BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ALLEN HOFMANN and MARIE HOFMANN, Petitioners, vs. CITY OF SEASIDE, Respondent, and JOHN TAYLOR, Jr. Intervenor-Respondent.	LUBA No. 92-043 FINAL OPINION AND ORDER

Appeal from City of Seaside.

Allen Hofmann and Marie Hofmann, Seaside, represented themselves.

Dan Van Thiel, Astoria, represented respondent.

William A. Monahan, Portland, represented intervenor-respondent.

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

REVERSED 10/23/92

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

Petitioners appeal City of Seaside Ordinance 92-08 which purports to change the zoning for 6.73 acres from Residential Medium Density (R-2) to Residential High Density (R-3).

MOTION TO INTERVENE

John E. Taylor, Jr., the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The city and Clatsop County have entered an Urban Growth Boundary Joint Management Agreement (hereafter UGB Agreement) which applies to those areas located inside the city's UGB but outside the city's corporate limits. This area is defined in the UGB Agreement as the "urban growth boundary area" (hereafter UGB Area). The subject 6.73 acres are located in the UGB Area and are subject to the UGB Agreement.[1]

Under the UGB Agreement, the county retains jurisdiction to adopt land use decisions concerning lands located in the UGB Area. The county is required to adopt and apply the substantive city zoning provisions to property

[1]The UGB Agreement is not included in the record submitted by the city in this proceeding. A copy of the UGB Agreement has been provided by the city, and we take official notice of that document.

in the UGB Area. However, the UGB Agreement states "the county shall retain final decision-making responsibility for all land use actions affecting the [UGB Area]." Requests for land use action in the UGB Area must be forwarded to the city for review and comment. The county is not bound by the city's comments, and the city is given standing under the UGB Agreement to appeal county land use decisions affecting the UGB Area.

In this case, the subject application for rezoning was submitted to the city.[2] The notices and staff reports preceding the city planning commission's and city council's consideration of this matter state that the county retains land use decision making jurisdiction over the property and that the city's decision would be advisory to the county. The planning commission denied the request, but the city council adopted the challenged ordinance rezoning the subject property.

Intervenor moves to dismiss this appeal proceeding, arguing the challenged ordinance is simply a recommendation to the county and is therefore not a "final" decision. Intervenor correctly notes that under ORS 197.015(10)(a)(A), a land use decision must be a "final" decision. See Tylka v. Clackamas County, 20 Or LUBA 296 (1990). This Board has

[2]We understand that a separate application has been submitted to Clatsop County, and the county has suspended its review proceedings pending our resolution of this appeal.

ruled on numerous occasions that advisory decisions adopted by one governmental entity recommending that particular actions be taken concerning property within the jurisdiction of a separate governmental entity having jurisdiction over the property are not final decisions over which this Board has jurisdiction. West Hills & Island Neigh. v. DEQ, 15 Or LUBA 506, 509 (1987); Citizens for Better Transit v. City of Portland 15 Or LUBA 278, 281-82 (1987).

It is clear that under the UGB Agreement, where property within the UGB Area is to be rezoned, the city's role is advisory. Had the city followed the procedures set out in the UGB Agreement or limited its decision in this matter to a recommendation to the county, we would agree with intervenor that the challenged decision is not a final decision. In that event, this appeal would be dismissed. However, despite the clearly defined advisory role set out in the UGB Agreement and despite the statements in the notices and staff reports that the city's action would only be advisory, the ordinance challenged in this appeal does not purport to be advisory. To the contrary, the challenged ordinance rezones the property from R-2 to R-3. There is not a word in the challenged ordinance suggesting that it is contingent on county action to rezone the property, or that it is contingent on any other action for that matter.[3] We

[3]There is an additional dispute and source of confusion among the parties concerning the legal effect of Ordinance 92-08. Apparently no

therefore reject petitioners' argument that the challenged decision is not final. However, in reaching this conclusion, a question concerning the city's jurisdiction to render the challenged decision is clearly raised. We turn to that question.

In certain circumstances cities may exercise subdivision and partition approval authority up to six miles outside their city limits. See ORS 92.042. However, we are are not aware of any such authority for the city to adopt ordinances amending the zoning for property outside the city's corporate limits. As explained above, the UGB Agreement clearly does not provide such authority.[4] Ordinance 92-08 purports to be an exercise of land use planning authority over property that is outside the city's jurisdiction. See Standard Insurance Co. v. City of Hillsboro, 97 Or App 627, 776 P2d 1313 (1989). Ordinance 92-08 therefore exceeds the city's jurisdiction, and the

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party believes the ordinance is currently effective to rezone the property. Petitioners fear that Ordinance 92-08, if not challenged and reversed or remanded in this proceeding, might have the effect of automatically rezoning the property R-3 if the property were annexed by the city in the future, regardless of what the county may do with the application now pending before it. We express no view concerning whether Ordinance 92-08, if unchallenged, could have the effect petitioners fear. See Multnomah County v. City of Fairview, 96 Or App 14, 18, 771 P2d 289 (1989).

[4]Under the UGB Agreement, the county is required to apply city zoning designations to property in the UGB Area. Therefore, the city would not be required to rezone the property upon annexation, because any properties annexed by the city would already be zoned in accordance with the city's zoning ordinance. Where there is no such agreement between a city and county, areas annexed by a city may continue to carry county planning and zoning designations until the city takes some action to provide otherwise. See Multnomah County v. City of Fairview, supra.

decision must be reversed. ORS 197.835(7)(a)(A); OAR 661-10-073(1)(a).

The city's decision is reversed.[5]

[5]The petition for review in this matter has already been filed and attacks the challenged city ordinance on a variety of substantive and procedural grounds. The respondents' briefs have not yet been filed. Because the county, rather than the city, has land use planning jurisdiction over the property, and must make any decision to rezone the property in the first instance, the city's decision must be reversed in any event. While our resolution of the remaining issues raised by petitioner concerning the city's decision might be of some indirect value to the county if it proceeds with the related application pending before it, we do not believe such benefits would warrant additional delay to allow completion of briefing, oral argument and a final opinion on the merits.