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BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DALE DICKERT, DARREN PENNINGTON,)
RICHARD E. GENTES and CITIZENS)
FOR ACCOUNTABILITY IN PRISON)
SITING, INC.,)

Petitioners,)

LUBA No. 98-101

vs.)

FINAL OPINION
AND ORDER

CITY OF WILSONVILLE,)

Respondent.)

Appeal from City of Wilsonville.

John Junkin, Portland, represented petitioners.

Michael E. Kohlhoff, City Attorney, represented respondent. With him on the pleadings was Joan S. Kelsey, Assistant City Attorney.

GUSTAFSON, Board Chair; HANNA, Board Member, participated in the decision.

DISMISSED 08/18/98

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

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the city's request to Metro, asking
4 Metro to amend metropolitan urban reserve areas and the
5 metropolitan urban growth boundary.

6 **FACTS**

7 Pursuant to OAR 660-21-020, Metro has exclusive authority
8 to designate and amend urban reserve areas and the urban
9 growth boundary (UGB) for the Portland metropolitan area.
10 Urban reserve areas and the UGB adopted by Metro become part
11 of the comprehensive plans of local governments within the
12 metropolitan region. Metro Code 3.01.012 sets forth criteria
13 for proposed amendments to urban reserve areas and the
14 metropolitan UGB. Such proposals are subject to a three-step
15 process: (1) a local government proposes the amendment to
16 Metro; (2) Metro conducts hearings and Metro decides whether
17 or not to adopt the proposed amendment; and (3), if Metro
18 adopts the proposed amendment, the city conducts proceedings
19 to annex the affected area.

20 In May 1998, the city's planning commission conducted
21 public workshops regarding possible expansion of urban reserve
22 area 42 northwest of the city and the proposed state siting of
23 a corrections facility in that area. After receiving public
24 comment, the planning commission drafted a concept plan that
25 proposes expanding urban reserve area 42 to include the site
26 of the proposed correctional facility. On May 28, 1998, the

1 city planning staff submitted the concept plan to Metro as the
2 first step in the process necessary to amend urban reserve
3 area 42.

4 Petitioner appeals the city's submission of the concept
5 plan to Metro.

6 **JURISDICTION**

7 The city moves to dismiss this appeal, arguing that we
8 lack jurisdiction because (1) the subject of the appeal is not
9 a "land use decision" as that term is defined at ORS
10 197.015(10) or, if it is a land use decision, because (2) that
11 decision is not final.¹

12 Both arguments rest on the same premise: that a request
13 from one local government that another local government make a
14 land use decision subject to its jurisdiction is not an
15 appealable final decision. See Sensible Transportation v.
16 Metro. Service Dist., 100 Or App 564, 787 P2d 498, rev. den.

¹ORS 197.015(10) provides:

"'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[.]

"* * * * *"

1 310 Or 70 (1990). Further, anticipating petitioners' argument
2 that the challenged decision causes "significant impacts" and
3 is thus subject to our jurisdiction under the test stated in
4 Billington v. Polk County, 299 Or 471, 703 P2d 232 (1985), the
5 city argues that its request to Metro has no impacts itself
6 and by its nature is not final.²

7 Petitioners respond that the city's action is a final, de
8 facto amendment of its comprehensive plan, analogizing to
9 Central Eastside Industrial Council v. City of Portland, 128
10 Or App 148, 875 P2d 482 (1994). In Central Eastside
11 Industrial Council, the city's comprehensive plan allegedly
12 required that a certain highway ramp be built. The challenged
13 decision was the city's adoption of a resolution requesting
14 that the Oregon Department of Transportation not build the
15 highway ramp. LUBA concluded that it lacked jurisdiction
16 because the resolution was simply a recommendation from one
17 governmental body to another. The Court of Appeals disagreed

²The city's motion argues, in addition, that because the challenged decision is not a final land use decision subject to our jurisdiction there is no record of any local government proceedings to transmit to LUBA, as required by OAR 661-10-025(2). The city also suggests the reverse: that the lack of a local record means that the city did not make a final land use decision.

Although transmission of the local record pursuant to OAR 661-10-025(2) was not necessary in this case to resolve the issue of jurisdiction, we write to express our disagreement with the city's approach to satisfying the obligations of OAR 661-10-025(2). It is obvious, and the city admits, that the city engaged in public proceedings leading up to the challenged decision. Whether, in the city's opinion, that decision is a final land use decision is irrelevant to the city's obligation to transmit the local record of those proceedings to LUBA. The city's approach places the cart before the horse and, at least in those cases where the record is necessary for LUBA to determine whether it has jurisdiction, threatens to delay resolution of review proceedings.

1 that a decision is not a final land use decision merely
2 because it purports to be a recommendation from one unit of
3 government to another. The court remanded the issue to LUBA
4 to determine whether

5 "the comprehensive plan require[s] the building of
6 the ramp, or contain[s] other requirements to which
7 the recommendation is contrary or the substance of
8 which applies to the recommendation? If so, are
9 there further actions by the city or other bodies
10 that must occur before the ramp project is rejected
11 or abandoned and that must culminate in a decision
12 by the city to amend the plan or otherwise apply and
13 demonstrate compliance with it? If the answer to
14 the first question is 'yes' and the answer to the
15 second is 'no,' the present decision is final and
16 reviewable." 128 Or App at 153-54 (emphasis in
17 original).

18 Petitioners argue that the city's request in this case is
19 the final action insofar as the city is concerned, that all
20 further steps belong to Metro, and therefore the present case
21 falls within the holding of Central Eastside Industrial
22 Council. We disagree with petitioners' conclusion. The
23 second inquiry stated in Central Eastside Industrial Council
24 is whether "further actions by the city or other bodies" must
25 occur before the city's plan is amended. Id. at 153 (emphasis
26 added). As petitioners concede, further action by Metro is
27 required before the urban reserve area is amended and hence
28 before the city's comprehensive plan is amended. The question
29 under Central Eastside Industrial Council is whether the
30 city's unilateral action had effectively amended the
31 comprehensive plan. We conclude that the city has not made a
32 final land use decision where the city's action is the first

1 step of a process that requires action by another government
2 in order to amend the city's comprehensive plan.

3 Petitioners argue in the alternative that the challenged
4 decision meets the "significant impact" test described in
5 Billington. Petitioners acknowledge that a decision that
6 meets the significant impact test must be a final decision in
7 order for LUBA to possess jurisdiction; however, petitioners
8 argue that the decision is final insofar as the city is
9 concerned and hence final for purposes of our jurisdiction.
10 We reject that argument for the reasons expressed above.

11 The appeal is dismissed.