BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAMES RICHARDI,
Petitioner,

vs.

CITY OF EUGENE,
Respondent,

EUGENE CIVIC ALLIANCE,
Intervenor-Respondent.

LUBA No. 2018-082

WILL, LLC,
Petitioner,

vs.

CITY OF EUGENE,
Respondent,

EUGENE CIVIC ALLIANCE,
Intervenor-Respondent.

LUBA No. 2018-083

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Michael E. Farthing, Eugene, filed a petition for review and argued on behalf of petitioner James Richardi.

Micheal M. Reeder, Eugene, filed a petition for review and argued on

behalf of petitioner Will, LLC. With him on the brief was the Law Office of Mike Reeder.

Lauren A. Sommers, Assistant City Attorney, Eugene, filed a response brief and argued on behalf of respondent.

William K. Kabeiseman, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Bateman Seidel Miner Blomgren Chellis & Gram, P.C.

ZAMUDIO, Board Member; RYAN, Board Chair; BASSHAM, Board Member, participated in the decision.

AFFIRMED 10/24/2018

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

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioners appeal a hearings officer's decision approving an application to develop an outdoor athletic field and neighborhood center on property zoned Public Lands (PL).

MOTION TO INTERVENE

The applicant Eugene Civic Alliance (intervenor) moves to intervene on the side of respondent in these consolidated appeals. No party opposes the motions and they are allowed.

FACTS

The subject property is comprised of approximately 9.3 acres designated medium density residential (R-2) in the Eugene-Springfield Metropolitan Area General Plan (Metro Plan) and zoned PL. Petitioners James Richardi and Will, LLC (petitioners) own multi-family residential rental units on abutting property.

The subject property is the site of the former Civic Stadium, an outdoor athletic stadium that was the home of a minor league baseball team from 1969 to 2009. The former Civic Stadium was destroyed by fire in the summer of 2015. The subject property was formerly owned by a school district. In 1987, the city adopted recommendations from the South Willamette Subarea Study

(SWS Study) as a refinement of the Metro Plan. Eugene City Ordinance No. 19523 (Dec 7, 1987). SWS Study Policy 3 (Policy 3),[1] provides:

> "The School District-owned Civic Stadium and bus garage property is appropriately designated for medium density residential development on the Metro Plan Diagram, but should remain zoned Public Land as long as the Civic Stadium use remains."

In 2009, the school district sold the subject property to the city. In April 2015, the city sold the subject property to intervenor, a non-profit organization established to develop and operate a community sports venue on the historic Civic Stadium property. Deed restrictions require that the property be "owned, operated and maintained by a public and/or private non-profit agency as a sports and recreation complex or, until funding is available, open space." Record 1109.

Intervenor desired to develop the subject property with a family-oriented sports facility to primarily serve the general public. The facility would include an outdoor athletic field with 2,500 to 5,000 covered seats, locker rooms, office, vending, parking, landscaping and site infrastructure and an indoor athletic facility with indoor basketball/volleyball courts, locker rooms, offices and additional sports areas. In October 2015, intervenor applied for a zone verification pursuant to Eugene Code (EC) 9.1080, to determine whether

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[1] Policy 3 is codified at EC 9.9640(3).

intervenor's intended uses would be permitted on the property. EC 9.1080 provides:

> "**Zone Verification.** Zone verification is used by the city to evaluate whether a proposed building or land use activity would be a permitted use or be subject to land use application approval or special standards applicable to the category of use and the zone of the subject property. The city may use zone verification as part of the review for a land use application or development permit, or where required by this land use code. As part of the zone verification, the planning and development director shall determine whether uses not specifically identified on the allowed use list for that zone are permitted, permitted subject to an approved conditional use permit or other land use permit, or prohibited, or whether a land use review is required due to the characteristics of the development site or the proposed site. This determination shall be based on the requirements applicable to the zone, applicable standards, and on the operating characteristics of the proposed use, building bulk and size, parking demand, and traffic generation. Requests for zone verification shall be submitted on a form approved by the city manager and be accompanied by a fee pursuant to EC Chapter 2." (Boldface and underscoring in original.)

The city responded to intervenor's request for a zone verification in a letter to intervenor dated November 9, 2015 (2015 Zone Verification), which determined that the following proposed uses are permitted in the PL zone:

> "1. Outdoor athletic field with 2,500 to 5,000 covered seats, locker rooms, office, vending, parking, landscaping and site infrastructure;
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> "2. KIDSPORTS facility with approximately 40,000 square foot sports center with indoor basketball/volleyball courts, locker rooms, offices and additional sports areas." Record 490.

The 2015 Zone Verification explained that an athletic field, outdoor and neighborhood center are both outright permitted uses in the PL zone. The 2015 Zone Verification was documented within the city's permit tracking system and made available to the public. Record 491. *See* ORS 227.175(11)(a) (requiring a zoning classification decision described in ORS 227.160(2)(b) to be entered into a public registry). The city was not required to and did not provide notice of the 2015 Zone Verification to neighboring property owners.[2]

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[2] A zone verification is not a statutory land use "permit." The city is required to enter a zone verification decision into a public registry; however, the city is not required to provide notice of the decision or opportunity for a local appeal of the decision. A zone verification decision is subject to LUBA review and the 21-day appeal period.

ORS 227.160(2)(b) provides:

> "(2) 'Permit' means discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation. 'Permit' does not include:
>
> "* * * * *
>
> "(b) A decision which determines the appropriate zoning classification for a particular use by applying criteria or performance standards defining the uses permitted within the zone, and the determination applies only to land within an urban growth boundary[.]"

ORS 227.175(11) provides:

> "(11) A decision described in ORS 227.160(2)(b) shall:
>
> "(a) Be entered in a registry available to the public setting forth:

On October 20, 2017, intervenor applied for site review, adjustment review, and traffic impact analysis review for an outdoor athletic field and neighborhood center. The city planning director approved the application with conditions. Petitioners and intervenor appealed that decision to the city hearings officer, who approved the application with conditions. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the hearings officer erred in finding that the proposed uses are allowed in the PL zone. Petitioners concede, as they must, that outdoor athletic fields, neighborhood centers, and combinations of those uses, are outright permitted uses in the PL zone. *See* EC 9.2682(1)(d).[3]

> "(A) The street address or other easily understood geographic reference to the subject property;
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> "(B) The date of the decision; and
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> "(C) A description of the decision made.
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> "(b) Be subject to the jurisdiction of the Land Use Board of Appeals in the same manner as a limited land use decision.
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> "(c) Be subject to the appeal period described in ORS 197.830(5)(b)."

ORS 197.830(5)(b) provides that a person adversely affected by the decision may appeal the decision to LUBA "[w]ithin 21 days of the date a person knew or should have known of the decision where no notice is required."

[3] EC 9.2682 provides, in pertinent part:

However, petitioners argue that the hearings officer misclassified intervenor's intended uses, which, in petitioners' view, are more appropriately classified together as an "Athletic Facility and Sports Club," which is a use category that is permitted in the employment and commercial zones, but not in the PL zone. EC Table 9.2160; EC Table 9.2450.

The hearings officer first concluded that petitioners' arguments regarding how the proposed uses are classified and whether they are allowed in the PL zone constituted an impermissible collateral attack on the 2015 Zone Verification. The hearings officer also adopted alternative findings that the proposed uses are properly classified as an outdoor athletic field, community

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"**Public Land Zone Land Use and Permit Requirements.**

"**(1) Permitted Public or Semi-Public Uses.** The following uses are permitted in the PL public land zone:

"* * * * *

"(d) The following uses not operated by the public agency that owns the property when the owner declares that the property is not currently needed for public uses:

"1. Athletic Field, outdoor.

"* * * * *

"4. Community and Neighborhood Centers.

"* * * * *

"9. Combinations of the above uses." (Boldface and underscoring in original.)

and neighborhood center, and combination of those uses, and accordingly are permitted outright in the PL zone.

In *Safeway, Inc. v. City of North Bend*, 47 Or LUBA 489, 500 (2004) we explained:

> "As a general principle, issues that were conclusively resolved in a final discretionary land use decision, or that could have been but were not raised and resolved in that earlier proceeding, cannot be raised to challenge a subsequent application for permits necessary to carry out the earlier final decision."

See also Butte Conservancy v. City of Gresham, 47 Or LUBA 282, 296, *aff'd* 195 Or App 763, 100 P3d 218 (2004) (assignments of error that collaterally attack a decision other than the decision on appeal do not provide a basis for reversal or remand).

Petitioners argue that the 2015 Zone Verification does not prevent them from raising the issues in the first assignment of error for three reasons. *First*, petitioners argue that the 2015 Zone Verification is not a final land use decision. In petitioners' view, the 2015 Zone Verification was part of the application on review in this proceeding which, as noted, intervenor submitted in 2017. *Second*, petitioners argue that, because the 2015 Zone Verification is not a statutory permit, it may not have any preclusive effect on later proceedings. *Third*, petitioners argue that, even if the 2015 Zone Verification is a final land use decision, it is not the type of land use decision that has preclusive effect.

Petitioners acknowledge that their arguments are contrary to our decision in *McCollough v. City of Eugene*, 74 Or LUBA 573 (2016). In *McCollough*, in March 2015, the Housing and Community Services Agency of Lane County (HCSA) obtained a zone verification decision from the city that concluded that the proposed development qualified as Controlled Income and Rent Housing, which is a permitted use in the R-2 zone, subject to special standards. *Id.* at 576. The zone verification also specified permitted density and accessory and conditional uses. *Id.* HCSA subsequently filed a site plan and building permit applications. *Id.* In April 2016, the city approved the building permits, and the petitioners appealed those approval decisions to LUBA. *Id.* at 577.

We held that the zone verification decision controlled the question of whether the proposed use is a permitted use in the zone and explained that "those answers cannot be collaterally attacked in the present appeals of the building permit decisions." *Id.* at 578–79. We observed that a zone verification "is a limited tool that resolves only those land use planning questions regarding a specific proposed development that are actually asked and answered." *Id.* at 578 n 4.

Petitioners argue that *McCollough* was wrongly decided because a zone verification is an elective procedure that was not required for intervenor to obtain approval of the proposed development, and accordingly the zone verification should not have any preclusive effect on petitioners' ability to raise issues in these appeals.

Intervenor responds that the collateral attack principle is broader than petitioners assert and that our decision in *McCollough* is consistent with *Safeway*. We agree. The cases cited by petitioners stand for the principle that legal issues that were decided in prior land use decisions may not be collaterally attacked in an appeal of a later land use decision. That principle is based on the finality of the prior land use decision and not on the mandatory or elective nature of the procedure that leads to that decision. The principle of collateral attack is that a final legal determination on a land use matter shall stand in later proceedings if not successfully challenged in prior proceedings. *Lockwood v. City of Salem*, 51 Or LUBA 334, 344 (2006); *Sahagian v. Columbia County*, 27 Or LUBA 341, 344 (1994); *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 16 Or LUBA 49, 52 (1987).

Zone classification decisions, such as the Zone Verification, are appealable to LUBA "in the same manner as a limited land use decision." ORS 227.175(11)(b); ORS 197.830(5). LUBA has exclusive jurisdiction to review land use decisions and limited land use decisions. ORS 197.825. Under the applicable statutory scheme, and EC 9.1080, the Zone Verification is a final land use decision. The fact that a zone verification is not a statutory permit removes certain procedural requirements that apply to statutory permits, such as notice and the opportunity for a hearing. However, the fact that a zone verification is not a statutory permit does not mean that a zone verification is

not a final land use decision for purposes of LUBA review, including the general prohibition on collateral attack.[4]

The 2015 Zone Verification answered the question of whether the proposed uses as described are permitted in the PL zone. Those determinations cannot be collaterally attacked in the present appeal.

However, even if we assume for purposes of this opinion that petitioners are not precluded from challenging the proper zoning classification of the proposed uses and whether they are allowed in the PL zone, we also agree with the city and intervenor that the hearings officer correctly concluded that the proposed uses are outdoor athletic field, neighborhood center, and a combination—which are permitted uses in the PL zone. The proposed uses include an outdoor athletic field with 2,500 to 5,000 covered seats, locker rooms, office, vending, parking, landscaping, and site infrastructure. The proposed neighborhood center is an approximately 40,000-square-foot sports center with sport courts, locker rooms, and offices.

The proposed outdoor area for sporting events is an "athletic field" as defined by the EC:

> "**Athletic Field(s)**. Open playing fields applicable to team-oriented sports such as football, baseball, softball, soccer, rugby, field hockey, ultimate frisbee, and other field-based activities. Athletic fields are distinguished from parks or playgrounds that

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[4] We note that an appeal of the Zone Verification is pending at the time that this decision is issued. *Leyden v. City of Eugene*, LUBA No. 2018-114.

provide for a greater range of use." EC 9.0500 (boldface in original).

The proposed indoor area is a "neighborhood activity center" as defined by the EC:

> "**Neighborhood Activity Center**. A building or premises used for recreational, social, educational, or cultural activities, open to the public or a designated part of the public, which is a common destination or focal point for community activities. Includes primary and secondary schools, neighborhood parks and playgrounds, and shopping centers." EC 9.0500 (boldface in original).[5]

Petitioners argue that the proposed uses are not an outdoor "athletic field" and "neighborhood activity center" but are an "athletic facility and sports club" because the outdoor seating area is proposed for up to 5,000 seats and intervenor's website, fundraising materials, and traffic impact analysis state that a soccer club will lease and use the facility. Record 145, 149, 407.

EC 9.0500 does not define "athletic facility and sports club," but that use is categorized under "entertainment and recreation" uses permitted in other zones, including the commercial and employment and industrial zones, but not in the PL zone. EC Table 9.21.60; EC Table 9.2450. The fact that a different category of use is permitted in other zones does not mean that the proposed use is not an outdoor athletic field and neighborhood center. Nothing in the EC

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[5] The hearings officer noted that the term in EC 9.2682(1)(d)(4) "neighborhood center" is not exactly the same as "neighborhood activity center" in EC 9.0500. Record 12. We perceive no meaningful distinction between those terms.

supports petitioners' assertion that seating capacity is a dispositive characteristic. The fact that a soccer club might lease the premises does not compel the conclusion that the facility is not an outdoor athletic field and neighborhood center. Petitioners emphasize that a "neighborhood activity center" is "open to the public or a designated part of the public," as defined in EC 9.0500. The fact that public access to the premises might be limited and regulated—including during soccer games—does not transform the use of the premises into something other than a neighborhood center.

In sum, petitioners' arguments regarding the characterization and permissibility of the proposed uses constitute impermissible collateral attacks on the 2015 Zone Verification. Even if petitioners were not precluded from raising issues regarding the permissibility of the proposed uses, the hearings officer correctly concluded that the proposed uses are an outdoor athletic facility, neighborhood center, and a combination of those uses, which are outright permitted uses in the PL zone.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that even if the proposed uses are permitted uses in the PL zone, the property should no longer be zoned PL, but must be rezoned medium density residential (R-2). Petitioners contend that, because the Civic Stadium was destroyed by fire in 2015, approval of those uses is inconsistent with SWS Study Policy 3, as codified at EC 9.9640(3). See n 1. EC 9.8440(6)

requires the site review application to comply with applicable adopted plan policies. As quoted above, Policy 3 provides:

> "The School District-owned Civic Stadium and bus garage property is appropriately designated for medium density residential development on the Metro Plan Diagram, but should remain zoned Public Land as long as the Civic Stadium use remains."

The hearings officer explained that the 2015 Zone Verification did not address Policy 3 and, therefore, that petitioners were not precluded from raising the issues they raised under Policy 3. The hearings officer also rejected intervenor's and the city's suggestion that Policy 3 is not mandatory but merely suggestive. The hearings officer reasoned:

> "EC 9.8440(6) requires site review applications to comply with the adopted plan policies codified and beginning at EC 9.9500. EC 9.9640(3) provides that Medium Density Residential is the proper plan designation for the property. EC 9.9640(3) further provides that PL zoning should remain as long as Civic Stadium remains. Now that Civic Stadium has burned down and is not being replaced, the zoning is not in compliance with the comprehensive plan. If an owner or the City Council wanted to rezone the property, EC 9.9640(3) is a mandatory provision that would require the property be rezoned consistent with its Medium Density Residential plan designation.
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> "The current application, however, does not entail a zone change. The proposed use would result in a use that is in conformance with the zoning of the property but not the plan designation. That situation occurs regularly. [Petitioner] Richardi argues that there is a de facto 'rezoning by fire.' As [intervenor] explains, no such thing occurs. [Petitioner] Will, LLC argues that even though there is no automatic rezoning of the property, any future uses of the property must be in conformance with the plan designation for the property. [Petitioner] Will, LLC, however, cannot point to any

> code provision (other than EC 9.9640(3)) that requires proposed uses to be consistent with the comprehensive plan designation rather than the zoning designation when the zoning designation is not in compliance with the plan designation. Again, this occurs regularly. That does not mean that EC 9.9640(3) prevents uses that comply with the PL zoning.[]
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> "While I agree with [petitioners] that EC 9.9640(3) is mandatory, rather than aspirational, I do not agree that it applies when no zone change is at issue. In other words, the application complies with EC 9.9640(3) because it is not rezoning the property to a zone that does not comply with the Medium Density Residential plan designation now that Civic Stadium no longer remains. EC 9.9640(3) does not preclude [intervenor] from applying for uses allowed in the PL zone." Record 14 (footnote omitted).

Intervenor responds that the second assignment of error is also an impermissible collateral attack on the 2015 Zone Verification. However, the hearings officer found that, because the 2015 Zone Verification did not address Policy 3, petitioners' argument was not a collateral attack on that decision. Intervenor did not challenge that finding in a cross petition for review. We conclude that the hearings officer's decision that petitioners could raise the issue of Policy 3 is correct. As we explained in *McCollough*, a zoning verification is a "limited tool" and only those issues actually addressed in the zoning verification are protected from collateral attack. *See McCollough*, 74 Or LUBA at 578 n 4 ("it is important to recognize that a zoning classification decision is a limited tool that resolves only those land use planning questions regarding a specific proposed development that are actually asked and answered").

The city responds that nothing in Policy 3 or the EC requires intervenor or the city to rezone the property and the property need not be rezoned until it is sold for private development. In support of that argument, the city relies on EC 9.2681, which provides that land zoned PL must be owned by either a public entity or a nonprofit organization established primarily to provide public uses *and must be rezoned* when the public land is sold for private development.[6] However, that response does not really address petitioners' argument, which is that Policy 3 implicitly requires the city to rezone the property to R-2 after the Civic Stadium was destroyed by fire.

Petitioners cite ORS 197.175(2)(d) and argue that the city's decision to approve the application without rezoning the property to R-2 is inconsistent with the comprehensive plan. *See* ORS 197.175(2)(d) (cities shall make land use decisions and limited land use decisions in compliance with the acknowledged plan and land use regulations). Petitioners cite *Baker v. City of Milwaukie*, 271 Or 500, 533 P2d 772 (1975) in support of their argument. Petition for Review 30. In *Baker*, the city's zoning ordinance allowed density

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[6] EC 9.2681(2) provides:

> "[T]he subject site must be land owned solely by a public agency or a non-profit organization established primarily to provide public uses listed in EC 9.2682(1). *When public land is sold for private development, the property shall be rezoned* according to the procedures for zone changes beginning with and following section 9.8850 Purpose of Zone Changes." (Underscoring in original; italics added.)

of 39 units per acre on the property, while the city's later-adopted comprehensive plan allowed 17 units per acre. *Id.* at 503. After the city issued building permits for neighboring property to develop at the more intensive density provided in the zoning ordinance, the plaintiffs filed a writ of mandamus to compel the city to suspend issuance of the building permits and amend the zoning to conform to the comprehensive plan's less intensive development density. *Id.* at 502. The plaintiffs also sought to compel the city to modify the zoning to conform to the comprehensive plan. *Id.* The Supreme Court explained that zoning is subordinate to planning because zoning is "the means by which the comprehensive plan is effectuated." *Id.* at 506. The court held that the comprehensive plan controlled over the inconsistent and subordinate zoning ordinance that allowed for more intensive development than contemplated in the plan. *Id.* at 514.

Baker is inapposite here for two reasons. First, petitioners have not established that, like the facts in *Baker*, the R-2 comprehensive plan designation allows for less intensive development than the PL zoning allows or vice versa. Second, and more importantly, petitioners have failed to establish that Policy 3 or ORS 197.175(2)(d) require the city or intervenor to rezone the property in connection with the application. The question in this appeal is whether Policy 3 requires the city to deny the application or requires the city and intervenor to rezone the property in connection with the application.

Petitioners have not established that Policy 3 requires the city to take any action.

The hearings officer explained that the destruction of the Civic Stadium and intervenor's subsequent application for permitted uses of the property do not trigger any requirement that the property be rezoned to R-2. Policy 3 simply says that the property will remain zoned PL but does not mandate a rezoning when the Civic Stadium use no longer remains. In contrast, EC 9.2681(2) requires the city to rezone property "[w]hen public land is sold for private development." See n 6. Policy 3 is simply silent about a different use that is permitted under the PL zoning that is not the Civic Stadium use.

We conclude that the hearings officer correctly concluded that Policy 3 does not compel intervenor or the city to rezone the subject property and does not require intervenor's land use application be denied. The subject property is currently zoned PL and the hearings officer did not err in approving uses that are permitted in the PL zone.

The second assignment of error is denied.

The city's decision is affirmed.