BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CBH COMPANY, Petitioner, vs. CITY OF TUALATIN, Respondent.	LUBA No. 87-097 FINAL OPINION AND ORDER

Appeal from the City of Tualatin.

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Participant-Respondents

HOLSTUN, Referee; BAGG, Chief Referee; SHERTON, Referee.

DISMISSED 02/09/88

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals the city's remand of a decision of the Tualatin Architectural Review Board (ARB) which recommended against approval of the design for petitioner's proposed apartment complex. In its remand order, the city council directed that a planning staff report for the proposal be reissued and that additional notice be given.[1]

FACTS

On September 2, 1987, the city planning director granted architectural review and public facilities approvals for petitioner's proposal. The planning director's decision provided (1) the architectural review approval would become final if not appealed to the ARB within 10 days, and (2) the public facilities approval would become final if not appealed to the city council within 15 days. Record 127.

On September 11, 1987, the city received requests for ARB review of the director's architectural review approval from the Tualatin Neighborhood Association (Neighborhood Association) and petitioner.[2] Petitioner subsequently withdrew its request for ARB review prior to the appeal hearing held by the ARB.[3] Record 137-138.

On September 17, 1987, petitioner also requested review by the city council of the portion of the September 2, 1987 decision dealing with public facilities.[4] The letter from petitioner's attorney requesting public facilities review by

the city council contains a handwritten note at the top that petitioner withdrew the request for review on September 28, 1987, and that the appeal fee was returned.

On September 25, 1987 the ARB rejected the design, and on September 30, 1987, petitioner filed a request for review of the ARB decision by the city council. Petitioner requested the city council find the ARB lacked jurisdiction because the Neighborhood Association lacked standing to bring the appeal and also requested, in the alternative, de novo review of the design by the city council. Record 110.

The city council, at its October 12, 1987 meeting, determined the planning director's original September 2, 1987 decision was not sent to all adjoining property owners as required by Section 73.075 of the city code. The city concluded it could not ignore this defect in notice and remanded the decision to the planning director to reissue his decision with notice as required by the code.[5]

In a nutshell, petitioner argues both its appeals of the planning director's decision were withdrawn, and the Neighborhood Association only appealed the architectural review approval to the ARB, but lacked standing to do so. Thus, petitioner argues, there was no proper appeal of the planning director's approval before the ARB. Neither, argues petitioner, was there an appeal of the director's public facilities approval before the city council. Therefore, according to petitioner, the planning director's decision

became final and the city council never had jurisdiction to review the decision.

Notices of intent to participate as respondents in this proceeding have been filed by 13 individuals. One of the participants, Ginni Snodgrass, filed a motion to dismiss alleging the city's decision to remand was not a final decision; and, therefore, not a land use decision subject to our jurisdiction. We agree and dismiss the appeal.[6]

OPINION

Petitioner claims the October 12, 1987 decision of the city council to remand the planning director's decision was a final decision that has the practical effect of taking away the final approval given by the planning director.

In support of its argument petitioner states:

> "The legal and practical effect of the decision was to take away certain rights - a land use approval - that had previously been granted. The changing, bestowing or denying of such a right constitutes a final decision. Floyd Jones and Chevron USA, Inc. v. City of Milwaukie, 6 Or LUBA 25, 29 (1982)." Petitioner's Points and Authorities (Jurisdiction) 8.

In Jones, supra, the city approved a concept plan authorizing the Tri-County Metropolitan Transit District to seek a federal grant for a transit center on a site within the city. Under the city code, a conditional use permit was required prior to construction of the transit center on the site. In that case we said:

> "We cannot tell from the record before this Board, however, whether the city's action somehow locks it into accepting petitioner's site as the only

> appropriate transit station location * * *. We do not believe * * * that the city has yet made a 'final' decision as that term is used in ORS 197.015(10). * * * It does not appear from the record submitted to this Board that [the city] has changed the permitted use of the site or granted to Tri-Met any rights Tri-Met did not already posess." Jones, supra, 6 Or LUBA at 28-29.

Petitioner argues that unlike the situation faced by Tri-Met in Jones, petitioner's rights, i.e., its rights to proceed under the terms of the planning director's approval, have been taken away. Although the approval given by the planning director ultimately may be amended or reversed, that is not a foregone conclusion under the terms of the city's remand. More importantly, any rights petitioner enjoys by virtue of the planning director's approval are subject to appeal under the city's code. The city asserted jurisdiction in the appeal below, over petitioner's objection, and remanded the decision for further notice and deliberations. Thus, even if petitioner is correct in its position that the city council lacked jurisdiction, it may yet receive the approval it seeks on remand.

Petitioner also cites Kasch's Gardens v. City of Milwaukie/Portland, 14 Or LUBA 406 (1986) in support of its argument that the city's decision is final. In that case the City of Milwaukie adopted a resolution endorsing a proposal for specific highway improvements passed by the Metropolitan Service District. In that case we said:

> "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 ('significant impact' test). Billington v. Polk County, 299 Or 471, 703 P2d 232 (1985). In some cases, the jurisdiction 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." Kasch's Gardens, supra at 411-412. (emphasis in original).

Petitioner notes the Board dismissed the proceeding in Kasch's Gardens, concluding the city's decision lacked "binding legal effect." Petitioner then argues that there is a "legal effect" in this case because the planning director's decision has been "overruled". Petitioner's Points and Authorities (Jurisdiction) at 9. We believe petitioner misunderstands our reference to lack of "binding legal effect" in Kasch's Gardens. Whatever the legal effect of the city's decision to remand in this proceeding, we do not believe the city's decision is a final decision.[7]

The city asserted jurisdiction to review the planning director's decision and remanded that decision for additional proceedings. The city's remand decision does at least temporarily suspend any rights petitioner may have under the planning director's decision. However, the course the city chose may yet result in approval. Notwithstanding the temporary uncertainty created by the remand or the possibility that petitioner may not prevail ultimately on the merits, the city's decision is not final until the additional proceedings

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are complete. Once those proceedings are complete, if the resulting decision is appealed to us, it may be that this Board will conclude the appeal period for the planning director's original decision expired rendering the planning director's decision final.

Petitioner notes that in Zarkoff v. Marion County, 14 Or LUBA 61, aff'd 76 Or App 403, 708 P2d 1211 (1985) the county refused to hear an appeal from a hearings officer's decision because the appeal was filed one day late. The Board concluded the county's refusal was a land use decision subject to our review because it was "a final determination on an action which implements the county's zoning code." Zarkoff, supra at 65. Petitioner argues

> "If Marion County's determination [in Zarkoff] that the appeal was invalid is a reviewable land use decision, then so should be Tualatin's determination that the Neighborhood Association's appeal was valid." Petitioner's Points and Authorities (Jurisdiction) at 10.

There is an important difference between the city's decision in this proceeding and the decision rendered by Marion County in Zarkoff. In Zarkoff, the county rejected the appeal and the local proceedings were therefore complete. In this appeal, the city's decision was to remand for further proceedings; and, therefore, the city's decision is not complete.

Finally, petitioner argues in the alternative that if the Board concludes the city's decision is not a land use decision,

it should do so based on ORS 197.015(10)(b), which excludes from the definition of land use decision ministerial decisions rendered under clear and objective standards for which there is no right to a hearing. Petitioner asks the Board to find that the city's decision is a revocation of a final approval "more properly adjudicated in circuit court." Petitioner's Points and Authorities (Jurisdiction) at 15.

In support of its argument, petitioner points out that in West v. City of West Linn, 6 Or LUBA 139 (1983) the Board noted it did not interpret the city's decision in that case to revoke preliminary or final subdivision plat approval and therefore did not decide whether the city could revoke such approval or whether such revocation would constitute a reviewable land use decision. Id. at 143, fn. 2.

In West, supra, we simply reserved judgment on whether revocation of a prior approval would necessarily constitute a land use decision reviewable by this board.[8] Even if we answered that question as petitioner asks, it would not lead us to dismiss this proceeding for the reason petitioner requests. We do not believe a decision to remand for additional proceedings is characterized correctly as revocation of a prior approval. Until and unless the project approved by the planning director is finally rejected by the city on remand, the city has revoked nothing. Petitioner's argument that such a final decision should be considered a ministerial decision rendered under clear and objective standards is premature.

We conclude the city's October 12, 1987 decision is not a final decision and therefore not a "land use decision" which this Board has jurisdiction to review under ORS 197.825(1). Accordingly, this proceeding is dismissed.[9]

FOOTNOTES

[1] The city's decision was "* * * to vacate the ARB decision to go back * * * to the original notice, [and] to reissue the staff report * * * after staff has time to carefully check on proper notice for all individuals that should be notified under the code * * *." Record 33.

In its decision, the city also formally recognized the Tualatin Neighborhood Association as a party to the proceeding. Record 33.

[2] Petitioner argued before the city and argues before the Board that the Neighborhood Association was not a recognized neighborhood organization and therefore lacked standing under the city's code to appeal the decision of the planning director.

[3] The city notes the record contains no written request from petitioner to withdraw its request for ARB review, but does not argue the withdrawal had to be in writing to be effective. Memorandum in Support of Motion to Dismiss 3.

[4] Petitioner claims the Neighborhood Association only appealed the planning director's architectural review approval since appeal of the director's approval of the public facilities portion of the proposal is to the city council rather than the ARB. Under the Tualatin Development Code (code) the ARB is only authorized to review the architectural review approval. The city claims it interpreted the appeal filed by the Neighborhood Association on September 11, 1987 as appealing both the architectural review approval to the ARB and the public facilities approval to the city council.

[5] The city council did not address the merits of the planning director's approvals or the ARB decision rejecting the architectural review approval.

[6] Petitioner objects to participation by Ginni Snodgrass pointing out she was not a person identified in the Notice of

Intent to Appeal as required by former OAR 661-10-020(1). Petitioner also moves to strike participant's motion to dismiss. The city filed a memorandum in support of participant's motion to dismiss, but has not filed its own motion to dismiss. We, therefore, decide the issue of our jurisdiction on our own motion rather than require participant to move to intervene or extend additional time for the city to file a motion to dismiss.

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[7] As noted by the Supreme Court in Billington v. Polk County, supra, decisions are "land use decisions" subject to LUBA's jurisdiction under ORS 197.825(1) if they meet either of two tests -- the definition in ORS 197.015(10) (statutory test) or the "significant impact test" enunciated in Petersen v. Klamath Falls, 279 Or 249, 566 P2d 1193 (1977), and City of Pendleton v. Kerns, 294 Or 126, 653 P2d 992 (1982). Under either test, a "land use decision" must be a final decision. the requirement of finality is part of the statutory test by virtue of the explicit provisions of ORS 197.015(10)(a) requiring that a land use decision be a final decision. The requirement of finality is inherently part of the "significant impact" test because a decision cannot have significant impacts on land use unless it is a final effective decision. Furthermore, we note that ORS 197.825(2)(a) limits LUBA's jurisdiction to cases where all available local remedies have been exhausted. Thus, ORS 197.825(2)(a) in effect separately imposes a requirement that decisions which are "land use decision" under either the statutory or significant impact test, or both, be the final outcome of the proceedings below in order to be subject to LUBA review.

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[8] More importantly, for purposes of this proceeding, in West we stated:

> "In order for this Board to have jurisdiction, there must be a final decision or determination by a local government or a state agency. By this we mean the legislature meant more than that the local government or state agency have finally expressed its position on a matter which may be in dispute with a third party. To be a land use decision we believe the local government's action must, of its own force, affect in some way the use of land." West v. West Linn, supra at 143.

[9] We recognize our disposition of this case places petitioner in the position of determining whether it will participate in the remand proceedings or refuse to participate and appeal the final decision on remand and reassert the arguments presented in this appeal. While petitioner's desire to assert what it believes may be dispositive legal arguments at the earliest date possible is understandable, our jurisdiction "is authorized only after every opportunity provided at the local level for addressing land use disputes has been pursued * * *." Lyke v. Lane County, 70 Or App 82, 85, 688 P2d 411 (1984). This limitation on our jurisdiction is required to ensure that land use disputes are resolved at the local level whenever possible. Id.