BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RAYMOND PILTZ,
Petitioner,

vs.

CITY OF PORTLAND,
Respondent,

and

PORT OF PORTLAND and MULTNOMAH COUNTY SHERIFF'S DEPARTMENT,
Intervenors-Respondent.

LUBA No. 2001-144

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Raymond Piltz, Portland, filed the petition for review and argued on his own behalf.

Linly F. Rees, Deputy City Attorney, Portland, filed a response brief and argued on behalf of respondent.

Steven W. Abel and Ellen P. Hawes, Portland, filed a response brief on behalf of intervenor-respondent Port of Portland. With them on the brief was Stoel Rives, LLP. Steven W. Abel argued on behalf of the Port of Portland.

Dana L. Krawczuk, Portland, filed a response brief on behalf of intervenor-respondent Multnomah County Sheriff's Department. With her on the brief was Ramis, Crew, Corrigan and Bachrach, LLP.

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

AFFIRMED 03/01/2002

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioner challenges a city decision approving a final subdivision plat.

MOTIONS TO INTERVENE

The Port of Portland (the Port), the applicant below, and the Multnomah County Sheriff's Department move to intervene on the side of respondent. There is no opposition to the motions, and they are allowed.

FACTS

The property that is the subject of this appeal is a 191.58-acre parcel located in the Ledbetter Industrial Park in North Portland near the confluence of the Willamette and Columbia Rivers. It is bordered on the west by the Columbia Slough and on the south, southeast and east by Bybee Lake. The Port proposes to subdivide the property into eight developable lots and Tract A, an open space lot. Tentative subdivision approval was granted by the city council pursuant to a Type III proceeding on June 15, 2000.[1] The tentative subdivision approval decision imposed conditions of approval, several of which had to be satisfied at the time the final plat was submitted. The city council decision was not appealed.

On May 10, 2001, the Port submitted its final subdivision plat. The city approved the final plat administratively, pursuant to city code provisions that implement statutory limited land use decision procedures.[2] Petitioner submitted written testimony opposing approval of

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[1]Under the city's code, Type III proceedings require notice to property owners within 100 feet of the property and a hearing before a hearings officer. Hearings officer decisions in Type III proceedings may be appealed to the city council.

[2]The procedure for final subdivision plat approval is set out at Portland City Code (PCC) 34.20.070(A), and 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."

the final plat, arguing (1) that the city did not have authority to approve the plat; (2) that the Port failed to show that it was the legal owner of the property; and (3) that fill had been placed illegally on the property. The city approved the final plat as submitted on July 31, 2001, and mailed notice of the decision on August 3, 2001. Petitioner appealed the city's decision to LUBA on August 23, 2001.

On September 11, 2001, the city withdrew its July 31, 2001 decision for reconsideration and reopened the record for additional written testimony. The Port and petitioner provided additional written testimony to the city. On October 30, 2001, the city adopted the challenged decision. Petitioner refiled his notice of intent to appeal on November 19, 2001.

JURISDICTION

The city, the Port, and the Multnomah County Sheriff's Office (respondents) challenge LUBA's jurisdiction.[3] According to respondents, petitioner's November 19, 2001 notice of intent to appeal does not identify the October 30, 2001 decision on reconsideration as the appealed decision. Rather, respondents argue, petitioner's notice of intent to appeal merely reiterates petitioner's intention to appeal the July 31, 2001 decision, which the city withdrew. Respondents contend that the city's act in withdrawing the July 31, 2001 decision and adopting the October 30, 2001 decision had the effect of nullifying the July 31, 2001 decision. Therefore, respondents argue, the only decision that could be appealed after October 30, 2001, was the October 30, 2001 decision. Because petitioner did not identify the October 30, 2001 decision in his November 19, 2001 notice of intent to appeal, respondents contend that petitioner failed to file a timely appeal of that decision and, therefore, LUBA does not have jurisdiction to review the October 30, 2001 decision.

[3]The Multnomah County Sheriff's Office filed a brief that joins in the responses made by the city and the Port. The city and the Port filed briefs that contain individual responses to the assignments of error, but also endorse the arguments contained in each others' briefs. For clarity, we will refer to the city's and the Port's individual arguments when appropriate. Otherwise, we refer to all respondents together.

We agree with respondents that the October 30, 2001 decision is the only decision that is before us in this continuation of petitioner's appeal, which originally sought review of the July 31, 2001 decision that the October 30, 2001 decision has now replaced. As we discuss later in this opinion, we also agree with respondents that petitioner does not appear to appreciate that the July 31, 2001 final plat decision and the June 15, 2000 tentative subdivision approval decision are not before us in this appeal. With that apparent misunderstanding on petitioner's part noted, we reject respondents' jurisdictional challenge.

As respondents recognize, OAR 661-010-0021(5)(a)(B) specifically allows a petitioner to refile his or her original notice of intent to appeal when a decision is withdrawn and readopted "with only minor revisions."[4] Respondents do not contend that the October 30, 2001 decision adopts more than "minor revisions" to the July 31, 2001 decision. Within 21 days after the October 30, 2001 decision was adopted, petitioner refiled his original notice of intent to appeal. As respondents correctly note, petitioner's refiled original notice of intent to appeal does not identify the date of the city's decision on reconsideration. However, that technical violation of our rules does not affect our jurisdiction to consider this appeal of the October 30, 2001 decision on reconsideration.

INTRODUCTION

The area in which the subject property is located is part of a network of waterways, wetlands and uplands. Development in and near the Columbia Slough and Bybee Lake has been the subject of debate over the years, and led to the adoption of ORS 196.820, which, with one exception, prohibits fill in those portions of Bybee Lake located below the 11-foot

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[4]OAR 661-010-0021(5)(a)(B) provides, in relevant part:

> "In the event the local government or state agency affirms its decision or modifies its decision [on reconsideration] with only minor revisions, the petitioner may refile the original notice of intent to appeal, with the date of the decision on reconsideration indicated thereon, together with two copies within 21 days after the decision on reconsideration is received by the Board."

elevation above mean sea level.[5] Petitioner's four assignments of error are based on petitioner's belief that the subject property, in large part, has been created by the illegal filling of Bybee Lake. As a result, petitioner argues that the Port's claim to ownership is tenuous because all submerged and submersible lands, such as the areas below the 11-foot elevation, are owned by the Oregon Division of State Lands. In the absence of evidence that all fill on the property was placed in conformance with ORS 196.820, petitioner contends that the Port does not own and has no authority to develop the property, because little if any of the subject property is naturally above the 11-foot elevation. With that introductory explanation, we turn to petitioner's assignments of error.

FIRST AND SECOND ASSIGNMENTS OF ERROR

ORS chapter 92 sets out the procedures and requirements for land divisions. ORS 92.044(1) provides, in relevant part:

> "[A] city shall, by regulation or ordinance, adopt standards and procedures, in addition to those otherwise provided by law, governing * * * the submission and approval of tentative plans and plats of subdivisions[.]"

Petitioner argues that the city violated ORS chapter 92 by failing to require the Port to demonstrate as part of its final subdivision plat approval that (1) the Port owns the subject property; (2) the fill that has been placed on the property was placed there legally; and (3) the Common School Fund has been paid for the loss of submerged and submersible lands that

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[5]ORS 196.820 provides, in relevant part:

> "(1) Notwithstanding any other provision of ORS 196.600 to 196.905 to the contrary, except as provided in [ORS 196.820(2)], the Director of the Division of State Lands shall not issue any permit to fill * * * Bybee Lake, located in Multnomah County, below the contour line which lies 11 feet above mean sea level as determined by the 1947 adjusted United States Geodetic Survey Datum.
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> "(2) Nothwithstanding [ORS 196.820(1)], the Director of the Division of State Lands may issue a permit to fill * * * Bybee Lake, located in Multnomah County, if such fill is to enhance or maintain fish and wildlife habitat at or near * * * Bybee Lake. A fill shall be considered to be for the purpose of enhancing or maintaining fish and wildlife habitat if the proposed fill is approved by the State Department of Fish and Wildlife."

petitioner claims were owned by the state prior to the placement of the illegal fill. Petitioner also argues that the city erred by failing to consider testimony that petitioner and others submitted that challenges the Port's ownership and the evidence the Port submitted to show that the subject property was filled in accordance with fill and removal laws. In addition, petitioner argues that the city's conclusions that the subject property is owned by the Port and that the fill was legally placed on the property are not supported by substantial evidence.

The city responds that ORS 92.044 pertains to *tentative* subdivision approval, not to *final* plat approval, such as the decision at issue here. According to the city, final plat approvals are governed by city regulations that implement ORS 92.040. *See* n 2 (setting out PCC provisions that govern final plat approvals). The city contends that ORS 92.040(1) limits review of final plats to determining that the final plat substantially conforms to the tentative subdivision plan and to confirming that any conditions precedent to approval of the final plat have been satisfied.[6] In addition, the city contends that during the tentative subdivision approval process in this case, the city considered testimony and evidence pertaining to the ownership of the property, and relied on the Port's evidence that it owns the entire subject property, despite the testimony that petitioner and others gave that questioned the Port's evidence. According to the city, all of the matters petitioner raises in his first and second assignments of error were addressed during the tentative subdivision approval proceedings and, as a result, the city's decision in that proceeding cannot be collaterally attacked in this appeal of the final subdivision plat approval.

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[6]ORS 92.040(1) provides, in relevant part:

> "* * * Approval of the tentative plan shall not constitute final acceptance of the plat of the proposed subdivision * * * for recording; however, approval by a city * * * of such tentative plan shall be binding upon the city * * * for the purposes of the preparation of the subdivision * * * plat, and the city * * * may require only such changes in the subdivision * * * plat as are necessary for compliance with the terms of its approval of the tentative plan for the proposed subdivision[.]"

In his assignments of error, petitioner fails to cite any statutory or other legal authority that requires or permits the city to revisit the issue of ownership or the effect of alleged illegal fill on the property during its review of the final subdivision plat. We agree with the city that in the absence of such a requirement, petitioner's arguments in his first and second assignments of error are impermissible collateral attacks on the tentative subdivision approval decision. *Bauer v. City of Portland*, 38 Or LUBA 715, 721 (2000).

The first and second assignments of error are denied.

THIRD ASSIGNMENT OF ERROR

In this assignment of error, petitioner makes two distinct arguments. First, petitioner argues that the procedures the city used unconstitutionally deprived petitioner of his due process rights by approving the final subdivision plat.[7] Second, petitioner argues that the U.S. Constitution, Article VIII, section 5, of the Oregon Constitution and the Public Trust Doctrine authorize only the Oregon State Land Board (State Land Board) to alienate lands held for the benefit of the citizens of the state. According to petitioner, the final subdivision plat cannot be approved, because the city does not have authority to permit public trust lands to be subdivided by the Port without approval of the State Land Board.

In response to petitioner's due process argument, respondents contend that the argument is insufficiently developed to allow them to respond. With respect to the argument that the city cannot approve the final subdivision plat because it in some way alienates property held in the public trust, respondents contend that (1) the subject property is owned by the Port, and is not owned by the state in trust for the citizens of Oregon; (2) the filing of a final subdivision plat does not itself have the effect of alienating lands; and (3) petitioner's

[7]Petitioner's assignment of error on this point states:

> "The [city] unconstitutionally deprived the petitioner of his substantive due process right to participate in land use planning in order to protect his constitutional property right to use the Public Trust being alienated by the [city]." Petition for Review 15.

challenge to the city's authority to approve a subdivision on this property was addressed during the tentative subdivision approval proceeding and nothing in the final subdivision plat review procedures permits that tentative subdivision approval decision to be revisited.

We agree with respondents that petitioner's due process challenge is insufficiently developed for review.[8] *Perry v. Yamhill County*, 26 Or LUBA 73, 77, *aff'd* 125 Or App 588, 865 P2d 1344 (1993); *Joyce v. Multnomah County*, 23 Or LUBA 116, 118, *aff'd* 114 Or App 244, 835 P2d 127 (1992). With regard to petitioner's argument that the city lacked authority to approve the final subdivision plat because it results in the alienation of public trust lands, we also agree with respondents that the city's tentative subdivision approval considered petitioner's arguments, but determined it had the authority to approve a subdivision of the property because the Port adequately demonstrated that it owns the subject property. Like petitioner's allegations under the first and second assignments of error, that determination cannot be collaterally attacked during the city's review of the final subdivision plat.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

The city processed the final subdivision plat approval through the city's Type I procedures. The Type I procedures require notice to adjacent landowners and affected local neighborhood associations, among others, and provide 30 days for parties to submit written testimony in support of or in opposition to the proposed final plat.

Petitioner argues that the city erred by reviewing the final subdivision plat through a Type I procedure rather than following a Type III procedure. *See* n 1 (describing Type III procedures). According to petitioner, two development permits that were previously granted

[8]We note, however, that petitioner and others availed themselves of the opportunity to provide evidence and testimony regarding their contention that the city lacked authority to consider subdivision applications on this property both during the tentative subdivision approval process and during the final plat process. It is therefore difficult to understand petitioner's argument that he was unconstitutionally deprived of his right to participate.

for this property contain standards or conditions that must be met before the final plat is approved. The first development permit is a 1999 conditional use and environmental review approval (1999 conditional use approval) that allows a medium security correctional facility and associated stormwater facilities to be located on proposed lot 8. The second development permit is the June 15, 2000 tentative subdivision approval. Petitioner argues that the city deferred its determination of compliance with certain criteria in those decisions, and that the city is therefore obligated to provide a review process that permits interested persons to provide evidence as to whether the standards can be met by the subdivision proposal. In particular, petitioner cites to PCC 34.60.030(A)(1) and claims that during the tentative subdivision approval proceedings, the city failed to adopt any findings to demonstrate that the standard had been met.[9] In addition, petitioner contends that because the city began with a Type III review of the subdivision application, the city must use Type III procedures throughout the entire approval process.

In response, the city argues that the application that led to the 1999 conditional use approval was withdrawn in 2000 and, therefore, any deferral of findings of compliance with approval criteria to final plat approval in this case no longer exists. With respect to the 2000 tentative subdivision approval, the city contends that the 2000 decision concluded that all standards could be feasibly met through conditions, and properly delegated technical review of those conditions to engineers and other technical experts. Therefore, the city argues that it is not obligated by its code or any other legal standard to provide an opportunity for public comment regarding compliance with the conditions of approval that were imposed to ensure compliance. *See Rhyne v. Multnomah County*, 23 Or LUBA 442, 447 (1992) (local

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[9]PCC 34.60.030(A)(1) provides:

> "*In areas that will not be served by a public sewer*, minimum lot and parcel sizes shall permit compliance with the requirements of the Department of Environmental Quality [(DEQ)] and shall take into consideration problems of sewage disposal, particularly problems of soil structure and water table as related to sewage disposal by septic tank." (Emphasis added.)

government may condition permit approval to allow for a future technical review so long as the government first makes all discretionary determinations of compliance during a stage where statutory notice and hearing requirements are observed).

In any event, the city contends that the Type I review process allowed interested parties, including petitioner, to submit testimony regarding compliance with the tentative subdivision approval. With regard to PCC 34.60.030(A)(1), the city argues that the proposed subdivision will be served by a public sewer, so compliance with DEQ requirements is not necessary.

We agree with the city that the 2000 tentative subdivision approval considered whether the proposed subdivision could comply with all development standards and concluded that, with conditions, the proposed subdivision satisfies all relevant standards. That decision was not appealed. We also agree that petitioner has not identified any standards from either the 1999 conditional use approval or the 2000 tentative subdivision approval for which findings of compliance were deferred to the final subdivision plat decision. Finally, we agree with the city that the Type I review process is adequate to provide petitioner an opportunity to provide testimony and evidence addressing whether the final subdivision plat substantially complies with PCC 34.20.070(A). *See* n 2.

The fourth assignment of error is denied.

The city's decision is affirmed.