

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 WILLAMETTE OAKS LLC,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF EUGENE,
10 *Respondent,*

11 and

12
13 GOODPASTURE PARTNERS, LLC,
14 *Intervenor-Respondent.*

15
16 LUBA Nos. 2013-043, 2013-047, 2013-048,
17 2013-049, 2013-050 and 2013-051
18

19 FINAL OPINION
20 AND ORDER

21
22 Appeal from City of Eugene.

23
24 Michael E. Farthing, Eugene, represented petitioner.

25
26 Glenn Klein, City Attorney, and Anne Davies, Assistant City Attorney, Eugene,
27 represented respondent.

28
29 Michael C. Robinson and Seth J. King, Portland, represented intervenor-respondent.

30
31 BASSHAM, Board Member; HOLSTUN, Board Chair; RYAN, Board Member,
32 participated in the decision.

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34 TRANSFERRED 09/11/2013

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

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2 **NATURE OF THE DECISION**

3 Petitioner appeals six building permits that approve construction of the foundations
4 for six buildings that the city earlier approved in a final planned unit development (PUD)
5 decision.

6 **BACKGROUND**

7 The present appeal is the latest in a long line of related appeals concerning intervenor-
8 respondent Goodpasture's multi-stage development proposal to develop a PUD that will
9 ultimately include ten apartment buildings, one assisted living/age restricted building, one
10 commercial building, two club houses, open space and associated infrastructure, on a 23-acre
11 tract that is adjacent to petitioner's retirement living facility.

12 In 2010, the city approved the tentative PUD for the proposed development, and after
13 various appeals and detours that tentative PUD approval ultimately became final. In 2011,
14 the city approved applications for final PUD and tentative subdivision plan. That 2011
15 decision was appealed to LUBA, and remanded for reasons that do not warrant discussion
16 here. The city conducted proceedings on remand, and on August 12, 2012, the city again
17 approved the final PUD and tentative subdivision plan for the project. Petitioner appealed
18 that decision to LUBA, asserting a single assignment of error that concerned potential
19 remediation of soils on some areas of the subject property where Goodpasture proposes
20 certain internal roads, parking lots, and sewer, electrical and water lines. Petitioner did not
21 challenge any part of the August 12, 2012 decision that concerns the proposed six buildings
22 at issue in the present appeals. On December 26, 2012, while the appeal of the final
23 PUD/tentative subdivision decision was pending before LUBA, the city approved the final

1 tentative subdivision plat. On December 28, 2012, Lane County accepted the final
2 subdivision plat for recording.¹

3 On January 17, 2013, LUBA remanded the final PUD/tentative subdivision decision,
4 sustaining the single assignment of error. *Willamette Oaks LLC v. City of Eugene*, __ Or
5 LUBA __ (LUBA No. 2012-064, January 17, 2013) (*Willamette Oaks*). LUBA held that
6 remand was necessary for the city hearings officer to consider whether two city land use
7 approval standards apply to the proposed internal roads, parking lots, and sewer, electrical
8 and water lines. We held that if the city interprets those standards to apply, then the city
9 should determine whether soil remediation in the areas underneath the roads, parking lots,
10 and water, sewer and electrical lines is necessary to ensure compliance with the two
11 standards. As far as we are aware, the city has not yet conducted proceedings on remand of
12 our January 17, 2013 decision.

13 On January 17, 2013, the same date that LUBA remanded the final PUD/tentative
14 subdivision plan decision, Goodpasture filed with the city six building permit applications to
15 construct foundations for the six buildings initially approved in the tentative PUD decision.
16 City planning staff conducted a review that consisted in relevant part of circulating the
17 building permit applications to other city staff for electrical, plumbing, public works,
18 architectural, and “land use review.” The land use review comments were largely identical
19 for each application, and addressed compliance with conditions imposed in development
20 agreements with the city, tentative PUD approval, or compliance with the final subdivision

¹ LUBA lacks jurisdiction over a decision approving or denying a final subdivision plat, ORS 197.015(10)(b)(G), and as far as we are informed petitioner did not seek review in circuit court of the city’s decision to approve the final subdivision plat. Petitioner, however, did appeal to LUBA a letter from Lane County’s counsel, which concludes that the county lacks authority to revoke the recordation of the final subdivision plat. LUBA concluded that the county counsel letter is not a “land use decision” subject to LUBA’s jurisdiction, and transferred that appeal to Lane County Circuit Court. *Willamette Oaks LLC v. Lane County*, __ Or LUBA __ (LUBA No. 2013-040, July 23, 2013).

1 plat.² On April 26, 2013, the city approved three of the challenged building permits. On
2 April 30, 2013, the city approved the remaining three permits.

3 **RECORD OBJECTIONS**

4 On July 16, 2013, petitioner filed objections to the record submitted in these
5 consolidated appeals. The city and intervenor-respondent (respondents) filed a response on
6 July 30, 2013. Respondents also moved to dismiss the appeals. As part of their motion to
7 dismiss, respondents also filed a motion to suspend all other deadlines in this proceeding,
8 pending resolution of the motion to dismiss. Petitioner opposes the motion to suspend,
9 arguing that LUBA should at least resolve the pending record objections, which petitioner
10 argues could have a bearing on the jurisdictional challenge.

11 We have considered petitioner's record objections, and do not see that resolving those
12 objections would have a bearing on the jurisdictional challenge. In relevant part, petitioner
13 argues that the record does not include all items "placed before" city planners in conducting
14 the "land use review" for each of the building permits. In particular, petitioner argues that the
15 land use planner considered the August 12, 2012 final PUD/tentative subdivision plan
16 approval at issue in *Willamette Oaks*, and that the complete city files for that decision should

² The following land use review comments for application 13-00308-01 are the most extensive:

"The applicant must address approval condition 2(a) of the Planned Unit Development Agreement for Goodpasture Island PUD (PDF 10-3), also known as condition 6 of the Tentative PUD, which states: 'The applicant must demonstrate that the mitigation measures will be in place at the time of occupancy or that a financial commitment is in place to complete the mitigation measures within a reasonable length of time from the approval date of the PUD.'

"The site plans are not consistent with the final plat configuration and do not show and label the 7 foot wide public utility easement. Submit revised site plans with property boundary dimensions, lot configuration, and 7 foot wide public utility easement that are consistent with the dimensions, configuration and public utility easements shown on Lot 2 of Goodpasture Island PUD Subdivision Plat.

"Provide details of the front porch stairs facing Waterford Way that demonstrate compliance with [Eugene Code] 9.2750 (10' front yard setback) and EC 9.6745 Setback Intrusions Permitted. Show areas where steps are elevated above 30-inches from grade and show surrounding grade adjacent to stairs in the front yard setback area." Record 345.

1 be included in the record. Petitioner also speculates that the land use planner may have
2 considered other, unidentified documents that should be included in the record. The city
3 responds that the record includes all documents considered during the city’s land use reviews,
4 and that petitioner’s speculations that other, unidentified documents might have been placed
5 before the final decision maker are an insufficient basis to require that the city supplement the
6 record.

7 The record must include all items “placed before, and not rejected by, the final
8 decision maker,” as required by OAR 661-010-0025(1)(b).³ Based on the land use planner
9 comments quoted in footnote 2, it appears that the planner considered at least portions of (1)
10 the PUD agreement between Goodpasture and the city, (2) the tentative PUD decision, and
11 (3) the final subdivision plat. It is possible that the planner also considered the conditions of
12 approval attached to the August 12, 2012 final PUD/tentative subdivision decision at issue in
13 *Willamette Oaks*, although nothing in the record indicates that is the case. If we proceeded to
14 resolve the record objections we would probably require the city to submit a supplemental
15 record including the above items. However, we see no point in doing so. Petitioner has not
16 demonstrated that any of the above items have any bearing on whether the challenged
17 building permits are land use decisions subject to LUBA’s jurisdiction. As explained below,
18 the main jurisdictional dispute centers on whether the city planner applied, or should have
19 applied, a comprehensive plan provision or land use regulation in approving the six
20 challenged building permits. None of the disputed items constitute a comprehensive plan
21 provision or land use regulation, and petitioner does not contend otherwise. Similarly,
22 petitioner’s speculation that the land use planner consulted other, unidentified documents
23 does not warrant amending the record, or delay in resolving the motion to dismiss. Nothing

³ OAR 661-010-0025(1)(b) states: “[a]ll written testimony and all exhibits, maps, documents or other written materials specifically incorporated into the record or placed before, and not rejected by, the final decision maker, during the course of the proceedings before the final decision maker.”

1 in the record or elsewhere cited to us supports that speculation, and without some attempt on
2 petitioner’s part to identify other documents that the planner might have consulted there is no
3 basis to sustain the record objection. Finally, petitioner has not demonstrated that any such
4 unidentified documents constitute comprehensive plan provisions or land use regulations, or
5 would otherwise have a bearing on the jurisdiction dispute. Accordingly, we proceed to
6 address the motion to dismiss without resolving the record objection.

7 **JURISDICTION**

8 Respondents move to dismiss these consolidated appeals, arguing that the building
9 foundation permits at issue are not statutory “land use decisions” as defined at ORS
10 197.015(10)(a), or otherwise decisions subject to LUBA’s jurisdiction.

11 ORS 197.015(10)(a) defines “land use decision” in relevant part as a final decision of
12 a local government that concerns the application of a statewide planning goal, comprehensive
13 plan provision or land use regulation.⁴ A decision “concerns” the application of a goal, plan

⁴ 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:

“(i) The goals;

“(ii) A comprehensive plan provision;

“(iii) A land use regulation; or

“(iv) A new land use regulation;

“* * * * *

“(b) Does not include a decision of a local government:

“* * * * *;

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

1 provision or land use regulation if the local government applied, or should have applied, the
2 goal, provision or regulation in making the decision. *Jaqua v. City of Springfield*, 46 Or
3 LUBA 566, 574 (2004). Respondents contend that in approving the challenged building
4 permits, the city did not apply and was not required to apply any goal, comprehensive plan
5 provision or land use regulation. According to respondents, all applicable city land use
6 regulations were applied in approving the tentative PUD applications and other discretionary
7 land use decisions, and issuance of building permits that follow those earlier approvals are
8 not required to again apply those land use regulations. Respondents cite to Eugene Code
9 (EC) 9.8005(3), which provides that if a decision granting land use approval includes a
10 finding of compliance with land use development standards, those standards are not
11 considered at the time of the development permit application.

12 Further, to the extent any EC code provisions were applied in issuing the building
13 permit approvals, respondents argue that the building permit approvals fall within the
14 exception set out in ORS 197.015(10)(b)(B), for decisions that approve or deny “a building
15 permit issued under clear and objective land use standards.”

16 Finally, respondents argue that the building permits are not “significant impact” land
17 use decisions as described in *Billington v. Polk County*, 299 Or 471, 479, 703 P2d 232
18 (1985), because the six building foundation permits have no impact on present or future land
19 uses beyond the impacts that were authorized in earlier land use decisions approving
20 Goodpasture’s project.

21 **A. ORS 197.015(10)(a) Land Use Decision**

22 In response, petitioner does not identify any comprehensive plan provision or land use
23 regulation that the city applied or should have applied in issuing the challenged building
24 permits. Instead, petitioner argues that in conducting the “land use review” or “Zoning Plan
25 Check” for each building permit, city planning staff erroneously applied (or failed to apply)
26 the remanded August 12, 2012 final PUD/tentative subdivision plan decision. We

1 understand petitioner to suggest that application of the August 12, 2012 final PUD/tentative
2 subdivision plan decision or conditions of approval to approve the building permits
3 constitutes the application of the comprehensive plan provisions or land use regulations. If
4 that is petitioner's argument, we disagree. A decision that concerns only the application of a
5 land use decision or conditions of approval attached to a land use decision does not concern
6 the application of a land use regulation or result in a land use decision within the meaning of
7 ORS 197.915(10)(a). *Mar-Dene Corp. v. City of Woodburn*, 149 Or App 509, 515, 944 P2d
8 976 (1997).

9 Petitioner also argues that in issuing the building permits city planning staff must
10 have implicitly determined that the city had authority to issue the permits notwithstanding
11 that LUBA had remanded the city's August 12, 2012 final PUD/tentative subdivision plat
12 decision. Petitioner explains that it filed these appeals because it seeks to understand how the
13 city could proceed to issue building permits implementing a land use decision that has been
14 remanded.

15 When LUBA remands a land use decision, absent some authority to the contrary the
16 remanded decision becomes ineffective, and remains ineffective unless and until the local
17 government takes action on remand to re-adopt the decision or otherwise render the decision
18 or portions of it effective. *Hatley v. Umatilla County*, __ Or LUBA __ (LUBA No. 2012-
19 030, Order, July 2, 2012), slip op 6; *Turner v. Jackson County*, 62 Or LUBA 199, 210
20 (2010); *NWDA v. City of Portland*, 58 Or LUBA 533, 541-42 (2009); *Western States v.*
21 *Multnomah County*, 37 Or LUBA 835, 842-43 (2000). Petitioner argues that a remanded and
22 therefore ineffective decision cannot constitute authority to issue building or other permits
23 that implement or necessarily depend upon the remanded decision.

24 We assume without deciding that the city may have lacked the authority to approve
25 the building permits, if those building permits depend on the authority and effectiveness of
26 the remanded August 12, 2012 final PUD/tentative subdivision decision. However, even if

1 so, that does not mean that the building permit decisions necessarily qualify as statutory land
2 use decisions. As noted, a local government decision falls within the definition at ORS
3 197.015(10)(a) only if it concerns the application of a statewide planning goal,
4 comprehensive plan provision, or land use regulation. Petitioner does not identify *any*
5 statewide planning goal, comprehensive plan provision, or land use regulation that the city
6 applied or should have applied to the challenged building permits.⁵ We understand petitioner
7 to suggest that the city was required to “apply” LUBA’s decision remanding the final
8 PUD/tentative subdivision decision and that the city’s failure to do so means that the city
9 failed to apply an applicable land use regulation. Response 8. However, if that is petitioner’s
10 argument, LUBA’s decision plainly does not meet the definition of land use regulation at
11 ORS 197.015(11).

12 In essence, petitioner’s arguments confuse the jurisdictional issue with the merits of
13 whether the city committed error in approving the building permits. A decision can be wrong
14 or erroneous or unauthorized, yet not qualify as a statutory land use decision. Errors a local
15 government may commit in issuing building permits that do not qualify as a statutory land
16 use decisions or other decisions subject to LUBA’s jurisdiction can be challenged in circuit
17 court.

18 For the foregoing reasons, petitioner has not demonstrated that the six building permit
19 approvals are statutory “land use decisions” as defined at ORS 197.015(10)(a).

⁵ We note that in the planner’s comments quoted at footnote 2, the planner applied two EC code provisions to one of the challenged building permits, EC 9.2750 (10’ front yard setback) and EC 9.6745 Setback Intrusions Permitted. Petitioner does not discuss these code provisions, but we understand the city to argue that any EC provisions applied in issuing the building permits fit the exception at ORS 197.015(10)(b)(B) for building permits issued under land use standards that are clear and objective. We agree with the city that both EC 9.2750 and EC 9.6745 set largely numerical standards for setbacks that appear to qualify as clear and objective land use standards.

1 **B. Significant Impacts Land Use Decision**

2 Alternatively, petitioner argues that the building permit decisions have a significant
3 impact on present and future land use on the site, and therefore the decisions qualify as
4 “significant impact” land use decisions described in *Billington* and its progeny,
5 notwithstanding that the decisions do not qualify as statutory land use decisions as defined at
6 ORS 197.015(10)(a). Petitioner contends that the six building permits authorize construction
7 of the foundations for six very large buildings, and that construction constitutes an actual,
8 qualitatively and quantitatively significant impact on the land uses on the subject property
9 and the surrounding neighborhood.

10 Respondents argue the challenged building permits have no land use impacts different
11 from or apart from the buildings approved in the tentative PUD and other statutory land use
12 decisions that petitioner has, or could have, appealed. Respondents cite *Elliott v. Lane*
13 *County*, 18 Or LUBA 871, 876 (1990), for the proposition that the significant impacts test
14 does not apply to decisions that ministerially implement previous land use approvals. At
15 issue in *Elliott* was a decision that approved a final subdivision plat approval for recording.
16 The county had earlier approved a tentative subdivision plat and a final subdivision plat, and
17 those decisions had not been appealed. We dismissed the appeal, concluding in relevant part
18 that the significant impacts test does not allow appeal of a decision based solely on impacts
19 that are inherent in one or more earlier decisions that qualify as statutory land use decisions.

20 Petitioner argues that *Elliott* is distinguishable, because in *Elliott* the earlier statutory
21 land use decision that authorized significant impacts on land use had not been remanded and
22 was effective on the date the final subdivision plat was recorded. In the present case,
23 petitioner contends, the most recent decision in the chain of land use decisions that
24 collectively authorize the six buildings and their impacts is on remand, and was not effective
25 on the date the building permit approvals were issued. In these circumstances, petitioner

1 argues, it is the building permits that approve the land use impacts, and therefore the
2 significant impact test should apply to allow LUBA to review those building permits.

3 Respondents reply that allowing petitioner to challenge the building permits based on
4 their associated land use impacts under the significant impacts test would effectively allow
5 petitioner to collaterally attack the building approvals in the tentative PUD decision and other
6 land use decisions that cannot now be appealed or challenged.

7 We generally agree with respondents. The building permits authorize the
8 construction of the foundations for the same buildings that were approved in the tentative
9 PUD decision. The tentative PUD decision comprehensively addressed the land use impacts
10 of the six buildings, pursuant to land use standards intended to address such impacts. All
11 issues regarding the tentative PUD decision have been finally resolved. As relevant to the six
12 buildings, as we understand it the August 12, 2012 decision merely confirmed that
13 Goodpasture had complied with all conditions imposed in the tentative PUD decision, and as
14 far as we are informed the August 12, 2012 decision did not apply any substantive land use
15 standards to “approve” those buildings.⁶ In other words, the present circumstances seem
16 similar to those in *Elliott*. In both cases, there was an earlier statutory land use decision that
17 comprehensively addressed all land use standards, and a later decision that implemented the
18 earlier decision. In both cases, it was an earlier decision that did all the heavy lifting of
19 addressing land use standards and the impacts of development. In the present case, the
20 tentative PUD approval addressed all land use standards and the impacts of development, and
21 the final PUD approval and the building permits both implemented that tentative PUD
22 approval. The main difference in the present case is that the final PUD approval was
23 remanded, and was no longer effective at the time the building permits were approved.
24 However, we do not see that that difference suffices to distinguish *Elliott*, or to extend the

⁶ Petitioner does not argue that the tentative subdivision plan approval “approved” the six buildings, or was necessary to authorize the building permits for the buildings.

1 significant impacts doctrine to the present circumstances. The essential holding in *Elliott* is
2 that LUBA will decline to apply the significant impacts test to allow the Board to review
3 decisions that merely implement earlier statutory land use approvals, even if those
4 implementing decisions are the proximate step leading to actual construction or other actions
5 affecting land use. That holding seems applicable here: The challenged building permits
6 authorize construction of the foundations to buildings that were approved in an earlier
7 statutory land use decision: the tentative PUD approval that addressed all land use standards
8 applicable to those buildings, and a decision that ultimately withstood all challenges on
9 appeal. To extend the significant impacts test to allow LUBA to exercise jurisdiction over
10 the challenged building permits in this circumstance would represent an end run around the
11 statutory scheme for reviewing land use decisions.

12 For the foregoing reasons, we disagree with petitioner that the challenged building
13 permits are subject to our jurisdiction as significant impact land use decisions.

14 **MOTION TO TRANSFER**

15 Petitioner moves to transfer these appeals to circuit court in the event LUBA
16 concludes the challenged decisions are not land use decisions subject to LUBA's jurisdiction.
17 We have concluded above that petitioner has not established that the building permits are
18 statutory land use decisions, or decisions otherwise subject to LUBA's jurisdiction.
19 Accordingly, the motion to transfer is granted.

20 The challenged decisions are transferred to Lane County Circuit Court.