

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

3 PETER E. CLAFLIN and NATACHA)
4 K. CLAFLIN, JOHN DAVID ABBY)
5 and KATHERIN B. ABBY, WILLIAM)
6 J. BARLOW and ANNE M. BARLOW,)
7 JERRY W. MADDOX II and SABRINA)
8 K. MADDOX, STEVEN W. COLE and)
9 NANCY J. COLE, ANN DURNING)
10 STALICK, NORMA L. STEVENS,)
11 ROBERT D. GLYNN, ROBERT A.)
12 KINDSVATER and SANDRA)
13 KINDSVATER, ROBERT A. RICE,)
14 JR. and BONITA M. RICE,)
15 MAUREEN A. FRALEY, HUEY)
16 DOUGAS CRABTREE and SHARLENE)
17 K. CRABTREE, ARTHUR J. MADDOCK)
18 and JANICE M. MADDOCK,)

19 Petitioners,)

20 v.)

21 DESCHUTES COUNTY, a political)
22 subdivision of the State of)
23 Oregon,)

24 Respondent.)

LUBA NO. 81-083

ORDER
MOTION TO DISMISS

25 This matter is before the Board on motion of Respondent
26 Deschutes County for an order of dismissal. A conference call
was held on March 5, 1982, to discuss the issues.

FACTS

On July 23, 1981, petitioners filed a notice of intent to appeal. The decision appealed was entitled "An Order Amending Order No. 81-270, Relating to the Improvement of a Certain Dedicated Public Road Known as a Portion of Sunnyside Boulevard in Deschutes County, Oregon; and Directing the Improvement to be Made by Contract." The notice states the order became final

1 on June 24, 1981.

2 This order was the last of a series of orders about a
3 roadway improvement. On April 14, 1981, the roadway was
4 dedicated. The roadway would connect Sunnyside Boulevard to
5 Highway 97, linking it with other portions of Sunnyside Road.
6 On April 20, 1981, an engineer's report was filed pursuant to
7 ORS 371.625 recommending construction of the roadway.¹

8 On April 22, 1981, the Board of Commissioners initiated
9 proceedings under ORS 371.625. On April 22, the county
10 provided notice to the only "benefited" landowner, Brooks
11 Resources, indicating that the engineer had filed a favorable
12 report on the proposed improvement and that the project would
13 continue unless an objection was received. There was a
14 remonstrance hearing on May 19, 1981, and no objections were
15 received.

16 On May 20, 1981, the county board entered its order
17 directing construction of the roadway pursuant to ORS 371.635,
18 and on June 24, 1981, a second order directing construction was
19 entered. The second order recites that the property owner, who
20 had requested the roadway improvement, requested an amendment
21 to the description of property benefited, and thus assessed for
22 the cost of improvement. The change in benefited property
23 designation was requested because the owner had contracted for
24 a sale of a portion of the property. The second order made the
25 change in the description of the property benefited as
26 requested, but the order did not change the location of the

1 roadway or the description of the roadway. See Exhibit A.

2 MOTION TO DISMISS

3 The county moves to dismiss the case on two grounds: The
4 county says first the appeal was filed more than 30 days after
5 the final order to improve the property and second, the order
6 for the improvement is not a land use action appealable to the
7 Land Use Board of Appeals. The county begins by saying the
8 extension of the Boulevard has been planned since 1978, and the
9 Deschutes County Roadway Network Plan Map shows the Boulevard
10 as a planned arterial. The comprehensive plan shows the
11 existence of major arterials and highways, and also shows an
12 extension of roadway to Highway 97 in the location of Sunnyside
13 Boulevard. The plan was adopted on October 1, 1981, and plan
14 provisions touching on this roadway were not appealed. The
15 county also says a number of subdivision approvals provide for
16 the extension of the street, and none of the approvals have
17 been appealed. The county advises that although some of the
18 extended portion of the Boulevard is outside the urban growth
19 boundary for the City of Bend, a majority of the roadway is
20 within that urban growth boundary. The Bend area general plan
21 map shows the extension of Sunnyside Boulevard in the same
22 location as it is shown in the county comprehensive plan and in
23 the Road Network Plan Map.

24 The county notes that the roadway was acquired long before
25 the appeal was filed. Two acts completed public acquisition of
26 the right of way. On November 5, 1980, the commissioners

1 established a portion of Sunnyside Boulevard by Order 80-230.
2 The Brooks Resources Corporation dedicated the final portion of
3 the Boulevard on April 8, 1981, and the county accepted the
4 dedication on April 14, 1981. There was no challenge to either
5 of these acts.

6 As recited earlier, the county went through the procedures
7 specified in ORS 371.605 to direct that the improvement be made
8 and provide for assessments. That process resulted in no
9 appeals except an appeal to this Board of the order dated June
10 24, 1981. The county describes this last order as merely
11 changing the description of the benefited property for
12 assessment purposes. The county states that the last activity
13 which should be considered a final decision within the meaning
14 of a "land use decision" was the decision made after the
15 remonstrance hearing on May 20, 1981 in Order 80-270. The
16 order petitioners appeal is simply a clerical change in a
17 description of benefited property, and is a financial
18 transaction, according to the county. Respondent County does
19 not argue that a decision to improve a roadway pursuant to the
20 provisions of ORS Chapter 371 is not a land use decision.
21 Respondent states only that the order appealed is a financial
22 matter and has nothing to do with the initiation of the street
23 improvement.² The Respondent County says

24 "It is not the intent of Oregon Laws 1979, Chapter
25 772, to allow appeals of local government proceedings
26 at every step on the basis that they are a land use
decision. It may be that a dedication of the
right-of-way was a land use decision, or that the

1 resolution initiating the project was a land use
2 decision, or even the order directing the improvement
3 could be viewed as a land use decision. But no appeal
4 was made from any of those proceedings."

5 Respondent County argues that any review of the order must
6 be conducted as any review of county business other than land
7 use decision. Respondent concludes that the writ of review is
8 an exclusive remedy for non-land use decisions of county
9 governing bodies. See ORS 34.040 to 34.100. Indeed, Oregon
10 Laws 1981, ch 529 provides that decisions of a county court
11 made in the transaction of the county business shall be
12 reviewed only as provided in ORS 34.010 to 34.100 and not
13 otherwise. As the petitioners did not appeal what the county
14 believes to be the final land use decision within the 30 day
15 limit provided in Oregon Laws 1979, ch 772, the case should be
16 dismissed, according to respondent.

17 Petitioners reply that the "textual discussion of the
18 specific location" of the roadway is "vague" or does not exist
19 at all. Petitioners contrast this vagueness with what
20 petitioners believe to be very detailed discussion of roadways
21 elsewhere in the comprehensive plan. Petitioner additionally
22 argues that the sequence of events in the case shows that the
23 county approved the project even before it was initiated, and
24 these irregularities show that the comprehensive plan and other
25 planning guidelines were not considered. Petitioners argue
26 that the record submitted by respondent does not show any
consideration of the plan policies at all. Petitioners argue

1 that the construction of Sunnyside Boulevard will have
2 significant impact on neighborhoods through which it passes,
3 and in that manner the roadway should be considered a land use
4 decision. See Kerns v. City of Pendleton, 2 Or LUBA 295
5 (1981).

6 Petitioners then state a dedication of acceptance of the
7 roadway in April of 1981 is an act for which no notice is
8 provided. ORS 368.546. Petitioners concede that the fact that
9 a road is dedicated and accepted does not have a land use
10 impact. But see Gaske v. Lane County, 3 Or LUBA 147 (1981).
11 Petitioners also say the resolution instructing the engineer to
12 make an investigation of the improvement pursuant to ORS
13 371.625 also has no immediate land use impact. With a
14 favorable report from the engineer, and notice to the
15 landowner, the Board may then make a determination as to
16 whether or not to proceed with the project. ORS 371.635. This
17 decision, argue petitioners, does have land use impact and is,
18 therefore, a "land use decision" appealable to this Board.
19 Petitioners argue that the fact the final order also creates an
20 improvement district does not change the character of the
21 decision.

22 Petitioners then turn their attention to whether the
23 county's second order under ORS 371.635, the June 23 order, is
24 appealable as a "land use decision." Petitioners draw analogy
25 to civil law where a modification of judgment will extend the
26 time of appeal. Petitioners cite Lee v. Imbire, 13 Or 510, 11

1 P 270 (1886) and Hewey v. Andrews, 82 Or. 448, 159 P 1149
2 (1917). Petitioners say that the description of the property
3 to be assessed "is fundamental to the order." Any change in
4 this element of the order is more than a clerical change,
5 according to petitioners. Petitioners argue that the last
6 order of June 24, 1981, will be the order from which applicable
7 time periods will run.³

8 Petitioners conclude that a "material amendment of the
9 initial order on June 23, 1981 constitutes the final decision
10 from which the time the applicable appeals period" should run.

11 We agree that an order entered pursuant to ORS 371.635
12 constitutes the land use decision in such proceedings. ORS
13 371.635(1) allows the county court (county governing body) to
14 direct that the improvement be made and the land be assessed.
15 In this case, however, the order appealed from recites as its
16 purpose not the creation or improvement of a roadway, but an
17 amendment to a property description that only affects the sole
18 person assessed for the improvement.

19 "WHEREAS, the property owner who requested the local
20 improvement district has requested an amendment to the
21 property description, since they [sic] entered into a
22 binding agreement for sale of a portion of the
23 property originally described within their [sic]
24 petition * * * *"

25 The purpose of the second order, then, is simply to amend the
26 description of the property benefited by the improvement.
27 There is no amendment to the description of the roadway or
28 change in the property owner assessed for the cost of the

1 improvement.

2 While we recognize the stated purpose of the order is only
3 an amendment to a property description, we are still faced with
4 an order that repeats the operative language of the May order.
5 Perhaps the county included the operative language only to
6 insure that the form of the statute was followed and that there
7 would be no question as to the validity of the assessment.
8 However, in so quoting the old language, the county appears to
9 have replaced the May 20th order with the June 24th order.
10 Were the county to have issued an order that only changed the
11 property description, we believe we could have treated the
12 amended order as a simple financial rearrangement and not a
13 land use decision appealable to this Board. As the order
14 reads, however, it is effective to construct a roadway as of
15 May 20, 1981 and not from June 24, 1982. As such, it is a new
16 land use decision and one which may be appealed to this Board
17 within 30 days.

18 We recognize that our holding may be overly technical, but
19 we believe that less confusion will result from this holding
20 than were we to hold otherwise. That is, where an order
21 clearly recites the operative language necessary to make the
22 order a land use decision, the order should be appealable. We
23 do not believe time is well spent or the public well served in
24 inquiring into the purpose of each and every order that may
25 come to us to determine whether in fact the order means what it
26 says. We believe the better rule is to take the order at face

1 value.

2 The motion to dismiss is denied, and the record in this
3 case shall be due 20 days from the date of this order.

4 Dated this 22nd day of June, 1982.

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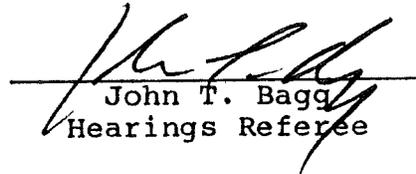
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John T. Baggett
Hearings Referee

FOOTNOTES

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ORS 371.605 to 371.660 provide for the improvement of streets and roads in unincorporated areas. The procedure is initiated by a petition or resolution for improvement (371.615), to an investigation estimated cost of improvement by an engineer (371.625) through notice to landowners (371.630), to a order by the county board of commissioners for improvement (371.635). The investigation and estimation of the cost of improvement by the engineer under ORS 371.625 includes a recommendation as to the method of assessment for the properties benefited by the roadway improvement and a description of each of the properties benefited, along with the names of the owners. After that proposed assessment is made, a notice is sent to landowners under ORS 371.630, and the owners may remonstrate against the improvement. The improvement shall not be undertaken if objections are received by the county signed by more than 50 percent of the owners of land representing more than 50 percent of the total amount of the assessment. After the work has been completed, there is an accounting of the actual cost of construction (371.640), and an assessment is made against individual parcels of land (371.645). The assessment is a lien against the property (ORS 371.650).

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See City of Pendleton, et al v. Kerns, et al, _____ Or App _____, _____ P2d _____ (Slip Opinion of 4-12/82 at 5, CA No. A20422).

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ORS 19.010(2) provides that "a judgment or decree" is
"(a) An order affecting a substantial right, and which in effect determines the action or suit so as to prevent a judgment or decree therein.

"* * * *

"(c) A final order affecting a substantial right, and made in a proceeding after judgment or decree."

We understand petitioners to argue that the change in property description affecting what portion of the owners' property is to be assessed is such a final judgment or decree. However, we do not believe we are controlled by ORS 19.010 as the law in

1 effect at the time, Oregon Laws 1979, ch 772, sec 3 defines a
2 "[1]land use decision" as

3 "(a) A final decision or determination made by a
4 city, county or special district governing body that
5 concerns the adoption, amendment or application of:

6 "(A) The state-wide planning goals;

7 "(B) A comprehensive plan provision; or

8 "(C) A zoning, subdivision or other ordinance
9 that implements a comprehensive plan; or

10 "(b) A final decision or determination of a
11 state agency other than the Land Conservation and
12 Development Commission, with respect to which the
13 agency is required to apply the state-wide planning
14 goals."
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