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

LOGAN RAMSEY,)
)
Petitioner,)
)
vs.)
) LUBA No. 95-041
CITY OF PORTLAND,)
) FINAL OPINION
Respondent,) AND ORDER
)
and)
)
ARNOLD ROCHLIN,)
)
Intervenor-Respondent.)

Appeal from City of Portland.

Logan Ramsey, Portland, represented himself.

Peter A. Kasting, Senior Deputy City Attorney,
Portland, represented respondent.

Arnold Rochlin, Portland, represented himself.

LIVINGSTON, Chief Referee; GUSTAFSON, Referee; HANNA,
Referee, participated in the decision.

DISMISSED 11/21/95

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

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals two decisions of the city council
4 adopting ordinances to regulate tree cutting on undeveloped
5 property.

6 **FACTS**

7 On February 2, 1995, the city council adopted Ordinance
8 168486, which adds a new Chapter 20.42 to the Portland City
9 Code ("PCC"). Chapter 20.42 sets forth an integrated,
10 complex scheme for controlling the cutting of large trees on
11 "underdeveloped parcels."¹ Among other things, it
12 establishes an application procedure for applying to the
13 city forester for tree-cutting permits; states an
14 application fee; includes notice requirements; creates an
15 appeal period in which to appeal either the grant or denial
16 of a permit; assigns the task of reviewing appeals to the
17 city's Urban Forestry Commission; and states that decisions

¹"Underdeveloped parcels" is a defined term that means:

"all property which either:

"(a) Does not have a single family dwelling on it; or

"(b) Can be further partitioned or subdivided, whether there
is a structure on the property or the property is vacant;
or

"(c) Is not located in a single family residential zone
pursuant to City of Portland Zoning Maps; or

"(d) Is not used exclusively for single family residential
use." PCC 20.42.020.

1 of the Urban Forestry Commission are reviewable solely by
2 writ of review.

3 On February 22, 1995, the city council adopted
4 Ordinance 168534, which adds one sentence to PCC chapter
5 20.42.²

6 Petitioner filed a notice of intent to appeal
7 Ordinances 168486 and 168534 to LUBA on March 15, 1995, 41
8 days after the adoption of Ordinance 168486 and 21 days
9 after the adoption of Ordinance 168534.

²Ordinance 168534 states:

"* * * * *

"2. The Council did not intend to require a permit for tree cutting pursuant to chapter 20.42 in situations where the same activity is already regulated and reviewed by other provisions of the City Code.

"3. An amendment to PCC 20.42.040 is necessary in order to clarify that lots or parcels which have been subject to environmental review through tentative plan approvals under Title 34 since 1981 are not subject to the requirements of chapter 20.42.

"* * * * *

"NOW, THEREFORE, the Council directs:

"a. PCC 20.42.040(3) is amended to add the following underlined language:

If a Development Application would require or result in tree cutting as defined in this Chapter, the applicant must comply with this Chapter, unless the cutting of the tree is itself regulated by Title 33 or 34. Trees on any lot or parcel which receives, or since 1981 has received, tentative plan approval under Title 34, are deemed to be regulated under Title 34, and are not subject to the requirements of this Chapter."

1 **MOTION TO DISMISS**

2 The city moves to dismiss petitioner's appeal of
3 Ordinances 168486 and 168534, contending that the decisions
4 to adopt the ordinances are not land use decisions over
5 which this Board has jurisdiction.³ The city moves to
6 dismiss petitioner's appeal of Ordinance 168486 on the
7 additional ground that, with respect to the adoption of this
8 ordinance, petitioner's notice of intent to appeal to LUBA
9 was not timely filed.

10 Because petitioner contends he did not receive adequate
11 notice at various times during and following the adoption of
12 the ordinances, we must identify the nature of the city's
13 decisions in order to determine the notice to which
14 petitioner was entitled. In the case of the adoption of
15 Ordinance 168486, the city's failure to provide proper
16 notice could, under certain circumstances, excuse
17 petitioner's failure to file a notice of intent to appeal to

³PCC 20.42.030 states:

"Applicability.

- "1. These regulations are not land use regulations and are being adopted under the City's police power to regulate to protect the public health, safety and welfare.
- "2. The requirements of this Chapter do not apply to tree cutting which is reviewed pursuant to any other provision of this Code with the exception of Chapter 24.70, Clearing, Grading, and Erosion Control, particularly PCC 24.70.020. On parcels subject to PCC 24.70.020, a permit is required under both that Section and under this Chapter."

1 LUBA within 21 days of the date of adoption.

2 **A. Nature of Ordinances**

3 Petitioner argues the adoption of Ordinances 168486 and
4 168534 are land use decisions over which LUBA has
5 jurisdiction, because they require discretion in their
6 application and because they affect the use of land.⁴ As
7 evidence that the ordinances are land use regulations,
8 notwithstanding the disclaimer in PCC 20.42.030, petitioner
9 points to the city's original notice, which states:

10 "On the above date, the City Council will hold a
11 public hearing to consider three matters: * * *
12 (3) an interim tree protection ordinance. These
13 proposals will be considered by the Council as a
14 response to possible action by the Department of
15 Land Conservation and Development * * * to
16 invalidate Portland's Environmental Zoning.

17 "In December 1994, a staff report of the
18 Department of Land Conservation and Development
19 stated that portions of the City's Environmental
20 zones do not comply with Statewide Planning Goal
21 5. The staff report called for more clear and
22 objective standards and more detailed ESEE
23 analysis from protection plans for Northwest Hills
24 and the Balch Creek and Johnson Creek watersheds.
25 * * *

26 "The purpose of the City Council hearing is to
27 discuss and take oral and written testimony on the
28 proposed E-zone amendments and tree preservation

⁴The fact the ordinances require discretion in their application does not make them land use regulations. Petitioner is apparently making an unjustified analogy to the statutory definition of "land use decision," which excludes decisions made under land use standards "which do not require interpretation or the exercise of policy or legal judgment." ORS 197.015(10)(b)(A).

1 ordinance. * * *"⁵

2 Petitioner also relies on a transcript of a January 18,
3 1995 city council meeting, at which the city planning
4 director explained that because of the city's difficulty in
5 correcting deficiencies in its environmental regulations
6 during periodic review, certain natural resources would be
7 left exposed unless interim protective measures were
8 adopted, including the tree-cutting ordinance (Ordinance
9 168486).

10 **B. LUBA Jurisdiction**

11 Under ORS 197.825(1), LUBA has exclusive jurisdiction,
12 subject to limitations stated in ORS 197.825(2) and (3),
13 over the review of "land use decisions" and "limited land
14 use decisions"⁶ that meet either the statutory definitions
15 in ORS 197.015(10) and (12), or the significant impact test
16 referred to in Petersen v. Klamath Falls, 279 Or 249, 566
17 P2d 1193 (1977) and City of Pendleton v. Kerns, 294 Or 126,
18 653 P2d 992 (1982).⁷ See Billington v. Polk County, 299 Or

⁵The notice is not included in the record, but is attached as an exhibit to petitioner's Response to Motion to Dismiss.

⁶Petitioner does not contend the city's adoption of Ordinances 168486 and 168534 are limited land use decisions.

⁷ORS 197.015(10) states, in relevant part:

"'Land use decision':

"(a) Includes:

1 471, 703 P2d 232 (1985).

2 **1. Statutory Land Use Decision**

3 The city argues the adoption of PCC chapter 20.42 by
4 Ordinance 168486 is not a land use decision, because it does
5 not concern the adoption, amendment or application of the
6 Statewide Planning Goals, a city comprehensive plan
7 provision or a land use regulation. See ORS
8 197.015(10)(a)(A).

9 **a. Application of Goals**

10 Petitioner contends both Statewide Planning Goals 4 and
11 5 apply. Goal 4, which regulates forest land, applies only
12 to lands acknowledged as forest lands or, in cases where a

"(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;

"(iii) A land use regulation; or

"(iv) A new land use regulation; or

"(B) * * * ; and

"(b) Does not include a decision of a local government:

"(A) Which is made under land use standards which do not require interpretation or the exercise of policy or legal judgment;

"(B) Which approves or denies a building permit issued under clear and objective land use standards;

"(C) Which is a limited land use decision; or

"* * * * *"

1 plan amendment involving forest lands is proposed, to lands
2 suitable for commercial forest uses, including adjacent or
3 nearby lands that are necessary to permit forest operations
4 or practices and other forested lands that maintain soil,
5 air, water and fish and wildlife resources. Petitioner does
6 not claim that the challenged regulation has any application
7 to acknowledged forest lands or lands suitable for
8 commercial forest uses.

9 Goal 5 applies to open space and a number of scenic
10 resources that could be protected by the adoption of PCC
11 chapter 20.42. However, not every regulation that arguably
12 furthers the objectives of Goal 5 applies Goal 5. OAR 660
13 Division 16 (the Goal 5 rule) addresses "resource sites."
14 PCC chapter 20.42 regulates the cutting of individual trees.
15 None of these trees by itself constitutes a Goal 5 resource
16 site.⁸ We conclude PCC chapter 20.42 applies neither Goal 4
17 nor Goal 5.

18 **b. Application of City Comprehensive Plan**

19 The city contends PCC chapter 20.42 does not apply any
20 provision of its comprehensive plan. Petitioner does not
21 contend otherwise. The city's Goal 8 (Environment) is
22 arguably furthered by protecting trees. However, the
23 connection between the plan and the regulation is not

⁸We note that certain individual trees may be protected by Goal 5 if they have historic significance. However, the protection of such trees occurs independently of PCC chapter 20.42.

1 sufficiently clear to justify the inference that the
2 regulation implements the plan.

3 **c. Land Use Regulation**

4 ORS 197.015(11) defines "land use regulation" as
5 "[A]ny local government zoning ordinance, land
6 division ordinance adopted under ORS 92.044 or
7 92.046 or similar general ordinance establishing
8 standards for implementing a comprehensive plan."

9 The city argues that PCC chapter 20.42 is not a land
10 use regulation, because it is not a part of the city's
11 zoning ordinance and does not establish standards for
12 implementing a comprehensive plan. We note the city has not
13 included the text of PCC chapter 20.42 in PCC chapter 33,
14 which contains its zoning code. It is therefore not a part
15 of the city's zoning ordinance and, as noted above, it does
16 not implement the city's comprehensive plan.

17 We conclude the adoption of PCC chapter 20.42 is not a
18 statutory land use decision.

19 **2. Significant Impact Land Use Decision**

20 Because our disposition of this case turns on the
21 timeliness of petitioner's appeal, and to give petitioner
22 the benefit of any doubt, we assume without deciding that
23 the city's decision to adopt Ordinance 168486 is a
24 significant impact land use decision.

25 Ordinance 168534 merely clarifies the scope of the city
26 code chapter adopted under Ordinance 168486. Petitioner has
27 not carried his burden of showing that Ordinance 168534 will

1 itself have significant impacts on land use. See Billington
2 v. Polk County, 14 Or LUBA 173 (1985). Although
3 petitioner's appeal of Ordinance 168534 is timely, we
4 conclude we have no jurisdiction over the city's adoption of
5 this ordinance.

6 **C. Timeliness of Appeal of Ordinance 168486**

7 The city moves to dismiss petitioner's appeal of
8 Ordinance 168486 on the ground the notice of intent to
9 appeal was not timely filed. OAR 661-10-015(1) requires
10 that notices of intent to appeal to LUBA be filed within 21
11 days of a final decision of a local government. The 21-day
12 deadline is strictly enforced. OAR 661-10-067(1).

13 Petitioner acknowledges that he received notice of a
14 January 18, 1995 city council hearing on Ordinance 168486.
15 He testified in opposition to the ordinance and, in
16 petitioner's words, "the matter was put forward to February
17 2, 1995, when it was enacted."⁹ Response to Motion to
18 Dismiss 1-2. On February 23, 1995, petitioner called the
19 city to ask for a list of those who had participated in the
20 adoption process. Petitioner alleges he intended to hand-
21 deliver a notice of intent to appeal to LUBA on that day.
22 However, petitioner did not hand-deliver the notice of
23 intent to appeal. He alleges he was confused as a result of

⁹The minutes of that meeting show that it was continued to February 1, 1995, but petitioner's error is not significant to this discussion. Record 45. Ordinance 168486 was actually adopted on February 2, 1995. Record 23.

1 a telephone discussion with a city employee who thought he
2 had called to discuss Ordinance 168534 rather than Ordinance
3 168486, and told him the city council had "reheard" the tree
4 cutting ordinance the day before. Petitioner understood he
5 had 21 days from that date to file his notice of intent to
6 appeal.

7 We have difficulty discerning petitioner's specific
8 arguments in support of the contention we should not dismiss
9 his appeal of Ordinance 168486 for untimeliness. We
10 understand petitioner to contend first, that having attended
11 and testified at the January 18, 1995 hearing on Ordinance
12 168486, he was entitled under PCC 33.740.030(B) to
13 individual notice of the February 1, 1995 hearing; second,
14 by failing to give him individual notice of the hearing on
15 Ordinance 168534, the city prejudiced his right to appeal
16 both Ordinances 168486 and 168534; third, he was denied a
17 right to present evidence prior to the adoption of Ordinance
18 168534; and fourth, because the city clerk gave him
19 misleading information, the appeal deadline should not
20 apply.

21 PCC chapter 33.740 states the legislative procedure for
22 the establishment and modification of "land use plans,
23 policies, regulations, and guidelines." PCC 33.740.010.
24 Because the city did not make a legislative land use
25 decision of the type described in PCC 33.740.010,
26 PCC 33.740.030(B) does not apply. Petitioner therefore was

1 not entitled under PCC 33.740.030(B) to receive individual
2 notice of hearings on either ordinance or to present
3 evidence before the city council.

4 Furthermore, since the city's decision is not a
5 statutory land use decision, none of the notice provisions
6 found in ORS 197.830 or any other land use statute apply,
7 except perhaps by analogy.¹⁰ Moreover, even if the clerk
8 misled petitioner concerning the status of Ordinance 168486,
9 that does not justify an extension of time in filing a
10 notice of intent to appeal. Columbia River Television v.
11 Multnomah County, 299 Or 325, 329 (1985); City of Grants
12 Pass v. Josephine County, 25 Or LUBA 722, 728 (1993).

13 Petitioner carries the burden of establishing that he
14 filed the notice of intent to appeal in a timely manner,
15 thereby conferring jurisdiction on LUBA. Sparrows v.
16 Clackamas County, 24 Or LUBA 318, 326 (1992). Petitioner
17 has not met this burden.

18 This appeal is dismissed.

¹⁰Petitioner does not make such an analogy, and we decline to do it for
him. See Deschutes Development v. Deschutes Cty., 5 Or LUBA 218 (1982).