BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

STEPHANIE BELLINGHAM, CRAIG BROWN,
HOLLY BROWN, THERESA PARKER-BJUR,
MATTHEW BJUR, TIM CONNELLY,
SHELLY CONNELLY, KIM DIEDE,
MICHAEL DOTY, SHANNON DOTY,
STEPHANIE FRY, MARK HOLZGANG,
KARIN HOLZGANG, RICK STALLKAMP,
KATHY STALLKAMP and SHERRY STELLAR,
Petitioners,

vs.

CITY OF KING CITY,
Respondent.

LUBA No. 2005-151

STEPHANIE BELLINGHAM, CRAIG BROWN,
HOLLY BROWN, THERESA PARKER-BJUR,
MATTHEW BJUR, TIM CONNELLY,
SHELLY CONNELLY, KIM DIEDE,
MICHAEL DOTY, SHANNON DOTY,
STEPHANIE FRY, MARK HOLZGANG,
KARIN HOLZGANG, ANGELA EBELER-JONES,
PRESTON JONES, RICK STALLKAMP,
KATHY STALLKAMP and SHERRY STELLAR,
Petitioners,

vs.

CITY OF KING CITY,
Respondent,

and

PRESTIGE INVESTORS, LLC,
Intervenor-Respondent.

LUBA No. 2005-169

FINAL OPINION
AND ORDER

Appeal from City of King City.

Stephanie Bellingham, Craig Brown, Holly Brown, Theresa Parker-Bjur, Matthew Bjur, Tim Connelly, Shelly Connelly, Kim Diede, Michael Doty, Shannon Doty, Stephanie Fry, Mark Holzgang, Karin Holzgang, Angela Ebeler-Jones, Preston Jones, Rick Stallkamp, Kathy Stallkamp, and Sherry Stellar, Tigard, represented themselves.

E. Andrew Jordan, Portland, represented respondent.

Andrew H. Stamp, Lake Oswego, represented intervenor-respondent.

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

DISMISSED 12/29/2005

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

In LUBA No. 2005-151, petitioners appeal an improvement agreement that authorizes construction of improvements related to a previously approved subdivision plat. In LUBA No. 2005-169, petitioners appeal the city engineer's approval of construction plans for the same subdivision plat.

MOTION TO INTERVENE

Prestige Investors, LLC, moves to intervene on the side of respondent in LUBA No. 2005-169. There is no opposition to the motion and it is allowed.

FACTS

On April 6, 2005, the city planning commission approved a preliminary subdivision plat for the Castle Oaks South Subdivision. On September 20, 2005, the developer and the city manager executed an improvement agreement, pursuant to King City Code (KCC) 16.196.100. [1] Among other things, the agreement approves construction drawings submitted by the applicant and approved by the city engineer providing construction details for various public facilities. On October 10, 2005, petitioners appealed the improvement agreement to LUBA.

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[1] KCC 16.196.100 provides:

> "A. Before city approval is certified on the final plat, and before approved construction plans are issued by the city, the subdivider shall:
>
> > "1. Execute and file an agreement with the manager specifying the period within which all required improvements and repairs shall be completed; and
> >
> > "2. Include in the agreement provisions that if such work is not completed within the period specified, the city may complete the work and recover the full cost and expenses from the subdivider.
>
> "B. The agreement shall stipulate improvement fees and deposits as may be required to be paid and may also provide for the construction of the improvements in stages and for the extension of time under specific conditions therein stated in the contract. All improvements shall comply with Chapter 16.196 of this code."

On November 15, 2005, petitioners appealed a set of construction plans for the Castle Oaks South Subdivision. The notice of intent to appeal states that the decision became final no earlier than September 12, 2005, when they were signed by the city engineer.

LUBA consolidated LUBA Nos. 2005-151 and 2005-169 in an order dated December 13, 2005.

MOTIONS TO DISMISS

The city moves to dismiss these appeals, arguing that neither the improvement agreement nor the construction plans are land use decisions[2] or limited land use decisions[3] subject to our

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[2] ORS 197.015(10) provides in relevant part:

> "'Land use decision':
>
> "(a) Includes:
>
> "(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
>
> "* * * * *
>
> "(iii) A land use regulation; or
>
> "* * * * *
>
> "(b) Does not include a decision of a local government:
>
> "(A) Which is made under land use standards which do not require interpretation or the exercise of policy or legal judgment[.]"

[3] ORS 197.015(12) defines "limited land use decision" in relevant part 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."

We note that, effective for plats filed after June 16, 2005, HB 2356 (Oregon Laws 2005, ch. 239, section 2) amends that definition to state that a limited land use decision concerns the "approval or denial of a *tentative* subdivision or partition *plan*, as described in ORS *92.040(1)*" (new language in italics). In addition, section 1 of HB 2356 states that

> "[g]ranting approval or withholding approval of a final subdivision or partition plat under this section by the county surveyor, the county assessor or the governing body of a city or

jurisdiction. The city also argues that petitioners failed to exhaust administrative remedies with respect to both documents.

A. ORS 197.015(10)(b)(A)

The city explains that improvement agreements are required as part of the city's subdivision process, at King City Code (KCC) 16.196.100. *See* n 1. Such agreements are executed after preliminary plat approval and before final plat approval and before the city issues approved construction plans. *Id.* Improvement agreements generally govern timelines for improvements authorized by the preliminary plat decision, provisions for failure to timely complete the improvements, fees and deposits, and similar matters, such as construction staging and time extensions. *Id.* An improvement agreement is executed by the developer and the city manager. According to the city, the city's code classifies such agreements as "administrative actions" delegated to the city manager that do not require discretion. *See* KCC 16.40.010 (defining administrative actions as involving "permitted uses or development governed by clear and objective review criteria"). Consequently, the city argues, an improvement agreement under KCC16.196.100 is a nondiscretionary or ministerial decision that falls within the ORS 197.015(10)(b)(A) exception to LUBA's jurisdiction.[4]

The city also moves to dismiss LUBA No. 2005-169, which appeals a set of construction plans stamped "Approved for Construction" by the city engineer, with a date of September 12, 2005. We understand these plans to be the same ones approved as part of the improvement agreement appealed in LUBA No. 2005-151. The city states that the city engineer approved those plans pursuant to KCC 16.208, which sets out procedures and requirements for gaining city approval to construct public improvements such as streets, sidewalks, sanitary sewer, stormwater

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county, or a designee of the governing body, is not a land use decision or a limited land use decision, as defined in ORS 197.015."

[4] The city also argues that the challenged improvement agreement is not a "development agreement" authorized by ORS 94.504 *et seq*. ORS 94.508(2) provides that, notwithstanding ORS 197.015(10)(b), a development agreement is "land use decision" subject to LUBA's jurisdiction. Petitioners do not contend that the challenged decision is a development agreement under ORS 94.504, and we agree with the city that it is not.

facilities, street signs and lighting. According to the city, the standards governing approval of construction plans for public improvements under KCC 16.208 do not require interpretation or the exercise of policy or legal judgment.

Petitioners respond that the construction plans approved by the improvement agreement include changes in floodplain elevation and final street grade from the plans approved by the planning commission in its decision approving the preliminary plat. Petitioners argue that the city necessarily re-interpreted and re-applied the criteria applicable to preliminary plat approval, specifically the floodplain and drainage hazard regulations at KCC 16.140, without required review by the city planning commission. Therefore, petitioners contend, the improvement agreement and construction plans do not fall within the exception to the definition of "land use decision" at ORS 197.015(10)(b)(A), because the city necessarily applied standards to the improvement agreement that "require interpretation or the exercise of policy or legal judgment."

Petitioners do little to substantiate their assertion that the improvement agreement approves construction plans that differ in two particulars from the plans considered or approved by the planning commission. Petitioners attach to their response a page from the preliminary plat *application* that refers to a 129-foot contour and a copy of an e-mail from the developer's engineer to the city engineer stating, in relevant part that "[a]fter further review and the latest revisions on the grading, we can balance the 130 floodplain elevation." First Response to Motion to Dismiss, Exhibit C. Petitioners also supply a page from construction plans dated September 7, 2005, which states in relevant part:

> "Current FEMA 100 year flood plain elevation = 129. As shown on City of King City Flood Insurance Study, Map Number 4102690514 A, Effective Date: February 18, 2005.
>
> "Pending FEMA 100 year flood plain elevation = 130.11. This elevation has been identified in updated flood studies and is pending approval by FEMA." Exhibit C to Second Response to Motion to Dismiss.

The significance of these documents is not explained. By themselves, they do not establish that the construction plans approved under the improvement agreement are based on a different

elevation than that approved by the planning commission. Petitioners cite nothing that substantiates their assertion that the construction plans depict final street grades that differ from the grades approved by the planning commission.

As far as we can tell, an improvement agreement under KCC 16.196.100 is a contract between the city and applicant specifying exactly how public improvements required or authorized by the preliminary plat approval will be financed and constructed. Nothing in the improvement agreement or the construction plans cited to us purports to approve any variation from the preliminary plat approval. The agreement does not mention any preliminary plat approval criteria with respect to floodplains and final street grades. If indeed it is the case that the construction plans approved in the improvement agreement differ from the plans considered during preliminary plat approval with respect to floodplain elevation and final street grades, it is entirely possible that those differences were authorized by or consistent with the preliminary plat approval. For example, the planning commission may have authorized or required the applicant to use a floodplain elevation of 130.11 feet, and to raise the final street grade by three feet. The parties have not supplied us with a copy of the preliminary plat approval, and petitioners have not cited anything in the improvement agreement or construction plans that is inconsistent with the planning commission's preliminary plat approval.

Petitioners' arguments that the city re-applied preliminary plat approval criteria in executing the improvement agreement and construction plans are based on the premise that the improvement agreement and plans are inconsistent with the preliminary plat approval. However, petitioners have not established that premise. It is petitioners' burden to demonstrate that we have jurisdiction to review a land use decision. *Billington v. Polk County*, 299 Or 471, 475, 703 P2d 232 (1985); *Hamby v. City of Jefferson*, 22 Or LUBA 1, 2 (1991). Petitioners have not done so. Therefore, we must dismiss LUBA Nos. 2005-151 and 2005-169.

B. Failure to Exhaust Administrative Remedies

ORS 197.825(2)(a) limits our jurisdiction to cases in which the petitioner has exhausted all remedies available by right before appealing to the Board. The city argues that local appeals were available for both challenged decisions, and that petitioners failed to exhaust those remedies. In response, petitioners submit two affidavits averring that the city informed petitioners that no local appeals of the improvement agreement and construction plans were available.

Because petitioners have not established that we have jurisdiction over the challenged decisions, we need not and do not consider the parties' arguments regarding whether petitioners failed to exhaust local appeals.

These appeals are dismissed.