BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BUTTE CONSERVANCY,
Petitioner,

vs.

CITY OF GRESHAM,
Respondent,

and

MIKE AGEE,
Intervenor-Respondent.

LUBA No. 2004-077

FINAL OPINION
AND ORDER

Appeal from City of Gresham.

Gary P. Shepard, Portland, filed the petition for review and argued on behalf of petitioner.

Richard D. Faus, City Attorney, Gresham, and Jeffrey L. Kleinman, Portland, filed a joint response brief. Richard D. Faus argued on behalf of respondent. Jeffrey L. Kleinman argued on behalf of intervenor-respondent.

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

AFFIRMED 07/29/2004

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals city approval of a final subdivision plat for the first three phases of a phased subdivision.

REPLY BRIEF

Petitioner moves to file a reply brief to respond to new matters raised in the response brief regarding the correct scope and standard of review in this appeal. The city and intervenor-respondent (intervenor) advise the Board that they do not object to the reply brief, and it is allowed.

FACTS

On December 18, 1996, intervenor's predecessor-in-interest filed an application for tentative subdivision plan approval for a phased subdivision on approximately 50 acres on Hogan Butte. On April 17, 1998, the city approved a 74-lot subdivision, in 12 phases, on the subject property. After local appeals were resolved, the city's tentative plan approval decision became final on June 29, 1998. Condition 1 of the 1998 tentative plan approval provided that the applicant must apply for all final plat reviews within five years of the tentative plan approval (*i.e.*, June 29, 2003). Condition 1 also provided for a maximum six-month extension if the applicant submits a written request prior to expiration of tentative plan approval.[1]

[1] Condition 1 of the 1998 tentative plan approval states, in relevant part:

> "The applicant shall apply for all final plat reviews within five (5) years of the tentative plan decision, per Sections 11.44.110 – 11.44.150 of the Community Development Plan [now codified as Gresham Community Development Code (GCDC) 6.0211 to 6.0412]. * * * An extension for a maximum of six months may be granted only upon a written request of the applicant submitted prior to the expiration of the approval, and following the Type I procedure with written findings that the facts upon which the approval was based have not changed to an extent sufficient to warrant refiling of the tentative plan and after finding no other development approval would be affected (11.44.090). Any phase of the subdivision not submitted for final plat approval within the five (5) year time limit, or approved extension, shall be required to be processed anew under the regulations current at that time in order to be developed." Record 224.

In April 1999, city staff adopted the position that the 1998 tentative plan approval was subject to a one-year expiration date, pursuant to GCDC 6.0410, rather than the five-year expiration date set forth in Condition 1.[2] City staff informed the applicant that the tentative plan approval would lapse on June 29, 1999, unless extended. The applicant filed a written request for a six-month extension, which city staff granted in writing on May 5, 1999. In November 1999, city staff informed the applicant that the tentative plan approval, as extended, would lapse in December 1999, again acting on the staff's understanding that the tentative plan approval was subject to the one-year expiration date at GCDC 6.0410. The applicant responded that no final plat for the first

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[2] The city recodified the GCDC sometime after the 1998 tentative plan approval. We follow the parties in citing to the current codification of GCDC 6.0410 and related provisions. At all relevant times, GCDC 6.0410 and 6.0411 provided as follows:

"**6.0410 Tentative plan Expiration Date**

"Within one year following the effective date of approval of a tentative land division plan, the final plat shall be submitted pursuant to Section 6.0402 and shall incorporate any modification or condition required by the tentative plan. The Manager may, upon written request of the applicant prior to the expiration of the approval and following the Type I procedure, extend the expiration date for an additional six months upon a written finding that the facts upon which the approval was based have not changed to an extent sufficient to warrant refiling of the tentative plan and after finding no other development approval would be affected.

"**6.0411 Reinstatement of Tentative Plan Approval Status**

"(A) Prior to the expiration date of a tentative plan extension the Manager may, upon written request of the applicant, assign an inactive status to the tentative plan.

"(B) An inactive plan may have its tentative plan approval status reinstated, under the Type II procedure, if the plan is found to be consistent with the following criteria:

"(1) There have been no changes in the Community Development Code that would necessitate a modification of the tentative plan;

"(2) The facts upon which the approval was based have not changed to an extent sufficient to warrant refiling of the tentative plan; and

"(3) There are no other development approvals that would be affected.

"(C) If the tentative plan approval status is reinstated the applicant shall comply with the City's final plan technical information requirements in effect at the time of reinstatement. A land division that has been reinstated shall be recorded with Multnomah County within three years from the date the inactive status was granted."

phase could be filed by that time, and city staff suggested that the applicant request that the tentative plan be placed on "inactive" status under GCDC 6.0411(A). On December 3, 1999, the applicant requested inactive status, and staff approved the request in a letter dated December 14, 1999.[3]

Shortly thereafter, in the course of reviewing another phased subdivision application, staff came to the conclusion that the one-year expiration date at GCDC 6.0410 did not apply to *phased* subdivisions. Staff concluded that the expiration dates for phased subdivisions are subject instead to GCDC 6.0211, which allows the approving authority to determine a time schedule for platting a subdivision in phases, up to five years.[4] Sometime in early 2000, city staff spoke by phone with the applicant's representative, and advised that the city would proceed on the understanding that the 1998 tentative plan approval decision was on "active" status, and the expiration date for the June 29, 1998 tentative approval was established by the five-year time limit set out in Condition 1. Thereafter, the applicant and the city acted consistently with that understanding.

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[3] The December 14, 1999 letter states, in relevant part:

> "Staff has completed its review and approves of your request for placing the Evergreen Ridge Subdivision (SD/VR2 96-9529) on 'Inactive Status' in accordance with Section 6.0411(A).
>
> "Please be advised that, in accordance with Section 6.0411(B):
>
> [quoting GCDC 6.0411(B). *See* n 2]
>
> "A Type II review will be required to reinstate the tentative plan approval status. While at this time there does not appear to be any [GCDC] changes that would necessitate a modification of the tentative plan, there is in progress a proposal to amend the Hillside Physical Constraint Overlay District development standards (CPA 99-2841) that may necessitate such changes. If this is the case, it will necessitate a full review for tentative plan approval of the development of the site." Record 155 (emphasis original).

[4] GCDC 6.0211 provides, in relevant part:

> "**6.0211 Phased Subdivision**
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> "The approval authority may authorize a time schedule for platting a subdivision in phases. Each phase may be for a period of time in excess of one year but the total time period for all phases shall not be greater than five years without resubmission of the tentative plan. Each phase so platted and developed shall conform to the applicable requirements of this code. * * * Portions platted after the passage of one year shall be required to have modifications if necessary to avoid conflicts with a change in the Community Development Plan."

In June 2000, the applicant and a non-profit land trust signed an option to purchase the subject property. In November 2002, the applicant requested two six-month extensions to the expiration date, pursuant to GCDC 6.0413.[5] City staff granted the request in a decision dated December 11, 2002, extending the expiration date for the 1998 tentative plan approval to June 29, 2004.[6]

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[5] GCDC 6.0413 was adopted in September 2002 as Ordinance 1554. The apparent motivation for Ordinance 1554 was to facilitate negotiations such as those that were then occurring between applicant and the land trust, by allowing up to two six-month extensions to the expiration date for tentative plan approvals. GCDC 6.0413 provides:

> "**6.0413 Final Plat Extension for Public Purpose**
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> "Prior to the expiration of a tentative land division plan under either Section 6.0211 or Section 6.0410 and upon application by the applicant, the Manager may extend the expiration date of the tentative plan for an additional six months under the Type 1 procedure. This six-month extension is in addition to the six- month extension allowed by Section 6.0410 for a non-phased subdivision to be platted, or in addition to the five years allowed by Section 6.0210 for all phases of a phased subdivision to be final platted. A written finding must accompany the decision that demonstrates that the property (or portion) has been under an option for acquisition as public open space or for a public facility-related purpose by the City of Gresham, other governmental agency or by a non-profit organization that is registered with the State of Oregon, for at least six months of the period allowed for the filing of the final plat. In the case of a non-profit organization, the City Council or a City department must support the proposed acquisition. Under the same procedure and for the same purposes, the Manager may extend the expiration date of the tentative plan for a second six-month period upon a written finding that the property (or portion) has been under the same option for at least one year of the period allowed for the filing of the final plat by Section 6.0211 or 6.0410."

[6] The city's December 11, 2002 decision states, in relevant part:

> "Staff has completed its review of your request for an extension of the approval with conditions for SD/VR2 96-9529. This development permit would have expired on June 29, 2003. * * *
>
> "Tentative plan decisions for a phased subdivision may be extended for six months if the code criteria of [GCDC] 6.0413 are met. Property that is under option for public open space acquisition for a period in excess of one year may have the tentative plat approval extended by a maximum of 12 months. Staff makes the following findings pursuant to [GCDC] 6.0413:
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> "1. The property in question has been under an option for acquisition for public open space by the Trust for Public Lands. * * *
>
> "2. The period of time that the land was under option was 28 months, in excess of the required minimum time period of 6 and/or 12 months.

Negotiations between the applicant and the land trust ultimately failed, and the applicant began preparing a final plat application. On April 2, 2004, petitioner sent a letter to the city arguing that the 1998 tentative plan approval decision had never been reinstated pursuant to GCDC 6.0411 and the tentative plan approval was therefore still on "inactive" status. On April 12, 2004, intervenor filed a final plat application for the first three phases of the 1998 tentative subdivision plan decision. On April 23, 2004, petitioner wrote another letter to the city arguing that the city could not review the final plat application until the city reinstated the 1998 tentative subdivision plan approval pursuant to the criteria at GCDC 6.0411.

A senior city planner responded in a letter dated April 30, 2004, explaining the city's position that the December 14, 1999 staff letter placing the tentative plan on "inactive" status was based on a misunderstanding of Condition 1 and applicable code provisions, and that the city viewed the tentative plan approval to be "active," with an expiration date of June 29, 2004.[7] On

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"3. The City of Gresham supported the proposed acquisition, as found in Resolution No. 2515 (12/11/01).

"Please be advised that this extension is granted with the following conditions:

"1. The expiration of the tentative plan is extended to June 29, 2004. An application for the final plat for all phases will be required by this date. Tentative approval for any phases for which a final plat has not been submitted by June 29, 2004, will be null and void.

"* * * * *" Record 154.

[7] The April 30, 2004 letter states, in relevant part:

"The City considers the County Club Estates Subdivision tentative plat approval to still be valid. The following are a set of facts that outline the validity of the tentative plat approval:

"* * * * *

"6. In April of 1999, the City misapplied Condition #1 and Section 6.0211 (formerly Section 11.44.110) and informed the applicant that the tentative plat approval would lapse if a final plat for the first phase was not submitted within a one-year time frame from the tentative plat approval, or an extension was applied for and granted.

"7. The applicant requested an extension of the tentative plat approval on 4/28/99 * * *.

"8. The City approved the extension on 5/5/99 * * *

May 3, 2004, petitioner sent a third letter disagreeing with the city's position and requesting that petitioner's letters be placed in the final plat review file. On May 14, 2004, the city issued its decision approving the final plat application. The city's May 14, 2004 decision adopts the city's April 30, 2004 letter and its attachments as the city's findings with respect to the issues raised by petitioner.

This appeal followed.

MOTION TO DISMISS

The city and intervenor (respondents) filed a joint response brief that includes a motion to dismiss this appeal. According to respondents, the city made a decision in early 2000 that the December 14, 1999 letter placing the tentative plan application on "inactive" status was in error, and that any determination of "inactive" status was void. Respondents argue that petitioner failed to appeal this city decision, or any of the city's subsequent actions based on that decision, and therefore petitioner's attempt in the present appeal to challenge the city's position on the "active" status of the application is untimely.

"9. In November of 1999, the City continued with the misapplication of Condition #1 and Section 6.0211 and informed the applicant of the forthcoming expiration of the tentative plat approval (with extension). As a final plat was not forthcoming, it was suggested by staff that the applicant request that the application be put on inactive status.

"10. The applicant requested, by letter, that the tentative plat be put on inactive status on 12/3/99.

"11. The City approved the placement of the tentative plat on inactive status on 12/14/99.

"12. Early in 2000, the City became aware of the misapplication of Condition #1 and Section 6.0211. * * * Sometime in early 2000, a phone conversation occurred with the Evergreen Ridge subdivision in which the original approval time limit, as provided in Condition of Approval #1 was acknowledged as being the correct time limit. Since the original 5-year approval time period had not been extended via the misapplied Inactive Status action, the applicant derived no benefit from the application being considered Inactive. Prior to this time, no action of any kind was taken assuming an 'inactive' status. Subsequent to this time, the City proceeded under the original 5-year time limit, as provided in Condition of Approval #1." Record 224-25.

The respondent's arguments are not properly viewed as a jurisdictional challenge. Respondents concede that LUBA has jurisdiction over the decision challenged in this appeal: the May 14, 2004 final plat approval. *See Hammer v. Clackamas County*, 190 Or App 473, 79 P3d 394 (2003) (final plat approval is a limited land use decision). It is more accurate to view respondents' jurisdictional challenge as an argument that all of the issues raised in the petition for review are beyond LUBA's scope of review. Stated differently, respondents contend that while petitioner has appealed the May 14, 2004 final plat approval decision, the arguments made in the petition for review are directed at determinations made in other city decisions that are not before us. Assuming respondents are correct on that point, the proper disposition is not to dismiss this appeal, but to reject petitioner's assignments of error and affirm the city's decision. Accordingly, we view respondents' arguments as a scope of review challenge rather than a jurisdictional challenge, and address those arguments accordingly. Respondents' motion to dismiss is denied.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR

In these assignments of error, petitioner contends that the city erred in approving the final plat review application. According to petitioner, the December 14, 1999 decision placing the 1998 tentative plan approval on "inactive" status still controls the status of the tentative plan approval, and unless and until the city reinstates the tentative plan approval, pursuant to the standards and procedures required by GCDC 6.0411(B), the city cannot approve the final subdivision plat. Further, petitioner argues that reinstatement is effectively precluded by the fact that the three-year deadline to record the subdivision plat set forth in GCDC 6.0411(C) has already expired.[8] Consequently, petitioner argues, the challenged decision to issue final plat approval violates GCDC 6.0411(B) and (C) and is prohibited as a matter of law.

[8] Inactive status was granted December 14, 1999. Under GCDC 6.0411(C), tentative plan approval would have to be reinstated and a final plat would have to be recorded not later than three years later, on December 14, 2002. The parties do not dispute that no final plat was recorded by December 14, 2002.

As noted, we understand respondents to contend that these assignments of error constitute an impermissible collateral attack on decisions that are not before LUBA, and therefore the issues raised by these assignments of error are beyond our scope of review.

Respondents' scope of review challenge is based on the unexceptional principle that assignments of error that collaterally attack a decision other than the decision on appeal do not provide a basis for reversal or remand. *See Robson v. City of La Grande*, 40 Or LUBA 250, 254 (2001) (assignments of error directed at decisions other than the decision on appeal do not provide a basis for reversal or remand); *Bauer v. City of Portland*, 38 Or LUBA 715, 721 (2000) (petitioner may not collaterally attack a tentative plan approval decision by appealing a final plat approval decision). According to respondents, city staff made a decision in early 2000, which was orally communicated to the applicant, to ignore or treat as void the December 14, 1999 decision placing the tentative plan approval decision on "inactive" status. Respondents emphasize that the city's subsequent actions were all consistent with the staff position that the December 14, 1999 decision was void.

In particular, respondents argue that the December 11, 2002 decision to extend the five-year expiration date for an additional year pursuant to GCDC 6.0413 is inconsistent with the December 14, 1999 decision to place the tentative approval on "inactive" status. In order to challenge the staff position on this point, respondents argue, petitioners must appeal the 2000 staff decision or the December 11, 2002 extension decision, and cannot collaterally attack that staff position in the present appeal of the final plat approval. Respondents argue that any attempt now to appeal the 2000 staff decision or 2002 extension decision would be untimely under ORS 197.830(3) or (9).

On the merits, respondents argue that challenged decision correctly determined that the December 14, 1999 decision to place the tentative plan approval on inactive status was erroneous, based on a mistaken understanding that the 1998 tentative plan approval was subject to the one-year expiration date at GCDC 6.0410, rather than the five-year period set out in Condition 1, as

authorized by GCDC 6.0211. In addition, respondents contend that the text, context and legislative history of GCDC 6.0411 indicate that that provision is intended to apply to non-phased tentative plan approvals and not to *phased* tentative plan approvals. Because GCDC 6.0411 is inapplicable to phased tentative plan approvals and such approvals *cannot* be placed on inactive status, respondents argue, the December 14, 1999 decision exceeded the city's authority, and is therefore a nullity.

Petitioner responds that the challenged May 14, 2004 final plat approval decision includes findings that for the first time express in a final, written decision the apparent staff position that the December 14, 1999 decision is void and the tentative plan review decision is on "active" status. Petitioner contends that no city action prior to adoption of the challenged decision, including the December 11, 2002 decision to extend the five-year expiration date for an additional year pursuant to GCDC 6.0413, had the effect of voiding the December 14, 1999 decision or placing the tentative plan review decision on "active" status.

In a sense, both petitioner and respondents seek to assign preclusive consequences to *som*e decisions that predate the challenged decision and argue against assigning preclusive consequences to *other* decisions that also predate the challenged decision. Petitioner argues that the city and intervenor are bound by the December 14, 1999 decision, and cannot collaterally attack the correctness of that decision in this appeal of the May 14, 2002 final plat approval. Respondents argue that the city is bound by the position that staff arrived at in early 2000 and subsequent decisions based on that staff position, such as the December 11, 2002 decision extending the deadline for filing the final plat application, and that petitioner cannot collaterally attack those decisions in this appeal. The complicated procedural history of this case makes it particularly trying to sort out the parties' scope of review arguments.

Our resolution of the parties' arguments is based on the following overview of the procedural history, and our view of the relationship between the pertinent decisions. The June 29, 1998 tentative plan approval, including Condition 1, gave the applicant up to five years (until June

29, 2003) to seek final plat approval. Based on an apparently mutual misunderstanding of Condition 1 and the relevant code provisions governing phased subdivision approvals, the applicant applied for, and staff approved, a six-month extension of the deadline for submitting the final plat application. Under that May 5, 1999 extension decision, the deadline for filing the final plat application became December 29, 1999. That May 5, 1999 extension decision was clearly inconsistent with, and hence clearly modified, Condition 1. Rightly or wrongly, the May 5, 1999 decision modified Condition 1 of the 1998 tentative plan approval. That May 5, 1999 decision was not appealed or challenged, and cannot now be challenged.

Again acting on a mutual misunderstanding, the applicant then applied for, and staff approved, placing the 1998 tentative plan approval on inactive status. Under that December 14, 1999 decision, the next step for the applicant was to seek reinstatement to active status, file for final plat approval, and record the final plat approval by December 14, 2002. Again, that December 14, 1999 decision is clearly inconsistent with, and hence clearly modifies Condition 1 of the 1998 tentative plan approval, as modified by the May 5, 1999 extension decision. Whether the December 14, 1999 decision was right or wrong, it was not appealed or challenged, and cannot now be challenged.

In early 2000, city staff came to the conclusion that the December 14, 1999 decision placing the tentative plan approval on inactive status was wrong, or based on a misunderstanding of the facts and law. Other than communicating that conclusion to the applicant, city staff made no effort to formally revoke or modify either the May 5, 1999 or the December 14, 1999 decisions, but instead simply proceeded on the understanding that those decisions were nullities and that the unmodified Condition 1 of the 1998 tentative plan approval controlled the timing and deadlines for final plat approval.

In our view, the informal staff decision in early 2000 that was communicated orally to the applicant did not and cannot modify or void either the May 5, 1999 or the December 14, 1999 written decisions. Both the May 5, 1999 and December 14, 1999 decisions were final, written

decisions issued pursuant to the code-required Type I procedures. Respondents do not cite us to any code provisions that allow the city to informally ignore or treat as void a final, written Type I decision because the city subsequently informally concludes the decision was erroneous or based on a misunderstanding of applicable law. At a minimum, any city decision to modify or void either the May 5, 1999 or the December 14, 1999 decisions, or to restore the terms of Condition 1, must be accomplished by a final, written decision.

The only candidate for such a final, written decision that predates the challenged May 14, 2004 final plat approval is the December 11, 2002 decision. In 2002, the applicant applied for an extension of the five-year deadline set out in Condition 1 from June 29, 2003 to June 29, 2004. The city approved that application in a final, written decision, pursuant to code-required Type I procedures. The December 11, 2002 decision is clearly based on the assumption that the 1998 tentative plan approval is "active" and subject to the five-year expiration date set out in Condition 1. It explicitly extends the deadline for filing the final plat application from June 29, 2003, the date that deadline would expire under Condition 1, to June 29, 2004. Rightly or wrongly, the December 11, 2002 extension decision determined that the applicant has the right to file and seek city approval of a final plat application, with the only qualification being that the application must be filed prior to June 29, 2004. That determination was not appealed or challenged, and cannot now be challenged.

In all pertinent ways, the December 11, 2002 decision is completely inconsistent with the December 14, 1999 decision. A decision regarding an application that is completely inconsistent with an earlier decision regarding that application is properly viewed as a modification or revocation of that earlier decision. It is true, as petitioner points out, that the December 11, 2002 decision does not mention the December 14, 1999 decision, or explain the relationship between the two decisions. However, we do not see that the lack of reference or explanation is a critical omission. The May 5, 1999 decision extending the deadline to December 29, 1999 also did not mention Condition 1 or explain that it modified that condition, yet there is little doubt that the May 5, 1999 decision effectively, if implicitly, modified Condition 1. The December 14, 1999 decision placing

the tentative plan approval on inactive status also did not mention Condition 1 or explain that it modified that condition, but that clearly was the effect. Similarly, the December 11, 2002 decision clearly, if implicitly, modified or voided the May 5, 1999 and December 14, 1999 decisions, and it effectively determined that the tentative plan approval is controlled by the terms of Condition 1, as extended by the December 11, 2002 decision.

Turning now to the challenged May 14, 2004 final plat approval, that decision rejects petitioner's claim that the December 14, 1999 decision controls the status of the tentative plan approval or the final plat application deadlines. It further determines that the tentative plan approval is "valid," with an expiration period extended to June 29, 2004, pursuant to the December 11, 2002 decision. Although the challenged decision does not frame the issue in this manner, it essentially recognizes that city decisions subsequent to the December 14, 1999 decision rendered that decision void and ineffective. As explained, to the extent the city views the informal staff decision in early 2000 to be the decision that voided or modified the December 14, 1999 decision, the city is wrong. However, the city is correct that the December 11, 2002 decision effectively voided or modified the December 14, 1999 decision.

Turning to petitioner's three assignments of error, each assignment of error is premised on petitioner's view that the December 14, 1999 decision is effective and continues to control the status of the tentative plan approval. As explained above, the city correctly rejected that view. To the extent petitioner's assignments of error are directed at the challenged May 14, 2004 decision, those assignments of error do not provide a basis for reversal or remand. To the extent petitioner's assignments of error are in substance a challenge to the December 11, 2002 decision, that decision cannot be collaterally attacked in this appeal, and therefore those assignments of error do not provide a basis for reversal or remand.

The first, second and third assignments of error are denied.

The city's decision is affirmed.