BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NYLA L. JEBOUSEK,
Petitioner,

vs.

CITY OF NEWPORT,
Respondent.

LUBA No. 2005-089

ORDER

Respondent moves to dismiss this appeal, arguing that the appeal was not timely filed and that the underlying decision is not a land use decision in any event. For the reasons set out below, we deny the motion to dismiss. We also deny petitioner's motion for an evidentiary hearing.

HISTORY

This appeal concerns a building permit to allow construction of a house in the City of Newport. Given the long history of prior appeals concerning this property, a summary of that history is appropriate before turning to the city's motion to dismiss.

A. The First Round of Appeals

In a memorandum opinion dated October 29, 1996, LUBA affirmed a city decision that approved a lot line adjustment for the subject property. The Court of Appeals remanded our memorandum opinion. *Jebousek v. City of Newport*, 147 Or App 100, 935 P2d 452 (1997). The basis for the Court of Appeals' remand to LUBA is set out below:

> "Petitioner contends that the slope of the affected property 'drops off drastically,' and that development on it would pose a landslide risk. She therefore argues that, as part of this decision, the city was required to, but did not, apply Goal 1 of the Natural Features component of the city's comprehensive plan. The goal requires minimization of 'damage to the natural resources of the coastal zone that might result from inappropriate development in environmentally hazardous areas.' Policy 3 of the goal, which petitioner specifically contends is applicable and was not followed by the city, provides:

> "'Where hazardous areas have not been specifically identified but there is a reason to believe that a potential does exist, a site specific investigation by a registered geologist or engineer shall be required prior to development.'
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> "Petitioner maintains that she raised the issue of 'environmental hazards and site specific investigation' at each level of the city's decision-making process and that the city did not address the issue. We emphasize that this opinion pertains directly only to the city's asserted failure to address the issue. We do not suggest anything about the merits of petitioner's substantive position, except that it is not outside the range that the city could have found meritorious had it considered it or should it do so later as a consequence of our remand." 147 Or App at 102.

In accordance with the Court of Appeals' decision, we remanded the city's lot line adjustment decision in an unpublished opinion dated June 17, 1997.

As a result of the first round of appeals, the city's lot line adjustment decision was remanded to the city to address petitioner's Goal 1, Policy 3 argument.

B. The Second Round of Appeals

In its decision following our June 17, 1997 remand, the city interpreted Goal 1, Policy 3 to establish a general policy rather than an approval standard for individual land use permit decisions. Petitioner appealed that decision to LUBA. LUBA affirmed the city's interpretation. *Jebousek v. City of Newport*, 34 Or LUBA 340 (1998). Because LUBA affirmed the city's interpretation that Goal 1, Policy 3 did not establish an approval standard for individual permit decisions, LUBA did not consider other assignments of error, in which petitioner (1) asserted an evidentiary challenge to "the city's finding that there is no reason to believe the subject property has a potential for geologic hazard" and (2) challenged city findings that even if Goal 1, Policy 3 is an approval standard, it applies at the time of development rather than to lot line adjustments. 34 Or LUBA at 346-47.

Petitioner appealed LUBA's decision in the second round of appeals to the Court of Appeals. The Court of Appeals reversed and remanded LUBA's decision:

> "Petitioner argues to us that the city and LUBA erred in a number of respects. Her principal contention is that the city's interpretation that [Goal 1, Policy] 3 is precatory only and is not an approval standard was erroneous. We agree. The provision is not subject to any reasonable reading except that it requires a particular

> action under particular circumstances as a condition of approving particular applications. The city's interpretation is 'clearly wrong.' *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 843 P2d 992 (1992).
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> "It follows that a remand to LUBA is necessary to decide petitioner's assignments of error that, given its disposition of the interpretive question, it did not decide on their merits. One of those assignments is directed against the city's alternative finding that there is no basis for belief that potential hazards are present, which petitioner challenges as being unsupported by substantial evidence in the whole record. * * * [W]e emphasize that the question under [Goal 1, Policy] 3 is whether *there is reason to believe* that a potential does exist, not whether there is *in fact* a hazard or a potential hazard." *Jebousek v. City of Newport*, 155 Or App 365, 367-68, 963 P2d 116 (1998) (court's emphases).

C. The Third Round of Appeals

Following the Court of Appeals decision in the second round of appeals, LUBA sustained petitioner's assignment of error in which she challenged the adequacy of the evidentiary support for the county's finding that there is no reason to believe a potential hazard exists on the subject property. *Jebousek v. City of Newport*, 36 Or LUBA 124, 127-28 (1999). LUBA next considered a separate interpretive issue that LUBA did not address in its decision in the second round of appeals. The city adopted an interpretive finding to the effect that even if Goal 1, Policy 3 did establish approval standards for individual permit decisions, it did not establish approval standards for lot line adjustment decisions. We quoted the city's interpretive finding:

> "'Even if Goal 1 (including but not limited to Policy 3) did apply, and even if there were reason to believe that a geologic hazard does exist, the Policy does not require a site-specific investigation at this time (by reason of a lot line adjustment). In general, under implementing provisions of other ordinances, if there were reason to believe that a hazard did exist, such a site-specific investigation would be carried out at the time the property was developed by the construction of improvements thereon. The site-specific investigation would involve an evaluation of the nature and method of construction of the improvements, and the steps which are to be taken to deal with any geologic or other natural hazards which are found to exist on the site. Typically, restraints might be imposed as to the method of construction, drainage, foundation requirements, location, setback and other matters of a similar nature. It would be very difficult to carry out such an evaluation where insufficient information about a specific intended improvement is available. A lot line adjustment, by its nature, does not usually cause information to be presented respecting the nature of improvements which would be constructed on the subject

> property, and such information is not required and, if provided, is not binding upon the applicant.'" 36 Or LUBA at 128 (record citation omitted).

In deferring to the city's interpretive finding that the potential applicability of Goal 1, Policy 3 would be addressed at the time development is proposed, we explained:

> "[The city's interpretive] finding taken as a whole indicates that the city considers that [Goal 1] Policy 3 will apply, if it applies, at the stage where the city is considering 'the method of construction, drainage, foundation requirements, location, setback and other matters of a similar nature.' Supplemental Record 10. As the city points out, that stage occurs under the city's ordinances when the city is evaluating a specific development proposal, typically a building permit, and prior to approval of that development." 36 Or LUBA at 129.

We went on to reject petitioner's concern that the building permit that would follow the lot line adjustment could not be a land use decision that is appealable to LUBA. 36 Or LUBA 130, n 1 (noting that building permits are excluded from LUBA's review jurisdiction only if they are issued pursuant to "clear and objective standards").

Petitioner appealed our decision in the third round of appeals to the Court of Appeals. After quoting the city's interpretive finding that is quoted immediately above, the Court of Appeals affirmed LUBA's decision:

> "Petitioner now argues to us that LUBA erred in rejecting her challenge to the city's interpretation of Policy 3. We agree with LUBA's understanding of the substance of the city's interpretation and with LUBA's conclusion that, *as so understood*, the interpretation is not reversible under *Clark* [*v. Jackson County*, 313 Or 508, 836 P2d 710 (1992).]" *Jebousek v. City of Newport*, 163 Or App 126, 129, 986 P2d 1244 (1999) (court's emphasis).

With the above history as background, we turn to the city's motion to dismiss petitioner's challenge of the city's permit to allow construction of a house on the subject property.

CITY MOTION TO DISMISS

The city moves to dismiss this appeal for two reasons. First, the city contends that the challenged building permit is neither a land use decision nor a limited land use decision.[1] Second, even if the challenged building permit is a land use decision or limited land use decision, petitioner contends that the petitioner's appeal was not timely filed. We address those arguments in turn.

A. Land Use Decision or Limited Land Use Decision

The city argues the challenged building permit is not a land use decision because it is a building permit that was issued under clear and objective standards.[2] The city does not really address the possibility that the challenged decision may be a limited land use decision.[3]

The city appears to argue that the record submitted in this appeal is not adequate to demonstrate that the city could not have issued the challenged building permit under clear and objective standards and, for that reason, petitioner failed to carry her burden of proof to demonstrate that LUBA has jurisdiction over the disputed building permit.

Although petitioner does have the burden to demonstrate that LUBA has jurisdiction over the challenged building permit, the city's view of the legal significance of the skimpy findings and evidentiary record in this matter is hard to reconcile with the history of this property. By virtue of the three prior rounds of appeals, there can be no dispute that Goal 1, Policy 3, which is part of the

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[1] As relevant here, LUBA's jurisdiction is limited to local government "land use decisions" and "limited land use decisions."

[2] ORS 197.015(10)(b)(B) provides that a "land use decision" does not include a local government decision that "approves or denies a building permit issued under clear and objective land use standards[.]"

[3] ORS 197.015(12) provides the following definition:

> "'Limited land use decision' is a final decision or determination made by a local government pertaining to a site within an urban growth boundary which concerns:
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> "* * * * *
>
> "(b) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review."

city's comprehensive plan, at least potentially applies to the disputed building permit. That would seem to make the building permit a land use decision.[4] In fact, in the third round of appeals, the city pointed to the building permit as the event that would trigger potential application of Goal 1, Policy 3. Therefore, unless and until the city establishes otherwise, the challenged decision "concerns" the application of a comprehensive plan and for that reason is a land use decision.[5]

To the extent the city suggests that Goal 1, Policy 3 is a clear and objective standard, within the meaning of ORS 197.015(10)(b)(B), or is not a discretionary standard, within the meaning of ORS 197.015(12), we reject the suggestion. Goal 1, Policy 3 requires the city to determine whether "there is a reason to believe that a potential [hazard] does exist" and, if so, to require "a site specific investigation by a registered geologist or engineer * * * prior to development." Without expressing any view here regarding whether the city correctly determined that "there is no reason to believe that a potential hazard does exist," that is a subjective and discretionary standard; it is not a clear and objective standard.

We reject the city's argument that the challenged decision is neither a land use decision nor a limited land use decision.[6]

B. Timely Filed Notice of Intent to Appeal

The building permit that is the subject of this appeal is dated May 10, 2005. As far as we can tell from the parties' arguments, the building permit was final on that date. Under OAR 661-010-0015, petitioner was required to file her appeal with LUBA within 21 days after May 10, 2005

[4] As defined by ORS 197.015(10)(a) a final local government decision "that concerns the * * * application of * * * [a] comprehensive plan provision" is a land use decision.

[5] We do not mean to foreclose the possibility that the challenged building permit may be a "limited land use decision." Limited land use decisions include certain decisions that apply "discretionary standards." *See* n 3. Certainly the application of Goal 1, Policy 3 involves the exercise of discretion.

[6] We do not mean to foreclose further argument by the parties on this issue. However, as the arguments now stand, we conclude that petitioner has adequately demonstrated that the challenged building permit is either a land use decision or a limited land use decision.

or "within the time provided by ORS 197.830(3) through (5)."[7] If the filing deadline was 21 days from May 10, 2005, it expired on May 31, 2005. Petitioner's notice of intent to appeal was filed on June 8, 2005.

Petitioner asserts that her notice of intent to appeal was timely filed under ORS 197.830(3)(b). Under ORS 197.830(3), where a local government makes a land use decision without a hearing, a petitioner may appeal a land use decision to LUBA more than 21 days after the decision becomes final.[8] There is no dispute that the city did not provide a hearing before it issued the building permit on May 10, 2005. We understand petitioner to contend that ORS 197.830(3)(b) rather than ORS 197.830(3)(a) applies because the city was not obligated to provide notice of the building permit to petitioner.

Petitioner contends that the city did not provide her with a copy of the building permit until June 2, 2005. Petitioner contends the building permit was first posted on the site "on or about May 25, 2005." Whether the 21-day deadline in ORS 197.830(3) is measured from May 25, 2005 or June 2, 2005, petitioner contends the notice of intent to appeal was timely filed.

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[7] As relevant, OAR 661-010-0015(1)(a) provides:

> "The Notice [of intent to appeal] shall be filed with the Board on or before the 21st day after the date the decision sought to be reviewed becomes final or within the time provided by ORS 197.830(3) through (5). * * * A Notice filed thereafter shall not be deemed timely filed, and the appeal shall be dismissed."

[8] 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:
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> "(a) Within 21 days of actual notice where notice is required; or
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> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

Respondent disputes petitioner's contention regarding the date the building permit was posted on the site. Based on a statement signed by the applicant, we understand the city to contend that the building permit was posted on the site on May 11, 2005, not May 25, 2005. In addition, based on the statement signed by the applicant, some of the supplies that were used for construction on site were purchased on May 12, 2005, and a backhoe was rented on May 16, 2005 and returned on May 17, 2005. The applicant supplied photographs to the city, which are attached to the city's motion. The applicant contends those photographs were taken "about 5/18 showing the completed work." We understand the city to argue that if the 21 day deadline established by ORS 197.830(3)(b) is measured from any date before May 18, 2005, the deadline for filing the notice of intent to appeal expired on June 7, 2005 or an earlier date and the notice of intent to appeal was not timely filed.

We are not sure what to make of the disagreement over the date the building permit was posted on the property. Whatever date it was actually posted on the property, we understand petitioner to contend she did not see it until May 25, 2005 and the city points to no evidence that would dispute that contention. Even if the building permit was posted on the site on May 11, 2005, that does not mean petitioner knew or should have known about the building permit on that date. We also agree with petitioner that the dated receipts for materials and the rental of the backhoe have no real bearing on when petitioner knew or should have known about the city's building permit decision, because petitioner had no knowledge of those receipts.

The actual construction that occurred between May 16, 2005 and May 18, 2005 presents a much closer question as it had the potential of putting petitioner on notice that the city may have issued a permit of some sort to authorize that construction. However, the city offers no reason to assume petitioner saw that construction before May 25, 2005. Even if she did notice the construction at some point before May 25, 2005, we have explained that construction activity on-site does not necessarily immediately trigger the 21-day appeal period under ORS 197.830(b):

> "Determining the date a petitioner 'should have known' of the decision that is appealed under ORS 197.830(3)(b) (1997) is not complicated where a petitioner has no reason to suspect that the decision was made until the petitioner is given a copy of the decision. However, where there are circumstances that would lead a reasonable person to realize that an appealable land use decision may have been rendered, it is necessary to consider whether a reasonable person would have made appropriate inquiries and thereby discovered the actual decision or confirmed the existence of the decision. We emphasize that the obligation to make reasonable inquires under ORS 197.830(3)(b) (1997) is an objective one, and it turns on what a reasonable person would do rather than what the petitioner actually did. Therefore, if a petitioner observes activity that would reasonably suggest that an appealable land use decision may have been adopted, the petitioner is obligated under ORS 197.830(3)(b) (1997) to make appropriate inquiries with the local government and discover the decision. If the petitioner does so and files an appeal within 21 days after discovering the decision, the appeal is timely under ORS 197.830(3)(b) (1997). However, if the petitioner fails to make such appropriate inquiries, the 21-day appeal period nevertheless begins to run." *Willhoft v. City of Gold Beach*, 38 Or LUBA 375, 390 (2000).

Applying the above-described standard here, after construction activity was visible on the site between May 16, 2005 and May 18, 2005, we understand petitioner to contend that she discovered the building permit posted on-site on May 25, 2005 and obtained a copy of the building permit from the county on June 2, 2005. She filed her notice of intent to appeal with LUBA on June 8, 2005, 14 days after she discovered the building permit that was posted on-site. It is not entirely clear whether petitioner was immediately aware of the construction activities on-site when they began on May 16, 2005. Even if she was, petitioner made reasonably prompt inquires and discovered the building permit less than 10 days later, on May 25, 2005. In that circumstance, we conclude that petitioner "knew or should have known of the decision" on May 25, 2005, and that her notice of intent to appeal was timely filed on June 8, 2005.

MOTION FOR EVIDENTIARY HEARING

In her notice of intent to appeal, petitioner includes the following statement:

> "Petitioner respectfully requests an evidentiary hearing and credit for prior appeal fees in this matter." Notice of Intent to Appeal 2.

Respondent contends that if the above was intended as a motion under OAR 661-010-0045 to consider extra-record evidence, it is inadequate. The grounds for a motion to consider extra-record evidence are set out at OAR 661-010-0045(1) and the supporting documents that must accompany such a motion are described at OAR 661-010-0045(2). We agree with respondent that the above-quoted sentence in the notice of intent to appeal is inadequate to constitute a motion to consider extra-record evidence under OAR 661-010-0045. To the extent it was so intended, the motion is denied.

BRIEFING SCHEDULE

Our order above resolves all pending motions. The petition for review has already been filed. The respondent's brief shall be due 21 days from the date of this order. The Board's final opinion and order shall be due 56 days from the date of this order. A time and date for oral argument will be set by separate letter to the parties.

Dated this 24th day of October, 2005.

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Michael A. Holstun
Board Member