

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

3
4 MOLLY JACOBSEN,
5 *Petitioner,*

6
7 vs.

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9 CITY OF WINSTON,
10 *Respondent,*

11 and

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13 FULLERTON & LEFEVRE,
14 *Intervenor-Respondent.*

15
16 LUBA No. 2010-074

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18 ORDER

19 **MOTION TO INTERVENE**

20 Fullerton & Lefevre (intervenor), the applicant below, moves to intervene on the side
21 of respondent in this appeal. There is no opposition to the motion, and it is granted.

22 **MOTION TO DISMISS**

23 This appeal involves petitioner’s appeal of a city decision regarding expansion of a
24 commercial loading dock at a Pepsi bottling plant. The notice of intent to appeal (NITA)
25 includes a copy of the one-page decision, which is entitled:

26 “Planning and Sanitation Pre-Application Worksheet No. 01-09.”

27 Below that title is the following: “[p]lanning approval valid for one (1) year from the date of
28 the approval.” In a section of the worksheet where the planning department provides the
29 required information, in a space entitled “Lot of Record” is listed “1600,” which is
30 presumably the tax lot number for the property, and in a space entitled “zoning” is listed “M-
31 L.”

1 The city moves to dismiss the appeal, arguing that the challenged decision is not a
2 final decision.¹ According to the city, the decision identified in the NITA is precisely what it
3 is entitled: a pre-application worksheet. Under the city’s theory, the pre-application
4 worksheet is a preliminary city document that is generated as part of the building permit
5 process, and the final decision on the building permit is made at a later stage by the Douglas
6 County Building Department.² According to the city, any challenge to the proposed loading
7 dock expansion must await a final decision on the building permit by Douglas County.

8 Petitioner responds that although the worksheet states that it a “pre-application
9 worksheet,” the worksheet serves as final *city planning department* approval for the proposed
10 use. According to petitioner, the decision challenged in the NITA is the single instance in
11 which the *city* makes a determination as to whether the proposed use is allowed under
12 applicable city ordinances. Petitioner argues that while Douglas County may approve the
13 final building permit, in approving that permit the county only considers whether the
14 proposed construction complies with the building code, but relies on the city’s determination
15 as to whether the use is permitted under the city’s land use ordinance.

16 We agree with petitioner that the title of the worksheet is not indicative of its actual
17 character or effect, and does not establish that the worksheet is not a final decision. On its
18 face, the worksheet appears to grant the city’s “planning approval” for the proposed dock,
19 valid for one year. Absent any other argument from the city, the challenged decision
20 certainly appears to be the city’s final determination that the proposed dock expansion is a
21 permitted use under its land use regulations. Decisions that local governments do not believe
22 to be land use decisions and do not process as land use decisions may in fact be land use

¹ Under ORS 197.825(2)(a), LUBA’s jurisdiction is limited to “final” decisions where the “petitioner has exhausted all remedies” before appealing to LUBA.

² Apparently, Douglas County reviews building permits for construction within the city for compliance with the building codes under these circumstances.

1 decisions. *Tirumali v. City of Portland*, 169 Or App 241, 246-47, 7 P3d 761 (2000); *Weeks*
2 *v. City of Tillamook*, 113 Or App 285, 289, 832 P2d 1246 (1992). While Douglas County
3 may ultimately determine whether the proposed dock expansion complies with the building
4 code, the city has not demonstrated that in making that determination the county would or
5 could consider whether the proposed dock expansion is a permissible use under city land use
6 regulations. As far as we can tell, and as far as the city has demonstrated, the decision
7 challenged in the NITA is the city's final approval of the proposed dock expansion.

8 The city's motion to dismiss is denied.

9 **AMENDED NITA**

10 In a response to the city's motion to dismiss, petitioner requested that in the event that
11 there is a later decision by the city that she is not aware of, the city be required to provide her
12 with a copy of that decision and that she be allowed to amend the NITA filed to appeal the
13 challenged decision to include the subsequent decision. Petitioner's request is denied. If
14 petitioner becomes aware of another land use decision that she desires to appeal, petitioner
15 must appeal that decision according to LUBA's rules.³ OAR 661-010-0015(1)(d).

16 **RECORD**

17 The city shall file the record within 21 days of the date of this order.

18 Dated this 3rd day of December, 2010.

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Melissa M. Ryan
Board Member

³ Given our disposition of the motion to dismiss, we need not consider petitioner's motion to take evidence outside of the record.