

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

McKENZIE RIVER GUIDES ASSOCIATION,)
THE OREGON RIVERS COUNCIL, INC.,)
PAUL PETTIT, MARITZA PETTIT,)
PAUL WILLIAMSON, HOLLIS OXBY,)
PRISCILLA OXBY, E. L. VANDERCOOK,)
JOE ROSALES, ANGIE ROSALES, and)
JAMES A. BAKER,) LUBA No. 90-020
)
Petitioners,) FINAL OPINION
) AND ORDER
vs.)
)
LANE COUNTY,)
)
Respondent.)

Appeal from Lane County.

Bill Kloos, Eugene, represented petitioners.

Stephen L. Vorhes, Eugene, represented respondent.

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

DISMISSED 05/23/90

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

Petitioners appeal an order of the Lane County Board of Commissioners selecting a preferred alternative site for a new bridge crossing the McKenzie River and directing county staff to prepare all necessary planning applications for construction of a new bridge at the preferred site.¹

FACTS

Lane County Rural Comprehensive Plan (RCP) Goal 12 Policy 4 adopts the Lane County Rural Transportation Plan (RTP) as a "special-function plan concerned with Goal 12 requirements," and provides with regard to the RTP:

"* * * Goal and Objective statements within [the

¹The order also prescribes certain design features to be included in, or omitted from, the preferred alternative. The operative clauses of the order state:

"IT IS HEREBY ORDERED that Site #6 Bear Creek be selected as the preferred alternative for a new bridge crossing over the McKenzie River to serve the Goodpasture Road area.

"IT IS FURTHER ORDERED that the bridge design at Site #6 be based on a two pier design, with the southerly pier located as close to the center of the river as practicable given this bridge type in order to facilitate boating activity and provide additional clearance for boating channels;

"IT IS FURTHER ORDERED that improvement of Goodpasture Road be deleted from the Site #6 Bear Creek proposal;

"IT IS FURTHER ORDERED that staff do preliminary engineering and planning work as required, to prepare all necessary planning applications for construction of a new bridge at Site #6 Bear Creek." Order No. 90-1-17-3.

The nature of the county's decision is an issue in this appeal, and is discussed in more detail, infra.

RTP] are incorporated into the above County [RCP Goal 12] Policies, and Recommendations within [the RTP] shall be applied where appropriate; these Recommendations shall be considered to be mandatory actions which are ultimately binding on the County." (Emphasis added.)

On July 13, 1988, Ordinance PA 953 added Recommendation 16 to the RTP. Recommendation 16 provides in relevant part:

"In the location of new bridge construction, the following criteria shall be applied:

- "1. Preliminary design analysis and cost estimates for the alternatives shall be based on applicable engineering standards and design procedures. The analysis shall include, but not be limited to, consideration of crossing length and angle, stream conditions, traffic operations, and safety.
- "2. The total project cost of the bridge shall be minimized in the selection of the new alignment. The cost of right-of-way acquisition and associated road construction shall be considered in the total project cost.
- "3. The new bridge construction shall comply with the Rural Comprehensive plan [emphasis in original] as determined by reasoning and evidence demonstrating compliance with the following criteria:

"* * * * *

- "4. High quality habitat is required for fish production. * * * An evaluation of the impacts of alternative locations for new bridge construction (and associated roadways) shall be based on reliable evidence provided by the Oregon Department of Fish and Wildlife or by other competent fish biologists. * * *

"* * * * *" (Except as noted, emphasis added.)

According to the recitals in the challenged order, the

Lane County Board of Commissioners (board of commissioners) reviewed a county staff analysis of eight potential bridge sites at a work session on November 8, 1988. The board of commissioners "screened out" four of the potential sites, and directed staff to prepare for a public hearing on the four remaining sites. The board of commissioners held a public hearing on these four sites on January 18, 1989, and after further consideration, adopted the appealed order.

MOTION TO DISMISS

Respondent Lane County (respondent) moves that this appeal be dismissed because this Board lacks jurisdiction to review the challenged order. Respondent contends the challenged order is not a "land use decision" under either the "statutory test" or the "significant impact test."

A. Statutory Test

LUBA's jurisdiction is limited to review of "land use decisions." ORS 197.825(1). "Land use decision" is defined by ORS 197.015(10) as including:

"(A) A final decision or determination made by a local government * * * 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; * * *

* * * * * (Emphasis added.)

Respondent argues that the challenged order is not a

final decision by the county. See N.O.P.E. in Mulino v. Port of Portland, 2 Or LUBA 243 (1980) (N.O.P.E.) (port district approval of study recommending preferred site for new airport and authorizing further studies is not a final decision). Respondent contends the order does not authorize construction of a new bridge, but rather merely expresses the board of commissioners' preliminary preference for bridge location and directs county staff to proceed with investigations necessary for preparation of planning applications for a new bridge. According to respondent, application of pertinent plan and land use regulation provisions will occur following the county's receipt of a completed land use application for a proposed new bridge. Respondent maintains that the board of commissioners' adoption of the challenged order will not in any way bind the county approval authority reviewing the land use application to be submitted at a later date.

Petitioners disagree with respondent's contention that the challenged order is preliminary in nature. Petitioners contend there is nothing in the wording of the order to indicate it is preliminary or has no legal effect. Petitioners argue that if the county intended its order to be without legal effect (i.e. not to express land use planning policy or choice), it must make its intention clear in the order itself or in supporting findings. See 1000 Friends of Oregon v. Washington County, ___ Or LUBA ___

(LUBA No. 88-106, 88-107, 88-108, May 5, 1989), slip op 11-12 (even if it is not the last decision necessary to authorize construction of a facility, an amendment of the county comprehensive plan requires application of the statewide planning goals to the extent planning courses of action are adopted or rejected). Petitioners argue the order contains "an unqualified policy choice about locating the bridge." Response to Motion to Dismiss 3.

Petitioners further argue that N.O.P.E. is inapposite because in N.O.P.E., the local government approved only a recommendation of a preferred site, whereas in this case the county made a selection of the preferred site. Petitioners also argue that this case is distinguishable from Sensible Transportation v. Metro Service Dist., 100 Or App 564, ___ P2d ___ (1990) (S.T.O.P.), in which the Court of Appeals determined that Metropolitan Service District (Metro) amendments to its Regional Transportation Plan concerning a proposed new freeway were not final land use decisions because they were:

"* * * contingent, inter alia, on a determination that the freeway project will be consistent with the statewide land use planning goals or, alternatively, on plan amendments or goal exceptions necessary to achieve consistency."
S.T.O.P., 100 Or App at 566.

Petitioners argue there is nothing about the challenged order that makes the county's decision on bridge site selection or design characteristics contingent on future

determinations.

Petitioners maintain that the appealed order is a final decision selecting the site for a new bridge, and any further proceedings will merely determine whether a bridge at the selected site complies with applicable plan and ordinance standards for a new bridge. Respondent, on the other hand, contends that the appealed order merely expresses a preference for a particular site, such that county staff can file appropriate land use applications for a new bridge at that site, and a final county determination on the selection of the preferred site will be made in the future county proceedings on those applications.

The order challenged in this case is analogous to the decision at issue in N.O.P.E., in that both are endorsements of a preferred site and provide authorization for further studies concerning that site, but are not actual approvals of acquisition of or construction on the site.² Additionally, in this case, the parties agree that further land use applications must be filed, and land use proceedings conducted, before actual construction of any new

²1000 Friends v. Washington County, supra, is distinguishable because it involved an appeal of an amendment to the text of a comprehensive plan. In this case, the plan is not amended by the challenged order. The challenged order simply selects a preferred alternative site to be the subject of a future land use application. Additionally, in 1000 Friends v. Washington County, there was no issue raised concerning the finality of the county's decision. The portions of our opinion petitioners rely on addressed what findings were required to demonstrate compliance of the county's decision with the statewide planning goals.

bridge is authorized by the county.

We agree with respondent that a final decision on selection of the preferred site will not be made until the county acts upon the land use applications for a new bridge authorized to be filed by the challenged order.³ The challenged order is simply the expression of the board of commissioners' preliminary preference for the location of a new bridge, not a final decision selecting a site for a new bridge.

Because the challenged order is not a final decision, it is not a "statutory test" land use decision.

B. Significant Impact Test

A decision which does not satisfy the statutory test may nevertheless be a land use decision subject to LUBA review if it will have a significant impact on present or future land uses. See Billington v. Polk County, 299 Or 471, 703 P2d 232 (1985); City of Pendleton v. Kerns, 294 Or 126, 653 P2d 992 (1982).

Respondent contends that because the appealed decision does not approve construction of a new bridge, it has at most a potential effect on future land use, contingent on future county land use decisions and, therefore, does not

³In making a future final land use decision authorizing a new bridge, the county will be required to demonstrate compliance with the criteria of RTP Recommendation 16 concerning "location of new bridge construction," "selection of the new alignment" and "evaluation of the impacts of alternative locations."

satisfy the significant impact test.

Petitioners argue that the appealed order does satisfy the significant impact test because "the decision to site a bridge (rather than not to site it) and the decision to put it at location Site #6 (rather than at other specified sites under scrutiny) would have a significant impact on future land use." Response to Motion to Dismiss 7.

In Hemstreet v. Seaside Improvement Comm., ____ Or LUBA ____ (LUBA No. 87-118, June 23, 1988), aff'd 93 Or App 73 (1988) (Hemstreet), slip op 6, we quoted our opinion in CBH v. City of Tualatin, 16 Or LUBA 399, 405 n 7 (1988), as follows:

"* * * Under either [the statutory test or the significant impact test], a 'land use decision' must be a final decision. The requirement of finality is part of the statutory test by virtue of the explicit provisions of ORS 197.015(10)(a) requiring that a land use decision be a final decision. The requirement of finality is inherently part of the 'significant impact' test because a decision cannot have significant impacts on land use unless it is a final effective decision."

We also noted in Hemstreet that the Supreme Court suggested that finality is required by the significant impact test in City of Pendleton v. Kerns, supra.

Potentially, the county order appealed in this case could lead to a significant impact on land use, if the authorized applications for a bridge at the preferred site result in county decisions actually approving construction of a new bridge. However, a decision which only has

potential impacts on land use does not satisfy the significant impact test. Billington v. Polk County, 299 Or at 479; Anderson Brothers, Inc. v. City of Portland, ____ Or LUBA ____ (LUBA No. 89-054, November 22, 1989), slip op 12-14; Hemstreet, supra, slip op at 7.

Because we conclude the county's order satisfies neither the statutory test nor the significant impact test, the appealed decision is not a land use decision subject to our review.

This appeal is dismissed.