

Hugo Neighborhood Association & Historical Society

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June 15, 2014 Letter/Email

Grace Zilverberg, Planner II
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Dear Grace:

I request that this communication be part of the record of the proceedings before the Josephine County (JO CO) Board of County Commissioners' (BCC) Sunny Valley Sand & Gravel JO CO Comprehensive Plan/Zone Change land use application.

Thanks for your June 11, 2014 heads-up email on submitting written testimony: *"The code implies that the written testimony has to be submitted at the hearing contrary to our usual practice."* I understand that this means my June 11, 2014 letter/email testimony is not accepted and it will not be part of the record. True? What specific section of the JO CO Rural Land Development Code (RLDC) would you reference to support this interpretation? Was this the same process used for submitting written testimony to the JO CO Planning Commission (PC)? What is the proper procedure for submitting testimony outside of hearing dates? Or, does this mean that all written testimony will only be accepted as part of the official record if it is submitted on one of the hearing dates? If so, this looks like a near impossible process as many written testimony documents are usually submitted outside hearing dates from a variety of sources: applicant, public, expert witnesses, county personnel and departments, other state and federal agencies, etc.

The questions above are examples of a near limitless supply because, in my opinion, there are no identified RLDC procedures for submitting written testimony outside the dates of hearings that become part of the record. These local government situations are so numerous that the Oregon Land Use Board of Appeals (LUBA) has a phrase to identify them: *"In the Absence of Established Procedures Governing How Items Are Submitted into the Record."* The following is my summary of the problem as I interpret the RLDC. The Planning Director (PD) has "For The Record" responsibilities for site reviews, administrative reviews, and public hearings: conducting the correspondence for the hearing body and *"maintaining the record for the course of the proceedings."* The hearing body is normally the RPC or the BCC. The PD's judgmental responsibilities to determine "For The Record" procedures for the "course of the land use proceedings" are general and substantial in their lack of specificity. The PD's judgement during local proceedings is near absolute as there are no identified RLDC procedures, except procedures

for quasi-judicial, public notice, and public hearings. Even for these areas of responsibility there are many situations not covered in the procedures, and the hearing bodies defer to the PD's opinion. However, for the purposes of a LUBA appeal, LUBA's definition of the "course of the proceeding" (OAR 661-010-0025) is different and more inclusive than the RLDC. It is from the time of a land use application until after the local decision is reduced to a written, signed and final decision (*Forest Highlands Neigh. Assoc. v. Lake Oswego*, 23 Or LUBA 723 (1992); *Nash v. City of Medford*, 48 Or LUBA 647 (2004); *Heilman v. City of Roseburg*, 39 Or App 71, 74-76, 591 P2d 390 (1979); *West Side Rural F.P.D v. City of Hood River*, 43 Or LUBA 612 (2002) *Kane v. City of Beaverton*, 49 Or LUBA 712 (2005)).

In contrast the local RLDC's defined view of the course of the proceedings is almost 100 percent focused on the requirements of ORS 197.763 (i.e., conduct of local quasi-judicial land use hearings, notice requirements, and hearing procedures), and is silent on the other time periods during the course of the proceedings which written testimony can be placed before the hearing body and/or final decision maker.

Therefore, we would certainly appreciate any clarification coming from the BCC as an update to the RLDC. We made this same clarification request March 5, 2007 to the JO CO Citizen Involvement Committee (CIC) and did not receive a response to our request.

"Request To CIC: Research and make recommendations to the Josephine County Board of Commissioners (BCC) on establishing procedures for how documents must be submitted into the record "during the course" of local land use proceedings. OAR 661-010-0025."

"The need is to have an understandable county procedure for submitting written testimony into the record of land use proceedings. This is because as used in OAR 661-010-0025(1)(b), the term "placed before" is a term of art and does not merely describe the act of setting documents in front of the decision maker. Witham Parts and Equipment Co. v. ODOT, 42 Or LUBA 589 (2002)."

"We request the CIC research and make recommendations to the BCC on establishing procedures for how documents must be submitted into the record "during the course" of local land use proceedings. OAR 661-010-0025. We recommend that written procedures be developed by the BCC which address, at a minimum, the following topics. . . ."

Historically citizen experience in understanding the rules for submission of written testimony outside of hearing dates has been confusing to chaotic as a result of interpretation changes to the RLDC over time. For example, reference our troubled and stressful 2007 experience for how a PD interpreted the written submittal process outside hearings and/or was directed by the BCC (see *For the Record, or Not*). The term "Placed Before" the decision-maker is a term of art and can have so many different meanings when not adequately defined in a local government's legislative rules. We request that the document *For the Record, or Not* be referenced as part of the record for this land use application.

For the Record, or Not

By Hugo Land Use Committee, Goal One Coalition, & Rogue Advocates
February 2007

<http://www.hugoneighborhood.org/fortherecordornot.htm>

Sadly, when reacting to an unknown JO CO Planning Office's testimony submittal process, I can not follow your suggestions on how to submit testimony. My 2007 experience in not understanding the Planning Office's written testimony submittal policy, after I was personally specifically informed what the policy was by a planner at the front counter, was just too conflicting as it was later overruled by the PD. I can only try to protect my own testimony the best way I know how, and recommend to others to do the same. This protection effort could include duplications of all or some testimony.

I thought about resubmitting my June 11, 2014 letter/email written testimony to the BCC via email with the date adjusted to the BCC's first hearing date because my health situation (i.e., chronic pancreatitis) currently makes it almost impossible for me to plan on attending events in the afternoons or evenings, let alone participating. I believe that for purposes of determining the composition of the local record of a decision on a land use application, the local land use proceedings begin when the application is submitted. The "course of the proceeding" is from the land use application date until the final written decision; its is not limited to hearing dates.

My preliminary reaction is that an interpretation of the RLDC to only accept written testimony at a hearing (versus the course of the proceedings) is a quasi-judicial procedural error that prejudices my substantial rights, and would be remanded by LUBA on appeal. I will research this potential assignment of error. Our problem is that the term "Placed Before" is a term of art that without specific local legal ordinance rules is a moving target. For example, in 2002 LUBA's opinion was "As used in OAR 661-010-0025(1)(b), the term "placed before" is a term of art and does not merely describe the act of setting documents in front of the decision maker." *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 589 (2002).

Are you now the lead planner for this land use application? I assume so, but the April 4, 2014 notice of public hearing for the JO CO PC identified James Black, JO CO Planner, as the contact person for the land use application.

Is the written and oral testimony that occurred before the PC for the Sunny Valley Sand & Gravel land use application part of the record of the BCC's proceedings, or does the public need to resubmit their written and oral testimonies?

We have not addressed the same land use application for some time. As context, I think we would agree that everyone should work within the parameters of the RLDC. For the record my comments are not personal, nor are they directed at the Planning Department. I know you are as an experienced planner focusing on performing your job in a fair and equitable manner. I have empathy for you as I consider myself to have had your position in a past life (i.e., one year the JO CO Assistant County Planner and near 30-years a BLM Planner-Environmental Coordinator).

Do you have a garden? I do, and working in it makes me feel good and healthier. Right now I am installing anti-burrowing rodent windmills around our garden. Have a great day!

Sincerely,

Mike :)

/s/ Mike Walker

Mike Walker, As An Individual
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/s/ Mike Walker

Mike Walker, Member
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Mike Walker, Director/Vice President
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