

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

ZIP-O-LAMINATORS LLC,
Petitioner,

vs.

CITY OF EUGENE,
Respondent.

LUBA No. 2023-017

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Micheal M. Reeder filed the petition for review and represented petitioner.

Emily N. Jerome filed the respondent's brief and represented respondent.

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

DISMISSED 09/29/2023

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 ordinance regulating commercial and industrial noise.

MOTIONS TO TAKE EVIDENCE

A. City's Motion to Take Evidence

Our review is generally limited to the record filed by the local government. ORS 197.835(2). OAR 661-010-0045 provides, in part:

“(1) Grounds for Motion to Take Evidence Not in the Record. The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties’ briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. * * *

“(2) Motions to Take Evidence

“(a) A motion to take evidence shall contain a statement explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in section (1) of this rule, and how those facts will affect the outcome of the review proceeding. * * *

“* * * * *.”

On April 18, 2023, the city filed a motion to take as evidence the following documents:

- 1 1. Excerpt – Eugene Code (EC) (1975) Chapter 4 Noise
2 Disturbance;
- 3 2. Excerpt – EC (1984) Chapter 4 Noise Disturbance;
- 4 3. Excerpt – EC (November 2003-February 2007) Chapter 4 Noise
5 Disturbance;
- 6 4. Ordinance No. 20378 (February 26, 2007) amending EC Chapter
7 4 and adding sections to EC Chapter 6 (Environment and
8 Health); and
- 9 5. Eugene City Council Agenda Item Summary for February 26,
10 2007.

11 The parties dispute the purpose of certain EC provisions and argue that the
12 purpose of those provisions is a factual dispute relevant to whether we have
13 jurisdiction. The city posits that the documents it moves for us to accept as
14 evidence contain legislative history explaining the purpose of various EC
15 provisions. Petitioner does not object to the city's motion to take evidence.
16 Although jurisdictional disputes are not explicitly recognized in OAR 660-010-
17 0045 as a reason for considering extra record evidence, we have held that where
18 the local government alleges that we do not have jurisdiction, we will consider
19 evidence relevant to that argument. *Vaccher v. City of Eugene*, 80 Or LUBA 10,
20 14 (2019). The city's motion to take evidence is granted.

1 **B. Petitioner’s Motion to Take Evidence¹**

2 On May 2, 2023, petitioner filed a motion to take as evidence not in the
3 record the following documents that it asserts are legislative history relevant to a
4 determination of jurisdiction:

- 5 1. EC sections 6.750 to 6.755;
- 6 2. Excerpt – Department of Land Conservation and Development
7 (DLCD) Staff Report re Metro Plan acknowledgment (August
8 19, 1982);²
- 9 3. Excerpt – DLCD Staff Report re Metro Plan acknowledgment
10 (June 26 and 27, 1981);
- 11 4. Ordinance No. 18915 (January 27, 1982) amending EC Ch 9
12 (Land Use);
- 13 5. Excerpt – Metro Plan Environmental Resources Element Part C;
- 14 6. Excerpt – EC Chapter 9 (2001);
- 15 7. Current EC 9.4150 to 9.4170 Clear Lake Overlay Zone; and

¹ Petitioner’s motion to take evidence was submitted as part of a single document titled:

- “1. Response to City Motion to Take Evidence Not in Record,
“2. Motion to Take Evidence Not in Record, and
“3. Response to Motion to Strike.”

OAR 661-010-0045(2)(a) provides that motions to take evidence must be submitted as a separate document and may not be included as part of other filings.

² The Metro Plan is a comprehensive plan jointly developed and adopted by Eugene, Springfield and Lane County. Petition for Review App, at 15.

1 8. Excerpt – EC Chapter 4 Offenses.

2 In its motion to take evidence, petitioner argues:

3 “The reasons supporting acceptance of [its list of] documents is
4 identical to the explanation given by the City in its Motion to Take
5 Evidence. Each of these documents is legislative history for the
6 subject ordinance, including context for the ordinance in the existing
7 code chapters and the comprehensive plan, and the DLCD
8 administrative history of the acknowledgment Order for the plan and
9 code. The discussion of the nature of the subject ordinance as a land
10 use regulation, despite its being included in Chapter 6, depends on
11 references to these documents.

12 “As explained at page 3 of the City’s Motion to Take Evidence,
13 LUBA’s cases and rules indicate[] that it accepts such evidence
14 related to jurisdiction. See, e.g. *Yost v. Deschutes County*, 37 Or
15 LUBA 653, 658 (2000); OAR 661-010-0045.” Petitioner’s Motion
16 to Take Evidence 3.

17 Petitioner’s motion to take evidence was filed in response to the city’s
18 motion to strike extra record documents that petitioner attached to their petition
19 for review, as well as “portions of Petitioner’s brief that rely on those extra-record
20 documents, beginning on page 12 (line 29) of Petitioner’s brief and continuing
21 through page 14 (line 8.)” City’s Motion to Strike 1. We treat the city’s motion
22 to strike as an objection to petitioner’s motion to take evidence. The city argues
23 that consideration of petitioner’s documents was improper because petitioner had
24 not submitted a motion to take evidence, but even if we subsequently granted a
25 motion from petitioner to accept the documents, modified documents should not
26 be accepted. The city maintained in its motion to strike that petitioner’s appendix

1 pages 14-21 are heavily highlighted and include handwritten notes of emphasis
2 and thus are not the documents in their original form.

3 Petitioner acknowledges that it added notations to some of the submitted
4 documents, states that it did so for LUBA's benefit, and offers to submit unedited
5 copies of the documents if so ordered. We agree that the notations are improper.
6 OAR 661-010-0030(4)(f) states that the petition of review shall include "a copy
7 of any comprehensive plan provision, ordinance or other provision of local law
8 cited in the petition, unless the provision is quoted verbatim in the petition." The
9 rule does not authorize any modification to the submitted documents.

10 We will not strike the appendices or the related portion of the petition for
11 review. We will not, however, consider petitioner's annotations to the
12 appendices. With that qualification, petitioner's motion to take evidence is
13 granted.

14 **MOTION TO DISMISS**

15 **A. Background**

16 EC 6.750-6.755 is titled "Environmental Noise Disturbance." On January
17 23, 2023, the city council adopted Ordinance No. 20680 (the Ordinance), titled
18 "An Ordinance Concerning Regulations for Commercial and Industrial Noise;
19 Amending Section 6.750 of the Eugene Code, 1971; Adding Section 6.752 to that
20 Code; and Declaring an Emergency and Providing for an Immediate Effective
21 Date." The city explains that the Ordinance deleted EC 6.750(g) from, and added
22 EC 6.752 to, the EC. The city maintains that the provisions in EC 6.752 are based

1 on Oregon Department of Environmental Quality (DEQ) regulations at OAR
2 340-035-0035(1)(d)(A) and (B), prohibiting the generation of specific median
3 sound band pressure levels from commercial or industrial equipment and
4 providing for their measurement. Motion to Dismiss 3.

5 On February 13, 2023, petitioner filed its notice of intent to appeal the city
6 council's adoption of the Ordinance. On March 27, 2023, petitioner filed their
7 petition for review. On April 18, 2023, the city moved to dismiss petitioner's
8 appeal, arguing that:

9 "The City's adoption of [the Ordinance] is not a land use decision
10 because it does not amend a land use regulation as described in ORS
11 197.015(10), nor does the ordinance's adoption pass the common
12 law 'significant impact' test for LUBA's jurisdiction. LUBA should
13 dismiss this appeal because LUBA lacks jurisdiction to review the
14 challenged City action." Motion to Dismiss 1.

15 EC 6.752 defines various terms and provides "[n]o person owning or
16 controlling an industrial or commercial noise source shall cause or permit the
17 operation of that noise source if an impulsive sound is emitted in air by that source
18 which exceeds [identified sound levels]" and limits the creation of octave band
19 sounds. In its petition for review, petitioner states it "anticipates that the City will
20 argue that [LUBA] lacks jurisdiction because, according to the City, the adoption
21 of these commercial and industrial noise regulations was not an amendment to
22 the City's land use code, EC Chapter 9. That position is wrong." Petition for
23 Review 6. Petitioner incorporates the jurisdictional statement from its petition for
24 review in its response to the Motion to Dismiss and supplements its jurisdictional

1 argument in its response to the Motion to Dismiss. Response to Motion to
2 Dismiss 1. For the following reasons, we agree with the city that we lack
3 jurisdiction over this appeal.

4 **B. Jurisdiction**

5 **1. Statutory Land Use Decision**

6 ORS 197.825 provides that LUBA has exclusive jurisdiction to review the
7 land use decisions of local governments. Land use decisions subject to our
8 jurisdiction include local government decisions that “concern the adoption,
9 amendment, or application of:

10 “(i) The goals;

11 “(ii) A comprehensive plan provision;

12 “(iii) A land use regulation; or

13 “(iv) A new land use regulation[.]” ORS 197.015(10)(a)(A).

14 “‘Land use regulation’ means any local government zoning ordinance, land
15 division ordinance * * * or similar general ordinance establishing standards for
16 implementing a comprehensive plan.” ORS 197.015(11). Petitioner bears the
17 burden of establishing that the appealed decision is a land use decision. *Billington*
18 *v. Polk County*, 299 Or 471, 475, 703 P2d 232 (1985).

19 The city’s land use regulations are codified in EC Chapter 9. Petitioner
20 maintains that in 1982, the city adopted noise standards into EC Chapter 9 in
21 Ordinance 18915. Petitioner argues that the city did so in response to instruction
22 from DLCD in 1981 to, as part of complying with Statewide Planning Goal 6

1 (Air, Water and Land Resources Quality), amend its code to “include noise
2 standards that are at least as stringent as state standards.” Petition for Review
3 App, at 17.³ The 1982 DLCD staff report on acknowledgment states: “Local
4 governments shall continue to monitor, to plan for and to enforce appropriate
5 noise standards and shall cooperate in meeting applicable federal and state noise
6 standards.” Petition for Review App, at 16. The DLCD staff report also states:
7 “The City of Eugene has revised the performance standards for all uses allowed
8 under the City’s Zoning Code and including a provision requiring conformance
9 with applicable federal and state regulations for all emissions (air, noise, water;
10 Ordinance 18915.)” Petition for Review App, at 17.

11 Ordinance 18915 (1982) adopted performance standards, including EC
12 9.644 setting out “maximum sound emissions” in decibels (1) based on time of
13 day and the zoning of the receiving property, and (2) for “noises of unusual
14 periodic character,” with additional allowances for industrial, commercial and
15 manufacturing zones. Petition for Review App, at 24-25. In 2001, the city
16 repealed and replaced EC Chapter 9. Motion to Dismiss n 6. Petitioner argues
17 that in 2001, the city “moved” those performance standards previously found in

³ Goal 6 is “[t]o maintain and improve the quality of the air, water and land resources of the state.” The goal provides that (1) the terms “waste and process discharges” include noise, and (2) “All waste and process discharges from future development, when combined with such discharges from existing developments[,] shall not threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards.”

1 EC Chapter 9 to the Environmental Noise Disturbance code in EC Chapter 6.
2 Petition for Review 9. Petitioner maintains that these standards still implement
3 Goal 6, and that the Ordinance implements Goal 6 and is a land use regulation
4 subject to our jurisdiction.

5 Again, the Ordinance amends EC Chapter 6. There is some similarity
6 between the EC Chapter 9 noise regulations that the city repealed in 2001 and the
7 EC Chapter 6 regulations first adopted in 2007. For example, the repealed EC
8 9.644 referenced allowed noise levels based on time of day and included
9 references to decibels at receiving property in the residential, I-1, M-1, and
10 Commercial zoning districts. Petition for Review App, at 24. EC 6.750 includes
11 in the acts declared to be noise disturbances “[o]perating any equipment and
12 conducting activities so as to create any noise which would cause the maximum
13 noise level to exceed a one-hour equivalent sound pressure level of 60 dBA at
14 any point on the property line of an affected residential property zoned R-1, R-2,
15 R-3 or R-4.” Motion to Dismiss Ex D, at 4. We do not, however, see any
16 indication that the city’s original adoption of the cited EC Chapter 6 provisions
17 in 2007 or the city’s amendments to EC Chapter 6 in the Ordinance were adopted
18 to comply with Goal 6.

19 The city maintains that petitioner “has confused the regulations at EC
20 6.750 with a completely different set of noise-related regulations that were added
21 to Eugene’s land use code (EC Chapter 9) in 1982, then completely repealed in
22 2001.” Motion to Dismiss 4. In the motion to dismiss, the city describes the

1 evolution of noise regulation within the city. Beginning in the early 1970s, the
2 city regulated “unreasonable or raucous noise” in EC Chapter 4 and defined
3 unreasonable or raucous noise sources as including, but not limited to, sources
4 such as steam whistles, loud speakers, pile drivers, hammers, and compressors.
5 *See* Motion to Dismiss Ex A, B, and C. In 2007, the city council elected to move
6 enforcement authority from the police to code enforcement and did so by moving
7 much of the noise regulation in EC Chapter 4 to EC Chapter 6. Motion to Dismiss
8 Ex E. The city maintains that the exact same regulations that are part of EC
9 Chapter 6 already apply in the city via the DEQ noise regulations. According to
10 the city, it “chose to adopt the DEQ noise control regulation[s] as part of the
11 City’s Chapter 6 Noise Disturbance regulations so the City can take civil
12 enforcement action when a noise threshold described in the DEQ regulation[s] is
13 surpassed.” Motion to Dismiss 13 (emphasis omitted). The city argues that these
14 noise regulations were independent of the noise regulations that the city adopted
15 in the early 1980s as part of EC Chapter 9. The city concedes that in 1982, the
16 city adopted noise regulations into EC Chapter 9 to implement Goal 6, but argues
17 that it repealed those provisions in 2001 and did not replace them. The city states
18 that it adopted different noise regulations in EC Chapter 9 after the 2001 repeal:

19 “Some noise regulations were included as standards for a particular
20 zone, such as the Natural Resource zone. There were both general
21 and specific noise-limiting approval criteria for new development,
22 depending on the nature of the use being proposed. *See, e.g.*, EC
23 9.8090(2)(b) and 9.8440 (imposing noise-related approval criteria
24 for conditional use and site review approvals, respectively); EC

1 9.5750(6)(a)(4) and (7)(f) (imposing noise limitations on site review
2 or conditional use permits for telecommunication devices).” Motion
3 to Dismiss n 8.

4 EC 9.5750(7)(f), Noise Reduction, provides:

5 “In R-1, R-2, R-3, R-4, C-1, and GO and in all other zones when the
6 adjacent property is zoned for residential use or occupied by a
7 dwelling, hospital, school, library, or nursing home, noise
8 generating equipment shall be sound-buffered by means of baffling,
9 barriers, or other suitable means to reduce sound level measured at
10 the property line to 45dB[A].”

11 A conditional use permit approval criterion in EC 9.8090(2)(b) provides: “The
12 proposed structures, parking lots, outdoor use areas or other site improvements
13 which could cause substantial off-site impacts such as *noise*, glare and odors are
14 oriented away from nearby residential uses and/or are adequately mitigated
15 through other design techniques, such as screening and increased setbacks.”
16 (Emphasis added). EC 9.8440(1) requires that “[t]he site review plan’s general
17 design and character is reasonably compatible with surrounding properties, as it
18 relates to building locations, bulk and height, *noise*, glare and odors.” (Emphasis
19 added). Thus, the city explains, Goal 6 is implemented through a variety of
20 provisions that are part of EC Chapter 9.⁴

21 We agree with the city that the Ordinance does not implement Goal 6
22 because EC Chapter 6 does not implement Goal 6. Petitioner has not met their

⁴ We observe that petitioner does not argue in its response to the city’s challenge to our jurisdiction that the amended EC Chapter 9 is not acknowledged to comply with Goal 6.

1 burden of establishing that the Ordinance amending EC Chapter 6 amends a land
2 use regulation.

3 2. **Significant Impacts Test**

4 Petitioner argues that we have common law jurisdiction under the
5 significant impacts test described in *City of Pendleton v. Kerns*, 294 Or 126, 653
6 P2d 992 (1982). In *Kerns*, the Supreme Court held that a local government
7 decision that is not a statutory land use decision may nonetheless be subject to
8 LUBA's review if the decision will have a "significant impact" on present or
9 future land uses in the area. 294 Or at 134. Petitioner argues that

10 "even if LUBA determines that the City's decision here is not a
11 statutory land use decision, the ordinance significantly impacts the
12 land use of all commercial and industrial property in the City. No
13 business or industrial user can be sure if the use will or will not meet
14 the City's newly-adopted noise and vibration standards. The ability
15 to invest in current and future industrial projects is jeopardized by
16 this legislation, making the City's industrial and commercial lands
17 inventories flawed.

18 "There are innumerable likely significant impacts to the current and
19 future land uses throughout the City." Response to Motion to
20 Dismiss 12.

21 In order to qualify as a significant impacts land use decision, the Ordinance
22 must create an actual, qualitatively or quantitatively significant impact on present
23 or future land uses. *Carlson v. City of Dunes City*, 28 Or LUBA 411 (1998). In
24 *Carlson*, petitioner argued that paving an unimproved right of way would
25 significantly impact the public's recreational use of the area and resort businesses
26 dependent on the beach, and also impact the quiet residential nature of the street.

1 We noted that “expected impacts must be likely to occur as a result of the
2 decision, and not simply speculative.” *Id.* at 414. We concluded that the petitioner
3 in *Carlson* had established that the decision was a significant impact test land use
4 decision because the decision authorized

5 “the paving of an area used as a public recreational area for a long
6 period of time and change[d] the character of the area by opening up
7 a dead end street at a beach and converting the dead end street into
8 a public thoroughfare. The impacts are actual and will have a
9 significant impact on the present and future land uses in the area.”

10 *Id.* at 415.

11 Petitioner has not established that the city’s application of the Ordinance will
12 have any bearing on petitioner’s or others’ use of their land at all. Petitioner has
13 not established that confusion is likely to occur and jeopardize current and future
14 investment in land uses. Petitioner’s broad assertion that the Ordinance creates
15 uncertainty because users of commercial and industrial land cannot be sure if
16 their use will meet newly adopted standards is speculative. We conclude that the
17 challenged decision is not a significant impacts land use decision.

18 The motion to dismiss is granted.

19 The appeal is dismissed.