BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROBERT R. CECIL, Petitioner, and MARIETTE MARMILLOD and ROBERT PRESTEGAARD, Intervenors-Petitioner, vs. CITY OF JACKSONVILLE, Respondent, and GERALD A. SCHATZ and SILVERWOOD INVESTMENT GROUP, Intervenors-Respondent.	)	LUBA No. 90-013 FINAL OPINION AND ORDER

Appeal from City of Jacksonville.

Robert R. Cecil, Jacksonville, filed a petition for review and argued on his own behalf.

Mariette Marmillod and Robert Prestegaard, Jacksonville, filed a petition for review and argued on their own behalf.

Martial E. Henault, Medford, filed a response brief and argued on behalf of respondent.

Carlyle F. Stout, Medford, filed a response brief and argued on behalf of intervenors-respondent.

HOLSTUN, Referee, SHERTON, Chief Referee, participated

in the decision.

REMANDED 08/27/90

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 and intervenors-petitioner (petitioners) appeal a decision of the Jacksonville City Council granting tentative plat approval for Silvercrest Heights, a 63 lot subdivision.

MOTIONS TO INTERVENE

Mariette Marmillod and Robert Prestegaard move to intervene on the side of petitioner in this proceeding. Intervenors-respondent do not contend movants failed to appear during the local proceedings in this matter, as required by ORS 197.830(6)(b)(B).[1] Nevertheless, intervenors-respondent object to movants' standing to participate in this appeal as intervenors, based on their contention that petitioner lacks standing to appeal.

Intervenors-respondent contend the disputed motions to intervene must be denied because petitioner lacks standing, and movants did not separately file notices of intent to appeal. Cf. Gross v. Washington County, ___ Or LUBA ___ (LUBA No. 88-115, April 14, 1989) (intervenor has no

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[1]ORS 197.830(6)(b) provides in relevant part:

"* * * [P]ersons who may intervene in and be made a party to the review proceedings * * * are:

"(A) The applicant who initiated the action before the local government, special district or state agency; or

"(B) Persons who appeared before the local government, special district or state agency, orally or in writing."

standing to pursue LUBA appeal where petitioner withdraws notice of intent to appeal and intervenor did not file its own notice of intent to appeal). However, even if the motions to intervene would have to be denied if petitioner lacks standing, as explained later in this opinion we reject intervenors-respondent's contention that petitioner lacks standing to pursue this appeal.

Mariette Marmillod's and Robert Prestegaard's motions to intervene are allowed.

Charles L. Baldwin also moves to intervene on the side of petitioner in this proceeding.[2]

Intervenors-respondent object to Mr. Baldwin's motion to intervene on the basis that Mr. Baldwin never appeared during local proceedings in this matter. Intervenors-respondent recognize that, as chair of the planning commission, Mr. Baldwin participated in the planning commission's consideration of the requested tentative plat approval. However, intervenors-respondent point out Mr. Baldwin never participated as a party in this proceeding or took a position on the merits before the planning commission or the city council. Intervenors-respondent contend Mr.

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[2]We previously entered an order granting a motion by Gerald A. Schatz and Silverwood Investment Group to intervene on the side of respondent. In that order we also granted a motion by Charles L. Baldwin to intervene on the side of petitioner, based on our understanding that no party objected to the requested intervention. Intervenors-respondent challenge intervenor-respondent Baldwin's standing to intervene in this proceeding, and we reconsider the portion of our order allowing intervention by Mr. Baldwin.

Baldwin's participation as planning commission chair is not sufficient to demonstrate he is a person "who appeared before the local government, * * * orally or in writing," as required by ORS 197.830(6)(b)(B) to establish standing to intervene.

We agree with intervenors-respondent. Movant did not file a petition for review in this proceeding and has not otherwise responded to intervenors-respondent's objection to his motion to intervene. As far as we can tell, Mr. Baldwin's participation in this matter was limited to his role as planning commission chair, i.e., as a decision maker. Participation as a decision maker, alone, is not sufficient to constitute an appearance before the local government.

Charles L. Baldwin's motion to intervene is denied.

FACTS

On August 9, 1989, intervenors-respondent applied for tentative plat approval. The subject property is vacant, includes 16.03 acres and is located within the city's adopted urban growth boundary (UGB).[3] The subject property is designated Urban Single Family Residential in the comprehensive plan and is zoned R-1-8, Single Family Residential (8,000 square foot minimum lot size).

The application was considered by the city's

[3]The legal status of the city's UGB is a critical issue in this appeal. We address the legal status of the UGB separately below.

subdivision committee on September 6, 1989. The planning commission considered the request at a public hearing on September 12, 1989. The matter was continued twice by the planning commission, once to September 25, 1989 and a second time to October 10, 1989 to allow the applicant time to submit additional written material. At its October 10, 1989 meeting, the planning commission voted to deny the application.

Intervenors-respondent appealed the planning commission's decision to the city council. On December 5, 1989, the city council held a hearing to review the planning commission's decision. At the conclusion of the December 5, 1989 hearing, the city council voted to reverse the planning commission and grant tentative plat approval. The city council's decision was reduced to writing and adopted by the city council on January 2, 1990. This appeal followed.

ACKNOWLEDGMENT STATUS OF THE CITY'S COMPREHENSIVE PLAN AND LAND USE REGULATIONS

The current acknowledgment status of the city's comprehensive plan and land use regulations has an important bearing on our jurisdiction to consider this appeal. We therefore consider that status before turning to intervenors-respondent's challenge to our jurisdiction.

On August 16, 1984, the city's comprehensive plan and land use regulations were acknowledged by the Land Conservation and Development Commission (LCDC) to be in

compliance with the Statewide Planning Goals. LCDC 84-ACK-176. LCDC's acknowledgment order was reversed and remanded by the Court of Appeals. Collins v. LCDC, 75 Or App 517, 707 P2d 599 (1985). The Court of Appeals determined LCDC violated ORS 197.251 and Statewide Planning Goals 5 (Open Spaces, Scenic and Historic Areas and Natural Resources) and 14 (Urbanization) by acknowledging the city's plan despite its failure to identify and evaluate conflicts over the use of open spaces around the city's historic buildings and its inclusion of 700 acres of land within its urban growth boundary (UGB) not shown to be needed for projected urban expansion.

Following the Court of Appeal's remand, LCDC entered a continuance order dated December 6, 1985. LCDC 85-CONT-178. In that continuance order LCDC found the city's plan and land use regulations complied with all Statewide Planning Goals except Goals 5 and 14.[4] Based on the Court of Appeal's decision, LCDC directed that the city

> "identify conflicts with the use of inventoried historic sites, evaluate the economic, social, environmental and energy (ESEE) consequences of conflicting uses and provide implementing measures to meet Goal 5. LCDC 85-CONT-178 at 2.

LCDC also directed that the city exclude certain lands from its UGB. Id.

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[4]In support of this finding, LCDC relied on staff reports supporting prior continuance orders and the acknowledgment order that was reversed by the Court of Appeals.

The city subsequently submitted to LCDC amendments to its plan to satisfy the Goal 14 concerns identified in LCDC 85-CONT-178. These amendments were reviewed and approved by LCDC in a continuance order dated January 14, 1988. LCDC 88-CONT-309. In that continuance order LCDC also found the city's comprehensive plan remained out of compliance with Goal 5, for the reasons previously set forth in LCDC 85-CONT-178. LCDC 88-CONT-309 at 2.

LCDC has the option, under ORS 197.251(9), to issue limited acknowledgment orders where a previously issued acknowledgment order is remanded by the appellate courts. ORS 197.251(9) provides LCDC may issue a limited acknowledgment order to acknowledge the portions of the plan and land use regulations not affected by the appellate court's remand. Had LCDC proceeded in this manner, the city's comprehensive plan and land use regulations would be acknowledged to be in compliance with the Statewide Planning Goals with respect to all Goals except Goal 5.

However, ORS 197.251(9) does not require that LCDC proceed by way of limited acknowledgment orders, and LCDC has not done so in the case of the City of Jacksonville. Because LCDC has never entered an acknowledgment order of any type since LCDC 84-ACK-174 was reversed and remanded by the Court of Appeals, no part of the city's comprehensive

plan and land use regulations is acknowledged.[5]

JURISDICTION

Our jurisdiction is limited to land use decisions. ORS 197.825(1). Intervenors-respondent point out that ORS 197.015(10)(b)(B) creates an exception to the definition of land use decision and therefore creates an exception to our review jurisdiction for a decision

> "[w]hich approves * * * a subdivision * * * located within an urban growth boundary where the decision is consistent with land use standards * * *[.]" See Parmenter v. Wallowa County, ___ Or LUBA ___ (LUBA No. 90-028, June 11, 1990).

Petitioner and respondent contend this exception to our review jurisdiction only applies where the local

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[5]The parties in this appeal are in agreement that the city's plan and land use regulations are not acknowledged. Although ORS 197.251(13) provides that a continuance order is a final decision for purposes of judicial review regarding the portions of the plan and land use regulations found in the continuance order to comply with the goals, it is reasonably clear that this does not mean such portions of the plan and land use regulations are acknowledged. Otherwise, the provisions in ORS 197.251(9) for limited acknowledgment orders, which may be issued in conjunction with continuance orders, would be superfluous. Therefore, even though portions of a plan and land use regulations have been found in a continuance order to comply with the goals, a local government is not thereby relieved of its obligation to apply the statewide planning goals prior to acknowledgment of its plan and land use regulations.

Respondent attaches to its brief an April 10, 1990 letter from the Department of Land Conservation and Development (DLCD) to the city in which DLCD states that in its view no part of the city's comprehensive plan is acknowledged. DLCD also takes the position in that letter that the city may satisfy its obligation to demonstrate individual land use decisions comply with the goals by relying "on LCDC's approval of [the] comprehensive plan as findings for all statewide planning goals except Goal 5 * * *." See Whitesides Hardware v. City of Corvallis, 68 Or App 204, 680 P2d 1004 (1984). We express no opinion concerning the correctness of DLCD's view of the city's current obligation to adopt findings concerning Goals other than Goal 5 in making land use decisions.

government's comprehensive plan and land use regulations are fully acknowledged by LCDC.[6]

Whether or not the exception specified in ORS 197.015(10)(b)(B) is limited to jurisdictions where the comprehensive plan and land use regulations are fully acknowledged, it is clear that the exception only applies where the subdivision is located within a UGB. Further, we believe that a subdivision can be located within a UGB in the sense intended by ORS 197.015(10)(b)(B) only where a jurisdiction has an established UGB. A UGB is not established until it is acknowledged. Branscomb v. LCDC, 64 Or App 738, 669 P2d 124 (1983); Roth v. LCDC, 57 Or App 611, 646 P2d 85 (1982).

As explained above, the City of Jacksonville's UGB is not yet acknowledged. Until the City of Jacksonville's UGB is acknowledged, it is at most a proposed UGB, within the meaning of Goal 14. Without an established UGB, the exception to our review jurisdiction created by ORS 197.015(10)(b)(B) does not apply.

Intervenors-respondent's motion to dismiss for lack of jurisdiction is denied.[7]

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[6]Petitioner and respondent correctly note the legislative history cited by intervenors-respondent in its brief strongly suggests the exception for urban subdivisions was intended to apply only where a local government's comprehensive plan and land use regulations are acknowledged.

[7]We consider other arguments presented in intervenors-respondent's May 30, 1990 motion to dismiss later in this opinion.

STANDING

Intervenors-respondent challenge petitioner's standing. Intervenors-respondent contend petitioner never appeared before the planning commission in this matter and therefore fails to satisfy the statutory requirement that he have "[a]ppeared before the local government * * * orally or in writing." ORS 197.830(2)(b).

We agree with intervenors-respondent that petitioner's participation in the local proceedings as mayor does not constitute an "appearance" for purposes of ORS 197.830(2)(b). However, we previously determined in sustaining a record objection filed by petitioner that he submitted a letter dated October 14, 1989 to the planning commission in which he opposed the application. Cecil v. City of Jacksonville, ___ Or LUBA ___ (LUBA No. 90-013, Order on Motions to Intervene and Record Objections, March 13, 1990). We find that letter is sufficient to constitute an appearance during the local proceedings, within the meaning of ORS 197.830(2)(b).[8] Petitioner also filed a

[8]In their brief, intervenors-respondent claim they disputed the factual circumstances that led us to conclude petitioner's October 14, 1989 letter was properly included in the record. However, as we pointed out in our order denying intervenors-respondent's motion for reconsideration and petition for depositions and evidentiary hearing, intervenors-respondent did not in any way dispute petitioner's factual allegations concerning his submission or the city's receipt of the letter until after we entered our order sustaining petitioner's record objection and ordering that the letter be added to the record. We decline to reconsider our prior decision that the October 14, 1989 letter is properly considered part of the local government record in this matter.

timely notice of intent to appeal as required by ORS 197.830(2)(a) and, therefore, has standing to bring this appeal.

FIRST ASSIGNMENT OF ERROR

ORS 197.175(2)(c) requires that a city "make land use decisions in compliance with the statewide planning goals" if the city's comprehensive plan and land use regulations have not been acknowledged. ORS 197.835(3) requires that LUBA reverse or remand a land use decision not subject to an acknowledged comprehensive plan and land use regulations if the land use decision does not comply with the Statewide Planning Goals. Because no part of the city's comprehensive plan has been acknowledged, the decision challenged in this appeal is required to demonstrate compliance with the Statewide Planning Goals.

Under the first assignment of error, petitioner contends the city was required to demonstrate that its decision complies with Goal 5. Petitioner contends that under Goal 5 and OAR 660 Division 16, the city is required to inventory Goal 5 resources, identify conflicting uses, and develop a program to resolve identified conflicts with Goal 5 resources. Petitioner complains there is an historic railroad right of way which terminates at the site and that numerous historic properties adjoin or are in close proximity to the subject property. Petitioner contends the city failed to demonstrate the proposed subdivision will not

conflict with these historic resources in a manner that violates the requirement of Goal 5 that historic resources be protected for future generations.

Respondent concedes that its decision does not adequately address potential conflicts between the proposed use and historic resources proximate to the subject property. However, intervenors-respondent contend the city adequately addressed petitioner's Goal 5 concerns.

Intervenors-respondent first contend we should deny the first assignment of error because petitioner's arguments concerning violations of Goal 5 are not specific enough. See Tichy v. Portland, 6 Or LUBA 13 (1982). We disagree. Petitioner's complaint that the city failed to identify and resolve potential conflicts between the proposed subdivision and nearby historic sites is sufficiently specific.[9]

Intervenors-respondent next contend the city did adopt findings addressing and resolving Goal 5 issues. The findings intervenors-respondent refer to are "Proposed Findings of Fact and Conclusions" which intervenors-respondent submitted to the planning commission. Record

[9]Similarly, we reject the portion of intervenors-respondent's May 30, 1990 motion to dismiss in which they claim petitioner failed to adequately raise below the issues he presents in this appeal. Although we disagree with intervenors-respondent's contention that the current "raise it or waive it" provisions of ORS 197.763, which became effective October 3, 1990, or the prior more limited "raise it or waive it" provisions of ORS 197.762 applicable within UGB's apply in this case, the issues asserted in petitioner's three assignments of error were raised in his October 14, 1989 letter.

291-310. Those findings were included in the record forwarded to the city council for review. The city council decision challenged in this proceeding states in part:

> "The City Council hereby incorporates by reference all oral and written information received during the aforementioned public hearing and meetings on the subject application in this final order." Record 32.

We agree with petitioner and respondent that the above quoted reference is not sufficient to demonstrate the city council adopted as findings the proposed findings submitted by intervenors-respondent to the planning commission. A more specific reference is required for a local government to adopt particular documents in the record as its own findings in support of the decision. DLCD v. Klamath County, 16 Or LUBA 817, 825 n 2 (1988); Jackson-Josephine Forest Farm Assn. v. Josephine County, 12 Or LUBA 40, 42 (1984).

The decision goes on to identify the standards the city council felt were relevant and adopts findings of fact and conclusions concerning those standards. Although the decision specifically recognizes that Goal 5 is applicable, it makes no attempt to explain how the standards of Goal 5 are met and makes no explicit reference to the proposed findings submitted to the planning commission.

The entire city of Jacksonville is a designated National Historic Landmark. Although the subject property does not appear to be identified as a historic site in the

plan and the parties dispute the exact location of the historic railroad right of way, it is clear that there are numerous significant historic properties close to the subject property. The city submitted a copy of the Jacksonville Historical Survey. That document inventories historic properties in the city of Jacksonville as "Primary," "Secondary," "Compatible", "Noncompatible" and "Vacant." Although the subject property is not included in the inventory, it is located close to several "Primary" structures which are of "exceptional architectural or historical value." Jacksonville Historical Survey 1.

We agree with intervenors-respondent that most of the provisions of OAR 660-16-000 concerning preparation of Goal 5 inventories relate more to plan and land use regulation adoption than individual permit decisions. See Holliday Family Ranches v. Grant County, 10 Or LUBA 199, 211 (1984). However, in view of the current unacknowledged status of the city's comprehensive plan, when acting on a land use application the city is required, at a minimum, to adopt findings identifying any historic resources that may be present on the subject property or in sufficiently close proximity to the subject property that the proposed development constitutes a conflicting use.[10] See

[10]Intervenors-respondent's contention that the record demonstrates the subject property contains no Goal 5 historic resources, even if true, does not mean the proposed subdivision will not conflict with nearby historic structures and sites. See Coats v. Deschutes County, 67 Or App 504, 510

OAR 660-16-005; Panner v. Deschutes County, 14 Or LUBA 1, 11 (1985) ("a conflicting use is one which, if allowed, could negatively impact a Goal 5 resource site"). Following identification of the location and nature of those historic resources, the city will be in a position to determine whether the proposed use conflicts with such resources and, if so, what the economic, social, environmental and energy (ESEE) consequences of the conflicts are. From this analysis the city may determine whether the proposed use can nevertheless be allowed, consistent with requirement of Goal 5 that historic areas be preserved for future generations.[11]

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

In this assignment of error petitioner contends the city's decision violates Goal 2 because the decision is not based on the kinds of inventory and planning analysis envisioned by Goal 2.

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679 P2d 898 (1984). To the extent such conflicts exist, the city must address the conflicts in its findings.

[11]Because we conclude the city council did not adopt the proposed findings submitted to the planning commission by intervenors-respondent as its own, we express no position concerning their adequacy to demonstrate compliance with Goal 5. However, by way of guidance on remand, we note those findings make no attempt to identify or discuss possible impacts of the development on nearby "Primary" and "Secondary" historic structures.

Although OAR 660-16-010 makes it clear that the city may in some circumstances allow uses which conflict with Goal 5 resource sites, it may do so only after considering the ESEE consequences of allowing the conflicting uses. OAR 660-16-005. In analyzing ESEE consequences, the city is required to consider the impacts of its decision on both the resource site and the conflicting use. Id.; Panner v. Deschutes County, supra.

We agree with intervenor-respondent that petitioner's arguments under this assignment of error essentially restate his arguments under the first assignment and do not provide a separate basis for remand.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Under this assignment of error petitioner contends the city failed to require that the proposal be reviewed by the "Site Plan Committee," and the "Historic and Architectural Review Commission" (HARC).[12]

Intervenors-respondent point out the city has adopted "Land Division Regulations" and "Land Development Regulations." Intervenors-respondent contend that while the latter may be applicable at the time development is proposed on lots in the subject subdivision, tentative plat approval is governed by the Land Division Regulations, not the Land Development Regulations. We agree with intervenors-respondent.

It is reasonably clear from the city's Land Division

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[12]The Site Plan Committee is created by Jacksonville Land Development Regulations (JLDR) 17.44.020 and consists of the fire chief, city planner, city engineer, city public works superintendent and city recorder. The HARC is composed of seven voting members and one ex officio member. The seven voting members include a city councilor, planning commission member and five members of the community with related professional expertise. The city planner is the ex officio member.

Apparently, the duties of the HARC are now performed by the planning commission. Petition for Review App 7. Petitioner contends the delegation of HARC's duties to the planning commission constitutes an unlawful delegation. We need not consider the issue.

Regulations and Land Development Regulations that the former govern the subdividing and partitioning of land as well as construction of streets and other required infrastructure improvements. Land Development Regulations, on the other hand, govern the placement and construction of structures on land. JLDR 17.44.030 provides that Site Plan Committee review is required before building permits are issued for development. Similarly HARC review, where required, is concerned with development, i.e. construction, alteration, or destruction of structures. JLDR 17.48.010. When and if structures are proposed for the lots in the subject subdivision, HARC and site plan approval may be required. However, we agree with intervenors-respondent that such review was not required to obtain tentative plat approval.

The third assignment of error is denied.

INTERVENORS-PETITIONERS' ASSIGNMENT OF ERROR

Intervenors-petitioner contend the property is subject to flooding and that the subdivision development and related roads would alter the character of the area. They also express concern that they currently depend on a well located on the subject property and that there may be impacts on nearby farming uses, open spaces, and Jacksonville's Historic Landmark status.

We agree with intervenors-respondent that the intervenors-petitioners do not explain how their concerns relate to applicable approval criteria in the Statewide

Planning Goals, comprehensive plan or land use regulations. Without an explanation by intervenors-petitioner of how their concerns relate to applicable approval standards, we are unable to sustain their assignment of error. Tichy v. Portland, supra.

Intervenors-petitioners' assignment of error is denied. The city's decision is remanded.[13]

[13]In view of our disposition of this appeal, intervenors-respondent's May 30, 1990 motion to dismiss and respondent's June 19, 1990 motion for remand, both filed before oral argument in this matter, do not require additional discussion. At oral argument in this matter a number of documents not included in the record were submitted to the Board. We take official notice of the LCDC continuance orders cited in this opinion, although the copies submitted by the parties do not include the supporting appendices. We also take official notice of the Jacksonville Historical Survey. The remaining letters offered at oral argument are not documents for which official notice is appropriate or warranted, and we decline to take official notice of those letters.