BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CITIZENS FOR PUBLIC ACCOUNTABILITY, Petitioner, vs. CITY OF EUGENE and DIVISION OF STATE LANDS, Respondents, and HYUNDAI ELECTRONICS AMERICA, Intervenor-Respondent.	LUBA No. 95-253 FINAL OPINION AND ORDER

Appeal from City of Eugene and Division of State Lands.

David A. Bahr, Eugene, represented petitioner.

Glenn Klein, City Attorney, Eugene, represented respondent City of Eugene.

William R. Cook, Assistant Attorney General, Salem, represented respondent Division of State Lands.

Steven L. Pfeiffer, Portland, represented intervenor-respondent.

LIVINGSTON, Chief Referee; HANNA, Referee, participated in the decision.

DISMISSED 07/22/96

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

Opinion by Livingston.

NATURE OF THE DECISION

Petitioner appeals a decision of the Division of State Lands (DSL) granting a removal-fill permit.

MOTION TO INTERVENE

Hyundai Electronics America (Hyundai) moves to intervene on the side of the respondent city in this proceeding. There is no opposition to the motion, and it is allowed.

FACTS[1]

Petitioner describes the challenged decision as follows:

> "[T]he land use decision of Respondents City of Eugene and the Division of State Lands, entitled 'In the Matter of Application RF 9842 by DAG Trust for a Removal-Fill Permit,' dated December 1, 1995. That decision grants Applicant DAG Trust Partnership a removal-fill permit and includes a determination that a proposal by Hyundai Electronics America to construct a semiconductor manufacturing facility in Lane County, Oregon, is 'in compliance with local land use policies and regulations.'" Notice of Intent to Appeal 1.

The specified decision is one made by DSL alone. It states that "D.A.G. Trusts Partnership is authorized in accordance with ORS 196.800 to 196.990 to perform the operations described in the attached copy of the application." The decision is supported by "Findings of

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[1]These facts are derived from materials filed by the parties. The record itself has not been filed.

Fact and Determinations."[2]

MOTIONS TO DISMISS

Both DSL and Hyundai (together, respondents) move to dismiss on the ground that this Board lacks jurisdiction over the challenged decision. They contend petitioner's only remedy is (or was) to request a contested case hearing under ORS 196.835.[3] As we stated in Stewart v. Division of State Lands, 25 Or LUBA 565 (1993), with respect to parallel provisions in ORS 196.825(6),[4]

> "This Board does not have jurisdiction to review state agency contested case orders. Pilling v. LCDC, 22 Or LUBA 188, 192 (1991). ORS 196.825(6)

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[2]The challenged decision and the "Findings of Fact and Determinations" are attached as Exhibit A to Petitioner's Response to Respondents' Motion to Dismiss (Petitioner's Response), dated January 9, 1996.

[3]ORS 196.835 provides, in relevant part:

> "Any person aggrieved or adversely affected by the director's grant of a [removal-fill] permit may file a written request for hearing with the director within 60 days after the date the permit was granted. If the director finds that the person making the written request has a legally protected interest which is adversely affected by the grant of a permit, the director shall set the matter down for hearing within 30 days after receipt of the request. The hearing shall be conducted as a contested case in accordance with ORS 183.415 to 183.430, 183.440 to 183.460 and 183.470. The permittee shall be a party to the proceeding. Within 45 days of the hearing the director shall enter an order containing findings of fact and conclusions of law. The order shall rescind, affirm or modify the director's original order. Appeals from the director's final order may be taken to the Court of Appeals in the manner provided by ORS 183.482. * * *"

[4]ORS 196.825(6) provides the opportunity for a contested case hearing to an applicant whose application for a permit has been denied or who objects to any of the conditions imposed. ORS 196.835 provides the opportunity for a contested case hearing to aggrieved or adversely affected persons.

> explicitly provides that DSL removal-fill permit decisions are contested case orders and that appeals of such orders are to the court of appeals, pursuant to ORS 183.482. Jurisdiction for initial review of state agency contested case orders is conferred on the court of appeals. Id. ORS 197.825(2)(d) explicitly provides that LUBA's jurisdiction '[d]oes not include those land use decisions of a state agency over which the Court of Appeals has jurisdiction for initial judicial review under ORS 183.400, 183.482 or other statutory provisions.'" Id. at 566.

The proceedings challenged in this appeal are at an earlier stage than those in Stewart; to call the challenged decision a contested case order is perhaps to jump the gun. However, we agree with respondents that petitioner's sole remedy on appeal from DLS's decision, stated in ORS 196.835, was to request a contested case hearing and, if desired, to appeal to the Court of Appeals from the order issued following the hearing.[5]

Petitioner argues that LUBA has jurisdiction over at least the city's determination that the proposed project is in compliance with local land use policies and regulations. Petitioner states that it is not "appealing DSL's permit in its entirety, only the land use decision announced at page nine of that document, which purports to find the applicant's proposed use consistent with local government land use standards." Petitioner's Response 1.

Petitioner refers specifically to the following finding

[5]We do not know whether petitioner requested a contested case hearing.

made by DSL in support of the challenged decision:

> "The project was reviewed relative to local land use issues and found to be in compliance with local land use policies and regulations. In June 1995, * * * Eugene's Planning Director, determined that the proposed use was consistent with local comprehensive plan and zoning ordinances. On August 7, 1995, * * * City of Eugene's attorney * * * stated that the proposed use for manufacture and assembly of electronic components and accessories was an outright permitted use in the I-1 zoned areas, and that the proposed use was consistent with and specifically contemplated with the Metro Plan. [A] City of Eugene planner, on June 26, 1995 stated that the proposed approach for development, protection, and wetland restoration and enhancement on the Willow Creek property was consistent with site designation criteria within the West Eugene Wetland Plan's [sic]; however, the Plan would need to be formally amended to include this site.
>
> "[DSL] finds that the project is in conformance with existing public uses of the site and the wetland functions and values inherent to the site and that the project is in compliance with the City of Eugene's acknowledged comprehensive plan and zoning ordinances. [DSL] further finds that the project is also consistent with uses designated for adjacent land in the West Eugene Wetlands Plan, a component of the acknowledged comprehensive plan." Findings of Fact and Determinations 9.

ORS 197.180(1) requires state agencies to take actions "that are authorized by law with respect to programs affecting land use" in a manner compatible with comprehensive plans and land use regulations. Under a rule adopted by the Land Conservation and Development Commission (LCDC), fill and removal permits are Class A state agency permits. OAR 660-31-012(1)(c). OAR 660-31-026(1)(d)(A)

requires an agency to determine whether or not a proposed permit complies with the Statewide Planning Goals and is compatible with the acknowledged comprehensive plan.

DSL rules require the agency to apply the rules stated in OAR Chapter 660, Division 31 and to confer with the local government to determine that actions taken by the agency are compatible with applicable land use plans and regulations. OAR 141-85-035(8), 141-85-050(2).[6] Both ORS 197.180(1) and the LCDC and DSL rules assign responsibility to the agency, rather than the local government, to make the ultimate compatibility determination. However, OAR 660-31-035(1) states:

> "Class A Permits. When making findings, state agencies may use the affected local government's compatibility determination when the agency finds the affected local government has determined that the proposed activity and use are compatible or incompatible with its Acknowledged Comprehensive Plan."

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[6]OAR 141-85-035(8) states:

> "The Director [of DSL] shall utilize the state permit compliance and compatibility rules (OAR 660-31-005 to 660-31-040) and the coordination agreement between the Division of State Lands and the Department of Land Conservation and Development to apply the Statewide Planning Goals to permit decisions."

OAR 141-95-050(2) states:

> "The director shall confer with local government to determine that the proposed fill activity is consistent with the applicable local comprehensive plan and ordinances and Statewide Planning Goals and the other policies of the removal-fill law and these administrative rules before approving permit issuance."

We held in Hudson v. City of Baker, 15 Or LUBA 650, 652-53 (1987) that a "final" compatibility determination by the local government, which necessarily concerns application of the local government's plan and land use regulations and is not a ministerial decision, is a "land use decision," as that term is defined in ORS 197.015(10). In Flowers v. Klamath County, 17 Or LUBA 1078 (1989), we stated:

> "We believe two factors govern whether a local government's determination of compatibility with its acknowledged plan and regulations, made as part of a state agency approval process, is a 'final' decision applying the local government's plan and regulations. First, the state agency must be required, by statute, rule or other authority, to assure that the proposal is compatible with the local government plan and regulations. Second, the state agency must be authorized, by statute, rule or other legal authority, to rely on the local government's determination of compatibility." Id. at 1083. (Emphasis in original.)

Both of those factors are satisfied in this case. DSL is required by its own rules to determine that actions taken by the agency are compatible with applicable land use plans and regulations. OAR 660-31-035(1) authorizes DSL to rely upon a local government's determination that a proposed project is compatible with its comprehensive plan and land use regulations. However, Hudson, Flowers and Knee Deep Cattle Company v. Lane County, 28 Or LUBA 288 (1994), aff'd 133 Or App 120 (1995), all concern Class B permits, for which local government compatibility determinations must be in writing. OAR 660-31-035(2), which governs Class B

permits, requires "written findings demonstrating compliance with the goals or compatibility with the acknowledged plan." In contrast, OAR 660-31-035(1), which governs Class A permits, does not expressly require that the affected local government's compatibility determination either be in writing or be supported by written findings.

Even so, the absence of a written local government determination raises the question of whether there actually is a local government determination upon which DSL relied or whether, instead, DSL made its own determination of compatibility based on evidence received from various local government employees and, perhaps, other sources.

The finding quoted above relies on the separate opinions of the city's chief planner, the city attorney and another planner. It is neither the product of a formal city process resulting in a final decision, nor even the determination of a designated city decision maker. Cf Weeks v. City of Tillamook, 113 Or App 285, 832 P2d 1246 (1992) (absence of formal motion and vote by city council on request that conditional use permit be revoked does not mean challenged decision is not final or that it is merely advisory). The determination of compatibility was actually made by DSL, based on the attorney's and planners' opinions, and not by the local government.

Because the compatibility determination portion of the challenged decision was not made by a city decision maker,

we agree with respondents that this Board lacks jurisdiction over petitioner's appeal.[7]

This appeal is dismissed.

[7]There may be other reasons, not briefed, that require we dismiss. Petitioner's notice of intent to appeal identifies the December 1, 1995 DSL decision as the decision being appealed. Our rules require the notice of intent to appeal include, among other things, the full title of the decision to be reviewed as it appears on the final decision, the date the decision to be reviewed became final, and a concise description of the decision to be reviewed. OAR 661-10-105(3). Petitioner's failure to comply with OAR 661-10-105(3) is not merely a technical defect, because we do not know what or whose decision petitioner wishes to appeal. Moreover, the planning director's compatibility determination was made in June, 1995. While certain circumstances might justify filing the notice of intent to appeal six months later, assuming that is the determination petitioner wishes to appeal, petitioner does not show those circumstances apply here.