

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

04/09/19 #11:28 LUBA

3
4 ROBERT VANNATTA
5 and AGNES MARIE PETERSEN,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF ST. HELENS,
11 *Respondent,*

12
13 and

14
15 ROBERT A. LUCAS
16 and ROBERT LEE,
17 *Intervenors-Respondents.*

18
19 LUBA No. 2018-128

20
21 FINAL OPINION
22 AND ORDER

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24 Appeal from City of St. Helens.

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26 Robert P. VanNatta and Agnes Marie Petersen, St. Helens, filed the
27 petition for review and Robert P. VanNatta argued on behalf of petitioners. With
28 them on the brief was VanNatta and Peterson.

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

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33 Robert A. Lucas, Rainier, filed a response brief and argued on behalf of
34 intervenors-respondents.

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36 RYAN, Board Chair; RUDD, Board Member; ZAMUDIO, Board
37 Member, participated in the decision.

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AFFIRMED

04/09/2019

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

NATURE OF THE DECISION

Petitioners appeal a decision by the city council approving a conditional use permit for a retail and medical marijuana dispensary.

REPLY BRIEF

Petitioners move for permission to file a separate reply brief to reply to each of respondent's and intervenors-respondents' response briefs. There is no opposition to the motions, and the reply briefs are allowed.

FACTS

Intervenors-respondents (intervenors) applied for a conditional use permit to establish a retail and medical marijuana dispensary in an existing building, on property zoned General Commercial. The planning commission denied the application, and intervenor appealed the decision to the city council.

On August 15, 2018, the city council held a hearing on intervenors' appeal. Four of the five city councilors were present, and one was absent. At the conclusion of the hearing, two of the four councilors in attendance voted in favor of a motion to approve the application, while two were opposed, resulting in a tie vote. As we discuss in more detail below, St. Helens Municipal Code (SMC) 17.24.220(5) provides that "[i]n the event of a tie, the decision which is the subject of appeal * * * shall stand."

After the tie vote, confusion ensued about the legal effect of the vote. Supplemental Record 9-14. The mayor announced that "pending what we find

1 out legally, we will determine whether the two to two vote, how we proceed, and
2 we will let those parties – we’ll let everybody know publicly, we’ll make a public
3 announcement and a phone call to the applicants for sure, okay? * * *”
4 Supplemental Record 13.

5 On August 22, 2018, the city mailed a “Notice of Continued Deliberations”
6 (Notice) to petitioners and others, and published the Notice in the August 29,
7 2018 issue of a local newspaper. Record 4, 24-27. The Notice stated that
8 continued deliberations on the appeal would occur during the September 19, 2018
9 city council meeting, and that the purpose of the continued deliberations was to
10 “resolve a tied vote, due to the absence of a Councilor at the August 15, 2018
11 public hearing and deliberations” on the appeal. Record 27. Petitioners objected
12 to the continued deliberations prior to and at the September 19, 2018 hearing.
13 Record 4.

14 At the September 19, 2018 hearing, the city council voted unanimously to
15 overturn the planning commission’s decision and approve the application with
16 conditions. The city council subsequently adopted a written decision that
17 interpreted SMC 17.24.220(5) as not precluding the city council’s additional,
18 later vote after the tie vote. Record 4-5. This appeal followed.

19 **ASSIGNMENT OF ERROR**

20 OAR 661-010-0030(4)(d) provides in relevant part that “[e]ach assignment
21 of error must state the applicable standard of review.” At the outset, we note that
22 petitioners do not specify the standard of review under which LUBA should

1 review petitioners’ challenges to the city’s decision. LUBA’s standard of review
2 of a land use decision is set out at ORS 197.835(9)(a)(A) – (E).¹ After reviewing
3 the arguments presented in support of petitioners’ single assignment of error, we
4 understand petitioners to argue that the city council committed a procedural error
5 when it continued its deliberations to September 19, 2018 without allowing
6 testimony and evidence regarding whether the city council should continue its
7 deliberations. ORS 197.835(9)(a)(B); *see* n 1. Petition for Review 7 (“the secret
8 decision by the ‘powers that be’ in City hall preordained the ultimate result
9 without even an opportunity of the appellant’s to complain about it”); Petition
10 for Review 8 (“[i]t is our bottom line that the city committed reversible error by
11 deciding to reconsider the matter without an opportunity for public input on the
12 specific question of whether the matter should be reconsidered”). Essentially,

¹ Under ORS 197.835(9), LUBA shall reverse or remand the land use decision if the Board finds:

“(a) The local government * * *:

“(A) Exceeded its jurisdiction;

“(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;

“(C) Made a decision not supported by substantial evidence in the whole record;

“(D) Improperly construed the applicable law; or

“(E) Made an unconstitutional decision[.]”

1 petitioners argue that the city council was required to make its decision about
2 whether to continue the deliberations during a public hearing that allowed for
3 public participation.

4 One of the requirements to establish a procedural error is that a petitioner
5 must identify the procedure allegedly violated. *Stoloff v. City of Portland*, 51 Or
6 LUBA 560, 563 (2006). Although petitioners do not identify in their petition for
7 review any procedure that they allege the city violated, in their reply to the city’s
8 response brief, petitioners do identify two procedures.² First, petitioners cite a
9 provision from a 2008 resolution that adopted operating rules and procedures for
10 the city council. Petitioners’ Reply to the City of St. Helen’s Response Brief 2.
11 That provision addresses a motion to reconsider.³ Second, petitioners cite SMC
12 17.20.110, which provides that “[t]he commission or the council may continue
13 any hearing and no additional notice shall be required if the matter is continued
14 to a place, date and time certain.” Petitioners’ Reply to the City of St. Helen’s
15 Response Brief 2.

² As noted, the city does not object to the reply brief.

³ Petitioners do not move for us to take official notice of the provision pursuant to ORS 40.090(7). According to petitioners, that provision states:

“A motion to reconsider a vote can be made only once and at the session at which the motion or matter was adopted, or at the next meeting of the council.” Petitioners’ Reply to the City of St. Helen’s Response Brief 2.

1 Petitioners have not established that either of the cited procedures are
2 applicable to the city council’s proceeding, and even if they are applicable,
3 petitioners have not established that the city council’s actions here violated either
4 of the cited procedures. The provision of the operating rules and procedures
5 related to a motion to reconsider cited by petitioners merely specifies the
6 circumstances under which a motion to reconsider can be made. No party takes
7 the position here that a motion to reconsider was made, and accordingly,
8 petitioners have not established that the operating rules and procedures related to
9 a motion to reconsider applied.

10 In addition, petitioners have not established that SMC 17.20.110 applied
11 to the city’s proceeding. SMC 17.20.110 specifies the circumstance when the city
12 council may continue a public hearing *without* providing additional notice of the
13 continued hearing. It does not apply where, as here, the city provided additional
14 mailed and published notice of the continued deliberations to petitioners and
15 other parties.

16 In their reply brief to intervenors’ response brief, petitioners for the first
17 time challenge the city council’s interpretation of SMC 17.24.220(5) included in
18 the city’s decision, that the city relied on to conclude that it had the authority to
19 continue its deliberations and proceed to a new vote.⁴ A new assignment of error

⁴ We understand petitioners to argue that the city council’s interpretation “[i]mproperly construed the applicable law.” ORS 197.835(9)(a)(D).

1 or basis for reversal or remand cannot be advanced for the first time in a reply
2 brief. *Porter v. Marion County*, 56 Or LUBA 635, 641 (2008). However, for
3 purposes of this opinion, we assume that we can consider petitioner’s challenges
4 to the city’s interpretation, and we reject those challenges.

5 The city council interpreted SMC 17.24.220(5) as not limiting the city
6 council’s ability to vote more than once:

7 “We do not interpret [SMC 17.24.220(5)] to allow the Council to
8 vote only once if the initial vote is a tie. Such an interpretation would
9 preclude the normal process of proposing various motions,
10 sometimes with differing conditions, until a decision that can be
11 supported by a majority is found. We expressly reject such a
12 restrictive interpretation which would substantially limit the ability
13 of the Council to resolve appeals and ensure compliance with City
14 ordinance. We interpret the provision to apply only when a tie vote
15 is the final vote taken and Council deliberation is concluded.”
16 Record 4-5.

17 In their reply brief, petitioners argue that the city council’s interpretation is
18 inconsistent with the express language in SMC 17.24.220(5).⁵ According to
19 petitioners, the express language of the provision requires that if any vote of the
20 city council results in a tie, then the city council is prohibited from voting again
21 and the planning commission’s decision is the final city decision.

⁵ ORS 197.829(1)(a) requires LUBA to affirm the city council’s interpretation of its land use regulation unless the interpretation is “inconsistent with the express language of the comprehensive plan or land use regulation[.]”

1 We conclude that the city council’s interpretation of SMC 17.24.220(5) is
2 not inconsistent with the express language of the provision, and we affirm it. ORS
3 197.829(1)(a). SMC 17.24.220(5) specifies what decision is the final city
4 decision for purposes of a subsequent appeal of that final decision, in the event
5 of a tie vote. But SMC 17.24.220(5) does not address at all whether the city
6 council may vote more than once, or limit the number of times that the city
7 council may vote on a matter.

8 The assignment of error is denied.

9 **MOTION FOR ATTORNEYS FEES**

10 In their response brief, intervenors move for an award of attorney fees
11 pursuant to ORS 197.830(15). Intervenors’ motion does not comply with the
12 OAR 661-010-0075(1)(e)(A) requirement for a “detailed statement of the amount
13 of attorney fees sought.” The motion is denied, as premature. *Gooley v. City of*
14 *Mt. Angel*, 56 Or LUBA 319, 321 (2008). Intervenors may refile their motion
15 within the time set forth in OAR 661-010-0075(1)(a).

16 The city’s decision is affirmed.