BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MGP X PROPERTIES, LLC,
Petitioner,

vs.

CITY OF SHERWOOD,
Respondent.

LUBA Nos. 2016-074 and LUBA No. 2016-081

FINAL OPINION
AND ORDER

Appeal from City of Sherwood.

Ty K. Wyman, Portland, represented petitioner.

Josh Soper, City Attorney, Sherwood, and Carrie A. Richter, Portland, represented respondent.

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

LUBA No. 2016-074	DISMISSED	11/17/2016
LUBA No. 2016-081	TRANSFERRED	11/17/2016

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

Opinion by Bassham.

NATURE OF THE DECISIONS

In these consolidated appeals, petitioner appeals (1) a comment letter from the city planning manager to the county regarding the Tualatin-Sherwood Road Widening Project, and (2) the city's subsequent decision denying a local appeal of the comment letter.

INTRODUCTION

Tualatin-Sherwood Road is a transportation facility under the road authority of Washington County, including some portions of the road located within the City of Sherwood. Petitioner owns commercial property adjacent to a section of Tualatin-Sherwood road within the city that the county proposes to widen. The road project also affects one city-owned facility, SW Baler Way. Pursuant to an intergovernmental agreement (IGA) between the city and the county, the county has assumed land use review authority over the project.[1]

[1] Petitioner appealed the city and county decisions to adopt the IGA, and LUBA dismissed those appeals. *MGP X Properties LLC v. Washington County & City of Sherwood* , __ Or LUBA__, (LUBA Nos. 2016-036/037, Sept 29, 2016), *appeal pending (A163395)*. In addition, opponents to the road project appealed an earlier county decision regarding the project, and LUBA remanded that decision for further proceedings. *Regency Centers L.P. v. Washington County*, 69 Or LUBA 135, *aff'd* 265 Or App 49, 335 P3d 856 (2014). We understand that the city and county adopted the IGA at least partially in response to the remand in *Regency Centers L.P.*, in order to establish the process whereby the county conducts land use review over the project and the roles of the city and county in that land use review process.

On July 11, 2016, the city planning manager submitted comments to county staff regarding the proposed road project, as contemplated in the IGA (hereafter, the comment letter). The July 11, 2016 comment letter noted that the project is identified in the city's Transportation System Plan (TSP), and expressed support for the project. County staff apparently incorporated the city planning manager's comments into the county staff report to the hearings officer, or otherwise presented them to the county hearings officer. *See* LUBA No. 2016-074 Record 4 (county planner explaining that he could incorporate the city's comments into the staff report, or present other information at the July 21, 2016 hearing).

On July 21, 2016, petitioner attempted to appeal the July 11, 2016 comment letter to a city hearings officer, arguing that the comment letter is subject to the right of local appeal under the city's code. On August 1, 2016, the city attorney responded in a letter rejecting the local appeal of the comment letter, on the grounds that the comment letter is not an appealable decision (hereafter, the denial letter).

The comment letter is the subject of LUBA No. 2016-074. The denial letter is the subject of LUBA No. 2016-081. Those appeals were consolidated for LUBA review.

MOTION TO DISMISS

The city moves to dismiss both appeals. Petitioner filed a response and a contingent motion to transfer the appeals in the event LUBA determines that it

lacks jurisdiction. The city then filed a reply. As is frequently the case with consolidated appeals involving (1) direct appeal of a decision, and (2) an appeal of a decision rejecting a local appeal of the same decision that was directly appealed to LUBA, the jurisdictional analysis is complex and interrelated. For the reasons below, we agree with the city that the comment letter is not a final decision subject to LUBA's review. That conclusion also plays a role in our disposition of the motion to dismiss the appeal of the denial letter.

A. The Comment Letter

In the two-page July 11, 2016 comment letter to the county transportation planner, the city's planning manager made several comments regarding the project. First, the planner noted that the city's TSP defers to county design standards for projects on county roads. Record 1 (LUBA No. 2016-074). Second, the planner noted that the city's TSP identifies the project as one that is needed over the 2035 planning horizon to address projected congestion during peak hour traffic. *Id.* Third, the letter quotes the city code provisions for a major modification to a site plan, and notes that if there are impacts outside the right-of-way to any of the adjoining sites, there may be a need to modify those site plan approvals governing the adjoining sites. *Id.* at 1-2. The letter notes that the project proposes to remove a traffic signal that was a condition of approval for a 1997 site plan on a property adjoining the right-of-way, but opines that a county decision to remove the traffic signal would not

cause a violation of that condition of approval. Record 2. The letter concludes:

> "Finally, the Tualatin Sherwood Road widening project is included in the TSP, and the City agrees with the applicant's narrative as it relates to the Comprehensive Plan and the Town Center Plan. As a result, the City supports the proposal and defers to the County process for a decision on this matter." *Id.*

As defined by ORS 197.015(10), a land use decision subject to LUBA's jurisdiction must be a "final" decision that "concerns the adoption, amendment or application of" one or more of the land use planning standards identified at ORS 197.015(10)(a).[2]

The city argues that although the comment letter may concern the application of the city's comprehensive plan and land use regulations, the letter merely provides comments to the on-going land use process before the county, and is therefore not a *final* decision for purposes of ORS 197.015(10)(a). The city argues that the relevant inquiry as to whether the letter is "final" for jurisdictional purposes depends on whether (1) a land use regulation was

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[2] "Land use decision" is defined at ORS 197.015(10)(a) as including:

> "(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; [or]
>
> "(iii) A land use regulation[.]"

applied, and (2) if so, are there "further actions by the city or other bodies" that must occur before the project culminates in a decision. Motion to Dismiss 3-4, *citing Central Eastside Industrial Council v. City of Portland*, 128 Or App 148, 875 P2d 482 (1994) (*Central Eastside*). If the answer to the first question is yes, but the answer to the second question is no, then the decision is final and reviewable. Conceding that the letter concerns the application of land use regulations, the city argues that the answer to the second question is yes: there are "future actions by the city or other bodies" necessary for the road project to culminate in a land use decision, *i.e.*, the county review and decision on the road project application as dictated by the IGA.[3] We understand the city to

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[3] Section 1.2 of the IGA provides:

> "The City has no transportation land use process for County roads within City limits that are identified in the [City's] TSP. As this project is identified in the TSP, the City expressly defers to County authority over County's own road and the land use process utilized by the County. To the extent the road project is upon City roads, City agrees that County shall be the planning authority for said roads, provided however that such roads shall be constructed in accordance with City design and construction standards, and City shall have review and approval authority as specified herein to ensure compliance with said standards. * * *" LUBA No. 2016-074 Record 127 (all caps omitted).

Section 2.2 of the IGA provides that the county "shall exercise its transportation planning authority over planning, design, and construction of the project." Section 2.4 states that the county "shall design and construct Baler Way, a City facility, to City standards and will provide City with the opportunity for design review and approval of 50% design

argue that the comment letter was submitted to the county for consideration in the county land use process, as contemplated by IGA Section 3.2.

Petitioner responds with several arguments. First, petitioner argues that the authority of the county hearings officer over the application of city plan and code provisions to the pending application arise under the IGA, and that the "legality of that IGA is disputed" in *MGP X Properties LLC* (LUBA Nos. 2016-036/037), which is currently on appeal to the Court of Appeals. Petitioner's Response at 12.

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development and final plans prior to bidding." Section 2.5 provides that the county shall "provide City with the opportunity for design review of final plans for all other project elements prior to bidding[,]" and that the county agrees to consider the city's comments that do not unreasonably impact project costs or schedule.

With respect to the city's obligations, the IGA provides:

"3.1 City shall, upon execution of this Agreement, assign a City project manager to be responsible for coordination of project with County and to participate in the design process including public open houses.

"3.2 City shall participate in the project land use process in a manner including but not limited to, submission of written or oral testimony during the County's public hearing(s), particularly on matters related to County road authority, consistency between City and County land use planning and regulations, and City's deferral to County's transportation planning process." *Id.* at 128 (all caps omitted).

"Project Land Use Process" is defined as "[t]he process of implementing the county land use provisions for the road improvements for both city and county[.]" *Id.* at 127. "Project" includes both the proposed physical road project and the Project Land Use Process. *Id.* at 128.

Second, petitioner argues that in the county proceeding county counsel took the position that the issues petitioner raised before the hearings officer are not relevant to the county approval criteria at Washington County Community Development Code (CDC) Article VII. Petitioner's Response, Exhibit G. If the hearings officer accepts that position, petitioner argues, then the county land use process may not consider whether the road project is consistent with the city's comprehensive plan and land use regulations, in which case the comment letter may be the final word on that question.

Third, petitioner argues that it is not certain that the hearings officer will issue a decision on the project at all, because the county could withdraw the application at any time and reapply again, or break the project components down and seek separate ministerial approvals for different components, such as the proposal to remove a traffic signal that petitioner wants to remain, which approvals may not involve consideration of compliance with the city's comprehensive plan and land use regulations. Petitioner argues that *Central Eastside*, the case cited by the city, actually supports a conclusion that the comment letter is a final decision, because if the county land use process is conducted in a way that does not consider whether the project is consistent with the city's plan and land use regulations, the comment letter may turn out to be the final word on that question.

We agree with the city that the comment letter is not a final decision. That LUBA's decision dismissing petitioner's appeal of the IGA is currently on

appeal to the Court of Appeals has no bearing on whether the comment letter the city provided to the county pursuant to Section 3.2 of the IGA is a final decision. If for some reason the current county process were invalidated, the comment letter sent to the county would be a nullity, and would not thereby suddenly become a final city decision on whether the project is consistent with applicable city comprehensive plan and land use regulations.

Similarly, even if the hearings officer ultimately decides that no city comprehensive plan or land use regulation standards apply as approval criteria to the project, that determination would not suddenly transform the comment letter into a final decision that the project is consistent with city standards. At most it would mean that the city spent time and resources submitting a comment letter regarding city standards that, it turned out, were not deemed to be applicable standards by the final decision maker under the IGA.

Petitioner's third argument is difficult to follow, but we fail to see how the possibility that the applicant could potentially withdraw the application and file a new application or applications means that the city's comment letter constitutes a final decision. If the application prompting the city's comments is withdrawn, the city's comments regarding that application would become comments on a withdrawn application, and they would still not be a final decision of any kind.

Moreover, we disagree with petitioner that *Central Eastside* supports its finality argument. *Central Eastside* involved a city resolution that

recommended that the Oregon Department of Transportation (ODOT) not build a ramp as a means of freeway access to the Central Eastside Industrial Area and, instead, to apply funding and development planning to other transportation alternatives. That recommendation was arguably inconsistent with a city comprehensive plan policy which expressly called for improving freeway access for the Central Eastside Industrial Area. The court concluded that the recommendation could constitute a final decision:

> "[T]he city itself is responsible for amending or correctly applying its plan. If its recommendation is contrary to a requirement of the plan and if the recommendation not to build the ramp can be carried out—by action or inaction—without further decisions by the city that assure a plan change or plan compliance, the present 'recommendation' is the last pertinent decision concerning the plan and, therefore, is a final land use decision under ORS 197.015(10)(a)(A)(ii)." 129 Or App at 153 (original emphasis omitted).

LUBA ultimately concluded that the city comprehensive policy applied to the resolution, and that the resolution was the final decision regarding consistency with the city plan policy. *Central Eastside Industrial Council v. Portland*, 29 Or LUBA 541, 544-45 (1995). LUBA remanded the resolution to the city for further proceedings. *Central Eastside Industrial Council v. Portland*, 29 Or LUBA 429, *aff'd* 137 Or App 554, 905 P2d 265 (1995).

In contrast to the circumstances in *Central Eastside*, here the city submitted its comments as part of an ongoing land use review process conducted by the county, pursuant to the IGA, in which the county, not the city, will ultimately determine (1) whether any city standards apply to the decision

to approve or deny the project, and (2) whether the project complies with any city standards deemed applicable. In *Central Eastside*, ODOT conducted no land use review process and had no obligation to consider whether the city's recommendation not to provide freeway access was consistent with the city's comprehensive plan, which called for freeway access. In the present case, the county has the obligation under the IGA of making the final decision whether the road project is consistent with all applicable land use standards.[4]

In our view, the present circumstances are more similar to those in *Dickert v. City of Wilsonville*, 35 Or LUBA 52 (1998), which involved a city letter requesting that Metro alter an urban reserves designation and amend the urban growth boundary to include additional lands near the city. We held that even if the letter was the city's last word on the matter, because the ultimate decision is subject to review by another land use decision-making body, the city's letter was not a final decision subject to LUBA's review. *See also*

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[4] One possible exception is with respect to the final design of Baler Way, a city road. IGA Section 2.4 requires the county to provide the city with an opportunity for "design review and approval of 50% design development and final plans prior to bidding." *See* n 3. Section 2.4 appears to give the city some approval authority over the final design of Baler Way. However, the comment letter does not mention Baler Way, and as far as we are informed the application presently before the county hearings officer does not concern approval of "50% design development and final plans" for Baler Way. It is reasonably clear that the comment letter was submitted to the county pursuant to IGA Section 3.2, which is concerned with the "Project Land Use Process," *i.e.*, the "process of implementing the county land use provisions for the road improvements for both city and county[.]" *See* n 3.

Sensible Transportation for People (STOP) v. Metropolitan Service District, 100 Or App 564, 787 P2d 498 (1990) (A Metro recommendation to update a county comprehensive plan is not a final decision, because the decision cannot lead to land use effects without further appealable land use decisions by the county). The July 11, 2016 comment letter is simply that, a letter providing comments to the only jurisdiction under the IGA that has review and approval authority over the road project application pending before the county. To the extent the letter makes any determination at all regarding city standards, that determination is at best interlocutory, because it was produced as part of a land use process intended to lead to a final decision by the county.

Accordingly, we conclude that the comment letter is not itself a final decision and therefore we lack jurisdiction to review the letter.

Petitioner has moved to transfer LUBA No. 2016-074 to circuit court in the event that LUBA lacks jurisdiction. However, transfer to circuit court under ORS 34.102(4) and OAR 661-010-0075 is not appropriate when the reason LUBA lacks jurisdiction is that the challenged decision is not a final decision. *Grabhorn v. Washington County*, 46 Or LUBA 672, 678-79 (2004). The motion to transfer is denied. The motion to dismiss LUBA No. 2016-074 is granted.

LUBA No. 2016-074 is dismissed.

b. The Denial Letter

The city also moves to dismiss LUBA No. 2016-081, the appeal of the city's letter rejecting petitioner's local appeal of the same comment letter that is the subject of LUBA No. 2016-074. The city argues that although the denial letter applied the land use regulations governing local appeals, the letter falls within the so-called "ministerial" exception to LUBA's jurisdiction, and therefore must be dismissed for lack of jurisdiction. The ministerial exception at ORS 197.015(10)(b)(A) excludes from LUBA's jurisdiction a decision "[t]hat is made under land use standards that do not require interpretation or the exercise of policy or legal judgment[.]"

As noted above, in a letter dated August 1, 2016, the city attorney rejected petitioner's attempt to appeal the comment letter. In the denial letter, the city attorney took the position that the comment letter was not an appealable decision under the city's code:

> "The purpose of this letter is to advise you that the City is rejecting the above-referenced local appeal because comments submitted to another jurisdiction do not fall within any of the City's recognized permit processing procedures set forth within Sherwood Municipal Code (SMC) 16.72." LUBA No. 2016-081 Record 1.

We understand the denial letter to take the position that local appeals are provided only for certain decisions resulting from "recognized permit process[es]" set forth in SMC 16.72. SMC 16.72 is entitled "Procedures for Processing Development Permits," and in relevant part states that all quasi-

judicial development permit applications shall be classified as either Type I, Type II, Type III, or Type IV decisions. For example, SMC 16.72.010(A)(1) lists a number of proposed uses or requested actions (signs, property line adjustments, interpretative decisions, etc.) that are classified as "Type I" decisions.[5] The city attorney apparently examined the decision types listed

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[5] SMC 16.72.010(A)(1) provides:

> "The following quasi-judicial actions shall be subject to a Type I review process:
>
> "a. Signs
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> "b. Property Line Adjustments
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> "c. Interpretation of Similar Uses
>
> "d. Temporary Uses
>
> "e. Final subdivision and partition plats
>
> "f. Final Site Plan Review
>
> "g. Time extensions of approval * * *
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> "h. Class A Home Occupation Permits
>
> "i. Interpretive Decisions by the City Manager or his/her designee
>
> "j. Tree Removal Permit - a street trees over five (5) inches DBH, per Section 16.142.050.B.2 and 3.
>
> "k. Adjustments
>
> "l. Re-platting, Lot Consolidations and Vacations of Plats

under each classification and, finding nothing resembling a comment letter regarding a land use application pending before another jurisdiction, concluded that no local appeal of the comment letter was available. The apparent premise to that conclusion is that the SMC provides a right of local appeal only for decisions on applications for uses or actions listed under the classifications in SMC 16.72.010(A).

That premise appears to be based on the fact that SMC 16.72.010(B), entitled "Hearing and Appeal Authority," follows immediately after the list of decisions set out in SMC 16.72.010(A), and describes for each type of decision the hearing authority and the appeal authority.[6] SMC 16.72.010(B)(3), for

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"m. Minor Modifications to Approved Site Plans[.]"

[6] SMC 16.72.010(B)(2) provides, in relevant part:

> "Each quasi-judicial development permit application shall potentially be subject to two (2) levels of review, with the first review by a Hearing Authority and the second review, if an appeal is filed, by an Appeal Authority. The decision of the Hearing Authority shall be the City's final decision, unless an appeal is properly filed within fourteen (14) days after the date on which the Hearing Authority took final action. In the event of an appeal, the decision of the Appeal Authority shall be the City's final decision.

SMC 16.72.010(B) then sets out the hearing and appeal authorities for each type of decision listed in SMC 16.72.010(A). For example, SMC 16.72.010(B)(3) provides, in relevant part:

> "The quasi-judicial Hearing and Appeal Authorities shall be as follows:

example, describes the appeal authority for "Type I" decisions. We understand the denial letter to conclude that only decisions on applications for uses listed in SMC 16.72.010(A) can be appealed locally, and that the comment letter is not one of the decisions or actions listed anywhere in SMC 16.72.010(A).

Petitioner argues that the relevant SMC provisions are ambiguous and require interpretation, regarding whether the code provides a right of local appeal for the comment letter. Petitioner notes that SMC 16.76.020, part of a code section that sets forth the procedures for conducting local appeals, states that "[l]and use actions taken pursuant to this Code shall be final unless a petition for review is filed with the Planning Director not more than fourteen (14) days after the date on which the Hearing Authority took final action on the land use application * * *." Petitioner argues that the scope of "land use action" is not expressly limited to the uses or actions listed at SMC 16.72.010(A), suggesting that a right of local appeal exists for "actions" not listed at SMC 16.72.010(A). Petitioner argues that the relevant code provisions

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> "a. The Type I Hearing Authority is the Planning Director and the Appeal Authority is the Planning Commission.
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> "(1) The Planning Director's decision shall be made without public notice or public hearing. Notice of the decision shall be provided to the applicant.
>
> "(2) The applicant may appeal the Planning Director's decision."

are ambiguous on this point, and require interpretation, and therefore the denial letter does not fall within the ministerial exception at ORS 197.015(10)(b)(A).

We disagree with petitioner that SMC 16.76.020 applies in a manner that renders the appeal provisions of SMC 16.72.010 ambiguous, for purposes of determining whether the denial letter was made under land use standards that require interpretation under ORS 197.015(10)(b)(A). SMC 16.76.020 is plainly and expressly concerned with land use actions that are capable of becoming final in the absence of a local appeal. As discussed above, the comment letter is an advisory recommendation, which by its inherent nature is incapable of becoming a final decision of any kind. For that reason, the comment letter cannot possibly be a "land use action" referenced in SMC 16.76.020, even if the phrase "land use action" is understood to encompass something more than the decisions listed in SMC 16.72.010(A), as petitioner argues. Petitioner's arguments under SMC 16.76.020 do not demonstrate that the denial letter was rendered under land use standards that require interpretation.

Turning to the standards the city attorney *did* apply, at SMC 16.72.010, those standards, like those at SMC 16.76.020, also clearly and expressly apply to decisions or actions that are capable of finality, in the absence of a local appeal. *See* n 6 ("The decision of the Hearing Authority shall be the City's final decision" unless appealed). That is entirely consistent with the exhaustion

requirement at ORS 197.825(2)(a).[7] A local appeal is necessarily limited to decisions that, in the absence of a local appeal, are capable of becoming final decisions. The decisions or actions listed in SMC 16.72.010(A) are all permits or similar actions or approvals that are capable of becoming final decisions, in the absence of a local appeal. *See* n 5. By contrast, as explained, the nature of the comment letter and the circumstances under which it was produced are such that the letter does not constitute, and cannot ever become, a final decision. Petitioner cites nothing in the city's code or elsewhere suggesting that the city's local appeal provisions could plausibly be interpreted to provide a right of local appeal for a *non-final* and at best interlocutory action such as the comment letter.[8]

Because the relevant SMC provisions unambiguously limit the right of local appeal to decisions and actions that are capable of becoming final in the absence of appeal, and nothing cited to us in the SMC suggests otherwise, we agree with the city that the denial letter was made under standards that do not

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[7] ORS 197.825(2)(a) provides that LUBA's jurisdiction is "limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review[.]"

[8] In the motion to dismiss, the city argues that even if the comment letter is viewed as a Type I decision, as petitioner argued below (Record 3, LUBA No. 2016-081), SMC 16.72.010(B)(3)(a)(2) limits the right of local appeal of Type I decisions to the *applicant.* *See* n 6. The city appears to be correct on that point. However, we do not understand the city attorney to have rejected the local appeal because petitioner was not the applicant. Accordingly, we consider this point no further.

require interpretation or the exercise of policy or legal judgment, at least on this point. It is petitioner's ultimate burden to show that the challenged decision is subject to LUBA's jurisdiction, and that none of the asserted exclusions at ORS 197.015(10)(b) apply. Petitioner has not met that ultimate burden.

Petitioner has moved to transfer LUBA No. 2016-081 to circuit court, in the event that LUBA concludes that one of the exclusions at ORS 197.015(10)(b) applies. *See* ORS 197.825(3)(a) (the circuit court has jurisdiction to provide relief in proceedings arising from decisions described in ORS 197.015(10)(b)). The city does not oppose the motion.

Accordingly, LUBA No. 2016-081 is transferred to Washington County Circuit Court.