BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SOUTHWOOD HOMEOWNERS ASSOCIATION and WILLIAM GATES, Petitioners, vs. CITY OF PHILOMATH, Respondent, and BETTY ELLIS and GARY REMINGTON, Intervenors-Respondent.	LUBA No. 90-103 FINAL OPINION AND ORDER

Appeal from City of Philomath.

Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Johnson and Kloos.

Scott A. Fewell, Corvallis, filed the response brief and argued on behalf of respondent.

Betty Ellis and Gary Remington, Philomath, represented themselves.

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

TRANSFERRED 11/15/90

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a city decision granting approval of a 41 lot subdivision located within the city's urban growth boundary (UGB).

MOTION TO INTERVENE

Betty Ellis and Gary Remington move to intervene on the side of respondent in this proceeding. There is no opposition to the motion, and it is allowed.

MOTION TO DISMISS

LUBA has exclusive jurisdiction to review land use decisions. ORS 197.825(1). ORS 197.015(10)(b) provides that land use decisions do not include a local government decision:

> "(A) Which is made under land use standards which do not require interpretation or the exercise of factual, policy or legal judgment;
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> "(B) Which 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; or
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> "(C) Which approves or denies a building permit made under land use standards which do not require interpretation or the exercise of factual, policy or legal judgment." (Emphasis added.)

See Oregonians in Action v. LCDC, 103 Or App 35, 38, ___ P2d ___ (1990); Meadowbrook Development v. City of Seaside, ___ Or LUBA ___ (LUBA No. 90-060, September 18, 1990); Parmenter

v. Wallowa County, ___ Or LUBA ___ (LUBA No. 90-034, June 11, 1990).

Respondent moves to dismiss, alleging the challenged decision falls within the statutory exception to the definition of land use decision provided in ORS 197.015(10)(b)(B) for subdivisions located within UGBs.

Petitioners do not dispute that the challenged decision concerns approval of a subdivision located within a UGB. However, petitioners contend respondent's motion to dismiss should be denied, because the challenged decision is not "consistent with land use standards," as required by ORS 197.015(10)(b)(B).[1]

Legislative amendments in 1989 produced the current language in ORS 197.015(10)(b)(B). We first interpreted the meaning and scope of the exception to our jurisdiction created by that section in Parmenter v. Wallowa County, supra. In that decision, we acknowledged that it is "possible" to interpret ORS 197.015(10)(b)(B) to exclude decisions concerning subdivisions and partitions from our review jurisdiction only where the "decision complies with all applicable approval standards found in the local government's comprehensive plan and land use regulations." Id. slip op at 4. We explained:

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[1]In the alternative, petitioners conditionally move that this case be transferred to circuit court, should this Board determine that it lacks jurisdiction. See ORS 19.230; OAR 661-10-075(10); Anderson Bros., Inc. v. City of Portland, ___ Or LUBA ___ (LUBA No. 89-054, November 22, 1989).

> "Under this interpretation, LUBA would essentially have to conduct a complete review of the merits of the appealed decision before it could determine whether or not it had jurisdiction to review the decision. If, upon concluding its review, LUBA determined that the decision was consistent with all applicable land use standards, LUBA could not affirm the decision, but rather would dismiss the appeal or transfer the appeal to circuit court, pursuant to ORS 19.230 and OAR 661-10-075(10)."

In Parmenter we rejected the above interpretation of ORS 197.015(10)(b)(B), concluding the phrase "consistent with land use standards" simply limited the jurisdictional exclusion to partition and subdivision decisions in which the local government applied land use standards, as opposed to partition and subdivision decisions which required amended land use standards for approval. As we subsequently explained in Meadowbrook Development v. City of Seaside, supra, slip op at 4-5:

> "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 conjunction with, an amendment or modification of a plan or land use regulation provision."

Petitioners recognize that under our decisions in Parmenter and Meadowbrook this case must be dismissed or transferred to circuit court. However, petitioners contend our interpretation of ORS 197.015(10)(b)(B) in those cases is wrong and should be reconsidered. Petitioners contend the interpretation we acknowledged in Parmenter as

"possible," but rejected, is the correct interpretation of ORS 197.015(10)(b)(B).

> "The language of ORS 197.015(10)(b)(B) is plain and unambiguous on its face * * *. It does mean * * * LUBA must address the merits of the case in order to determine whether it has jurisdiction. If upon review LUBA concludes that the decision is not consistent with the applicable standards, then LUBA has jurisdiction and issues a decision. If LUBA's review concludes that the decision was made "consistent with land use standards," then LUBA so determines, finds that it has no jurisdiction, and the matter can be transferred to circuit court under the applicable statute. At that point, the circuit court could conduct review of any procedural issues that might be raised by the parties. This reading of the statute gives meaning to its unambiguous terms; it is workable, if a bit cumbersome, process." (Emphasis in original.) Petitioners' Response to Motion to Dismiss and Conditional Motion for Transfer to Circuit Court 2.

As an initial point, we readily agree with petitioners that the review process required under their construction of the language of ORS 197.015(10)(b)(B) is "cumbersome." Effectively, under their interpretation, LUBA only lacks review jurisdiction over "procedural" issues. LUBA must review "substantive" issues to determine whether it has jurisdiction to review the challenged decision for compliance with substantive standards. If LUBA determines it has jurisdiction (because the decision violates one or more substantive standards), it issues an opinion on the merits. If LUBA lacks jurisdiction (because the subdivision "is consistent with [substantive] land use standards") and

one or more procedural issues remain unresolved, the appeal must be transferred to circuit court so that a trial may be held to consider possible procedural issues.

There is no support in the statutory language of ORS 197.015(10)(b)(B) for petitioners' jurisdictional distinction between "substantive" and "procedural" issues. Land use standards can be procedural or substantive, and the statute does not state that only "substantive" land use standards are to be considered under ORS 197.015(10)(b)(B). Absent some support in the language of the statute for petitioners' contention the legislature intended to bifurcate review of decisions on urban partitions and subdivisions in the way they suggest, with review of substantive issues by LUBA and review of procedural issues by circuit courts, we reject that interpretation.

Petitioners contend the interpretation we adopted in Parmenter and followed in Meadowbrook improperly looks beyond unambiguous language to consider legislative intent and contend our interpretation adds language to the statute that was not adopted by the legislature. We disagree with both contentions.

As petitioners correctly point out, it is this Board's obligation to apply statutes as they are written and if the statutory language is clear as written, no interpretation by this Board is required. Whipple v. Howser, 291 Or 475, 481, 632 P2d 752 (1981); State v. Young, 74 Or 399, 403, 145 P2d

647 (1915); Hay v. City of Cannon Beach, ___ Or LUBA ___ (LUBA Nos. 88-054 and 88-093, December 27, 1988). However, our decisions in Parmenter and Meadowbrook are based on our view that the language in ORS 197.015(10)(b)(B) is ambiguous.[2]

Although a literal reading of the phrase "consistent with land use standards" may suggest that a review of the merits necessarily is called for in making a jurisdictional determination under ORS 197.015(10)(b)(B), we do not agree it unambiguously requires such a review.[3] Statutes are to be construed in context with related provisions. Davis v. Wasco IED, 286 Or 261, 266-267. 593 P2d 1152 (1979); State Highway Com. v. Rawson, 210 Or 593, 608-610, 312 P2d 849 (1957). We believe the context of the statutory language in ORS 197.015(10)(b)(B) is particularly important. The phrase appears in a section of the statute which creates exceptions to our jurisdiction, and we assume the legislature intended to create a workable exception when it adopted ORS 197.015(10)(b)(B). Viewed in context, we continue to believe that although it is "possible" that

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[2]Actually, in both cases we described the statute as "unclear." Parmenter, slip op 5; Meadowbrook, slip op 4.

[3]Even where statutory language is unambiguous, literal application of statutory language is to be avoided where it produces absurd results. Rather, if it is possible in such situations, statutory language should be construed so that it is a reasonable and workable law and not inconsistent with the general policy of the legislature * * *." Fox v. Galloway, 174 Or 339, 347, 148 P2d 922 (1944). See Pacific Power and Light Co. v. State Tax Commission, 249 Or 103, 110, 437 P2d 473 (1968).

ORS 197.015(10)(b)(B) can be interpreted to require that we conduct a substantive review of partition and subdivision decisions to determine whether we have jurisdiction to conduct such a review in the first place, it does not do so unambiguously.

Finally, petitioners charge that our interpretation of ORS 197.015(10)(b)(B) in Parmenter and Meadowbrook effectively inserts language into the statute which the legislature did not. Petitioners correctly note that in determining the meaning of statutes this Board is "not to insert what has been omitted" from the statute.[4] ORS 174.010; 1000 Friends of Oregon v. Benton County, ___ Or LUBA ___ (LUBA No. 90-066, September 14, 1990).

In interpreting ambiguous statutory language, the reviewing body almost always elaborates upon, or qualifies in some manner, the words that appear in the statute. Although the distinction between improper insertion of new statutory language and permissible explanation of the meaning of the statute may in particular cases be a fine one, we do not believe our decisions in Parmenter and Meadowbrook improperly insert language that the legislature omitted.

Again, we recognize that this Board's obligation is to

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[4]Petitioners contend the effect of our decisions in Parmenter and Meadowbrook is to make the critical phrase in ORS 197.015(10)(b)(B) "consistent with land use standards," read "consistent with existing land use standards."

"discern and declare the intent of the legislature." ORS 174.020; Fifth Avenue Corp. v. Washington Co., 282 Or 591, 596, 581 P2d 50 (1978). However, in seeking that intent, we presume the legislature intended to create a workable exception to our jurisdiction and did not intend to create a procedural morass. Our decision in Parmenter simply interprets the phrase "consistent with land use standards" to express a legislative intent that the exception to our jurisdiction created by ORS 197.015(10)(b)(B) be confined to those partition and subdivision decisions which merely apply applicable land use regulations. Under this interpretation of the exception to our jurisdiction created by ORS 197.015(10)(b)(B), jurisdiction to determine whether the land use regulations were correctly applied in making those decisions no longer lies at LUBA.

On the other hand, partition and subdivision decisions which require application of modified or amended land use standards are not "consistent with land use standards," because those standards must be changed or modified in some manner to accommodate the partition or subdivision. Such partition and subdivision decisions remain subject to our review.[5] This interpretation of ORS 197.015(10)(b)(B) gives

[5]In Hoffman v. City of Lake Oswego, ___ Or LUBA ___ (LUBA No. 90-067, September 26, 1990), slip op 3, we stated that where a subdivision and planned unit development approval granted "modifications" to setbacks that would otherwise be required under the land use regulations the exception to our jurisdiction provided by ORS 197.015(10)(b)(B) does not apply.

meaning to the statutory language. Unlike the interpretation petitioners suggest, which could require review of urban partition and subdivision decisions by both LUBA and the circuit court, the interpretation adopted in Parmenter results in a relatively straightforward exception to the definition of the term "land use decision" and our review jurisdiction.

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For the reasons explained above, we adhere to our prior interpretation of ORS 197.015(10)(b)(B). The challenged decision falls within the exception to our jurisdiction specified by ORS 197.015(10)(b)(B). Accordingly, petitioners' conditional motion to transfer this appeal to the Benton County Circuit Court is allowed.