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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

LESLIE MILLER,)
)
Petitioner,) LUBA No. 91-170
)
vs.) FINAL OPINION
) AND ORDER
CITY OF DAYTON,)
)
Respondent.)

Appeal from City of Dayton.

Thomas G.P. Guilbert, Portland, filed the petition for review and argued on behalf of petitioner.

James E. Green, Newberg, filed the response brief and argued on behalf of respondent.

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

DISMISSED 02/18/92

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

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city council decision to enlarge a
4 basketball court in a city park.

5 **FACTS**

6 Courthouse Square Park (park) is located in the center
7 of the City of Dayton and is zoned Park and Public Facility
8 (P-PF). The park is listed in the National Register of
9 Historic Places. The park contains numerous mature trees
10 and a variety of recreational structures, including
11 playground equipment, a covered picnic area, a reconstructed
12 blockhouse and a 30 ft. by 40 ft. basketball court. On
13 September 24, 1991, after a public hearing, the city council
14 voted to enlarge the basketball court to 30 ft. by 65 ft.
15 This appeal followed.

16 **MOTION TO DISMISS**

17 Respondent moves to dismiss this appeal, on the ground
18 that the challenged decision is not a "land use decision"
19 subject to this Board's review jurisdiction. Respondent
20 contends the challenged decision is not a "land use
21 decision," as defined in ORS 197.015(10), because it does
22 not concern the adoption, amendment or application of the
23 statewide planning goals, the city's comprehensive plan or
24 the city's land use regulations. Respondent also contends
25 the challenged decision will not have a "significant impact
26 on present or future land uses." Petersen v. Klamath Falls,

1 279 Or 249, 253-54, 566 P2d 1193 (1977).

2 LUBA's review jurisdiction is limited to "land use
3 decisions." ORS 197.825(1). A local government decision is
4 a land use decision if it meets either (1) the statutory
5 definition in ORS 197.015(10); or (2) the significant
6 impacts test established by City of Pendleton v. Kerns, 294
7 Or 126, 133-34, 653 P2d 996 (1982). Billington v. Polk
8 County, 299 Or 471, 479, 703 P2d 232 (1985).

9 **A. Statutory Test**

10 ORS 197.015(10)(a)(A) defines "land use decision" to
11 include:

12 "A final decision or determination by a local
13 government * * * that concerns the adoption,
14 amendment or application of:

15 "(i) The [statewide planning] goals;

16 "(ii) A comprehensive plan provision;

17 "(iii) A land use regulation; or

18 "(iv) A new land use regulation[.]"

19 Petitioner contends the challenged decision concerns
20 the application of the statewide planning goals and the
21 city's comprehensive plan and land use regulations.

22 **1. Statewide Planning Goals**

23 Petitioner argues that Goal 5 (Open Spaces, Scenic and
24 Historic Areas, and Natural Resources) applies to the
25 decision because the park is listed in the National Register
26 of Historic Places. Petitioner also contends the plan is
27 deficient because it contains no provisions regarding

1 historic resources.

2 There is no dispute that the city's comprehensive plan
3 and land use regulations have been acknowledged by the Land
4 Conservation and Development Commission pursuant to
5 ORS 197.251. It is well established that after
6 acknowledgment, the local comprehensive plan and land use
7 regulations, not the statewide planning goals, govern a
8 local government's decisions concerning land use actions
9 which do not amend the plan or land use regulations.¹ ORS
10 197.175(2)(d); Byrd v. Stringer, 295 Or 311, 666 P2d 1332
11 (1983); Oregon Worsted Company v. City of Portland, ___
12 Or LUBA ___ (LUBA No. 91-117, December 13, 1991), slip op 5;
13 Kola Tepee, Inc. v. Marion County, 17 Or LUBA 910, 920,
14 aff'd 99 Or App 481 (1989), rev den 309 Or 441 (1990).
15 Consequently, we conclude the challenged decision does not
16 concern the application of the statewide planning goals.

17 **2. Comprehensive Plan**

18 Petitioner contends the City of Dayton Comprehensive
19 Plan (plan) Open Space objective and a plan Open Space
20 policy concerning the protection of existing trees on city
21 owned property apply to the appealed decision. Petitioner
22 also contends the city's decision concerns the application

¹Knapp v. City of Jacksonville, ___ Or LUBA ___ (LUBA No. 90-064, October 21, 1990), cited by petitioner in support of his contention that Goal 5 applies to decisions affecting historic resources listed in the National Register of Historic Places, is inapposite. In Knapp v. City of Jacksonville, the city's plan and land use regulations were not acknowledged. Id., slip op at 11.

1 of the plan because, although the Citizen Involvement
2 chapter of the plan designates the city planning commission
3 as the Committee for Citizen Involvement, the city council
4 did not refer the subject proposal to the planning
5 commission for review.

6 The plan Open Space objective is "[t]o conserve desired
7 open spaces and protect scenic areas and views." Plan 12.
8 We agree with respondent that this objective is not an
9 approval standard applicable to individual land use actions.
10 The objective is worded as a general aspirational goal, not
11 an approval standard. See Stotter v. City of Eugene, 18
12 Or LUBA 135, 157 (1989). Further, the park is not
13 designated Open Space on the plan map or otherwise
14 identified as open space by the plan. Additionally, city
15 parks are specifically addressed in the Recreation section
16 of the plan. Plan 24.

17 The plan Open Space policy cited by petitioner states
18 "[t]he City shall establish provisions to protect existing
19 trees on City owned properties." Plan 13. This policy
20 directs the city to adopt implementing regulations to
21 protect trees on city property. Nothing in the wording or
22 context of the policy indicates it was intended to be an
23 approval standard for individual city actions. Wissusik v.
24 Yamhill County, ___ Or LUBA ___ (LUBA No. 90-050,
25 November 13, 1990), slip op 11; Bennett v. City of Dallas,
26 17 Or LUBA 450, 456, aff'd 96 Or App 645 (1989). Therefore,

1 the challenged decision does not concern the application of
2 either comprehensive plan provision cited by petitioner.

3 **3. Land Use Regulation**

4 Petitioner contends the Dayton Zoning Ordinance (DZO)
5 site design review provisions are applicable to the
6 challenged decision. Petitioner argues that the existing
7 basketball court is a nonconforming use. Petitioner cites
8 DZO 9.30.A, which provides that site design review shall be
9 required for all new conditional uses and the expansion of
10 existing conditional uses in the P-PF zone. According to
11 petitioner, "[i]f site design review is required for
12 conditional uses, then, a fortiori, site design review was
13 required for expansion of a nonconforming use." (Emphasis
14 in original.) Petition for Review 13.

15 "Public parks and recreation areas" are permitted uses
16 in the P-PF zone. DZO 9.10.A. We agree with respondent
17 that Courthouse Square Park and the public recreational
18 facilities it contains, including the basketball court at
19 issue in this appeal, clearly fall within this category and,
20 therefore, are permitted uses in the P-PF zone. No DZO
21 provision requires site design review for expansion of a
22 permitted use in the P-PF zone. Petitioner cites no other
23 DZO provision allegedly applicable to the challenged
24 decision.

25 We, therefore, conclude the challenged decision does
26 not satisfy the statutory test for a "land use decision,"

1 because it does not adopt, amend or apply the goals or the
2 city's comprehensive plan and land use regulations.

3 **B. Significant Impact Test**

4 Respondent argues the city's decision to enlarge its
5 basketball court will have a de minimis impact on land use
6 in the city, and will cause no damage to trees or other
7 features of the park. Record 7. According to respondent,
8 the city's decision is the type of minor public works
9 project which the Court of Appeals has said is not a land
10 use decision under the "significant impact" test. City of
11 Pendleton v. Kerns, 294 Or 126, 133, 653 P2d 992 (1982).

12 As the party seeking LUBA review, the burden is on
13 petitioner to establish that the appealed decision is a land
14 use decision. Billington v. Polk County, supra, 299 Or
15 at 475; City of Pendleton v. Kerns, 294 Or at 134 n 7; City
16 of Portland v. Multnomah County, 19 Or LUBA 468, 471 (1990);
17 Portland Oil Service Co. v. City of Beaverton, 16 Or LUBA
18 255, 260 (1987). Further, in Billington v. Polk County, 299
19 Or at 478-79, the Oregon Supreme Court stated the
20 significant impact test requires us to find that the
21 challenged decision will have a significant impact on
22 present or future land uses, not merely that it "would have
23 potential impact" or "would have any impact" on present or
24 future land uses.

25 Petitioner cites a State Historic Preservation Office
26 letter stating "the square has reached the saturation point

1 for displacement of green open space," and asking that the
2 city "exercise restraint in its future management [of the
3 park] so that the square will retain as much as possible its
4 historic character * * *." Record 20-21. Petitioner also
5 cites his own testimony that the proposal could potentially
6 damage surrounding fir trees (Record 7), and a letter to the
7 city from an Oregon State University Extension Agent stating
8 that in general, paving under and around large, old fir
9 trees "may threaten the health of the trees or increase the
10 care necessary to maintain them."² Petition for Review
11 App. 1.

12 Based on the evidence described above, the most we can
13 conclude is that the city's decision to expand the
14 basketball court might potentially cause some impact to
15 surrounding mature fir trees or to the historic character of
16 the park. Petitioner has not demonstrated the city's
17 decision will cause a significant impact on present or
18 future land uses in the area, as is required by the
19 significant impact test. Billington v. Polk County, supra.

20 The challenged decision meets neither the statutory
21 test nor significant impact test for a "land use decision."
22 We therefore lack jurisdiction to review it.

23 Under OAR 661-10-075(10)(a), any party may request that

²The extension agent's letter is not in the local record. However, LUBA may consider evidence outside the record in determining whether it has jurisdiction. Hemstreet v. Seaside Improvement Comm., 16 Or LUBA 630, 632 (1988).

1 an appeal before this Board be transferred to circuit court,
2 in the event the Board decides the appealed decision is not
3 reviewable as a land use decision. Such a request to
4 transfer an appeal to circuit court must be filed not later
5 than ten days after the respondent's brief is due. OAR
6 661-10-075(10)(b). We have not received a motion to
7 transfer to circuit court. Accordingly, the motion to
8 dismiss is granted.

9 This appeal is dismissed.