BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROGER R. WARREN, Petitioner, vs. CITY OF AURORA, Respondent, and RUDI KASEL and ANNETTE KASEL, Intervenors-Respondent.	LUBA Nos. 91-141 and 92-005
	FINAL OPINION AND ORDER

Appeal from City of Aurora.

Roger R. Warren, Aurora, filed the petition for review and argued on his own behalf.

No appearance by respondent.

James L. Murch, Salem, and Brendan Enright, Aurora, filed the response brief on behalf of respondent and intervenor-respondent. With them on the brief was Sherman, Bryan, Sherman & Murch. James L. Murch argued on behalf of respondent and intervenors-respondent.

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

REMANDED 07/23/92

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 seeks review of city decisions granting preliminary plat and final plat approval for a 15 lot subdivision on a 6.7 acre parcel.

MOTIONS TO INTERVENE

Rudi Kasel and Annette Kasel, the applicants below, move to intervene on the side of respondent in this consolidated appeal proceeding. There is no objection to the motions, and they are allowed.

FACTS

The subject property is located in the Single Family Residential Zone and is subject to the Historic Overlay Zone. The property is located within the City of Aurora's urban growth boundary and includes a portion of what is identified as Resource No. 2 on the Aurora Colony Historic Resources Inventory.[1] At the time it was included on the Historic Resources Inventory, the subject property included an historically significant but dilapidated barn. The barn has since been removed, and the property is presently vacant.

The intervenors previously obtained approval for, and have developed, a residential subdivision on another portion of their property. The proposed subdivision would represent

[1]The Aurora Colony Historic Resources Inventory is part of the city's comprehensive plan.

the second phase of that subdivision. There are a number of adjacent and nearby properties with significant historic structures. Petitioner is the owner of one such adjacent property and objects that the city's decision granting approval for the challenged subdivision fails to demonstrate compliance with a variety of statewide planning goal and city comprehensive plan and development code requirements.

JURISDICTION/SCOPE OF REVIEW

The written decision granting preliminary subdivision plat approval is composed of the minutes of the August 27, 1991 city council meeting. The written decision granting final plat approval is composed of the minutes of the December 10, 1991 city council meeting.

Until ORS 197.015(10)(b) was amended by the 1991 legislature, LUBA lacked review jurisdiction over decisions concerning subdivisions located within urban growth boundaries, where those decisions were "consistent with land use standards." Thus, prior to the effective date of the 1991 legislative amendments, this Board was required to first determine whether a challenged urban subdivision decision complied with land use standards before it could determine whether it had review jurisdiction. Southwood v. City of Philomath, 106 Or App 21, 24, 806 P2d 162 (1991); Schultz v. City of Grants Pass, ___ Or LUBA ___ (LUBA No. 91-122, December 13, 1991), slip op 9.

The 1991 legislature repealed the above noted exception

to LUBA's jurisdiction for urban subdivisions. Oregon Laws 1991, ch 817, § 1. In addition, Oregon Laws 1991, chapter 817, section 4 specifically gives LUBA review jurisdiction over "limited land use decisions." As defined by Oregon Laws 1991, chapter 817, section 1, limited land use decisions include urban land division decisions, such as the decisions challenged in this appeal. Oregon Laws 1991, chapter 817 became effective September 29, 1991.

The notice of intent to appeal filed with this board initiating the LUBA No. 91-141 appeal challenging the city decision granting preliminary subdivision plat approval was filed September 12, 1991. Therefore, our jurisdiction and scope of review concerning the preliminary plat approval is governed by ORS 197.015(10)(b), as it existed prior to the 1991 legislative amendments. For the reasons explained below, we conclude the decision challenged in LUBA No. 91-141 granting preliminary plat approval is not consistent with at least one land use standard, and for that reason we have jurisdiction.[2]

Petitioner's notice of intent to appeal in LUBA No. 92-005, challenging the final plat approval decision, was filed after the effective date of the 1991 legislative amendments to our review jurisdiction. Assuming we have jurisdiction over that decision, it is a limited land use decision under

[2]Any differences in our scope of review of land use decisions before and after the 1991 legislative amendments are not important in this case.

the amended statutory provisions.

Intervenor argues, however, that final plat approval decision challenged in LUBA No. 92-005 is a nondiscretionary decision and for that reason is neither a land use decision nor a limited land use decision, because ORS 197.015(10)(b)(A) exempts local government decisions "made under land use standards which do not require interpretation or the exercise of policy or legal judgment" from our review jurisdiction.

A number of decisions issued by the Court of Appeals and this Board have made it clear that the exception to our review jurisdiction provided for nondiscretionary decisions is an exceedingly narrow one. Flowers v. Klamath County, 98 Or App 384, 391-392, 780 P2d 227 (1989); Doughton v. Douglas County, 82 Or App 444, 449, 728 P2d 887 (1986), rev den 303 Or 74 (1987); Bell v. Klamath County, 77 Or App 131, 134-35, 711 P2d 209 (1985); Breivogel v. Washington County, ___ Or LUBA ___ (LUBA No. 91-146, April 13, 1992); Tuality Lands Coalition v. Washington County, ___ Or LUBA ___ (LUBA Nos. 91-035/036, November 12, 1991); Hollywood Neigh. Assoc. v. City of Portland, ___ Or LUBA ___ (LUBA No. 91-100, Order on Motion to Dismiss, September 26, 1991); Citizens Concerned v. City of Sherwood, ___ Or LUBA ___ (LUBA Nos. 91-091/093, Order on Motions for Evidentiary Hearing and Depositions, April 2, 1991); Komning v. Grant County, 20 Or LUBA 481 (1990); Kirpal Light Satsang v. Douglas County, 18 Or LUBA

651 (1990). Respondents neither identify the land use standards governing approval of the final plat approval decision nor explain why those standards are nondiscretionary. For that reason, we reject the argument.

FIRST ASSIGNMENT OF ERROR

Under the first assignment of error, petitioner makes a variety of arguments in which he alleges the challenged decisions violate Statewide Planning Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources).

Limited land use decisions, such as the final plat approval decision challenged in LUBA No. 92-005, must comply with applicable plan and land use regulation standards. ORS 197.195(1). However, under ORS 197.828, our review of limited land use decisions does not include review for compliance with the statewide planning goals. Similarly, our review of land use decisions which are subject to acknowledged comprehensive plans and land use regulations, such as the preliminary plat approval decision challenged in LUBA No. 91-141, does not include review for compliance with the statewide planning goals. ORS 197.835(1) through (7); Byrd v. Stringer, 295 Or 311, 666 P2d 1332 (1983).

Because our scope of review of the challenged decisions does not include review for compliance with the statewide planning goals, petitioner's Goal 5 arguments provide no basis for reversal or remand. For that reason, the first assignment of error is denied.

REMAINING ASSIGNMENTS OF ERROR

In his remaining assignments of error, petitioner contests the adequacy of the city's findings supporting the challenged decisions and argues the challenged decisions violate a host of comprehensive plan and development code requirements.

We seriously question whether any of the plan provisions cited by petitioner under his second assignment of error are approval standards for the challenged decisions.[3] See Bennett v. City of Dallas, 17 Or LUBA 450, 456, aff'd 96 Or App 645 (1989) (plan provisions may or may not be approval standards, depending on their wording and context). Similarly, the plan Historic District Guidelines cited by petitioner under his fourth assignment of error apparently are not intended to operate as approval standards applicable to individual permit decisions. The plan explains as follows:

"Historic District Guidelines cannot do the

---

[3]For example, petitioner cites a plan overall objective to "[m]aintain the city's historic character and community identity." Plan 62. We have determined in other cases that such generally worded plan provisions do not apply directly to individual permit decisions. Benjamin v. City of Ashland, 20 Or LUBA 265 (1990); Wissusik v. Yamhill County, 20 Or LUBA 246 (1990); Neuenschwander v. City of Ashland, 20 Or LUBA 144 (1990). One of the other plan provisions cited by petitioner indicates the stated historic preservation objectives are "accomplished through * * * provisions incorporated in the Development Code * * *." Plan 39. We have previously held that plan provisions which the plan states are implemented by provisions in land use regulations do not apply directly to individual permit decisions. Murphy v. City of Ashland, 19 Or LUBA 182, 199-200 (1990).

following:

"* * * * *

"3) Serve the same legal purpose as a design review ordinance. A design review ordinance is a law, but guidelines are not laws.

"4) Guarantee that all new construction will be compatible with an historic district. Guidelines ultimately can only guide. The Design Review Ordinance establishes the law for the Aurora Historic District." Plan Appendix B, page 2.

We are less certain whether remaining development code provisions cited by petitioner under the third assignment of error are inapplicable to the challenged decisions, although intervenors and respondent appear to take the position in their brief that they are not.

A fundamental problem presented in this appeal is the failure of the city to adopt any findings identifying the standards that must be satisfied to grant the requested preliminary plat and final plat approvals. The minutes of the August 27, 1991 city council do include findings attempting to respond to issues raised by petitioner. However, those findings do not identify the standards in the plan and development code that must be satisfied to grant preliminary subdivision plat approval, or what facts led the city to conclude those standards are met. The findings are simply a written response to issues raised by petitioner without any attempt to relate the disputed points to the relevant approval criteria. The minutes of the December 10,

1991 meeting at which the city council granted final plat approval also make no attempt to identify the applicable standards.

ORS 227.173(2) imposes the following requirement on the city:

> "Approval or denial of a permit[4] application or limited land use decision shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

The minutes comprising the challenged decisions do not satisfy the requirements of ORS 227.173(2).[5] See Hoffman v. Dupont, 49 Or App 699, 705, 621 P2d 63 (1980), rev den 290 Or 651 (1981); Hewitt v. Brookings, 7 Or LUBA 130, 132 (1983). Because the challenged decisions do not comply with this statutory requirement, and therefore fail to provide an adequate basis for determining whether applicable plan and land use regulation requirements are satisfied, the decisions must be remanded. ORS 197.828(2)(b); 197.835(6).

---

[4]The term "permit" is defined as including "discretionary approval of a proposed development of land." ORS 227.160(2). The challenged preliminary plat approval decision falls within this definition. As explained earlier in this opinion, the final plat approval decision is a limited land use decision.

[5]ORS chapter 227 sets out city planning and zoning authority. The findings requirement of ORS 227.173(2) is therefore a land use standard. Because we conclude this land use standard is violated, we have jurisdiction over the city's decision granting preliminary plat approval. See discussion supra, regarding jurisdiction and scope of review.

As we indicated in our earlier order denying intervenors-respondent's motion to dismiss, there are inconsistencies in the development code that make it difficult even to determine the respective roles of the planning commission and city council in reviewing and granting approval of subdivision applications, much less identify the approval standards that govern such decisions. It is sufficiently unclear to us what standards govern the disputed preliminary plat and final plat approval decisions that we cannot overlook the city's failure to adopt findings identifying the relevant standards. Neither can we be certain that all of petitioner's arguments fail to implicate an applicable approval standard.

We emphasize that our decision to remand the city's decisions so that it may adopt findings identifying the relevant approval standards is not based on a purely technical deficiency. LUBA's role as an appellate tribunal is to review the city's explanation for why it believes its decision satisfies relevant approval standards. If this Board were to take the initiative in the first instance to identify potential approval standards in the development code and plan, and interpret ambiguous plan or development code language, it would be assuming the role assigned to the city. In addition, there would be a risk that this Board would not interpret the city's plan and development code language in the same way the city would, thereby potentially

usurping the city's interpretive discretion. See Clark v. Jackson County, ___ Or ___, ___ P2d ___ (slip op, July 9, 1992); cf. Schatz v. City of Jacksonville, 113 Or App 675, 681 (1992) (LUBA remand decision "simply tells the locality that the basis for its decision is not affirmable; it does not necessarily connote that alternative bases cannot exist * * *."). The statutory requirements limiting this Board's role to reviewing the city's findings supporting its decision serves the purpose of preventing this Board from substituting its judgment for that of the city where the applicable law and the facts leave the city discretion. See Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 20, 569 P2d 1063 (1977).

The city's decisions are remanded so that the city may adopt findings identifying the applicable standards governing the challenged decisions. Then the city will be in a position to adopt the findings of fact and legal reasoning necessary to support decisions determining whether those standards are met.[6]

[6]After the city identifies the applicable approval standards, the city may also be in a position to find particular issues petitioner raises are not relevant to compliance with the applicable standards.