BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FOREST HILLS EASEMENT ASSOCIATION,
SHEREE TUPPAN, SHELLEY LORENZEN
and EVIE FUSON,
Petitioners,

vs.

CITY OF LAKE OSWEGO,
Respondent,

and

JEFF PARKER,
Intervenor-Respondent.

LUBA No. 2004-139

ORDER

On March 17, 2005, we issued an order on record objections filed by petitioners in this appeal. The city subsequently filed a supplemental record that included numerous e-mails related to the grading permit, the decision challenged in this appeal, that were sent to or received by the final decision maker, the city's building official.[1] On April 18, 2005, petitioners filed an objection to the supplemental record. Specifically, petitioners' objection involves pages 18, 19, 20 and 30 of the supplemental record. Each of those pages includes material that has been redacted with an accompanying notation, "attorney/client communication redacted." Oregon Evidence Code (OEC) 503.[2]

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[1] On April 15, 2005, we prematurely issued an order settling the record. We now withdraw that order.

[2] OEC 503 provides, in pertinent part:

> "(2) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

A. Record Items Objected To

On July 20, 2004, the deputy city attorney responded via e-mail to a request for advice from the city's community development director. Pages 30 and 31 of the supplemental record include the originating e-mails and the response from the deputy city attorney. The substance of the response from the city attorney is redacted.

On July 26, 2004, the city attorney sent an e-mail message to the city building official and other city employees requesting comments regarding a draft of a letter addressed to intervenor's attorney. Both the city manager and the city engineer responded to that request via e-mail on July 27, 2004. Pages 18-20 of the supplemental record include the original message from the city attorney and the two responses. A portion of the attorney's original message requesting comments is not redacted, but the entire substance of the city attorney's draft letter is redacted. The responses by the city manager and the city engineer are also redacted.

B. Discussion

Petitioners argue that the record should include the entire substance of those e-mails, including the portions that the city has chosen to redact. Petitioners first urge us to overrule *Dimone v. City of Hillsboro*, 44 Or LUBA 805 (2003). In that case, we held:

> "Under OEC Rule 503(2) and ORS 40.225(2) confidential communications between the city attorney and city council in furtherance of seeking and providing legal services are privileged, and the city asserts the privilege. LUBA has no

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> "(a) Between the client or the client's representative and the client's lawyer or a representative of the lawyer;
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> "(b) Between the client's lawyer and the lawyer's representative;
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> "(c) By the client or the client's lawyer to a lawyer representing another in a matter of common interest;
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> "(d) Between representatives of the client or between the client and a representative of the client; or
>
> "(e) Between lawyers representing the client."

authority to order that privileged attorney/client communications be made part of the public record of this appeal." *Dimone*, 44 Or LUBA at 809-10.

Petitioners assert that ORS 197.830(10)(a) requires a local government to file the "entire record" of the proceeding under review. Record Objection on Supplemental Record 2. *See also* OAR 661-010-0025(1)(b) (incorporates in record all "written materials * * * placed before, and not rejected by, the final decision maker"). We understand petitioners to argue that ORS 197.830(10)(a) and OAR 661-010-0025(1)(b) trump the attorney/client privilege and require inclusion of all materials that are required to be included in the record, whether they qualify for the attorney/client privilege or not. Petitioners cite to Statewide Planning Goal 1 (Citizen Involvement) in support of their position. First, they claim that it is impossible for citizens to participate fully in the land use process if all of the information relied upon by the decision maker is not available to them. Second, they argue that Goal 1 requires that "information necessary to reach policy decisions shall be available." Such information includes "technical information," and "technical information" is defined to include "legal" information.[3] The city responds that petitioners' reliance on Goal 1 is misplaced and that its obligation to assemble the record does not supersede the attorney/client privilege.

We agree with petitioners that information before the decision maker upon which the decision maker relies to render its decision should be made available to the public. However,

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[3] Goal 1 provides, in pertinent part:

"The citizen involvement program shall incorporate the following components:

"* * * * *

"**4. Technical Information – To assure that technical information is available in an understandable form.**

"Information necessary to reach policy decisions shall be made available in a simplified, understandable form. * * *"

Under the sub-heading entitled "Technical Information," the goal provides, in pertinent part:

"2. Technical information should include, but not be limited to, energy, natural environment, political, legal, economic and social data, and places of cultural significance, as well as those maps and photos necessary for effective planning."

attorneys for local governments are quite frequently called upon to render legal advice to a decision making body. Some such advice is properly rendered in executive sessions pursuant to ORS 192.660(2)(h). We have previously held that we cannot require the city to include minutes of those meetings in the record precisely because those communications are privileged. *Dimone*, 44 Or LUBA at 809-10 (citing *McCrary v. City of Talent*, 28 Or LUBA 773, 774 (1994)). In this case, the decision maker is the building official, and the decision was rendered administratively without a hearing. While this less formal decision-making procedure is distinguishable from the more public decision making of a city council or board of commissioners, we do not see that the attorney/client privilege is superseded in either circumstance. If a document qualifies as a confidential communication between a client and the client's lawyer, the client asserts the privilege, and no exceptions to the attorney/client privilege apply, then LUBA cannot require that such privileged communications be disclosed, or "made part of the public record" on appeal. *Id*.

We do not see that Goal 1 requires a different result. Guideline D of Goal 1 provides that "technical information" include "legal" information. *See* n 3. While petitioners assert that the reference in Goal 1 to "legal" information includes legal advice within the attorney/client privilege, we do not agree that Goal 1 was intended to supersede the attorney/client privilege in all land use proceedings. Petitioners' interpretation would result in the extreme position that a local government cannot obtain confidential legal advice in the context of land use proceedings. The reference to "legal" information does not have the meaning that petitioners argue.

Petitioners next argue that the e-mails on pages 18-20 do not qualify as "confidential communications" because the redacted portions are related to an e-mail meant to be sent to the attorney for the applicant.[4] The commentary to OEC 503 states that confidential communications

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[4] OEC 503(1)(b) provides:

> "'Confidential communication' means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."

do not apply to communications "meant to be relayed to outsiders." The city responds that the draft letter was not intended to be sent to the applicant's attorney. Perhaps the city attorney intended to send the final version of the letter to the applicant's attorney, and for all we know, the final version was sent to the applicant's attorney. However, we agree with the city that the *draft* letter, which was circulated by the city attorney only to city employees, was not meant to be relayed to outsiders and otherwise qualifies as a confidential communication subject to the attorney/client privilege.[5]

Finally, petitioners argue that even if we do not overrule *Dimone*, the extent of redaction is inappropriate. Petitioners allege that the privilege applies, if at all, only to confidential information and that LUBA should review the communication *in camera* to "ensure that only appropriate material has been redacted." Record Objection 3. The city asserts that *in camera* review is not necessary to determine that the communications at issue are (1) not intended to be disclosed to third persons and (2) "in furtherance of the rendition of professional legal services to the City." Response to Petitioners' Objection to the Supplemental Record 5, 6. We agree with the city.

In an order issued this date in another appeal, we hold that the party seeking *in camera* review of privileged materials on the basis of an exception to that privilege must "present evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception's applicability." *Grabhorn v. Washington County*, ___ Or LUBA ___ (LUBA No. 2004-065, Order, May 31, 2005) slip op 9 (quoting *Frease v. Glazer*, 330 Or 364, 372, 4 P3d

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[5] Petitioners do not argue that the city waived the privilege by disclosing a portion of that communication. OEC 511. OEC 511 provides, in relevant part:

> "A person upon whom ORS 40.225 to 40.295 confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. * * *"

Petitioners do not make any argument regarding OEC 511, and we decline to raise that issue on our own. Neither do petitioners make specific arguments that the communication at page 30 of the supplemental record does not qualify as a "confidential communication." Accordingly, we do not address that item further.

56 (2000)).[6] In this case, petitioners have not argued that an exception applies. As noted above, in n 5, they also do not argue that the privilege was waived. The e-mails were sent between a lawyer and client, were not intended to be disclosed to third persons, and were made in furtherance of the rendition of legal services. No further review is necessary to determine that those communications are protected from disclosure by the attorney/client privilege.

Petitioners' objection to the supplemental record is denied.

The record is settled as of the date of this order. The petition for review is due 21 days, and the response brief 42 days, from the date of this order. The Board's final order and opinion is due 77 days from the date of this order.

Dated this 31st day of May, 2005.

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Anne C. Davies
Board Member

[6] We note that we have questioned our authority to conduct *in camera* review. In *Taylor v. City of Waldport*, 15 Or LUBA 620, 621 n1 (1987), we stated:

> "Petitioners state we can review the materials 'in camera' to decide whether they should be included in the record. However, no provision of law exempts local government records submitted to LUBA from public disclosure. ORS 192.650(2) grants circuit court the power to review minutes of an executive session 'in camera.'"

Because the city does not raise that issue, and because we deny petitioners' request for *in camera* review, we need not reach that issue in this case.