

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

3
4 MOLLY JACOBSEN,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF WINSTON,
10 *Respondent,*

11 and

12
13 FULLERTON & LEFEVRE,
14 *Intervenor-Respondent.*

15
16 LUBA No. 2010-074

17
18 FINAL OPINION
19 AND ORDER

20
21 Appeal from City of Winston.

22 Molly Jacobsen, Winston, filed the petition for review on her own behalf.

23
24 Zack P. Mittge, Eugene, filed the response brief on behalf of respondent.

25
26 James W. Spickerman, Eugene, represented intervenor-respondent.

27
28 RYAN, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member,
29 participated in the decision.

30
31 DISMISSED

32 09/19/2011

33
34 You are entitled to judicial review of this Order. Judicial review is governed by the
35 provisions of ORS 197.850.
36

1 **INTRODUCTION**

2 The challenged decision is a city planning director’s decision to grant city planning
3 department approval of intervenor-respondent’s building permit application to construct a
4 loading dock expansion at a bottling plant. In *Jacobsen v. City of Winston*, __ Or LUBA __
5 (LUBA No. 2010-074, Order, December 3, 2010), we described the challenged decision in
6 some detail:

7 “[T]he one-page decision * * * is entitled:

8 “‘Planning and Sanitation Pre-Application Worksheet No. 01-09.

9 “‘Below that title is the following: ‘[p]lanning approval valid for one (1) year
10 from the date of the approval.’ In a section of the worksheet where the
11 planning department provides the required information, in a space entitled
12 ‘Lot of Record’ is listed ‘1600,’ which is presumably the tax lot number for
13 the property, and in a space entitled ‘zoning’ is listed ‘M-L.’”¹

14 As we explained in the order, Douglas County administers building permits for properties
15 located within the city. *Id.* at slip op 2. The challenged decision is signed by the planning
16 director and then, according to the decision, it was referred to the Douglas County building
17 department.

18 We denied a previously filed motion to dismiss where the city argued that the
19 challenged decision is not an appealable land use decision under ORS 197.015(10)(a)(A) and
20 OAR 661-010-0005 because it is not a “final decision.” Then, after resolving a dispute over
21 the content of the record, we settled the record. The parties then filed their briefs.

22 In its response brief, the city asserts two legal theories challenging LUBA’s
23 jurisdiction. First, the city argues, the appeals were not timely filed under ORS

¹ The decision also includes blank spaces where the planning department notes applicable front, side and rear setbacks, any special setbacks, the building height, any required parking spaces, and “conditions of approval.” Record 1.

1 197.830(3)(b).² The city supported that challenge with a motion to take evidence outside the
2 record under OAR 661-010-0045, and the filing of that motion suspended all deadlines in
3 this appeal.³

4 Second, the city argues, even if the appeals were timely filed, the challenged decision
5 is not a “land use decision” subject to LUBA’s jurisdiction because the challenged decision
6 falls within the exception found at ORS 197.015(10)(b)(B) for building permits that are
7 approved or denied under “clear and objective standards.”⁴ Petitioner responded to both
8 jurisdictional challenges with a “Reply to Motion to Take Evidence Outside the Record”
9 which also requests that LUBA take evidence outside the record. For the reasons that follow,
10 we agree with the city that the decision is not subject to LUBA’s jurisdiction because it is a

² ORS 197.830(3) provides:

“If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416 (11) or 227.175 (10), or the local government makes a land use decision that is different from the proposal described in the notice of hearing 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.”

³ OAR 661-010-0045 provides in relevant part:

“(1) Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties’ briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its discretion take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845.”

⁴ ORS 197.015(10)(b)(B) provides that a land use decision does not include a decision by a local government:

“That approves or denies a building permit issued under clear and objective land use standards[.]”

1 decision of the local government that “approves or denies a building permit issued under
2 clear and objective standards.”

3 **JURISDICTION**

4 LUBA has exclusive jurisdiction to review land use decisions. ORS 197.825(1).⁵ As
5 defined by ORS 197.015(10), a land use decision must be a “final” decision that “concerns
6 the adoption, amendment or application of” one or more of the land use planning standards
7 identified at ORS 197.015(10)(a)(A). However, ORS 197.015(10)(b) removes certain
8 decisions that might otherwise fall under the description of “land use decision” from LUBA’s
9 jurisdiction, including as relevant here a decision of a local government “[t]hat approves or
10 denies a building permit issued under clear and objective land use standards[.]”

11 As the party seeking review by LUBA, petitioner has the burden of establishing that
12 LUBA has jurisdiction. *Billington v. Polk County*, 299 Or 471, 475, 703 P2d 232 (1985). In
13 the petition for review, petitioner argues:

14 “[the decision involved] lots of discretion and legal interpretations. Although
15 [the Winston Zoning Ordinance (WZO)] require[s] the city to apply [WZO]
16 definitions to this decision, instead the city applied a different definition.
17 Furthermore, since the city has no officially adopted and acknowledged map
18 as required by [WZO] 3.020 and since the city nor the applicant has asserted
19 that there is an ordinance that changed the plan designation or zoning of the
20 property from the original county farm/agriculture to city zoning of M-L,
21 again a lot of legal judgment and interpretation had to take place. Hence it is
22 a land use decision.” Petition for Review 4-5.

23 In her reply to the city’s motions, petitioner largely repeats her argument that “the decision
24 required lots of discretion and legal judgment” and sets out in footnotes what appear to be
25 quotes of statements allegedly made by city staff in 2006 and 2007 that petitioner apparently
26 thinks support her argument that the decision is a “land use decision.”

⁵ ORS 197.825(1) provides in part:

“[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.”

1 **A. Lot of Record**

2 As we understand it, petitioner thinks that in making the decision to approve the
3 building permit, the city either determined or was required to determine whether the subject
4 property is a “lot of record” as defined in WZO 1.020.⁶ As we understand it, petitioner
5 thinks that such a determination is not a decision made under “clear and objective standards.”

6 The city argues that the use of the phrase “lot of record” on the planning department
7 worksheet is “surplusage,” and that rather than making a determination as to whether the
8 property that is the subject of the building permit is a “lot of record” under WZO 1.020, the
9 phrase “lot of record” and the blank that follows it are simply requests that the city insert the
10 property’s tax lot number, and are not requests to determine that the property is a “lot of
11 record” as defined in WZO 1.020. Response Brief 3-4. According to the city, determining
12 the property’s tax lot number does not require application of any standards at all and
13 certainly does not require discretion.

14 For purposes of this opinion, we assume without deciding that use of the phrase “lot
15 of record” on the planning department worksheet requires the city to determine whether the
16 property that is the subject of the building permit application is a “lot of record” as defined in

⁶ WZO 1.020 defines “Lot of Record:”

“Lot of Record. A unit of land created as follows:

- “1. A lot in an existing, duly recorded subdivision;
- “2. A parcel in an existing duly recorded major or minor land partition;
- “3. An adjusted lot resulting from an approved lot line adjustment;
- “4. An existing unit of land for which a survey has been duly filed which conformed to all applicable regulations at the time of filing;
- “5. Any unit of land created prior to zoning and partitioning regulations by deed or metes and bound description; and recorded with the Douglas County Clerk; provided however that contiguous units of land so created under the same ownership and not conforming to the minimum property size of this Ordinance shall be considered one (1) lot of record.”

1 WZO 1.020. However, even so assuming, petitioner does not explain why such a
2 determination requires the exercise of discretion or why the definition of “lot of record” set
3 out at WZO 1.020 is not “clear and objective.” The definition set out at WZO 1.020 includes
4 five circumstances or categories under which a unit of land may be considered a “lot of
5 record.” *See* n 6. Determining whether a unit of land is a “lot of record” under most of the
6 five categories does not appear to require the exercise of any discretion at all. Categories 1
7 and 2 only require that the subdivision or partition that created a lot has been recorded; they
8 do not require the city to determine whether the subdivision or partition violated planning
9 and zoning laws at the time it was recorded and should not have been recorded. Category 3
10 only requires an approved lot line adjustment, and similarly does not require the city to
11 determine whether the lot line adjustment violated planning and zoning laws at the time it
12 was approved and should not have been approved. Category 5 only requires that the deed
13 that created the parcel predates city zoning and partitioning regulations. All of those
14 circumstances are easily verifiable and do not require the exercise of any discretion that we
15 can see. And while it may be the case that determining whether a unit of land is a lot of
16 record under Category 4 might require the exercise of discretion, we do not understand
17 petitioner to argue that the subject parcel was created by a survey under Category 4.
18 Accordingly, petitioner has not met her burden of demonstrating that any determination
19 about whether the subject property is a “lot of record” as defined in WZO 1.020 requires the
20 exercise of discretion or that the definition is not “clear and objective.”

21 **B. Zoning**

22 As we understand it, petitioner also thinks that in making the decision to approve the
23 building permit, the city applied standards that are not “clear and objective” when it
24 identified the zoning of the property as M-L. Petitioner maintains throughout her pleadings
25 that the city does not have an officially adopted zoning map. As we understand it, according

1 to petitioner, because the city does not have an official zoning map, any determination as to
2 the zoning of the property cannot be based on “clear and objective standards.”

3 WZO Section 3.020 provides in relevant part that “[t]he City of Winston Zoning Map
4 is hereby adopted by reference. The boundaries for the zones listed in this ordinance are
5 indicated on the City of Winston Zoning Map which is hereby adopted by reference.” The
6 city included as Appendix 8 to the response brief a copy of the Winston Zoning Map that
7 identifies the zoning of the property as Limited Industrial. Petitioner does not support her
8 contention that the city does not have an official zoning map with any argument that we can
9 understand and offers no reason that we can understand why WZO 3.020 does not contradict
10 her argument that the city does not have an adopted zoning map.⁷ Petitioner merely cites
11 WZO 3.020 and repeats her contention that, in spite of WZO 3.020, the city does not have an
12 officially adopted map and attaches to the petition for review excerpts of a map of the city’s
13 zoning districts in effect in 1973, excerpts from the city’s Comprehensive Plan, and excerpts
14 from a Department of Land Conservation and Development periodic review order for
15 Douglas County. Petition for Review 13.

16 We agree with the city that in approving the building permit that is challenged, all the
17 city was required to do was to look at the city’s officially adopted and incorporated zoning
18 map, as adopted in WZO 3.020, determine what the map shows is the zoning of the property,
19 and insert that zoning into the blank space for “zoning,” and that such an exercise hardly
20 requires the application of subjective standards or the exercise of discretion.

21 **C. Statutory Permit**

22 Finally, we understand petitioner to argue that the challenged decision is a statutory
23 permit under ORS 227.175(10) and ORS 227.160(2), that she was entitled to notice of the
24 decision under ORS 227.175(10)(c), and that no notice was given. Petition for Review 10-

⁷ At most, we understand petitioner’s arguments to be an attempt to collaterally attack the 2005 ordinance that adopted the map, and we reject that attempt.

1 11. However, petitioner does not explain why the decision is the “discretionary approval of a
2 proposed development of land, under ORS 227.215 or city legislation or regulation[.]” We
3 determine above that no discretion was exercised by the city in determining whether to
4 approve the building permit, and it follows that the decision is not a permit as defined in
5 ORS 227.160(2).

6 Because we determine that the challenged decision falls within the exception to our
7 jurisdiction under ORS 197.015(10)(b)(B) for building permits that are issued based on
8 “clear and objective standards,” and the decision is not a “permit” as defined in ORS
9 227.160(2), we need not address the city’s alternative theories challenging LUBA’s
10 jurisdiction or the city’s motion to take evidence.

11 The appeal is dismissed.