

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 CALVARY CONSTRUCTION, LLC.,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF GLENDALE,
10 *Respondent.*

11
12 LUBA No. 2009-074

13
14 FINAL OPINION
15 AND ORDER

MAR 25 10 pm 2:53 LUBA

16
17 Appeal from City of Glendale.

18
19 Duane Wm. Schultz, Grants Pass, represented petitioner.

20
21 Stephen Mountainspring, Roseburg, represented respondent.

22
23 HOLSTUN, Board Member; BASSHAM, Board Chair; RYAN, Board Member,
24 participated in the decision.

25
26 TRANSFERRED

03/24/2010

27
28 You are entitled to judicial review of this Order. Judicial review is governed by the
29 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a letter from the city to petitioner concerning petitioner’s proposed subdivision.

INTRODUCTION

The parties dispute whether certain infrastructure improvements that have been constructed in conjunction with petitioner’s proposed subdivision were properly constructed and whether the city must be reimbursed for certain engineering costs it has incurred in reviewing construction of that infrastructure. The record filed by the city in this appeal is five pages long. In a September 23, 2009 Order, we questioned whether LUBA has jurisdiction to review the disputed letter. We also noted that the five-page record would likely not be sufficient to provide substantial evidence to support the city’s decision, if LUBA were to find that it has jurisdiction to review the letter. We suggested that the parties attempt to reach an expedited resolution of this matter or stipulate to a remand to develop a more complete record. The parties have not taken either course of action.

LUBA review of a land use decision or limited land use decision is normally limited to the record that is submitted by the local government. ORS 197.835(2)(a) (“Review of a decision under ORS 197.830 to 197.845 shall be confined to the record.”) As noted, the record in this appeal is only five pages long. However, in making a threshold decision regarding whether LUBA has jurisdiction to review the decision on appeal, LUBA may consider extra-record evidence. *Homebuilders Association v. City of Eugene*, 54 Or LUBA 692, 700 (2007); *Vanspeybroeck v. Tillamook County*, 51 Or LUBA 546, 548 (2006); *Hemstreet v. Seaside Improvement Comm.*, 16 Or LUBA 630, 631-33 (1988). In support of their jurisdictional arguments, the parties have filed many extra-record documents and have requested that LUBA consider those extra-record documents in determining whether we have jurisdiction. We have considered all of those extra-record documents.

1 **FACTS**

2 Petitioner filed an application for subdivision approval on February 16, 2006. The
3 following language appears immediately above petitioner’s signature on the subdivision
4 application:

5 “* * * I understand that the full application fee must be paid to the City before
6 this application will be processed, and that any additional costs incurred by the
7 City in processing this application are my responsibility. I hereby agree to pay
8 all application processing costs in full, and within the time specified by the
9 City (or within 30 days of the billing date if no time is specified.”
10 Respondent’s Motion to Dismiss, Appendix 15 (underscoring in original).

11 Petitioner was granted preliminary approval for an eleven-lot subdivision on June 12, 2007.
12 The preliminary plat included the following notation describing “Project completion
13 requirements:”

14 “1. One-year guarantee letter, from the date the new water main is turned
15 on, from the developer.

16 “2. Affidavit of payment of debts and claims from the developer.

17 “3. As-Built plans from engineer shall be submitted on reproducible
18 matted mylar.

19 “4. Easement documents from the property owner, per City approved
20 form.

21 “5. The engineer shall submit to the city of Glendale Public Works
22 Department a statement certifying that the project has been constructed
23 in compliance with the approved plans and specifications and
24 according to the Oregon State Health Division Requirements, Oregon
25 Administrative Rule Chapter 333.

26 “6. Payment of all fees for services rendered by the City of Glendale on
27 this project.” Respondent’s Motion to Dismiss, Appendix 19.

28 As explained later in this opinion, under the City of Glendale Zoning and Land
29 Development Ordinance (LDO) all subdivision water, sewer and street improvements must
30 be completed or guaranteed before a final subdivision plat can be approved and recorded.
31 For reasons that are not clear to us, the final plat was approved by a number of city and

1 county officials and recorded on September 14, 2007, long before all water, sewer, and street
2 improvements were completed and without any guarantee for completion.¹ Respondent's
3 Motion to Dismiss, Appendix 26.

4 Eight months later, on May 19, 2008, petitioner received approval from the Oregon
5 Department of Environmental Quality (DEQ) to construct a sanitary sewer extension to serve
6 the subdivision. Respondent's Motion to Dismiss, Appendix 8-9. A little less than three
7 months later, on August 12, 2008, the city recorder sent petitioner a letter. In that letter the
8 city demands that petitioner pay a past-due June, 2008 city invoice for engineering services in
9 the amount of \$6,893.82. Respondent's Motion to Dismiss, Appendix 1. The letter also
10 included a July, 2008 invoice for engineering services in the amount of \$2,813.80. A portion
11 of the city's August 12, 2008 letter is set out below:

12 "The City of Glendale cannot expend public funds in support of your private
13 project, but does require engineering oversight to insure that additions to the
14 City infrastructure meet public works design standards. Therefore, you leave
15 the city no choice but to issue a **STOP-WORK ORDER** effective this date on
16 the Riverview Estates Subdivision. The City's engineer, The Dyer
17 Partnership, has been notified to discontinue any work on this project until
18 further notice.

19 "Upon receipt of payment for all engineering work done to date on this project
20 by The Dyer Partnership, work may proceed toward completion of the
21 subdivision infrastructure. All future engineering costs must be paid within
22 30 days of invoice. *The City will issue final plat approval only when all*
23 *associated costs have been paid.*" Respondent's Motion to Dismiss,
24 Appendix 1 (bold lettering in original; italics added).

25 The city recorder sent a second letter the next day, August 13, 2008, in which she took the
26 position that the city has not granted final plat approval and that until the final plat is

¹ There are a number of city and county approval signatures on the final plat. The signature over the line for the planning commission chair is signed by the city recorder. We understand the city to take the position that the final plat was not signed by the planning commission chair, as required by the LDO, that the plat is missing required certificates from the State Health Division and the Oregon Department of Environmental Quality (DEQ) and that the recorded final plat is "invalid." Respondent's Motion to Dismiss 3. We understand the city to take the position that once petitioner has paid the required fees and the parties' dispute regarding required subdivision improvements is resolved, the city will approve the final plat and a second final plat will have to be recorded. We understand petitioner to take the position that the recorded final plat is a valid final plat.

1 approved by the city, petitioner's subdivision "is in process." Respondent's Motion to
2 Dismiss, Appendix 2.²

3 Petitioner met with the city council on September 3, 2008. The parties dispute what
4 occurred at that meeting. Petitioner registered a complaint that the city was requiring it to
5 relocate a city sewer line at petitioner's expense and that the city was unreasonably
6 interfering with petitioner's efforts to complete infrastructure improvements before the rainy
7 season began.

8 In a September 10, 2008 letter to petitioner from the city public works superintendent,
9 the city advised petitioner that the city engineer was concerned about compaction over the
10 sewer line trench. Respondent's Motion to Dismiss, Appendix 3-4. The city advised
11 petitioner that it must remove the backfill from the sewer trench and give notice to the city
12 engineer before replacing and compacting the fill, so that the city engineer could observe the
13 compaction. That letter closes with the following:

14 "In order to insure that DEQ requirements [have] been fulfilled approval by
15 the City Public Works Department will be based on the recommendation of
16 the City Engineer." Respondent's Motion to Dismiss, Appendix 4.

17 In another letter, also dated September 10, 2008, the city advised DEQ of its concerns about
18 the subdivision improvements, including its concerns about the compaction of fill above the
19 storm drain. Respondent's Motion to Dismiss, Appendix 10-11. In a September 11, 2008 e-
20 mail message to the city, DEQ advised the city that the city is ultimately responsible for
21 ensuring that the conditions of DEQ's May 19, 2008 approval were met. DEQ closed that e-
22 mail message with the following;

23 "We recommend the city not accept the project until the design engineer
24 fulfills his obligation of proper construction inspection and proper installation

² Notwithstanding the August 12, 2008 stop work order, it appears that at least some work on the subdivision infrastructure improvements continued after that date. The parties dispute whether the city authorized that additional work.

1 and provides a copy of the certification to the city per DEQ guidelines.”
2 Respondent’s Motion to Dismiss, Appendix 12.

3 In a September 30, 2008 letter from the city attorney to petitioner, the city attorney
4 took the position that petitioner owes the city \$9,707.62 for engineering services through July
5 31, 2008. The city attorney also stated:

6 “Your client is responsible for paying these costs incurred by the City. The
7 City will not approve further work, *nor approve the final plat for the*
8 *subdivision* without receiving payment for these and all other costs associated
9 with the project.” Respondent’s Motion to Dismiss, Appendix 5 (emphasis
10 added).

11 In an October 6, 2008 letter from petitioner to the city, petitioner stated that the city’s
12 requirement that it absorb the cost of relocating a city storm water drain constituted an
13 unconstitutional taking. Petitioner’s Supplemental Motion to Take Evidence not in the
14 Record, Appendix 5. Petitioner requested a meeting with the city to allow work on the
15 subdivision to continue. The Galli Group, a geotechnical consultant for petitioner, prepared a
16 report dated October 13, 2008 which explains that density retesting was done on the site and
17 compaction exceeds the project specification of 95 percent.³ Petitioner’s Supplemental
18 Motion to Take Evidence Not in the Record, Appendix 48.

19 In an April 16, 2009 letter from the city attorney to petitioner’s attorney, the city
20 proposed that petitioner (1) pay the city \$8,900 to reimburse it for city engineer fees, (2)
21 rescind the final plat recording, (3) deposit the estimated cost of engineering services to
22 complete the project in a trust account, and (4) agree to pay any additional engineering costs
23 incurred by the city that exceed the estimated cost. Petitioner’s Supplemental Motion to Take
24 Evidence not in the Record, Appendix 7. In a letter dated April 21, 2009, petitioner stated
25 that the April 16, 2009 letter did not address petitioner’s concerns about being asked to pay to
26 relocate the city storm drainage line. Petitioner’s Supplemental Motion to Take Evidence not

³ The city claims it did not receive a copy of this report before it issued its June 12, 2009 decision in this matter.

1 in the Record, Appendix 8-9. Petitioner also took the position that (1) it would not rescind
2 the final plat, (2) it has obtained all necessary inspections of subdivision improvements by a
3 private engineering firm⁴ and (3) the city should allow the project to proceed to completion.

4 *Id.*

5 Against the above backdrop, the city sent petitioner the June 12, 2009 letter that is the
6 subject of this appeal. We set out the relevant text of that letter below:

7 “This letter is to inform you that the development of the above-referenced
8 property has not complied with [LDO] 9.0.60(H), (K) and the City therefore
9 accepts no responsibility for any utility infrastructure or street construction
10 associated with this project.

11 “According to [LDO] 1.0.60(A), the City cannot issue building permits for any
12 lots in this subdivision.

13 “Page 5 of the Preliminary Plat for this project includes a list of Project
14 Completion Requirements submitted by the developer. None of these
15 requirements have been met.” Respondent’s Motion to Dismiss, Appendix 7.

16 **JURISDICTION**

17 LUBA has exclusive jurisdiction to review land use decisions and limited land use
18 decisions. ORS 197.825(1). As the party seeking LUBA review, the burden is on petitioner
19 to establish that the appealed June 12, 2008 letter is a land use decision or limited land use
20 decision. *Billington v. Polk County*, 299 Or 471, 475, 703 P2d 232 (1985); *City of Portland*
21 *v. Multnomah County*, 19 Or LUBA 468, 471 (1990); *Portland Oil Service Co. v. City of*
22 *Beaverton*, 16 Or LUBA 255, 260 (1987). Petitioner contends the challenged letter is a land
23 use decision.⁵ As relevant here, a final city decision that concerns the application of a land

⁴ In separate June 11, 2009 communications, one to the city and one to DEQ, petitioner’s engineer takes the position that the subdivision water system has been tested and is operating properly. Petitioner’s Supplemental Motion to Take Evidence not in the Record, Appendix 19-24.

⁵ ORS 197.015(10) provides in part:

“‘Land use decision’:

“(a) Includes:

1 use regulation is a land use decision, unless one of the exclusions set out at ORS 197.015(b)
2 applies. See n 5. Because the challenged letter appears to apply the LDO, which is a land use
3 regulation, petitioner contends the challenged letter is a land use decision. The city offers a
4 number of arguments for why it believes the challenged letter is not a land use decision.

5 **A. The Decision**

6 The city’s June 12, 2009 letter cites three sections of the LDO. LDO 9.0.60(H),
7 9.0.60(K) and 1.0.60(A). LDO 9.0.60(H) requires that an applicant for subdivision approval
8 complete all required subdivision improvements before the final plat can be approved and
9 before the final plat can be recorded.⁶ LDO 9.0.60(K) sets out some of the requirements that

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

“* * * * *

“(iii) A land use regulation; * * *

“* * * * *;

“* * * * *

“(b) Does not include a decision of a local government:

“(A) That is made under land use standards that do not require interpretation or the exercise of policy or legal judgment;

“* * * * *

“(D) That determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility that is otherwise authorized by and consistent with the comprehensive plan and land use regulations;

“* * * * *

“(G) That approves or denies approval of a final subdivision or partition plat or that determines whether a final subdivision or partition plat substantially conforms to the tentative subdivision or partition plan[.]”

⁶ LDO 9.0.60(H) provides:

“Provision for Improvements. Improvements including streets, sidewalks, water distribution lines, sewage collection lines, land surface drainage, electrical service, telephone services,

1 must be met before the city will accept responsibility for subdivision improvements, and
2 requires a certificate from an engineer “working at the discretion of the City Council” that
3 “the applicant has submitted a detailed ‘as built’ engineering plan and survey of the
4 subdivision indicating location, dimensions, materials and other information as may be
5 required by the City of Glendale.”⁷ The third LDO section cited in the letter is LDO
6 1.0.60(A), which states that subdivision plats may not be recorded and building permits may
7 not be issued “without compliance with the provisions of [the LDO].”⁸

T.V. cable service, fire protection service or any other service, utility or improvement required by the City as a condition of approval shall be the responsibility of each applicant in compliance with Section 9.3.10 Standards, Section 9.3.20 Construction of Improvements, and Section 9.3.30 Modification of Provisions.

*“It shall also be the responsibility of each applicant to complete such construction, installation or repair as a condition of, and prior to, final approval or recording of a subdivision plat or partition map for subject property. * * * *”* (Emphasis added.)

⁷ LDO 9.0.60(K) provides:

“Certificate and Guarantee of Improvements. The City of Glendale shall not accept the responsibility for any improvements, nor release a subdivision improvement guarantee and performance bond, or any security therefore, until such time as a licensed professional engineer working at the discretion of the City Council, shall submit a certificate stating that the applicant has submitted a detailed ‘as built’ engineering plan and survey of the subdivision, indicating location, dimensions, materials and other information as may be required by the City of Glendale. Notwithstanding such approval or acceptance, or the release of any subdivision guarantee and improvement bond or any security therefore, the applicant shall and by proceeding with such project in accord with this ordinance does, for a period of one year following the submission of such a certificate, guarantee that such improvements and repairs are constructed and performed in a good and workmanlike manner, using first class materials, in accordance with all standards and requirements of the City of Glendale and all requirements and conditions imposed for the approval of the subdivision or partition by the City of Glendale Planning Commission and the Glendale City Council.”

⁸ LDO 1.0.60(A) provides:

“Compliance with the provision of the ordinance. Land and structures may be used for developed by construction, reconstruction, alteration, occupancy, use or otherwise, only as this ordinance or any amendment thereto permit. No plat shall be recorded or no building permit shall be issued without compliance with the provisions of this ordinance.”

1 If we count them correctly, the city offers a total of six separate theories for why it
2 believes the June 12, 2009 letter is not a land use decision.⁹ We only address the city's
3 second theory.

4 **B. ORS 92.100(7) and 197.015(10)(b)(G)**

5 Under ORS 92.100(7), "approval or withholding approval of a final subdivision * * *
6 plat * * * is not a land use decision or a limited land use decision."¹⁰ *Ehle v. City of Salem*,
7 54 Or LUBA 688 (2007); *Wagon Trail Ranch v. Klamath County*, 54 Or LUBA 654, 658
8 (2007); *Severson v. Josephine County*, 51 Or LUBA 569, 570-71 (2006). ORS
9 197.015(10)(b)(G) includes similar language. *See* n 5. As we have already explained, the
10 city's position is that (1) the September 14, 2007 final plat is invalid and (2) the city has not
11 approved the final plat and will not approve the final plat until petitioner pays outstanding
12 invoices for engineering services and the city engineer certifies that all subdivision
13 infrastructure complies with applicable specifications. We need not and do not attempt to
14 determine here whether the city's position is legally correct. However, it is clear beyond
15 doubt that the city's position in this matter is that it is withholding final plat approval until
16 engineering services invoices are paid and the required engineer certification is forthcoming.

⁹ First, the city contends the challenged letter qualifies for the ORS 197.015(10)(b)(A) exclusion for decisions rendered under standards that "do not require interpretation or the exercise of policy or legal judgment." *See* n 5. Second, the city contends the letter withholds final plat approval, and therefore is not a land use decision under ORS 197.015(10)(b)(G). Third, the city argues the decision concerns construction of a transportation facility and qualifies for the ORS 197.015(10)(b)(D) exclusion for certain transportation facility decisions. Fourth, the city contends petitioner's appeal of the June 12, 2009 letter should be dismissed as an impermissible collateral attack challenging earlier unappealed letters. Fifth, the city argues that land use decisions must be "final" decisions and that the June 12, 2009 letter is not a "final" decision. Finally, petitioner contends the challenged June 12, 2009 letter only applies preliminary plat conditions of approval and is therefore not a land use decision, because it does not apply any of the land use standards set out at ORS 197.015(10)(a).

¹⁰ ORS 92.100(7) provides:

"Granting approval or withholding approval of a final subdivision or partition plat under this section by the county surveyor, the county assessor or the governing body of a city or county, or a designee of the governing body, is not a land use decision or a limited land use decision, as defined in ORS 197.015."

1 The city first took that position in the August 12, 2008 letter from the city recorder to
2 petitioner. The city again took that position in its August 13, 2008 letter. The city attorney
3 also took that position in his September 30, 2008 letter. The city attorney's April 16, 2009
4 letter asks petitioner to rescind the final plat that was recorded on September 14, 2007, but
5 we do not understand that April 16, 2009 letter to change the city's position that the
6 petitioner still needs city final plat approval. Similarly, while the June 12, 2009 letter does
7 not expressly repeat the city's previously stated position that city final plat approval is
8 required and will not be forthcoming until the invoices for engineering services have been
9 paid, there is nothing in the June 12, 2009 letter to suggest that the city's position regarding
10 the need for and preconditions for final plat approval have changed. To the contrary, the June
11 12, 2009 letter takes the position that the preliminary plat "list of Project Completion
12 Requirements," which must be completed prior to final plat approval, "have [not] been met."
13 Respondent's Motion to Dismiss, Appendix 7.

14 It is clear from *Ehle*, *Wagon Trail Ranch* and *Severson* that under ORS 92.100(7) a
15 final local government decision that *approves* a final plat is not a land use decision or limited
16 land use decision. The decision that is before us is a decision that *withholds* final plat
17 approval. However, under ORS 92.100(7) and 197.015(10)(b)(G) it does not matter whether
18 the decision "approves" or "denies" a final plat or "withholds" final plat approval. *See* ns 5
19 and 9. All those final plat decisions are excluded from the ORS 197.015(10) definition of
20 land use decision, and none of those decisions are reviewable by LUBA.

21 **MOTION TO TRANSFER**

22 OAR 661-010-0075(11)(c) provides that:

23 "If the Board determines the appealed decision is not reviewable as a land use
24 decision or limited land use decision as defined in ORS 197.015(10) or (12),
25 the Board shall dismiss the appeal unless a motion to transfer to circuit court
26 is filed as provided in subsection (11)(b) of this rule, in which case the Board
27 shall transfer the appeal to the circuit court of the county in which the
28 appealed decision was made."

1 Petitioner filed a motion requesting that LUBA transfer this appeal to circuit court, in the
2 event LUBA finds that the June 12, 2009 letter is not a land use decision or limited land use
3 decision. The city opposes that motion, arguing that the challenged letter is not a “decision.”
4 Under ORS 34.102(2) and (4), transfer to circuit court for review via a writ of review is only
5 appropriate if the city has rendered a “decision,” in its “judicial or quasi-judicial capacity.”¹¹
6 We understand the city to argue that the June 12, 2009 letter is not accurately viewed as a
7 “decision,” because it lacks finality. The city also suggests the challenged letter is at most an
8 administrative decision, which is not reviewable via a writ of review under ORS 34.100(2).
9 *Graziano v. City Council of Canby*, 35 Or App 271, 273, 581 P2d 552 (1978). In opposing
10 the motion to transfer to circuit court, the city simply incorporates unspecified arguments it
11 previously made in its motion to dismiss, where it argued the challenged decision is not a
12 “land use decision” because it is not a “final” decision:

13 “LUBA does not have jurisdiction over non-decisions.” Motion to Dismiss 9.

14 “The city’s June 12th letter is not a final decision within the meaning of ORS
15 197.015(10)(a). It is a progress statement. The developer has not completed
16 the improvements. When they are completed, the city will be in a position to

¹¹ ORS 34.102 provides in part:

“(2) Except for a proceeding resulting in a land use decision or limited land use decision as defined in ORS 197.015, for which review is provided in ORS 197.830 to 197.845, or an expedited land division as described in ORS 197.360, for which review is provided in ORS 197.375 (8), the *decisions* of the governing body of a municipal corporation *acting in a judicial or quasi-judicial capacity* and made in the transaction of municipal corporation business shall be reviewed only as provided in ORS 34.010 to 34.100, and not otherwise.

“* * * * *

“(4) A notice of intent to appeal filed with the Land Use Board of Appeals pursuant to ORS 197.830 and requesting review of a *decision* of a municipal corporation made in the transaction of municipal corporation business that is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015 shall be transferred to the circuit court and treated as a petition for writ of review. If the notice was not filed with the board within the time allowed for filing a petition for writ of review pursuant to ORS 34.010 to 34.100, the court shall dismiss the petition.” (Emphases added.)

1 accept them and issue building permits. This is not substantially different
2 from a status report on any other subdivision project. It is perhaps a bit more
3 edgy as to stating the consequences, but the consequences flow naturally from
4 the city's previous determinations that the compaction was faulty and the
5 required fees weren't paid, and the edgy character is due to the developers
6 intransigence in fulfilling its duties to comply with the construction
7 specifications and arrange inspections. Merely stating the current status of a
8 matter is not a land use decision. * * *” Motion to Dismiss 16-17.

9 When the June 12, 2009 letter was written, the dispute between petitioner and the city
10 had dragged on for nearly a year. The city had issued a stop work order and petitioner
11 apparently had continued work on the subdivision infrastructure notwithstanding that stop
12 work order. The city's and petitioner's lawyers had exchanged letters that were every bit as
13 edgy as the June 12, 2009 letter. While it may be that a sufficient degree of finality is
14 required for a decision to qualify as a quasi-judicial decision under ORS 34.102(2), it seems
15 to us that the June 12, 2009 letter is about as final as a decision withholding final plat
16 approval could get.

17 It also seems to us that the June 12, 2009 decision qualifies as a quasi-judicial
18 decision rather than an administrative decision, although that seems to us to present a closer
19 question. The decision is more than an isolated letter demanding payment of alleged past due
20 fees owed; it is the culmination of a significant and protracted legal dispute between
21 petitioner and the city about a number of city requirements for construction of subdivision
22 improvements, acceptance of subdivision improvements and preconditions for approval and
23 recording of a final plat. Nevertheless, we believe any issue that there may be about whether
24 the June 12, 2009 letter constitutes a quasi-judicial decision that is reviewable by the circuit
25 court under ORS 34.102(2) is for the circuit court to decide.

26 For the reasons explained above, the challenged June 12, 2009 letter is not a land use
27 decision or limited land use decision. Petitioner's motion to transfer this appeal to circuit
28 court pursuant to ORS 34.102(4) and OAR 661-010-0075(11)(c) is granted.

29 This appeal is transferred to Douglas County Circuit Court.