BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MEADOWBROOK DEVELOPMENT, Petitioner, vs. CITY OF SEASIDE, Respondent, and NELL F. WATERHOUSE TRUST, Intervenor-Respondent.	)	LUBA No. 90-060 FINAL OPINION AND ORDER

Appeal from City of Seaside.

Phillip E. Grillo, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was O'Donnell, Ramis, Elliot & Crew.

No appearance by respondent.

Jeanyse R. Snow, Astoria, filed the response brief and argued on behalf of intervenor-respondent. With her on the brief was MacDonald, McCallister & Snow.

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

TRANSFERRED 09/18/90

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioner seeks review of the decision of the Seaside City Council denying petitioner's application for minor partition approval.

MOTION TO INTERVENE

The Nell F. Waterhouse Trust moves to intervene on the side of respondent. There is no objection to the motion and it is allowed.

FACTS

The subject property is zoned Medium Density Residential (R-2) and consists of two lots. The lots are part of the Ocean Cove Estates subdivision. Petitioner applied for permission to divide the two R-2 zoned lots to create therefrom a third parcel. The R-2 zone permits 5,000 square foot lots. The proposed sizes of the resulting three lots are 5,201, 5,196 and 5,286 square feet respectively.

The planning commission approved petitioner's application and intervenor-respondent (respondent) appealed to the city council. The city council denied petitioner's application. This appeal followed.

MOTION TO DISMISS

Intervenor moves to dismiss this appeal proceeding on the basis of ORS 197.015(10)(b)(B). Intervenor states the challenged decision denies a minor partition of land located within an acknowledged urban growth boundary, and no plan or

zoning regulation or map amendment was sought or approved by the city. Intervenor cites Parmenter v. Wallowa County, ___ Or LUBA ___ (LUBA No. 90-034, June 11, 1990), slip op 5, in which this Board determined:

> "[i]f a decision on an urban subdivision or partition is made without concurrent plan or land use regulation amendments, consistent with the preexisting land use standards, LUBA would not have review jurisdiction."

This Board has authority to review local government "land use decisions." ORS 197.825(1). ORS 197.015(10)(b)(B) provides the phrase "land use decision" does not include a decision of a local government:

> "[w]hich approves, approves with conditions or denies a subdivision or partition, as described in ORS chapter 92, located within an urban growth boundary where the decision is consistent with land use standards."

Petitioner argues that in its interpretation of ORS 197.015(10)(b)(B) in Parmenter, quoted supra, the Board added the word "preexisting" to 197.015(10)(b)(B). Petitioner argues that the Board in Parmenter did not go far enough in its interpretation of ORS 197.015(10)(b)(B). According to petitioner, the words "preexisting and objective" should be added to the interpretation of the operative statutory language of ORS 197.015(10)(b)(B), as follows:

> "[w]hich approves, approves with conditions or denies a subdivision or partition, as described in ORS chapter 92 located within an urban growth boundary where the decision is consistent with

[preexisting and objective] land use standards."

Petitioner argues that interpreted in this way ORS 197.015(10)(b)(B) is consistent with ORS 197.015(10)(b)(A) and (C), which remove certain objective or ministerial land use decisions from LUBA's review authority. According to petitioner, the legislative history of ORS 197.015(10)(b)(B) demonstrates that only divisions of land which are approved under objective criteria were intended to be exempted from LUBA's review authority.

Petitioner argues this Board should review the applicable city comprehensive plan and land use regulation provisions and determine if they are objective land use approval standards. If the applicable standards are determined to be objective, petitioner argues LUBA should dismiss the appeal or transfer the appeal to circuit court, pursuant to ORS 19.230 and OAR 661-10-075(10). If those standards are not objective, however, petitioner argues ORS 197.015(10)(b)(B) does not prohibit this Board from reviewing the challenged decision for compliance with those standards.

While we agree with petitioner that the scope and intended meaning of ORS 197.015(10)(b)(B) is unclear, we disagree with petitioner's interpretation of ORS 197.015(10)(b)(B), that it excludes from our review authority only those subdivision and partition decisions which are based on objective criteria. We continue to

believe that our reasoning and conclusion in Parmenter is correct. ORS 197.015(10)(b)(B) removes from our review authority any decision approving or denying a proposed subdivision or partition within an acknowledged urban growth boundary, where the challenged decision does not also approve, or is not made in conjuction with, an amendment or modification of a plan or land use regulation provision.[1] We believe that if the legislature had intended to remove only our authority to review decisions on subdivisions and partitions made under objective review criteria, then it would have been unnecessary to add ORS 197.015(10)(b)(B) to the statute, as ORS 197.015(10)(b)(A) already removes our jurisdiction to review decisions made under objective approval standards.[2]

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[1]We note petitioner does not argue that the proposed partition is dependent upon another land use approval over which we do have review authority.

[2]Petitioner also argues that the legislature did not need to exempt ministerial building permit decisions from our review authority under ORS 197.015(10)(b)(C), because ORS 197.015(10)(b)(A) already exempts all ministerial decisions from our jurisdiction. Petitioner argues the only way ORS 197.015(10)(b), read as a whole, makes sense is to interpret it as exempting all ministerial decisions, including ministerial decisions on building permits and subdivisions, from our review authority.

Petitioner may be correct that ORS 197.015(10)(b)(C) partially duplicates ORS 197.015(10)(b)(A) and is therefore unnecessary. However, this possible overlap in the statutory exclusion from the definition of land use decision provides no basis for reading a requirement into ORS 197.015(10)(b)(B) that it be be limited to subdivision and partition decisions "that do not require the exercise of factual, policy or legal judgment." Such an interpretation would simply make ORS 197.015(10)(b)(B) equally duplicative and unnecessary and, unlike the interpretation of

It is undisputed that the challenged decision approves a minor partition within the acknowledged urban growth boundary of the City of Seaside, and that the challenged decision does not include and is not made in conjunction with an amendment of provisions in the city's plan or land use regulations. Accordingly, we conclude this Board does not have review authority over the challenged decision.[3]

PETITIONER'S CONDITIONAL MOTION FOR TRANSFER

Petitioner requests that if we determine that we do not have jurisdiction to consider the challenged decision, we transfer this matter to the Circuit Court of Clatsop County pursuant to ORS 19.230 and OAR 661-10-075(10). Petitioner's motion for transfer is allowed.

This appeal is transferred.

ORS 197.015(10)(b)(C) to impose such a requirement, has no basis in the statutory language.

[3]Petitioner also argues the challenged decision is within our jurisdictional authority because it is a significant impacts land use decision. Billington v. Polk County, 299 Or 471, 479, 703 P2d 232 (1985); City of Pendleton v. Kerns, 294 Or 126, 133, 653 P2d 992 (1982). However, the significant impacts test does not confer jurisdiction where such review authority is specifically excluded by statute. Parmenter v. Wallowa County, slip op at 6 n 5; Oregonians In Action v. LCDC, __ Or LUBA ___ (LUBA No. 90-028, April 9, 1990), slip op 3, aff'd 103 Or App 35 (1990).