

NATURE OF THE DECISION

Petitioner appeals a building permit decision that approves a site plan for construction of retaining walls as part of development of a single family dwelling.

FACTS

This appeal is the latest of a number of appeals challenging decisions that the city has issued to authorize petitioner’s next door neighbors, intervenors-respondents (intervenors), to construct a single family dwelling on their residential, R-1-10 zoned lot in the City of Ashland. *Brodersen v. City of Ashland*, ___ Or LUBA ___ (LUBA No. 2012-056, November 8, 2012); *Brodersen v. City of Ashland*, 62 Or LUBA 329 (2010), *aff’d* 241 Or App 723, 250 P3d 992 (2011); *Brodersen v. City of Ashland*, 55 Or LUBA 350 (2007); *Brodersen v. City of Ashland*, (LUBA No. 2004-201, June 21, 2005); *Brodersen v. City of Ashland*, 49 Or LUBA 719 (2005). Although the facts in this appeal are not entirely clear, it appears that the decision that is before us in this appeal is a building permit decision in which the city approved an amendment to a previously approved building permit. Specifically, the appealed decision approves a site plan and grading plan to construct retaining walls along the eastern and western lot lines of intervenors’ lot. Supplemental Record 33, 35 (highlighted at Petition for Review App 6). An earlier grading plan, which was previously approved by the city, proposed retaining walls in different locations, to the south and west of the proposed dwelling. Supplemental Record 126.

1 **MOTION TO CONSIDER EXTRA RECORD EVIDENCE**

2 Along with their motion to dismiss, which we discuss later in this
3 opinion, intervenors and the city filed a motion asking that LUBA consider
4 extra-record evidence to determine whether it has jurisdiction in this matter.
5 Motions to consider extra-record evidence are generally governed by ORS
6 197.835(2)(b) and OAR 661-010-0045, which set out the circumstances in
7 which LUBA’s review is not limited to the record.¹ Intervenor and the city do
8 not contend the offered extra-record evidence may be considered under ORS
9 197.835(2)(b) and OAR 661-010-0045. Instead they offer the evidence to
10 support their contention that LUBA lacks jurisdiction in this case. We have
11 considered extra-record evidence, without a motion pursuant to ORS
12 197.835(2)(b) and OAR 661-010-0045, for the limited purpose of determining
13 whether we have jurisdiction. *Yost v. Deschutes County*, 37 Or LUBA 653,
14 658 (2000); *Leonard v. Union County*, 24 Or LUBA 362, 377 (1992);
15 *Hemstreet v. Seaside Improvement Comm.*, 16 Or LUBA 630, 631-33 (1988).

16 The offered extra-record evidence is a memorandum from a registered
17 professional engineer in which the engineer concludes that the average slope of
18 tax lot 500 is 15.3 percent and that the maximum slope, located in a small area

¹ ORS 197.835(2)(b) provides:

“In the case of disputed allegations of standing, unconstitutionality of the decision, ex parte contacts, actions described in subsection (10)(a)(B) of this section or other procedural irregularities not shown in the record that, if proved, would warrant reversal or remand, the board may take evidence and make findings of fact on those allegations. The board shall be bound by any finding of fact of the local government, special district or state agency for which there is substantial evidence in the whole record.”

1 near the eastern boundary of tax lot 500, is 24 percent. That evidence goes to
2 the merits of the city’s decision to issue the building permit without requiring a
3 Physical Constraints Review Permit, which we discuss in more detail below.
4 But that evidence has no bearing on whether Ashland Land Use Ordinance
5 (ALUO) 18.62.040(A) and 18.62.050(A) and (B) are clear and objective, which
6 is the dispositive jurisdictional issue in this appeal. Because the motion to
7 consider extra-record evidence has no bearing on the question of our
8 jurisdiction, the motion is denied.

9 **MOTION TO DISMISS**

10 **A. The ORS 197.015(10)(a) Definition of “Land Use Decision”**

11 LUBA has exclusive jurisdiction to review “land use decisions.” ORS
12 197.825(1). As defined by ORS 197.015(10)(a)(A), land use decisions include
13 “final decision[s]” “that concern[] the * * * application of * * * [a] land use
14 regulation[.]” The ALUO is a “[l]and use regulation,” as that term is defined at
15 ORS 197.015(11). There does not appear to be any dispute that the city was
16 required to apply the ALUO in adopting the decision that is before us in this
17 appeal, or that the city’s decision is final. The city’s decision therefore falls
18 within the ORS 197.015(10)(a) definition of land use decision and is subject to
19 LUBA’s review jurisdiction unless one or more of the exemptions to the ORS
20 197.015(10)(a) definition of land use decision, which are set out at ORS
21 197.015(10)(b), apply.

22 **B. The ORS 197.015(10)(b) Exemptions From the Statutory**
23 **Definition of Land Use Decision—Building Permits issued**
24 **Under Clear and Objective Standards**

25 The ORS 197.015(10)(b) exemption that all parties assume the city is
26 relying on is set out at ORS 197.015(10)(b)(B), which exempts “building

1 permit[s],” from the statutory definition of land use decision, but only if the
2 building permits are “issued under clear and objective land use standards.”
3 Intervenors and respondent contend the land use standards the city applied in
4 the challenged decision are clear and objective. Petitioner contends that in at
5 least two respects they are not clear and objective.

6 The subject property is referred to as tax lot 500. All of tax lot 500 is
7 within an area designated “Hillside Lands” on the City of Ashland Physical and
8 Environmental Constraints, Hillside Lands and Severe Constraints Map
9 (Constraints Map).² Petition for Review, Appendix 5. We take official notice
10 of the Constraints Map. The Constraints Map also shows areas of “Severe
11 Constraints (>35% slope)” (hereafter “Severe Constraints”). The Constraints
12 Map is a small scale map, but it appears that there are two very small areas on
13 tax lot 500 designated Severe Constraints.³ There is another map in the record
14 that indicates there may be areas along the eastern property line in the vicinity
15 of the approved retaining walls with slopes between 25 percent and 35 percent.
16 Supplemental Record 39.

17 It is not disputed that the challenged decision authorizes “development,”
18 as that term is defined by ALUO 18.62.030. ALUO 18.62.040 requires a
19 Physical Constraints Review Permit (Constraints Permit) for development on

² As we explain below, designation as Hillside Lands on the Constraints Map is one of two requirements for land to qualify as Hillside Lands.

³ On the Constraints Map that is attached to the petition for review, the two areas that appear to be designated as Severe Constraints on the subject property are in the vicinity of the proposed retaining wall on east side of the lot and are approximately the size of an ink dot that would be made by tapping a pen lightly on a sheet of paper.

1 Hillside Lands or Severe Constraints Land.⁴ If the “area” to be developed
2 qualifies as Hillside Lands or Severe Constraints Lands, a Constraints Permit is
3 required and the development standards at ALUO 18.62.080 (Hillside Lands)
4 or ALUO 18.62.100 (Severe Constraints) apply. The building permit that is the
5 subject of this appeal does not include any findings that address whether the
6 building permit authorizes development on Hillside Lands or Severe
7 Constraints Land.

8 Initially we note that intervenors and the city contend that petitioner has
9 the burden of demonstrating that LUBA has jurisdiction to review the appealed
10 decision. Joint Motion to Dismiss 2. As a general rule there is no doubt that
11 petitioner has the burden to establish that a decision that is appealed to LUBA
12 qualifies as a “land use decision” subject to LUBA’s jurisdiction. *Billington v.*
13 *Polk County*, 299 Or 471, 475, 703 P2d 232 (1985). But in this case we have
14 already concluded that petitioner has established that the challenged decision
15 qualifies as a “land use decision,” as defined by ORS 197.015(10)(a). Whether
16 we have jurisdiction to review the disputed building permit therefore turns on
17 whether the *exception* that appears at ORS 197.015(10)(b)(B) applies. It is
18 unclear to us whether the burden to show that exception does not apply lies
19 with petitioner or whether the burden to show that the exception does apply lies
20 with respondent and intervenors. We need not attempt to resolve that question

⁴ As relevant, ALUO 18.62.040 provides:

“A Physical Constraints Review Permit is required for the following activities:

“A. Development, as defined in [ALUO] 19.62.030(H), in areas identified as Flood Plain Corridor Land, Hillside Land, or Severe Constraints Land. * * *”

1 here, because whoever has the burden, that question is primarily or entirely a
2 question of law and we conclude below that the ORS 197.015(10)(b)(B)
3 exception applies.

4 The relevant ALUO sections are ALUO 18.62.040(A), 18.62.050(B) and
5 (D). ALUO 18.62.040(A) requires “[a] Physical Constraints Permit * * * for *
6 * * [d]evelopment * * * in *areas* identified as * * * Hillside Land, or Severe
7 Constraints Land.” (Emphasis added.) See n 4. ALUO 18.62.050(B) and (D)
8 determine whether an “area” qualifies as “Hillside Land, or Severe Constraints
9 Land.” As relevant here “areas * * * which have a slope of 25% or greater”
10 qualify as “Hillside Lands,” and “lands with a slope greater than 35 %” qualify
11 as “Severe Constraints Lands.”⁵

⁵ALUO 18.62.050 provides, in part:

“B. Hillside Lands - Hillside Lands are lands which are subject to damage from erosion and slope failure, and include areas which are highly visible from other portions of the city. The following lands are classified as Hillside Lands:

“1. All *areas* defined as Hillside Lands on the Physical Constraints Overlay map and *which have a slope of 25 % or greater.*

“* * * * *

“D. Severe Constraint Lands - Lands with severe development characteristics which generally limit normal development. The following lands are classified as Severe Constraint Lands:

“1. All areas which are within the floodway channels, as defined in Chapter 15.10.

1 Petitioner argues that ALUO 18.62.040(A) and 18.62.050(B) and (D)
2 require that the slope be computed and that the requirement to compute slope is
3 not clear and objective. In *Home Builders Assoc. v. City of Eugene*, 41 Or
4 LUBA 370 (2002), we considered whether a land use regulation that prohibited
5 grading on slopes of more than 20 percent ran afoul of ORS 197.307(6), which
6 requires that needed housing be subject to “clear and objective standards.” We
7 concluded that it did not: “[T]he slope of a property is an objectively
8 determinable fact, and the absence of instructions on how to determine slope
9 does not offend ORS 197.307(6).” 41 Or LUBA at 411. We reached the same
10 conclusion in *SE Neighbors v. City of Eugene*, ___Or LUBA ___ (LUBA No.
11 2013-004, July 12, 2013), slip op 7-9, *aff’d* 259 Or App 139, 314 P3d 1004
12 (2013). *Home Builders* and *SE Neighbors* both concerned the requirement in
13 ORS 197.307(4) that needed housing be subject only to “clear and objective
14 standards” and in this case we are considering whether the ORS
15 197.015(10)(b)(B) exception to the statutory definition of land use decision for
16 building permits that are subject to “clear and objective land use standards”
17 applies. We assume for purposes of this opinion that those nearly identical
18 phrases mean the same thing. We agree with intervenors and the city that the
19 requirement under ALUO 18.62.040(A), 18.62.050(B) and (D) to consider
20 slope is “clear and objective,” and the requirement to consider slope does not
21 itself render the ORS 197.015(10)(b)(B) exception inapplicable.

22 We next consider petitioner’s contention that the term “area” is not clear
23 and objective. Again, the relevant ALUO sections are ALUO 18.62.040(A)

“2. *All lands with a slope greater than 35 %.*”
(Emphases added.)

1 and 18.62.050(B) and (D). ALUO 18.62.040(A) requires “[a] Physical
2 Constraints Permit * * * for * * * [d]evelopment * * * in *areas* identified as
3 * * * Hillside Land, or Severe Constraints Land.” (Emphasis added.) *See* n 4.
4 To comply with ALUO 18.62.040(A), the applicant must determine under
5 18.62.050(B) and (D) whether there are any “areas” or “lands,” within the area
6 to be developed pursuant to the approved building permit addendum, that have
7 25 percent or greater slopes (ALUO 18.62.050(B)) or exceed 35 percent slopes
8 (ALUO 18.62.050(B)). *See* n 5. If any such areas exist within the area to be
9 developed, a Constraints Permit is required. We see nothing unclear or
10 subjective about those requirements.

11 The only land use standards that apply in this matter that petitioner
12 contends are not clear and objective are ALUO 18.62.040(A) and 18.62.050(B)
13 and (D). Because we conclude that those standards are clear and objective, the
14 exception to the statutory definition of land use decision set out at ORS
15 197.015(10)(b)(B) applies, and the circuit court rather than LUBA has
16 jurisdiction over this appeal. Petitioner did not file a motion to transfer this
17 appeal to circuit court under OAR 661-010-0075(11). Accordingly, pursuant
18 to OAR 661-010-0075(11)(c), this appeal is dismissed.