

1 Opinion by Holstun.

2 NATURE OF THE DECISION

3 Petitioner challenges the Seaside Improvement Commission's
4 (commission's) decision to accept participant-responder's
5 (participant's) proposal to lease air rights over property
6 owned by the commission to construct a multi-story parking
7 structure.

8 FACTS AND PROCEDURAL HISTORY

9 This appeal is the third challenge of actions by the
10 commission and Seaside City Council¹ (council) concerning
11 this property. The property is located adjacent to the
12 Promenade in the City of Seaside.

13 In Hemstreet v. Seaside Improvement Commission, ___ Or
14 LUBA ___ (LUBA No. 87-094, April 22, 1988) we dismissed
15 petitioner's appeal of the commission's request that the
16 council transfer ownership of the property to the commission.
17 In Hemstreet v. City of Seaside, ___ Or LUBA ___ (LUBA No.
18 87-096, April 22, 1988) we dismissed petitioner's challenge of
19 the council's decision to comply with the commission's
20 request. In each case, we concluded the challenged decisions
21 were not land use decisions subject to our review. Our
22 statement of the relevant facts in those cases was as follows:

23 "On April 11, 1983, the Council adopted a resolution
24 authorizing purchase of the property at issue in this
25 appeal. Deeds dated May 5, 1983 and May 19, 1983 were
26 executed to convey the property to the City of
Seaside. Although the property was deeded to the City
of Seaside, rather than to the Trails End Urban
Renewal District, funds for the purchase of the

1 property came from a bond issue by the latter.
2 Following this transfer, the Property Acquisition Map
[of the Trails End Urban Renewal Plan] was amended to
3 show the property as 'acquired.' (footnote omitted)

4 "On October 7, 1987, the Commission took the action
5 challenged in [LUBA No. 87-094] 'to request the city
6 council to place ownership of the property purchased
7 with the urban renewal funds in the name of the urban
renewal district.' * * * On October 12, 1987, the
8 Council took action to approve placing the property
into the name of the urban renewal district. That
action is challenged in LUBA No. 87-096. * * *"
Hemstreet v. Seaside Improvement Commission, supra,
9 slip op at 5.

10 Following the above described actions leading to Hemstreet
v. Seaside Improvement Commission and Hemstreet v. City of
11 Seaside, the commission advertised for proposals for lease of
12 air space over the property in dispute. On December 2, 1987,
13 the commission conducted a public meeting at which it
14 considered three proposals submitted by petitioner and one
15 proposal submitted by participant. By majority vote, the
16 commission approved a motion to accept the proposal submitted
17 by participant. This appeal followed.

18 JURISDICTION

19 In his brief, participant did not challenge our
20 jurisdiction in this appeal.² However, at oral argument we
21 questioned our jurisdiction to consider the challenged
22 action.³

23 A. Requirement for a Writing

24 The decision appealed in this proceeding is as follows:

25 "Motion to accept Mr. Hammon's proposal, based on
26 further details to be agreed upon by the attorneys and
Administrative Officer, and subject to the approval of

1 the Improvement Commission; carried by the following
2 roll call vote * * *." Record 8.

3 Neither party questions whether the minutes, which are the only
4 written evidence of the commission's decision, satisfy the
5 requirement in OAR 661-10-010(3) that a decision be reduced to
6 "writing" before it can be final.⁴

7 We will assume the minutes satisfy the requirement in
8 OAR 661-10-010(3) for a "writing." Astoria Thunderbird v. City
9 of Astoria, 13 Or LUBA 297, 300 (1985). However, the
10 OAR 661-10-010(3) requirement that a decision be in writing
11 before it can become final does not determine whether a
12 decision is, as a matter of substance and procedure, otherwise
13 a "final" decision as required by ORS 197.015(10). In other
14 words, with respect to land use decisions, all final decisions
15 must be in writing, but some written decisions may not be
16 final. Some written decisions are tentative or preliminary and
17 require further action before there is a "final decision" as
18 that term is used in ORS 197.015(10).

19 B. Statutory Requirement for Finality

20 ORS 197.015(10) requires a land use decision to be a final
21 decision. In 1000 Friends of Oregon v. Clackamas County, 3 Or
22 LUBA 233 (1981), we concluded the county's decision adopting
23 plan and zone designation changes was a final decision,
24 notwithstanding the county's express provision in its decision
25 that the amendments would not be effective until other actions
26 were taken by the Metropolitan Service District and the

1 Portland Area Local Government Boundary Commission. Id. at
2 233-234. However, in Ehlen v. Portland, 1 Or LUBA 134 (1980)
3 we found a resolution requesting the boundary commission to
4 approve an annexation under ORS 199.490(1)(a) was not a final
5 decision. We distinguished the decisions in those cases noting
6 the county's decision in 1000 Friends of Oregon v. Clackamas
7 County was sufficient, by itself, to affect the permissible use
8 of land while the resolution in Ehlen was a preliminary step
9 that would never, by itself, affect the use of land. 1000
10 Friends of Oregon v. Clackamas County, supra at 235.⁵

11 In NOPE in Mulino v. Port of Portland, 2 Or LUBA 243
12 (1981), we held the port director's decision selecting a
13 preferred airport site and authorizing preparation of a master
14 plan and environmental assessment was not a final decision.
15 Id. at 244. In Grant County v. Oregon Dep't. of Fish and
16 Wildlife, 1 Or LUBA 214 (1980), we examined a decision very
17 similar factually to the decision in this proceeding.⁶ In
18 that case, the Oregon Fish and Wildlife Commission approved a
19 motion to authorize the staff to proceed with negotiation for
20 trading property owned by the Fish and Wildlife Commission for
21 a specific ranch. The motion stated that the proposal was to
22 be brought back to the Fish and Wildlife Commission for
23 approval. Id. at 216.

24 While it is possible to distinguish the decision to pursue
25 a proposal for exchange of property in Grant County from the
26 decision to accept a proposal subject to agreement on the terms

1 for a lease in this case, we do not believe the distinction is
2 significant in this case. Both the decision of the Fish and
3 Wildlife Commission in Grant County and that of the Seaside
4 Improvement Commission in this case are expressly subject to
5 further negotiations and later approval by the governing body.
6 In both cases, any number of events could prevent that ultimate
7 approval from being granted. Such decisions are not "final" as
8 that term is used in ORS 197.015(10).⁷

9 We conclude the commission's decision does not meet the
10 statutory definition of a land use decision because it is not a
11 final decision.

12 C. Significant Impact Test Requirement for Finality

13 We noted in CBH v. City of Tualatin, ___ Or LUBA ___ (LUBA
14 No. 87-097, February 9, 1988):

15 "Under either [the statutory test or the significant
16 impact test], a 'land use decision' must be a final
17 decision. The requirement of finality is part of the
18 statutory test by virtue of the explicit provisions of
19 ORS 197.015(10)(a) requiring that a land use decision
20 be a final decision. The requirement of finality is
21 inherently part of the 'significant impact' test
22 because a decision cannot have significant impacts on
23 land use unless it is a final effective decision."
24 Id., slip op at 11.

25 As participant notes, the Supreme Court in City of
26 Pendleton v. Kerns, supra, suggested finality is also required
under the significant impact test:

27 "A city's final decision authorizing a significant
28 project of this nature is, as a result, reviewable by
29 LUBA * * *." (Emphasis added.) Id. at 133.

30 We believe the Supreme Court would conclude that only "final

1 decisions" can have a significant impact on land use, as the
2 court uses that concept.

3 Potentially, the commission's decision in this case will
4 lead to a significant impact on land use. However, the lease
5 remains to be negotiated and must be approved by the
6 commission. In addition, permits or other approvals may be
7 required under the city's land use regulations before
8 construction of the proposed parking structure can occur. A
9 decision that only "will have potential impact" does not
10 satisfy the significant impact test. Billington v. Polk
11 County, 299 Or 471, 479, 703 P2d 232 (1985).

12 We conclude the commission's decision does not satisfy the
13 significant impact test for a land use decision. Because we
14 conclude the commission's decision satisfies neither the
15 statutory test nor the significant impact test, its decision is
16 not a land use decision subject to our review.⁸

17 This appeal is dismissed.

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FOOTNOTES

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The commission is the Urban Renewal agency for the municipality of Seaside. The commission was created pursuant to ORS 457.045(3) which allows urban renewal agency powers to be exercised by the municipality's governing body. Although the same elected officials serve on both the council and the commission, the council and commission are separate governing bodies.

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The Seaside Improvement Commission did not file a brief in this appeal.

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LUBA has exclusive jurisdiction to review land use decisions of a local government, special district or state agency. ORS 197.825(1). "Land use decision" is defined in ORS 197.015(10) as follows:

"'Land use decision':

"(a) Includes:

"(A) A final decision or determination made by a local government or special district 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 * * *.

"* * * * *"

In addition to decisions satisfying the definition of land use decision in ORS 197.015(10), LUBA has jurisdiction to review decisions satisfying the "significant impact test" enunciated in Petersen v. Klamath Falls, 279 Or 249, 252-254, 566 P2d 1193 (1977), and City of Pendleton v. Kerns, 294 Or 126, 133, 653 P2d 992 (1982).

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OAR 661-10-010(3) provides as follows:

"'Final decision': A decision becomes final when it is reduced to writing and bears the necessary signatures of the decisionmaker(s) * * *."

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In Citizens for Better Transit v. Metro, 15 Or LUBA 623 (1987) we concluded a resolution directing staff to prepare an ordinance to amend the Regional Transportation Plan was not a final decision. However, the resolution also adopted an amendment to the Transportation Improvement Program. We concluded this latter amendment would have a significant impact on land use and therefore was a land use decision. Id. at 623-624.

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That decision also was reflected only in minutes as follows:

"Commissioner Boyer moved to authorize the staff to proceed with negotiations for trading the Sutphin Ranch for the Murderers Creek Base Ranch in Grant County per staff recommendation and to develop a proposal for the commission to consider. Commissioner Klarquist seconded the motion. Commissioners Klarquist, Kelly, Boyer and Barth voted yes. Commissioner Steiwer voted no and the motion carried." Grant County v. Oregon Dep't. of Fish and Wildlife, 1 Or LUBA at 216.

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As petitioner notes, the commission's decision has the practical effect of denying his proposals. However, as we view the commission's decision, its practical effect of denying petitioner's proposals is also not yet final. Unless and until the lease referred to in the motion is completed and approved by the commission, petitioner's proposals could again be considered and approved. See CBH v. City of Tualatin, ___ Or LUBA ___ (LUBA No. 87-097, February 9, 1988) (when city council remands application for further consideration by lower approval authority there is no final decision until those deliberations are concluded, even though the temporary effect is to deprive applicant of the approval previously granted by the lower approval authority).

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We need not and do not decide in this opinion whether subsequent action by the commission to approve the lease, if such action occurs, will result in a statutory test or significant impact test land use decision.