

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
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4 6710 LLC and
5 DONNA BABBITT,
6 *Petitioners,*

7
8 vs.
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10 CITY OF PORTLAND,
11 *Respondent,*

12 and

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14
15 COREY G. LARNER and
16 JEFF L. JORGENSEN,
17 *Intervenors-Respondent.*

18
19 LUBA No. 2002-108

20
21 FINAL OPINION
22 AND ORDER
23

24 Appeal from City of Portland.

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

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

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

34
35 BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,
36 participated in the decision.

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38 DISMISSED

08/07/2003

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

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NATURE OF THE DECISION

Petitioners challenge city approval of a final subdivision plat.

FACTS

This appeal is the latest in a series of appeals of a development proposal for a 1.54-acre parcel located in Portland. We recite some of the tortuous procedural history to provide context for this appeal. The parcel is currently undeveloped. Sometime in 2000, intervenors consulted the city regarding subdivision approval for a 28-lot subdivision. The parcel has two zoning designations: the eastern portion of the parcel is zoned Standard Residential (R5) and the western portion of the parcel is zoned General Employment 2 (EG2). As proposed, five detached dwellings would be developed on the lots located within the R5 zone, and 23 attached dwellings would be developed on the lots located within the EG2 zone.

During the city’s preliminary review, a question arose regarding the location of the zoning line that separates the R5 and EG2 zones. The digitized map the city currently uses depicts a jog in the zoning line. A mylar zoning map created in 1991 depicts a straight line. If the mylar map is correct, petitioners’ subdivision could be approved as proposed. If the digitized map is correct, petitioners would have to reconfigure their subdivision to create fewer lots in order to conform with the R5 minimum density standards. At the request of the city, intervenors applied for a zoning map correction pursuant to Portland City Code (PCC) 33.855.070(A)(3)(2001).¹ The Director determined that the older mylar maps more

¹ PCC 33.855.070(2001) provided, in relevant part:

“The Director of OPDR [(Director)] may initiate and approve a review following the Type I procedure for the types of corrections to the Official Zoning Maps listed below. If the Director of OPDR determines that the map error is discretionary in nature, then the Director of OPDR can initiate a Type II process.

“A. **Mapping Errors.** The correction may be made for mapping errors such as:

“* * * * *

1 accurately depicted the designated zoning boundary and approved intervenors' map
2 correction application.

3 Petitioners 6710 LLC and Donna Babbitt (6710 LLC and Babbitt, respectively, or
4 petitioners) appealed that decision to LUBA. In *6710 LLC v. City of Portland*, 40 Or LUBA
5 389 (2001) *aff'd* 181 Or App 467, 46 P3d 229, *rev den* 334 Or 289, 49 P3d 798 (2002)(*6710*
6 *LLC I*), we agreed with 6710 LLC that the city's decision regarding the location of zoning
7 lines on the subject property was not supported by adequate findings or substantial evidence.

8 The city conducted additional proceedings on remand from that decision and
9 concluded that intervenors had not met their burden of demonstrating an error in the city's
10 digitized maps and, therefore, the city denied intervenors' zoning line correction request.
11 Intervenors appealed that decision to LUBA. The city moved for reconsideration of its
12 decision pursuant to ORS 197.830(13)(b) and OAR 661-010-0021. However, the petitioners'
13 appeal was not timely filed with LUBA. We dismissed the petitioners' appeal while the
14 decision was still pending reconsideration before the city. *Larner v. City of Portland*, 41 Or
15 LUBA 471 (2002).

16 During the reconsideration proceedings before the city, 6710 LLC argued that, as a
17 result of LUBA's dismissal in *Larner*, the city's reconsideration proceedings could not be
18 continued. The hearings officer conducting the reconsideration proceedings disagreed with
19 6710 LLC, concluding that, notwithstanding the dismissal of the LUBA appeal, the decision
20 was properly before the city for reconsideration. Based on additional evidence that showed
21 that the 1991 mylar zoning map correctly depicted the zoning boundary, the hearings officer
22 then approved the zoning map correction request.

“3. The line on the [zoning] map does not match the legal description or map shown or referenced in the ordinance which applied the designation[.]”

This process has been modified somewhat since 2001; however, those changes do not affect this appeal.

1 Petitioners appealed the city hearings officer’s decision to LUBA, arguing that the city
2 lacked jurisdiction to consider intervenors’ application once LUBA had dismissed its appeal.
3 We rejected that argument, and affirmed the city’s decision. *6710 LLC v. City of Portland*, 43
4 Or LUBA 177 (2002), *aff’d* 186 Or App 136, 63 P3d 55, *rev den* 335 Or 422, ___ P3d ___
5 (2003)(*6710 LLC II*).

6 While *6710 LLC I* and *II* were making their way up and down the appellate ladder,
7 intervenors submitted a tentative subdivision plat that divided the subject property into lots
8 based on the line depicted on the 1991 mylar zoning map. On June 8, 2001, the city hearings
9 officer approved the tentative subdivision plat, subject to conditions.² On April 19, 2002, the
10 city mailed notice of intervenors’ final plat submittal to 6710 LLC, among others. Notice of
11 the final plat submittal was not sent to Babbitt. Neither 6710 LLC nor Babbitt commented on
12 the final plat proposal. On August 8, 2002, the city issued its decision approving intervenors’
13 final subdivision plat. This appeal followed.

14 **DECISION**

15 The final subdivision plat was reviewed pursuant to statutory procedures for limited
16 land use decisions.³ ORS 197.830(2) provides:

17 “* * * a person may petition the board for review of a * * * limited land use
18 decision if the person:

² One of the conditions of approval, Condition C-6, required:

“Prior to final plat approval, the applicant must obtain a letter from the city attorney’s office indicating that LUBA and any subsequent review body has issued a final opinion for appeals taken from [(*6710 LLC I*)] such that the zoning line is in the same location as [shown on the 1991 mylar zoning map.]” Record 15.

³ ORS 197.015(12) defines “limited land use decision” as:

“[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.
* * *”

1 “(a) Filed a notice of intent to appeal the decision [with LUBA]; and

2 “(b) Appeared before the local government * * * orally or in writing.”

3 Intervenors move to dismiss this appeal, arguing that petitioners did not appear
4 during the proceedings below and, therefore, have not satisfied one of the two prerequisites
5 set out at ORS 197.830(2) for appealing the city’s decision to LUBA.

6 Petitioners contend that they have standing to appeal, notwithstanding their failure to
7 appear during the final subdivision plat proceedings.⁴ First, petitioners argue that the
8 challenged decision is merely one part of the entire subdivision process and, therefore,
9 because petitioners appeared during the proceedings that led to the city’s tentative
10 subdivision plat approval, they have also satisfied the appearance requirement for purposes
11 of appealing the city’s final subdivision plat approval.

12 We have held that a final subdivision plat approval may itself constitute a limited
13 land use decision. *Bauer v. City of Portland*, 38 Or LUBA 715 (2000). Here, the city treated
14 the final subdivision plat submittal as a separate decision, and provided notice, an
15 opportunity to comment and an opportunity to appeal the city’s final decision to LUBA
16 pursuant to ORS 197.195.⁵ Therefore, petitioners’ appearances before the city during

⁴ Petitioners did not file a written response to intervenors’ motion to dismiss. Their response was presented in their oral argument before LUBA.

⁵ ORS 197.195(3) sets out the process to be used in making a limited land use decision. It provides, in relevant part:

“(b) For limited land use decisions, the local government shall provide written notice to owners of property within 100 feet of the entire contiguous site for which the application is made. The list shall be compiled from the most recent property tax assessment roll. For purposes of review, this requirement shall be deemed met when the local government can provide an affidavit or other certification that such notice was given. * * *

“(c) The notice and procedures used by local government shall:

“(A) Provide a 14-day period for submission of written comments prior to the decision;

1 proceedings that led to the *tentative* subdivision plat approval do not constitute an
2 appearance for purposes of establishing standing to appeal the separate *final* subdivision plat
3 decision.

4 Petitioners next argue that they are excused from the ORS 197.830(2) appearance
5 requirement because the city failed to provide adequate notice to 6710 LLC. Petitioners
6 concede that 6710 LLC was mailed notice of the final subdivision plat submittal pursuant to
7 ORS 197.195(3)(b). However notice of the final subdivision plat submittal was not sent to
8 6710 LLC's attorney, who has appeared on 6710 LLC's behalf throughout these appeals.
9 Petitioners contend that the city erred in providing notice only to 6710 LLC at its business
10 address and by not mailing that notice to 6710 LLC's attorney in addition to, or instead of, its
11 business address.

12 With respect to petitioner Babbitt, petitioners concede that Babbitt is not entitled to
13 written notice of the final subdivision plat submittal. However, petitioners argue that she is
14 adversely affected and aggrieved by the decision, because she resides near the subject
15 property and, as a result of the proposed development, will lose her view and her enjoyment
16 of the open space provided by intervenors' undeveloped land.

17 The city's failure to provide petitioner 6710 LLC's attorney notice that the final
18 subdivision plat had been submitted for approval does not excuse 6710 LLC's failure to

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- “(B) State that issues which may provide the basis for an appeal to the Land Use Board of Appeals shall be raised in writing prior to the expiration of the comment period. Issues shall be raised with sufficient specificity to enable the decision maker to respond to the issue;
 - “(C) List, by commonly used citation, the applicable criteria for the decision;
 - “* * * * *
 - “(H) Provide notice of the decision to the applicant and any person who submits comments under subparagraph (A) of this paragraph. The notice of decision must include an explanation of appeal rights; and
 - “(I) Briefly summarize the local decision making process for the limited land use decision being made.”

1 appear and oppose the final subdivision plat approval. Petitioner 6710 LLC was mailed
2 notice of the request for final plat approval as a person who owns property within 100 feet of
3 the subject property, as ORS 197.195(3)(b) requires. If petitioner 6710 LLC had requested
4 that the city also provide notice of any request for final plat approval to its attorney, there
5 might be an argument that the city’s failure to do so excuses petitioner 6710 LLC’s failure to
6 appear. However, petitioners do not argue that such a request was made of the city. There
7 was no error on the city’s part, and petitioner 6710 LLC does not have standing to bring this
8 appeal because it did not appear during the local proceedings, as required by ORS
9 197.830(2)(b).

10 With regard to petitioner Babbitt, we understand the city to argue petitioner Babbitt
11 was not entitled to written notice of the application for final plat approval under ORS
12 197.195(3)(b), because she does not own property within 100 feet of the subject property.
13 We assume that fact explains her failure to make a local appearance. At oral argument,
14 petitioners suggested that petitioner Babbitt may be adversely affected by the final plat
15 approval decision. That suggestion may have been intended as an argument that petitioner
16 Babbitt has standing to appeal under ORS 197.830(5), as a person who is “adversely affected
17 by the decision,” notwithstanding her failure to appear locally.⁶ However, petitioners neither
18 cite to any evidence in the record that would establish that petitioner Babbitt is adversely
19 affected by the city’s decision nor move for an evidentiary hearing pursuant to OAR 661-

⁶ ORS 197.830(5) provides:

“If a local government makes a limited land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government’s final actions, a person adversely affected by the decision may appeal the decision to the board under this section:

“(a) Within 21 days of actual notice where notice is required; or

“(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required.”

1 010-0045 to produce evidence of such adverse effect. We conclude that petitioners have
2 failed to demonstrate that petitioner Babbitt has standing to appeal, notwithstanding her
3 failure to appear locally.

4 Finally, even if one or both of the petitioners had standing to bring this appeal, the
5 appeal would have to be dismissed as moot or, at worst, remanded so that the city attorney's
6 office could write the letter that Condition C-6 expressly requires before the city grants final
7 plat approval. *See* n 2. Petitioners allege two assignments of error. In the first assignment of
8 error, they allege it was error for the city to grant final plat approval in advance of a final
9 decision by the appellate court in *6710 LLC II* and a letter from the city attorney's office
10 confirming that fact. In their second assignment of error, petitioners attack a deputy city
11 attorney's rationale for concluding that the final plat could be approved without a final
12 decision in *6710 LLC II*, based on his independent finding that the zoning district boundaries
13 on the property are as shown on the 1991 mylar zoning map.

14 The appellate judgment in *6710 LLC II* was issued on July 9, 2003 and therefore the
15 issue of whether the 1991 mylar zoning map accurately depicts the zoning boundary location
16 on the subject property is finally resolved.⁷ As a matter of law, the 1991 mylar zoning map
17 accurately depicts the zoning line. The city's error in approving the final plat without the
18 letter from the city attorney's office confirming a final judgment in *6710 LLC II* as required
19 by condition C-6, if it was error, would be corrected on remand by the city attorney's office
20 issuing the required letter and the city readopting its final plat approval.

21 For the reasons explained above, this appeal is dismissed.

⁷ We recognize that *6710 LLC II* is not final in all respects. The city has appealed our post-appellate judgment order denying its motion for attorney fees. However, for the purposes of this opinion, the material issue was resolved by the July 9, 2003 appellate judgment.