BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

J.C. REEVES CORPORATION, Petitioner,	)	LUBA No. 93-103
vs.	)	FINAL OPINION AND ORDER
SHERWOOD EDUCATION DISTRICT No. 88J, Respondent.	)	

Appeal from Sherwood Education District No. 88J.

William C. Cox, Portland, filed the petition for review and argued on behalf of petitioner.

Timothy J. Sercomb, Portland, filed the response brief and argued on behalf of respondent. With him on the brief were Preston, Thorgrimson, Shidler, Gates & Ellis.

James E. Green, Salem, filed an amicus brief on behalf of Oregon School Boards Association.

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

DISMISSED 12/03/93

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioner appeals a resolution denying petitioner's request to change respondent district's boundaries.[1]

FACTS

Petitioner owns residentially zoned land within respondent's boundaries. Several years ago, petitioner secured annexation of this land to the City of Tigard. The challenged decision is in response to petitioner's request that respondent adjust its boundaries to allow petitioner's land to be included within the Tigard-Tualatin School District.[2]

MOTION TO DISMISS

We first consider respondent's motion to dismiss. Respondent alleges the challenged decision is neither a land use decision, as defined in ORS 197.015(10), nor a significant impact land use decision, as described in

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[1]The resolution states, in its entirety:

> "BE IT RESOLVED THAT the Sherwood Board of Education denies the proposed transfer of property as identified on [certain] maps * * *." Record 6.

[2]Petitioner asserts that he asked the school district to take action so that children living in subdivisions located on the subject property "be allowed to attend the Tigard-Tualatin Schools in the immediate vicinity of their homes * * *." Petition for Review 7-8. Petitioner contends the school district improperly characterized the requested action as a "boundary change request." However, regardless of what petitioner may have requested from respondent, we only consider the decision respondent adopted, and which is appealed to this Board. Petitioner does not cite any legal requirement entitling him to have the request characterized in a particular way.

Billington v. Polk County, 299 Or 471, 703 P2d 232 (1985) (Billington), and Petersen v. Klamath Falls, 279 Or 249, 566 P2d 1193 (1977) (Petersen). Respondent therefore argues this Board lacks jurisdiction over the challenged decision. ORS 197.825(1).

A. Statutory Test

ORS 197.825(1) provides LUBA has exclusive jurisdiction over appeals of land use decisions. As defined by ORS 197.015(10)(a), "land use decision" includes:

> "(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
>
> "(i) The goals;
>
> "(ii) A comprehensive plan provision;
>
> "(iii) A land use regulation; or
>
> "(iv) A new land use regulation * * *
>
> "* * * * *"

Respondent contends the challenged decision is not an exercise of its "planning duties, powers and responsibilities" under ORS 197.185(1). Respondent argues that in adopting the challenged decision it did not, and was not required to, apply the Statewide Planning Goals (goals), any comprehensive plan provision or any land use regulation. Therefore, respondent argues, the challenged decision is not a statutory test land use decision.

Under the statutory test, the obligation to apply the

goals, a comprehensive plan provision or a land use regulation must arise from legal requirements contained in statutory, administrative rule or local ordinance provisions. Billington, supra, 299 Or at 479-80. We first consider whether there is a requirement in any statute, administrative rule or local ordinance that the goals be applied to the challenged decision. ORS 197.185(1) provides:

> "Special districts shall exercise their planning duties, powers and responsibilities and take actions that are authorized by law with respect to programs affecting land use, including a city or special district boundary change as defined in ORS 197.175(1), in accordance with [the statewide planning] goals * * *."

Under ORS 197.185(1), there are two circumstances in which a special district may be required to apply the goals to a particular decision. Those two circumstances are where a special district exercises its planning duties, powers and responsibilities, or takes an action with respect to a program affecting land use. The statute cites certain boundary changes as specific examples of the second of these circumstances. We deal with each of these two circumstances below.

First, we agree with respondent that its decision not to change its district boundaries is not an action "authorized by law with respect to a program affecting land use," because there is no "program affecting land use" implemented by the challenged decision. See Keating v.

Heceta Water District, 24 Or LUBA 175 (1992). Further, the requested change is not a "boundary change" as that concept is defined in ORS 197.175(1). ORS 197.175(1) defines "boundary change" to mean:

> "* * * the annexation of unincorporated territory by a city, the incorporation of a new city and the formation or change of organization or annexation to any special district authorized by ORS 197.705 to 198.955, 199.410 to 199.519 or 451.010 to 451.600 * * *."

School district boundary changes are processed under ORS ch 330, and are not included in any of the boundary changes authorized by the statutory sections cited in ORS 197.175(1).

Finally, we agree with respondent that the challenged decision is not an exercise of its planning duties, powers and responsibilities. There is no statutory or other legal scheme, of which we are aware, requiring a school district to make decisions refusing to adjust its boundaries as part of its land use planning responsibilities.[3]

Petitioner is correct that ORS 197.185(2) requires special districts, within the boundaries of the Metropolitan Service District (Metro), to enter into a cooperative

[3]ORS ch 330 governs school district boundary changes. There is no dispute that ORS ch 330 was amended in 1989 to mandate that a properly presented petition or request for a boundary change be approved. This apparently changed the pre-1989 rule that boundary changes could only be approved upon the application of discretionary standards. Therefore, the decision to change a school district boundary is more akin to a political process than a quasi-judicial process.

agreement with Metro identifying methodologies to be employed to bring each special district's "plans or programs" into compliance with the goals. However, that respondent may not yet have entered into such an agreement with Metro does not establish that the challenged decision refusing to change school district boundaries is part of a plan or program requiring application of the goals. The lack of any existing legal framework making a school district boundary change decision an exercise of its "planning responsibilities" is dispositive. See Springer v. LCDC, 111 Or App 262, 826 P2d 54 (1992) (that a statutory taxing scheme may have some effect on land use, does not render taxing decisions under that statutory scheme subject to land use laws, where nothing specifically requires the application of the land use laws to those decisions); Westside Neighborhood v. School Dist. 4J, 58 Or App 154, 647 P2d 962 (1982) (a decision that is an "exercise of the school board's responsibility for educational policy and basic district management" is not a land use decision); United Citizens v. Environmental Quality Comm., 15 Or LUBA 500, 504 (1987) (determination concerning solutions to a threat to drinking water is not a land use decision). We conclude there is no legal requirement that respondent apply the goals to its decision refusing to adjust district boundaries.

Next, we consider whether the challenged decision

concerns the application of a land use regulation or comprehensive plan provision and, therefore, is a land use decision under ORS 197.015(10)(a)(A)(ii), (iii) or (iv). Respondent argues it neither applied a land use regulation or comprehensive plan provision, nor was required to do so in adopting the challenged decision.

Petitioner argues respondent should have applied land use regulations and comprehensive plan provisions to the challenged decision. However, other than the statutory provisions discussed above, petitioner cites no specific state or local requirements that land use regulations or plan provisions be applied to the challenged decision, and we are not aware of any such requirement. We agree with respondent that the challenged decision does not, and is not required to, apply land use regulations or comprehensive plan provisions.

Accordingly, the challenged decision is not a statutory test land use decision.

B. Significant Impact Test

For the significant impact test to provide this Board with jurisdiction over a decision that is not a statutory test land use decision, there must be a demonstrated relationship between the challenged decision and the alleged impacts of the decision, and evidence that the expected significant impacts are likely to result. Anderson Bros., Inc. v. City of Portland, 18 Or LUBA 462 (1989). In this

regard, that a challenged decision might potentially cause some impact on land uses does not demonstrate the decision will cause a significant impact on present or future land uses in the area, as is required by the significant impact test. Many Rivers Group v. City of Eugene, ____ Or LUBA ____ (LUBA No. 93-040, June 25, 1993); Keating v. Heceta Water District, supra, 24 Or LUBA at 181-82 (1992); Miller v. City of Dayton, 22 Or LUBA 661, aff'd 113 Or App 300 (1992); Citizens For Better Transit v. Metro Service Dist., 15 Or LUBA 482 (1987). Here, the challenged decision simply refuses to change school district boundaries. Petitioner has not demonstrated that any of the impacts it alleges will result from that decision are likely to occur, and we do not see that they are. Therefore, the challenged decision is not a significant impact test land use decision.

Because we lack jurisdiction to review the challenged decision, this appeal is dismissed.[4]

[4]No motion to transfer this appeal to the circuit court has been filed under OAR 661-10-075(10).