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

1
2
3 STANDARD INSURANCE COMPANY,)
 an Oregon corporation,)
 4)
 Petitioner,)
 5)
 vs.)
 6)
 CITY OF HILLSBORO,)
 7)
 Respondent,)
 8)
 and)
 9)
 HILLMAN POWELL COMPANY and)
 10 ALBERTSON'S, INC.,)
)
 11 Intervenors-Respondent.)

LUBA No. 88-120
FINAL OPINION
AND ORDER

12 Appeal from City of Hillsboro.

13 Jack L. Orchard, Portland, filed the petition for review
 14 and argued on behalf of petitioner. With him on the brief was
 Ball, Janik & Novack.

15 Lawrence R. Derr, Portland, filed a response brief on
 16 behalf of respondent and intervenors-respondent. With him on
 the brief was Weiss, DesCamp & Botteri. Paul R. Hribernick
 17 argued on behalf of respondent. Lawrence R. Derr argued on
 behalf of intervenors-respondent.

18 SHERTON, Referee, HOLSTUN, Chief Referee, participated in
 the decision.

19 REVERSED 04/26/89

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

1 Opinion by Sherton.

2 NATURE OF THE DECISION

3 Petitioner appeals a City of Hillsboro decision denying
4 petitions for reconsideration of a Washington County decision
5 approving a comprehensive plan map amendment from Industrial
6 (IND) to Neighborhood Commercial (NC) for a ten acre tract at
7 the intersection of Walker Road and 185th Avenue.

8 MOTION TO INTERVENE

9 Hillman Powell Company and Albertson's, Inc., move to
10 intervene on the side of respondent in this proceeding. There
11 is no opposition to the motion, and it is allowed.

12 FACTS

13 This is the fourth time a plan map amendment from IND to NC
14 for the subject property has been appealed to LUBA. Our first
15 two reviews resulted in decisions remanding the amendment.

16 Standard Insurance Company v. Washington County, ___

17 Or LUBA ___ (LUBA No. 87-020, September 1, 1987) (Standard I);

18 Standard Insurance Company v. Washington County, ___

19 Or LUBA ___ (LUBA No. 88-005, June 7, 1988) (Standard II).¹

20 Our decision in Standard II was appealed to the Court of
21 Appeals, which issued an opinion affirming our decision on

22 October 5, 1988. Standard Insurance Company v. Washington
23 County, 93 Or App 276, 761 P2d 1348 (1988). A petition for

24 review of the Court of Appeals decision was filed with the

25 Oregon Supreme Court. The Supreme Court issued an order

26 acknowledging withdrawal of the petition for review on

1 January 10, 1989. The Court of Appeals issued its mandate in
2 Standard II on February 3, 1989.

3 Prior to the issuance of the Court of Appeals mandate, the
4 county commenced proceedings to address the deficiencies in its
5 decision identified by the Court of Appeals and this Board in
6 their opinions in Standard II. On November 8, 1988, the
7 Washington County Board of Commissioners (board of
8 commissioners) adopted a resolution and order approving the
9 plan amendment. Petitions for reconsideration of that decision
10 were filed by Robert Lamb on November 8 and by petitioner on
11 November 9, 1988. Under the Washington County Community
12 Development Code (CDC), if a petition for reconsideration of a
13 decision of the board of commissioners is timely filed, that
14 decision does not become final until notice is given to the
15 parties that either reconsideration is denied or a reconsidered
16 decision is adopted.²

17 On November 9, 1988, the subject property was annexed by
18 the City of Hillsboro. On December 20, 1988, the Hillsboro
19 City Council (city council) denied the petitions for
20 reconsideration that were filed with the board of commissioners
21 on November 8 and 9, 1989.³

22 STANDING

23 The "Standing of Petitioner" section of the petition for
24 review contains allegations that (1) petitioner participated in
25 the December 20, 1988 proceeding before the city; (2)
26 petitioner was one of two parties to file a petition for

1 reconsideration of the county's November 8, 1988 decision; and
2 (3) petitioner's petition for reconsideration was at issue
3 before the city council.

4 The city and intervenors-respondent (respondents) challenge
5 the third allegation. Respondents argue that when petitioner
6 filed its petition for reconsideration with the county on
7 November 9, 1988, the county no longer had authority over the
8 subject property because of its annexation to the city,
9 effective that date. According to respondents, this means the
10 city could not act on petitioner's petition because it was
11 filed with the wrong entity. Respondents concede that the
12 separate petition for reconsideration filed by Robert Lamb was
13 properly filed and acted upon by the city. However,
14 respondents maintain that petitioner cannot appeal from the
15 city's denial of Lamb's petition and, therefore, has no
16 standing.

17 Both the City of Hillsboro's and Washington County's
18 comprehensive plans and land use regulations have been
19 acknowledged by the Land Conservation and Development
20 Commission. LCDC 84-ACK-058 (April 2, 1984); LCDC 83-ACK-218
21 (November 25, 1983). The challenged city decision to deny the
22 petitions for reconsideration of the county's November 8, 1988
23 decision approving an amendment to the county's acknowledged
24 comprehensive plan purported to apply the procedural provisions
25 of the CDC and, therefore, to have the effect of making a final
26 decision on the plan amendment. Record 168.

1 ORS 197.620(1) provides in pertinent part:

2 "Notwithstanding the requirements of ORS 197.830(2)
3 and (3) [concerning standing to initiate appeals to
4 LUBA], persons who participated either orally or in
5 writing in the local government proceedings leading to
6 the adoption of an amendment to an acknowledged
comprehensive plan or land use regulation or a new
land use regulation may appeal the decision to the
Land Use Board of Appeals under ORS 197.830 to
197.845. * * * "

7 Petitioner alleges in its petition for review that it
8 participated in the December 20, 1988 proceeding in the
9 appealed matter before the city council. Respondents do not
10 challenge this allegation. Under ORS 197.620(1), this
11 allegation is sufficient to establish petitioner's standing to
12 appeal the city's decision.⁴

13 FIRST ASSIGNMENT OF ERROR

14 "The City of Hillsboro lacked jurisdiction to hear any
15 proceedings relating to the comprehensive plan
16 amendment at issue in County Case No. 86-396-M because
the case was pending before the appellate courts at
all times relevant to the City's actions."

17 Petitioner asserts that the legal and factual bases of this
18 assignment of error are the same as those in petitioner's first
19 assignment of error in Standard IV. Petitioner contends local
20 governments lack jurisdiction over a plan amendment decision
21 while that decision is on appeal to LUBA or the appellate
22 courts. Indeed, the parties make the same arguments with
23 regard to this assignment of error as they did under the first
24 assignment of error in Standard IV.

25 We issued this date a final opinion and order in
26 Standard IV sustaining petitioner's first assignment of error

1 and reversing the county's decision. Our decision to sustain
2 the virtually identical first assignment of error in
3 Standard IV was based on our conclusion that counties do not
4 have jurisdiction to take further action on a land use decision
5 while review of that decision is pending before LUBA or the
6 appellate courts. Respondents in this case do not identify,
7 and we do not find, any additional statutory authority
8 possessed by cities to take such actions.

9 The first assignment of error is sustained based on the
10 reasons stated with regard to the first assignment of error in
11 Standard Insurance Company v. Washington County, ___
12 Or LUBA ___ (LUBA No. 88-109, April 26, 1989). This requires
13 us to reverse the city's decision. ORS 197.835(8)(a)(A);
14 OAR 661-10-071(1)(a).

15 SECOND ASSIGNMENT OF ERROR

16 "The City improperly placed reliance on void County
17 proceedings and decisions in making its decision
18 recognizing the comprehensive plan amendment. Because
19 the County had no jurisdiction to undertake any
proceedings with respect to the plan amendment, any
City action in reliance upon void County proceedings
is, itself, invalid."

20 Petitioner argues the city's decision merely completed and
21 incorporated the decision making process improperly started by
22 the county. According to petitioner, because the county lacked
23 jurisdiction for the reasons given in the first and second
24 assignments of error in Standard IV, "the county's actions were
25 void, [and] the city had no legal right to rely upon those
26 actions." Petition for Review 10.

1 Respondents argue this assignment of error is premised on
2 an assumption that the county's actions were void for lack of
3 jurisdiction. According to respondents, because this premise
4 is false, this assignment of error must be denied.

5 As discussed under the previous assignment of error, in our
6 decision in Standard IV issued this date, we sustained
7 petitioner's first assignment of error, concluding that the
8 county did lack jurisdiction to take any action on the
9 challenged plan amendment decision while review of the decision
10 was pending before the Court of Appeals.⁵ Because the
11 county's acts were void for lack of jurisdiction, a city
12 decision relying on those actions cannot be upheld.

13 The second assignment of error is sustained.

14 THIRD AND FOURTH ASSIGNMENTS OF ERROR

15 "The City has improperly applied ORS 215.130(2) in
16 purportedly adopting a final order approving the
17 comprehensive plan amendment by virtue of the City's
18 decision concerning the petitions for reconsideration
19 previously filed with the county."

18 "The City process in acting upon petitions for
19 reconsideration and the entry of a final order in
20 County Case File No. 86-396-M was accomplished both
21 through an improper procedure and constituted an
22 illegal comprehensive plan amendment."

21 In the third and fourth assignments of error, petitioner
22 challenges the city's ability, and procedures used, to step
23 into the "shoes" of the board of county commissioners and
24 complete the quasi-judicial plan amendment process begun by the
25 county, after the property was annexed by the city. With
26 regard to these assignments, petitioner states "[i]n the event

1 that LUBA decides the first two assignment [sic] of error
2 adversely to Petitioner, the following assignments of error
3 should be considered by LUBA." Petition for Review 10.

4 We sustain petitioner's first two assignments of error,
5 either of which requires us to reverse the city's decision. We
6 are aware that ORS 197.835(10)(a) generally requires us, when
7 reversing or remanding a land use decision, to decide all
8 issues presented to us.⁶ We believe the purpose of this
9 provision is to provide needed guidance to the local government
10 making the decision, so that it may, if possible, correct all
11 deficiencies in its decision without the need for repeated
12 appeals to this Board.

13 However, we do not believe that addressing all issues
14 raised by petitioner with regard to the city's completion of
15 the county quasi-judicial proceeding would serve a useful
16 purpose in this particular case. The county acted in
17 Standard IV without jurisdiction. Since the subject property
18 has been annexed, The county will not regain jurisdiction over
19 the matter. The city, therefore, will not again be in a
20 position to argue it may step into the board of county
21 commissioners' "shoes" to finalize a plan amendment by denying
22 petitions for reconsideration filed with the county. We,
23 therefore, decline to address the third and fourth assignments
24 of error.

25 The county's decision is reversed.

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FOOTNOTES

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A third appeal of the plan amendment is pending before LUBA in Standard Insurance Company v. Washington County, LUBA No. 88-109. See n 3, infra. In addition, development review approval for a supermarket on the subject property was appealed to us in Standard Insurance Company v. Washington County, LUBA No. 88-015 (Standard III). We initially issued an order reversing that approval. However, our decision was appealed to the Court of Appeals, and in Standard Insurance Company v. Washington County, 93 Or App 276, ___ P2d ___ (1988), the court directed we change our disposition of the case to a remand. See Standard III, ___ Or LUBA ___ (LUBA No. 88-015, Order on Remand from Court of Appeals, January 13, 1989).

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Washington County Community Development Code (CDC) 211-2 provides:

"Decisions of the Board on an application shall be deemed final as follows:

"211-2.1 If no petition for reconsideration is timely filed, the decision shall be deemed final on the date notice of the decision was provided to the parties;

"211-2.2 If a petition for reconsideration is filed and denied, the decision shall be deemed final on the date notice of the denial of reconsideration is provided to the parties;

"211-2.3 If a petition is filed and reconsideration granted, the decision shall be deemed final on the date notice of decision on the development, as reconsidered, is provided."

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On November 15, 1988, the board of commissioners made a decision denying the same petitions for reconsideration. That decision is on appeal in Standard Insurance Company v. Washington County, LUBA No. 88-109 (Standard IV). A separate final opinion and order in that appeal is issued this date. We shall refer to the appeal proceeding challenging the city's decision on the petitions for reconsideration, which is the subject of this opinion, as Standard V.

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Since we view petitioner's allegation that its petition for reconsideration was at issue before the city council as mere surplusage, no purpose would be served by considering respondents' claim that petitioner's petition for reconsideration was not properly before the city.

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In Standard IV, we also upheld petitioner's second assignment of error. We found that the county lacked jurisdiction to deny the petitions for reconsideration of its November 8, 1988 decision after the city annexed the subject property on November 9, 1988. Our ruling on that assignment of error concerned only the validity of county actions occurring after annexation of the subject property by the city. The city decision challenged in this case, Standard V, depends on the validity of the county actions on the plan amendment taken before annexation occurred. Our ruling on the second assignment of error in Standard IV, therefore, does not provide a serarate basis for upholding petitioner's second assignment of error in Standard V.

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ORS 197.835(10)(a) provides:

"Whenever the findings, order and record are sufficient to allow review, and to the extent possible consistent with the time requirements of ORS 197.830(12), the board shall decide all issues presented to it when reversing or remanding a land use decision described in subsections (2) through (8) of this section."