

1 October 16, 2006, petitioner sent a letter to a city planner in which she contended that the
2 recorded conveyances of the southern five feet of lot 6 that predated July 26, 1979 were
3 sufficient to establish lot 6 as a separate lot of record. Record 14-15. Petitioner's October
4 16, 2006 letter also included the following:

5 "I understand from your telephone message left on Thursday afternoon,
6 October 12, 2006, that you will be sending me a letter regarding the request of
7 the Estate of Ann Jackson that the City confirm that both Lots 6 and 5 as
8 referenced above are buildable lots. I trust I'll have an opportunity to respond
9 to your letter in writing with additional points and relevant records prior to a
10 final decision by the City (and prior to any need to appeal to the City
11 Commissioner or to LUBA or to file a Measure 37 claim). My understanding
12 from our prior telephone conversation was that I would have such an
13 opportunity. In fact, I thought from our discussion that I might be meeting
14 with you and perhaps other staff to discuss this request prior to any decision.
15 I would at least like an opportunity to respond formally to your letter before
16 any final decision is made so that a reconsideration could include all the
17 relevant facts, circumstances, and documents." Record 12.

18 In an October 30, 2006 letter to petitioner, the city planner concludes that lot 6 is not
19 a legal lot of record. The letter concludes with the following sentence: "Please contact me
20 * * * if you have additional questions." Record 3.

21 The October 30, 2006 letter does not acknowledge or address petitioner's
22 "understanding" stated in her October 16, 2006 letter that petitioner would have an
23 opportunity to comment on the planner's letter before the city's decision became final. The
24 October 30, 2006 letter also does not clearly state that it is the city's final decision on
25 petitioner's zoning confirmation request, or that an appeal to LUBA is available. However,
26 petitioner apparently was later told that the October 30, 2006 letter was the city's final
27 decision and that there would be no further opportunity for petitioner to comment on the

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- “• Which was created and recorded before July 26, 1979; and
 - “• For which the deed, or other instrument dividing the land, is recorded with the appropriate county recorder.”

1 October 30, 2006 letter. On November 20, 2006, petitioner appealed the October 30, 2006
2 letter to LUBA.

3 **B. Petitioner’s Record Objections**

4 **1. Second Page of the 1962 Land Sale Contract**

5 Petitioner contends that the record should be supplemented with the second page of
6 the 1962 Tokstad to Jackson land sale contract. The city inadvertently omitted that page, and
7 has submitted a Supplemental Record that includes the omitted page.

8 This objection is moot.

9 **2. Summary of October 4, 2006 Telephone Conversation**

10 Petitioner contends that her parents’ intentions may have some bearing on the issue of
11 whether lot 6 is properly viewed as a lot of record. Petitioner contends she had a lengthy
12 telephone conversation on October 4, 2006 with the city planner who wrote the October 30,
13 2006 letter, and a summary of that conversation should be included in the record.

14 OAR 661-010-0025(1) sets out the required content of the record in a LUBA
15 proceeding. As potentially relevant here, OAR 661-010-0025(1) provides:

16 “Contents of Record: Unless the Board otherwise orders, or the parties
17 otherwise agree in writing, the record *shall include at least the following*:

18 “(b) All *written* testimony and all exhibits, maps, documents or other
19 *written* materials specifically incorporated into the record or placed
20 before, and not rejected by, the final decision maker, during the course
21 of the proceedings before the final decision maker.

22 “(c) *Minutes and tape recordings of the meetings conducted by the final*
23 *decision maker as required by law*, or incorporated into the record by
24 the final decision maker. A verbatim transcript of audiotape or
25 videotape recordings shall not be required, but if a transcript has been
26 prepared by the governing body, it shall be included. If a verbatim
27 transcript is included in the record, the tape recordings from which that
28 transcript was prepared need not be included in the record, unless the
29 accuracy of the transcript is challenged.” (Emphases added.)

30 Petitioner does not contend that her conversation with the city planner was “written,”
31 and therefore OAR 661-010-0025(1)(b) does not apply. Petitioner does not claim that the

1 city is required by law to keep minutes of planning staff conversations regarding zoning
2 confirmation applications or make tape recordings of such conversations. Because petitioner
3 has not identified any legal basis for doing so, we reject petitioner's contention that the city
4 should be ordered to supplement the record with a summary of the planner's October 4, 2006
5 telephone conversation with petitioner.

6 Finally, in a January 16, 2007 reply to the city's response to petitioner's record
7 objections, petitioner points out that language in OAR 661-010-0025(1) that states that the
8 record "shall include at least the following" makes it clear that the requirements set out at
9 OAR 661-010-0025(1)(a) through (d) are minimum requirements and do not preclude the
10 possibility that additional items must be included in the record in appropriate circumstances.
11 We agree that OAR 661-010-0025(1)(a) through (d) are minimum requirements. However,
12 we are not persuaded that a summary of a conversation that was not recorded and for which
13 contemporaneous minutes were not prepared should be made part of the record in this matter,
14 even if some satisfactory manner of preparing such a summary could be agreed to.

15 Petitioner's second record objection is denied.

16 3. November 14, 2006 Letter

17 After petitioner received the city planner's October 30, 2006 letter, petitioner sent the
18 planner another letter, dated November 14, 2006, in which she urged the planner to
19 reconsider the October 30, 2006 decision and reach a different conclusion regarding the legal
20 lot status of lot 6. Petitioner contends her November 14, 2006 letter should be included in
21 the record and that failure to do so would result in petitioner not being given "an opportunity
22 for a full and fair review of the issues involved before a final decision by the City," which
23 petitioner contends would result in a denial of due process of law. Petitioner's Objection to
24 the Record Transmitted by Respondent 4.

25 If petitioner believes the city's actions in this matter denied her due process of law,
26 she may assign error to those actions. The possibility that the city may have denied

1 petitioner due process of law is not a basis for ordering the city to include in the record of its
2 October 30, 2006 decision a letter that post-dates the appealed decision by two weeks.

3 In her January 16, 2007 reply to the city's response to petitioner's record objections,
4 petitioner contends that if the October 30, 2006 letter is a final decision it did not become
5 final until the city planner called petitioner on November 15, 2006, after receiving her
6 November 14, 2006 letter, and told her the October 30, 2006 letter was the city's final
7 decision.

8 As we have already noted, the city's October 30, 2006 letter completely ignores
9 petitioner's October 16, 2006 request for a chance to further comment on the planner's
10 conclusions about lots 5 and 6 before the city issued its final decision on the matter. If
11 petitioner believes she had a legal right to submit such a response before the city's decision
12 became final, she may assign error to the city's failure to provide that opportunity. The
13 city's failure in that regard does not mean the October 30, 2006 letter was not the city's final
14 decision in this matter. While the city planner certainly could have made it clearer that the
15 October 30, 2006 letter was the city's final decision, it meets the OAR 661-010-0010(3)
16 definition of "final decision."³ We agree with the city that the October 30, 2006 letter was
17 final on the day it was sent and that petitioner's November 14, 2006 letter is not part of the
18 record in this matter.

19 Petitioner's third record objection is denied.

20 **C. Conclusion**

21 The record shall be considered settled as of the date of this order. The petition for
22 review shall be due 21 days from the date of this order. The respondent's brief shall be due

³ OAR 661-010-0010(3) provides the following definition:

“Final decision’: 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.”

1 42 days from the date of this order. The Board's final opinion and order shall be due 77 days
2 from the date of this order.

3 Dated this 23rd day of January, 2007.

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Michael A. Holstun

11 Board Member