BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LEROY C. HAMMER and
CHRISTINE L. HAMMER,
Petitioners,

vs.

CLACKAMAS COUNTY,
Respondent.

LUBA No. 2002-165

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Mary W. Johnson, Oregon City, represented petitioners.

Michael E. Judd, Assistant County Counsel, Oregon City, represented respondent.

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

DISMISSED 07/11/2003

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

Petitioners challenge county actions that resulted in the filing of a final partition plat.

FACTS

The subject property includes approximately 15 acres and is developed with a single-family dwelling. Access to the property is via a private easement that connects with SE 139th Avenue to the north. The area surrounding the subject property is generally developed with single-family dwellings on large lots. The area is located within the Metro urban growth boundary and is planned for urban development as part of the Sunnyside Village Community.

On November 20, 2001, the North Clackamas County Park and Recreation District (Park District) applied to partition the property into two parcels. The application stated that if the partition was approved, the northern five acres of the property would be acquired by the Park District and would be land banked for future park and recreation land development.

On March 6, 2002, the Clackamas County hearings officer approved a conditional zone change for the subject property. As approved, the northern five acres would be rezoned to Village Standard Residential (VR 5/7), and the remainder of the property would retain its Future Urbanizable (FU-10) designation. The rezoning was conditioned on acquisition of the northern five acres of the property by the Park District. In addition, the zone change decision required that a public access between the subject property and SE 139th Avenue be obtained before any development permits could be issued for the northern five acres.

On March 19, 2002, the county approved the application for preliminary plat approval. The preliminary plat approval incorporated the conditions of approval set out in the

hearings officer's zone change decision.[1] Neither the zone change decision nor the March 19, 2002 preliminary plat approval was appealed.

The Parks District commissioned a survey of the property in order to prepare the final partition plat. Apparently, the Park District survey used different monumentation than was used to establish the boundaries of adjoining properties. As a result, the Park District survey depicted some adjoining property lines that were established by prior surveys as encroaching on the subject property. With respect to petitioners' property, the Park District survey included within the boundaries of the subject property a 4,000-square-foot strip of land that prior surveys had shown to be part of petitioners' property. To rectify the discrepancies between the surveys neighboring property owners, including petitioners, were provided quit claim deeds to convey whatever interest they may have in the subject property to the current property owners.

Petitioners objected to the accuracy of Park District's survey, and declined to sign the quitclaim deed that was provided to them. In July and August 2002, petitioners' attorney and petitioners met with the county surveyor and the Park District representatives to attempt to resolve their concerns regarding the Park District survey. Those discussions failed to resolve the matter. On October 29, 2002, the county surveyor sent a letter to petitioners' attorney, informing her that he had decided to approve the partition plat for the Park District. In that letter, the surveyor stated:

> "[My approval] is based on my opinion that the [Park District] survey correctly represents the position of the deed lines of the [subject property] as well as those of the [adjoining properties.]" Supplemental Record 14.

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[1] The record indicates that petitioners were sent notice of the application for preliminary plat approval on March 1, 2002. Record 146, 150. In an affidavit attached to the notice of intent to appeal, petitioner Leroy Hammer avers that (1) he received notice from the county of the partition application on or about March 4, 2002; and (2) he received notice of the preliminary plat approval on or about March 22, 2002. Affidavit of Petitioner Leroy C. Hammer 1.

On November 1, 2002, petitioners' attorney sent a letter to the county counsel, advising the county counsel that she believed the surveyor's approval was in error. On November 8, 2002, the surveyor signed the partition plat. On November 15, 2002, the county counsel sent a letter to petitioners' attorney, informing her that the surveyor had signed the partition plat on November 8, 2002. On November 21, 2002, the partition plat was recorded with the county clerk. Petitioners' notice of intent to appeal was filed with LUBA on December 12, 2002.

DECISION

Petitioners' December 12, 2002 notice of intent to appeal states, in relevant part:

> "* * * Petitioners intend to appeal a land use decision or limited land use decision of Respondent, entitled Major Partition File No. Z0917-01 and specifically the recording of the final Clackamas County Partition Plan No. 2002-091, which became final on November 21, 2002, and adversely affects Petitioners. The final recorded plat unreasonably differs from the proposal described in the notice of partition and the notice of decision, in that a part of Petitioners' land is included within the plat without their declaration or consent. The recording of the partition plat involves the interpretation and application of ORS 92.075, ORS 92.100(3), Clackamas County Ordinance No. 9-99, Clackamas County Zoning and Development Ordinance 1106, and standards and criteria omitted from the notice of partition and the notice of decision, namely Policies 1.1 through 1.5 in the Parks and Recreation Section of Chapter 9 of the Clackamas County Comprehensive Plan, and Clackamas County Zoning and Development Ordinance §§ 301, 1006, 1007, 1008, 1011, 1014, 1015, 1602. This notice was filed on or before the 21st day after the date the decision sought to be reviewed became final or within the time provided by ORS 197.830(3) through (5)." Notice of Intent To Appeal 1-2.

On February 25, 2003, the county moved to dismiss this appeal, arguing two bases for dismissal. First, the county argues that the first sentence of the notice of intent to appeal, quoted above, merely challenges the recording of a partition plat. According to the county, the recording of a plat in the records of the county clerk is governed by ORS chapter 205, and not by any comprehensive plan or land use regulation. The county argues that to the extent the notice of intent to appeal identifies the recording of the partition plat as the "decision" of the county, that act of recording a final partition plat is not a "land use

decision" or "limited land use decision," as those terms are defined in ORS 197.015.[2] Because the act of recording of a partition plat is not a land use decision or limited land use decision, the county contends that LUBA does not have jurisdiction to review that action.

Second, the county argues that if the notice of intent to appeal challenges the decision of the county surveyor to approve the final partition plat and, presuming that the county surveyor's decision was either a land use decision or a limited land use decision, the notice of intent to appeal was filed more than 21 days after the date the county surveyor's decision was made.[3] According to the county, petitioners were put on notice that the county surveyor

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[2] ORS 197.015(10) defines "land use decision" as including:

> "(a)(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
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> "(i) The goals;
>
> "(ii) A comprehensive plan provision;
>
> "(iii) A land use regulation; or
>
> "(iv) A new land use regulation;
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> "* * * * *
>
> "(b) Does not include a decision of a local government:
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> "(A) Which is made under land use standards which do not require interpretation or the exercise of policy or legal judgment;
>
> "* * * * *
>
> "(C) Which is a limited land use decision[.]"

ORS 197.015(12) defines a "limited land use decision" as:

> "[A] final decision or determination made by a local government pertaining to a site within an urban growth boundary which concerns:
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> "(a) The approval or denial of a subdivision or partition, as described in ORS chapter 92."

[3] The county does not concede that the county surveyor's decision to approve the partition plat is a land use decision or a limited land use decision.

would approve the partition plat on October 29, 2002. The county further notes that county counsel, in a November 12, 2002 letter, advised petitioners that the county surveyor had approved the final plat on November 7, 2002. Therefore, the county argues that this appeal must be dismissed because petitioners failed to file a timely appeal.[4]

The county's decision to approve the disputed final subdivision plat is a limited land use decision. *Bauer v. City of Portland*¸ 38 Or LUBA 715, 719 (2000) (final partition plat approval for city land is a limited land use decision). Limited land use decisions are within LUBA's exclusive jurisdiction. ORS 197.825(1). We agree with the county that its limited land use decision became final, at the latest, when the county planner and county surveyor signed the final plat on November 7, 2002. Petitioners were provided actual notice of that November 7, 2002 decision on November 12, 2002. Therefore, at the latest, the 21-day deadline for appealing the county's decision to approve the final plat expired 21 days after November 12, 2002, or December 3, 2002.[5] As previously noted, petitioners' notice of intent to appeal was filed on December 12, 2002, or nine days after that deadline expired.

Petitioner's December 12, 2002 notice of intent to appeal could only be timely if the county clerk's recording of the final plat on November 21, 2002 either (1) is the county's final decision to approve the final plat; or (2) is the date that some earlier county decision to approve the final plat became final for purposes of appeal. Petitioners offer no basis for concluding that the county clerk's action of recording the final plat was anything other than a ministerial act that had nothing to do with county land use regulations or whether the final

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[4] In their response to the county's motion, petitioners request oral argument and an opportunity to provide supplemental briefing. We do not believe that it is necessary to hold oral argument or allow for supplemental briefing to address the county's motion. Petitioners' request is therefore denied.

[5] The statute that establishes the relevant date for the commencement of the 21-day deadline for filing an appeal with LUBA is ORS 197.830. Various subsections of that statute start the 21-day deadline at various times depending on a variety of factors. The subsection most favorable to petitioners is ORS 197.830(5)(a), which starts the 21-day deadline on the date the petitioners received "actual notice" of the county's decision to approve the final plat.

plat conforms to the preliminary subdivision plan approval. We agree with the county that the county clerk's recording of the final plat on November 21, 2002 was not itself a county limited land use decision to approve the final plat.

Petitioners argue that the county clerk's decision to accept the final plat for recording and to record the plat on November 21, 2002 was the date the county surveyor's November 7, 2002 approval of the final plat became final for purposes of an appeal to LUBA. Limited land use decisions, like land use decisions, must be "final" decisions. ORS 197.015(10)(1); 197.015(12). Under OAR 660-010-0010(3),

> "A decision becomes final when it is reduced to writing and bears the necessary signatures of the decision maker(s), unless a local rule or ordinance specifies that the decision becomes final at a later date, in which case the decision is considered final as provided in the local rule or ordinance."

The county surveyor's November 7, 2002 decision to sign the final plat appears to meet the rule's requirement for a writing and signature, and petitioners do not argue otherwise. That means, at the latest, the county's limited land use decision to approve the final plat became final on November 7, 2002, unless some "local rule or ordinance specifies that the decision becomes final at a later date." Petitioners cite no such local rule or ordinance.

Because petitioners' notice of intent to appeal was not timely filed, this appeal is dismissed.[6]

[6] Petitioners move to transfer this appeal to circuit court, in the event that we conclude that the challenged decision is not a land use decision or limited land use decision. Because we have concluded that the challenged decision is a limited land use decision, a transfer to circuit court is not appropriate, and petitioners' motion is denied.