BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARK HEMSTREET, Petitioner, vs. SEASIDE IMPROVEMENT COMMISSION, Respondent, and JOHN Q. HAMMONS, Participant-Respondent.	LUBA No. 87-094 FINAL OPINION AND ORDER OF DISMISSAL

Appeal from Seaside Improvement Commission.

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

DISMISSED 04/22/88

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

Opinion by Holstun.

This appeal challenges the October 7, 1987 decision of the Seaside Improvement Commission (Commission) requesting that the City of Seaside City Council (Council) transfer ownership of the Sand Dollar Square Parking Lot, located in the City of Seaside, to the Commission. In a related appeal decided this date, Hemstreet v. City of Seaside, ___ Or LUBA ___ (LUBA No. 87-096), petitioner challenges the October 12, 1987 decision of the city to comply with that request and transfer ownership of the property to the Commission. In a third appeal, Hemstreet v. Seaside Improvement Commission, ___ Or LUBA ___ (LUBA No. 87-118), petitioner challenges a December 2, 1987 decision of the Commission to lease a portion of the property to Participant-respondent (respondent) Hammons.

Respondent moves to dismiss, arguing this Board lacks jurisdiction because the Commission's decision is not a land use decision.

Our jurisdiction extends only to review of land use decisions. ORS 197.825(1). Decisions are subject to our review under ORS 197.825(1) if they fall within the definition of land use decision in ORS 197.015(10) (the statutory test) or meet the significant impact test enunciated in Petersen v. Klamath Falls, 279 Or 249, 253-254, 566 P2d 1193 (1977) and City of Pendleton v. Kerns, 294 Or 126, 133-134, 653 P2d 992 (1982). Billington v. Polk County, 299 Or 471, 479, 703 P2d 232 (1985). Therefore, if the challenged decision satisfies

either the statutory test or the significant impact test, the Motion to Dismiss must be denied.

THE RECORD

The Board has entered three orders on record objections in this appeal. The record was settled on February 12, 1988, when the last order on record objections was entered. Respondent first argues that this Board is limited to the record in deciding the Motion to Dismiss.

Citing Wagner v. Marion County, 15 Or LUBA 260 (1987), petitioner argues the Board is not limited to the record in determining whether a decision is a land use decision. Petitioner argues that under Wagner this Board may consider evidence beyond the record to determine whether it has jurisdiction. In Wagner we said:

> "this is not a case in which a significant land use impact can be presumed.* * * Given this circumstance, and the challenge to the factual support for petitioners' allegations, petitioners were obligated to support their allegations with proof the decision would actually have a significant land use impact." Wagner, supra at 268.

Petitioner recognizes that in Wagner we relied on Benton County v. Friends of Benton County, 294 Or 79, 653 P2d 1249 (1982) which concerned a challenge to standing, not jurisdiction. Petitioner argues, however, if the Board is to require proof that a decision will have significant impact on land use in order to determine a jurisdictional challenge, the Board must accept relevant evidence on that issue, just as it would accept evidence outside the record to establish standing.

We conclude we may consider evidence outside the local record in determining jurisdiction. We reach this conclusion notwithstanding the lack of express provision in the governing statutes and in our rules.[1] The significant impact test recognizes land use decisions that are subject to our review even though those decisions may not fall within the literal terms of the definition of land use decision in ORS 197.015(10). The Supreme Court has recognized the uncertainty inherent in determining whether a decision satisfies the significant impact test. City of Pendleton v. Kerns, supra, 294 Or at 133. Where the degree and nature of the impact on land use is not apparent on the face of the decision, a factual inquiry may be required. To rigidly limit that factual inquiry to the record in all cases could deny a petitioner the ability to show a decision is subject to our review under ORS 197.825, where, for whatever reason, the local government generated no record or an insufficient record in support of its decision.[2]

Petitioner, in opposing the Motion to Dismiss, submitted a number of documents that are not included in the local record. Following oral argument on the Motion to Dismiss, all parties submitted additional documents that are not included in the local record. As noted supra, we do not agree with respondent that our review to determine whether we have jurisdiction must be limited to the record. The parties draw different conclusions from the evidence submitted. However, with the exception of the Urban Renewal Plan (Plan) Property Acquisition

Map discussed infra, the parties do not dispute the accuracy or relevance of the evidence submitted by the other parties. In deciding this motion, we have considered all of the evidence submitted by the parties.[3]

FACTS

On April 11, 1983, the Council adopted a resolution authorizing purchase of the property at issue in this appeal. Deeds dated May 5, 1983 and May 19, 1983 were 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 property came from a bond issue by the latter. Following this transfer, the Property Acquisition Map, which under Plan Section 200 E and G is part of the Plan, was amended to show the property as "acquired."[4]

On October 7, 1987, the Commission took the action challenged in this proceeding "to request the city council to place ownership of the property purchased with the urban renewal funds in the name of the urban renewal district." Record 7. On October 12, 1987, the 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. Following these actions, the Commission took action on December 2, 1987 to approve a lease of the property to respondent. That decision is appealed in LUBA No. 87-118.

During oral argument on the Motion to Dismiss, the Board

was advised by respondent the city has not executed a deed conveying the property to the Commission and that the Commission had not yet executed a lease with the respondent as authorized by the Commission's December 2, 1987 decision. On April 11, 1988, the Board received respondent's brief in this appeal and found appended to that brief a judgment and decree from the Clatsop County Circuit Court dated February 23, 1988 reforming the 1983 deeds by substituting the "Seaside Improvement Commission * * * governing body for Trails End Urban Renewal District" as grantee.

THE STATUTORY TEST

In order to determine whether the decision challenged in this appeal is a land use decision subject to our review, it is necessary to consider other related decisions that occurred in 1983 and 1987 identified supra. Therefore, we do not limit our discussion of the statutory test and the significant impact test, infra, to the decision challenged in this appeal.

Under ORS 457.095(3) a governing body adopting an urban renewal plan as defined in ORS 457.015(11) is required to determine that the urban renewal plan "conforms to the comprehensive plan * * * of the municipality as a whole * * *."[5] Thus, adoption of an urban renewal plan is a "statutory test" land use decision under ORS 197.015(10) because it involves application of the comprehensive plan. Additionally, substantial changes to an adopted urban renewal plan must be "approved and recorded in the same manner as the

original plan." ORS 457.220(2). Therefore, substantial changes to an urban renewal plan also require application of the comprehensive plan and are "statutory test" land use decisions. See Burrell v. City of Salem, 14 Or LUBA 540 (1986); Union Station Business Community Assoc. v. City of Portland, 15 OR LUBA 4 (1986); Tides Unit Owners Assoc. v. City of Seaside, 11 Or LUBA 84 (1984).

At the Board's request, following a March 1988 conference with the parties, the city submitted a certified true copy of the Plan.[6] The Plan includes text (Part 1) and two exhibits (Part 2). Exhibit 1 is a Land Use Plan and Boundary Map and Exhibit 2 is a Property Acquisition Map. The Plan text also provides specific procedures for acquisition of property by the Commission as follows:

> "* * * Prior to the acquisition of any property by the Seaside Improvement Commission, the common concil [sic] of the City of Seaside shall first approve of such property acquisition and by Council resolution so authorize and instruct the Improvement Commission to proceed with such acquisition. Should the Common Council not approve such acquisition, the Seaside Improvement Commission is thereby not authorized to acquire such property.
>
> "Where property acquisition is authorized, pursuant to this section, such property to be acquired shall be identified on the property acquisition map, Exhibit 2 of Part 2 of this plan." Plan Section 600.A.2.

The Plan does not explain how or when property acquired pursuant to Section 600.A is to be identified on the property acquisition map; it simply dictates that the property be identified on the map following council authorization.

There is also a procedure for adopting changes in the Plan:

> "This plan may be changed or modified only by formal written amendment duly approved by the City Council of the City of Seaside.
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> "The plan will be reviewed and analyzed periodically and will continue to evolve during the course of project execution and ongoing planning. It is anticipated that this plan will be changed or modified from time to time or amended as development potential and conditions warrant, as planning studies are completed, as financing becomes available, or as local needs dictate. Where the proposed modification will substantially change the Plan the modification must be duly approved and adopted by the City Council in the same manner as the original plan and in accordance with the requirements of state and local law.
>
> "Substantial changes shall be regarded as revisions in project boundaries, land uses, the alignment and use of streets, and other elements which will change the basic planning principles or objectives of this plan." Plan Section 1000.

The course of events envisioned by the Plan for purchase of property by the Commission would begin with the Commission advising the Council that it wished to acquire property. The Council would then adopt a resolution authorizing the purchase. Under Section 600 A.2, quoted supra, adoption of the resolution also requires that the Property Acquisition Map be amended to identify the property.[7]

On April 11, 1983, the Council adopted what appears to be the authorization required under Section 600.A.2 for purchase of the disputed property by the Commission. However, the deeds executed in May 1983 to carry out this authorization conveyed the property to the City of Seaside. Record 9-12. Sometime after this, the Property Acquisition Map was amended to reflect

acquisition of the property.[8]

It is not entirely clear how to determine whether this amendment constituted a "substantial change" or simply a "change" or "modification" under Section 1000. The parties cite us to nothing that suggests the Council or Commission expressly considered whether the 1983 acquisition of the property was a "substantial change." The portion of the definition of substantial change in Section 1000 that would arguably apply is "other elements which will change the basic planning principles or objectives of this plan." This portion of the definition and the plan objectives it references are very subjective.[9]

We note the city's inclusion of the Property Acquisition Map as part of the plan, together with the requirement in Section 600 that the map be amended to show properties as they are purchased, suggests the Council and Commission view property acquisitions as significant decisions. In addition, the disclosed $130,000 purchase price for one of the properties is substantial, and the planned ultimate use of the property as a parking facility is significant. We conclude the 1983 decision to purchase the property and amend the Property Acquisition Map constituted a substantial change as that term is used in ORS 457.220(2) and defined in the urban renewal plan.[10] Under ORS 457.095(3), 457.220(2) and Plan Sections 1000 and 900 substantial changes must comply with the City's comprehensive plan. Accordingly the 1983 decision to purchase

the property and amend the Property Acquisition Map was a statutory land use decision. See Union Station Business Community Assoc. v. City of Portland, supra; Burrell v. City of Salem, supra.

However, the 1983 decision to acquire the property and amend the Property Acquisition Map is not before this Board. What is before the Board is the Commission's 1987 request that the Council take action regarding ownership of the disputed property that the Plan shows had already been acquired by the Commission. There is no change in the Plan involved, significant or otherwise. We find nothing in the Plan or statutes requiring that the Commission's October 7, 1987 request comply with the city's comprehensive plan. Accordingly, we conclude the Commission's October 7, 1987 request is not a statutory test land use decision.

SIGNIFICANT IMPACT TEST

We have little difficulty concluding the use of the disputed property as apparently envisioned by the Council and Commission will ultimately have a significant impact on land use.[11] Cf. Tides Unit Owners Association, supra at 89 (Urban renewal projects including "street closure, new public restrooms, and marinas and/or boat docks may well have significant impacts on surrounding lands - impacts of equal or greater magnitude than those found significant in the Kerns case.").

Petitioner argues that under our decision in Tides, it does

not matter that a decision may be an initial step in a multistep process that will ultimately have significant impacts. Id. at 90. We agree with petitioner that a multistep land use process may involve more than one land use decision. However, we disagree with petitioner's suggestion that every identifiable step in a multistep process necessarily is a land use decision.

The decision to purchase property in and of itself has no actual impact on land use until and unless the new owner does something to change the existing land use. It is not apparent any purpose would be served by subjecting to separate review as land use decisions a request and an approval to transfer ownership of property. We particularly question whether such decisions are appropriately viewed as land use decisions where, as here, the decision to purchase property requires a contemporaneous amendment of the Plan which is a land use decision under ORS 197.015(10). Cf. See Tides Unit Owners Assoc. v. City of Seaside, supra; Union Station Business Community Assoc. v. City of Portland, supra; Burrell v. City of Salem, supra.

However, even if the decisions to request and approve transfer of the disputed property could be viewed as separate "significant impact test" land use decisions, those decisions were made in 1983, the Plan was amended to reflect those decisions and neither the Plan amendment nor the decisions were appealed. Stripped to essentials, the decision at issue in

this appeal and the decision at issue in LUBA No. 87-096 were only made because (1) the property was mistakenly transferred to the city rather than to the urban renewal district which provided the purchase funds (respondent's position); or (2) the disposition of the property currently desired by the Commission and Council apparently cannot be made without following certain procedures that apply to property owned by the city, but do not apply to property owned by the District (petitioner's position).

We see no significant land use impact that will result from the challenged decision (or the decision in LUBA No. 87-096) that was not fully present as a result of the 1983 decisions discussed supra. No party has called our attention to goal, comprehensive plan, or land use regulation considerations that could not have been raised following the Council's and Commission's 1983 decisions which authorized and resulted in purchase of the property and amendment of the Property Acquistion Map. To the extent the Council and the Commission in transferring ownership of the disputed property exercised their planning and zoning responsibilities under ORS 197.175(1) and 197.185, those responsibilities were exercised in conjunction with the decisions made in 1983. See Collins Foods v. City of Oregon City, 14 Or LUBA 311, 313-314 (1986).

In these circumstances we conclude the Commission's decision to request that the property ownership be placed in the name of the urban renewal district is not a significant impact test land use decision.[12] Our determination that the

decision appealed in this proceeding is not a land use decision requires that we dismiss the appeal.[13]

FOOTNOTES

[1] Respondent correctly notes that ORS 197.830(11)(c) and OAR 661-10-045 expressly provide for evidentiary hearings to accept evidence outside the record when there are disputed allegations regarding standing. Our rules and the statute provide for evidentiary hearings in other limited situations as well, but do not expressly provide for evidentiary hearings to determine whether we have jurisdiction. However, under both ORS 197.830(11)(c) and OAR 661-10-045, it is implicit that the hearings envisioned by those provisions would occur during our review of a land use decision, i.e., after this Board asserted jurisdiction. Accordingly, while neither provision expressly authorizes the Board to conduct an evidentiary hearing to determine jurisdiction, neither do they expressly preclude our receipt of evidence to determine jurisdiction. We believe we have implied authority to consider evidence outside the record where necessary to determine our jurisdiction.

We also note that the question of our authority to receive evidence to determine jurisdiction rarely occurs where a challenged decision is a "statutory test" land use decision. We routinely take administrative notice of applicable plans and land use regulations and those documents usually are sufficient to determine whether the decision falls within the definition in ORS 197.015(10). As discussed infra in the text, determining whether a decision is a significant impact decision may require a more extensive factual inquiry.

[2] This does not mean the evidence we receive in order to determine our jurisdiction can later be used in reviewing the decision on the merits. ORS 197.830(11)(a) ("review of a decision [by LUBA] shall be limited to the record"). However, we may accept and review such evidence to determine whether a decision is a land use decision subject to our jurisdiction.

[3] On April 11, 1988, respondent submitted an affidavit in which the city manager relates certain facts concerning acquisition of the property at issue by the City of Seaside. Attached to the affidavit are minutes of an April 11, 1983 Seaside City Council meeting, a city council resolution dated April 12, 1983 and two maps previously submitted to the Board by the parties. Petitioner, having previously submitted several documents outside the record, now urges this Board not

to consider the affidavit or attachments because they are not included in the local record. Petitioner does not submit an opposing affidavit or provide any reason why we should question the facts as stated in the affidavit. We consider the affidavit and attachments with the other evidence submitted by the parties in this proceeding.

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[4] The Board is unable to tell from the record precisely when the map was amended. See footnote 8, infra.

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[5] 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 (i.e., the city council). Plan Section 200 L. Although the same elected officials serve on both the Council and the Commission, the Council and Commission are separate governing bodies. Id. The Commission is charged with responsibilitiy for preparing the Plan and amendments to the plan. ORS 457.085; 457.220. The Plan and substantial amendments are only effective upon approval by the Council and any other affected municipalities as provided in ORS 457.095 and 457.105. See Dennehy v. City of Portland, 87 Or App 33, 36-38 ___ P2d ___ (1987). Upon approval by the Council, the Commission is given power and authority to implement the Plan. E.g., ORS 457.120; 457.180. Among the powers granted the Commission is the power to acquire real property and dispose of that property by sale or lease. ORS 457.170(3)(a).

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[6] Like the city, the Seaside Improvement Commission and respondent parties, we simply use the term "city" without indicating whether we refer to the City of Seaside or the Seaside Improvement Commission in instances where the distinction between the City of Seaside and the Seaside Improvement Commission is not important. We maintain the distinction where it is important to our decision.

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[7] If the property were located outside the boundaries of the Trails End Urban Renewal Area, presumably the Land Use Plan and Boundary Map attached to the Plan as Exhibit 1 would also have to be amended.

[8] The Plan provided to the Board shows the disputed property as acquired. It is not clear when the Plan was actually amended to reflect the transfer. The April 6, 1988 affidavit submitted by respondent (see footnote 3) advises the Board that the Property Acquisition Map was amended following the transfer, but does not specify the date of amendment. Commission Resolution IC-11 dated June 6, 1984, submitted by the city proposes a "Third Amendment" to the Plan and contains a reference to "City owned properties immediately adjacent to * * * [the] promenade." The Third Amendment was approved by the Council on June 25, 1984. While it appears the third amendment amended the Property Acquisition Map to show the disputed property, we cannot be certain from the materials submitted by the city and respondent.

However, the Plan provided to the Board indicates its last "amendment" was June 25, 1984 and that it includes "minor revisions" dated July 3, 1985 and October 16, 1985. Therefore, it appears the property was included on the Property Acquisition Map no later than October 16, 1985. For lack of a better alternative, we will assume that if the Property Acquisition Map had been changed after October 16, 1985, that would be noted on the copy of the Plan the city provided as either an amendment or a minor revision.

Prior to filing this appeal in October 1987, the petitioner in this case also requested that the city provide him a current copy of the Plan. Apparently the copy provided to petitioner was not the same as provided to the Board. The Plan provided to petitioner did not show the property as acquired on the Property Acquisition Map.

[9] For example:

"* * * * *

"H. Provide additional, offstreet parking facilities for the convenience of local residents and visitors

* * * * *

"P. Incorporate into a theme for the project the fact that the historic Lewis and Clark Trail teminated with the area now encompassed by the City of Seaside.

"Q. In light of the pending energy shortage, encourage all forms of public transportation--rail, bus and air--to provide improved passenger service to the City of Seaside." Plan Section 400.

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[10] We also note that Section 500 of the Plan states:

"This plan shall conform, in all respects, with the city's adopted comprehensive plan."

Arguably this would require a decision to amend the Property Acquisition Map to comply with the comprehensive plan whether or not a particular acquisition constituted a "substantial change, rendering all such acquisition land use decisions under ORS 197.015(10).

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[11] The ultimate plan apparently is to lease the property to respondent for development of a multi-story parking structure, with respondent utilizing the upper floors of the parking structure for parking in conjunction with a planned resort hotel.

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[12] Respondent also argues that the Commission's action simply adopted a recommendation for city action rather than a final decision. We agree with respondent, and this provides a separate basis for our conclusion that the decision at issue in this appeal is not a land use decision. Citizens for Better Transit v. City of Portland, 15 Or LUBA 278, 281-282, (1987); Kasch's Gardens v. City of Milwaukie/Portland, 14 Or LUBA 406, 412-414 (1986).

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[13] Of course it is possible that the decision, while not a land use decision, is nevertheless a decision reviewable by the Circuit Court. It is our understanding from the parties that a Circuit Court proceeding is pending. We also note the Commissioner's decision to lease the property to respondent remains before the Board in LUBA No. 87-118.