

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

08/13/18 PM 1:25 LUBA

3
4 ARDEN NEWBROOK,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF PORTLAND,
10 *Respondent,*

11
12 and

13
14 PORTLAND YACHT CLUB,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2017-113

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from City of Portland.

23
24 Arden M. Newbrook, Vancouver, Washington, filed a petition for review
25 and argued on his own behalf.

26
27 Linly F. Rees, Chief Deputy City Attorney, Portland, file a response brief
28 and argued on behalf of respondent.

29
30 Timothy V. Ramis, Lake Oswego, filed a response brief and argued on
31 behalf of intervenor-respondent. With him on the brief was Jordan Ramis PC.

32
33 RYAN, Board Chair; ZAMUDIO Board Member, participated in the
34 decision.

35
36 BASSHAM, Board Member, did not participate in the decision.

37
38 AFFIRMED

08/13/2018

1
2 You are entitled to judicial review of this Order. Judicial review is
3 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a hearings officer’s decision approving an application for environmental review to remove, reconfigure, and replace existing breakwater, docks, and pilings at a marine moorage facility.

EXHIBITS AND ARGUMENTS INTRODUCED AT ORAL ARGUMENT

At oral argument, petitioner submitted a document entitled “Exhibits to Petitioner’s Oral Presentation” that included (1) copies of Record pages 195 and 276–78; and (2) excerpts of provisions of the Portland City Code (PCC).

OAR 660-010-0040(5) provides:

“Demonstrative exhibits presented at oral argument shall be limited to copies of materials already in the record, including reductions or enlargements, or materials created during the party’s presentation at oral argument.”

The copies of record pages 195 and 276-78 are pages from the record, and those pages are accepted.

OAR 661-010-0030(4)(f) provides that the petition for review shall contain “a copy of any comprehensive plan provision, ordinance or other provision of local law cited in the petition, unless the provision is quoted verbatim in the petition.” Even if we assume for purposes of this opinion that petitioner’s exhibits presented at oral argument are appendices to his petition for review, petitioner has not established that the excerpts of provisions of the PCC included in the exhibits are cited in the petition for review, and has not

1 established that the excerpts of provisions of the PCC are part of materials
2 already in the record. Accordingly, LUBA will not consider those pages.¹

3 OAR 661-010-0040(1) provides that LUBA “shall not consider issues
4 raised for the first time at oral argument.” At oral argument, intervenor-
5 respondent Portland Yacht Club (intervenor) and the city (together,
6 respondents) objected that some of petitioner’s arguments presented at oral
7 argument were not included in the petition for review and requested that LUBA
8 not consider those arguments. Given the inherent difficulty in “striking”
9 portions of oral testimony, we consider respondents’ motion a request for
10 LUBA to focus its review on the issues framed in the petition for review, the
11 evidence cited in the record, and the portions of the oral argument that discuss
12 those issues and evidence. *NAAVE v. Washington County*, 59 Or LUBA 153,
13 156 (2009). That request is granted.

14 **MOTION TO STRIKE**

15 The petition for review includes several exhibits. Respondents move to
16 strike the following exhibits to the petition for review: (1) Exhibit PYC-1A to
17 1C; (2) Exhibits COP-1, COP-2A to 2B, and COP-3, and Exhibit LUBA-1.
18 The city also moves to strike (1) page 8, line 23 through page 9, line 14, (2)
19 page 10, lines 3-6, and (3) page 21, lines 7-9 of the petition for review,

¹ ORS 197.835(2)(a) provides that “[LUBA’s] review of a decision under ORS 197.830 to 197.845 shall be confined to the record.”

1 because, according to the city, those portions of the petition for review rely on
2 extra-record material.

3 Petitioner concedes that the exhibits are not included in the record, but
4 argues that he should be allowed to submit the extra-record material included
5 in the exhibits because the city withdrew the original hearings officer's
6 decision for reconsideration, and during its proceedings on reconsideration, the
7 hearings officer did not re-open the evidentiary record.

8 Pursuant to OAR 661-010-0021, the city is permitted to limit its
9 consideration on withdrawal of a decision for reconsideration to adoption of
10 revised findings, unless local code provides otherwise. *McElroy v. Corvallis*,
11 36 Or LUBA 185, 195, *aff'd* 162 Or App 390, 991 P2d 582 (1999). Petitioner
12 has not established a basis for considering the extra-record exhibits to the
13 petition for review, and accordingly, respondents' motions to strike are granted.
14 The Board will not consider the exhibits or the arguments presented in the
15 petition for review that rely on those exhibits.

16 **FACTS**

17 Intervenor is a marine moorage that has operated in and along the bank
18 of a side channel of the Columbia River since 1926. Record 7, 54, 291. The city
19 annexed the property on which the moorage sits in 1971, and subsequently
20 applied city zoning to the property and the in-water improvements.² Response

² The city requests LUBA take official notice of a Local Boundary Commission Final Order on Boundary Change Proposal No. 335, October 27,

1 Brief, Exhibit A. Most of the marina is located in the General Commercial
2 (CG) zone, but a portion of the marina on the eastern part of the site is zoned
3 Residential 10,000 (R10) and Residential Farm/Forest (RF).

4 In April 2016, intervenor applied to the city for environmental review to
5 replace wood pilings and a breakwater and dock located on the eastern portion
6 of the marina, referred to by the parties as the “A Row” breakwater. Portions of
7 the A Row breakwater and its pilings are located in the RF and R10 zones.
8 Record 189-91. In the RF and R10 zones, commercial outdoor recreation uses
9 such as the breakwater, pilings and dock are prohibited. Intervenor’s
10 application proposes replacing existing wood and foam docks with concrete
11 docks, and the wood pilings and breakwater with steel pilings and a concrete
12 breakwater. Record 189.

13 The planning department approved the application, and petitioner
14 appealed the decision to the hearings officer. The hearings officer approved the
15 application, and petitioner appealed that decision to LUBA. The city withdrew
16 the decision for reconsideration pursuant to OAR 661-010-0021, and the
17 hearings officer subsequently issued a new decision approving the application.
18 This appeal followed.

1971, which annexed the subject property into the city. No party opposes the
city’s request and it is granted.

1 **ASSIGNMENT OF ERROR**

2 Petitioner’s assignment of error is difficult to follow, and petitioner does
3 not identify the standard of review LUBA should apply in reviewing his
4 assignment of error, as required by LUBA’s rules.³ However, we address
5 petitioner’s assignment of error as best we can understand it. A brief summary
6 of the applicable provisions of the PCC is necessary before we address the
7 assignment of error.

8 As explained above, in the RF and R10 zones, commercial outdoor
9 recreation uses are prohibited. Intervenor took the position in its application
10 that the moorage and improvements are “nonconforming situations” as
11 described in PCC 33.258. PCC 33.258 is entitled “Nonconforming Situations.”

12 The purpose of PCC 33.258 is explained in PCC 33.258.010:

13 “This chapter provides methods to determine whether situations
14 have legal nonconforming status. This is based on whether they
15 were allowed when established, and if they have been maintained
16 over time. This chapter also provides a method to review and limit
17 nonconforming situations when changes to those situations are
18 proposed. The intent is to protect the character of the area by
19 reducing the negative impacts from nonconforming situations. At
20 the same time, the regulations assure that the uses and
21 development may continue and that the zoning regulations will not
22 cause unnecessary burdens.”

23 PCC 33.258.038 is entitled “Documenting A Nonconforming Situation,” and
24 provides:

³ OAR 661-010-0030(4)(d) provides, in part: “Each assignment of error must state the applicable standard of review.”

1 “The applicant must provide evidence to show that the situation
2 was allowed when established and was maintained over time. *If*
3 *the applicant provides standard evidence from the list below, the*
4 *Director of BDS will determine if the evidence is satisfactory.* The
5 Director of BDS will also determine, based on the evidence, what
6 the current legal use is, using the definitions in Chapter 33.910
7 and the use categories in Chapter 33.920. If the applicant provides
8 evidence other than the standard evidence listed below, a
9 Determination of Legal Nonconforming Status is required. (See
10 33.258.075.)

11 “A. Situation allowed when established. *Standard evidence that*
12 *the situation was allowed when established is:*

13 “1. *Building, land use, or development permits; or*

14 “2. Zoning codes or maps;

15 “B. Situation maintained over time. Standard evidence that the
16 use has been maintained over time is:

17 “1. Utility bills;

18 “2. Income tax records;

19 “3. Business licenses;

20 “4. Listings in telephone, business, or Polk directories;

21 “5. Advertisements in dated publications;

22 “6. Building, land use, or development permits;

23 “7. Insurance policies;

24 “8. Leases;

25 “9. Dated aerial photos;

26 “10. Insurance maps that identify use or development,
27 such as the Sanborn Maps; or

1 “11. Land use and development inventories prepared by a
2 government agency.” (Emphases added.)

3 *See River City Disposal v. City of Portland*, 35 Or LUBA 360, 363 (1998)
4 (characterizing PCC 33.258.038 as an “abbreviated procedure that the city
5 provides” for establishing a nonconforming situation using “standard
6 evidence”).

7 PCC 33.258.075 in turn provides in relevant part:

8 “33.258.075 Determination of Legal Nonconforming Status
9 Review

10 “A. Purpose. This review will determine if a use or site has legal
11 nonconforming situation rights. In addition, it will
12 determine what the current legal use is, based on the use
13 categories in Chapter 33.920.

14 “B. When this review is required. Determination of Legal
15 Nonconforming Status Review is required where a land use
16 review or building permit is requested, and the applicant
17 does not provide standard evidence or the Director of BDS
18 does not find the evidence to be satisfactory. (See
19 33.258.038). This review also may be requested by an
20 applicant when it is not required.”

21 The planning department’s initial decision concluded that:

22 “Without cause to question the status, BDS staff assumes that the
23 nonconforming use status was reviewed prior to issuance of
24 building permits for the A/Breakwater row back in 1997 (Permit#
25 BLD 97 026 59), for which site plans show the A/Breakwater in
26 the present location. Without evidence to the contrary, BDS staff
27 saw no reason to request that the applicant apply for a
28 Nonconforming Review to document a nonconforming situation.”
29 Record 7, 288.

1 In his decision, the hearings officer found that “[s]tandard evidence in the
2 record supports the determination that the general commercial use was a legal
3 nonconforming use in the residential zones at the time [it] was established * *
4 *.” Record 8. The hearings officer relied on a building permit issued in 1997 by
5 the city for replacement of the A Row pilings. Record 308. The hearings officer
6 also relied on other evidence, in addition to the evidence of the 1997 building
7 permit. Record 7 (detailing other evidence).

8 Absent any attempt by petitioner to identify LUBA’s standard of review
9 of his assignment of error, we understand petitioner to argue that the hearing
10 officer’s decision that the portions of the existing moorage located in the RF
11 and R10 zones are “nonconforming situations” under PCC 33.258 is not
12 supported by substantial evidence in the whole record. ORS 197.835(9)(a)(C).

13 Substantial evidence is evidence a reasonable person would rely on in
14 reaching a decision. *City of Portland v. Bureau of Labor and Indus.*, 298 Or
15 104, 119, 690 P2d 475 (1984); *Bay v. State Board of Education*, 233 Or 601,
16 605, 378 P2d 558 (1963); *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff’d*
17 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, however, we
18 may not substitute our judgment for that of the local decision maker. Rather,
19 we must consider and weigh all the evidence in the record to which we are
20 directed, and determine whether, based on that evidence, the local decision
21 maker’s conclusion is supported by substantial evidence. *Younger v. City of*

1 *Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v.*
2 *Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

3 Petitioner argues that the 1997 building permit at Record 308 is not a
4 valid permit for purposes of PCC 33.258.038 because, according to petitioner,
5 the permit never actually issued, because the applicant for the building permit
6 failed to identify a special inspector. Petitioner cites Record 355 in support of
7 this argument. Petition for Review 19–20. Petitioner does not argue that the
8 1997 building permit does not qualify as “standard evidence” under PCC
9 33.258.038.

10 Respondents respond that the hearings officer’s decision that the
11 moorage and improvements were “allowed when established * * *” is
12 supported by substantial evidence in the whole record, including the building
13 permit at Record 308, along with additional evidence including aerial photos
14 taken in 1996. Record 7.

15 Record 308 is a document that was received on June 30, 1997 that
16 includes a “Building Permit Number: BLD97-02659,” and a description of the
17 fees paid by the applicant for “replacement of 6 multiple pile wood dolphins
18 with 6 two-pile steel dolphins at ‘A’ Row of PYC Moorage[.]” Record 355 is a
19 plan examination sheet dated July 2, 1997 that requests that the applicant
20 complete a special inspection form. The document at Record 355 is not
21 evidence that the building permit for the work described at Record 308 was not
22 issued.

1 Second, and in the alternative, petitioner argues that the permit at Record
2 308 expired 180 days after it was issued. The document at Record 308 includes
3 a statement that “permits are non-transferable and expire if work is not
4 commenced within 180 days of issuance or if work is suspended for more than
5 180 days.” In support of his argument that the permit expired, petitioner cites
6 an exhibit that is attached to the petition for review. However, as we previously
7 concluded, that exhibit is not a part of the record, and accordingly LUBA may
8 not consider it in resolving petitioner’s assignment of error. ORS
9 197.835(2)(a). *See* n 1. Accordingly, petitioner’s argument provides no basis
10 for reversal or remand of the decision.

11 Our review of the hearings officer’s decision is to determine whether his
12 decision — that the use is a nonconforming situation that was “allowed when
13 established” pursuant to the provisions of PCC 33.258.038 — is supported by
14 substantial evidence in the whole record. We conclude that the hearings
15 officer’s decision is supported by substantial evidence in the whole record. In
16 another portion of his assignment of error, petitioner argues that:

17 “As new construction the marine breakwater and dockage facility
18 proposed by [intervenor’s] Land Use Application * * * is not
19 permitted outright as a CG-zoned Outdoor Commercial Recreation
20 use on properties zoned as RF and R10 Single-Dwelling
21 residential uses. The [hearings officer] erred in not recognizing
22 that the Land Use Application factually proposes the construction
23 of new marine facilities as opposed to the ‘replacement’ of
24 existing marine facilities or the modification of existing
25 commercial marine dockage facilities constituting a
26 nonconforming use on residentially zoned property.” Petition for
27 Review 18.

1 Petitioner's argument is not sufficiently developed to provide a basis for
2 reversal or remand, and for that reason the argument is rejected. *Deschutes*
3 *Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982). Moreover, we
4 also understand it to be derivative of his argument that the hearings officer
5 erred in concluding that the evidence of the 1997 building permit established a
6 nonconforming situation, and therefore legal nonconforming status review
7 pursuant to PCC 33.258.075 was not required. We have already rejected that
8 argument above.

9 The assignment of error is denied.

10 The city's decision is affirmed.