BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LINDA BAUER,
Petitioner,

vs.

CITY OF PORTLAND,
Respondent,

and

RALSTON INVESTMENTS,
Intervenor-Respondent.

LUBA No. 2000-053

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Linda Bauer, Portland, filed the petition for review and argued on her own behalf.

Adrianne Brockman, Senior Deputy City Attorney, Portland, filed a response brief and argued on behalf of respondent.

Jeff H. Bachrach and Dana L. Krawczuk, Portland, filed a response brief. With them on the brief was Ramis, Crew, Corrigan & Bachrach, LLP. Jeff H. Bachrach argued on behalf of intervenor-respondent.

BASSHAM, Board Chair; BRIGGS, Board Member; HOLSTUN, Board Member, participated in the decision.

AFFIRMED 09/21/2000

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a city decision granting final plat approval for a planned unit development (PUD) and subdivision.

MOTION TO INTERVENE

Ralston Investments (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is a 29.93-acre parcel zoned Residential, 10,000-square foot minimum (R-10), and subject to environmental protection and conservation overlay zones. The property lies on the northwestern flank of a steep hill.[1] In 1998, intervenor applied for a PUD and subdivision of the subject property, called MacGregor Heights, proposing 104 residential lots and four open space tracts. The preliminary plat proposed water retention ponds and storm drainage facilities in the open space tracts. A city hearings officer approved the preliminary plat in December 1998. In August 1999, the hearings officer approved a modification of the preliminary plat that, among other things, consolidated the two detention ponds into one pond and allowed the release of stormwater, at pre-development rates, into a natural drainageway located in an environmental protection zone in the northwest corner of the subject property. That drainageway continues off-site to an adjacent property, tax lot 200, which is also subject to an environmental protection zone.

In March 2000, intervenor applied for final plat approval. City planning staff reviewed the final plat against the conditions imposed in the preliminary plat approval, as modified in the August 1999 decision, and approved the final plat. This appeal followed.

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[1]The subject property is adjacent to and downhill from the Obrist Heights subdivision, which was the subject of an appeal in *Bauer v. City of Portland*, ___ Or LUBA ___ (LUBA No. 2000-016, July 31, 2000).

MOTION TO DISMISS

Intervenor moves to dismiss the appeal, on the grounds that the city's final plat approval is a nondiscretionary decision not subject to LUBA's jurisdiction. Intervenor argues that, under the city's code, approval of a final plat is a matter of checking to see whether the final plat conforms to the conditions imposed in the preliminary plat.[2] Intervenor explains that final plat approval is typically the second step of a two-step process. *Bienz v. City of Dayton*, 29 Or App 761, 767, 566 P2d 904 (1977). According to intervenor, the first step of that process, preliminary plat approval, is conducted pursuant to a land use process leading to a land use or limited land use decision. The second step, final plat approval, is conducted through a ministerial review by city staff. Because final plat approval does not require the exercise of judgment or interpretation, intervenor argues, such decisions are excluded from the definition of "land use decision" pursuant to ORS 197.015(10)(b)(A).[3] Therefore, intervenor argues, LUBA lacks authority to consider petitioner's appeal.

Petitioner responds that the challenged subdivision approval falls within the definition of "limited land use decision" found in ORS 197.015(12).[4] Because the

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[2]Portland City Code (PCC) 34.20.070(A) provides in relevant part:

> "The Subdivision or major partition plat and other data shall be submitted to the Bureau of Planning. Upon receipt the Planning Director shall determine whether it conforms to the approved tentative plan and with these regulations. * * * If the Planning Director determines that the plat or map conforms to all requirements and that the supplemental documents are in order he shall so indicate by inscribing his signature thereon with the date of such approval."

[3]ORS 197.015(10)(b) provides in relevant part that "land use decision" excludes a decision of a local government:

> "(A) Which is made under land use standards which do not require interpretation or the exercise of policy or legal judgment;
>
> "(B) Which approves or denies a building permit issued under clear and objective land use standards;
>
> "(C) Which is a limited land use decision[.]"

[4]ORS 197.015(12) provides in relevant part:

challenged decision is the city's "final decision or determination" concerning the "approval or denial" of a subdivision within an urban growth boundary, petitioner argues, the city's decision is a limited land use decision subject to LUBA's exclusive jurisdiction under ORS 197.825 and 197.828. Petitioner points out that, in contrast to the definition of "land use decision" at ORS 197.015(10), the statutory definition of "limited land use decision" contains no exclusion for nondiscretionary or ministerial decisions.

In its response brief the city agrees with petitioner that LUBA has jurisdiction, because its decision "involves a discretionary decision approving a final PUD and subdivision plat. It is a decision made by planning staff with notice to the public and an opportunity to submit testimony." Respondent's Brief 1.

Intervenor discounts petitioner's assertion, arguing that the "final decision or determination" described in ORS 197.015(12) must be understood to refer to preliminary plat approval, not final plat approval. If petitioner's view were adopted, intervenor argues, LUBA would have jurisdiction over "every decision pertaining in any way to a subdivision or partition within the urban growth boundary * * *." Intervenor-Respondent's Brief 3. To avoid that result, intervenor urges the Board to read a nondiscretionary or ministerial exception into the definition of limited land use decision at ORS 197.015(12), similar to that applicable to land use decisions at ORS 197.015(10)(b)(A).

The definition of a "limited land use decision" in ORS 197.015(12)(a) does not distinguish between preliminary and final plat approvals. Arguably, both types of approvals constitute a "final decision or determination" concerning the "approval or denial" of a

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"'Limited land use decision' is a final decision or determination made by a local government pertaining to a site within an urban growth boundary which concerns:

"(a) The approval or denial of a subdivision or partition, as described in ORS chapter 92."

subdivision.[5] We conclude that our authority to review limited land use decisions includes review of subdivision approvals, whether at the preliminary or the final plat stage. We are cited to nothing in ORS chapter 197 that suggests the legislature's grant of authority to review limited land use decisions is circumscribed by the particular stage of subdivision or partitioning approval.[6]

Even if an implicit exception for nondiscretionary limited land use decisions could be read into the definition at ORS 197.015(12), we agree with the city and petitioner that the present decision would not fall into such an exception. Depending on the particular circumstances of each preliminary plat approval and attendant conditions, if any, whether or not the developer has satisfied the preliminary plat approval conditions may require the exercise of considerable factual, legal and policy judgment. In the instant case, the city did more than simply conduct a ministerial review when deciding whether a required easement or storm drainage management scheme or construction plan met preliminary plat conditions. For example, the city's preliminary approval included a condition that the applicant submit plans and analyses assuring that sewer and storm drainage improvements comply with city standards. *See, e.g.*, Condition H at Record 23 (applicant must submit engineered analysis of

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[5]Different stages of a multi-stage decision making process can be final, appealable decisions. *See Carlsen v. City of Portland*, 169 Or App 1, 16, ___ P2d ___ (2000) (rejecting an argument that only the last stage of a multi-stage decision making process can be a final, appealable decision). Preliminary plat approval is a "final" decision because it binds the city (as well as the applicant) for purposes of preparation of the final plat. ORS 92.040. The city may require only such changes in the subdivision plat as are necessary to comply with the terms of the preliminary plat approval. *Id.* Final plat approval is also a "final" decision, because it is the city's ultimate determination that the proposed subdivision is approved or denied. As we discuss below, the standards applicable to preliminary and final plat approvals under the city's code do not overlap. Because those approvals are separate, appealable decisions, failure to appeal the city's preliminary plat approval renders that decision immune from collateral attack in a subsequent appeal of the city's final plat approval. *Carlsen*, 169 Or App at 16-17 (issues that could have been raised in an appeal of a preliminary-stage decision are not cognizable in an appeal to LUBA from a later decision).

[6]For example, ORS 197.195 sets forth the procedures applicable to limited land use decisions. Notably, the written notice that local governments must provide for limited land use decisions must include an explanation of appeal rights and a statement that issues that may provide the basis for an appeal to LUBA must be raised in writing prior to the expiration of the required comment period. ORS 197.195(3)(c)(B) and (H). The notice and process the city followed in the present case complied with these requirements. Nothing in ORS 197.195 distinguishes between preliminary and final subdivision plat approvals.

stormwater velocities and assurances of construction of measures necessary to ensure that city water quality and erosion control standards are met). We cannot say that a determination at this level of complexity does not involve the exercise of significant factual and legal judgment. *Tirumali v. City of Portland*, 37 Or LUBA 859 (2000).

For the foregoing reasons, we deny the motion to dismiss.

APPLICABLE LAW

PCC 34.20.070 requires approval of a final subdivision plat if it conforms with the approved preliminary plat. *See* n 2. Similarly, pursuant to PCC 33.269.300(B), the standard for final approval of a PUD application is substantial conformance with the preliminary PUD approval. The city argues, and we agree, that under the city's land use regulations, criteria applicable to preliminary plat approval are not applicable to the challenged decision approving the *final* PUD/subdivision plat. To the extent petitioner's arguments collaterally attack the city's findings of compliance with other criteria as part of the earlier preliminary plat approval or the subsequent modification of that approval, or argue that the city erred in failing to apply such criteria to either the preliminary plat approval or the instant final approval, such arguments do not provide a basis for reversal or remand. Consequently, our opinion will not address those arguments.

FIRST ASSIGNMENT OF ERROR

The caption of the first assignment of error states that the city "unconstitutionally caused to be used land that had not been properly dedicated for use as a public drainage way." Petition for Review 6. This claim is not further developed, and we are not obliged to create the necessary supporting argument.[7] We therefore decline to find any "unconstitutionality" in the city's decision. *Poddar v. City of Cannon Beach*, 26 Or LUBA

[7]We might speculate that petitioner's complaint is that the city has taken property for public use without paying just compensation. Petitioner does not tell us whether her claim is based in the United States or the Oregon Constitution. Because petitioner does not explain her argument or support it with reference to facts in the record, we have no basis upon which to test the city's decision against either constitution.

429, 432 (1994).

The text of petitioner's argument claims the MacGregor Heights development will use off-site drainage. It also asserts the city's code requires that the final plat show easement dedications. As we understand petitioner's argument, she believes the city may not approve the final plat without showing easements for the off-site drainage onto tax lot 200, which adjoins the subject property to the west. She advises that a condition imposed as part of the Gilbert's Ridge subdivision, which adjoins the subject property to the northwest, restricts the city from using a surface sewer easement in "Tract A" for any other purpose. Petitioner attaches to her brief a document referring to this Tract A.[8]

The city responds that the plat need not include the dedication of off-site easements. This statement is correct but incomplete. The relevant code provision requires that easements must be "identified" on the plat and, if recorded, the recording number must appear on the plat. PCC 33.269.320(C)(2)(c). In other words, if off-site easements are part of the approval, they must be referenced with sufficient clarity to inform readers of the easement and where it is recorded.

Petitioner's argument is, however, misdirected. As far as we can tell, Tract A on the Gilbert's Ridge subdivision has nothing to do with the off-site storm drainage from the subject property onto tax lot 200 or the Gilbert's Ridge subdivision. Petitioner appears to view Tract A as somehow serving the MacGregor Heights development. She directs us to nothing in the record showing this relationship. The city points out that none of the drainage from the subject development passes over Tract A in the Gilbert's Ridge subdivision.[9]

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[8]The document is not part of the record in this appeal. In its response brief the city notes this fact, but does not object to consideration of the document on that basis. To assist review of the merits of petitioner's argument, the city attaches to its brief the subdivision plat for the Gilbert's Ridge subdivision, which is also apparently not in the record, to support its argument that the storm drainage system approved for MacGregor Heights does not affect Tract A in the Gilbert's Ridge subdivision.

[9]The city adds that Tract B on the Gilbert's Ridge subdivision contains a 30-foot wide drainage reserve easement over a natural drainage. That natural drainage is apparently the lower section of the same drainage

Because petitioner does not identify an error in the city's treatment of the drainage easement for this development, the first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In her second assignment of error, petitioner again says the city made an unconstitutional decision in taking, "without purchase or eminent domain, a 30 foot surface drainage easement, when a 20 foot sewer easement, with conditions, was granted * * *." Petition for Review 6. Once again, the claim of unconstitutionality is not developed, and we decline to find fault with the city's decision based on an undeveloped claim.

The text of petitioner's argument includes an argument that Condition G of the preliminary plat approval requires a 30-foot public stormwater drainage easement.[10] Petitioner then argues that the easement shown on Tract A of the Gilbert's Ridge subdivision shows only a 20-foot width. If we understand petitioner correctly, she argues that the city erred in failing to require intervenor to acquire another 10 feet of easement width.

The city responds, as before, that Tract A on the Gilbert's Ridge subdivision has nothing to do with stormwater drainage from MacGregor Heights. As noted above, the city points out that stormwater drainage from MacGregor Heights does pass through a 30-foot wide easement on Tract B of the Gilbert's Ridge subdivision, down to SE Foster Road. We agree with the city that petitioner has not demonstrated that the final plat fails to substantially

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channel that leaves the western portion of the subject property and crosses tax lot 200. Petitioner directs no argument at that easement.

[10]Condition G of the preliminary plat approval reads:

> "Improvements must be made to the drainageway outfall area near SE Foster Road per the approval of BES [the Bureau of Environmental Services] * * *. If the work occurs outside existing public easements or outside the public right-of-way, easements may need to be acquired by the applicant." Record 32.

The staff response to this condition was as follows:

> "* * * Improvements will be made to the drainageway outfall area near SE Foster Road per the approval of BES. If the work occurs outside existing public easements or outside the public right-of-way, easements will be acquired by the applicant." Record 10.

conform to Condition G.

In a second argument under this assignment of error, petitioner complains that improvements needed to stabilize the drainageway referred to in Condition G have not been made. The city responds that the condition requiring improvements does not mandate that improvements be completed as a condition of final plat approval. That is, whether or not the condition is satisfied is a matter for post-approval enforcement under PCC 33.700.030.

The city's August 1999 modifications to the preliminary plat contained several conditions of approval, including Condition G. As we understand that decision, the conditions that must be satisfied before final plat approval are so stated. Other conditions, including Condition G, do not state a deadline for completion. Petitioner does not cite us to a code provision prohibiting the city from using post-approval conditions or requiring that every condition be satisfied before final plat approval. Because the city's preliminary plat does not require the cited improvements to be completed before final plat approval, petitioner has not demonstrated that the final plat fails to substantially conform to Condition G.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the city violated PCC 33.430.250(A) in approving a mitigation plan for storm drainage notwithstanding that intervenor lacks ownership of off-site property used for storm drainage or the legal right to carry out the mitigation plan on such off-site property.[11] Petitioner refers again to Tract A of the Gilbert's Ridge subdivision.

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[11]PCC 33.430.250(A) provides in relevant part:

> "An environmental review application will be approved if the review body finds that the applicant has shown that all of the applicable approval criteria are met. * * *
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> "1. General criteria for * * * PUDs;
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> "* * * * *

Although petitioner refers to Conditions B and C of the modified preliminary plat, she does not argue that the final plat fails to substantially conform to those conditions. Instead, her argument under this assignment of error appears to collaterally attack the city's finding of compliance with PCC 33.430.250(A) as part of the prior preliminary plat approvals. In any case, even if petitioner's argument can be read to challenge those conditions, those conditions do not require the applicant to demonstrate ownership or other legal right to carry out the mitigation plan over off-site property. As explained above, Tract A of the Gilbert's Ridge subdivision has nothing to do with stormwater drainage from the MacGregor Heights development.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner challenges the August 26, 1999 amendment to the December 3, 1998 preliminary plat approval. Her challenge boils down to an argument that the city erred in failing to provide an adequate environmental review as part of that August 1999 decision. The city responds to these challenges by asserting petitioner is making an impermissible collateral attack on the August 1999 decision. *Drake v. Polk County*, 30 Or LUBA 199, 202 (1995). We agree.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioner attacks the evidentiary support for the city's approval of the drainage

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> "c. The mitigation plan demonstrates that all significant detrimental impacts on resources and functional values will be compensated for;
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> "d. Mitigation will occur within the same watershed as the proposed use * * *; and
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> "e. The applicant owns the mitigation site; possesses a legal instrument that is approved by the City (such as an easement or deed restriction) sufficient to carry out and ensure the success of the mitigation program; or can demonstrate legal authority to acquire property through eminent domain."

reserve easement in Tract B of the MacGregor Heights development. Petitioner contends that Condition E of the preliminary plat approval requires that drainage reserve easements must be shown on the final plat, and no such easement appears in Tract B as shown on the plat.[12]

The city responds by pointing to a note (note 12) attached to Tract B on the plat. Tract B is identified on the plat as a "Common Open Area" and "Public Storm Drainage Reserve Easement." Record 15. Note 12 states:

> "The public storm drainage reserve easements granted to the City of Portland on this plat are perpetual easements for the purpose of stormwater drainage, flood control, water quality, and for protection of a natural drainage reserve. The public storm drainage reserve easement areas shall remain in natural topographic condition. No private structures, culverts, excavations or fills shall be constructed within the public storm drainage reserve easements without the prior written consent of the Director of the Bureau of Environmental Services, City of Portland." Record 18.

Contrary to petitioner's argument, the easement and necessary statements appear on the plat. The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioner alleges that certain water quality violations exist, and argues that the city engineer failed to address those violations when he signed the final plat. Petitioner asserts the city erred in failing to conduct an environmental review to resolve the violations prior to final plat approval. In support of her argument, petitioner references two conditions of approval, Conditions E and H, which address watercourses and stormwater disposal. We

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[12]Condition E states:

> "All natural water courses on this site shall be protected by drainage reserves. * * * The drainage reserve easements shall be shown on the final plat and be accompanied on the plat by the following statement:
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> > "'This storm drainage reserve will remain in natural topographic condition. No private structures, culverts, excavations or fills will be constructed within the drainage reserve unless authorized by the City Engineer and applicable land use approvals.'" Record 401.

discussed Condition E under the fifth assignment of error, above. Condition H refers to city water quality and erosion control standards, stating that the means of stormwater disposal must include assurances for construction of any measures needed to ensure compliance with city standards.[13] However, petitioner does not describe the alleged water quality violations or cite a water quality standard she believes was violated.

The city confesses some puzzlement over petitioner's allegations but assumes she is complaining about violations of federal Environmental Protection Agency water quality standards. The city says compliance with the agency's standards is not an approval criterion under Condition E or H, and any concern over violation of such standards is an enforcement issue.

Petitioner does not cite us to the federal or local water quality standards she thinks were violated. She does not cite us to a city standard requiring that any charge of water quality violation be resolved before a final plat may be approved, or explain why Condition E or H requires such resolution prior to final plat approval. The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

In her final assignment of error, petitioner argues that the city failed to address compliance with the construction management plan required by PCC 33.430.240(B)(2).[14]

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[13]Condition H states:

> "* * * Prior to final plat approval the applicant shall submit an engineered analysis of proposed post-development stormwater velocities in the drainageways, erosive potentials as a result of those velocities, and related slope stability issues that meets the requirements of the [BES]. The analysis shall also include stormwater discharge expected from the proposed detention ponds, and plans and assurances for construction of any measures necessary to ensure that City standards, including water quality and erosion control, can be met. Any additional land use reviews required to implement the proposed measures must be completed prior to final plat approval." Record 401.

[14]PCC 33.430.240(B)(2) requires submission of a construction management plan that

> "identif[ies] measures that will be taken during construction or remediation to protect the remaining resources and functional values at and near the construction site and a description

The construction management plan addresses erosion control measures and other issues relevant to site improvements during the time of construction. Record 46-48; Supplemental Record 408-11. Intervenor submitted a construction management plan. We understand petitioner to argue that there is no evidence that the construction management plan was, in fact, followed during pre-development construction on the property.

However, petitioner does not cite to any condition of approval or other applicable provision requiring that the city find compliance with the construction management plan prior to or as part of final plat approval. We agree with the city that any violation of the plan is an enforcement issue, not a matter for final plat approval. The seventh assignment of error is denied.

The city's decision is affirmed.

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of how undisturbed areas will be protected. For example, describe how trees will be protected, erosion controlled, construction equipment controlled, and the timing of construction[.]"