BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

STANDARD INSURANCE COMPANY, an Oregon corporation, Petitioner, vs. CITY OF HILLSBORO, Respondent, and HILLMAN POWELL COMPANY and ALBERTSON'S, INC., Intervenors-Respondent.	LUBA No. 89-017 FINAL OPINION AND ORDER

Appeal from City of Hillsboro.

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

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

SHERTON, Referee; HOLSTUN, Chief Referee; KELLINGTON, Referee participated in the decision.

REVERSED 06/21/89

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioner appeals City of Hillsboro Resolution No. 1503, which grants development review approval for a supermarket with more than 35,000 square feet of floor area, a lot line adjustment and a temporary permit for access onto N.W. 185th Avenue.

MOTION TO INTERVENE

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

FACTS

The city decision appealed in this case is connected to other decisions of the City of Hillsboro (city) and Washington County (county) concerning plan map amendments and development review approvals for the subject property which have resulted in six prior appeals to this Board. The following is a brief history of these decisions.

The county's first decision to amend the plan map designation for the subject property from Industrial (IND) to Neighborhood Commercial (NC) was remanded by us in Standard Insurance Company v. Washington County, ___ Or LUBA ___ (LUBA No. 87-020, September 1, 1987) (Standard I). After our remand, the county readopted the plan map amendment to NC. This decision was appealed to us in Standard Insurance Company v. Washington County, ___ Or LUBA ___ (LUBA No. 88-005, June 7,

1988) (Standard II). Based on this decision reapplying the NC designation, the county also granted the same development approvals challenged in this appeal. This county decision was appealed to us in Standard Insurance Company v. Washington County, LUBA No. 88-015 (Standard III).

We remanded the county's second attempt to change the plan designation for the subject property to NC in Standard II. Our decision in Standard II was appealed to the Court of Appeals, which issued an opinion affirming our decision on September 14, 1988. Standard Insurance Company v. Washington County, 93 Or App 78, 761 P2d 534 (1988). The Court of Appeals issued its appellate judgment in Standard II on February 3, 1989.

In Standard III, we initially issued an order reversing the county's grant of the development approvals. However, our decision was appealed to the Court of Appeals, and in Standard Insurance Company v. Washington County, 93 Or App 276, 761 P2d 1348 (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).

Prior to issuance of the Court of Appeals' appellate judgment in Standard II, the county commenced proceedings to address the deficiencies in its decision identified by the Court of Appeals and this Board in their opinions in Standard II. On November 8, 1988, the Washington County Board of Commissioners (board of commissioners) adopted a resolution

and order approving the plan amendment to NC. Petitions for reconsideration of that decision were filed with the board of commissioners on November 8 and 9, 1988. On November 9, 1988, the subject property was annexed by the City of Hillsboro. Under the Washington County Community Development Code (CDC), the county's decision became final on November 23, 1988, when the county mailed notice of its denial of the petitions for reconsideration.

The county's decision was reversed by us in Standard Insurance Company v. Washington County, ___ Or LUBA ___ (LUBA No. 88-109, April 26, 1989) (Standard IV). The alternative grounds for reversal were (1) the county lacked jurisdiction over the subject plan amendment decision while an appeal of that decision was pending before the Court of Appeals, and (2) the county lacked jurisdiction to approve the subject amendment after the subject property had been annexed to the City of Hillsboro. Our decision in Standard IV is currently before the Court of Appeals.

On December 20, 1988, the Hillsboro City Council (city council), acting in the belief that the annexation of the subject property to the city entitled it to step into the "shoes" of the county board of commissioners, also denied the petitions for reconsideration that were filed with the board of commissioners on November 8 and 9, 1988. We reversed the city's decision in Standard Insurance Company v. City of Hillsboro, ___ Or LUBA ___ (LUBA No. 88-120, April 26, 1989)

(Standard V). The alternative grounds for reversal were (1) the city lacked jurisdiction over the subject plan amendment decision while an appeal of that decision was pending before the Court of Appeals, and (2) the city's decision relied on county plan amendment proceedings which were void for lack of jurisdiction. Our decision in Standard V is also before the Court of Appeals.

On December 20, 1988, immediately after making its decision to deny the petitions for reconsideration of the plan amendment to NC, the city council authorized the city staff to "reissue" the development approvals originally issued by the county and eventually remanded by us in Standard III. On December 23, 1988, the planning director issued a decision reissuing these development approvals. Petitioner appealed the planning director's decision to the city council. The city council held a hearing on petitioner's appeal on February 7, 1989.[1] On February 21, 1989, the city council adopted a resolution upholding the reissuance of the subject development review approvals. This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The City's approvals were premised upon redesignation of the subject property to Neighborhood Commercial by Washington County and the City. Because the County and City each lacked jurisdiction to designate the property NC, the development review approvals based on such actions are likewise invalid."

Petitioner asserts that our decisions in Standard IV and Standard V establish the county and city decisions in November

and December, 1988 to change the plan designation of the subject property to NC were invalid for lack of jurisdiction. Petitioner argues that because these plan amendment decisions were invalid, the development review approvals challenged in this appeal, which are premised on a NC plan designation for the subject property, are also invalid. Petitioner asks that we reverse the appealed city development review approvals.

Respondents agree that the city development review approvals challenged in this appeal are premised upon the subject property being designated NC. Respondents urge us to reconsider our holdings in Standard IV and Standard V that the county and city November and December, 1988 plan amendments applying the NC designation to the subject property were void for lack of jurisdiction. Respondents argue that if our holdings in Standard IV and Standard V are not modified, we should remand, rather than reverse, the development review approvals challenged in this appeal, "for further action consistent with the treatment of the plan amendment" to NC remanded in Standard II. Respondents' Brief 3.

We decline to reconsider our holdings concerning the jurisdictional issue in Standard IV and Standard V.

There is no dispute that the decisions made by this Board and the Court of Appeals to date concerning county and city attempts to change the plan designation of the subject property to NC establish that no valid change to a NC designation has occurred.[2] There is no dispute that the development review

approvals challenged in this appeal are premised on the property being designated NC. Furthermore, there is no claim that the use for which the development review approvals were granted is allowed under the county IND plan designation applicable to the subject property. Accordingly, because the development approved by the city decision challenged in this appeal is not allowed by the appicable plan designation, we must either reverse or remand the city's decision.

At issue in Standard III was the county's decision to grant the same development review approvals at issue in this appeal. In Standard III, we initially decided that we must reverse the development review approval decision because it permitted a use not allowable under the applicable IND plan designation. However, the Court of Appeals disagreed, stating as follows:

> " * * * LUBA's and our decisions in the [Standard II] plan amendment proceeding have the effect of returning [intervenors'] amendment application to the county for further proceedings. Neither our disposition nor our reasoning in Standard Insurance Company v. Washington County, [93 Or App 78, 761 P2d 534 (1988)], precludes the possibility that the plan amendment which petitioner seeks can be legally enacted. Should that occur, the development review approval proceedings would relate to a permissible use, and it would make no sense for [intervenors] and the county to have to repeat the entire development review process.
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> " * * * We conclude that, in this case, where the validity of a land use decision is contingent on the validity of an earlier decision which has been remanded to the local government, the proper disposition is to remand the later decision rather than to reverse it." (Footnotes omitted.) Standard III, 93 Or App at 278-279.

Thus, in Standard III, the Court of Appeals determined the county's development review approvals should be remanded, rather than reversed, because nothing then precluded the possibility that the plan amendment to NC, upon which the development review approvals depended, could eventually be legally enacted. We must consider whether, under the present circumstances, it is legally possible for the city to adopt the plan amendment to NC upon which the city's reissuance of the development review approvals depends.

In our view, one critical fact has changed since the Court of Appeals issued the opinion in Standard III quoted above. On November 9, 1988, the subject property was annexed to the city. Thus, it is no longer possible for the county to complete the plan amendment for the subject property to the county NC designation which was remanded in Standard II. What we must determine is whether it is possible for the city, which now has jurisdiction over the subject property, to adopt a plan amendment applying the county NC plan designation to the subject property. If it is, the development review approvals should be remanded. If it is not, the development review approvals should be reversed.

The only potential source of authority for city application of a county plan designation to the subject property of which we are aware, or which has been suggested by the parties to this appeal, is ORS 215.130(2)(a). ORS 215.130(2)(a) provides as follows:

"(2) An ordinance designed to carry out a county comprehensive plan and a county comprehensive plan shall apply to:

"(a) The area within the county also within the boundaries of a city as a result of extending the boundaries of the city or creating a new city unless, or until the city has by ordinance or other provision provided otherwise * * * "

The Supreme Court has interpreted ORS 215.130(2) only with regard to its application to the incorporation of a new city. In City of Salem v. Families for Responsible Govt, 298 Or 574, 694 P2d 965 (1985), the court stated that under ORS 215.130(2):

" * * * unless or until a new city adopts its own plan providing otherwise, the new city incorporated within an acknowledged UGB must comply with the acknowledged plan and implementing land use ordinances for the geographic area of which it is a part." Id. at 581.

In Multnomah County v. City of Fairview, 96 Or App 14, 17, ___ P2d ___ (1989) (appeal of city change of zone designation of annexed territory to city zone), the Court of Appeals said that ORS 215.130(2)(a) "applies in plain terms to annexed areas as well as to newly incorporated areas, and it makes the county plan applicable until the city provides otherwise."

Thus, it is clear from the courts' decisions that under ORS 215.130(2)(a), the county plan and zone designations in effect at the time of annexation of the subject property continue in effect until the annexing city applies its own designations to the property. In addition, we have decided that under ORS 215.130(2), if an annexing city has not yet applied its own plan and land use regulations to annexed

property, it properly processes land use actions concerning the subject property pursuant to the applicable county plan and land use regulation provisions.[3] See Multnomah County v. City of Fairview, ___ Or LUBA ___ (LUBA No. 88-035 and 88-076, December 23, 1988). However, what neither we nor the appellate courts have previously decided is whether ORS 215.130(2) authorizes a city to change the county plan designation in effect at the time of annexation to another county plan designation.

ORS 215.130(2) was originally enacted by Oregon Laws 1977, chapter 766, section 5. Respondents offer the following testimony by the drafter of Senate Bill 846, a legal consultant to the Bureau of Governmental Research and Service, before the Senate Environment and Energy Committee, Subcommittee Number 2 on Land Use, May 16, 1977, as legislative history explaining the purpose of ORS 215.130(2):

> "215.130 is designed primarily to provide for some statutory rules of what happens when we have the interfacing of land use regulatory actions by a county or by a city. Under most of the case law throughout the United States, if, for example, there were incorporation of territory into a city, that area would lose the county land use regulations and vice versa. If there were withdrawal of territory from a city that was planned and zoned, once the withdrawal was effective, the city regulations would go by the wayside and if a county has not made some action locally for preservation or just readoption automatically of the old city provisions, there could be a hiatus in terms of somebody being able to say the area is unzoned. So what this does, essentially, is to say if you have annexation, the County zoning material stays intact until the City affirmatively moves and vice versa * * * ."

We find that the purpose of ORS 215.130(2)(a), as expressed in the prior decisions of this Board and the appellate courts, and the legislative history of this statute, is that the annexation or incorporation of territory into a city should not result in a hiatus during which there are no plan or land use regulations applicable to the subject property. This purpose is achieved by (1) providing that the county plan and land use regulations applicable at the time of annexation or incorporation remain in effect until an annexing or newly incorporated city applies its own plan and land use regulations to the property; and (2) giving such a city the authority to apply the county provisions in making land use decisions until the city applies its own plan and land use regulations. We do not interpret ORS 215.130(2)(a) to give an annexing city the authority to amend the county plan or land use regulations remaining in effect on annexed property other than by applying the city's own plan and land use regulations.

We conclude that the City of Hillsboro does not have the authority to amend the county IND plan designation applicable to the subject property to the county NC plan designation. We, therefore, must reverse the city's issuance of development review approvals which are dependent upon the subject property obtaining a county NC plan designation.

The city's decision is reversed.[4]

FOOTNOTES

1 Also on February 7, 1989, the city council adopted an ordinance changing the plan map designation for the subject property from county NC to city Commercial. That decision was appealed in Standard Insurance Company v. City of Hillsboro, LUBA No. 89-012 (Standard VI). A separate final opinion and order in that appeal is issued this date.

2 In addition, in Standard VI, decided this date, we remand a city decision changing the plan designation for the subject property to the city's Commercial designation.

3 Although we do not decide the issue here, we see no reason why the city's authority under ORS 215.130(2)(a) could not include stepping into the "shoes" of the county to continue processing a development permit application pending at the time of annexation, so long as that proceeding simply involved application, rather than amendment, of the effective county plan and land use regulations, and proper procedural safeguards were observed.

4 Because we reverse the city's decision based upon petitioner's first assignment of error, we do not address petitioner's second through seventh assignments of error. We are aware that ORS 197.835(10)(a) generally requires us, when reversing or remanding a land use decision, to decide all issues presented to us. We believe the purpose of this provision is to provide needed guidance to the local government making the decision, so that it may, if possible, correct all deficiencies in its decision without the need for repeated appeals to this Board. However, we do not believe that addressing all issues raised by petitioner with regard to the city's issuance of development review approvals premised on a county NC plan designation would serve a useful purpose in this particular case, as we have determined that the city lacks authority to amend the plan designation of the subject property to the county NC plan designation.