BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

E. A. WEST, Petitioner, v. CITY OF WEST LINN, THOMAS WHITE and CATHY WHITE, Respondents.	LUBA NO. 82-041 NO. 82-048 FINAL OPINION AND ORDER

Appeal from City of West Linn.

Thomas R. Page, Portland, filed a petition for review and argued the cause for Petitioner. With him on the brief was Richard A. Hayden, Jr.

John H. Hammond, Jr., Oregon City, filed a brief and argued the cause for Respondent City of West Linn.

Frank Josselson, Portland, filed a brief and argued the cause for Respondents White. With him on the brief were Wolf, Griffith, Bittner, Abbott & Roberts.

REYNOLDS, Chief Referee; COX, Referee; BAGG, Referee; participated in the decision.

DISMISSED 8/31/82

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

REYNOLDS, Chief Referee.

Respondent City of West Linn moved to dismiss LUBA Appeal No. 82-041 on the grounds that the decision appealed, dated April 28, 1982, was not a final decision or determination within the meaning of LUBA Rule 3(c). Intervenor-respondents Thomas and Cathy White joined in the motion to dismiss. The basis for the motion to dismiss was that this decision was not a "final decision or determination" of the City of West Linn. The final decision was made by the city on June 1, 1982, argue respondents. The June 1, 1982 decision was, however, also appealed by petitioner in LUBA No. 82-048. In a conference call held shortly after the motion to dismiss was filed, the Board advised the parties of its concern of whether either "decision" of the city was a land use decision within the meaning of ORS 197.015 (10). For the following reasons, the Board concludes that the city's "decisions" of April 28, 1982 and June 1, 1982, are not "land use decisions" over which this Board has jurisdiction.

FACTS

The essential facts pertaining to this motion to dismiss are the following. Petitioner, apparently doing business as "Wesco," received tentative plat approval for Robinwood Estates No. 3 in 1978. Petitioner thereafter submitted his final plan for approval and, on April 8, 1980, entered into an agreement with the city by which the city granted final plat approval "in consideration of" subdivider stipulations and agreements "as follows:"

"That subdivider complete, [sic] required public improvements on or before the thirty-one day of December, 1981, in accordance with the specifications and standards set forth in the subdivision ordinance of the City of West Linn, Oregon, and be in accord with the specifications, general standards and specific conditions or standards for the subdivision, on file with the City of West Linn, Oregon, and shall further guarantee said required public improvements for a period of eighteen (18) months after acceptance of the improvements by the City of West Linn, Oregon, against defects in design, construction, workmanship, or materials."

* * *

"That should the subdivider fail to complete said improvements within such period of time, the City may complete the same and recover the full cost and expenses thereof from the cash escrow bond, or irrevocable letter of credit, or [from the subdivider]."

On January 12, 1982, the city engineer for the City of West Linn wrote to petitioner as follows:

"Please be advised that the public improvements as delineated on sheets 1 through 6 of the construction plans as prepared by David Evans & Associates, and marked "As Built" are accepted by the City of West Linn subject to the following:

"1. A maintenance bond in the amount of 20% of the construction costs for eighteen months from December, 1981.

"2. Completion of the items on the Inspection Report dated December 18, 1981. Some of these items will not be able to be completed until the weather is favorable.

"3. The trash racks in the Arroyo above Autumn View and at the southerly end of Robinwood No. 2 must be scheduled for completion not later than June 15, 1982.

"4. The terms of the subdivision agreement dated April 8, 1980."

During the winter and early spring of 1982, heavy rains resulted in flooding of property downslope from Robinwood No. 3. On April 28, 1982, the city met and concluded that the cause of the flooding to property downslope from Robinwood No. 3 was the inadequate storm drainage facilities installed by petitioner in Robinwood No. 3. The city, through the city attorney, advised the petitioner's attorney by letter that the city considered the flooding problem to have been caused by the inadequate drainage facilities and that, as a result,

> "...the city council has determined that the public facilities within the Robinwood Estates No. 3 subdivision will not be accepted until this problem is alleviated by your client to the satisfaction of the city."

The letter also directed the petitioner to take "immediate steps to alleviate this problem" and instructed petitioner's attorney to have his client give the city "satisfactory assurances from your client within two weeks of the date of your receipt of the engineering design plan prepared by Murry, Smith & Associates to alleviate this problem" or else the city would initiate proceedings to have "this problem formally declared to be a nuisance and subject to abatement by the city with abatement costs being placed as a lien on your client's real property."

The letter further advised petitioner that as he was failing to comply with the conditions of tentative plan approval, petitioner "is not authorized to sell any lots within the bounds of the subdivision." Finally, the letter noted that

petitioner had the right to request the city council to reconsider this decision in a public hearing. This letter "decision" was appealed by petitioner to this board (LUBA No. 82-041).

Petitioner so requested a public hearing and reconsideration of the city's decision. The city conducted such a hearing on May 19, 1982, and adopted findings of fact as follows:

"1. The subdivider is required to provide adequate storm drainage facilities within the subdivision to insure that all reasonable foreseeable increases in the rate and quantity of run-off through his development will be contained on his property and will flow in an unrestricted and satisfactory manner into the City's storm drainage system.

"2. That portion of the present storm drainage system in Robinwood No. 3 flowing downslope through Robinwood No. 3 culminating in the vicinity of Autumn View Court is inadequate and insufficient for the following reasons:

"(a) The existent 12-inch drainage pipe constructed in Robinwood Estates No. 2 is insufficient to handle the increased water run-off and flow generated because of changes in the topography and construction and improvements within Robinwood No. 3 and because of increased run-off from uphill properties.

"(b) The berm at the existent drainage inlet is not sufficient enough to catch the water flow due to increased drainage flows.

"(c) The inlet is not large enough to accommodate the increase drainage flows.

"(d) Because of the quantity of storm flow existent within the drainage system culminating on Autumn View Court and because of the steep grade of the slope through the drainage course, the existent system is inadequate because of the inadequate size of the storm drainage pipes now constructed and because of the partially open nature of the drainage course.

"(e) The existent debris retention barrier upstream from the existent 12-inch inlet is totally inadequate to retain the downward flow of storm run-off during peak run-off periods, and substantially aggrevates the already existent situation as the buildup of water behind that debris barrier causes water surges which damage downstream properties.

"3. Prior to the development in the spring and summer of 1981 of Robinwood No. 3, the existing drainage system was adequate to handle storm run-off in the subject area. Development of Robinwood No. 3 and resultant flooding has damaged downstream properties and deposited water and debris on city streets on September 21, 1981, December 5, 1981, January 23 and 24, 1982, and February 20, 1982. These occurrences were the result of the inadequate storm drainage facility above referred."

The above findings of fact were mailed to the parties with a cover letter dated June 1, 1982, stated:

"The purpose of this letter is to confirm the action by the West Linn City Council on May 19, 1982, to deny the request for reconsideration by your client, E. A. West and Wesco, of the City Council's prior action of April 28, 1982, that the storm drainage facilities in Robinwood Estates No. 3 are deficient and further that there will be no final approval of public facilities within the subdivision until such time as the storm drainage facilities within the subdivision are corrected to the satisfaction of the City's consulting engineers, Murray, Smith & Associates, and the City Administrator.

"The City Council based this land use decision upon the findings of fact attached to my memorandum to the City Council dated May 19, 1982, a copy of which findings of fact I have enclosed with this letter.

"The effective date of this land use decision is May 26, 1982."

This "decision" was also appealed to this board (LUBA No. 82-048).

OPINION

It is our view that the city's letters of April 28, 1982, and June 1, 1982, regardless of their intent, constitute mere notification to the developer that the city considered the improvements installed by the developer to be inadequate for purposes of complying with the agreement executed by the city and the developer on April 8, 1980. It was pursuant to this agreement that the city granted final plat approval. By "appealing" the city's determination that the terms of the agreement have not been fulfilled, the developer is obviously disputing the city's position. The question is whether this Board is the proper forum in which that dispute should be resolved.

In order for this Board to have jurisdiction, there must first be a final decision or determination by a local government or a state agency. By this we believe the legislature meant more than that the local government or state agency have finally expressed its position on a matter which may be in dispute with a third party. To be a land use decision, we believe the local government's action must, of its own force, affect in some way the use of land. See Medford Assembly of God v. City of Medford, ___ Or LUBA ___ (LUBA No. 82-010, Slip Op 7/15/82).[1]

In the present case, the city did not, so far as we can tell, have the right or the authority to decide between itself and the petitioner that the agreement has or has not been

violated. No facts suggest that this contractual dispute is any different from the typical contractual dispute which can be resolved only by a circuit court. The city's determination the contract or agreement has not been complied with according to its terms has no force or effect of its own.[2] It is, therefore, not a land use decision subject to review by this Board.[3]

For the foregoing reasons, we conclude that the city's letters of April 28, 1982 and June 1, 1982, are not "land use decisions" over which this Board has review jurisdiction. The above captioned appeals are, accordingly, dismissed.

FOOTNOTES

[1] In Medford Assembly of God, supra, the city declared that the church's use of church property for school purposes was in violation of the city's zoning ordinance and that in order to carry on school activities on the property the church needed to obtain a conditional use permit. The church appealed the "decision" to this Board. We held the "decision" was not a land use decision as defined in ORS 197.015(10).

> "Resolution 4541 does nothing except declare what the city understands to be the meaning of terms in its own ordinance. Resolution 4541 does not deny or in any way affect application for a building permit or any other permit to construct, maintain or operate a school or any other use in the R-4 zone. It is advice to the applicant that if it wishes to continue operation of its school, it must apply for and receive a conditional use permit from the city. If the applicant refuses, the city can seek to enjoin continued use of the school in circuit court. The city, however, would have to prove in circuit court that the use was in violation of the zoning ordinance. The city's own determination the use was in violation of the ordinance would be of no effect.[6] In this sense, the determination is much like a city's determination that a person has a vested right. Once challenged, the city's determination means nothing. It has no force except that it provides guidance to the city in how to proceed. See Forman v. Clatsop County, ___ Or LUBA ___ (LUBA No. 82-006, 1982).[7]" (Footnotes deleted) Slip Op at 8-9.

[2] None of the parties has argued the city's letters purport to revoke preliminary or final subdivision plat approval and we do not so construe the letters. Hence, we do not decide whether a city can revoke such approval or, if so, whether such revocation would be a land use decision.

We also take note of the statement by the city in its April 28, 1982, letter that the petitioner "is not authorized to sell any lots within the bounds of the subdivision." At most, the city's statement is a warning to the developer that the city would consider any attempt by the petitioner to sell lots to be a violation of ORS 92.016 or 92.025. The city can not declare the petitioner to be in violation of ORS 92.016 or 92.025 and have that declaration have any legal force or effect. Rather,

the city would be required to seek to enjoin the petitioner in circuit court.

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[3] That the city's subdivision ordinance or comprehensive plan may contain standards to be applied in ultimately deciding whether the terms of the agreement have been met, does not make the city's determination a land use decision. Again, we can not find where the city derives the authority to finally decide, subject to review, that the terms of the agreement have been met.