BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WAGON TRAIL RANCH PROPERTY
OWNERS ASSOCIATION,
Petitioner,

vs.

KLAMATH COUNTY,
Respondent,

and

RAY SCRIVNER and CATHERINE SCRIVNER,
Intervenors-Respondent.

LUBA No. 2007-076

FINAL OPINION
AND ORDER

Appeal from Klamath County.

A. Richard Vial, Thomas M. Johnson, and Jason L. Grosz, Portland, filed the petition for review. A. Richard Vial argued on behalf of petitioners. With them on the brief was Vial Fotheringham LLP.

No appearance by Klamath County.

Mark S. Bartholomew and P. David Ingalls, Medford, filed the response brief. P. David Ingalls argued on behalf of intervenors-respondent. With them on the brief was Hornecker, Cowling, Hassen & Heysell, LLP.

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

TRANSFERRED 08/01/2007

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 a decision by the county board of commissioners that approves a final subdivision plat.

MOTION TO INTERVENE

Ray Scrivner and Catherine Scrivner (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

In 1972, the county approved a planned unit development involving a 1,080-acre tract, which included the first of a series of preliminary subdivision plat approvals. In 1975, the county expanded and revised the planned unit development by approving a conditional use permit known as CUP 75-9, which approved preliminary subdivision plats for Wagon Trail Acreages, Third and Fourth Additions. CUP 75-9 included no expiration date. The Third Addition received final subdivision plat approval in 1978.

This appeal involves the Fourth Addition, which originally consisted of a 54-acre parcel. Sometime after 1978, that 54-acre parcel was partitioned into two parcels 10.53 acres and 43.64 acres in size. The northern 10.53-acre parcel was acquired by petitioner, which is the homeowners association for the first three completed additions to the Wagon Trail Ranch subdivision. In 1983, intervenors acquired the southern 43.64-acre parcel, which is known as tax lot 8400. Intervenors made no effort to develop tax lot 8400 until 2006, when they applied to the county for final subdivision plat approval to create 24 residential lots on tax lot 8400.

The county planning director concluded that the proposed subdivision conforms with the conditions imposed by CUP 75-9, and issued a decision without a hearing approving the application, with notice to nearby property owners. Petitioner appealed the planning director's decision to the county board of commissioners, arguing that the proposed

subdivision does not conform to the conditions imposed by CUP 75-9. The board of commissioners conducted a hearing on the appeal and, on April 4, 2007, issued a decision sustaining the planning director's decision and approving the application. This appeal followed.

JURISDICTION

The county did not file a response brief in this appeal. Intervenors' response brief accepts petitioner's jurisdictional statement. On its own motion, LUBA requested additional briefing from the parties on whether the Board has jurisdiction over this appeal, in light of ORS 92.100(7), which provides:

> "Granting approval or withholding approval of a final subdivision or partition plat under this section by the county surveyor, the county assessor or the governing body of a city or county, or a designee of the governing body, is not a land use decision or a limited land use decision, as defined in ORS 197.015."

Petitioner responds that the challenged decision is not the type of decision contemplated by ORS 92.100(7), which petitioner argues is limited to nondiscretionary or "ministerial" final subdivision or partition plat decisions. According to petitioner, the county exercised considerable discretion in approving a final subdivision plat based on a 32-year old preliminary plat approval, involving property that had subsequently been illegally partitioned, and in rejecting petitioner's arguments regarding the meaning of the 1975 conditions of approval. Because the challenged decision falls squarely within the definition of "land use decision" at ORS 197.015(11)(a), petitioner argues, LUBA has jurisdiction over this appeal. In the alternative, petitioner moves to transfer this appeal to circuit court, pursuant to OAR 661-010-0075(11).

Intervenors respond by citing to legislative history of the 2005 amendments that adopted ORS 92.100(7), to the effect that the legislature broadly intended ORS 92.100(7) to divest LUBA of jurisdiction over any final subdivision or partition plat decision.[1]

As relevant here, our jurisdiction is limited to review of land use decisions or limited land use decisions, as those terms are defined in ORS 197.015. ORS 197.825(1). ORS 197.015(11)(a)(A) defines "land use decision" to include a final decision or determination made by a local government that concerns the application of its land use regulations, among other provisions.[2] ORS 197.015(11)(b) excludes from the definition of "land use decision" a decision of a local government that (1) that is made under land use

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[1] We note that in the 2007 legislative session the legislature passed and the Governor signed HB 3025, which amends the definitions of "land use decision" and "limited land use decision" to clarify that such decisions do not include decisions that approve or deny a final subdivision or partition plat. Because HB 3025 became effective after the date of the decision challenged in this appeal, we do not consider it.

[2] ORS 197.015(11) provides, in relevant part:

> "'Land use decision':
>
> "(a) Includes:
>
> "(A) A final decision or determination made by a local government or special district 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;
>
> "* * * * *
>
> "(b) Does not include a decision of a local government:
>
> "(A) That is made under land use standards that do not require interpretation or the exercise of policy or legal judgment;
>
> "(B) That approves or denies a building permit issued under clear and objective land use standards;
>
> "(C) That is a limited land use decision[.]"

standards that do not require interpretation or the exercise of policy or legal judgment or (2) that is a limited land use decision.

ORS 197.015(13) defines "limited land use decision" to include in relevant part "a final decision or determination made by a local government pertaining to a site within an urban growth boundary" that concerns "[t]he approval or denial of a tentative subdivision or partition plan, as described in ORS 92.040 (1)." The same 2005 legislation that adopted the current wording of ORS 92.100(7) inserted the word "tentative" into the above definition of "limited land use decision." HB 2356, Oregon Laws 2005, Chapter 239, Section 2.

But for ORS 92.100(7), we would likely agree with petitioner that the challenged decision, which approves a final subdivision plat outside an urban growth boundary, would be a "land use decision" subject to LUBA's jurisdiction. *See Hammer v. Clackamas County*, 190 Or App 473, 79 P3d 394 (2003) (final partition plat approval is reviewable at LUBA). However, the clear intent of the 2005 amendments to ORS 92.100(7) and ORS 197.015(13) was to overrule *Hammer* and LUBA decisions that had reached similar conclusions. Under the 2005 amendments, it is clear that approval of a final subdivision plat by various local government agents, including the governing body, is not a land use decision or limited land use decision. Nothing cited to us in the text or legislative history of ORS 92.100(7) suggests that the legislature intended to limit the scope of that statute to decisions on final subdivision or partition plat applications that do not involve discretion. Because the challenged decision is neither a land use decision nor a limited land use decision, we have no jurisdiction over it. *Severson v. Josephine County*, 51 Or LUBA 569 (2006) (dismissing appeal of final subdivision plat decision under ORS 92.100(7), where no motion to transfer is filed).

MOTION TO TRANSFER

OAR 661-010-0075(11)(c) provides that:

> "[i]f the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015[(11) or (13)], the Board shall dismiss the appeal unless a motion to transfer to circuit

> court is filed as provided in subsection (11)(b) of this rule, in which case the Board shall transfer the appeal to the circuit court of the county in which the appealed decision was made."

Neither the county nor intervenors oppose petitioner's motion to transfer. Accordingly, this appeal is transferred to the Klamath County Circuit Court.