

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 CALVARY CONTRUCTION, LLC,

5 *Petitioner,*

6  
7 vs.

8  
9 CITY OF GLENDALE,

10 *Respondent.*

11  
12 LUBA No. 2009-074

13 ORDER

14 **JURISDICTION**

15 The decision that is before us in this appeal is a letter from the mayor to petitioner  
16 regarding Riverview Estates Subdivision. As far as we can tell, Riverview Estates  
17 Subdivision has been given preliminary and final plat approval, the final plat has been  
18 recorded and the subdivision is under construction. The city and the subdivision developer  
19 appear to have a dispute about the subdivision streets and utilities. The mayor's letter  
20 appears at page 1 of the record, and the substance of that letter is set out below:

21 "This letter is to inform you that the development of the above-referenced  
22 property has not complied with Glendale's Land Use and Development  
23 Ordinance #01-2005, Section 9.0.60(H), (K) and the City therefore accepts no  
24 responsibility for any utility infrastructure or street construction associated  
25 with this project.

26 "According to City Ordinance 01-2005, Section 1.0.60(A), the City cannot  
27 issue building permits for any lot in this subdivision.

28 "Page 5 of the Preliminary Plat for this project includes a list of Project  
29 Completion Requirements submitted by the developer. None of these  
30 requirements have been met." Record 1.

31 LUBA has jurisdiction to review two kinds of decisions—land use decisions and  
32 limited land use decisions. ORS 197.825(1). Statutory definitions of the terms "land use  
33 decision" and "limited land use decision" appear at ORS 197.015(10) and 197.015(12). One

1 of the more common ways a decision qualifies a “land use decision” is when it “concerns the  
2 \* \* \* application of” a “land use regulation.” ORS 197.015(10)(a). The city’s Land Use  
3 Development Ordinance is almost certainly a land use regulation and the challenged decision  
4 appears to apply the Land Use Development Ordinance, but we cannot be sure.<sup>1</sup> Despite the  
5 letter’s reference to the Land Use Development Ordinance, the June 12, 2009 letter may be  
6 based solely on the city’s position that the subdivision infrastructure is inconsistent with the  
7 referenced “list of Project Completion Requirements submitted by the developer.” If that is  
8 the case, the challenged decision may not concern the application of a land use regulation  
9 and for that reason it may not be a land use decision. *Garrard v. City of Newport*, 40 Or  
10 LUBA 258, 261 (2001); *see Mar-Dene Corp. v. City of Woodburn*, 149 Or App 509, 514-15,  
11 944 P2d 976 (1997) (city decision that condition of permit approval had been substantially  
12 complied with is not a land use decision where the decision does not also apply a  
13 comprehensive plan or land use regulation). Since the letter does not grant tentative  
14 subdivision plan approval, it also may not qualify as a limited land use decision.<sup>2</sup>

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<sup>1</sup> No party has provided LUBA with copies of the Land Development Ordinance sections cited in the June 12, 2009 letter.

<sup>2</sup> ORS 197.015(12) provides:

“‘Limited land use decision’:

“(a) Means a final decision or determination made by a local government pertaining to a site within an urban growth boundary that concerns:

“(A) The approval or denial of a tentative subdivision or partition plan, as described in ORS 92.040 (1).

“(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.

“(b) Does not mean a final decision made by a local government pertaining to a site within an urban growth boundary that concerns approval or denial of a final subdivision or partition plat or that determines whether a final subdivision or partition plat substantially conforms to the tentative subdivision or partition plan.”

1 The city has not moved to dismiss this appeal, and with what has been provided to us  
2 at this point, LUBA is in no position to answer the jurisdictional question on its own.

3 We note however that if the challenged decision is a land use decision or limited land  
4 use decision, it appears quite likely that it is not supported by substantial evidence in the  
5 five-page record that we discuss below. The evidentiary basis for the city's conclusion that  
6 the disputed subdivision streets and utility infrastructure either does not comply with the  
7 cited sections of the Land Use and Development Ordinance or does not meet the "list of  
8 Project Completion Requirements submitted by the developer," appears to be lacking.  
9 Although our order rejecting petitioner's record objections below begins the briefing  
10 schedule, the parties may wish to consider whether some other expedited approach to resolve  
11 the jurisdictional question or a stipulated remand of the decision to the city for development  
12 of a more complete record might be in all parties' best interest.

### 13 **RECORD OBJECTIONS**

#### 14 **A. The Record**

15 The record transmitted by the city to LUBA is five pages long. Page 5 is a  
16 memorandum to the mayor and city council from the city recorder forwarding the former city  
17 manager's (Andrew's) recommendation concerning Riverview Estates Subdivision. The  
18 substance of those recommendations is set out below:

19 "Notify the City Attorney to cease any work on this case,  
20 spend no more money on it.'

21 "Do not attempt collection of the engineering fees, but  
22 continue to bill the developer monthly.'

23 "Send the developer a letter stating that services will not be  
24 provided to any lots and building permits will not be issued  
25 without compliance with City Ordinance, citing the ordinance  
26 chapter and section, and the developer's own plan.'

27 "Copy this letter to Douglas Co. Clerk with a reference to the  
28 recorded "final plat" by book, page, file number.'

1 “Do not answer any correspondence from the developer’s  
2 attorney, do not forward to City attorney. Do not respond to  
3 threats of lawsuit unless a suit is actually filed.’

4 “Inform any title companies investigating liens on the  
5 property that there are no City services available at this time,  
6 and that the street is a private street and not maintained by the  
7 City.’

8 “It is Mr. Andrew’s opinion that the developer needs the City far more than  
9 the City needs the \$12,267 he owes. I have drafted the attached letter to the  
10 developer for the Council’s review and revision, if they choose to follow this  
11 suggestion.” Record 5.

12 Page 4 of the record is the agenda for a June 12, 2009 city council workshop listing one of  
13 the discussion items as “Riverview Estates Subdivision.” Pages 2 and 3 of the record are the  
14 minutes of the June 12, 2009 city council workshop at which the city council voted to send a  
15 letter to petitioner.<sup>3</sup> As noted earlier, page 1 of the record is the June 12, 2009 letter from the  
16 mayor to petitioner.

17 **B. Petitioner’s Record Objections**

18 Petitioner objects to the record. According to petitioner, the record should include  
19 “the entire City file on the Riverview Estates Subdivision \* \* \*.” Petitioner believes that file  
20 includes the following:

- 21 “1. Original subdivision application.  
22 “2. Staff report.

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<sup>3</sup> The closest those minutes come to explaining why the city sent the June 12, 2009 letter is the following;

“Councilor Jensen then requested that Dennis Stanfill, a retired civil engineer, explain to the Council the usual process that a subdivision development takes. The Council also heard input from Public Works Superintendent Ned Dausel regarding the construction of infrastructure. The Council agreed that none of the infrastructure constructed in the Riverview Estates Subdivision had been certified by City engineers, and therefore, could not be accepted.” Record 2.

The record does not include a recording of the June 12, 2009 city council workshop, the record table of contents does not indicate that the city intends to provide that recording as a difficult-to-duplicate exhibit pursuant to OAR 661-010-0025(2), and petitioner’s record objection does not include an objection that the recording of that meeting should be included in the record.

- 1           “3. Findings of approval, with conditions.  
2           “4. Preliminary plat.  
3           “5. Final recorded plat.  
4           “6. All correspondence.  
5           “7. All minutes.  
6           “8. All internal memos.  
7           “9. All technical engineering data.  
8           “10. All studies and other technical reports.  
9           “11. All inspection reports.  
10          “12. Land Use Development Ordinance 01-2005.  
11          “13. All documents relating to pre-existing City Storm drain located within  
12             Subdivison.  
13          “14. Any and all other documents placed before the City Council either  
14             physically or through operation of law, or specifically incorporated  
15             into the Record by reference.

16           “The basis for the claim that the above items are part of the Record is that the  
17           City has refused to accept any responsibility for any utility infrastructure or  
18           street construction associated with the project or issue any building permits  
19           for any lot in the Subdivision, as evidenced by the letter to Petitioner attached  
20           as page 1 to the Record heretofore submitted, and therefore all matters of  
21           record relative to said Subdivision are relevant to LUBA’s review.”  
22           Objection to Record 1-2.

23           **C. The City’s Response to Petitioner’s Record Objections**

24           The city responds that “none of the documents identified by petitioner was placed  
25           before the [city] council at [the] June 12<sup>th</sup> session, which was the only session or hearing held  
26           on the challenged decision.” Response to Record Objections 1. The city further argues that  
27           objections one through five appear to seek to supplement the record of this appeal of the  
28           city’s June 12, 2009 letter with documents that are part of the record of the city’s preliminary  
29           subdivision and final plat approval decisions. The city contends that neither of those

1 decisions is before LUBA in this appeal and none of those documents from those records  
2 were actually placed before the city council during its deliberations that led up the June 12,  
3 2009 letter. The city contends objections “6-11 and 13-14 appear to be discovery requests.”  
4 *Id.* at 2. The city also contends that the Land Use Development Ordinance mentioned in  
5 objection 12, while subject to official notice, was not placed before the city council and was  
6 not made part of the record. The city goes on to point out that the only justification that  
7 petitioner gives for seeking to have the documents included in the record in this LUBA  
8 appeal is that “the City has refused to accept any responsibility for any utility infrastructure  
9 or street construction associated with the project or issue any building permits for any lot in  
10 the Subdivision, \* \* \* and therefore all matters of record relative to said Subdivision are  
11 relevant to LUBA’s review.” The city contends that the required content of a record at  
12 LUBA is governed by OAR 661-010-0025(1), and the alleged fact that the documents  
13 petitioner seeks to have added to the record might be relevant to LUBA’s review, even if  
14 true, is simply not a basis for LUBA to order the documents to be included in the record.

15 The city is correct. Whether a document or other evidence is *relevant* to the decision  
16 maker’s decision, in and of itself, has no bearing on whether that document must be included  
17 in the record. *Adkins v. Heceta Water District*, 22 Or LUBA 826, 828 (1991). The required  
18 content of the record is dictated by LUBA’s rules. As potentially relevant here, OAR 661-  
19 010-0025(1) provides that the record must include:

20 “All written testimony and all exhibits, maps, documents or other written  
21 materials specifically incorporated into the record or placed before, and not  
22 rejected by, the final decision maker, during the course of the proceedings  
23 before the final decision maker.”

24 Petitioner neither alleges that the documents identified in objections one through 14 were  
25 actually placed before the city council or specifically incorporated into the record. Neither

1 does petitioner offer any reason to question the city’s contention that none of them were  
2 placed before the city council.<sup>4</sup> Petitioner’s record objections are denied.

3 **CONCLUSION**

4 The record is settled as of the date of this order. The petition for review shall be due  
5 21 days from the date of this order. The respondent’s brief shall be due 42 days from the  
6 date of this order. The Board’s final opinion and order shall be due 77 days from the date of  
7 this order.<sup>5</sup>

8 Dated this 23<sup>rd</sup> day of September, 2009.

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Michael A. Holstun  
Board Member

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<sup>4</sup> We note that if the preliminary plat was never placed before the city council, it appears that the letter relies in part on a document that is not in the record, since the letter takes the position that the subdivision infrastructure does not comply with “a List of Project Completion Requirements” that appears on page 5 of the preliminary plat. That may be a basis for reversal or remand, but we do not question the city’s assertion that the preliminary plat was not placed before the city council.

<sup>5</sup> After the city filed its response to petitioner’s record objection, petitioner filed a request for a telephone conference. The Board does not see that a telephone conference is warranted here. If petitioner made that request so that it could reply to the city’s response to its record objections, and believes that reply would lead LUBA to rule differently on the record objections, petitioner may file a written reply and ask that LUBA reconsider its resolution of petitioner’s record objections.