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

6710 LLC,
Petitioner,

and

DONNA BABBITT,
Intervenor-Petitioner,

vs.

CITY OF PORTLAND,
Respondent,

and

COREY G. LARNER and
JEFF L. JORGENSEN,
Intervenors-Respondent.

LUBA No. 2002-050

FINAL OPINION
AND ORDER

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Appeal from City of Portland.

Roger A. Alfred, Portland, filed a petition for review and argued on behalf of petitioner. With him on the brief was Perkins Coie, LLP.

Donna Babbitt, Portland, filed a petition for review and argued on her own behalf.

Frank Hudson, Deputy City Attorney, Portland, filed a response brief and argued on behalf of respondent.

Daniel Kearns, Portland, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief was Reeve Kearns, PC.

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

AFFIRMED

10/15/2002

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

NATURE OF THE DECISION

Petitioner and intervenor-petitioner challenge a city decision that approves a request to correct a zone map error.

FACTS

This is the third appeal involving intervenors-respondent’s attempt to correct what they contend is a zone map error delineating the zoning boundary on a split-zoned lot located west of North Edison Street in Portland. The city originally approved the map correction in 2001, and petitioner appealed the decision to LUBA. We sustained petitioner’s assignment of error challenging the legal and evidentiary basis for the challenged decision, and remanded the decision to the city. *6710 LLC v. City of Portland*, 40 Or LUBA 389 (2001) (*6710 LLC I*).

The city initiated a new land use review to correct the errors identified in *6710 LLC I*. City staff again approved the map correction, and 6710 LLC appealed the approval to the hearings officer. The hearings officer sustained the appeal and denied the requested map correction. Intervenors-respondent then appealed the hearings officer’s decision to LUBA. On January 28, 2002, prior to the record being filed, the city withdrew the challenged decision for reconsideration pursuant to OAR 661-010-0021. After the city withdrew the decision for reconsideration, petitioner filed a motion to dismiss at LUBA arguing that the notice of intent to appeal had not been timely filed. We granted petitioner’s motion and dismissed the appeal on March 5, 2002. *Larner v. City of Portland*, 41 Or LUBA 471 (2002). Following our decision to dismiss the appeal, the city continued its proceedings on reconsideration and, on March 28, 2002, adopted the decision challenged in this appeal. The decision reversed the denial and approved the map correction request based on additional evidence.

1 **MOTION TO DISMISS**

2 Intervenor-responent move to dismiss the appeal on the basis that the city’s
3 decision is not a land use decision subject to our jurisdiction. Intervenor-responent
4 acknowledge that the city’s decision concerns the application of a land use regulation and
5 would appear to be a land use decision subject to our jurisdiction under ORS 197.015(10).
6 They argue, however, that the decision falls under one of the exceptions to land use decisions
7 listed in ORS 197.015(10). ORS 197.015(10)(b) provides that a “land use decision”:

8 “Does not include a decision of a local government:

9 “(A) Which is made under land use standards which do not require
10 interpretation or the exercise of policy or legal judgment.”

11 During the city’s proceedings on reconsideration, intervenor-responent were able to
12 locate the maps depicting the original zoning boundaries. Those maps were not available to
13 the hearings officer in the prior decisions pertaining to the subject property. According to
14 intervenor-responent, the act of reviewing maps to locate a zoning boundary does not
15 require interpretation or the exercise of policy or legal judgment and, therefore, the
16 challenged decision is not a land use decision.

17 Even assuming intervenor-responent are correct that reviewing maps to identify
18 zoning boundaries under the city’s map correction regulation does not involve interpretation
19 or the exercise of policy or legal judgment, the motion to dismiss must nonetheless be denied
20 because in addition to reviewing the maps, the hearings officer also had to determine whether
21 the city retained the authority to make a decision on reconsideration after we dismissed the
22 underlying appeal. The hearings officer’s decision involved the application and interpretation
23 of statutes and administrative rules pertaining to land use decision making. The hearings
24 officer also had to review the local land use regulations to determine whether he was
25 required to render a decision after LUBA dismissed the underlying appeal. The hearings
26 officer concluded that the city has “plenary authority” to render a decision under such

1 circumstances, and that nothing in the city’s land use ordinances was to the contrary.
2 Therefore, the city’s decision does not fall under the exception to the definition of “land use
3 decision” at ORS 197.015(10)(b)(A), and we have jurisdiction to hear this appeal.

4 **ASSIGNMENTS OF ERROR¹**

5 Petitioners do not challenge the hearings officer’s decision on the merits. Instead,
6 petitioners argue that the hearings officer did not have the authority to render a decision on
7 reconsideration after the underlying LUBA appeal had been dismissed for lack of
8 jurisdiction. When we dismissed the underlying appeal in *Larner*, we stated:

9 “We recognize that the January 28, 2002 notice of withdrawal, the pending
10 March 5, 2002 hearing and our decision that this appeal must be dismissed
11 raise potential questions about (1) the propriety of continued consideration of
12 the withdrawn decision; (2) whether any decision on reconsideration could be
13 reviewed by LUBA under OAR 661-010-0021(5); and (3) whether any
14 decision on reconsideration could be successfully challenged in a separate
15 appeal based on the above-described history that led to the reconsidered
16 decision. Intervenor suggests answers to some of those questions, and no
17 other party has responded to those suggestions.

18 “At this point, we do not believe it is appropriate to consider intervenor’s
19 suggestions concerning the possible consequences of our decision that this
20 appeal must be dismissed. If petitioner files an amended or refiled notice of
21 intent to appeal or if a new appeal is filed challenging any decision the city
22 may render on reconsideration, it may be appropriate for us to consider some
23 or all of the questions noted above.” 41 Or LUBA at 474-75.

24 Petitioners’ assignments of error require us to address the first question we posed
25 above. The starting point of our analysis is necessarily ORS 197.830(13)(b), which provides:

26 “At any time subsequent to the filing of a notice of intent [to appeal] and prior
27 to the date set for filing the record, the local government or state agency may

¹ Intervenor-petitioner’s petition for review purports to raise four separate assignments of error. The assignments of error, however, are not developed outside the brief “summary of argument” portion of intervenor-petitioner’s brief. As far as we can tell, intervenor-petitioner’s arguments parallel the arguments made by petitioner in its brief. Therefore, we address intervenor-petitioner’s arguments in our discussion of petitioner’s assignment of error, and refer to the parties together as petitioners. To the extent intervenor-petitioner’s petition for review can be read to raise any arguments in addition to those contained in petitioner’s brief, those arguments are not sufficiently developed for our review. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

1 withdraw its decision for purposes of reconsideration. If a local government or
2 state agency withdraws an order for purposes of reconsideration, it shall,
3 within such time as the board may allow, affirm, modify or reverse its
4 decision. If the petitioner is dissatisfied with the local government or agency
5 action after withdrawal for purposes of reconsideration, the petitioner may
6 refile the notice of intent [to appeal] and the review shall proceed upon the
7 revised order. An amended notice of intent [to appeal] shall not be required if
8 the local government or state agency, on reconsideration, affirms the order or
9 modifies the order with only minor changes.”

10 We have consistently interpreted this statute to provide local governments with the
11 unilateral right to withdraw their decisions for reconsideration. *Sanchez v. Clatsop County*,
12 29 Or LUBA 26, 31 (1995); *Fraser v. Wallowa County*, 25 Or LUBA 788, 789 (1993). Our
13 rule implementing ORS 197.830(13)(b) is also consistent with this practice. OAR 661-010-
14 0021 provides in pertinent part:

15 “(1) If a local government or state agency, pursuant to ORS
16 197.830(13)(b), withdraws a decision for reconsideration, it shall file a
17 notice of withdrawal with the Board on or before the date the record is
18 due. A copy of the decision on reconsideration shall be filed with the
19 Board within 90 days after the filing of the notice of withdrawal or
20 within such other time as the Board may allow.

21 “(2) The filing of a notice of withdrawal under section (1) of this rule shall
22 suspend proceedings on the appeal until a decision on reconsideration
23 is filed with the Board, or the time designated therefore expires, unless
24 otherwise ordered by the Board. If no decision on reconsideration is
25 filed within the time designated therefor, the Board shall issue an order
26 restarting the appeal.”

27 Petitioners argue that the existence of the decision on reconsideration is based
28 entirely on LUBA’s authorizing statutes and its administrative rule and, therefore, once the
29 appeal at LUBA is dismissed, the proceedings on reconsideration are made moot, and the
30 challenged decision becomes final. In the present situation, petitioners argue, our dismissal
31 of the appeal of the city’s denial of intervenors-respondent’s application means that that
32 decision is the final decision of the city in this matter.

33 ORS 197.830(13)(b) and OAR 661-010-0021 do not contemplate the situation that is
34 before us in this appeal. Nonetheless, we believe that it is fairly clear from the statutory

1 language that the city retains authority to make a decision on reconsideration
2 notwithstanding a decision by LUBA to dismiss the underlying appeal. ORS 197.830(13)(b)
3 allows a local government to withdraw a decision for reconsideration, provided that the
4 reconsideration results in a new decision. The fact that our rules provide that such a decision
5 on reconsideration does not require a new appeal does not mean that the city's decision on
6 reconsideration has no separate identity from the matters before LUBA. The procedures for
7 reconsideration are best viewed as a shortcut to a full review by LUBA in those
8 circumstances where the local government believes that the decision appealed to LUBA is
9 not defensible. Rather than have the appeal at LUBA continue, followed by a remand and
10 the submission of a new application, the local government has the opportunity to take back
11 its decision and modify it so that it may withstand an appeal, thereby avoiding time and
12 resources spent on an appeal and a new application. In such a context, the reconsideration
13 process is one avenue to expeditiously reach a final land use decision.

14 We conclude, therefore, that the city has the authority to make a decision on
15 reconsideration, even when the appeal that led to the withdrawal for reconsideration is
16 dismissed. Accordingly, the hearings officer did not err in reviewing intervenors-
17 respondent's application on the merits and rendering a new decision on reconsideration.
18 Petitioners' assignments of error are denied. The city's decision is affirmed.