BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SHARON MITCHELL JEWETT,
Petitioner,

vs.

CITY OF BEND,
Respondent

and

J.L. WARD CO.,
Intervenor-Respondent.

LUBA No. 2004-072

FINAL OPINION
AND ORDER

Appeal The City of Bend.

Sharon Mitchell Jewett, Sunriver, filed the petition for review and argued on her own behalf.

No appearance by City of Bend.

Tamara E. MacLeod, Bend, filed the response brief and argued on behalf of intervenor-respondent. With her on the brief was Karnopp Petersen LLP.

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

DISMISSED 10/05/2004

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals city approval of a lot line adjustment.

MOTION TO STRIKE

Intervenor-respondent (intervenor) moves to strike documents appended to the petition for review at pages 10 to 29, and "Supplemental Documents" petitioner submitted to the Board at oral argument on September 9, 2004. Intervenor argues that none of the disputed documents are in the record, and petitioner has not established any basis for the Board to consider extra-record documents.

We agree with intervenor. Petitioner has not established any basis for the Board to consider the documents at Petition for Review 10 to 29, or the "Supplemental Documents" submitted at oral argument. The Board will not consider those documents. The motion to strike is granted.

FACTS

The subject property involves two adjoining parcels, tax lot 4409 (33.16 acres) and tax lot 4500 (64.75 acres). The two parcels are located in a 260-acre area commonly known as Mountain High, which includes four platted planned unit developments (PUDs) or "villages" known as St. Andrews, Willow Creek, Aspen Village and Alpine Village. Tax lots 4409 and 4500 are not included within the boundaries of the four platted PUDs, but adjoin or are interspersed between the four PUDs. Tax lots 4409 and 4500 are partially developed with a golf course, clubhouse and similar amenities.[1]

[1] Although it is not reflected in the record of the challenged decision, we understand from the parties that intervenor, who developed the four Mountain High PUDs and who owns the subject parcels, no longer intends to operate the golf course and clubhouse on tax lots 4409 and 4500, but ultimately intends to develop those parcels for a different use or uses. There is apparently on-going civil litigation between the Mountain High Homeowners Association and intervenor with respect to intervenor's obligation to maintain the golf course operation.

On July 3, 2003, intervenor filed an application with the city to adjust the common boundary line between tax lots 4409 and 4500, in two places. The proposed amendment would decrease the area of tax lot 4409 from 33.16 acres to 21.67 acres, while increasing the area of tax lot 4500 from 64.75 acres to 76.24 acres, a net change of approximately 11 acres. The city planning department granted tentative approval of the proposed adjustment on September 3, 2003, pursuant to Land Division Ordinance (LDO) 5.030.[2] Copies of the tentative approval were provided to intervenor, a law firm representing the Mountain High Homeowners Association, and an individual landowner in one of the PUDs.

Intervenor thereafter provided the city with the deeds and other information needed for final approval, pursuant to LDO 5.040.[3] On April 19, 2004, planning staff sent written

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[2] LDO 5.030 provides:

> "1. No application for lot line adjustment shall be approved unless the following standards are met:
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> "A. The adjustment does not result in lot or parcel sizes that are less than those established by the underlying zoning designation.
>
> "B. Nonconforming lots or parcels that are less than the minimum size established for the zone shall not be further reduced in size.
>
> "C. Existing structures shall not be made nonconforming with regard to setbacks, lot coverage or other requirements of the underlying zone, or this Title.
>
> "D. Existing water and sewer service lines to the adjusted lots or parcels shall be in conformance with current City standards or shall be constructed to conform with current City standards.
>
> "E. Existing sanitary septic systems on the adjusted lots or parcels shall meet all requirements of the County Environmental Health Division.
>
> "F. The two lots or parcels subject to the proposed boundary line adjustment shall not be subject to any other pending lot line adjustment applications with other lots or parcels."

[3] LDO 5.040 provides:

> "1. In order to obtain final approval of a lot line adjustment, the following requirements shall be completed within one (1) year of the tentative approval:

notice to intervenor confirming that the city had "finalized" the lot line adjustment. Record 7. On May 3, 2004, petitioner appealed to LUBA the city's April 19, 2004 decision finalizing the lot line adjustment.

JURISDICTION

Intervenor contends that LUBA lacks jurisdiction over the April 19, 2004 decision, because that decision is subject to the exception to the definition of "land use decision" at ORS 197.015(10)(b)(A), and does not qualify as a "significant impacts" land use decision under *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982) and *Billington v. Polk County*, 299 Or 471, 703 P2d 232 (1985).

A. ORS 197.015

ORS 197.015(10)(a) defines "land use decision" in relevant part to include a final decision or determination that concerns the application of a land use regulation. ORS 197.015(10)(b)(A) provides that "land use decision" does not include a decision of the local government that "is made under land use standards which do not require interpretation or the exercise of policy or legal judgment[.]" As relevant here, LUBA's jurisdiction is limited to "land use decisions." ORS 197.825(1).

Intervenor argues that the April 19, 2004 final lot line adjustment approval was made under, and is subject only to, the land use standards at LDO 5.040. According to intervenor,

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"A. New deeds or other instrument conveying ownership containing the legal descriptions for the adjusted parcels shall be recorded with the County Clerk.

"B. A survey drawing containing the stamp and signature of a licensed surveyor or engineer shall be recorded with the County Surveyor.

"C. All property taxes on the adjusted parcels shall be paid in full.

"D. Verification of acceptance of water and sewer line construction to the adjusted lots or parcels by the City Engineering Division."

the standards at LDO 5.040 do not require interpretation or the exercise of policy or legal judgment.

We agree with intervenor. The standards at LDO 5.040 require only that the applicant submit deeds, a survey drawing, proof that property taxes have been paid, and verification that the city engineering department has accepted any water and sewer line construction. If there is anything about those standards that require interpretation or the exercise of policy or legal judgment, petitioner has not pointed it out to us. If there are other land use regulations or legal standards that apply or potentially apply to the April 19, 2004 decision, petitioner has not pointed them out to us.

The closest petitioner comes is to allege that the covenants, conditions and restrictions (CC&Rs) that apparently govern the four platted PUDs require that the homeowners association approve lot line adjustments. However, even assuming that the subject parcels are within the platted PUDs or otherwise subject to the CC&Rs, something petitioner has not established, petitioner does not explain why the CC&Rs are land use regulations or standards within the meaning of ORS 197.015(10)(a) or (b), or what land use regulation or standard requires the city to apply or consider the CC&Rs in finalizing the disputed lot line adjustment. Finally, petitioner alleges that the city's approval violates "ORS chapter 94," but does not identify anything in that chapter that applies to or has a bearing on the city's decision. Petition for Review 6.

Accordingly, petitioner has failed to establish that the city's April 19, 2004 decision is a statutory land use decision subject to our jurisdiction under ORS 197.015(10).

B. Significant Impacts Land Use Decision

Petitioner alleges that the disputed lot line adjustment affecting approximately 76 acres that is part of the entire 260-acre Mountain High area significantly affects a large area of land and a substantial number of property owners, and is therefore a "significant impacts" land use decision.

Under *Kerns*, a decision that does not otherwise qualify as a statutory land use decision may nonetheless come within LUBA's jurisdiction if the decision "effects a significant change in the land use status quo of the area." 294 Or at 135. Elaborating on that test, we have held that the "significant impact" test is met if the decision creates an "actual, qualitatively or quantitatively significant impact on present or future land uses." *Carlson v. City of Dunes City*, 28 Or LUBA 411, 414 (1994); *Keating v. Heceta Water District*, 24 Or LUBA 175, 181-82 (1992).

Here, petitioner does not explain how the April 19, 2004 decision changes the "land use status quo of the area" or creates an actual, qualitatively or quantitatively significant impact on present or future land uses. We understand petitioner to be concerned with intervenor's intent to abandon the golf course operation on the adjusted parcels, or with development that intervenor may propose on the readjusted parcels in the future. However, petitioner does not explain how the disputed adjustments relate to those present or future land uses. For example, petitioner makes no attempt to demonstrate that the disputed adjustments allow a different kind or intensity of development than would otherwise be permitted under the applicable zoning regulations. Petitioner has failed to demonstrate that the April 19, 2004 decision is a "land use decision" within our jurisdiction under *Kerns* and *Billington*.

Given our conclusion that the challenged decision is not within our jurisdiction, we need not consider intervenor's other jurisdictional arguments.

This appeal is dismissed.