

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 WENDY M. KENT and ERIC H. VETTERLEIN,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF PORTLAND,
10 *Respondent.*

11
12 LUBA No. 2000-099

13 ORDER

14 Before us are the city’s motion to dismiss and motion to take evidence not in the
15 record, and petitioners’ request for oral argument on the city’s motions. We conclude that it
16 is unnecessary for the parties to provide oral argument to clarify the dispositive issues. In
17 addition, our disposition of the motion to dismiss makes it unnecessary to take evidence not
18 in the record. We therefore deny the request for oral argument and the motion to take
19 evidence not in the record, and turn to the city’s motion to dismiss.

20 **FACTS**

21 Albert Kelly Park is a 15-acre neighborhood park located in the southwest area of the
22 City of Portland and zoned Open Space. It is owned and operated by the city. It is roughly
23 “L”-shaped, with the vertical leg of the “L” running north to south. It contains an improved
24 soccer field and a children’s play area in the vertical leg of the park. In the fall of 1999, the
25 Vista Soccer Club (Vista) approached the city parks and recreation department with a
26 proposal to regrade the eastern portion of Albert Kelly Park (the horizontal leg of the “L”) for
27 use as a soccer practice field. According to Vista, there is a shortage of available soccer
28 practice areas in Southwest Portland and the site in Albert Kelly Park provides an
29 opportunity for additional play. The proposed practice area is open, with an overall slope of
30 approximately seven percent. In exchange for paying the cost of regrading the site, Vista

1 requested that the city permit Vista to conduct soccer practices there four to five evenings a
2 week during September and October each year.

3 The proposal was presented informally to the Bridlemile Neighborhood Association
4 Board in October 1999. Neighbors located near the proposed practice area opposed the
5 concept, citing surface drainage problems and increases in traffic congestion within the
6 residential neighborhood as a result of the practice activities. Neighbors were also concerned
7 about the use of a former passive recreational area for more structured recreational activities.

8 There were a series of meetings between the city commissioner charged with
9 administering the parks bureau, the parks director, city staff, neighbors and Vista. During
10 these discussions, petitioners and others questioned whether the proposed practice area
11 required a conditional use permit, in accordance with Portland City Code (PCC) 33.100.100.¹

12 As a result of these meetings, the commissioner sent a letter to the parties on March
13 21, 2000. The letter stated in part:

14 "Within the next thirty days, [the parks director] and I will make a decision
15 about the field. * * * I will communicate with you again after we reach a
16 decision." Supplemental Record 15-16.

17 On June 7, 2000, the commissioner again wrote to the parties. In this letter, the commissioner
18 stated:

19 "Recently, [the parks bureau] was asked if a Conditional Use Review should
20 have been done. I requested an opinion from the Office of Planning and
21 Development Review, who oversees those reviews. They have reviewed the
22 city code and stated that no Conditional Use Review is required.

23 "It is my conclusion that the neighborhood is well served by providing this
24 play area at Albert Kelly [Park]. It will, as the Bridlemile Neighborhood
25 Association Board noted, add to the multi-use of the park, not subtract from it.
26 It is open green space now and it will be more versatile open green space in
27 the future, for everyone to use. * * *

¹PCC 33.100 contains the regulations for the city's Open Space zone. According to PCC 33.100.100.B.2.a, certain facilities, such as "baseball, football, soccer, and other fields used for organized sports; and other facilities that draw spectators to events in a park, are conditional uses within a park use."

1 “Parks staff will work with the civil engineers and other experts to ensure that
2 play area drainage, which has been a primary cause of concern, will not affect
3 any neighbors. Site modifications are expected to begin in late August or early
4 September * * *.

5 “Parks will work with the Bridlemile Neighborhood Association to develop a
6 ‘good neighbor use agreement’ about the use of the site so that the neighbors
7 and the soccer club users are very clear about appropriate behavior and use of
8 the area. * * * In the event that use of this area for soccer practice causes
9 unsolvable problems, Parks will not permit it to be used for practice.” Record
10 1-2.

11 In response to the city commissioner’s letter, petitioner Kent made inquiries at the
12 commissioner’s office regarding the documents referred to in the letter. On June 14, 2000,
13 the city commissioner’s office forwarded to petitioner Kent a copy of a “Zoning
14 Confirmation Letter,” dated May 10, 2000, from the Portland Office of Planning and
15 Development Review (OPDR) to the parks department’s project manager. In that May 10,
16 2000 letter, OPDR concludes that the proposed soccer practice area is not subject to the city’s
17 conditional use review.²

18 On June 28, 2000, petitioner filed a notice of intent to appeal with LUBA. The notice
19 challenges

20 “that land use decision or limited land use decision of respondent, entitled
21 Letter from Commissioner Jim Francesconi, dated June 7, 2000, regarding the
22 conditional use review of a proposed soccer field in Albert Kelly Park, which

²The OPDR letter states, in relevant part:

“[PCC] 33.100.100 states that the Parks and Open Areas use category is allowed by right in the Open Space Zone. However, certain facilities such as ‘baseball, football, soccer, and other fields used for organized sports; and other facilities that draw spectators to events in a park, are conditional uses within a park use.’ [In the application for zoning confirmation], you state that the field proposed for grading will not be used for organized games at any time and the space is not large enough to accommodate a field of the size required for organized sports. Further, you state that no permanent markings or structures, goal posts, etc., will be installed.

“**Based on your written explanation of the proposed improvements and activities in the southeastern portion of the park, no Conditional Use Review is required.** That area may be used for ‘pick-up’ games, sports practice sessions and other activities that normally occur in large open play areas. In the future, if the Portland Parks Bureau wishes to sponsor organized matches/games/competition or allows use of the facility for other organizations to hold organized matches/games a Conditional Use Review must be requested and approved.” Record 7-8 (emphasis in original).

1 letter concludes that the Portland Zoning Code does not require a conditional
2 use permit for the proposed development.” Notice of Intent to Appeal 1.

3 **MOTION TO DISMISS**

4 The city moves to dismiss this appeal. According to the city, the city commissioner’s
5 letter is not a land use decision; it is merely a communication between an elected official and
6 interested constituents. The city argues that the land use decision that petitioners should have
7 appealed, but did not, is the May 10, 2000 zoning confirmation letter.³

8 Petitioners respond that, throughout the process before the city, the city commissioner
9 made it clear that he would be the one making the final decision as to whether the proposed
10 area would be used as a soccer practice field. Petitioners characterize the zoning confirmation
11 letter as an internal advisory opinion, not a *final* land use decision. To support this
12 characterization, petitioners cite to a letter from the city commissioner dated May 11, 2000,
13 where the commissioner informed interested parties that he and the parks director were

14 “seeking an *opinion* on whether a conditional use review is required to allow
15 the use of the open grassy play area in Albert Kelly Park for soccer practice.”
16 Supplemental Record 1 (emphasis added).

17 Petitioners argue that the June 7, 2000 letter clearly articulates the city commissioner’s
18 conclusion that a conditional use permit is not required. According to petitioners, implicit in
19 this conclusion is an interpretation and application of PCC 33.100.100.

20 LUBA has exclusive jurisdiction to review “land use decisions.” ORS 197.825(1).
21 ORS 197.015(10)(a)(A) defines “land use decision” to include:

22 “A final decision or determination made by a local government * * * that
23 concerns the adoption, amendment, or application of:

24 “* * * * *

³The city moves for LUBA to take evidence not in the record to show when petitioners received actual notice of the May 10, 2000 zoning confirmation letter. The city’s motion attaches a letter from petitioners’ former attorney, indicating that petitioners received actual notice of the OPDR zoning confirmation letter no later than June 23, 2000. Petitioners do not dispute this assertion and, for the purpose of resolving the motion to dismiss, we assume that petitioners did in fact receive actual notice of the OPDR letter on or before June 23, 2000.

1 “(iii) A land use regulation[.]”

2 We disagree with petitioner that the commissioner’s June 7, 2000 letter constitutes a “land
3 use decision” as defined at ORS 197.015(10)(a). Nothing in that letter purports to apply any
4 land use regulation. The closest the June 7, 2000 letter comes to applying a land use
5 regulation is to refer to the OPDR May 10, 2000 letter. However, there is no dispute that the
6 OPDR May 10, 2000 letter applies a land use regulation.

7 We agree with the city that to the extent that the May 10, 2000 zoning confirmation
8 letter can be construed as the “final decision or determination” by the city in interpreting and
9 applying a land use regulation, that letter constitutes an appealable land use decision. We
10 conclude that the May 10, 2000 zoning confirmation letter is a “final decision or
11 determination.” Petitioners do not identify any further appeal or other process, the outcome
12 of which would constitute the city’s last word on whether the proposed use is allowed under
13 the city’s land use regulations. Because the zoning confirmation letter is an appealable land
14 use decision, petitioners’ notice of intent to appeal must have been filed within 21 days of the
15 date they actually received notice of the letter. ORS 197.830(3)(b).⁴ As noted earlier,
16 petitioners do not contest the city’s allegation that by June 23, 2000, petitioners received
17 actual notice of the zoning confirmation letter. Nor do any of the parties allege that
18 petitioners had notice of the zoning confirmation letter prior to receiving the city
19 commissioner’s June 7, 2000 letter.

20 Petitioners’ notice of intent to appeal the June 7, 2000 letter was filed with LUBA on
21 June 28, 2000, within 21 days of the city commissioner’s letter and within 21 days of

⁴ ORS 197.830(3)(b) provides, in pertinent part:

“If a local government makes a land use decision without providing a hearing, * * * a person adversely affected by the decision may appeal the decision to the board under this section:

“* * * * *

“(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required.”

1 receiving notice of the zoning confirmation letter. We now turn to the question of whether
2 petitioners' June 28, 2000 notice of intent to appeal the June 7, 2000 letter is sufficient to
3 constitute appeal of the zoning confirmation letter as well.

4 In *Caraher v. City of Klamath Falls*, 30 Or LUBA 204 (1995), we addressed a
5 situation in which the petitioners received notice of a land use decision by means of a follow-
6 up clarification letter. In *Caraher*, we concluded that, because the appeal period under ORS
7 197.830(3) did not commence until the petitioners learned of the prior decision, the appeal of
8 the clarification letter was sufficient to appeal the earlier land use decision. 30 Or LUBA at
9 211. Thus, in this case, because petitioners received notice of the city's May 10, 2000 zoning
10 confirmation decision by means of the June 7, 2000 letter, and their appeal of the May 10,
11 2000 letter would have been timely under ORS 197.830(3), we believe that an appeal of the
12 June 7, 2000 letter is also sufficient to appeal the May 10, 2000 zoning confirmation letter.

13 The city's motion to dismiss is denied.

14 Dated this 24th day of October, 2000.

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Anne Corcoran Briggs
Board Member