BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KAISER PERMANENTE,
Petitioner,

vs.

CITY OF PORTLAND,
Respondent.

LUBA No. 2012-087

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Corinne S. Celko and Steven L. Pfeiffer, Portland, filed the petition for review and Corinne S. Celko argued on behalf of petitioner. With them on the brief was Perkins Coie LLP.

Eric Shaffner, Deputy City Attorney, Portland, filed the response brief and argued on behalf of respondent. With him on the brief was Kathryn S. Beaumont, Chief Deputy City Attorney.

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

DISMISSED 02/13/2013

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a letter from a city planner to petitioner concluding that a previously approved master plan for petitioner's properties has expired.

FACTS

In 1989, the city approved a conditional use master plan that authorized, without further conditional use review, future development of petitioner's medical campus. After the master plan was approved, sometime between 1989 and 2000 petitioner developed a new office and administrative building and in 2004 developed a new radiation and oncology building. Record 18. In October, 2011 petitioner submitted an "Early Assistance" application to the city, and met with city planners pursuant to the city's Early Assistance process to determine whether the 1989 master plan had expired. Record 40-41. After that meeting, a city planner sent petitioner a letter that concluded that the 1989 master plan had expired as of the year 2000. Record 2. This appeal followed.

REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to new matters raised in the response brief. The reply brief is allowed.

JURISDICTION

In its response brief, the city moves to dismiss the appeal on the basis that the challenged decision is not a "land use decision" as defined in ORS 197.015(10)(a), because it is not a *final* decision. ORS 197.015(10)(a) defines a "land use decision" in relevant part to include "[a] final decision or determination made by a local government * * *." According to the city, the city's zoning code does not include any references to the Early Assistance process and therefore a determination made at the conclusion of that process is not a "land use decision." The city argues that the city's Early Assistance process is an optional, informal process that is designed to assist property owners before a land use application is

submitted. The Early Assistance process explains the procedures and requirements of the city's zoning code, assists an applicant in preparing a complete application, identifies when multiple applications will need to be submitted, and identifies potential information an applicant will need to provide in the application. As the city describes it, the Early Assistance process "has no formal place in the City's land use review hierarchy." Response Brief 3. According to the city, the appealed letter is merely an advisory opinion of one of the city's planners that the 1989 master plan has expired, and that city planner's advisory opinion is not a "final decision or determination * * *" under ORS 197.015(10)(a). The city argues that absent an application that seeks approval of a development proposal under the master plan, which petitioner has not submitted, the city has no basis upon which to issue a final, binding decision that is subject to LUBA review.

Petitioner responds that the letter constitutes the city's final decision that its master plan has expired because there is no further appeal or other process available to petitioner to receive such a determination. In support, petitioner cites *Kent v. City of Portland*, 38 Or LUBA 942, 946-7 (2000). *Kent* involved an appeal of a clarification letter that re-stated the position a city planner took in an earlier letter. In *Kent*, we stated that the letter from the city planner concluding that a proposed use did not require a permit was the final "land use decision" because it applied a land use regulation and no further local appeal process was available. We declined to dismiss the appeal because the appeal of the clarification letter was filed within the period in which the petitioner could have filed an appeal of the planner letter, the final land use decision that applied a land use regulation.

Although the facts in *Kent* presented a procedurally more complex case than this one, *Kent* did concern a May 10, 2000 "Zoning Confirmation Letter," that in some respects was similar to the letter in this case. The Zoning Confirmation Letter in *Kent* was signed by an unspecified city Office of Planning and Development Review staff person and the city took the position, and LUBA ultimately concluded, "that the May 10, 2000 zoning confirmation

letter [was] a 'final decision or determination.'" 38 Or LUBA at 947. But the issue in *Kent* was whether proposed use of a park for soccer practices required conditional use approval. The zoning confirmation letter determined that the disputed soccer practices *did not require conditional use review*, and LUBA ultimately concluded that the zoning confirmation letter was "the city's last word on whether the proposed use is allowed under the city's land use regulations." *Id.* In *Kent* the disputed soccer practices apparently would be allowed without further city review or decisions. In contrast in this appeal, as explained below, there is no reason to believe the Early Assistance letter is the city's last word in this matter.

In *Hollywood Neighborhood Ass'n v. City of Portland*, 21 Or LUBA 381 (1991), LUBA concluded that it lacked jurisdiction over an appeal of a "zoning confirmation" letter from a city planner to a property owner. That letter took the position that a proposed methadone clinic was a permitted use in the zone in which the property was located. LUBA agreed with the city's position that the letter in that case was merely the author of the letter's "advisory statement of opinion" and "a final decision on whether [the use] is a permitted use in the * * * zone will not be made until a building or occupancy permit for such a use is applied for, and a review of such application is conducted pursuant to PCC 33.700.010 ('Uses and Development Which Are Allowed by Right')." 21 Or LUBA at 383. *See also Davis v. Lane County*, 32 Or LUBA 267 (1997) (a legal lot verification process that is not provided for in the county's code results in a preliminary, advisory opinion on whether a lot was legally created); *Yost v. Deschutes County*, 37 Or LUBA 653, 662 (2000) (where a local government's land use regulations make it clear that staff determinations describing the uses to which property may be put are informal decisions rather than final county decisions, and those decisions are rendered outside formal local government land use procedures for decision making and declaratory rulings, such decisions do not constitute land use decisions that may be appealed to LUBA).

Perhaps if the Early Assistance letter in this appeal had decided instead that the 1989 master plan is valid, and by virtue of such a decision development could go forward without any additional review by the city, it would be more like the decision at issue in *Kent* and could be viewed as a final city decision. But that is not the case here. In essence the city has decided that additional review of petitioner's future proposed development is required. While it might be possible to view the decision in this appeal as the city's last word on whether additional conditional use review is required in this case, we see no reason why petitioner could not file an application for development under the 1989 Conditional Use Master Plan, or for conditional use review under protest, and argue that the 1989 master plan is valid. If petitioner were to do so, there is no reason to believe the city planner's decision in the challenged letter would be binding on the city's hearings officer, and as far as we can tell the hearings officer would be free to agree with petitioner. The city planner's Early Assistance letter is not a final decision, and for that reason is not a land use decision that may be appealed to LUBA.

We do not mean to suggest that a formal adopted procedure for issuing declaratory ruling is the only way a city can issue decisions that are final and binding on the city. *Brogoitti v. Wallowa County*, 23 Or LUBA 247, 250-51(1992); *Townsend v. City of Newport*, 21 Or LUBA 286, 289-90 (1991). But outside the declaratory ruling context, there must be something about the decision that can reasonably be understood to demonstrate that the decision is final and binding on the city. There is no reason in this case to believe the city would be bound by the city planner's Early Assistance letter in any future application petitioner might file to seek approval for development consistent with the 1989 master plan.

Petitioner does not dispute that the city's zoning code does not include any references to the Early Assistance process, and does not dispute that there was no development application pending before the city when the city issued the challenged letter. Accordingly, the challenged decision is simply the city planner's advisory opinion about whether

petitioner's master plan has expired. *Hollywood Neighborhood Ass'n*, 21 Or LUBA at 383. Because it is not a "final" decision, it cannot be a "land use decision" as defined in ORS 197.015(10)(a).

The appeal is dismissed.