BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RITA THOMAS, SOC, INC.
and PAUL GREINER,
Petitioners,

vs.

CITY OF TURNER,
Respondent,

and

CALPINE CORPORATION,
Intervenor-Respondent.

LUBA No. 2001-170

FINAL OPINION
AND ORDER

Appeal from City of Turner.

Wallace W. Lien, Salem, represented petitioner.

Robert C. Cannon, Salem, represented respondent.

Kris Jon Gorsuch, Salem, represented intervenor-respondent.

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

DISMISSED 04/04/2002

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

Opinion by Briggs.

INTRODUCTION

Calpine Corporation (intervenor) is currently seeking an expedited permit for the siting of a natural gas fired electrical generating facility (generating facility) from the Oregon Energy Facility Siting Council (EFSC).[1] The generating facility is proposed to be sited on property located within the City of Turner and zoned Industrial (M-1). On May 23, 2001, an attorney for intervenor submitted a letter to the city administrator, requesting an interpretation of the city's Land Use Development Code (LUDC). Specifically, the letter requested confirmation that the generating facility would be permitted as a conditional use in the M-1 zone.[2] *See* LUDC 1.170(2)(a) and 3.200(1).[3]

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[1]We previously granted Calpine Corporation's motion to intervene.

[2]The May 23, 2001 letter states, in relevant part:

> "Dear [City Administrator]:
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> "As you know, we represent [intervenor] and we are assisting them in their site review process. I am asking you, as City Administrator, for an interpretation of the City of Turner [LUDC] per your authority under [LUDC] 1.170(2)(a) and [LUDC] 3.200(1).
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> "Our client desires to locate a privately owned natural gas fired turbine electrical generating facility in Turner's General Industrial M-1 district. Unlike many city codes, the [LUDC] does not specify a detailed list of permitted or conditional uses. Rather, it simply states:
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> > "'[LUDC] 4.141(3) Conditional Uses. In an M-1 district, the following uses and their accessory uses may be permitted, subject to the provisions of [LUDC] 2.500:
> >
> > "'(a) Manufacturing, warehousing, wholesaling, compounding, assembling, processing, storing, researching, or testing uses having emissions or nuisance characteristics discernible without instruments at the property line or uses requiring a permit from a local, state or federal agency.' (Emphasis added.)
>
> "In our meetings you have indicated that our client's facility is a conditional use in the M-1 zone and we have proceeded accordingly. We believe that our facility is a manufacturing, wholesaling and/or processing use, and a use which requires local, state or federal permitting. For purposes of our due diligence, we would like a letter from the City interpreting the Code to the effect that our client's proposed use is permitted in the M-1 zone subject to conditional use standards under [LUDC] 2.500." Record 20.

[3]LUDC 1.170(2) provides, in relevant part:

The city administrator responded by letter on May 29, 2001.[4] The letter concluded that intervenor's proposed natural gas fired turbine electrical generating facility is a conditional use in the city's Industrial (M-1) zone. Copies of the letter were provided to the city council on June 11, 2001. Record 16. Petitioners' appeal of the May 29, 2001 letter followed.

MOTION TO DISMISS

Intervenor moves to dismiss this appeal, arguing that (1) EFSC, and not LUBA, has jurisdiction over the challenged decision; (2) the May 29, 2001 letter is not a "land use decision," as that term is used in ORS 197.015(10)(a)(A) because it is not a "final" decision; (3) the appeal is moot; (4) petitioners have failed to establish that there is a justiciable controversy before LUBA; and (5) even if the city's decision is a land use decision, is not moot, and this appeal presents a justiciable controversy, petitioners failed to file a timely appeal.[5] In support of the last argument, intervenor filed a motion to take evidence not in the

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> "* * * An Administrative Decision is a decision by the City Administrator with notification of actions taken provided to the Planning Commission and City Council.
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> "(a) The City Administrator shall have the initial authority and responsibility to interpret all terms, provisions, and requirements of this Code. * * *"

LUDC 3.200(1) defines an "administrative decision" as:

> "[A] decision that correlates the adopted code or ordinance requirements and standards, to an individual issue. These interpretations are usually provided by the City Administrator or designee."

"Administrative actions authorized by [the LUDC] do not require notifications." LUDC 3.300(1).

[4]The May 29, 2001 letter states, in relevant part:

> "Based on the information provided by you and [intervenor's] representatives, the proposed natural gas fired turbine electrical generating facility proposed by [intervenor] may be permitted on M-1 (Industrial) zoned property within Turner subject to review and approval in accordance with [LUDC 2.500]." Record 19.

[5]In relevant part, ORS 197.015(10)(a)(A) defines a "land use decision" as:

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

record seeking to demonstrate that all petitioners were aware of the challenged decision more than 21 days before the filing of the notice of intent to appeal on November 2, 2001. Because we find intervenor's first argument in support of its motion to dismiss to be dispositive, we need not address intervenor's other grounds for dismissal or its motion to take evidence outside of the record.

Our resolution of the motion to dismiss requires some background explanation of EFSC and its authority to approve the siting of generating facilities such as the one proposed by intervenor. We provide that background first. We then turn to the specific arguments presented by the parties.

A. EFSC

In order to site an energy facility, an applicant must obtain a site certificate from EFSC. ORS 469.320(1). To obtain a site certificate, an applicant must demonstrate, among other things, that the proposed facility complies with the statewide planning goals. ORS 469.503(4). To make that demonstration, an applicant may either obtain land use approvals from the local government, or may request that EFSC make the determination of compliance with local land use regulations. A local government or EFSC determination that the proposal complies with the relevant local acknowledged comprehensive plan and land use regulations is sufficient to demonstrate that the proposed facility complies with the statewide land use planning goals. ORS 469.504(1)(a) and (b).[6] Determinations made by

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"* * * * *

"(iii) A land use regulation[.]" (Emphasis added.)

[6]ORS 469.504(1) provides, in relevant part:

"A proposed facility shall be found in compliance with the statewide planning goals under ORS 469.503(4) if:

"(a) The facility has received local land use approval under the acknowledged comprehensive plan and land use regulations of the affected local government; or

EFSC are commonly referred to as "path b" determinations. ORS 469.373 provides an expedited process for proposed energy facilities that meet certain criteria and eliminates many of the intermediate steps necessary under the process established to implement ORS 469.504. In order to use the expedited process, an applicant must, among other things, make an initial demonstration to the Oregon Office of Energy (OOE) that the proposed use is designated as a permitted or conditional use in the local zoning scheme. ORS 469.373(1)(b).[7] Pursuant to ORS 469.373(6), when the expedited process is used, "path b" is the only available option to demonstrate that the proposed facility complies with statewide land use planning goals. As we stated above, under that option, EFSC makes the determination of compliance with local land use approval standards.

As part of the "path b" process, OOE seeks input from local governments where the proposed facility will be located. Representatives from the local government are appointed to a special advisory group that has the opportunity to provide comments on whether it believes the application complies with the applicable local approval standards. ORS 469.504(5).[8] Pursuant to ORS 469.504(8), LUBA has no jurisdiction over a local government approval under ORS 469.504(1)(a) or the advisory group recommendation under ORS 469.504(5).[9]

> "(b) [EFSC] determines that:
>
> > "(A) The facility complies with applicable substantive criteria from the affected local government's acknowledged comprehensive plan and land use regulations that are required by the statewide planning goals and in effect on the date the application is submitted[.] * * *"

[7]The decision by OOE that a proposed use is a permitted or conditional use in the underlying zone is a preliminary, nonbinding decision that merely allows the applicant to proceed with expedited review.

[8]ORS 469.504(5) provides, in relevant part:

> "Upon request by the [OOE], the special advisory group * * * shall recommend to [EFSC] * * * the applicable substantive criteria under [ORS 469.504(1)(b)(A)]. * * *"

[9]ORS 469.504(8) provides, in relevant part:

> "Notwithstanding * * * ORS 197.825 [pertaining to LUBA's jurisdiction to review land use decisions] or any other provision of law, the affected local government's land use approval of

B. Jurisdiction

Intervenor argues that LUBA does not have jurisdiction to hear this appeal because exclusive jurisdiction for siting energy facilities lies with EFSC. Petitioners do not dispute that EFSC has exclusive jurisdiction to review the siting of energy facilities. Petitioners contend that intervenor misapprehends the decision being appealed. According to petitioners, the challenged decision does not involve the siting of an energy facility, but rather an ordinance interpretation regarding permitted and conditional uses within a particular zoning classification.

As discussed earlier, an applicant for an energy facility may proceed under either of two paths: ORS 469.504(1)(a) or (b). If an applicant proceeds under "path a," the decision rendered by the local government is reviewable only by appeal of the EFSC decision to the Oregon Supreme Court. ORS 469.504(8); ORS 469.403(3). If an applicant proceeds under "path b" or under the expedited process of ORS 469.373 (which requires an applicant to proceed under "path b"), the decision rendered by EFSC is again reviewable only by appeal to the Oregon Supreme Court. ORS 469.403; 469.373(11). Once a site certificate has been issued for an energy facility, any local government decision involved in amending that site certificate is also reviewable only by the Oregon Supreme Court. ORS 469.405(1). We believe the statutory scheme sets out a clear intent that review of any local government decision related to the siting of energy facilities does not lie with LUBA.

Petitioners argue that notwithstanding this clear statutory scheme, intervenor requested an ordinance interpretation, which is an administrative decision pursuant to the LUDC and therefore a land use decision subject to our jurisdiction pursuant to ORS 197.825. According to petitioners, nothing in ORS chapter 469 expressly negates LUBA's jurisdiction

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> a proposed facility under [ORS 469.504(1)(a)] and the special advisory group's recommendation of applicable substantive criteria under [ORS 469.504(5)] shall be subject to judicial review only as provided in ORS 469.403 [pertaining to review of EFSC decisions by the Oregon Supreme Court]."

over the kind of decision challenged here. While petitioners' argument is plausible, we do not believe the legislature intended LUBA to have jurisdiction over ancillary local government decisions involving the siting of energy facilities. The statutory scheme clearly anticipates energy facility applicants proceeding under ORS 469.504(1)(a) and (b), ORS 469.373, and ORS 469.405, and grants exclusive jurisdiction to EFSC to make such decisions. Appeals of such decisions are directly to the Oregon Supreme Court. The statutory scheme does not expressly anticipate the current situation, where an applicant requests clarification of the zoning code from a local government during the threshold inquiry for obtaining expedited review. Given that LUBA does not have jurisdiction over any other aspect of the energy facility siting review process, it is difficult to imagine that the legislature intended for LUBA to have jurisdiction over a local government decision rendered as part of the process to determine whether a proposed facility qualifies for expedited review. Jurisdiction over such matters lies with EFSC with appeal to the Oregon Supreme Court, and not with LUBA.

This appeal is dismissed.