

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

GORDON W. ELLIOTT,)
)
 Petitioner,)
)
 vs.)
)
 LANE COUNTY,) LUBA No. 90-001
)
 Respondent,) FINAL OPINION
) AND ORDER
 and)
)
 LARRY R. LEE, J. KEITH)
 SHERMAN, and TONI P. SHERMAN,)
)
 Intervenors-Respondent.)

Appeal from Lane County.

John Mehringer, Eugene, represented petitioner.

William Van Vactor, Eugene, represented respondent.

Allen L. Johnson, Eugene, represented intervenors-respondent.

SHERTON, Chief Referee; KELLINGTON, Referee, participated in the decision.

DISMISSED 02/23/90

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioner appeals the Lane County Board of Commissioners' approval of the final plat of a subdivision for recording.

MOTION TO INTERVENE

Larry R. Lee, J. Keith Sherman and Toni P. Sherman, the applicants below, move to intervene on the side of respondent in this proceeding. There is no opposition to the motion, and it is allowed.

FACTS

The subdivision at issue in this appeal is a nine-lot, 2.37 acre subdivision located within the city limits of the City of Eugene (city). The city planning director granted tentative subdivision approval on July 31, 1989, and final subdivision approval on October 19, 1989. These decisions have not been appealed.

The Lane County Board of Commissioners signed the final subdivision plat on December 13, 1989.¹ On December 14, 1989, the final plat was recorded with the county clerk. This appeal followed.

MOTIONS TO DISMISS

The county and intervenors-respondent (respondents)

¹The city surveyor, city planning director and county assessor also signed the final subdivision plat, on October 18, October 19 and November 3, 1989, respectively.

move that this appeal be dismissed for lack of jurisdiction because the certification of a final subdivision plat for recording by a board of county commissioners, pursuant to ORS 92.100, is not a "land use decision."²

Respondents argue that the board of commissioners' action is not a "land use decision" as defined by ORS 197.015(10)(a)(A) because it does not concern the adoption, amendment or application of the goals, comprehensive plan or land use regulations.³ Respondents argue that the city has land use jurisdiction to approve subdivisions within city limits, and exercised that jurisdiction in its July 31 and October 19, 1989 decisions.

²ORS 92.100(1) provides, in relevant part:

"Before any subdivision * * * plat can be recorded, covering land within the corporate limits of any city, it must be approved by the county surveyor. However, for the purposes of this chapter, the governing body of the city may, by resolution or order, designate the city surveyor to serve in lieu of the county surveyor. * * * All subdivision plats must also be approved by the county assessor and the governing body of the county in which the property is located before recording.
* * *"

³ORS 197.015(10)(a) states that "land use decision" includes:

"(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 new land use regulation; * * *

** * * * *

Respondents argue that the board of commissioners does not have authority to, and in fact did not, review the subject final plat against the applicable comprehensive plan or land use regulations. According to respondents, the role of the county board of commissioners in signing final plats for city subdivisions under ORS 92.100 is "simply to determine that the plat is in final form, with all necessary signatures and approvals, so that it can be recorded." Memorandum Supporting Motion to Dismiss 3.

Respondents also argue the appealed decision is not a "significant impact" test land use decision. Respondents contend in this case the relationship between the board of commissioners final subdivision plat approval for recording and the city preliminary subdivision approval is parallel to that between county issuance of a building permit and site plan approval in Flowers v. Klamath County, ___ Or LUBA ___ (LUBA Nos. 88-112, 88-113 and 88-124, Interlocutory Order on Motions to Dismiss, February 28, 1989) (Flowers). According to respondents, in Flowers, this Board ruled that issuance of a building permit subsequent to site plan approval was not a land use decision where the county code provided that all land use determinations be made at the site plan approval stage. Respondents argue that in this case, the "significant impact" test is similarly inapplicable, because the city tentative subdivision approval was the land use decision under both the statutory and "significant impact"

tests.

Petitioner argues that the motions to dismiss were not timely filed and served under OAR 661-10-065(2).⁴ Petitioner points out intervenors' memorandum states that the alleged defect in jurisdiction is "apparent on the face of the Notice of Intent to Appeal." Memorandum Supporting Motion to Dismiss 1. Petitioner argues that the motions to dismiss were not filed within ten days of when respondents received the notice of intent to appeal, as required by OAR 661-10-065(2).

Petitioner argues further that the board of commissioners' approval of the final plat was "more than a pro forma ministerial act." Answer to Motion to Dismiss 3. Petitioner contends the county approval required by ORS 92.100 must be more than a "meaningless 'rubber stamp' or 'laundry list' item." Id. at 3. Petitioner argues the record shows that the county staff advised the board of commissioners that it had a choice of whether to approve the final plat, and could consider issues beyond whether the

⁴OAR 661-10-065(2) provides in relevant part:

"Time of Filing: A party seeking to challenge the failure of an opposing party to comply with any of the requirements of statutes or Board rules shall make the challenge by motion filed with the Board and served on the adverse party within 10 days after the moving party obtains knowledge of such alleged failure. * * *"

final plat was in proper form for recording.⁵

We reject petitioner's contention that the motions to dismiss were not timely filed and served. A challenge to our jurisdiction may be brought at any time and is not subject to the ten day requirement of OAR 661-10-065(2). Standard Insurance Co. v. City of Hillsboro, ___ Or LUBA ___ (LUBA No. 89-012, June 21, 1989), slip op 20, n 3; Tournier v. City of Portland, ___ Or LUBA ___ (LUBA No. 87 111, April 6, 1988), slip op 4; Osborne v. Lane County, 4 Or LUBA 368, 369 (1981).

A city has jurisdiction over approvals of tentative subdivision plans and subdivision plats for property within city limits. ORS 90.042(1). A city governing body is required to adopt standards and procedures for the approval of tentative subdivision plans and subdivision plats for property within its jurisdiction. ORS 92.044. A city may approve tentative subdivision plans and subdivision plats only if they comply with the city's or county's comprehensive plan and land use regulations. ORS 92.046(5); 92.090(2)(c), (3)(c) and (d). However, after city approval of the tentative plan and final plat for a subdivision

⁵Petitioner also argues that if respondents are correct that the challenged decision is not a land use decision, they must concede that a land use decision with regard to the subject subdivision was made, at some point, by the city. According to petitioner, any land use decision made by the city was made without providing required notice and hearing to petitioner and, therefore, petitioner is entitled to appeal the city decision to this Board. Petitioner argues that under these circumstances no purpose would be served by dismissal of this appeal.

inside city limits, pursuant to the statutory provisions cited above, the final plat must also be "approved" by the county or city surveyor, county assessor and county governing body before it can be recorded. ORS 92.100(1).

The parties cite no provisions of the statute, or of the applicable comprehensive plan or land use regulations which require the goals, comprehensive plan or land use regulations to be applied to such a county pre-recording approval for a subdivision inside city limits. We agree with respondents that under ORS 92.100(1), the board of commissioners' role in signing a final subdivision plat prior to recording is simply to determine that the plat is in proper form for recording. Accordingly, we conclude the challenged decision is not a statutory test land use decision.

The Oregon Supreme Court has stated that the "significant impact" test applies to decisions "not expressly covered in a land use norm." Billington v. Polk County, 299 Or 471, 479, 703 P2d 232 (1985). In Flowers, we explained

"* * * the significant impact test was designed by the court to allow LUBA review of decisions which have significant impacts on present or future land use, but otherwise would evade review by LUBA on issues related to land use because they do not meet the statutory definition of a 'land use decision.' * * *

"Even though the completed project in this case will have significant impacts on land use, we do not believe it serves any purpose to recognize the

issuance of a building permit for this project as a 'significant impact test' land use decision. [U]nder applicable county ordinances all determinations involving application of the goals, plan or land use regulations are required to be made in a separate county decision (i.e., the site plan approval). Without site plan approval, the project cannot be constructed. [T]he county's site plan approval is the county 'land use decision' approving the project which LUBA has jurisdiction to review. It is the site plan approval decision which is both a statutory land use decision and a significant impact test land use decision. Thus, we conclude the county's issuance of a building permit for the proposed [use] is not a significant impact test land use decision." (Emphasis in original.) Flowers, slip op at 12-13.

Our reasoning in Flowers is applicable to this case as well. With regard to the subject subdivision, the applicable provisions of ORS chapter 92 require all determinations involving application of the comprehensive plan and land use regulations to be made by the city in its tentative plan and final plat approval process. Without those required city approvals, the proposed subdivision cannot be accomplished. No purpose would be served by recognizing the county's approval of the final plat for recording as a "significant impact" test land use decision when the same impacts are inherent in one or more city approvals which are statutory land use decisions as well.⁶

⁶We need not and do not decide whether the city's tentative subdivision approval, final subdivision approval, or both approvals are land use decisions subject to LUBA review, or whether petitioner is entitled to appeal those decisions at this time, because those decisions are not the subject of this appeal.

Accordingly, we conclude the appealed decision is not a "significant impact" test land use decision.

The motions to dismiss are granted.

This appeal is dismissed.