

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

3
4 ERNEST McCULLOH and PAM McCULLOH,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF JACKSONVILLE,
10 *Respondent,*

11
12 and

13
14 DAN HAWKINS and RHONDA HAWKINS,
15 *Intervenors-Respondent.*

16
17 LUBA No. 2003-083

18
19 FINAL OPINION
20 AND ORDER

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22 Appeal from City of Jacksonville.

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24 Debbie V. Minder, Medford, filed the petition for review.

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26 Kurt H. Knudsen, Ashland, represented respondent.

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28 Alan D. B. Harper, Medford, represented intervenors-respondent.

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

32
33 REMANDED

02/24/2004

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

NATURE OF THE DECISION

Petitioners appeal a decision by the city Historical and Architectural Review Commission (HARC) approving the covenants, conditions and restrictions (CC&Rs) for a proposed subdivision.

MOTION TO WITHDRAW

By order dated June 20, 2003, we granted the motion of intervenors-respondent (intervenors) to intervene in this appeal. On January 23, 2004, intervenors moved to withdraw from this appeal. The motion is granted.

FACTS

In 2002, intervenors applied to the city for tentative plat and conditional use approval to subdivide a 6.37-acre parcel. Petitioners, who own land adjacent to the subject property, appeared before the planning commission in opposition to the application. On April 9, 2003, the planning commission issued its final decision approving the requested plat and conditional use approval. Petitioners separately appealed that decision to LUBA. *See McCulloh v. City of Jacksonville*, __ Or LUBA __ (LUBA No. 2003-061, January 20, 2004) (remanding planning commission decision).

Prior to the planning commission decision, but after the close of the record in those proceedings, intervenors submitted to HARC the draft CC&Rs for the proposed subdivision for review under Jacksonville Municipal Code Title 18 pursuant to JMC 16.02.04(E) and JMC 18.23.010.¹ Staff scheduled the matter for HARC review during a March 26, 2003 meeting,

¹ JMC 16.02.04(E) provides:

“The applicant [for tentative subdivision approval] shall prepare preliminary [CC&Rs] that affect all resulting properties in order to ensure the compatibility of the proposed subdivision with the historic character of Jacksonville. These CC&Rs shall also establish a homeowners association if necessary to address the development and maintenance of all common areas. A copy of the proposed [CC&Rs] which will be applicable to the subject property shall be submitted to the Planning Commission and HARC. The proposed preliminary [CC&Rs] are subject to the approval of HARC and, once approved, may not be substantially altered when presented back to the City in their final form.”

1 and issued a public notice of that meeting that listed the matter as an agenda item. The notice
2 indicated that “[a]ll applications to be considered are Limited Land Use decisions as defined by
3 ORS 197.015 and are subject to the provisions of ORS 197.195.” Record 19. At the March 26,
4 2003 meeting, HARC reviewed the draft CC&Rs and approved them, with no major modifications.
5 City staff then generated a memorandum memorializing the HARC action. Record 18. No notice
6 of the HARC meeting or decision was provided to petitioners.

7 Petitioners learned of the HARC decision when they reviewed the record of the planning
8 commission decision on May 13, 2003. Petitioners appealed the HARC decision to LUBA under
9 ORS 197.830(5) and, at the same time, filed a local appeal of the HARC decision to the city
10 council. The city council subsequently determined that no right of local appeal exists under the city’s
11 code for the challenged HARC decision.

12 **ASSIGNMENT OF ERROR**

13 Petitioners contend that the HARC decision is a limited land use decision as defined by
14 ORS 197.015 and subject to the requirements of ORS 197.195.² Therefore, petitioners argue, the

JMC 18.23.010 provides:

Every proposed subdivision or PUD shall submit a set of [CC&Rs] for HARC review as to historic appropriateness. The CC&Rs’ compatibility with the criteria and standards found in [JMC] Title 18 shall be used to determine such appropriateness, along with the need to provide a mixture of roof configurations and heights and lot size variations.”

² ORS 197.015(12) defines “limited land use decision” as follows:

“‘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.

“(b) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review.”

1 city erred in failing to provide petitioners with the written notice to which they were entitled under
2 ORS 197.195(3)(b).³

3 Our review is hampered somewhat by the city’s decision not to participate in this appeal.
4 However, as far as we can tell, petitioners are correct that under the city’s code HARC review of
5 the proposed CC&Rs required by JMC 16.02.04(E) and JMC 18.23.010 is accurately
6 characterized as a limited land use decision. In most jurisdictions, consideration of whether

³ ORS 197.195(3) provides, in relevant part:

“A limited land use decision is subject to the requirements of paragraphs (a) to (c) of this subsection.

“* * * * *

“(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. * * *

“(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;

“(B) State that issues which may provide the basis for an appeal to [LUBA] 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;

“(D) Set forth the street address or other easily understood geographical reference to the subject property;

“(E) State the place, date and time that comments are due;

“(F) State that copies of all evidence relied upon by the applicant are available for review, and that copies can be obtained at cost;

“(G) Include the name and phone number of a local government contact person;

“(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 proposed CC&Rs for a proposed subdivision comply with applicable requirements would be
2 conducted by the review body evaluating the application for subdivision. A participant in those
3 proceedings would have an opportunity to present testimony with respect to whether proposed
4 CC&Rs complied with applicable criteria. The resulting decision on the subdivision application
5 would either be a limited land use decision or land use decision, depending on whether the subject
6 property was within an urban growth boundary.

7 In the City of Jacksonville, however, the city has delegated consideration of CC&Rs to a
8 different review body than the review body that evaluates the subdivision application. HARC
9 conducts its review under what appear to be “discretionary standards designed to regulate the
10 physical characteristics of a use” otherwise permitted outright. Either because the HARC review
11 “concerns” the “approval or denial of a subdivision or partition” within an urban growth boundary,
12 or because HARC review applies discretionary standards designed to regulate the physical
13 characteristics of uses permitted outright, the HARC review of the proposed CC&Rs in the present
14 case appears to fall within the definition of “limited land use decision” at ORS 197.015(12).

15 It follows that the city erred in failing to follow the procedures required for limited land use
16 decisions, in particular in failing to provide notice to persons within 100 feet of the subject property,
17 including petitioners. Therefore, remand is necessary to follow the required statutory procedures.

18 The city’s decision is remanded.