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

SANDRA KELLEY and RANDOLPH)
MISLICK,)
)
Petitioners,)
)
vs.)
)
CITY OF CASCADE LOCKS,)
)
Respondent,)

LUBA No. 99-107
FINAL OPINION
AND ORDER

Appeal from City of Cascade Locks.
Sandra Kelley, Cascade Locks, appeared on her own behalf.
Randolph Mislick, Cascade Locks, appeared on his own behalf.
Wilford K. Carey, City Attorney, Hood River, appeared on behalf of respondent.

BRIGGS, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,
participated in the decision.

DISMISSED 10/21/99

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

1 Opinion by Briggs.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a resolution by the city council endorsing the siting of a tribal
4 casino within the city limits.

5 **FACTS**

6 The Confederated Tribes of the Warm Springs are considering the siting of a casino
7 within the City of Cascade Locks. The tribes do not own the land as yet, but they do have an
8 option to purchase their preferred site. In late 1998, the city council performed a survey of
9 residents to determine the local response to the establishment of the casino within the city.
10 The results of the survey indicated that a majority of the residents supported the casino
11 concept. On January 11, 1999, the city council adopted Resolution No. 839, which
12 recognized the results of the survey. On June 14, 1999, the city council repealed Resolution
13 No. 839, and replaced it with Resolution No. 851. Resolution No. 851 resolved that the city
14 council supported the siting of the casino within city limits. Resolution No. 851 was in turn
15 repealed and replaced by Resolution No. 856. Resolution No. 856 supports the siting of the
16 casino, provided that the city's negotiations with the tribes conclude as planned. Resolution
17 No. 856 also conditions the city's support on the tribes' ability to obtain all required permits.

18 This appeal followed.

19 **MOTION TO DISMISS**

20 The city moves to dismiss this appeal, arguing that Resolution No. 856 is not a land
21 use decision subject to LUBA jurisdiction. The city contends that the resolution, by itself,
22 does not approve an application to site a casino. The city also argues that the city's formal
23 support is not a necessary precondition to the siting of the casino within city limits.
24 Petitioners argue that the city's resolution is the beginning of the process to site a casino
25 within the city, the implication being that if the city does not embrace the concept, the tribes

1 would not consider siting the casino within Cascade Locks. For the following reasons, we
2 agree with the city that the resolution is not a land use decision subject to our jurisdiction.

3 LUBA’s jurisdiction is limited to review of land use decisions. ORS 197.825(1). A
4 local government decision is a land use decision if it meets either: (1) the statutory definition
5 of land use decision in ORS 197.015(10);¹ or (2) the significant impacts test established by
6 *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982).² *City of Portland v. Multnomah*
7 *County*, 19 Or LUBA 468, 471 (1990).

8 To resolve this issue, we must look at the special nature of property ownership by
9 Indian tribes to determine whether the action of the local government in this instance
10 constitutes a land use decision. Federally recognized tribes may own real estate outside of the
11 boundaries of established reservations in one of two ways. In the first instance, property is
12 owned in fee by the tribe, and the land is subject to the jurisdiction of the state government
13 and its political subdivisions. In the second instance, the land is held by the Secretary of the
14 Interior in trust for the tribes. Generally trust lands are not subject to the jurisdiction of the
15 states – they are an extraterritorial extension of the tribal lands, and thus are subject to the
16 jurisdiction of the tribal government. In order for the land to be put in trust for the tribes, the
17 Secretary of the Interior must approve the purchase as “trust lands.” *See* 25 USC §

¹ORS 197.015(10)(a)(A) defines “land use decision” in relevant part as:

“A final decision or determination made by a local government * * * that concerns the adoption, amendment or application of:

“(i) The [statewide land use planning] goals;

“(ii) A comprehensive plan provision;

“(iii) A land use regulation; or

“(iv) A new land use regulation[.]”

²In *Kerns* the Supreme Court held that a decisions is subject to LUBA review “if, but only if, it can be said that [the decision] will have a ‘significant impact on present or future land uses’ in the area.” 294 Or at 134.

1 2710(d)(3)-(8). To site a casino within the State of Oregon, the tribes must obtain the
2 property as trust lands because state law prohibits gaming casinos on property subject to its
3 jurisdiction.

4 Part of the process for approving the acquisition of trust lands is for the tribes to enter
5 into a compact with the affected state, through its governor. Before the governor enters into
6 negotiations for the compact, he or she receives information from various affected agencies
7 and local governments as to the advisability of siting the casino at the selected location. The
8 information is not binding on the governor, who may approve a compact over the objections
9 of the local government.

10 Resolution No. 856 is a one-page document. Background statements regarding the
11 survey conducted by the city and the status of the negotiations between the city and the tribes
12 comprise half a page. The relevant section of Resolution No. 856 resolves as follows:

13 **SECTION 1: Council Declaration of Support.** The City Council hereby
14 declares its support for an Indian Gaming Casino to be located in the City of
15 Cascade Locks in the event the Confederated Tribes obtains all required legal
16 permits to locate the casino at the current site owned by the Port of Cascade
17 Locks (known as Government Rock) and upon which the Confederated Tribes
18 has purchased an option. This consent to support the location of an Indian
19 Gaming Casino in Cascade Locks is based upon the indication from the
20 survey that a majority of the population of the City supports an Indian Gaming
21 Casino, and is conditioned upon the negotiated terms of the Memorandum of
22 Understanding being included in the State compact agreed to by the
23 Confederated Tribes and the State of Oregon.” Record 8.

24 In effect, the city’s action constitutes non-binding support for the concept that the
25 tribes acquire the identified property for a casino. It is not a statutory land use decision
26 because it does not apply the city’s land use regulations; neither the petitioners nor the city
27 cite to local land use provisions that apply to city expressions of support for the acquisition
28 of property by tribes. Nor is the resolution a “significant land use decision” because, by
29 itself, it does not have any impact, significant or otherwise, on present or future uses of land.
30 The decision that may have a significant impact is being made by others, in this case the

1 Secretary of the Interior. The resolution is merely an expression of conditional support for
2 the tribes to proceed with their plan to acquire property for use as a casino so long as the
3 project receives all of the requisite federal and state approvals. *See Citizens for Better Transit*
4 *v. City of Portland*, 15 Or LUBA 278 (1987) (A city resolution which endorses a program
5 funded by the Federal Highway Administrator and constructed by the state Department of
6 Transportation, is not a final land use decision subject to LUBA review). The resolution is
7 not a land use decision subject to LUBA's jurisdiction.

8 OAR 661-010-0075(11) permits any party to request, pursuant to ORS 34.102, that an
9 appeal be transferred to the circuit court of the county in which the appealed decision was
10 made in the event LUBA determines that the appealed decision is not reviewable as a land
11 use decision. However, the request to transfer must be made within 10 days of the date a
12 challenge to LUBA's jurisdiction has been filed with the Board. No such request has been
13 made in this case. Therefore, we dismiss this appeal.

14 The appeal is dismissed.