

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 LOUIS S. SCHULTZ and ANNA MAY)
5 SCHULTZ,)
6)
7 Petitioners,) LUBA No. 91-122
8)
9 vs.) FINAL OPINION
10) AND ORDER
11 CITY OF GRANTS PASS,)
12)
13 Respondent.)

14
15
16 Appeal from City of Grants Pass.
17

18 Louis F. Schultz, Grants Pass, filed the petition for
19 review and argued on behalf of petitioners. With him on the
20 brief was Schultz, Salisbury, Cauble & Versteeg.
21

22 Timothy J. Sercombe, Portland, filed the response brief
23 and argued on behalf of respondent. With him on the brief
24 was Preston, Thorgrimson, Shidler, Gates & Ellis.
25

26 HOLSTUN, Chief Referee; SHERTON, Referee; KELLINGTON,
27 Referee, participated in the decision.
28

29 TRANSFERRED 12/13/91
30

31 You are entitled to judicial review of this Order.
32 Judicial review is governed by the provisions of ORS
33 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city decision granting their
4 request for approval of a partition of their 3.85 acre
5 property into two lots.

6 **FACTS**

7 The subject property is located within the city's
8 acknowledged urban growth boundary (UGB). In approving
9 petitioners' request, the city imposed several conditions.
10 Two of those conditions require that petitioners dedicate
11 land to widen abutting rights of way. Two other conditions
12 require petitioners to sign deferred development agreements
13 which require petitioners to participate financially in
14 future storm drain, street and sidewalk improvements within
15 abutting rights of way.

16 Petitioners challenge the conditions requiring
17 dedications, arguing they violate the takings clause of the
18 Fifth Amendment to the United States Constitution, made
19 applicable to the states by the Fourteenth Amendment.
20 Petitioners challenge the deferred development agreement
21 conditions, arguing they violate the city charter and a city
22 ordinance granting landowners a right of remonstrance.

23 **DECISION**

24 This Board has exclusive jurisdiction to review land
25 use decisions. ORS 197.825(1). In 1989 the legislature
26 adopted an exception to our review jurisdiction for

1 decisions concerning subdivisions and partitions located
2 within UGBs (hereafter urban subdivisions and partitions).
3 Or Laws 1989, ch 761, § 1. As codified at ORS 197.015(10),
4 the definition of "land use decision" was amended to exclude
5 urban subdivisions and partitions.

6 " 'Land use decision':

7 "* * * * *

8 "(b) Does not include a decision of a local
9 government:

10 "* * * * *

11 "(B) Which approves, approves with conditions
12 or denies a subdivision or partition * *
13 * located within an urban growth
14 boundary where the decision is
15 consistent with land use standards.

16 "* * * * *"

17 The above exception to our review jurisdiction became
18 effective October 3, 1989.

19 The 1991 legislature repealed the above exception to
20 our jurisdiction. Oregon Laws 1991, ch 817, § 1. In
21 addition, Oregon Laws 1991, ch 817, § 4 specifically gives
22 LUBA review jurisdiction over "limited land use decisions."
23 As defined by Oregon Laws 1991, ch 817, § 1, limited land
24 use decisions include urban partition decisions, such as the
25 decision challenged in this appeal. Oregon Laws 1991, ch
26 817 became effective September 29, 1991.

27 Under the above described statutory provisions, LUBA
28 lacked review jurisdiction over the urban subdivision and

1 partition decisions described in ORS 197.015(10)(b)(B)
2 between October 3, 1989 and September 28, 1991. Beginning
3 September 29, 1991, LUBA's review jurisdiction includes
4 urban subdivision and partition decisions.

5 The challenged urban partition decision became final
6 July 24, 1991. The notice of intent to appeal was filed on
7 August 14, 1991. The petition for review was filed on
8 September 27, 1991.¹ Each of these events occurred prior to
9 September 29, 1991, when Oregon Laws 1991, chapter 817
10 became effective, and LUBA was granted jurisdiction over
11 limited land use decisions (including urban partitions).

12 Two questions are presented in determining whether we
13 have jurisdiction in this matter. First, is this review
14 proceeding governed by the above noted sections of Oregon
15 Laws 1991, chapter 817? If so, we have jurisdiction.
16 Second, if Oregon Laws 1991, chapter 817 does not apply to
17 this appeal, is the challenged decision nevertheless subject
18 to our review jurisdiction under ORS 197.015(10)(b)(B) and
19 197.825(1), as they existed prior to their amendment by
20 Oregon Laws 1991, chapter 817?

21 **A. Applicability of Oregon Laws 1991, Chapter 817**

22 On the day the notice of intent to appeal was filed

¹Under OAR 661-10-075(2)(b)(B), the petition for review is "filed" when it is mailed. According to the certificate of filing and mailing attached to the petition for review, the petition for review was mailed to LUBA on September 27, 1991. The petition for review was received by LUBA on September 30, 1991.

1 (August 14, 1991), Oregon Laws 1991, chapter 817 had not yet
2 become effective. Neither was Oregon Laws 1991, chapter 817
3 in effect on September 27, 1991 when the petition for review
4 was filed.² Oregon Laws 1991, chapter 817 became effective
5 two days after the petition for review was filed and 44 days
6 after the notice of intent to appeal was filed.

7 Despite the fact Oregon Laws 1991, chapter 817 did not
8 become effective until 44 days after this appeal was
9 initiated, respondent contends those legislative amendments
10 apply to give LUBA jurisdiction in this matter. First,
11 respondent argues those amendments currently apply to LUBA
12 appeal proceedings and therefore must apply to all acts of
13 the Board after the legislation becomes final. Second,
14 respondent argues the legislation is procedural and remedial
15 and should apply retrospectively. We reject both arguments.

16 Respondent relies in large part on Fish and Wildlife
17 Department v. LCDC, 288 Or 203, 209, 603 P2d 1391 (1979),
18 where the Supreme Court explained:

19 " * * * As we pointed out in Joseph v. Lowery, 261
20 Or 545, 548-549, 495 P2d 273 (1972) after a review
21 of the cases, we have held that 'procedural or
22 remedial' statutes are applied retrospectively and

²Respondent contends the critical question is which jurisdictional statute was in effect when the petition for review was received. We do not agree. The filing of the notice of intent to appeal is the event which initiates a LUBA appeal. Even if the submittal of the petition for review were relevant to the present jurisdictional question, as noted above, the petition for review was filed prior to the effective date of Oregon Laws 1991, chapter 817 and it is the date of filing, not the date of receipt of the petition for review by LUBA, that would be important.

1 'substantive' statutes are not, in the absence of
2 a legislative indication to the contrary, but
3 these are labels which are applied after the court
4 has decided whether it thought the new statute
5 affected legal rights and obligations arising out
6 of past transactions. If they did, they were
7 substantive and were not applied. It is clear
8 here that we are not dealing with a 'substantive'
9 change. The statutory change deals only with the
10 scope of this court's review, not with the rules
11 upon which the litigants' rights are established
12 and is, therefore, applicable to causes of action
13 existing and litigation pending at the time of the
14 statutory change. * * *" (Emphasis added.)

15 To the extent the above quoted language is relevant in
16 this appeal, it contradicts respondent's argument that
17 Oregon Laws 1991, chapter 817 applies to give LUBA
18 jurisdiction. At issue in Fish and Wildlife Department v.
19 LCDC was whether the application of legislation which became
20 effective during appellate court review of a contested case
21 order and amended the scope of appellate court review
22 applied, or whether the prior statutory scope of review
23 applied.³ The jurisdictional question presented in this
24 appeal (i.e. which appellate tribunal has jurisdiction to
25 consider an appeal of the city's decision) is a
26 significantly different question than the question of what
27 scope of review applies. Although the change in the scope
28 of appellate court review of an agency decision at issue in
29 Fish and Wildlife Department v. LCDC may not "affect the

³The amended scope of review provisions became effective after the Court of Appeals decision and while the appeal was pending before the Oregon Supreme Court.

1 legal rights and obligations arising out of past
2 transactions," a statutory change in the tribunal with
3 appellate jurisdiction over the city's decision does affect
4 such rights and obligations. The legal rights and
5 obligations arising out of past transactions include the
6 right to pursue an appeal of the city's decision in the
7 proper forum, if such an appeal is provided by statute, and
8 the corresponding obligation to pursue that appeal properly
9 before the correct tribunal.

10 Oregon Laws 1991, chapter 817 both repealed existing
11 jurisdictional statutory provisions and adopted new ones.
12 In Russell et al v. Pac. Maritime et al, 9 Or App 402, 496
13 P2d 252, rev den (1972), the Court of Appeals considered a
14 question substantially identical to the question presented
15 in this appeal. In Russell, state agency decisions denying
16 unemployment benefits were appealed to circuit court, as
17 provided by existing statutes. While those cases were
18 pending before three separate circuit courts, the state
19 Administrative Procedures Act was substantially revised, and
20 the Court of Appeals was given original appellate
21 jurisdiction over such decisions. The circuit courts
22 thereafter dismissed the pending appeals on the basis of the
23 jurisdictional statutory amendments.

24 In a consolidated appeal of the circuit courts'
25 decisions dismissing the appeals, the Court of Appeals first
26 acknowledged that there were prior cases supporting both the

1 plaintiffs' and the defendants' positions.⁴ The Court of
2 Appeals explained:

3 "To the extent any precise rules can be distilled
4 from these complicated cases, it would appear
5 that: (1) statutes abolishing appellate
6 jurisdiction apply to cases pending when the
7 statutes become effective, but (2) statutes which
8 preserve a right of appeal but change the
9 procedures therefor apply prospectively and do not
10 affect pending cases.

11 "We believe the 1971 statutory changes here in
12 question fall within the second category. Both
13 before and after September 9, 1971, persons
14 aggrieved by an administrative decision have a
15 right to judicial review; all that changed on that
16 date was the court to which an appeal would go."
17 (Emphasis added; citations omitted.) Russell,
18 supra, 9 Or App at 405.

19 Oregon Laws 1991, chapter 817 did not abolish appellate
20 review of urban partition decisions. Oregon Law 1991,
21 chapter 817, sections 1 and 4 simply provide that whereas
22 LUBA lacked jurisdiction over such decisions before
23 September 29, 1991, after that date LUBA has jurisdiction
24 over such decisions. Following the Court of Appeals'
25 reasoning in Russell, we conclude that Oregon Laws 1991,
26 chapter 817 does not apply retrospectively to give LUBA

⁴See, e.g., Gibbs v. Multnomah County et al, 219 Or 84, 346 P2d 636 (1959); In re estate of T.A. Stoll, 188 Or 682, 214 P2d 345, 217 P2d 595 (1950); Brown v. Irwin, Executrix, 187 Or 462, 212 P2d 729 (1949); Libby v. Southern Pac. Co., 109 Or 449, 219 P 604, 220 P 1017 (1923); State v. Ju Nun, 53 Or 1, 97 P 513 (1908).

1 jurisdiction over a pending appeal.⁵ Therefore, the
2 decision challenged in this appeal is within our
3 jurisdiction only if LUBA had jurisdiction to review the
4 challenged decision on August 14, 1991, under the statutes
5 in effect on that date.

6 **B. Prior ORS 197.015(10)(b)(B)**

7 Under prior ORS 197.015(10)(b)(B) and 197.825(1), this
8 Board lacked jurisdiction over urban partitions, providing
9 the decision was "consistent with land use standards[.]"
10 Urban partition decisions that violated one or more land use
11 standards remained subject to our review. Southwood v. City
12 of Philomath, 106 Or App 21, 24, 806 P2d 162 (1991).
13 Therefore, the question of our jurisdiction under prior ORS
14 197.015(10)(b)(B) requires that we consider the merits of
15 any allegations of violation of land use standards to
16 determine if one or more land use standards are violated.
17 If so, we have jurisdiction to review the decision.
18 Southwood v. City of Philomath, supra.

19 Neither petitioners nor respondent contend the charter
20 or ordinance provisions granting landowners a right of
21 remonstrance are land use standards. The only remaining

⁵In Russell the appeals were pending before the proper tribunal when the jurisdictional statutes were revised. In the present case the appeal is not pending before the proper tribunal under the jurisdictional statutes in effect when the appeal was filed. Nevertheless, we believe the legal principle in Russell concerning whether the old or new jurisdictional statute controls is equally applicable in the circumstances presented in this appeal.

1 challenges to the decision are petitioners' allegations that
2 the conditions requiring dedications to widen abutting
3 rights of way violate the takings clause of the Fifth
4 Amendment of the United States Constitution.

5 Respondent argues we should give a broad construction
6 to the words "land use standards" in ORS 197.015(10)(b)(B).
7 Although we agree a broad construction of those words is
8 appropriate, we do not believe the legislature intended the
9 words "land use standards" to include constitutional
10 provisions that may be violated by individual decisions on
11 urban subdivisions and partitions.⁶ There is nothing in
12 ORS 197.015(10)(b)(B) or elsewhere in ORS chapter 197 to
13 suggest the legislature intended the term "land use
14 standards" to go beyond the provisions of ORS chapter 215
15 and 227 governing county and city planning and zoning, ORS
16 chapter 92 governing partitions and subdivisions and
17 acknowledged comprehensive plans and land use regulations
18 adopted to comply with the statewide planning goals. We
19 reject respondent's argument that the petitioner's
20 allegations concerning Fifth Amendment takings clause
21 violations could provide a basis for our jurisdiction in

⁶We also have some question whether, even in a general sense, the takings clause can be classified correctly as a land use standard. The takings clause is a restriction on governmental power to acquire and regulate private property and requires that a property owner be compensated when his or her property is taken by the government. Technically, the takings clause is only a limit on the use of land in the sense the land use for which property may properly be taken must be a "public" use rather than a private use.

1 this matter.⁷

2 Grants Pass Development Code (GPDC) 17.052 provides the
3 following relevant approval criterion for minor partitions:

4 "Criteria for Approval. The Director shall
5 approve, approve with conditions or deny the
6 request based upon the following criteria:

7 "(1) The plat complies with applicable portions of
8 this Code, the Comprehensive Plan, and State
9 and Federal Laws.

10 "* * * * *."

11 Respondent finally contends that the reference in GPDC
12 17.052(1) to "Federal Laws" makes the Fifth Amendment
13 takings clause a land use standard.

14 We do not agree. Although GPDC 17.052(1) does not
15 specifically identify what is meant by "applicable * * *
16 State and Federal Laws," we assume it is intended to
17 encompass any state and federal regulations concerning
18 approval of partitions, not every state and federal statute
19 or constitutional provision that might be implicated in some
20 way by a particular partition decision.

21 Because petitioners do not contend the challenged urban
22 partition decision violates "land use standards," as that
23 term is used in former ORS 197.015(10)(b)(B), we conclude

⁷Of course respondent does not contend petitioners' constitutional arguments are meritorious. However, respondent does argue we must consider the merits of those arguments to determine whether we have jurisdiction. For the reasons explained in the text, we do not agree petitioners' constitutional arguments concern land use standards. Therefore, even if those arguments are meritorious, we do not have jurisdiction in this matter.

1 the decision is "consistent with land use standards" and,
2 therefore, we lack review jurisdiction.

3 **C. ORS 19.230(4)**

4 ORS 19.230(4) provides in part

5 "A notice of intent to appeal filed with the Land
6 Use Board of Appeals pursuant to ORS 197.830 and
7 requesting review of a decision of a municipal
8 corporation made in the transaction of municipal
9 corporation business that is not reviewable as a
10 land use decision as defined in ORS 197.015(10)
11 shall be transferred to the circuit court and
12 treated as a petition for writ of review. * * * "

13 Petitioners filed a conditional Motion to Transfer this
14 appeal to the Josephine County Circuit Court "in the event
15 LUBA determines that the decision is not a land use decision
16 as defined in ORS 197.015(10)." Motion to Transfer 1. See
17 OAR 661-10-075(10).

18 As explained above, we conclude the city's decision is
19 not a decision reviewable by this Board. Accordingly, we
20 grant petitioners' motion and transfer this appeal to the
21 Josephine County Circuit Court.