

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 MICHAEL McNICHOLS,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF CANBY,
10 *Respondent,*

11
12 and

13
14 CANBY DEVELOPMENT, LLC,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2018-012

18
19 ORDER

20 **MOTION TO WITHDRAW**

21 Intervenor-petitioner Oregon Department of Fish and Wildlife (ODFW)
22 moves to withdraw as a party from this appeal. The motion is granted.

23 **MOTION TO DISMISS**

24 The challenged decision approves a 22-lot subdivision. The approved
25 subdivision includes provision for emergency access on city-owned property,
26 along a “Logging Road” that exists within a conservation easement benefiting
27 ODFW. In its decision, the city council concluded that using the Logging Road
28 for emergency access is consistent with the terms of the easement benefiting
29 ODFW. Alternatively, the city council found that to the extent use of the

1 Logging Road for emergency access is inconsistent with the easement, the
2 easement allows for modifications with the express written consent of ODFW.
3 To ensure consistency with the easement, the city council imposed Condition of
4 Approval One (Condition 1), which states that the “Applicant shall comply with
5 the terms of the Canby Landing Conservation Easement between the City of
6 Canby and ODFW dated May 28, 2002.” Record 126. Petitioner appealed the
7 city council’s final decision to LUBA.

8 In the petition for review, petitioner advances five assignments of error
9 that challenge Condition 1 and the use of the conservation easement for
10 emergency access. Under the first assignment of error, petitioner argues that
11 Condition 1 is inadequate, because it does not expressly require the applicant to
12 obtain ODFW’s written consent to modify the easement or use the Logging
13 Road for emergency access. For the same reason, petitioner argues under the
14 second and third assignments of error that Condition 1 is insufficient to ensure
15 compliance with Canby Municipal Code (CMC) 16.46.010(F), which requires
16 that “legally binding alternative emergency vehicle access is available.”
17 Similarly, under the fourth assignment of error, petitioner argues that the city
18 misconstrued the Canby Landing Conservation Easement. Finally, under the
19 fifth assignment of error, petitioner argues that the proposed emergency access
20 along the Logging Road does not comply with CMC 16.46.050, which requires
21 that “[n]onconforming access” be brought into compliance with applicable
22 standards when new access connections or a change of use is approved.

1 Petitioner argues that the approved emergency access does not comply with
2 applicable access standards for width.

3 Intervenor-respondent Canby Development, LLC (intervenor) filed a
4 motion to dismiss this appeal as moot, based on the fact that on October 15,
5 2018, intervenor and ODFW executed a settlement agreement that grants
6 intervenor permission to construct an emergency vehicle access across ODFW's
7 conservation easement. Intervenor argues that the settlement agreement
8 effectively moots review of petitioner's first through fourth assignments of
9 error, which all contend that Condition 1 is insufficient or unlawful unless and
10 until ODFW grants permission to use the conservation easement for emergency
11 access. Now that ODFW has granted that permission, intervenor argues,
12 LUBA's review of the first four assignments of error would have no practical
13 effect on the parties.

14 With respect to the fifth assignment of error, intervenor argues that it also
15 concerns the proposed emergency access and is therefore "derivative" of the
16 first four assignments of error, and is thus also moot. In the alternative,
17 intervenor argues that the issue raised in the fifth assignment of error regarding
18 compliance with road-width standards was not raised below and is therefore
19 waived and not within LUBA's scope of review, pursuant to ORS 197.763(1)
20 and ORS 197.835(3).

21 Petitioner responds that the settlement agreement does not moot any
22 issues raised in this appeal, because petitioner has filed a petition for

1 reconsideration with ODFW, apparently seeking to persuade ODFW to rescind
2 the settlement agreement. Attached to petitioner's response is the petition for
3 reconsideration. Petitioner states that if the petition for reconsideration is
4 unsuccessful, he intends to file an action in circuit court.

5 Intervenor replies that ODFW has no authority to "reconsider" the
6 settlement agreement, which has already been executed by recordation of a
7 modified easement consistent with the settlement agreement. Intervenor argues
8 that petitioner does not dispute that, unless the settlement agreement and
9 executed easement are somehow set aside by a circuit court, the agreement and
10 recorded easement effectively moot LUBA's review of petitioner's first four
11 assignments of error challenging Condition 1. Intervenor also notes that
12 petitioner does not dispute intervenor's argument that the fifth assignment of
13 error has been waived and thus is not within LUBA's scope of review.

14 The settlement agreement and modified conservation easement are not in
15 the record of the decision before us, although we may consider those documents
16 for the limited purpose of resolving disputes regarding our jurisdiction over the
17 appeal. *Neighbors v. Sensible Dev. v. City of Sweet Home*, 39 Or LUBA 766
18 (2001). Absent a motion to take evidence outside the record, we cannot
19 consider those documents in order to resolve the merits of any assignments of
20 error. ORS 197.835(2)(a) (LUBA's review is confined to the local record). We
21 tend to agree with intervenor that the settlement agreement and the modified
22 conservation easement appear to eliminate the premise for petitioner's first four

1 assignments of error, which all turn on whether Condition 1 is sufficient in the
2 absence of ODFW consent to use the easement and improve the easement to
3 comply with applicable access standards. However, even if those documents
4 could be considered to resolve the merits of this appeal, it is not entirely clear to
5 us that nothing remains to be resolved under the first four assignments of error.
6 Further, petitioner's petition for reconsideration presents the possibility,
7 however unlikely, that ODFW may revoke its consent. We are in no position to
8 resolve intervenor's argument that ODFW lacks the authority or ability to
9 rescind the settlement agreement. Given that uncertainty, even if the documents
10 were properly before us pursuant to a motion to take evidence we would decline
11 to summarily resolve the first four assignments of error in the manner that
12 intervenor requests.

13 Further, we disagree with intervenor that the gravamen of the fifth
14 assignment of error, which only tangentially concerns Condition 1 and the
15 easement, is affected by the settlement agreement. If intervenor is correct that
16 the issue raised in the fifth assignment of error was not raised below, then that
17 issue is not within LUBA's scope of review under ORS 197.835(3). However,
18 even if that turns out to be the case, the appropriate disposition would be to
19 deny the fifth assignment of error and affirm the city's decision. We would not
20 dismiss this appeal as moot.

21 In sum, intervenor has not demonstrated that this appeal should be
22 dismissed as moot, and the motion to dismiss is denied.

1 **BRIEFING SCHEDULE**

2 The next event in this review proceeding is the filing of the response
3 brief, which to avoid the holidays is due 30 days from the date of this order.
4 The Board's final order and opinion is due 65 days from the date of this order.
5 The Board will schedule oral argument in this proceeding by separate letter.

6 Dated this 4th day of December, 2018.

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12 Tod A. Bassham
 Board Member