

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 GEORGE BACH, DORIS BACH,)
5 C. RICHARD RUPP, and DIANE RUPP,)
6)
7 Petitioners,)
8)
9 vs.)
10)
11 DESCHUTES COUNTY,)
12)
13 Respondent,)
14)
15 and)
16)
17 A.K.A. PRODUCTIONS, INC.,)
18)
19 Intervenor-Respondent.)

LUBA No. 94-118

FINAL OPINION
AND ORDER

20
21
22 Appeal from Deschutes County.

23
24 Laurence E. Thorp, Springfield, represented
25 petitioners.

26
27 Bruce W. White, Assistant County Counsel, Bend,
28 represented respondent.

29
30 Steven L. Pfeiffer, Portland, represented intervenor-
31 respondent.

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

35
36 DISMISSED 09/15/94

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 Petitioners appeal from activities being conducted on a
4 parcel zoned Exclusive Farm Use (EFU). As explained below,
5 the parties dispute whether the county adopted an appealable
6 land use decision.

7 **MOTION TO DISMISS¹**

8 Intervenor recently purchased the subject property and
9 for the past several months has used it to produce a
10 television series. Petitioners brought these activities to
11 the attention of the board of commissioners, but the
12 commissioners refused to take any specific action on
13 petitioners' complaints. Petitioners cite a transcript they
14 prepared of a meeting of the board of commissioners in which
15 individual commissioners state they do not have a position
16 on intervenor's uses of the subject property, and will not
17 take a position on such uses in the absence of an
18 application by the property owner for some form of permit
19 approval. In addition, petitioners cite statements by an
20 individual commissioner to the press that the commissioner
21 believes intervenor's uses of its property are merely

¹The county did not submit a local record in this appeal proceeding, arguing there is no local record to submit. Regardless, this Board may examine materials outside the record to determine its jurisdiction. Hemstreet v. Seaside Improvement Comm., 16 Or LUBA 630, 632 (1988). Our decision here is based on the facts and arguments presented by the parties in their motions and supporting documents.

1 incidental to farm uses, and permitted. Petitioners argue
2 the county adopted a land use decision that is reflected in
3 these statements by the county commissioners.²

4 Respondent and intervenor-respondent (respondents) move
5 to dismiss this appeal on the basis that there is no land
6 use decision from which to appeal. Respondents contend
7 there are no minutes indicating the board of commissioners

²The Notice of Intent to Appeal, page 1, identifies the appealed land use decision as follows:

"[T]hat untitled land use decision * * * which was final on June 30, 1994, in which the Deschutes County Board of Commissioners either (1) made a determination that the contemplated use by [intervenor] of EFU zoned property for commercial film-making is an allowed use, or 2) failed to enforce the zoning regulations by taking appropriate action to prevent [intervenor's] use of EFU zoned property for commercial film-making purposes."

We do not understand any party to contend the following June 15, 1994 memorandum from the county Building Safety Division to the Planning Director is the decision that is the subject of the Notice of Intent to Appeal or is, itself, a land use decision appealable to this Board:

"After a thorough search of the [Uniform Building Code] to identify the requirements to regulate the proposed temporary structures on a television production set, I have settled on Section 301(b) entitled 'Work Exempt from Permit.' Number 9 of that Section refers to 'Temporary motion picture, television and theater stage sets and scenery.'

"Therefore, it is my decision to not require building permits for what I believe to be television stage sets.

"Plumbing and Electrical Permits, if applicable, are still required.

"This exemption does not grant any authorization for any work to be done in any manner in violation of the provisions of the code." Petitioners' Brief in Opposition to Respondent's Motion to Strike and/or Motion to Dismiss and to Intervenor-Respondent's Motion to Dismiss, Exhibit 13.

1 adopted any decision concerning intervenor's uses of its
2 property, and there is no written decision by any decision
3 maker concerning intervenor's use of its property.
4 Therefore, respondents argue there is no land use decision,
5 and this Board lacks jurisdiction.

6 LUBA has exclusive jurisdiction to review "land use
7 decisions."³ ORS 197.825(1). As relevant here,
8 ORS 197.015(10)(a)(A) defines "land use decision," as
9 follows:

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

13 "(i) The goals;

14 "(ii) A comprehensive plan provision;

15 "(iii) A land use regulation; or

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

17 A local government decision is also a "land use decision"
18 subject to LUBA's review if the decision satisfies the
19 "significant impact" test.⁴ Billington v. Polk County,
20 299 Or 471, 475, 703 P2d 232 (1985). Both the statutory and

³LUBA also has exclusive jurisdiction to review "limited land use decisions," as defined in ORS 197.015(12). ORS 197.825(1). However, no party contends the county adopted a limited land use decision, and we do not believe that it has.

⁴Significant impact test land use decisions are decisions having impacts on present and future land uses that are significant, actual and not speculative. City of Pendleton v. Kerns, 292 Or 126, 133-34, 653 P2d 996 (1982); Miller v. City of Dayton, 22 Or LUBA 661, 666, aff'd 113 Or App 300, rev den 314 Or 573 (1992).

1 significant impact tests presuppose the existence of a final
2 local government decision. City of North Plains v.
3 Washington County, 24 Or LUBA 78, 81 (1992); CBH Company v.
4 City of Tualatin, 16 Or LUBA 399, 405 n 7 (1988).
5 Therefore, we must determine whether the county adopted a
6 final decision concerning the activities on intervenor's
7 property.⁵

8 For a land use decision to result, there must be some
9 discreet land use question presented and one answered.
10 Weeks v. City of Tillamook, 113 Or App 285, 832 P2d 1246
11 (1992); Owen Development Group, Inc. v. City of Gearhart,
12 111 Or App 476, 826 P2d 1016 (1992). Although petitioners
13 may have presented a discrete land use question to the board
14 of commissioners, this does not mean the board of
15 commissioners answered that question. Rather, it appears
16 from the statements made at the June 20, 1994 meeting, that
17 the commission explicitly did not answer the land use
18 question petitioners presented concerning intervenor's use
19 of its land for film-making purposes.⁶

⁵We assume for purposes of this motion, that petitioners' description of the adverse impacts caused by intervenor's activities on the subject property is accurate. However, that activities on property have an adverse impact on neighboring properties, does not establish that a land use decision was made.

⁶Petitioners include arguments that suggest they believe the county should make a land use decision or should enforce its plan and land use regulations against intervenor's film-making activities on the subject property. We note the circuit court possesses jurisdiction to enforce the county's plan and land use regulations. ORS 197.825(3)(a).

1 It is well established that statements made by
2 individual parties, local government staff, or members of
3 the decision making body during the course of local
4 proceedings or to members of the press, do not constitute a
5 land use decision by the local decision maker. See Hess v.
6 City of Portland, 23 Or LUBA 343, 349 (1992). Therefore,
7 that an individual member of the board of commissioners may
8 have told a newspaper that he believes intervenor's uses of
9 the subject property are incidental to farm use or otherwise
10 are permitted uses in the EFU zoning district, does not
11 constitute a decision of the board of commissioners.

12 We agree with respondents that the board of
13 commissioners did not adopt a land use decision. Therefore,
14 the motion to dismiss is granted.

15 This appeal is dismissed.