BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WILLAMETTE OAKS LLC,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

GOODPASTURE PARTNERS, LLC,
Intervenor-Respondent.

LUBA No. 2013-040

FINAL OPINION
AND ORDER

Appeal from Lane County.

Michael E. Farthing, Eugene, represented petitioner.

Stephen L. Vorhes, Assistant County Counsel, Eugene, represented respondent.

Michael C. Robinson, Portland, represented intervenor-respondent.

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

TRANSFERRED 07/23/2013

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a letter from the county's counsel that takes the position that the board of county commissioners cannot revoke the county's previous approval, acceptance and recording of a final subdivision plat.

MOTION TO INTERVENE

Goodpasture Partners, LLC moves to intervene on the side of respondent. No party opposes the motion and it is granted.

FACTS

In March, 2013, petitioner sent a letter to the board of county commissioners that requested that the board of commissioners revoke the county's previous acceptance and recording on December 28, 2012 of a final subdivision plat for intervenor's subdivision located in the city of Eugene.[1] In response, the county's counsel sent petitioner a letter that took the position that the board of commissioners cannot revoke the county's previous acceptance and recording of the final plat. Petitioner appeals that letter to LUBA.

JURISDICTION

ORS 197.015(10)(a) defines "land use decision" to include:

> "(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

[1] Apparently while petitioner's appeal of the City of Eugene's decision approving intervenor's application for tentative approval of the disputed subdivision was pending before LUBA (LUBA No. 2012-064), the city approved intervenor's application for final subdivision approval and the county accepted and approved the final plat and recorded it on December 28, 2012. LUBA remanded that tentative subdivision approval on January 17, 2013.

"(iv) A new land use regulation[.]"

A decision "concerns" the application of a land use regulation if (1) the decision maker was required by law to apply its land use regulations as approval standards, whether it did so or not, or (2) the decision maker in fact applied land use regulations. *Jaqua v. City of Springfield*, 46 Or LUBA 566, 574 (2004).

A. Statutory Land Use Decision

The county and intervenor (respondents) jointly move to dismiss the appeal. Respondents argue that the letter is not a "land use decision" as defined in ORS 197.015(10)(a) because in issuing the letter the county's counsel was not required to and did not in fact apply the goals, a comprehensive plan provision, or a land use regulation. We understand respondents to argue there is nothing in the county's comprehensive plan or land use regulations that authorizes the county to revoke an approved and recorded final subdivision plat. Respondents argue that the county counsel's letter to petitioner merely confirms that the county has accepted, approved and recorded the final plat and that the board of commissioners cannot revoke the county's acceptance and recording of the final plat.

Respondents also point out that ORS 92.100(7) provides that the county's decision to accept, approve and record the final plat is not a land use decision.[2] Respondents argue that because the underlying decision that is the subject of the letter is not a land use decision, the county counsel's letter to petitioner that relates to that underlying county decision to accept approve and record the final plat cannot somehow be converted into a land use decision.

Petitioner responds that the county counsel's letter "'concerns' the 'application' of the County's and the City's land use regulations, specifically, its land division processes." Petitioner's Combined Response to Joint Motion to Dismiss Appeal and Precautionary

[2] ORS 92.100(7) excludes from the definition of "land use decision" in ORS 197.015(10)(a) and the definition of "limited land use decision" in ORS 197.015(12) a city or county decision "[g]ranting 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[.]"

Motion to Transfer to Circuit Court 6. However, petitioner does not explain, and we fail to understand, how the *county counsel's* letter could "concern[] the * * * application of" the *city's* land use regulations. Beyond its undeveloped assertion, petitioner does not cite any specific provision of the county's (or city's) "land division processes" or any other land use regulation that the county's counsel either applied, or should have applied, in concluding that the county lacks authority to revoke a previously approved and recorded final subdivision plat. Petitioner argues:

> "[t]he County is a home rule governmental agency of the State and can take action to alter previous decisions. The County, under the present record, has no authority to sign the Final Plat. Even without that authority, the County approved and accepted the Final Plat. The County can certainly use the same unstated authority to revoke the plat." Petitioner's Combined Response 15.

That argument falls far short of demonstrating that in issuing the challenged letter the county's counsel was required to and did not apply a comprehensive plan provision or land use regulation.

The remainder of petitioner's response explains why petitioner believes that the county erred in accepting, approving and recording the final plat while petitioner's appeal of the city's tentative subdivision approval was pending before LUBA. *See* n 1. But whether the county erred in accepting, approving and recording the final plat is not the relevant question in determining whether the county counsel's letter to petitioner that takes the position that the board of commissions cannot revoke the county's previous acceptance and recording of the final plat is a land use decision. That letter is only a statutory land use decision if it applied or was required to apply comprehensive plan or land use regulation authority to revoke approved subdivision plats or standards governing such revocations. Petitioner identifies no such plan or land use regulation authority or standards.

As the party seeking review by LUBA, petitioner has the burden to establish that LUBA has jurisdiction to review the challenged letter. *Billington v. Polk County*, 299 Or 471, 475, 703 P2d 232 (1985). We conclude that petitioner has not established that the

county counsel's letter is a land use decision as defined in ORS 197.015(10)(a). Petitioner has not cited to any comprehensive plan provision or land use regulation that the county's counsel either applied or was required to apply in the challenged letter to petitioner that takes the position that the county cannot revoke its acceptance and recording of the final plat. Accordingly, we agree with respondents that the challenged letter is not a "land use decision" as defined in ORS 197.015(10)(a).[3]

B. Significant Impacts Land Use Decision

Respondents also contend that the county counsel's letter is not a land use decision under the significant impacts test set out in *City of Pendleton v. Kerns*, 294 Or 126, 133-34, 653 P2d 992 (1982). In *Kerns*, the Supreme Court held that a local government decision that is not a statutory land use decision may nonetheless be subject to LUBA's review if the decision will have a "significant impact" on present or future land uses in the area. 294 Or at 134. Petitioner's response argues that the county's acceptance and recording of the final plat will have "far-reaching consequences of a final subdivision plat in an urban setting" and that "[w]ater, electrical and natural gas lines will be installed in public utility easements created by the Final Plat. Public streets, curbs, sewer and stormwater lines will be constructed and installed in dedicated public roads. Real property and financial agreements and transactions will be made in reliance on the legality of the Final Plat." Response to Joint Motion 9.

Petitioner's response relies on the county's decision to accept and record the final plat. But even if we assume for purposes of this opinion only that the decision to approve and record the final subdivision plat may have significant impacts on present or future land uses, that decision is not the decision that is before us in this appeal. As far as we can tell, the decision that the county lacks authority to revoke the final plat approval and recording—

[3] In addition, to the extent petitioner seeks to challenge the county's decision to approve, accept and record the final plat, that county decision is excluded pursuant to ORS 92.100(7) from the definition of "land use decision" and accordingly, is not reviewable by LUBA.

the only decision that is before us in this appeal—will not have any impacts on present or future land uses that are independent of the decision to approve and record the final plat. Petitioner has not established that the challenged decision is a "significant impacts" land use decision.

Accordingly, because we agree with respondents that the challenged decision is neither a statutory land use decision under ORS 197.015(10)(a) or a significant impacts land use decision, we do not have jurisdiction over the challenged letter.

TRANSFER

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

> "If 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(10) or (12), 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."

Petitioner filed a precautionary motion to transfer the appeal to circuit court in the event we determine we do not have jurisdiction.

The appeal is transferred.