BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RICHARD R. RASMUSSEN,
Petitioner,

vs.

CITY OF LAKE OSWEGO,
Respondent,

and

ANDREW D. RUSSELL,
Intervenor-Respondent.

LUBA No. 2007-216

FINAL OPINION
AND ORDER

Appeal from the City of Lake Oswego.

Charles E. Corrigan and Jeffrey L. Kleinman, Portland, filed the petition for review. Jeffrey L. Kleinman argued on behalf of petitioner.

Evan P. Boone, Lake Oswego, represented respondent.

Peter Livingston, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Schwabe, Williamson & Wyatt P.C.

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

TRANSFERRED 05/22/2008

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a city decision that approves amendments to a planned development subdivision's covenants and restrictions.

FACTS

Palisades Terrace IV (Palisades Terrace) is a planned development subdivision that was approved by the city in 1985. Palisades Terrace includes designated open space areas. The 1985 decision that approved Palisades Terrace included conditions of approval, two of which are set out below:

> "2. The conditions for approval for VAR 29-84/VAR 31-84/VAR 32-84/VAR 33-84 and PD 9-84 are as follows:
>
> "* * * * *
>
> "b. That the CC and R's restrict the removal of trees and disturbance of understory plant material in the designated open space areas, except for treatment or removal of hazardous conditions.
>
> "* * * * *
>
> "i. All open space shall be clearly shown on the plat. A narrative in the CC and R's shall state: 'open space' areas shall remain in their natural condition—removal, cutting or alteration of trees, understory vegetation, ground cover or other natural features are prohibited. A notation on the plat shall refer to the aforementioned narrative. In addition, tree cutting restrictions within setbacks of Lots 15-19 shall be noted on the plat. The narrative in the CC and R's shall describe these restrictions[.]" Record 111-12.

The original declaration of protective covenants and restrictions (hereafter CC&Rs) included CC&Rs to comply with the above conditions of approval. The original CC&Rs have been amended three times. The challenged decision approves the "Third Amendment," which amends two of the original CC&Rs. Record 3-8. We set out below the original text of those two CC&Rs followed by the amended text that is approved by the challenged decision:

"XIII. FENCES [Original Text]

> "No fences, hedge or wall shall be erected or placed or permitted to remain on any lot in said addition without the written approval of developers or their designated representatives." Record 99.

"XIII. FENCES [Amended Text]

> "Fences may be erected or placed on any lot subject to compliance with all applicable provisions of the Lake Oswego City Code. The owner of the lot, on which the fence is erected or placed, shall maintain the fence in good order and condition." Record 3.

"XVI OPEN SPACE [Original Text]

> "Those areas designated on the plat as open space shall remain in a natural condition and shall have no tree removal, cutting or alteration of trees, understory vegetation, ground cover, or other natural features unless it is found to be hazardous. Then, upon approval of the City of Lake Oswego, it may be treated for removal." Record 99.

"XVI OPEN SPACE [Amended Text]

> "Subject to all applicable laws and the provisions of Section XI of this Declaration relating to the removal of trees, the owners of the lots containing those areas designated on the plat as open space may (i) install landscaping in the open space on the owners lot including, without limitation, grass, shrubs, trees, plantings of every kind, and decorative ground cover consisting of bark dust/mulch or rock, (ii) alter and replace any landscaping, trees, or other vegetation in the open space on the owner's lot in accordance with this Section XVI, and ([iii]) erect or place a fence around such open space in a manner which complies with Section XIII of this Declaration." Record 3.

The necessity for city approval of the challenged CC&R amendments apparently is attributable to a third CC&R, "Section XX," which sets out the duration of the CC&Rs and also provides as follows:

> "The provisions of * * * Section XVI regarding open space may not be amended or deleted without prior approval by the City of Lake Oswego." Record 100.

Although intervenor concedes that Section XX requires city approval for the amendments to Section XVI regarding Open Space, intervenor contends that city approval was not required for the amendments to Section XIII regarding Fences.

JURISDICTION

Intervenor moves to dismiss this appeal. LUBA's jurisdiction extends to land use decisions and limited land use decisions. ORS 197.825.[1] Intervenor argues the challenged decision is neither a land use decision nor a limited land use decision.[2] We understand intervenor to argue that the challenged decision is not a land use decision, because it does not adopt, amend or apply a *land use regulation*. Instead, intervenor argues, in approving the disputed CC&R amendments, the challenged city decision merely applies conditions of approval that were included in the original 1985 planned development approval decision. Neither the 1985 planned development approval nor its conditions of approval are "land use regulations," as defined by ORS 197.015(11).[3] We understand intervenor to argue that the

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[1] As relevant, ORS 197.825 (1) provides:

> "[T]he Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845."

[2] As potentially relevant here, a "land use decision" is "[a] final decision or determination made by a local government or special district that concerns the adoption, amendment or application of * * * [a] land use regulation[.]" ORS 197.015(10)(a). A "limited land use decision is

> "[A] final decision or determination made by a local government pertaining to a site within an urban growth boundary that concerns:
>
> "(A) The approval or denial of a tentative subdivision or partition plan, as described in ORS 92.040 (1).
>
> "(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." ORS 197.015(12)(a).

[3] ORS 197.015(11) provides:

> "'Land use regulation' means any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan."

challenged decision is not a limited land use decision because it does not apply "discretionary standards designed to regulate the physical characteristics of a use permitted outright."

> "[T]he amendment to the CC&Rs * * * is not a modification to the Original Approval. It implements the Original Approval. The city Assistant Planning Director approved the amendment on behalf of the city, indicating that the city believes the modification is appropriate and consistent with the Original Approval. If petitioner believes the city has allowed a modification to the CC&Rs that is inconsistent with the conditions in the Original Approval, it has a remedy in a different forum, as explained in *Wygant v. Curry County*, 110, Or App 189, 821 P2d 1109 (1991) and *Mar-Dene Corp. v. City of Woodburn*, 149 Or App 509, 944 P2d 976 (1997)." Intervenor-Respondent's Brief 6.

Wygant concerned a county decision to seek injunctive relief from the circuit court to enforce its zoning ordinance. The Court of Appeals concluded that such a decision is an action taken under ORS 197.825(3)(a), and not a land use decision, where there is no pending related matter that must result in a land use decision."[4] 110 Or App at 192. *Mar-Dene* concerned a city decision to take no action to enforce an access condition of approval that was included in a previously issued land use decision. The court concluded in those cases that local government decisions to seek circuit court enforcement or not to seek circuit court enforcement of conditions of prior land use approvals are not land use decisions reviewable by LUBA.

Petitioner characterizes the challenged decision differently from intervenor. Petitioner characterizes the decision as an amendment to the Palisades Terrace open space scheme that was approved in 1985:

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[4] ORS 197.825(3) sets out the following exception to LUBA's jurisdiction:

> "Notwithstanding subsection (1) of this section [which sets out LUBA's jurisdiction], the circuit courts of this state retain jurisdiction:
>
> "(a) To grant declaratory, injunctive or mandatory relief in proceedings * * * brought to enforce the provisions of an adopted comprehensive plan or land use regulations[.]"

> "[T]he city approved significant amendments to the open space scheme for Palisades without notice to anyone; without engaging in a public process of any kind; and without adopting findings of any kind, supported by substantial evidence in the whole record. Specifically, the city authorized amendment of the CCRs to remove the requirement of Section XVI that 'areas designated on the Plat as open space shall remain in a natural condition and shall have no tree removal, cutting or alteration of trees, understory vegetation, ground cover, or other natural features' * * * and to replace it with language allowing property owners to effectively trash the natural condition and natural feature of the open space lying on their lots * * *." Petition for Review 10.

Petitioners also argue:

> "Petitioner would prefer to give Lake Oswego the benefit of the doubt. We would like to assume that when the city signed off on the third amendment to the CCRs, it made a thoughtful interpretation (albeit one with which petitioner disagrees), in which it applied its land use regulations to allow a modification the open space plan for [Palisades Terrace]. We would like not to believe the city made an intentional choice to 'not enforce' its prior condition of approval, as occurred in *Mar-Dene*. However, we simply do not know what happened. In the absence of duly adopted findings or some other form of explanation stating the latter choice, this case cannot be dismissed for lack of jurisdiction." Petitioner's Memorandum in Opposition to Motion to Dismiss 3-4.

The difficulty with petitioner's jurisdictional argument is that there is nothing to suggest that the challenged decision is anything other than the city approval for a modification of Section XVI of the CC&Rs that is required by Section XX of the CC&Rs. The "Third Amendment" is signed by 15 Palisades Terrace property owners and the following signature block is included at the bottom of the Third Amendment:

> "Approved on _____, 2007 on behalf of the City of Lake Oswego, a municipal corporation
>
> "By: _____
>
> "Name: _____
>
> "Title: _____" Record 4.

The city planner filled in the date of approval, September 27, 2007, and added his signature, name and title. As petitioners point out, there are no findings. But there is simply no reason to believe the planner's completion of the signature block does anything other than supply

the city approval for the CC&R amendments that is required by Section XX of the CC&Rs. There is certainly no reason to believe the city planner intended his signature to constitute an amendment to the open space scheme for Palisades Terrace that was approved in the city's 1985 land use decision.

We also agree with intervenor that the challenged decision is most accurately characterized—for jurisdictional purposes—as an enforcement decision or a failure to enforce decision. Under the Court of Appeals reasoning in *Mar-Dene* and *Wygant*, if the city's decision approves CC&R amendments that are inconsistent with the 1985 decision that approved Palisades Terrace, as appears to be the case, the circuit court is the forum to make that determination and order an appropriate remedy.

Finally, in arguing that the challenged decision is nevertheless a land use decision, even if it only applies conditions of land use approval, petitioner cites *Terraces Condo. Assn. v. City of Portland*, 110 Or App 471, 823 P2d 1004 (1992). *Terraces Condo. Assn.* does not support petitioner's jurisdictional argument. The city decision on appeal in *Terraces Condo. Assn.* did not merely apply a prior land use decision's conditions of approval to determine whether proposed CC&R amendments were consistent with those land use decision conditions of approval. The city decision in *Terraces Condo. Assn.* interpreted the legal effect of prior city variance decisions to allow development that exceeded current zoning density limitations. In doing that, the decision in *Terraces Condo. Assn.* did at least three things with jurisdictional significance that the city's decision in this appeal does not do. First, based on the city's interpretation of the prior variances, the city determined it would not require compliance with some current land use regulations. The Court of Appeals concluded that that action by the city also concerned application (or more accurately the non-application) of a land use regulation. 110 Or App at 477. Second, the decision in *Terraces Condo. Assn.* was required to consider the zoning standards that govern variances. *Id.* Those variance zoning standards are "land use regulations," and a decision that concerns the

application of a land use regulation is a land use decision. *See* n 2. Finally, the city's decision in *Terraces Condo. Assn.* approved a proposed development of land. The decision that is the subject of this appeal does not approve a proposed development of land; it merely approves CC&R amendments.

For the reasons explained above, we agree with intervenor that LUBA does not have jurisdiction over this appeal.

MOTION TO TRANSFER

Pursuant to ORS 34.102 and OAR 661-010-0075(11), petitioner filed a precautionary motion to transfer this appeal to Clackamas County Circuit Court, in the event LUBA determines that it does not have jurisdiction. We grant petitioner's motion and transfer this appeal to Clackamas County Circuit Court.