

NATURE OF THE DECISION

The decision that petitioner appeals is described in the Notice of Intent to Appeal (NITA) filed on October 9, 2009 as “that land use decision of respondent entitled ‘Review of Hearings Officer’s Decision for Conditional Use 09-2 for Property Located at 2303 Fairgrounds Road NE,’ which became final on July 13, 2009.” NITA 1 and Exhibit 1.

FACTS

The subject property is located at 2303 Fairgrounds Road, NE, Salem, and is zoned Commercial Retail (CR), with a Portland-Fairgrounds Road Overlay. The applicant submitted three separate applications for Design Review, Site Plan Review and Conditional Use Review for a retail development on the subject property, including a sandwich shop with a drive through. Access to the development was proposed from Columbia Street, a local street. The planning commission approved the application for Design Review on April 21, 2009, and the city planning administrator approved the application for Site Plan Review on June 15, 2009. Those decisions were not been appealed.

On May 27, 2009, the hearings officer issued a conditional use approval for the drive-through that was proposed as part of the sandwich shop. On June 22, 2009, the city council conducted a hearing to review the hearings officer’s decision approving the conditional use for the drive-through, deliberated, and voted to affirm the hearings officer’s decision, with the additional condition that access to the development be relocated to Fairgrounds Road instead of Columbia Street.

On July 7, 2009, the applicant submitted an e-mail to the case planner informing the city that it was withdrawing the conditional use application. On July 13, 2009, staff provided a copy of the e-mail to the city council, along with a staff report informing the city council that the application had been withdrawn. The document attached to petitioners’ NITA is that

1 staff report.¹ The city council took no further action on the conditional use application or the
2 applicant's withdrawal of the conditional use application.

3 **MOTION TO DISMISS**

4 **A. Parties**

5 Petitioner's attorney filed the NITA in this matter on behalf of Columbia Addition for
6 Revitalization and Livability (CARL), an organization, and Toni Larson, an individual.
7 Subsequent to filing the NITA, petitioners' attorney mailed a letter to the Board stating that
8 "petitioners have decided to continue the above-referenced appeal without my representation.
9 * * * Toni Larson will be the lead petitioner * * *."

10 CARL is not an individual and therefore under OAR 661-010-0075(6), Toni Larson
11 may not represent CARL in this appeal and CARL must be represented by a member of the
12 Oregon State Bar.² On January 28, 2010, the Board issued an order requiring CARL to notify
13 the Board and respondent in writing of the identity and contact information for its attorney
14 within seven days of the date of the order. CARL has not provided such written notice.
15 Accordingly, CARL is dismissed from the appeal.

16 **B. Jurisdiction**

17 The city moves to dismiss the appeal. First, the city argues, the appealed decision is
18 not a "land use decision" as described in ORS 197.015(10)(a).³ According to the city,

¹ According to the challenged decision, the applicant indicated to the city that it decided to construct the sandwich shop without a drive-through. As we understand it, including a drive-through component for the sandwich shop necessitated a CUP, and the applicant's decision to eliminate the drive-through made a CUP unnecessary.

² OAR 661-010-0075(6) provides in relevant part:

"Appearances Before the Board: An individual shall either appear on his or her own behalf or be represented by an attorney. A corporation or other organization shall be represented by an attorney. In no event may a party be represented by someone other than an active member of the Oregon State Bar. * * *."

³ ORS 197.015(10)(a) defines a "land use decision" as

1 although the city council made a tentative oral decision at the June 22, 2009 hearing, after the
2 applicant withdrew its application no further action was taken by the city council to approve
3 or disapprove the CUP application, and no “final” land use decision has been made by the
4 city council on that application. Although we agree with the city that the city council’s oral
5 vote that occurred prior to the applicant’s withdrawal did not result in a land use decision by
6 the city, petitioner is not challenging that oral decision. Rather, as explained above, the
7 challenged decision is the July 13, 2009 staff report to the city council, which takes the
8 position that the CUP application has been withdrawn.⁴

9 Petitioner has not responded to the city’s motion to dismiss.⁵ In the NITA, petitioner
10 asserts:

“[a] final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

- “(i) The goals;
- “(ii) A comprehensive plan provision;
- “(iii) A land use regulation; or
- “(iv) A new land use regulation[.]”

OAR 661-010-0010(3) provides that:

“[a] decision becomes final when it is reduced to writing and bears the necessary signatures of the decision maker(s), unless a local rule or ordinance specifies that the decision becomes final at a later date, in which case the decision is considered final as provided in the local rule or ordinance.”

⁴ The staff report concludes with the following:

“Pursuant to the applicant’s notice, Conditional Use application 09-2 is withdrawn.” Record 1.

⁵ In an objection to the record that petitioner filed prior to the city’s filing of the motion to dismiss, petitioner set out a variety of arguments and legal theories regarding the city’s actions and the challenged decision. We decline to read those arguments as a response to the city’s motion to dismiss. The proper method for a party to respond to a motion to dismiss is by filing a response to the specific motion to dismiss, and we will not comb through prior pleadings to attempt to find arguments that are set forth in those pleadings that could be read as responses to a motion to dismiss.

1 “The determination by staff that the subject conditional use permit application
2 had been withdrawn is a final land use decision in that it involves the
3 interpretation and application of facts to the city’s zone code. There are no
4 internal appeals or other action that can be taken at the city, and the City
5 Attorney’s office declined to issue a stop work order, and therefore [it] is the
6 final decision of the city. As such the action in dismissing this application
7 was a land use decision subject to the jurisdiction of this Board.” NITA 3.

8 Although the NITA references the city’s zoning code, it does not cite any specific provision
9 of the city’s zoning code that petitioner alleges the staff report interpreted. We fail to see
10 how the staff report is a “land use decision” as defined in ORS 197.015(10)(a). It does not
11 appear that the challenged decision “concerns” the application of a land use regulation within
12 the meaning of ORS 197.015(10)(a). The staff report merely informs the city council of the
13 status of the application, but does not actually refer to or apply a land use regulation. It does
14 not request any action by the city council under the Salem Revised Code. At best the staff
15 report is an informational memo for the city council to act on as it deems appropriate, or not
16 act on at all. We agree with the city that the challenged decision is not a land use decision as
17 defined in ORS 197.015(10)(a).

18 Accordingly, the appeal is dismissed.