



Opinion by Sherton.

NATURE OF THE DECISION

Petitioners appeal a Wallowa County Court decision which approves a minor partition of a 68 acre parcel within the urban growth boundary (UGB) of the City of Joseph.

FACTS

Petitioners applied to respondent Wallowa County for approval of a minor partition to create three parcels, 5, 15 and 48 acres in size, from a 68 acre parcel within the City of Joseph UGB. The subject property is zoned Rural Residential (R-1). The R-1 zone has a minimum lot size of five acres. Wallowa County Land Development Ordinance § 17.025.1.

On November 28, 1989, the county planning commission denied petitioners' application. Petitioners appealed the planning commission's decision to the county court. On February 7, 1990, the county court approved petitioners' application, but imposed four conditions concerning access, services and protection of two identified archaeological sites. This appeal followed.<sup>1</sup>

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<sup>1</sup>Petitioners are also seeking review of the county's decision by the Wallowa County Circuit Court. Wallowa County Circuit Court Case No. 90-02-9926. In addition, a separate appeal of the county's decision, Nez Perce Tribe v. Wallowa County, LUBA No. 90-033, was filed with this Board by intervenors-respondent (intervenors). On March 9, 1990, we issued an order consolidating the two appeals and recognizing the petitioners in each appeal as intervenors-respondent in the other appeal. However, after petitioners in this appeal filed a motion to dismiss LUBA No. 90-033 for lack of jurisdiction, petitioners Nez Perce Tribe et al moved to withdraw

JURISDICTION

A threshold issue in this appeal is whether LUBA has jurisdiction to review the challenged county decision.<sup>2</sup> Although no motion to dismiss this appeal has been filed, petitioners did move to dismiss LUBA No. 90-033, another appeal of the same county decision (see n 1). Petitioners argued that LUBA lacked jurisdiction in LUBA No. 90-033 because the county's decision approves a partition within a UGB, and was made under land use standards which do not require discretion.

This Board has jurisdiction to review local government "land use decisions." ORS 197.825(1). The ORS 197.015(10) definition of "land use decision" includes the following exclusion:

" 'Land use decision':

"\* \* \* \* \*

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

"\* \* \* \* \*

"(B) Which approves, approves with conditions or denies a subdivision or partition, as described in ORS chapter 92, located within an urban growth boundary where

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their appeal. On April 24, 1990, we issued an order dismissing LUBA No. 90-033.

<sup>2</sup>The Board invited the parties to this appeal to submit memoranda on the jurisdictional issue. Petitioners submitted a memorandum, attaching a copy of their Amended Memorandum in Opposition to [Respondent's] Motion to Dismiss in Wallowa County Circuit Court Case No. 90-02-9926.

the decision is consistent with land use standards; \* \* \*

"\* \* \* \* \*."<sup>3</sup> (Emphasis added.)

There is no dispute that the county's decision approves with conditions a partition located within the City of Joseph UGB. The only issue which must be determined is the correct interpretation of the statutory phrase "where the decision is consistent with land use standards."

One possible interpretation of this phrase is that a partition or subdivision decision is subject to the statutory exclusion only if the decision complies with all applicable approval standards found in the local government's comprehensive plan and land use regulations. Under this interpretation, LUBA would essentially have to conduct a complete review of the merits of the appealed decision before it could determine whether or not it had jurisdiction to review the decision. If, upon concluding its review, LUBA determined that the decision was consistent with all applicable land use standards, LUBA could not affirm the decision, but rather would dismiss the appeal or transfer the appeal to circuit court, pursuant to ORS 19.230 and OAR 661-10-075(10). Therefore, although plausible, this interpretation of the quoted phrase would produce a result

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<sup>3</sup>ORS 197.015(10)(b)(B) was added to the statutory definition of "land use decision" by Oregon Laws 1989, chapter 761, section 1, which became effective October 3, 1989, prior to the date the county made the appealed decision.

at odds with the apparent intent of ORS 197.015(10)(b)(B) to remove the review of certain urban subdivision and partition decisions from LUBA's jurisdiction, and would be inconsistent with providing timely review of such decisions.

Petitioners offer, in their memoranda in this case and Wasco County Circuit Court Case No. 90-02-9926, another possible interpretation of the phrase "where the decision is consistent with land use standards" in ORS 197.015(10)(b)(B). Petitioners suggest the phrase means where the decision on an urban subdivision or partition is made under existing plan and land use regulation provisions, i.e. without the necessity of concurrent amendments to the text or maps of the comprehensive plan or land use regulations. Petitioners argue this interpretation of the quoted phrase would avoid making ORS 197.015(10)(b)(B) a nullity, and would enable petitioners to know in which forum their appeals should be filed.

We believe petitioners' suggested interpretation is the most reasonable interpretation of an admittedly unclear statutory provision. Under this interpretation, if a decision on an urban subdivision or partition were made together with a plan or land use regulation map or text amendment (over which LUBA clearly does have review jurisdiction), LUBA would have jurisdiction to review the subdivision or partition decision as well. If a decision on an urban subdivision or partition is made without concurrent

plan or land use regulation amendments, consistent with the preexisting land use standards, LUBA would not have review jurisdiction. LUBA would not have to conduct a complete review of the merits of an urban subdivision or partition decision to determine whether it has jurisdiction, and parties would know in advance whether LUBA has jurisdiction to review a particular decision.

In this case, the approval for a partition within the City of Joseph UGB was granted without amendments to the county plan or land use regulations. Therefore, the county's decision was made "consistent with [existing] land use standards" and, under ORS 197.015(10)(b)(B), is not a "land use decision."<sup>4</sup>

This appeal is dismissed.<sup>5</sup>

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<sup>4</sup>Because we decide that the challenged county decision is an urban partition excluded from the definition of "land use decision" under ORS 197.015(10)(b)(B), we need not determine whether it is also a decision "made under land use standards which do not require interpretation or the exercise of factual, policy or legal judgment" excluded from the definition of "land use decision" under ORS 197.015(10)(b)(A).

<sup>5</sup>The appellate courts recognize an alternative test for identifying land use decisions subject to LUBA review, generally referred to as the "significant impact test." Billington v. Polk County, 299 Or 471, 479, 703 P2d 232 (1985); City of Pendleton v. Kerns, 294 Or 126, 133, 653 P2d 992 (1982). However, we do not believe this alternative test applies to decisions which are specifically excluded from the statutory definition of "land use decision" under ORS 197.015(10)(b). See Oregonians in Action v. LCDC, \_\_\_ Or LUBA \_\_\_ (LUBA No. 90-028, April 9, 1990), slip op 3.