BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RIDDELL FARMS, INC.,
Petitioner,

vs.

POLK COUNTY,
Respondent,

and

FRIENDS OF POLK COUNTY and SOUTHEAST POLK AREA ADVISORY COMMITTEE,
Intervenors-Respondent.

LUBA No. 2001-148

FINAL OPINION
AND ORDER

Appeal from Polk County.

Mark Irick, Dallas, represented petitioners.

David Doyle, Dallas, represented respondent.

Margaret A. Toole, Portland, represented intervenor-respondent Friends of Polk County.

Stephen F. Mannenbach, Dallas, represented intervenor-respondent Southeast Polk Area Advisory Committee.

BRIGGS, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member, participated in the decision.

DISMISSED 11/07/2001

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioner appeals a decision by the board of county commissioners denying petitioner's motion to dismiss a local appeal of a county hearings officer's decision that approved petitioner's application to change the location of an approved farm stand.

MOTIONS TO INTERVENE

Southeast Polk Area Advisory Committee (SEPAAC) and Friends of Polk County, opponents below, both move to intervene on the side of respondent. There is no opposition to the motions and they are allowed.

FACTS

Petitioner currently operates a farm stand in an existing barn located on land zoned exclusive farm use (EFU) near Monmouth in Polk County. Petitioner filed an application to relocate its farm stand, and SEPAAC, among others, opposed the application. The hearings officer approved the application, and SEPAAC appealed the decision to the board of county commissioners. Petitioner moved to dismiss the local appeal based on SEPAAC's alleged failure to comply with the appeal requirements set out in Polk County Ordinance 00-15.[1] The board of county commissioners denied petitioner's motion to dismiss and scheduled a public hearing for the appeal, but they also adopted what purports to be a "final decision" that the denial of the motion to dismiss was immediately appealable and that the failure to do so would preclude any further consideration of the issue. This appeal followed.[2]

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[1] Ordinance 00-15 establishes area advisory committees as a mechanism to satisfy Statewide Planning Goal 1 (Citizen Involvement). It provides that, if the area advisory committee follows certain procedures, an area advisory committee may demand a hearing before the county without paying the designated fee, $500 in the present case. The ordinance has numerous requirements; in particular, section 4C sets forth specific criteria that must be considered by the advisory committee and reflected in its minutes before any formal decision to challenge an application is made.

[2] After this appeal was filed, the board of county commissioners postponed the public hearing and stayed the local appeal pending our resolution of this appeal.

MOTION TO DISMISS

Intervenor-respondent SEPAAC moves to dismiss this appeal on the basis that the challenged decision is not a final land use decision subject to our jurisdiction.

ORS 197.015(10) provides that a land use decision subject to our jurisdiction must be a *final* decision. *E & R Farm Partnership v. City of Gervais*, 37 Or LUBA 702, 705 (2000). The county clearly has not made a final decision on petitioner's application to relocate its farm stand. Nevertheless, the county has attempted to issue a final, appealable decision regarding petitioner's motion to dismiss the local appeal. In *Besseling v. Douglas County*, 39 Or LUBA 177 (2000), we determined that the county could not separate a single application for land use approval into one final, appealable component and remand another component for further consideration. In that case, the applicant applied for a comprehensive plan and zone change from EFU to industrial. *Id*. at 178. The board of county commissioners approved the entire application except for the required alternative sites analysis. The board of county commissioners remanded the alternative sites analysis back to the planning commission for further proceedings, but purported to issue a final, appealable land use decision approving the remainder of the application. *Id*. at 179. Relying on *Tylka v. Clackamas County*, 20 Or LUBA 296 (1990), we held that the board of county commissioners' decision was not final regarding any of the issues.

> "The only difference between this case and *Tylka* is that the board of commissioners expressly attempted to do what the petitioners in *Tylka* only suggested was possible, *i.e.*, split a single decision into separate, discrete components, some of which are final and immediately appealable to LUBA. The determination of when a local government decision is 'final' is left to the local government, as long as the local government's determination does not conflict with the applicable statutes or administrative rules. *City of Grants Pass v. Josephine County*, 25 Or LUBA 722, 726 (1993). In this case, however, as demonstrated by *Tylka*, the board of commissioners' attempt to render one component of the decision appealable to LUBA is in direct conflict with ORS 197.015(10). Therefore, no part of the board of commissioners' decision is a final land use decision subject to our jurisdiction." *Besseling*, 39 Or LUBA at 180.

The present case is nearly identical to *Besseling*. The county attempted to render one component of the decision appealable to LUBA while proceeding with the local appeal. Although this case concerns a procedural issue and *Besseling* involved a substantive issue, we do not believe that difference is important. SEPAAC is correct that the county's decision would be a final land use decision had it *granted* the motion to dismiss the local appeal. However, by continuing with the appeal, the county has not made a final decision on the application. The county cannot make an interlocutory decision into a final land use decision merely by designating it as such.[3] Only when the county proceedings on SEPAAC's local appeal are complete will the county have made its *final* decision on the application.

Petitioner relies on *DLCD v. City of McMinnville*, ___ Or LUBA ___ (LUBA No. 2001-093, Order on Motion to Dismiss, September 19, 2001) for the proposition that the county's decision is not an interlocutory decision, but rather the first step of a sequential land use process involving multiple, final land use decisions. *DLCD v. City of McMinnville* involved the City of McMinnville's periodic review of its urban growth boundary (UGB). As part of periodic review, the city is required to comply with ORS 197.296(3) through (5). ORS 197.296(3) requires a local government to conduct a buildable lands inventory and analysis. ORS 197.296(4) and (5) provide a local government with methods to amend its UGB and/or its comprehensive plan and ordinances if the buildable lands inventory indicates the UGB is insufficient to meet the identified need. The City of McMinnville conducted its buildable lands inventory and issued a final decision concerning the inventory before it initiated efforts to select the measures necessary to respond to the need identified by the inventory. The city adopted its buildable lands analysis as an amendment to its

[3] Technically, the county's decision denying the motion to dismiss is a "final decision" as it is reduced to writing, signed by the necessary decision makers, and mailed to persons entitled to notice. OAR 661-010-0010(3). Nevertheless, it is not a final *land use* decision because petitioner has not completed all local land use procedures. *See DLCD v. City of St. Helens*, 29 Or LUBA 485, 494 n 11, *aff'd* 138 Or App 222, 907 P2d 259 (1995) (final decision not necessarily a final *land use* decision).

comprehensive plan. Another comprehensive plan amendment would be necessary to amend the UGB or otherwise proceed under ORS 197.296(4) or (5). Comprehensive plan amendments are land use decisions. ORS 197.015(10)(a)(A)(ii). We held that there was no reason why the city could not adopt one land use decision under ORS 197.296(3) and another separate land use decision under ORS 197.296(4) and (5).

DLCD v. City of McMinnville is inapposite. The county's denial of the motion to dismiss in this case is part of the county's consideration of the farm stand proposal. The county's purported final decision is an interlocutory decision rather than the first step in a sequential land use process with multiple separate decisions.

Finally, petitioner argues it should be able to pursue the merits of the denied motion to dismiss because if petitioner prevails then the appeal below would be unnecessary. However, if petitioner prevails in the continued appeal below, the county's disposition of the motion to dismiss, and consequently this appeal, would be moot. Despite the preferences of one or all of the parties to proceed with an appeal to LUBA, our jurisdiction "is authorized only after every opportunity provided at the local level for addressing land use disputes has been pursued * * *." *Lyke v. Lane County*, 70 Or App 82, 85, 688 P2d 411 (1984); *Besseling*, 39 Or LUBA at 181.

The motion to dismiss is granted.

ATTORNEY FEES

In addition to moving to dismiss the appeal, SEPAAC seeks an award of attorney fees pursuant to OAR 661-010-0075(1)(e)(A) and ORS 197.830(15)(b), which provides:

> "The board shall also award reasonable attorney fees and expenses to the prevailing party against any other party who the board finds presented a position without probable cause to believe the position was well-founded in law or on factually supported information."

In determining whether to award attorney fees against a nonprevailing party, we must find that every argument made by the nonprevailing party is lacking in probable cause, *i.e.*,

merit. *Fechtig v. City of Albany*, 150 Or App 10, 24, 946 P2d 280 (1997). We have held that "a position without probable cause" under ORS 197.830(15)(b) is presented where "no reasonable lawyer would conclude that any of the legal points asserted on appeal possessed legal merit." *Contreras v. City of Philomath*, 32 Or LUBA 465, 469 (1996). The probable cause standard creates a low threshold. *Brown v. City of Ontario*, 33 Or LUBA 803, 804 (1997).

The county purported to make a final land use decision. The decision was reduced to writing, signed by the necessary decision makers, and mailed to those persons entitled to notice as required by OAR 661-010-0010(3) to constitute a "final decision." The decision states that it is final and anyone wishing to challenge the decision must appeal the matter to LUBA within 21 days of the date of the decision. Record 40. This is what petitioner did. Petitioner argues it was necessary to appeal the denial of its motion to dismiss to LUBA in order to preserve its right to challenge the decision.

Petitioner was reasonably concerned that its failure to appeal the county's denial of the motion to dismiss to LUBA would preclude challenging that denial in the future. We cannot say no reasonable lawyer would conclude that any of petitioner's legal positions have merit.

The motion for attorney fees is denied. This appeal is dismissed.