 17.92.040 sets out ‘[a]pproval standards for conditional
2 uses.’ One of those approval standards, BMC 17.92.040(F),
3 requires that:

4 “‘All *required public facilities* and services have
5 adequate capacity to serve the proposal, and *are*
6 *available or can be made available* by the applicant
7 [.]” (Emphases added.)

8 “* * * * *

9 “Despite the unavailability of public sewer facilities to serve the
10 subject property, the city council adopted the planning
11 commission’s finding that the proposal could be approved because
12 intervenor has received Oregon Department of Environmental
13 Quality (DEQ) approval to use a private septic system on the
14 property.

15 “Public facilities have adequate capacity to serve this
16 request and are available to the subject property, *with*
17 *the exception of sanitary sewer*. Sanitary sewer
18 cannot be provided to the subject property, however,
19 the applicant has secured a DEQ permit for onsite
20 septic system, and therefore the Planning Commission
21 found this criterion has been met.’ * * *” *Pennock*,
22 72 Or LUBA at 387 (emphasis in original).

23 In *Pennock* we concluded that because the city council appeared to view
24 public sewer facilities as “required public facilities,” and because Resolution
25 No. 95-12 appeared to preclude making public sewer facilities “available,”
26 within the meaning of BMC 17.92.040(F), the record appeared to support a
27 decision that the proposal to develop with a private septic system does not
28 comply with BMC 17.92.040(F). We rejected the applicant’s argument that the
29 city council adopted an adequate interpretation concerning BMC 17.92.040(F)
30 to explain that the city council views *private septic systems* to qualify as *public*

1 *facilities* where properties are located outside the South Jetty Sewer
2 Improvement District boundary and DEQ issues a permit for a private septic
3 system. We also noted one development that might have a bearing on whether
4 the proposal complies with BMC 17.92.040(F):

5 “We note that there is one additional twist that may have some
6 bearing on that question on remand. Respondents take the
7 position, based on extra-record evidence, that the federal
8 government has lifted its restriction on extending the public sewer
9 system to serve properties outside the [South Jetty Sewer
10 Improvement D]istrict and that the city has adopted a new
11 resolution that allows the subject property to be connected to the
12 public sewer system. However, under ORS 197.835(3) our review
13 is limited to the record unless one or more of the circumstances
14 identified in ORS 197.835(4) applies. Respondents do not argue
15 that any of the circumstances identified in ORS 197.835(4) apply
16 here, so that LUBA could consider the extra-record evidence they
17 rely on. Neither have respondents asked that LUBA take official
18 notice of the new resolution they claim the city has adopted.
19 *Friends of Eugene v. City of Eugene*, 44 Or LUBA 239, 282-83
20 (2003). We therefore limit our review here to the record.”
21 *Pennock*, 72 Or LUBA at 390 (footnote omitted).

22 On remand the city council conducted a hearing and adopted the decision
23 that is before us in this appeal. That decision adopts two legal theories in
24 concluding that the proposal complies with BMC 17.92.040(F). First, the city
25 council interprets BMC 17.92.040(F) to be satisfied because DEQ issued a
26 permit authorizing a private septic system on the subject property and “[i]n the
27 narrow circumstances presented by this case, * * * the private septic system
28 [qualifies] as a Public Facility, and satisfies [BMC 17.92.040(F)].” Remand

1 Record 80.¹ Second, the Remand Record includes Resolution 15-10, the
2 resolution that was not included in the Original Record. That resolution was
3 adopted while *Pennock* was pending before LUBA and expands the South Jetty
4 Sewer Improvement District boundary to include the subject property, making
5 it possible to connect the subject property to the public sewer system without
6 violating Resolution 95-12. The city council’s decision on remand requires
7 that the subject property connect to the public sewer system.

8 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

9 In her first assignment of error, petitioner argues that conditional use
10 approval for the proposed dwelling must be denied because the sewer permit
11 that DEQ previously issued to allow construction of a private septic system
12 expired on August 20, 2015. Original Record 234. In her second assignment
13 of error, petitioner challenges the city council’s interpretation of BMC
14 17.92.040(F) to allow the subject property to be developed with a private septic
15 system.

16 In resolving the third assignment of error below, we conclude the city
17 council’s remand decision requires that the subject property connect to the
18 public sewer system rather than develop with a private septic system.
19 Therefore the fact that the original DEQ septic permit may have expired

¹ The record submitted in this appeal of the city’s decision following our remand in *Pennock* includes the record compiled by the city following our remand (Remand Record, pages 1 through 185) and the 409-page record that led to our remand in *Pennock* (Original Record pages 1 through 409).

1 provides no basis for reversal or remand. And because we understand the city
2 to require that the subject property be connected to the public sewer system as a
3 condition of development, rather than rely on a private septic system, we need
4 not and do not consider whether the city council’s interpretation of BMC
5 17.92.040(F) to allow the subject property to be developed with a private septic
6 system must be affirmed under ORS 197.829(1) and *Siporen v. City of*
7 *Medford*, 349 Or 247, 259, 243 P3d 776 (2010).

8 The first and second assignments of error are denied.

9 **THIRD ASSIGNMENT OF ERROR**

10 The city council adopted the following finding following our remand in
11 *Pennock*:

12 “Notwithstanding the interpretation of BMC 17.92.040(F) in
13 relation to DEQ private septic systems, the City has adopted
14 Resolution 15-10, which adjusts the [South J]etty [S]ewer
15 [Improvement D]istrict boundary line to include now the subject
16 property and per the City’s original decision the applicant is
17 authorized and *required to connect to the City sewer*.^[2]

18 “* * * * *

19 “Regardless of the above discussion of the [BMC 17.92.040(F)]
20 interpretation, the Council finds that because of Resolution No.

² The original decision imposed the following condition of approval:

- “1. Should the City’s public sewer system restriction be eliminated to allow such service to this property, Applicant must have the property connected to the sewer within ninety (90) days of the lifting or elimination of the restriction.”
Original Record 3.

1 15-10 and the applicant's readjustment of his site plan, the
2 application is approved and is in conformance with BMC
3 17.92.040(F)."³ Record 6-7 (emphasis added).

4 Resolution 15-10 was adopted August 3, 2015, and was not appealed to
5 LUBA as a land use decision, and was not challenged in circuit court through a
6 writ of review.⁴ It is final. We do not understand petitioner to dispute that
7 Resolution 15-10 expands the South Jetty Sewer Improvement District
8 boundary to include the subject property. We also do not understand petitioner
9 to dispute that because the subject property is now located within the South
10 Jetty Sewer Improvement District boundary, Resolution 95-12 does not
11 preclude extending the public sewer system to serve the subject property. In
12 the above-quoted findings, the city council requires that the subject property be
13 connected to the public sewer system and because the subject property can and
14 will be connected to the public sewer system, the city council finds the
15 proposal satisfies BMC 17.92.040(F).

16 Petitioner advances two legal challenges at the city's reliance on
17 Resolution 15-10. First, citing *Standard Insurance Co. v. Washington County*,
18 17 Or LUBA 647, *rev'd and rem'd on other grounds*, 97 Or App 687, 776 P2d

³ The revised site plan shows the proposed dwelling will be connected to the public sewer line in SW Third Street. Remand Record 73.

⁴ Regardless of whether Resolution 15-10 is a land use decision and thus appealable to LUBA or a quasi-judicial decision that does not qualify as a land use decision, and thus subject to challenge through a writ of review, there is no dispute that the deadlines for filing either type of challenge have expired.

1 1315 (1989), petitioner argues the city was without jurisdiction to adopt
2 Resolution 15-10, because it was adopted *after* the appeal to LUBA in *Pennock*
3 was perfected and *before* LUBA issued its decision in *Pennock*.

4 *Standard Insurance* stands for the proposition that once a LUBA appeal
5 is perfected to challenge a land use decision at LUBA, a local government no
6 longer has jurisdiction to take further action regarding the land use decision on
7 appeal until LUBA finally resolves the appeal. *Standard Insurance*, 17 Or
8 LUBA at 660. But here, the city did not take further action regarding the site
9 plan and conditional use permit approval decision that was the subject of the
10 appeal in *Pennock*. Resolution 15-10 only expanded the South Jetty Sewer
11 Improvement District boundary to include the property. Resolution 15-10 did
12 not change the site plan and conditional use permit approval decision in any
13 way. *Standard Insurance* is therefore inapposite in the present appeal.

14 Next, petitioner cites ORS 215.427(3)(a), which is generally referred to
15 as the goal post rule. In specified circumstances, ORS 215.427(3)(a) requires
16 that “approval or denial of [an] application [for permit approval] shall be based
17 upon the standards and criteria that were applicable at the time the application
18 was first submitted.” Petitioner contends Resolution 15-10 qualifies as
19 applicable standards and criteria that were not in effect at the time the
20 application in *Pennock* was submitted.

21 Resolution 15-10 is not a “standard[] or criteri[on]” within the meaning
22 of ORS 215.427(3)(a). BMC 17.92.040(F) and the other conditional use

1 approval criteria are “standards and criteria” that are subject to the ORS
2 215.427(3)(a) goal post rule. Those standards and criteria have not been
3 changed since the application was submitted. Resolution 95-12, which
4 precludes extension of the public sewer system to serve properties outside the
5 South Jetty Sewer Improvement District boundary, might qualify as a
6 “standard[] or criteri[on]” within the meaning of ORS 215.427(3)(a).⁵ But
7 even if it does, Resolution 15-10 does not change Resolution 95-12. By
8 expanding the South Jetty Sewer Improvement District boundary to include the
9 disputed property, Resolution 95-12 no longer prohibits connecting the subject
10 property to the public sewer system. But Resolution 95-12 itself is not
11 amended by Resolution 15-10 in any way.

12 The third assignment of error is denied.

13 **FOURTH ASSIGNMENT OF ERROR**

14 The Remand Record includes a three-page e-mail message from
15 petitioner to the city. Remand Record 75-77. The Remand Record also
16 includes 99 pages of documents that petitioner transmitted earlier to the city as
17 an e-mail attachment. Remand Record 87-185. One of the reasons cited in
18 Resolution 15-10 for including the subject property in the South Jetty Sewer
19 Improvement District is the city’s position that the subject property could have
20 been included in the South Jetty Sewer Improvement District when it was first

⁵ The city and applicant argue that Resolution 95-12 is not a land use regulation.

1 formed in 1995. We understand petitioner to take the position that those 99
2 pages of documents show that the federal government, at the time the South
3 Jetty Sewer Improvement District was established, intended that properties
4 located outside the South Jetty Sewer Improvement District in the 100 year
5 floodplain, including the subject property, were not to be developed.

6 Petitioner’s fourth assignment of error is difficult to understand. Most of
7 the 14 pages of argument speculate that the 99 pages of documents were either
8 not given to the city council or were not made available in the same way other
9 documents were made available to the city council. That speculation is not
10 sufficient to show that the disputed documents were in fact not made available
11 to the city council. The fact that they are included in the record that was
12 transmitted to LUBA supports that they were made available to the city
13 council. Petitioner also argues the city council’s failure to refer specifically to
14 the 99 pages of documents in the appealed decision shows her documents were
15 not considered by the city council. There is no general requirement that the
16 city council must discuss evidence that it does not rely on. *Wethers v. City of*
17 *Portland*, 21 Or LUBA 78, 87 (1991); *Cope v. City of Cannon Beach*, 15 Or
18 LUBA 546, 552 (1987); *Ash Creek Neighborhood Ass’n v. City of Portland*, 12
19 Or LUBA 230, 237 (1984). Moreover, the city council’s failure to refer
20 specifically to petitioner’s 99 pages of documents does not establish that the
21 city council did not consider those documents.

1 Finally, petitioner asks “LUBA to decide if the federal government asked
2 for the City to adopt a no-new-development in the floodplain policy” in the
3 area outside the original South Jetty Sewer Improvement District area and
4 whether the federal government intended that the subject property not be
5 developed. Petition for Review 28. The questions petitioner asks LUBA to
6 answer in this appeal might have been properly presented in challenges to
7 Resolution 95-12 or Resolution 15-10. But those questions are simply not
8 relevant in this appeal. The city council’s decision merely concludes that the
9 proposal complies with the public facilities availability standard at BMC
10 17.92.040(F), because over one year ago unappealed Resolution 15-10
11 removed the only legal impediment to connecting the subject property to the
12 public sewer system. Petitioner’s contention that Resolution 15-10 *should not*
13 have included the subject property in the South Jetty Sewer Improvement
14 District is a collateral attack on Resolution 15-10 and is not a contention that is
15 properly presented or resolved in this appeal of a different decision. *Graser-*
16 *Lindsey v. City of Oregon City*, 72 Or LUBA 25, 34-35 (2015); *Westlake*
17 *Homeowners Assoc. v. City of Lake Oswego*, 25 Or LUBA 145, 148 (1993);
18 *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 16 Or LUBA 49, 52
19 (1987).

20 The fourth assignment of error is denied.

21 The city’s decision is affirmed.