

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a Portland Metropolitan Area Local
4 Government Boundary Commission (Boundary Commission) order
5 approving the City of Fairview's request to annex the
6 southern half of Fairview Lake, previously located in
7 unincorporated Multnomah County. Petitioners also appeal
8 the city resolution that initiated the annexation request.

9 **INTRODUCTION**

10 The requested annexation is a "boundary change" as
11 defined by ORS 199.415(4) and (12).¹ For purposes of
12 considering proposed boundary changes, the subject property
13 lies within the jurisdiction of the Boundary Commission.
14 ORS 199.460.

15 Under ORS 199.490(2)(a)(B), the city may adopt a
16 resolution initiating consideration of an annexation request
17 by the Boundary Commission:

18 " * * * upon receiving written consent to
19 annexation from a majority of the electors
20 registered in the territory proposed to be annexed
21 and written consent to the annexation of their
22 land from the owners of more than half the land in
23 the territory proposed to be annexed."

24 The challenged city resolution declares the city
25 "received the necessary 'consents' in sufficient numbers to

¹ORS 199.415(4) defines boundary changes to include both major and minor boundary changes. ORS 199.415(12) defines minor boundary change as including "annexation * * * of territory to or from a city * * *."

1 meet so-called 'double majority' annexation requirements * *
2 * as authorized by ORS 199.490(2)(a)(B)." The first
3 paragraph of the Boundary Commission order similarly
4 determines "the resolution and consent meet the requirements
5 for initiating a proposal set forth in ORS 199.490,
6 particularly Section (2)(a)(B)." The challenged Boundary
7 Commission order then applies the standards set forth at ORS
8 199.462 and approves the requested annexation.²

9 **PETITIONERS' CHALLENGE**

10 Petitioners contend the city never received the
11 required consent from the owners of more than half the land
12 in the territory proposed to be annexed, because the
13 ownership of the lake bottom is unsettled.³ Petitioners
14 contend the city committed error in adopting the challenged
15 resolution without the consent required by ORS
16 199.490(2)(a)(B) and that the Boundary Commission similarly

²ORS 199.462 provides, in part, that the

"* * * boundary commission shall consider local comprehensive planning for the area, economic, demographic and sociological trends and projections pertinent to the proposal, past and prospective physical development of land that would directly or indirectly be affected by the proposed boundary change or application under ORS 199.464 and the [statewide planning] goals adopted under ORS 197.225."

³Petitioners have also appealed the Boundary Commission order to the court of appeals and request that we delay issuing a decision in this matter until the court of appeals determines whether it may consider the disputed property ownership issue. Because we conclude the reviewability of the property ownership issue in the separate appeal of this matter before the court of appeals has no bearing on our jurisdiction, we see no reason to further delay our decision in this matter.

1 erred in its final order in concluding the consent required
2 by ORS 199.490(2)(a)(B) was given.⁴

3 **DECISION**

4 The Boundary Commission moves to dismiss this appeal,
5 arguing appeal of the challenged Boundary Commission order
6 is within the exclusive jurisdiction of the court of
7 appeals, pursuant to ORS 197.825(2)(d) and 199.461(4). For
8 the reasons explained below, we agree. Although the city
9 does not move to dismiss this appeal with regard to the
10 challenged city resolution, we raise the question of our
11 jurisdiction over that resolution on our own motion and
12 conclude that we lack jurisdiction over the city resolution
13 as well.

14 **A. Boundary Commission Order**

15 ORS 199.461(4) provides, in pertinent part, as follows:

16 " * * * Jurisdiction for judicial review of [orders
17 on boundary changes] is conferred upon the Court
18 of Appeals. Except as provided in ORS 183.315(1),
19 any person interested in a boundary change may
20 petition for judicial review of the order under
21 ORS 183.482."⁵

⁴Actually, petitioners argue the Boundary Commission erred in relying on evidence produced by the city and statements by the county assessor, with regard to the ownership issue. There does not appear to be any real dispute that a quiet title action in circuit court is the only way to definitively determine ownership of the disputed lake bottom. Petitioners' complaint appears to be that the city and the Boundary Commission determined the annexation request could proceed as it did, notwithstanding the current level of uncertainty about ownership of the lake bottom.

⁵ORS 183.482 sets out the procedure and scope of review for court of appeals review of state agency contested case orders.

1 In Kalmiopsis Audubon Soc'y v. Div. of State Lands, 66 Or
2 App 810, 676 P2d 885 (1984), the court of appeals held that
3 under then existing statutory provisions, an Oregon Division
4 of State Lands removal-fill permit could be appealed to LUBA
5 under Oregon Laws 1979, chapter 772, section 4(1), as
6 amended by Oregon Laws 1981, chapter 748, section 35 (to
7 consider compliance with the statewide planning goals), and
8 under ORS 183.482 to the court of appeals (to consider other
9 issues properly raised under ORS 183.482(8)).

10 At the time of the court of appeals' decision in
11 Kalmiopsis Audubon, LUBA's scope of review of state agency
12 land use decisions was limited to determining whether the
13 decision violated the statewide planning goals. Or Laws
14 1979, ch 772, § 5(4)(b), as amended by Or Laws 1981, ch 748,
15 § 36. LUBA's scope of review of state agency land use
16 decisions is still limited to determining compliance with
17 the statewide planning goals. ORS 197.835(7)(b). It was
18 this limitation on LUBA's scope of review of state agency
19 land use decisions that led the court of appeals to conclude
20 it shared jurisdiction with LUBA to review the state agency
21 land use decision at issue in Kalmiopsis Audubon.
22 Kalmiopsis Audubon, supra, 66 Or App at 815-16. However, as
23 the court of appeals noted in its decision, the statutes
24 governing review of state agency land use decisions by LUBA
25 subsequently were amended. Id. at 816 n 2.
26 ORS 197.825(2)(d) now provides as follows:

1 "[LUBA's jurisdiction does] not include those land
2 use decisions of a state agency over which the
3 Court of Appeals has jurisdiction for initial
4 judicial review under ORS 183.400, 183.482 or
5 other statutory provisions." (Emphasis added.)

6 ORS 197.825(2)(d) excludes from our jurisdiction those
7 state agency land use decisions over which other statutory
8 provisions give the court of appeals responsibility for
9 initial judicial review. Because ORS 199.461(4) gives the
10 court of appeals responsibility for initial judicial review
11 of the challenged Boundary Commission order, we lack
12 jurisdiction to review the Boundary Commission order
13 challenged in this appeal.

14 Petitioners' argument that LUBA has jurisdiction over
15 the challenged Boundary Commission order is based on
16 petitioners' contention that the court of appeals' scope of
17 review under ORS 183.482 is limited. Petitioners contend
18 the court of appeals may not consider petitioners' argument
19 that the Boundary Commission erred in accepting the city's
20 position that it received "written consent to the annexation
21 of their land from the owners of more than half the land in
22 the territory proposed to be annexed," as required by
23 ORS 199.490(2)(a)(B).

24 We express no position concerning the merits or
25 reviewability of that question in petitioners' pending
26 appeal of the Boundary Commission order before the court of

1 appeals.⁶ However, even if petitioners are correct, ORS
2 197.825(2)(d) now makes it clear that where the court of
3 appeals has jurisdiction for initial review of a state
4 agency decision, the court's jurisdiction is exclusive, and
5 LUBA does not have jurisdiction to review the decision.
6 LUBA may not ignore the jurisdictional exclusion expressed
7 in ORS 197.825(2)(d).

8 **B. City Resolution**

9 In Vancouver Federal Savings v. City of Oregon City, 17
10 Or LUBA 348 (1989), we held that a city resolution
11 initiating a Boundary Commission proceeding to consider
12 annexation of property to the city was not a land use
13 decision subject to our review, because it was not a final
14 decision, as ORS 197.015(10)(a)(A) requires.⁷ In Vancouver
15 Federal Savings, we reasoned that while the city's
16 resolution included findings concerning compliance of the

⁶We note that petitioners do not explain why they believe compliance with ORS 199.490(2)(a)(B) falls outside the court of appeals' scope of review under ORS 183.482(8).

⁷ORS 197.015(10)(a)(A) defines "land use decision" as follows:

"A final decision or determination made by a local government
* * * that concerns the adoption, amendment or application of
[land use standards]."

Although petitioners do not argue the challenged decision is reviewable by this Board as a "significant impacts test land use decision," see City of Pendleton v. Kerns, 294 Or 126, 653 P2d 992 (1982), we previously have held that significant impact test land use decisions also must be final decisions. McKenzie River Guides Assoc. v. Lane County, 19 Or LUBA 207 (1990); CBH v. City of Tualatin, 16 Or LUBA 399, 405 n 7 (1988).

1 requested annexation with the city's comprehensive plan,
2 those findings did not constitute a final decision
3 concerning whether the requested annexation was consistent
4 with the city's comprehensive plan. We determined the
5 Boundary Commission remained obligated to determine whether
6 the proposed annexation was consistent with the city's
7 comprehensive plan in adopting its final order on the
8 requested annexation. Vancouver Federal Savings, supra, 17
9 Or LUBA at 354.

10 The resolution at issue in this appeal, although
11 adopted pursuant to a different subsection of ORS 199.490,
12 similarly is not a final land use decision. It simply
13 initiates the Boundary Commission annexation proceedings.
14 Petitioners attempt to avoid this result by citing the
15 Boundary Commission's reliance on the city's decision
16 concerning the land ownership question, discussed supra.
17 According to petitioners, the city's resolution in this case
18 is different from the resolution at issue in Vancouver
19 Federal Savings because the City of Fairview's resolution
20 became a final land use decision, at least with regard to
21 the land ownership question, when the Boundary Commission
22 chose in its final decision to rely on the city's
23 determination on that question.

24 We explained in Vancouver Federal Savings that our
25 determination that the city's resolution lacked the
26 requisite finality might be different if the Boundary

1 Commission were authorized to rely on the city's findings
2 concerning compliance with applicable comprehensive plan
3 requirements. However, in Vancouver Federal Savings, 17 Or
4 LUBA at 354, we also concluded that "we [were] aware of no
5 authority allowing the boundary commission simply to rely on
6 the the city's determination of plan compatibility [in the
7 disputed resolution] to establish compatibility with the
8 comprehensive plan."

9 In this case, we disagree with petitioners' initial
10 premise that the Boundary Commission did not make an
11 independent determination concerning whether the city's
12 resolution complies with the consent requirement of ORS
13 199.490(2)(a)(B). The first paragraph of the Boundary
14 Commission order specifically makes that determination.⁸

15 Even if the Boundary Commission did not make its own
16 determination that the requirements of ORS 199.490(2)(a)(B)
17 are satisfied in this case, and instead relied on the city
18 for that determination, we fail to see how that reliance
19 would make the city's decision a final land use decision
20 subject to our review. Our suggestion in Vancouver Federal
21 Savings, that a local government's determination of
22 comprehensive plan compliance in a resolution initiating an

⁸The Boundary Commission's decision does appear to rely on information supplied by the city and county tax assessor in making its determination, but that does not mean that the Boundary Commission failed to determine that the requirements of ORS 199.490(2)(a)(B) are satisfied in this case. It simply means the Boundary Commission relied on information compiled by the city and the assessor in making that determination.

1 annexation request might constitute a final land use
2 decision reviewable by this Board, was based on a
3 hypothetical circumstance where the Boundary Commission was
4 legally entitled to rely on that determination. The
5 requisite legal authority for such reliance concerning local
6 government comprehensive plan compliance determinations was
7 lacking in Vancouver Federal Savings, and is lacking in this
8 case with regard to compliance with the consent requirements
9 of ORS 199.490(2)(a)(B).

10 The city resolution is not a final land use decision
11 over which this Board has review authority.

12 This appeal is dismissed.