

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 MARALEE SULLIVAN,)
5)
6 Petitioner,)
7)
8 vs.)
9)
10 CITY OF ASHLAND,)
11)
12 Respondent,)
13)
14 and)
15)
16 DONALD J. JOHNSON,)
17)
18 Intervenor-Respondent.)

LUBA No. 94-034

FINAL OPINION
AND ORDER

19
20
21 Appeal from City of Ashland.

22
23 Judith H. Uherbelau, Ashland, filed the petition for
24 review and argued on behalf of petitioner. With her on the
25 brief was Howser & Munsell.

26
27 No appearance by respondent.

28
29 Daniel L. Harris, Ashland, filed the response brief and
30 argued on behalf of intervenor-respondent. With him on the
31 brief was Davis, Gilstrap, Harris, Hearn & Welty.

32
33 KELLINGTON, Chief Referee; HOLSTUN, Referee; SHERTON,
34 Referee, participated in the decision.

35
36 REMANDED 06/23/94

37
38 You are entitled to judicial review of this Order.
39 Judicial review is governed by the provisions of ORS
40 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city decision approving a building
4 permit for a dwelling.

5 **MOTION TO INTERVENE**

6 Donald J. Johnson moves to intervene on the side of
7 respondent in this appeal proceeding. There is no objection
8 to the motion, and it is allowed.

9 **FACTS**

10 The subject parcel is partially within the city and
11 partially within unincorporated Jackson County. The portion
12 within the city is zoned Single Family Residential (R-1),
13 and the portion within the county is zoned Rural Residential
14 (RR-5). The proposed dwelling will be situated on the
15 portion of the parcel within the city.

16 The city planning department approved the disputed
17 building permit and petitioner appealed to the city planning
18 commission. The planning commission determined issuance of
19 the building permit is not a land use decision. Petitioner
20 appealed the planning commission's decision to the city
21 council. The city council agreed issuance of the building
22 permit is not a land use decision, and affirmed the earlier
23 decisions approving the permit. This appeal followed.

24 **MOTION TO DISMISS**

25 Intervenor moves to dismiss this appeal, contending the
26 challenged decision is not a "land use decision" subject to

1 LUBA review. Intervenor's arguments in this regard
2 essentially parallel city determinations challenged under
3 petitioner's first assignment of error. We consider whether
4 the challenged decision constitutes a land use decision
5 within our jurisdiction under the first assignment of error.

6 **FIRST ASSIGNMENT OF ERROR**

7 Petitioner argues the city erred in determining the
8 challenged decision is not a land use decision.

9 ORS 197.015(10)(a) provides, in relevant part:

10 "Land Use Decision" includes:

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

14 "(i) The goals;

15 "(ii) A comprehensive plan provision;

16 "(iii) A land use regulation; * * *

17 "* * * * *."

18 However, as relevant here, ORS 197.015(10)(b) provides
19 that land use decisions over which this Board has
20 jurisdiction do not include a decision of a local
21 government:

22 "(A) Which is made under land use standards which
23 do not require interpretation or the exercise
24 of policy or legal judgment; [or]

25 "(B) Which approves or denies a building permit
26 issued under clear and objective land use
27 standards[.]

28 "* * * * *"

1 Therefore, the challenged decision approving a building
2 permit is a "land use decision" if it involves the
3 application of the goals, a comprehensive plan or a land use
4 regulation and does not qualify as a ministerial decision
5 under the above quoted portions of ORS 197.015(10)(b).
6 Doughton v. Douglas County, 82 Or App 444, 449, 782 P2d 887
7 (1986); Tuality Lands Coalition v. Washington County, 22 Or
8 LUBA 319 (1991); Flowers v. Klamath County, 17 Or LUBA 1078,
9 1087 (1989).

10 The challenged decision adopts the following findings:

11 "From the staff report we find that the lot in
12 question was legally created by a minor land
13 partition in September, 1975 and approved by the
14 City of Ashland as Planning Action MLP 251. We
15 find that the lot consists of all that property
16 encompassed by the lot lines irrespective of the
17 city limits boundary which bisects the lot.
18 [Ashland Land Use Ordinance (LUO)] 18.08.350
19 defines lot as a 'unit of land created by a
20 partition or subdivision, or a unit or contiguous
21 units of land under single ownership, which
22 complies with all applicable laws at the time such
23 lots were created.' The fact that the [subject]
24 lot lies in both the city and county does not make
25 it two lots. The city limits boundary is not a
26 lot line and we specifically make such
27 interpretation of the [LUO]. We find, and so
28 interpret the [LUO], that the boundaries of the
29 lot, whether in the city or county, are the lot
30 lines used in all decisions associated with the
31 issuance of a building permit." Record 6.

32 These findings demonstrate that the LUO definition of
33 the term "lot" is not clear and objective. In addition, the
34 challenged decision interprets and applies provisions of the
35 city's solar access ordinance. The city's solar access

1 ordinance is ambiguous, for reasons more fully explained
2 below. Therefore, we conclude the challenged decision
3 applies land use regulations -- the solar access ordinance
4 and LUO 18.08.350 -- and that neither of those regulations
5 provide clear and objective standards governing the issuance
6 of the subject building permit.

7 We therefore conclude the challenged decision is a
8 "land use decision" subject to LUBA review. Intervenor's
9 motion to dismiss is denied.

10 The first assignment of error is sustained.¹

11 **SECOND ASSIGNMENT OF ERROR**

12 Petitioner contends the city erroneously interpreted
13 and applied the definition of the term "lot." in the LUO.
14 Petitioner argues the city/county boundary line bisecting
15 the subject property divides the subject property.
16 According to petitioner, this means the subject property
17 consists of two different lots: one lot situated on one side
18 of the city/county boundary line and another lot situated on
19 the other side of the line.

20 We believe the city's interpretation of LUO 18.08.350,
21 quoted above, reflects an interpretation of the city's own
22 ordinance that is not contrary to the ordinance's express
23 words, policy or purpose. Therefore, we defer to the city's

¹Although sustaining this assignment of error provides a basis for denying intervenor's motion to dismiss, it does not, of itself, provide a basis for reversal or remand of the challenged decision.

1 interpretation. ORS 197.829; Clark v. Jackson County, 313
2 Or 508, 836 P2d 710 (1992).

3 The second assignment of error is denied.

4 **THIRD ASSIGNMENT OF ERROR**

5 The city has a solar access ordinance -- LUO 18.70.010
6 et seq. The city applied the solar access ordinance in
7 adopting the subject decision. The parties' dispute mainly
8 centers on the proper interpretation and application of
9 LUO 18.70.020.D, which defines "northern lot line." The
10 location of the northern lot line is important because solar
11 access setbacks are calculated, in part, based on the
12 northern lot line. Petitioner contends the method used by
13 the city to determine the northern lot line resulted in
14 erroneous placement of the subject dwelling directly along
15 the southern boundary line of petitioner's property.
16 Petitioner contends this cuts off at least a portion of her
17 solar access. Petitioner further contends that had the city
18 property considered all of the northern lot lines on the
19 subject property, the city would have correctly applied
20 various city setback requirements to the placement of the
21 subject dwelling.

22 LUO 18.70.020.D provides as follows:

23 "Northern Lot Line. Any lot line or lines less
24 than forty five (45) degrees southeast or
25 southwest of a line drawn east-west and
26 intersecting the northernmost point of the lot.
27 If the northern lot line adjoins any unbuildable
28 area (e.g., street, alley, public right-of-way,
29 parking lot, or common area) other than a required

1 yard area, the northern lot line shall be that
2 portion of the northerly edge of the unbuildable
3 area which is due north from the actual northern
4 edge of the applicant's property."

5 The challenged decision determines:

6 "We specifically find that the northern lot line,
7 as defined in [LUO] 18.70.020.D, is that lot line
8 at the northernmost point of the lot or line BD
9 depicted below." Record 7.

10 Below this finding is a diagram. The diagram identifies
11 seven property lines.² As relevant here and acknowledged by
12 the challenged decision, line "BD" is a northern lot line.
13 However, as petitioner points out, line "EF" could also be
14 considered a northern lot line, under the above quoted
15 definition. While the LUO 18.070.020.D definition
16 recognizes there can be more than one northern lot line on
17 any given piece of property, the challenged decision simply
18 contains a conclusory statement that "there is only one such
19 northern lot line [referring to line BD]." Record 8.

20 Because it is unclear what lines constitute the
21 northern lot line under LUO 18.070.020.D, it is appropriate
22 to look to the purposes of the solar access ordinance, as
23 set out in LUO 18.070.010. ORS 197.829(2). LUO 18.070.010
24 provides:

25 "The purpose of the Solar Access Chapter is to

²The subject property is a modified flag lot, with the "pole" portion of the lot extending east from the middle of the "flag" portion of the lot. One lot line (BD) forms the northern border of the "flag" portion of the lot. A second lot line (EF) is offset some distance south from lot line BD and forms the northern border of the "pole" portion of the lot.

1 provide protection of a reasonable amount of
2 sunlight from shade from structures and vegetation
3 whenever feasible to all parcels in the city to
4 preserve the economic value of solar radiation
5 falling on structures, investments in solar energy
6 systems, and the options for future uses of solar
7 energy."

8 Clearly, the purpose of the solar access ordinance is
9 to protect solar access. The solar access setbacks are
10 designed to protect a lot's southern exposure by requiring
11 setbacks from northern lot lines. In view of this purpose
12 for the city solar access ordinance and the ambiguous
13 language of LUO 18.070.020.D, we remand the challenged
14 decision for the city to supply the necessary interpretative
15 findings. The city must either explain why it does not
16 consider line EF to be a northern lot line or recalculate
17 the subject property's northern lot lines to include line
18 EF. If the city adopts the latter course, the location of
19 the subject dwelling would have to be adjusted to be
20 consistent with solar access setback requirements based on
21 the EF and BD northern lot lines.

22 The third assignment of error is sustained.³

23 The city's decision is remanded.

³Given our resolution of the third assignment of error, no purpose is served in reviewing petitioner's contentions concerning the evidentiary support for the city's application of the solar access ordinance. Therefore, we do not consider the fourth assignment of error.