

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

1
2
3 ACKERLEY COMMUNICATIONS,)
4 INC., a Washington)
5 corporation,)
6 Petitioner,)
7 vs.)
8 CITY OF PORTLAND, a)
9 municipal corporation, and)
10 WILSON PARK NEIGHBORHOOD)
11 ASSOCIATION,)
12 Respondents)

LUBA No. 83-082
ORDER ON MOTION
TO DISMISS

13 Both Ackerley Communications, Inc., and the City of
14 Portland assert that this Board lacks jurisdiction over the
15 subject matter of this proceeding. We disagree for the reasons
16 stated herein.

17 The matter on appeal is a decision of the City of Portland
18 dated July 13, 1983 denying a request by Petitioner Ackerley
19 for sign approval for two outdoor advertising signs to be
20 located on a building on S.E. Powell Boulevard in the City of
21 Portland. The denial was pursuant to application of the city's
22 "Sign Board Control Overlay" zone regulations or "S" zone
23 regulations. The regulations were adopted by the city in 1959,
24 long before adoption of the city's comprehensive plan. The "S"
25 zone regulations establish standards for the type and size of
26 signs which may be placed in various zones in the city. Under
the "S" zone ordinance, the land uses permitted in each zone
dictate the type and size of sign allowable in the zone.

1 Without approval of the sign design by the sign review
2 committee, it is not possible to obtain a building permit.

3 The purpose of the Sign Board Control Zone is as follows:

4 "33.74.010 Purpose. (Amended by Ord. No. 139117,
5 139702, and 141105 passed and effective Dec. 31,
6 1975). In locations where large numbers of
7 advertising signs, business identification signs or
8 outdoor advertising signs (billboards) would adversely
9 affect traffic safety and the appearance and scenic
10 outlook of the city, the control of such signs becomes
11 necessary. S Zones are intended to include areas
12 along bridges or bridge approaches, throughways
13 designated by the Oregon State Highway Commission or
14 other authority within the city, highways specially
15 designated by the council, and other areas adjacent to
16 such bridges, bridge approaches or designated
17 throughways or highways and the extension thereof,
18 where an S Zone for sign control is determined to be
19 appropriate. The bridge or bridges, bridge approach
20 or approaches, throughway or highway designated in
21 establishing an "S" sign control zone or zones, shall
22 be deemed a protected highway. Additional S sign
23 control zones may from time to time be established.
24 Land classified in an S Zone shall also be classified
25 in one or more of the regular zones listed in Chapter
26 33.16. The zoning of such land shall be designated by
a combination of such symbols, e.g. C2S, M1S, etc.
The provisions of this chapter shall not apply to
directional traffic signs or signals, nor to other
official signs or notices."

18 The "S" zone ordinance goes on to discuss signs subject to
19 approval under the ordinance and to provide standards for
20 approval. The ordinance also establishes a sign review
21 committee with the power to act on applications and provide
22 fees. Lastly, the ordinance includes a provision for appeal of
23 a decision of the committee to the city council.¹

24 The city argues that an "S" zone review action by the
25 committee, or the city council on appeal, is not a final land
26 use decision within the meaning of 1979 Or Laws, ch 772, §3, as

1 amended by 1981 Or Laws, ch 748.² The city asserts its
2 action is not a final decision or determination which concerns
3 the application of the comprehensive plan or a land use
4 regulation.³ The city further explains the "S" Zone
5 regulations do not implement the city's comprehensive plan and
6 do not, therefore, constitute land use regulations. In short,
7 the "S" zone ordinance neither implements nor constitutes a
8 land use regulation.

9 As an alternative argument, the city claims the decision
10 does not have a significant impact on present or future land
11 uses and does not constitute an exercise of city's planning and
12 zoning responsibilities as outlined in ORS 197.175. See 1000
13 Friends of Oregon v Wasco County Court, 62 Or App 75, 659 P2d
14 1001 (1983), rev den, 298 Or 259; City of Pendleton v Kerns,
15 294 Or 126, 653 P2d 992 (1982).

16 The petitioner's argument is similar, but petitioner likens
17 a proceeding under the provisions of the "S" zone ordinance to
18 the approval of a building permit. Because the end result of
19 this proceeding is the issuance or non-issuance of a building
20 permit, petitioner claims the decision is not a land use
21 regulation subject to LUBA's review. See Footnote 2, supra.⁴

22 The law in effect at the time the city made its decision
23 defined a land use decision as a final decision or
24 determination that concerns, in part,

25 "the adoption, amendment or application of

26 "(B) A comprehensive plan provision; or

1 "(C) A land use regulation...." ORS 197.015(10).

2 Under subsection 11 of the former ORS 197.015, a land use
3 regulation was defined in such a manner as to exclude, among
4 other things, building permits "and similar administrative-type
5 decisions." ORS 197.015(11). This provision is confusing in
6 that it is easily read to carve out an exception to what the
7 Board may review. It suggests the Board lacks authority to
8 review any decision excluded from the definition of "land use
9 regulation" in ORS 197.015(11). The key to understanding the
10 statute, however, is to understand what LUBA did have the power
11 to review. Under the former statute, LUBA was given the power
12 to review any land use decision, even those excluded from the
13 definition of "land use regulation," as long as the decision
14 was about "the adoption, amendment or application" of a
15 comprehensive plan provision or a land use regulation. For
16 example, subdivisions, zone changes, partitions and conditional
17 use permits concern application of a comprehensive plan
18 provision or a land use regulation even though they are not
19 considered land use regulations because of the exclusion
20 language in ORS 197.015(11). A building permit was of the same
21 class, at least as the class was defined by the former ORS
22 197.015(11). The exclusion from the definition of land use
23 regulation, then, did not necessarily mean these kinds of
24 decisions do not involve the application of a statewide
25 planning goal or comprehensive plan provision or some other
26

1 land use regulation. Therefore, the Board has jurisdiction to
2 review decisions which implement the local comprehensive plan
3 or zoning ordinance but are not land use regulations under the
4 provision of the old ORS 197.015(11).

5 A possible reason for this curious exclusion language
6 within the definition of land use regulation was to clarify the
7 jurisdiction of the Land Conservation and Development
8 Commission. Under the former law, the Land Conservation and
9 Development Commission was not to review individual subdivision
10 requests, partitions, building permits and the other kinds of
11 decisions listed in ORS 197.015(11). The reason for this
12 prohibition may be seen in the former ORS 197.605-640. Under
13 these provisions, the Land Conservation and Development
14 Commission was responsible for reviewing land use regulations
15 for compliance with statewide planning goals as part of the
16 acknowledgment process or the post-acknowledgment process. The
17 commission would have been hopelessly bogged down if individual
18 subdivision requests, conditional use permits, partitions,
19 building permits and the like were considered to be "land use
20 regulations" subject to acknowledgment review and therefore
21 carted to LCDC for review for compliance with statewide
22 planning goals either prior to acknowledgment or as part of a
23 post-acknowledgment review process. The commission, clearly,
24 would not have been able to finish its duty under ORS 197.251
25 which then as now is to acknowledge comprehensive plan and land
26 use regulations and amendments thereto.⁵

1 There remains the question of whether or not LUBA has
2 authority to consider this particular decision. In deciding
3 this issue, the Board must consider whether or not the "S" zone
4 regulations found at §33.74.010 of the City of Portland
5 Planning and Zoning Code are measures which concern the
6 adoption, amendment or application of a comprehensive plan
7 provision or a land use regulation.⁶

8 As noted in the purposes section quoted supra at 2, the "S"
9 zone seeks to control signs where the signs would "adversely
10 affect traffic safety and the appearance and scenic outlook of
11 the city...." These qualities are the kinds of qualities
12 listed in the scope and purposes section of the zoning
13 ordinance. In §33.04.020 of the zoning ordinance, the city
14 states the scope and purpose of its ordinance is as follows:

15 "The several purposes of this title are to encourage
16 the most appropriate use and development of land
17 throughout the city; to stabilize and conserve the
18 value of property; to provide adequate light, air and
19 reasonable access; to secure safety from fire and
20 other dangers; to prevent overcrowding of land; to
21 avoid undue concentration of population; to improve
the city's appearance; to facilitate the adequate
provision of transportation, water, sewerage, schools,
parks and other public improvements; and, in general,
to promote the public health, safety and welfare, all
in accordance with a comprehensive development plan
for the city.

22 "Furthermore, the scope of this title is to regulate
23 and restrict the location and use of buildings,
24 structures, and land for business, industry, trade,
25 callings and dwellings, and for public, semi-public,
26 and other specified uses; to regulate and determine
the area of yards, courts, and other open spaces, for
said purposes to divide the city into zones of such
number, shape, and areas as may be deemed best suited
to carry out these regulations and to set forth

1 general requirements to carry out the board purposes
mentioned above."

2

3 The Board believes then, that the application of the "S"
4 zone regulations constitutes the application of a city land-use
5 regulation, the zoning ordinance. As such, a decision under
6 the "S" zone is reviewable by this Board for compliance with
7 the applicable criteria in the zoning ordinance.

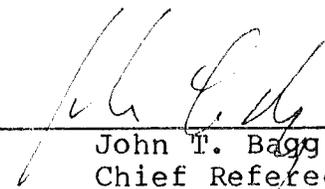
8 The motion to dismiss is denied.

9 Dated this 17th day of August, 1984.

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John T. Bagg
Chief Referee

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FOOTNOTES

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4 There are other provisions providing for removal of
5 non-conforming signs.

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7 The decision of the city and the filing of the appeal
8 in this matter predates the effective date of 1983 Or
9 Laws, ch 827. Under the statute effective at the time the
10 decision was made, ORS 197.015(10), a land use decision
11 was defined as follows:

12 "(10) 'Land use decision' means:

13 "(a) A final decision or determination made by a
14 local government or special district that
15 concerns the adoption, amendment or application
16 of:

17 "(A) The goals;

18 "(B) A comprehensive plan provision; or

19 "(C) A land use regulation; or

20 "(b) A final decision or determination of a state
21 agency other than the commission with respect to
22 which the agency is required to apply the goals."

23 As codified in ORS 197.015(10), a land use decision now is
24 defined as follows:

25 "(10) 'Land use decision':

26 "(a) Includes:

27 "(A) A final decision or determination made by a
28 local government or special district that
29 concerns the adoption, amendment or application
30 of:

31 "(i) The goals;

32 "(ii) A comprehensive plan provision;

33 "(iii) A land use regulation; or

1 "(iv) A new land use regulation; or

2 "(B) A final decision or determination of a state
3 agency other than the commission with respect to
4 which the agency is required to apply the goals.

5 "(b) Does not include a ministerial decision of a
6 local government made under clear and objective
7 standards contained in an acknowledged
8 comprehensive plan or land use regulation and
9 for which no right to a hearing is provided by
10 the local government under ORS 215.402 to
11 215.438 or 227.160 to 227.185." ORS 197.015(10).

12 _____
13 3 The city's plan has been acknowledged as being in
14 compliance with statewide planning goals.

15 _____
16 4 Unlike the city, petitioner asserts that the committee's
17 decision under the "S" zone provisions does have a significant
18 impact on present and future land uses because, as we
19 understand the argument, the ordinance has an impact on "sacred
20 First Amendment rights."

21 _____
22 5 The commission's authority to review legislative acts for
23 compliance with statewide planning goals is now limited to the
24 acknowledgment process.

25 _____
26 6 Because the city's comprehensive plan has been acknowledged
27 as being in compliance with statewide planning goals, the Board
28 will not review this decision against the goals. See Fujimoto
29 v Land Use Board of Appeals, 52 Or App 875, 630 p2d 364; rev
30 den, 291 Or 662 (1981).