

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 KNUTSON FAMILY LLC,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF EUGENE,
10 *Respondent,*

11
12 and

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14 CAROL BOTHMAN, CHRIS BOTHMAN
15 and CARLEE INVESTMENTS, LLC,
16 *Intervenors-Respondent.*

17
18 LUBA No. 2004-100

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20 CARL BOTHMAN, CHRIS BOTHMAN
21 and CARLEE INVESTMENTS, LLC,
22 *Petitioners,*

23
24 vs.

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26 CITY OF EUGENE,
27 *Respondent,*

28
29 and

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31 KNUTSON FAMILY LLC,
32 *Intervenor-Respondent.*

33
34 LUBA No. 2004-106

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36 ORDER ON MOTION TO DETERMINE JURISDICTION
37 AND ORDER SETTLING RECORD

38 Petitioner Knutson Family, LLC (petitioner) moves for an order determining jurisdiction.¹ It

¹ Petitioner filed its “Motion to Determine Jurisdiction” on August 13, 2004. The city responded to the motion, and supplemented the record with additional information on August 24, 2004. The city’s

1 argues that the challenged decision is not “final” and therefore this Board does not have jurisdiction
2 to review it.

3 **FACTS**

4 The decision challenged in this appeal is a decision by the city planning commission denying
5 petitioner’s request to rezone several tax lots. The city hearings official initially denied the
6 application, and petitioner appealed that denial to the planning commission, raising four separate
7 appeal issues. The planning commission held its final deliberations on June 9, 2004. At that
8 meeting, the planning commission addressed the four appeal issues and voted orally to affirm the
9 hearings official on three appeal issues, reverse the hearings official on the fourth, modify some of
10 the hearings official’s findings, and deny the zone change request. The oral discussions were
11 relatively specific regarding the content of the modified language for the findings to be adopted on
12 the fourth appeal issue.²

13 Following that June 9, 2004 meeting, planning staff drafted findings for approval by the
14 planning commission. On June 22, 2004, the planning director e-mailed the draft findings to four
15 planning commissioners, including the commission president. The e-mail provided:

16 “Hello Commissioners – here is the final order for the Knutson appeal. This has
17 been through review by legal [counsel] and they have given their final input. We
18 worked hard to keep it clear and simple, and directly in line with the wording of
19 your motions (other than where legal [counsel] advised minor revisions). Our

supplementation was referred to as “Second Supplemental Record of Proceedings.” We will refer to that document as “Sec. Supp. Record” and to the original record as “Record.” On August 30, 2004, petitioner filed a “Renewed Motion and Second Memorandum of Knutson Family LLC Relating to Jurisdiction” and the city responded to that renewed motion on September 2, 2004. In this order, we refer to both motions as the Motion to Determine Jurisdiction and include discussion of all relevant facts and arguments in all of the pleadings filed by petitioner and the city.

² The fourth appeal issue involved EC 9.8865(3), which provides: “[t]he uses and density that will be allowed by the proposed zoning in the location of the proposed change can be served through the orderly extension of key urban services.” With respect to EC 9.8865(3), the minutes reflect that following a discussion of that applicable criterion:

“Ms. McMillan moved, with a second from Mr. Belcher, that the Hearings Official erred with respect to findings on criterion [9.8865(3)] as the evidence provided by the applicant, including the traffic analysis, appeared to demonstrate that transportation facilities could be extended to the C-2 uses that would be permitted on the five tax lots in question. * * *” Record 28.

1 process we would like to follow would be to have Chuck review and sign.
2 However, a few of you requested the opportunity to see the order so I wanted to
3 send it to you. I would recommend, if possible, you resist the urge to make minor
4 modifications to this if you can live with the wording as we have proposed.

5 “Please contact me ASAP if you have an issue with the order (how about by end of
6 day Wednesday the 23rd). If I don’t hear from anyone we will proceed and have
7 Chuck sign it. Chuck, let us know here how you would like to print/sign, we can
8 insert the date and you can stop by and sign, or you can insert the date, sign, and
9 we’ll figure out a way to get it to our office ASAP. There are timelines associated
10 with this so we need to move quickly. * * *.” Sec. Supp. Record 13.³

11 Later the same day, at least one planning commissioner e-mailed the planning director that he could
12 not open the draft findings in the particular format in which it had been sent.⁴ Sec. Supp. Record 2.

13 The record reflects that, on the morning of June 23, 2004, the planning director forwarded the draft
14 findings to all four planning commissioners in a different format. *Id.* At noon on June 23, 2004, the
15 commission president replied to the planning director’s e-mail: “I just read the order quickly and no
16 flags popped up.” Sec. Supp. Record 1. The record does not reflect that anyone other than the
17 planning commission president responded to the planning director’s e-mail. The planning
18 commission president signed the findings the following day, on June 24, 2004.⁵

19 This appeal followed. In the course of reviewing the record on appeal, petitioner’s counsel

³ References to “Chuck” are to the president of the planning commission.

⁴ The e-mail from the planning commissioner seems to suggest that there were others who could not access the findings (“I, too, cannot open this document * * *.”); however, the record does not contain any e-mail correspondence regarding the formatting of the document from other planning commissioners. Sec. Supp. Record 2.

⁵ The findings provide, as relevant:

“The Eugene Planning Commission sustains the appellant’s fourth assignment of error and finds that the Hearings Official erred with respect to the scope of EC 9.8655(3) [sic]. The Hearings Official improperly concluded that the applicant failed to demonstrate that the existing transportation system can be extended in an orderly fashion to serve a more intense level of development. The Eugene Planning Commission concludes that the evidence in the record is adequate to demonstrate that transportation facilities can be extended to serve the C-2 uses that would be permitted on the five tax lots. Specifically, the traffic analysis submitted by applicant, and included in the record, provides sufficient evidence that the transportation facilities can be appropriately extended.” Record 9.

1 noticed that the record did not seem to reflect that all members of the planning commission reviewed
2 the final order. Motion of Petitioner Knutson to Determine Jurisdiction 1. It subsequently filed this
3 motion.

4 **DISCUSSION**

5 LUBA has jurisdiction to review “land use decisions.” ORS 197.825(1).⁶ A “land use
6 decision” must be a “final” decision. ORS 197.015(10)(a)(A).⁷ A “final decision” is one that is
7 “reduced to writing and bears the necessary signatures of the decision maker(s).” OAR 661-010-
8 0010(3). The “final decision maker” is “the governing body, or a person, commission or other
9 entity authorized by the governing body, that makes the final decision.” OAR 661-010-0010(4).
10 Petitioner argues that because there is no evidence that the final order and accompanying findings
11 were reviewed by the planning commission members, other than the president who signed the final
12 decision, there was no final decision. According to petitioner, LUBA lacks jurisdiction.

⁶ ORS 197.825, entitled “Jurisdiction of board,” provides in relevant part:

“(1) Except as provided in ORS 197.320 and subsections (2) and (3) of this section, the Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845.

⁷ ORS 197.015(10) provides, in part:

“‘Land use decision’

“(a) Includes:

“(A) 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;

“* * *.”

1 Petitioner’s sole source of authority in support of his contention that we lack jurisdiction is a
2 1980 opinion by this Board, *Thede v. Polk County*, 1 Or LUBA 339 (1980). In *Thede*, the
3 county planning director initially denied an application for approval of a partition. The applicant
4 appealed that determination to the board of commissioners (BOC). The BOC conducted a hearing,
5 closed the record and voted to approve the partition. Legal counsel then prepared an order
6 approving the partition, and the BOC chair signed the order, but the order was never presented to
7 the full BOC. The petitioners in that case argued that the order was not a final order because it was
8 not adopted, approved or ratified by the BOC. We agreed with the petitioners, holding that “a
9 letter order containing findings of fact which has not been reviewed by the governing body and
10 adopted by the governing body as its order is not a final order * * *.” *Id.* at 343. We stated that
11 local governing bodies are free to delegate to a chairperson the authority to sign a final order for the
12 governing body. *Id.* at 344. However, in holding that the order was not a final decision over which
13 we had jurisdiction, we concluded that the governing body may not delegate to one its members
14 “approval of written findings in support of a land use decision and the entry of a final order granting
15 that approval.” *Id.* at 343-44.

16 The city attempts to distinguish *Thede* from the facts in this case. That exercise is
17 unnecessary, however, because *Thede* has been implicitly overruled, at least in part, as discussed
18 below.

19 Petitioners inaccurately frame the issue as one of finality. The error that petitioners allege
20 the decision maker committed is either (1) a procedural error or (2) a question of the planning
21 commission president’s authority to sign the challenged decision where the other planning
22 commissioner’s did not review and approve the final written decision. Whether it is a procedural
23 error or a question of the decision maker’s authority, the issue is properly presented as a challenge
24 on the merits. *See Caraher v. City of Klamath Falls*, 30 Or LUBA 204, 211 (1995) (whether
25 the decision maker exceeded the scope of his authority was not a proper consideration in
26 determining whether LUBA had jurisdiction over the challenged decision).

1 The statutes and LUBA’s rules directly address the question of a decision maker’s authority
2 to act. ORS 197.835(9)(a)(A); OAR 661-010-0071(1)(a).⁸ The statutes and rules provide that
3 where a local governing body exceeds its jurisdiction, LUBA must reverse or remand the challenged
4 decision. The directive falls within the “scope of review” provisions of the statute, ORS 197.835,
5 and not within the section that spells out LUBA’s jurisdiction, ORS 197.825. *See n 6; see also*
6 *Scott v. Josephine County*, 22 Or LUBA 82, 86 (1991)(reversing board of commissioners’
7 decision because board exceeded its authority by approving application for alteration of
8 nonconforming use before action by the hearings officer, as was required under the local code);
9 *Downtown Community Ass’n. v. Portland*, 3 Or LUBA 244, 253 (1981) (“* * * City Council
10 exceeded its authority, and, hence, its jurisdiction in granting a variance request without that request
11 having been first acted upon by the Variance Committee of the Planning Commission.”). Alleged

⁸ ORS 197.835, entitled “Scope of review,” provides, in part:

- “(9) [T]he board shall reverse or remand the land use decision under review if the board finds:
 - “(a) The local government or special district:
 - “(A) Exceeded its jurisdiction;
 - “(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;
* * *.”

OAR 661-010-0071 provides, in part:

- “(1) The Board shall reverse a land use decision when:
 - “(a) The governing body exceeded its jurisdiction;
* * * * *.”
- “(2) The Board shall remand a land use decision for further proceedings when:
 - * * * * *
 - “(c) The decision is flawed by procedural errors that prejudice the substantial rights of the petitioner(s) * * *.”

1 procedural errors are also issues that are properly raised in a petition for review. ORS
2 197.835(9)(a)(B); OAR 661-010-0071(2). See n 8.

3 Here, as in *Caraher*, the “sole question is whether the challenged decision falls within the
4 class of decisions over which LUBA has review authority.” *Caraher*, 30 Or LUBA at 211. The
5 challenged decision in this case is a signed, facially valid written decision and is, therefore, a final
6 decision subject to our jurisdiction, although it may be susceptible to challenge based on procedural
7 irregularities. There is a difference between a decision that has not been reduced to writing or does
8 not bear the necessary signatures of the decision maker and a decision that has been reduced to
9 writing but may not have been properly signed by the decision maker or by someone with authority
10 to sign for the decision maker. “The former circumstance vests no jurisdiction in LUBA, the latter
11 circumstances vests jurisdiction and may result in reversal or remand.” *Urban Resources v. City*
12 *of Portland*, 5 Or LUBA 299, 303 (1982).

13 CONCLUSION

14 To the extent our opinion in *Thede* holds that LUBA lacks jurisdiction where it determines
15 that a president or chair of a local decision making body lacks authority to sign the final written
16 decision for the decision making body, we now expressly overrule it. We do not determine whether
17 a procedural error occurred in this case or whether the planning commission president had authority
18 to act under the circumstances presented here. We decide only that the challenged decision in this
19 appeal falls within the class of decisions over which we have review authority.

20 Respondent’s supplemental record has been received, and the record is settled as of the
21 date of this order. The petition for review is due 21 days from the date of this order. The response
22 brief is due 42 days from the date of this order. The Board’s final opinion and order is due 77 days
23 from the date of this order.

24 Dated this 20th day of October, 2004.

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26 _____
27 Anne C. Davies
28 Board Member