

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 E & R FARM PARTNERSHIP,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF GERVAIS,
10 *Respondent.*

11
12 LUBA No. 2000-069

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from City of Gervais.

18
19 Daniel A. Doyle, Salem, filed the petition for review on behalf of petitioners. With
20 him on the brief was Connolly & Doyle, LLP.

21
22 Brendan Enright, Aurora, filed the response brief on behalf of respondent.

23
24 HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member,
25 participated in the decision.

26
27 DISMISSED

12/15/2000

28
29 You are entitled to judicial review of this Order. Judicial review is governed by the
30 provisions of ORS 197.850.

31

NATURE OF THE DECISION

Petitioner appeals a city decision to acquire approximately 15 acres of his exclusive farm use (EFU)-zoned property.

FACTS

This is the second LUBA appeal that petitioner has filed in this matter. We dismissed the first appeal. *E & R Farm Partnership v. City of Gervais*, 37 Or LUBA 702 (2000) (*E & R Farm I*). Respondent moves to dismiss this appeal as well. We explained the history and relevant facts in our earlier order resolving petitioner’s record objection in this appeal.

“In 1999, the city began taking steps to acquire approximately 50 acres of land for disposal of wastewater from its sewage treatment plant. The city anticipates planting poplar trees on the land to absorb the wastewater. Petitioner’s property is one of the properties the city anticipates acquiring for its proposal. In [*E & R Farm I*], we dismissed petitioner’s prior attempt to challenge the city’s proposal. In doing so we quoted the following arguments presented by the city in its motion to dismiss:

““At this point in the process the City has done no more than authorize a couple of appraisals to be completed and the land owners [to] be informed that the City wishes to acquire their property. This is not a final decision, it is the *first* step in a large number of steps which will be taken which *may* result in the petitioner’s land being the subject of the City’s eminent domain power. This has not yet happened. Once the City has received the appraisals, determined that the projected [purchase] price is reasonable and within the resources of the City, the City will then, as part of the same hearing, address the land use issues raised by Petitioner. The Petitioner’s appeal is premature and does not afford the City an opportunity for orderly decision making. There is simply no reason for the City to engage in a lengthy land use decision making process until and unless it decides to actually purchase Petitioner’s land. No decision to purchase the land has yet been made.” Motion to Dismiss 3 * * *.’ 37 Or LUBA at 704.

“We accepted the city’s representation that it would complete any required land use decision making process at the time ‘it decides to actually purchase Petitioner’s land.’ *Id.* We explained:

1 “‘We understand the city to argue that it has not yet made a
2 *final* decision that petitioner’s property or any other property
3 may be used as a poplar tree plantation for application of
4 wastewater under relevant state and local land use standards.
5 Based on that understanding, we agree with the city that this
6 appeal should be dismissed, because land use decisions must
7 be *final* decisions. *Hemstreet v. Seaside Improvement Comm.*,
8 16 Or LUBA 748, 752, *aff’d* 93 Or App 73, 761 P2d 533
9 (1988); *CBH Company v. City of Tualatin*, 16 Or LUBA 399,
10 405 n 7 (1988).’ *Id.* at 705 * * *.

11 “‘As relevant, the record filed by the city in this [second appeal] is composed
12 of (1) the minutes of a March 30, 2000 city council meeting; (2) copies of the
13 agenda for that meeting that were mailed to petitioner and others; (3) certified
14 receipts for the agenda mailing; and (4) a newspaper article giving notice of
15 the March 30, 2000 city council meeting. The minutes of the March 30, 2000
16 city council meeting disclose that the city council opened the meeting and
17 advised petitioner and other members of the public who were present that the
18 city council would ‘meet in executive session for the purpose of deliberating
19 with persons designated by the city to negotiate real property transactions.’
20 Record 9. Members of the public, including petitioner, were asked to leave
21 the room during the executive session. At the conclusion of the executive
22 session, the city council allowed the public to return and went ‘back into its
23 special session to deliberate on the appraisals.’ *Id.* The city council thereafter
24 passed a motion to ‘offer the appraised value to [petitioner] contingent on
25 funding.’ *Id.*

26 “‘Although the minutes of the March 30, 2000 city council meeting that are
27 included in the record make it clear that the city directed its agent to offer to
28 purchase petitioner’s property for the appraised value, those minutes do not
29 disclose that the city council conducted a land use hearing or made any
30 decision that a wastewater disposal facility could be operated under relevant
31 land use laws on the three properties that the city council directed its agent to
32 attempt to purchase. * * *’” *E & R Farm Partnership v. City of Gervais*, ___
33 Or LUBA ___ (LUBA No. 2000-069, Order on Record Objection, August 25,
34 2000), slip op 1-2 (emphases in original; underline emphasis added; footnote
35 omitted).

36 Notwithstanding its representation in its motion to dismiss the first appeal, the city
37 takes the position in its motion to dismiss in this appeal that it plans to complete purchase of
38 petitioner’s property and the other two affected properties *before* seeking any land use
39 approvals that may be required from Marion County to institute a poplar tree farm and

1 irrigate that farm with wastewater from its sewage treatment plant.¹ The city explains:

2 “The City has exercised its power of condemnation following the procedures
3 for doing so set forth in ORS 35.205 *et. seq.* Once completed, these
4 procedures would change the ownership of Petitioner’s land but would have
5 no effect on the permitted [uses] of Petitioner’s land. Once ownership is
6 acquired, the City must apply to Marion County, pursuant to Marion County
7 Rural Zoning Ordinance 136.040(i), and obtain planning permission before it
8 can locate the poplar plantation on the land acquired from Petitioner.”²
9 Respondent’s Brief 5.

10 We are unsure why the city represented in seeking to have the first appeal dismissed
11 that it would address the land use issues petitioner is attempting to raise at the same time it
12 made a final decision to purchase petitioner’s property. That representation likely influenced
13 petitioner’s decision to file this second appeal. Nevertheless, we only have jurisdiction over
14 the challenged decision if it is a land use decision, and we agree with the city that petitioner
15 has not demonstrated that the city either applied or was legally required to apply any land use
16 standards when it made a final decision to condemn petitioner’s property.³ For whatever
17 reason, the city has decided to defer seeking any required land use approvals from the county
18 until after it takes title to the property.

19 The city’s motion to dismiss is granted.

20 This appeal is dismissed.

¹The city’s brief suggests that Marion County has exclusive land use decision making authority over the subject property. That suggestion is inconsistent with the city’s representations in its initial motion to dismiss, and we express no view on whether such is the case.

²Marion County Rural Zoning Ordinance 136.040(i) authorizes “[u]tility facilities necessary for public service” in the county’s EFU zone.

³ORS 197.015(10)(a) defines “land use decision” to include:

“(A) A final decision or determination made by a local government or special district that concerns the * * * application of:

“* * * * *

“(ii) A comprehensive plan provision; [or]

“(iii) A land use regulation[.]”