BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NICHOLAS P. BAKER and SUSAN G. BAKER,
*Petitioners,*

vs.

CITY OF GEARHART,
*Respondent.*

LUBA No. 2013-069

FINAL OPINION
AND ORDER

Appeal from City of Gearhart.

Nicholas P. Baker and Susan G. Baker, Medford, filed a petition for review and represented themselves.

Ed Trompke, Portland, filed a response brief and represented respondent. With him on the brief was Jordan Ramis PC.

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

DISMISSED 04/02/2014

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

Petitioners appeal a letter from the city's attorney to petitioners.

## BACKGROUND

Petitioners own a home located in the City of Gearhart. Petitioners' property and the adjacent properties are zoned Low Density Residential (R-1). In 2009, the city issued a building permit to the owner of a home located next door to petitioners' home, to construct a second story addition accessed from the exterior from a walkway that leads to stairs, a deck, and a second story entrance off the deck. The adjacent owner completed the addition in 2011. The walkway, stairs, and deck that provide the access to the second story addition are located adjacent to petitioners' property. The addition contains a bedroom, bathroom, kitchen style sink, small refrigerator, and microwave. In July 2012, the city issued a building permit to the adjacent property owner for construction of an interior connection of the main floor of the dwelling to the second story addition.[1]

Since 2009, petitioners have been and remain opposed to their neighbor's second story addition. For a period of time in 2011, the owner of the adjacent property rented the second story addition for short term use. In August, 2011, petitioners complained in writing to the city about the short term rental use of the adjacent property and in September, 2011, the city notified the adjacent property owner to cease short term rental of the property.

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[1] Petitioners obtained a copy of the 2009 building permit and the 2012 building permit on October 11, 2012. Record 11. Petitioners did not file a local appeal of either building permit and did not appeal those building permits to LUBA.

### A. The Exchange of Letters Between Petitioners and the City

The challenged decision is a July 11, 2013 letter from the city's attorney to one of the petitioners, Nicholas Baker, that is the final piece of correspondence between petitioners and the city following an exchange of letters between petitioners and the city regarding the second story addition. We briefly describe the contents of the letters as background for the July 11, 2013 letter that petitioners appealed to LUBA.

Petitioners wrote a May 1, 2013 letter addressed to the city administrator, the mayor, and all city councilors.[2] Petitioners describe the May, 2013 letter as:

> "a formal complaint against [the city] alleging [the city's] failure to enforce city zoning ordinances, city code of ordinances and the fundamental precepts of the comprehensive plan, therefore violating the rights of [p]etitioners as provided under certain zoning ordinances, statutes of city code and the fundamental precepts of the city's comprehensive plan. * * * Petitioners demanded that [the city] take the necessary action as legally mandated in the city's own codes and ordinances and bring the [adjacent] property * * * into compliance with the standards, use and conditions of a single-family residence in a low-density R-1 zone[.]" Petition for Review 9.[3]

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[2] That May 1, 2013 letter included as exhibits (1) an August 22, 2011 document entitled "Brief on R-1 Zoning Violations on 2nd Street in Gearhart, Oregon," and an unsigned "Civil Complaint" for "City Ordinance Violations" by petitioners as plaintiffs against the city as defendant, dated May 1, 2013. Record 13-41. The August, 2011 document apparently led to the city's September, 2011 notice to the adjacent property owner to cease short term rental of the second story addition.

[3] The May 2013 letter included a demand on the city to take the following actions: (1) declare the adjacent property a nuisance and institute injunction proceedings to prevent short term rental of the property; (2) order

In a June 11, 2013 letter, the city attorney responded to petitioners' May 1, 2013 letter. The city attorney responded that the city had conducted additional investigations into whether the adjacent property was being rented on a short term basis and found no evidence that it was. The June 11, 2013 letter concluded with a statement that the city did not intend to pursue enforcement action against the neighbor. Record 8-9.

Thereafter, petitioners wrote a June 20, 2013 letter to the city that stated that it was an appeal by petitioner Nicholas Baker of the decision by the city in its June 11, 2013 letter. Record 5-7. Petitioners' June 20, 2013 letter requested written decisions from the city regarding:

> "1. [W]hat course of action the city intends to take to remedy the city's failure to provide me, and adjacent property owners to [the adjacent property], the due process of public notice and opportunity for voiced input as required by land use regulations of the City * * * and the State * * *, prior to the permit approval for construction of an additional dwelling unit on the [adjacent] lot * * *[;]
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> "2. [W]hether the city will, or the city will not, provide relief to me and adjacent property owners * * * by defining a course of action the city will take to bring the property * * * into compliance with single family, low-density R-1 zone standards as defined in the land use regulations of the City * * *." Record 7.

The challenged July 11, 2013 letter responds to petitioners' June 20, 2013 letter.

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deconstruction of the existing deck and stairs; (3) order that a "mini-kitchen" be removed; (4) order the outside entrance to the second story addition to be relocated to the interior of the dwelling. Record 12.

### B. The Challenged Decision

In the challenged decision, the city's attorney takes the position that (1) the 2009 building permit and subsequent construction did not result in the approval or construction of more than one "dwelling unit," as defined in GZO 1.030(70), on the property in violation of GZO R-1 zone provisions; and (2) there is no evidence that the second story addition is being rented for short term use.

## JURISDICTION

Petitioners filed their petition for review, and the city filed a response brief that includes a motion to dismiss. Petitioners filed a reply brief and a response to the motion to dismiss. We now resolve the motion to dismiss.

### A. Statutory Land Use Decision

LUBA has jurisdiction to review "land use decisions." ORS 197.825(1). Pursuant to ORS 197.015(10)(a)(A), a land use decision includes "[a] final decision or determination made by a local government * * * that concerns the * * * application of * * * [a] comprehensive plan provision * * * or * * * [a] land use regulation[.]" The city argues that the letter is not a "land use decision" because the letter merely restates the conclusion the city reached in its June 11, 2013 letter to petitioners.

In the Notice of Intent to Appeal (NITA) and in their arguments set out in the petition for review, the reply brief, and the response to the motion to dismiss, petitioners challenge the validity of the 2009 building permit. The 2009 building permit is a decision that was not appealed and is not before us.[4]

[4] Petitioners' NITA provides:

Petitioners' assignments of error and arguments under them are entirely directed at whether the 2009 building permit approved a second "dwelling unit" in violation of the GZO. The assignments of error cite and rely on the provisions of the permit itself and events that occurred shortly after construction under the permit was completed in 2011 to argue that the city wrongfully approved a second "dwelling unit" as defined in GZO 1.030(70) when it issued the building permit. To the extent petitioners are directly challenging the 2009 building permit in the appeal of the July 11, 2013 letter, that challenge is a collateral attack on a decision that is not before us.

Even if we understand the city to have decided in its July 11, 2013 letter not to revoke the 2009 building permit, based on petitioners' request that it do so at Record 7 and 12, a city decision not to revoke the 2009 building permit because the city believes the permit was correctly issued is not a new

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> "Notice is hereby given that Petitioners intend to appeal the land use decision of Respondent entitled Our File No. 50398-37669 with the following description of the action:
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> > "'After investigation the city has seen no evidence that an additional 'dwelling unit' was created in [the adjacent neighbor's] dwelling as a result of his 2011 construction efforts.'
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> "This decision became final on July 11, 2013, *and involves the City of Gearhart's permitting the construction of an attached dwelling unit independent of the primary single-family dwelling unit in a single-family, low-density R-1 zone*." NITA 1 (emphasis added.)

The petition for review similarly describes the challenged decision by quoting the portion of the July 11, 2013 letter that is quoted in the NITA. Petition for Review 4.

appealable decision. The challenged decision states the city's position for why it believes the 2009 building permit for the second story addition complied with the GZO:

> "Section 1.030(70) of the [GZO] defines the term 'dwelling unit' as follows:
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> > "'One room or rooms connected together, constituting a separate, independent housekeeping establishment for owner occupancy, or rental or lease on a weekly, or longer basis, and physically separated from any other rooms or dwelling units which may be in the same structure, and containing independent cooking and sleeping facilities. For purposes of this definition 'rooms connected together' includes rooms connected by means of a breezeway.'
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> "After investigation the City has seen no evidence that an additional 'dwelling unit' was created in [the adjacent] dwelling as a result of his 2011 construction efforts. There is no 'physical separation' between the new construction and the old. The new construction does not contain 'independent' cooking and sleeping facilities. The construction drawings initially submitted by [the adjacent owner] included a full kitchen. Neither the building code nor the above-referenced provision of the [GZO] permits more than one kitchen in a single family dwelling. Accordingly, the City rejected the initial plans. Upon re-submittal, the kitchen was removed. There is no provision for 220v power or natural gas connections in the new construction and there is no stove or oven. Although the addition includes a sink and microwave, the Uniform Building Code does not consider such facilities a 'kitchen'. Based on this information, the City does not believe that [the owner] has created a multiple dwelling unit." Record 3.

Even assuming for purposes of this opinion that the 2009 building permit was a land use decision as defined in ORS 197.015(10)(a)(A), the July 11, 2013 letter merely reaffirms the city's 2009 decision to issue the building permit, and explains why the city does not agree with petitioners' position regarding the

validity of the 2009 building permit.[5] A decision that merely affirms the validity of a prior decision is not a new appealable decision. *Johnston v. Marion County*, 51 Or LUBA 250, 262-63 (2006). Just as importantly, the July 11, 2013 letter simply reiterates the decision the city made in the June 11, 2013 letter that also refused to take enforcement action based on petitioners' allegations that the addition is being used for transient lodging. The city's reiteration of that June 11, 2013 decision is not a separately appealable decision. *Lloyd Dist. Community Assoc. v. City of Portland*, 30 Or LUBA 390, 395, *aff'd* 141 Or App 29, 916 P2d 884 (1996).

**B. Significant Impacts Land Use Decision**

Petitioners argue that the city's decision will lead to significant impacts on present and future land uses within the city. *Petersen v. Klamath Falls*, 279 Or 249, 566 P2d 1193 (1977). Whatever remaining significance there may be to the significant impacts test, a test that was announced by the Oregon Supreme Court at a time where many local governments did not have acknowledged comprehensive plans and land use regulations, we do not believe the challenged decision qualifies as a significant impacts test land use decision. If petitioners believe the addition that they contend is a separate dwelling unit creates a significant impact, it is the unappealed 2009 building

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[5] Although petitioners do not assign error in the petition for review to the portion of the city's letter that concludes that there is no evidence that the adjacent property owner is currently renting the second story addition, we similarly conclude that the July 11, 2013 letter is not a "land use decision" where petitioners have not identified any adopted procedures for conducting local proceedings to enforce the city's comprehensive plan or land use regulations that led the city to issue a "final" decision that falls within the ORS 197.015(10)(a)(A) definition. *Johnston*, 51 Or LUBA at 258-59; *Yost v. Deschutes County*, 37 Or LUBA 653, 659-60 (2000).

permit that authorized that addition. Even if a post-building permit decision not to take enforcement action regarding that addition could qualify as a significant impacts test land use decision, that decision was rendered on June 11, 2013. The challenged decision simply reiterates that prior decision, and just as such a decision does not qualify as a statutory land use decision, it does not qualify as a significant impacts test land use decision.

The appeal is dismissed.