BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KASCH'S GARDEN CENTERS & NURSERIES, INC., Petitioner, vs. CITY OF MILWAUKIE and CITY OF PORTLAND, Respondents.	LUBA No. 85-097 FINAL OPINION AND ORDER

Appeal from City of Milwaukie.

Barry L. Adamson, Portland, filed the petition for review. With him on the brief were Williams, Fredrickson, Stark, Norville & Weisensee, P.C. Frederick E. Cann, Portland, argued on behalf of petitioner.

Greg Eades, Milwaukie, filed a response brief and argued on behalf of Respondent City of Milwaukie.

Ruth Spetter, Portland, filed a Statement of Intent to Participate and a brief on behalf of the City of Portland.

Eleanor Baxendale, Portland, filed a brief in intervention and argued on behalf of Metro.

KRESSEL, Chief Referee; BAGG, Referee; DuBAY, Referee, participated in the decision.

DISMISSED 04/30/86

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

Opinion by Kressel.

NATURE OF DECISION

Petitioner appeals Resolution No. 30 - 1985 of the Milwaukie City Council. The resolution endorses a program of highway improvements proposed by the Metropolitan Service District (Metro). The program is known as the McLoughlin Corridor Improvement Program (program).

FACTS

Petitioner conducts a retail nursery business near the intersection of SE Tacoma Street and McCloughlin Boulevard in Portland. Petitioner also conducts a landscaping contracting business on SE Johnson Creek Boulevard in Milwaukie.

Petitioner alleges that its properties could be adversely affected by implementation of parts of the improvement program. First, the program could affect petitioner's Portland property (the nursery) by realigning SE Tacoma Street and constructing an overpass at its intersection with McLoughlin Boulevard. Second, traffic flow near petitioner's Milwaukie property would allegedly be affected by proposed changes to SE Johnson Creek Boulevard.

The improvement program involves numerous units of government and has a long history. A review of the steps leading up to respondent's adoption of Resolution No. 30 - 1985 is helpful to an understanding of the issues presented in this appeal.

Metro, which has responsibility for regional transportation

planning, ORS 268.390, set the program in motion in 1979. Over 20 million dollars of federal interstate transfer funds (money originally allocated to the Mount Hood Freeway Project) were authorized for engineering, acquisition and construction of improvements in the corridor[1] connecting the City of Milwaukie to the Union/Grand Couplet in southeast Portland. In 1982, Metro incorporated the corridor improvement program in its Regional Transportation Plan. The plan designated McLoughlin Boulevard as a principal arterial, to be reconstructed and widened.

Following Metro's identification of the need for the project, studies were conducted by the Oregon Department of Transportation (ODOT). The studies resulted in a recommendation in 1983 that the improvement project be undertaken in four phases. The first phase involves the Tacoma Street overpass and related improvements at Portland's southern boundary.

Opposition to several aspects of the four-phase program was expressed by affected municipalities in 1983. As a result, Metro held up the funds for plan implementation until a consensus could be achieved.

The challenged resolution was prepared by Metro in September, 1985. The resolution was intended to be the vehicle by which all the affected municipalities could approve ("endorse") the project design as revised. The resolution is in four parts.

Part one states that all jurisdictions endorse construction of the "full McLoughlin Boulevard highway improvement." The four phases of the improvement, including the Tacoma Overpass, are then outlined. The resolution also endorses certain allocations to the project from the McLoughlin Corridor Reserve Account.

In the second part of the resolution, all jurisdictions endorse "bus service and capital improvements as part of a comprehensive transportation improvement strategy" for the McLoughlin Corridor. Inclusion of light rail transit in Metro's Regional Transportation Plan for the corridor is also endorsed.

The third part of the resolution endorses "a policy intent to discourage through traffic on Johnson Creek Boulevard between McLoughlin Boulevard and SE 45th Avenue." Record at 9. This part of the resolution also endorses other policy objectives for traffic improvements in that area (e.g., "to design connections to Johnson Creek Boulevard to match the 25 mph design speed on existing street improvements"). Id. Part three also endorses "identification of east-west traffic problems in this area as an outstanding issue in the Regional Transportation Plan." The municipalities agree "to participate with Metro on an intergovernmental effort to resolve these issues." Record at 10.

Finally, in the fourth part of the resolution, all jurisdictions endorse funding allocations for the recommended

improvements and others that are "consistent with the McLoughlin Corridor Improvement Program." Id.

In August, 1985, a Metro representative presented a draft of the above-described resolution at a public hearing of the Milwaukie City Council. On November 19, 1985, the City Council held another public hearing, during which certain modifications of the draft resolution were adopted. The revised resolution was adopted at the conclusion of the November hearing.

INTERVENTION

Metro seeks to intervene on the side of respondent. Metro alleges it actively participated in the city's proceedings. As noted, the record shows that Metro prepared the challenged resolution and advocated its adoption by respondent.

The City of Portland also wishes to participate in the appeal. Portland alleges that it also participated in respondent's proceedings. The minutes of the November 19, 1985 hearing indicate that prior to the meeting the Milwaukie City Council received correspondence from the City of Portland concerning the overpass project. The minutes say the correspondence concerned an alternative to the Tacoma Overpass. However, the correspondence is not in the record.

ORS 197.830(5) provides:

> "(5) Within a reasonable time after a petition for review has been filed with the board, any person may intervene in and be made a party to the review proceeding upon a showing of compliance with subsection (2) or (3) of this section."

The cross references to ORS 197.830(2) and (3) in the

intervention statute raise some doubt about whether the legislature intended to authorize intervention on the side of respondent in a LUBA appeal. Both subsections concern who may petition LUBA for review of a land use decision. Further, ORS 197.830(5) allows intervention "within a reasonable time after a petition for review has been filed...", but the cross references to ORS 197.830(2) and (3) seem to limit the time for intervention to the time for the filing of the notice of intent to appeal (i.e., 21 days after the challenged land use decision is final).

We doubt the legislature intended to bar or create strict barriers to intervention on the side of the respondent in a LUBA appeal. Although ORS 197.830(2) and (3) are phrased in terms of standing to petition for review of a land use decision, we believe the legislature intended that one who would have standing to appeal a decision adverse to his stated interests may intervene as a respondent to defend the decision that is in accord with those interests. In our view, this approach to intervention best comports with the overall policy (if not the literal text) of the appeal provisions in ORS Chapter 197.

Applying the above standard of intervention, we conclude that Metro's motion should be allowed. Metro is the driving force behind the improvement project. As noted earlier, it is responsible for transportation planning in the affected region. Pursuant to federal law, Metro has also been

designated by the Governor as the metropolitan agency responsible for cooperative state/local transportation planning in the Portland urbanized area.

Metro actively participated in respondent's proceedings. In its role as a public planning agency it would be "aggrieved" (as the term is used in ORS 197.830) if the city refused to endorse the improvement program. See Benton County v. Friends of Benton County, 294 Or 79, 88, 653 P2d 1249 (1982). Correspondingly, we believe Metro should be permitted to defend the action since it was in accord with Metro's position.[2]

The City of Portland's request to participate in this appeal on the side of respondent stands on less solid ground than Metro's. Portland's involvement in respondent's proceedings was minor, at least as far as the record shows. Although Portland was on respondent's list of persons given notice of the decision, there is little else to show the nature of its interest in the proceedings. Portland's brief and other written memoranda provide very little information on this point. As noted, the record alludes to correspondence from Portland to the Milwaukie City Council, but the correspondence is not in the record. We cannot conclude on this record that Portland would be adversely affected or aggrieved if respondent had refused to adopt the challenged resolution.

Portland seems to rely on ORS 197.620(1) as the basis for its participation in the appeal. The statute reads:

"(1) Notwithstanding the requirements of ORS

> 197.830(2) and (3), persons who participated either orally or in writing in the local government proceedings leading to 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. A decision to not adopt a legislative amendment or a new land use regulation is not appealable."

The statute is not of assistance. The record does not show that respondent's resolution was "the adoption of an amendment to an acknowledged comprehensive plan or land use regulation or a new land use regulation."

Portland also relies on a procedural rule of this Board, OAR 661-10-020(1) in support of its request to participate in the appeal. The rule states:

> "(1) Any person identified in the Notice, other than the petitioner and governing body, who desires to participate as party in the appeal shall within 15 days of service of the Notice upon such person, file with the Board and serve on all parties designated in the Notice, a Statement of Intent to Participate. The Statement may be in the form set forth in Exhibit 2 of these rules."

Although Portland filed a timely notice of intent to participate, this is insufficient to establish intervention status. Once petitioner objected to Portland's involvement in the appeal, Portland was obligated to satisfy the intervention statute by demonstrating the nature of its interest in the appeal. Our procedural rule is neither designed nor intended to obviate the need to satisfy statutory intervention requirements where there is an objection to participation. The statute (ORS 197.830(5), not our rule, is controlling.

Portland has failed to show that it has standing to intervene in the appeal. Accordingly, we deny Portland's request to intervene on the side of respondent.

JURISDICTION

Jurisdictional disputes before LUBA commonly center on whether the challenged measure is a "land use decision" as defined by statute (ORS 197.015(10)) and decisional law (the "significant impact" test). Billington v. Polk County, 299 Or 471, 703 P2d 232 (1985). In some cases, the jurisdictional issue is whether the local decision is final, i.e., whether it has binding legal effect. As respondent points out, we have dismissed appeals of local actions that were tentative or advisory in nature, relying on the portion of ORS 197.015(10)(a) defining "land use decision" as a final decision or determination. See, e.g. NOPE v. Port of Portland, 2 Or LUBA 243 (1980) (approval of study identifying site for airport and authorizing preparation of master plan was not a final land use decision). See Allen Associates v. City of Beaverton, 11 Or LUBA 140, 145-46 (1984).

Respondent and Metro urge us to dismiss this appeal on grounds that the challenged resolution is not a final land use decision, but is instead an expression of advice to Metro and ODOT. Respondent's brief states:

> "ORS 197.015(10) grants LUBA jurisdiction over 'final decisions.' The Board has consistently refused jurisdiction where further action is required for finality sufficient for review. Stewart v. Metropolitan Wastewater Management Commission, 3 Or

> LUBA 216 (1981) (Motion to accept consultant's report and proceed with acquisition of site); N.O.P.E. in Mulino v. Port of Portland, 2 Or LUBA 243 (1980) (approval of study recommending site and authorizing master plan and environmental assessment); Keller v. Crook County, 1 Or LUBA 120 (1980) (approval of 'outline development plan' for subdivision). The decision reviewed here is smaller to those in N.O.P.E. and Keller: it only authorizes further studies and provides for further action at a later date."

Metro's brief stresses respondent's advisory role in decisionmaking on regional transportation improvements such as the one in question. According to Metro, the decision on the McLoughlin Corridor Improvement Program was made in 1982, when Metro included the program in its Regional Transportation Plan. Since adoption of the plan,

> "Metro has been working with local governments within its jurisdiction to develop certain design refinements, and in doing so has released federal funds to study alternatives and sought local consensus on the appropriate designs. The Milwaukie resolution was part of this consensus building, but it is not a final decision on the design of this interesection [Tacoma and McLoughlin Boulevard], it is only advice to Metro and ODOT." Metro's brief at 5.

Metro's characterization of the city's resolution as advisory is somewhat at odds with its admission that if consensus on the design of the proposed improvement is not reached, "...this design would not be put into the Plan [Metro's Regional Transportation Plan] and the plan would have no design restriction." Metro's brief at 6. This implies, at least, that the city's action is a significant part of the process for finalizing project design. However, Metro goes on to say that if there is no consensus, and therefore the

regional plan does not reflect a final design for the improvements, the state (ODOT) has the authority "...to construct this improvement in any manner consistent with the Plan once the EIS is adopted and the jurisdiction in which the improvement is constructed signs a contract with the state." Id. (Emphasis in original.)

Petitioner does not dispute this point or the contention that the major actors in the planning and construction of the project are Metro and ODOT. Nonetheless, petitioner insists Milwaukie's role is not purely advisory. In support, petitioner directs our attention to federal law requiring that "the responsible local officials of the area or areas to be served" must select projects, such as the one in question, involving federal funds previously allocated to other projects. See 23 USC Section 103(e)(4). Petitioner claims that in this instance, the Milwaukie's City Council is "the responsible local official." Petitioner adds

> "Practically speaking, the only way that what has happened makes sense is that regardless of whether everyone thinks consensus building is legally unnecessary, 23 USC 103(e)(4) requires a legal consensus, and this Resolution was the mechanism to obtain it." Petitioner's Response to Metro's Brief at 8.

However, Metro points out that petitioner has not traced the applicable federal law to its terminus. Although the reference to "the responsible local officials" in 23 USC 103(e)(4) might make respondent's approval critical to

development of the project, the phrase is general enough to have other meanings. Indeed, the federal regulations that implement 23 USC 103(e)(4) designate the "metropolitan planning organization" as the local official responsible for project selection under 23 USC 103(e)(4). 23 CFR 450.206(b) states:

> The endorsement of the annual (or biennial) element of the TIP by the metropolitan planning organization constitutes the selection of the projects by local officials pursuant to 23 USC 105(d) and 223 USC 103(e)(4).

There is no doubt that Metro has sought the concurrence of affected jurisdictions in the design of this major project. However, petitioner has failed to show that respondent's endorsement of the project is legally required or has any legal effect. The project is regional in scope. Metro, not Respondent, is the designated regional planning agency. State law requires Metro to adopt a regional transportation plan. The law also requires Metro to assure that the plans and actions of cities and counties within its jurisdiction conform to the regional plan. ORS 268.390(4).

Petitioner's position is not consistent with the statutory hierarchy. Although the law gives legal control to Metro, petitioner seems to say that without a "sign-off" by each affected jurisdiction, regional projects cannot proceed. We find no authority for this position.

Based on the foregoing, we conclude the challenged resolution is not a "final decision or determination" (ORS 197.015(10)) subject to our review. The resolution expresses

the city's position on a matter assigned by law to other levels of government. Accordingly, the appeal must be dismissed.

We find a second reason for dismissal of this appeal. As we read the petition, petitioner's chief concern is with an aspect of the project (the Tacoma Overpass) that is outside the Milwaukie City Limits. The proposed overpass is therefore outside respondent's land planning jurisdiction. Although petitioner urges us to remand the resolution for entry of findings showing how the overpass project carries out the city's comprehensive plan, we know of no authority for such a remand. Since the city does not have planning jurisdiction over the land in question, a remand for consideration of whether its plan sanctions the overpass would be futile. Thus, we conclude that the city's endorsement of the Tacoma Overpass (phase one of the project) cannot be considered a reviewable land use decision.[3]

The appeal is dismissed.

FOOTNOTES

[1] Metro advises that the corridor is a "federal aid primary route" under federal law.

[2] Petitioner objects that Metro's intervention was not timely. However, Metro's motion and brief on intervention were filed shortly after the due date for respondent's brief, the filing did not prejudice petitioner, who was allowed ample time to respond.

[3] An aspect of the petition seems to direct our attention to a portion of the resolution (section III, entitled "East-West Traffic Circulation") affecting land inside Respondent's city limits. However, petitioner has not demonstrated that this portion of the resolution constitutes a reviewable land use decision. The burden is on petitioner to establish LUBA's jurisdiction. Billington v. Polk County, 299 Or. 471, 703 P2d 232 (1985).