

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

ROBERT R. MILKS,)
)
Petitioner,)
)
vs.)
) LUBA No. 95-080
CITY OF EUGENE,)
) FINAL OPINION
Respondent,) AND ORDER
)
and)
)
DENSMORE TOWNEHOMES, INC., L.L.C.,)
)
Intervenor-Respondent.)

Appeal from City of Eugene.

Kathy A. Lincoln, Salem, represented petitioner.

Anne C. Davies, City Attorney, Eugene, represented respondent.

Michael E. Farthing, Eugene, represented intervenor-respondent.

GUSTAFSON, Referee; LIVINGSTON, Chief Referee; HANNA, Referee, participated in the decision.

DISMISSED 08/10/95

1. LUBA Jurisdiction - Effect of Circuit Court Proceedings.

When a petition for writ of mandamus is filed in circuit court pursuant to ORS 227.178(7), the city is divested of any jurisdiction to render a land use decision. When the circuit court issues the writ of mandamus and orders the city to approve the underlying application, the order of the city is not a land use decision. Jurisdiction over an appeal

1 of that order rests with the court of appeals.

1 Gustafson, Referee.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city order approving a residential
4 subdivision.

5 **MOTION TO INTERVENE**

6 Densmore Townehomes, L.L.C.(intervenor), the applicant
7 below, moves to intervene on the side of respondent. There
8 is no opposition to the motion, and it is allowed.

9 **FACTS**

10 The applicant applied to the city for tentative
11 approval of a subdivision. The application was deemed
12 complete on November 24, 1994. The city did not render a
13 final decision on the application within 120 days after it
14 was deemed complete. On March 27, 1995, applicant
15 petitioned the Lane County Circuit Court for a writ of
16 mandamus to compel the city to issue the approval. After a
17 circuit court hearing on April 10, 1995, the circuit court
18 issued a writ of mandamus requiring the city to approve the
19 application. On April 11, 1995, the city approved the
20 application. This appeal followed.

21 **MOTION TO DISMISS**

22 Intervenor moves to dismiss, contending this Board
23 lacks jurisdiction to review the challenged order because it
24 is not a "land use decision" as defined in ORS

1 197.015(10)(a).¹ According to intervenor, the city was
2 mandated to approve the subject subdivision as a result of
3 the writ of mandamus issued by the county circuit court.
4 Accordingly, the county circuit court, and not the city,
5 made the final determination approving the subdivision

6 Petitioners argue the city's approval of the
7 subdivision is a land use decision as defined in ORS
8 197.015(10)(a). Petitioners argue the city, not the circuit
9 court, made the challenged decision, and that the decision
10 approves a development subject to the city's land use
11 regulations. Therefore, according to petitioners, the
12 decision is a land use decision.

13 This Board has exclusive jurisdiction to review local
14 government "land use decisions" as defined in ORS
15 197.015(10). ORS 197.825(1). However, the challenged
16 decision is not a land use decision. When the intervenor
17 filed a petition for writ of mandamus with the circuit court

¹ORS 197.015(10)(a) defines "land use decision" as

"(A) A final decision or determination made by a local
government 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[.]

"* * * * *"

1 pursuant to ORS 227.178(7), the city was divested of any
2 jurisdiction to render a land use decision.² State ex rel
3 Compass Corp. v. City of Lake Oswego, 319 Or 537, 878 P2d
4 (1994). As the Supreme Court explained,

5 "LUBA reviews a local government decision. The
6 predicate for a mandamus proceeding under
7 ORS 227.178(7) is the local government's failure
8 to make a timely final decision on an application.
9 Because the local government has failed to make a
10 decision, the mandamus proceeding is not a process
11 for 'review' of a local government's decision."
12 Id. at 544.

13 The city did not make a land use decision in this case.
14 Rather, before the city rendered a land use decision, the
15 applicant filed a petition for writ of mandamus which
16 divested the city of jurisdiction over the matter. The
17 circuit court's writ of mandamus is not a local government
18 land use decision. Gearhard v. Klamath County, 22 Or LUBA
19 377 (1991). Jurisdiction over an appeal of a circuit court
20 order rests with the court of appeals. ORS 19.010.

21 The motion to dismiss is granted.

²ORS 227.178(7) states:

"If the governing body of the city or its designate does not take final action on an application for a permit, limited land use decision or zone change within 120 days after the application is deemed complete, the applicant may apply in the circuit court of the county where the application was filed for a writ of mandamus to compel the governing body or its designate to issue the approval. The writ shall be issued unless the governing body shows that the approval would violate a substantive provision of the city comprehensive plan or land use regulations as defined in ORS 197.015."