

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 HOME BUILDERS ASSOCIATION
5 OF LANE COUNTY and HOME BUILDERS
6 CONSTRUCTION COMPANY,

7 *Petitioners,*

8
9 vs.

10
11 CITY OF EUGENE,

12 *Respondent.*

13
14 LUBA No. 2006-099

15 ORDER ON RECORD OBJECTIONS

16 **INTRODUCTION**

17 On February 13, 2006, the city council adopted a resolution in which it adopted the
18 City of Eugene Parks, Recreation and Opens Space Comprehensive Plan (PROS Plan). That
19 resolution was appealed to LUBA. In *Home Builders Association of Lane County v. City of*
20 *Eugene*, ___ Or LUBA ___ (LUBA Nos. 2006-023 and 2006-024, August 9, 2006), we
21 remanded that February 13, 2006 resolution.

22 The May 22, 2006 city resolution that is the subject of this appeal adopts the City of
23 Eugene Parks, Recreation and Opens Space Project and Priority Plan (Project Plan).¹

24 “* * * The Project * * * Plan includes text, a number of maps, tables
25 proposing projects and priorities for parks, open space and recreation
26 facilities, a list of capital costs by improvement type and planning area and a
27 list of non-capital costs. * * *” Response to Record Objections 2.

28 Until sometime before September 22, 2005, while the PROS Plan was under consideration by
29 the city planning commission, the substance of what was eventually adopted by the May 22,
30 2006 resolution as the Project Plan was part of the PROS Plan. The Project Plan was

¹ The parties refer to the Project Plan in various ways. We use the term “Project Plan” in an attempt to avoid confusing the Project Plan with the PROS Plan.

1 separated out and was transmitted by city planning staff to the city council separately from
2 the PROS Plan. The city council held a public hearing on the Project Plan on April 10, 2006,
3 after it had already adopted the PROS Plan on February 13, 2006. On May 22, 2006, the city
4 council adopted the Project Plan by resolution and that resolution is the subject of this
5 appeal.

6 **RECORD OBJECTION**

7 The record submitted by the city in this appeal begins on February 22, 2006, and does
8 not include any part of the record that led to adoption of the PROS Plan. Petitioners object
9 that given the common beginning of the Project Plan and the PROS Plan, at least the part of
10 the PROS Plan record that predates the city’s decision to separate the Project Plan from the
11 PROS Plan should be included in the record of this appeal. In support of that objection,
12 petitioners cite to page two of the Project Plan itself, which acknowledges the shared history
13 of the two plans:

14 “The projects identified in this document are a result of over 3 years of
15 planning and public input in association with the [PROS Plan].” Record 11.

16 In resisting petitioners’ record objection, the city points out that the planning
17 commission neither reviewed nor made any recommendation to the city council regarding the
18 Project Plan. According to the city, the city council is the only body that reviewed, held a
19 public hearing on, and ultimately took action to adopt the Project Plan. We understand the
20 city to argue that all documents that were actually placed before the city council in its
21 deliberations that led to adoption of the Project Plan have already been included in the record
22 and no part of the PROS Plan record was placed before the city council in those proceedings
23 or otherwise incorporated into the record of the city’s council’s proceedings.² Petitioners

² OAR 661-010-0025(1) generally governs the content of the record. As relevant, OAR 661-010-0025(1)(b) provides that the record shall include:

1 offer the following characterization of the city's argument for a shortened record for the
2 Project Plan:

3 "The city * * * is really trying to convince LUBA that the final version of the
4 [Project Plan] arrived from outer space on February 27, 2006, falling onto the
5 City Council's dais fully complete, whereupon the City Council promptly
6 adopted it by slapping an adopting resolution on top. Everything that came
7 before that date was a related, but different, strictly earth-bound planning
8 process." Reply in Support of Record Objection 2.

9 Given that the substance of the Project Plan began as part of the PROS Plan, we
10 almost certainly would agree with the city if it took the position presently advocated by
11 petitioners, *i.e.*, that the portion of the PROS Plan record that predates the separation of the
12 Project Plan from the PROS Plan should be included in the record in this appeal. However,
13 for whatever reason, the city takes the position that the local proceedings that ultimately led
14 to adoption of the Project Plan did not begin until February 22, 2006, when planning staff
15 first transmitted portions of the Project Plan to the city council. The entire Project Plan
16 apparently was first given to the city council at a February 27, 2006 city council work
17 session or a short time prior to that work session. Record 343-91. The question we must
18 resolve in this record objection is whether the city's more circumscribed view of the contents
19 of the record is sustainable.

20 Defining the scope of a local government's record in adopting a legislative land use
21 decision is frequently more difficult than defining the scope of the record in a quasi-judicial
22 land use decision making process. The beginning point is generally easier to identify in the
23 quasi-judicial context, and the procedures for compiling the record tend to be better defined.
24 *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 589, 593 (2002).

"All written testimony and all exhibits, maps, documents or other written materials specifically incorporated into the record or placed before, and not rejected by, the final decision maker, during the course of the proceedings before the final decision maker."

1 In *McKay Creek Valley Assoc. v. Washington County*, 19 Or LUBA 500, 503 (1990),
2 the Washington County Board of County Commissioners and the county planning
3 commission held hearings and considered public input on proposed code amendments and
4 later directed staff to prepare and file ordinances for adoption, as required by the county
5 charter. The issue was “whether the county proceedings resulting in the adoption of the
6 challenged ordinances include[d] the citizen input and prioritization process conducted by
7 the county * * * before the proposed ordinances were filed, as required by county charter.”
8 *Id.* We required that the record of the citizen input and prioritization process be included in
9 the record that was provided to LUBA in an appeal of the ordinances. Although *McKay*
10 might be read to lend support to petitioners, in *McKay* the board of commissioners was
11 clearly part of the earlier public planning process, whereas here the city council apparently
12 was not part of the local proceedings when the PROS Plan and Project Plan were a single
13 document.

14 *Central Eastside Industrial Council v. City of Portland*, 29 Or LUBA 541 (1995)
15 lends some support to the city’s position. In that case we held that a record of meetings
16 between city council members and local advisory committee members did not have to be
17 included in the record of the city council’s subsequent action regarding one of the special
18 advisory committee’s recommendations concerning a freeway access ramp. 29 Or LUBA at
19 546. We emphasized that the charge to the advisory committee went far beyond the freeway
20 ramp recommendation and that the advisory committee worked independently of the city
21 council. *Id.* Similarly, in this case the scope of the PROS Plan is broader than the Project
22 Plan and the planning commission apparently was working independently of the city council.

23 Finally, if the city’s code required that documents that were placed before the
24 planning commission must be included in the record before the city council, without regard
25 to whether those documents were also placed before the city council, we would give effect to
26 that code requirement. For example, in *League of Women Voters v. Coos County*, 13 Or

1 LUBA 311 (1985) we held that because the county's code specifically required that the
2 hearings body record be forwarded to the board of county commissioners in the event of a
3 local appeal of the hearings body's decision, that hearings body record must be included in
4 the record that was provided to LUBA in an appeal of the board of county commissioners'
5 decision on appeal. Similarly, in *Union Gospel Ministries v. City of Portland*, 21 Or LUBA
6 557, 560 (1991), the city code required that the planning commission conduct a public
7 hearing on the disputed proposal before the city council could take action on the proposal.
8 Based on that requirement, we concluded that the record of the planning commission hearing
9 must be included in the record that was provided to LUBA in an appeal of the city council's
10 decision. *Id.* However, petitioners do not argue that there is anything in the city's code that
11 requires that the record of the Project Plan while it was before the planning commission must
12 be provided to the city council or that the planning commission was required to conduct one
13 or more hearings on the Project Plan.

14 Based on (1) the reasoning in our decision in *Central Eastside Industrial Council*, (2)
15 the apparent lack of any requirement under city law that the planning commission conduct a
16 public hearing on the Project Plan or that the planning commission record be provided to the
17 city council and (3) the city's undisputed contention that no part of the record of the PROS
18 Plan was in fact placed before the city council during its deliberations on the Project Plan, we
19 agree with the city that the record in this appeal does not include any part of the record of the
20 PROS Plan.

21 Petitioners' record objection is denied. The record is settled as of the date of this
22 order. The petition for review shall be due 21 days from the date of this order. The response
23 brief shall be due 42 days from the date of this order. The Board's final opinion and order
24 shall be due 77 days from the date of this order.

25 Dated this 3rd day of October, 2006.
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Michael A. Holstun
Board Member