BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DOUGLAS HOSCHEK, ROBERT FOLEY
and OREGON SHORES CONSERVATION
COALITION,
Petitioners,

vs.

TILLAMOOK COUNTY,
Respondent,

and

BARBARA GIDDINGS, DON GIDDINGS
and WILD-FLOWER CORPORATION,
Intervenors-Respondent.

LUBA Nos. 2006-090 and 2006-091

ORDER ON MOTION TO DISMISS

Intervenors-respondent (intervenors) move to dismiss both of these appeals, arguing that neither of the decisions that are the subject of these appeals is a "land use decision" subject to LUBA's jurisdiction.

LUBA NO. 2006-090

The decision appealed in LUBA No. 2006-090 is Order 06-01-AP-LUC, a planning commission decision rejecting petitioners' appeal of a Land Use Compatibility Statement (LUCS). We provide the following chronology of events leading up to the challenged planning commission decision.

In December 2004, the county approved a tentative subdivision plat for Phase II of the Nantucket Shores residential development. The subdivision application included a tentative sewer plan, which the county approved after finding that the plan "satisfied all requirements, and can satisfy all applicable ordinance requirements prior to final plat approval[.]" Record 85. Condition 4 of tentative plat approval required the applicant to

provide written certification from the Department of Environmental Quality (DEQ) that the sewer system approved in the tentative plat approval is "complete and approved, prior to final plat approval." *Id.* The county's decision approving the tentative plat was not appealed locally and became final on December 20, 2004.

As required by Condition 4, intervenors applied to DEQ for review and permitting of the proposed sewage treatment system. DEQ requested that the county certify that the proposal for sewage treatment complies with applicable land use regulations, and submitted a LUCS for the county to fill out and return. The LUCS form requires the county to answer the following question: "Does the business or facility comply with all applicable land use requirements?" Record 80. If the answer is yes, the form instructs the county to attach findings to support the affirmative compliance decision. County staff checked the box marked "yes" and attached the planning commission's December 2004 tentative plat approval. County staff signed the LUCS on December 12, 2005.

Petitioner Hoschek appealed the staff LUCS decision to the planning commission, which allowed petitioners to testify at a hearing on March 9, 2006. On May 3, 2006, the planning commission issued a decision that denied the local appeal on the grounds that the LUCS was not a "discretionary process or decision," and was not a "land use decision" subject to local appeal. Record 9.[1] Petitioners then appealed the planning commission

[1] The planning commission decision states, in relevant part:

> "[Petitioner] requested that the Tillamook County Planning Commission review the Planning Department's issuance of a [LUCS] on December 12, 2005 for the Tentative Subdivision Plat 'Nantucket Shores II.' The Tillamook County Planning Commission considered the above-entitled matter at a Public Hearing held on March 9, 2006, closed the record and made a decision on the same day.
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> "The Planning Commission considered staff's findings of fact, and conclusions contained within the March 2, 2006 Staff Report, written testimony received and oral testimony received at the hearing. After consideration of all the available evidence described above, the Planning Commission was able to make findings and conclusions related to the LUCS appeal, which are attached as Exhibit I.

decision to LUBA.

Intervenors now move to dismiss, contending that the LUCS decision is not a "land use decision" subject to LUBA's jurisdiction, as that term is defined at ORS 197.015(11)(a)(A)[2]. To the extent it falls within that definition, intervenors argue, the LUCS decision is subject to the ORS 197.015(11)(b)(A) exception for decisions made under land use standards that do not require interpretation or the exercise of legal or policy judgment.[3]

Petitioners respond that the challenged decision is not the LUCS decision itself, but rather the *planning commission* decision rejecting petitioner's *local appeal* of the LUCS decision. Petitioners are correct that the notice of intent to appeal filed in LUBA No. 2006-090 identifies the planning commission decision rejecting petitioner's local appeal of the LUCS, not the LUCS itself, as the challenged decision. According to petitioners, in determining that there was no local appeal of the LUCS decision, the planning commission decision necessarily concerned the application of the county's land use regulations that

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> "The Tillamook County Planning Commission hereby denies the above referenced appeal because the LUCS was not a discretionary process or decision, was not a land use decision and for the reasons explained in the findings attached as Exhibit I. This decision is not a land use decision and is final and may not be appealed to the Board of County Commissioners." Record 9.

[2] ORS 197.015(11)(a)(A) defines "land use decision" to include:

> "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[.]"

[3] ORS 197.015(11)(b)(A) provides that "land use decision" does not include "a decision of a local government" that is "made under land use standards that do not require interpretation or the exercise of policy or legal judgment[.]"

govern such local appeals. Further, petitioners argue, the determination that the LUCS was not a "land use decision" and therefore not subject to local appeal necessarily concern application of land use standards that require interpretation and the exercise of legal judgment. *See Von Lubken v. Hood River County*, 20 Or LUBA 208, 212 n 4 (1990) (determination that no right of local appeal exists under county code concerned the application of a land use regulation, required legal judgment, and therefore did not qualify for the exception for decisions "made under land use standards that do not require interpretation or exercise of legal or policy judgment").

Intervenors do not assert that or explain why the planning commission's decision denying petitioners' local appeal is not a land use decision subject to LUBA's jurisdiction. Although the parties do not cite Tillamook County Code (TCC) 10.020, it states that "[a]n action or ruling by the [planning director] pursuant to this Ordinance" may be appealed to the planning commission within 10 days of the date notice is mailed to the parties, and that "other actions" of the director may be appealed "within 21 days of such an action or decision is reduced to writing." Neither intervenors nor the planning commission's decision offers any explanation for why the determination that no right to appeal the LUCS decision exists under the county code does not concern the application of at least TCC 10.020, and thus constitute a "land use decision" as that term is defined at ORS 197.015(11)(a)(A). As to the ORS 197.015(11)(b)(B) exception to that definition, determining whether a particular decision is a "discretionary" decision or a "land use decision" as those terms are used in statutes and implementing code regulations certainly would seem to require some interpretation and the exercise of legal judgment, as the numerous LUBA decisions attempting to interpret those and similar terms would attest.

It may be, of course, that the planning commission correctly concluded that there is no right to appeal the LUCS decision under the city's code. However, that question involves the merits of this appeal. For purposes of the jurisdictional question, intervenors have not

demonstrated that the planning commission's decision is not a land use decision subject to our jurisdiction and, as far as we can tell, it is a land use decision. Accordingly, the motion to dismiss LUBA No. 2006-090 is denied.

LUBA NO 2006-091

The decision appealed in LUBA No. 2006-091 is a May 3, 2006 decision by the planning commission that purports to correct a "clerical error" in the 2004 tentative plat decision.

Condition 1 of the 2004 tentative plat approval provided that the approval would be valid for 12 months. At one time, the county's subdivision ordinance provided for a 12-month period during which the tentative plat approval would be valid. However, at the time of the 2004 decision, Section 25(3) of the county's subdivision ordinance provided that "[a]pproval of the tentative plat shall be for a period of 24 months."[4] Intervenors brought the inconsistency between Condition 1 and Section 25(3) to county staff's attention in August 2005. County staff agreed that Condition 1 was in error, and promised to ask the planning commission to correct the error at the next meeting in September 2005. However, staff failed to do so. The 12 month expiration period in Condition 1 passed. On February 1, 2006, intervenors requested again that Condition 1 be corrected. The planning director made a tentative decision that the plat had expired, and therefore the subdivision application must be considered anew. The planning director scheduled a public hearing to be held on March 9, 2006, to consider Phase II as a new tentative plat application.

At the March 9, 2006 hearing, the planning director requested that the planning commission made a threshold determination whether to (1) view the 12-month term in Condition 1 as a mistake, and issue a corrected order instead of requiring a new tentative plat

[4] Section 25(3) provides:

> "Approval of the tentative plat shall be for a period of 24 months. Such approval may be extended according to the provisions of Section 30 of this Ordinance."

application, or (2) view the 12-month term in Condition 1 as intentional, in which case the plat had expired and the Commission must consider a new tentative plat application. The planning commission concluded that the 12-month term in Condition 1 was a mistake and contrary to the commission's intent in approving the tentative plat in 2004. Accordingly, the commission adopted findings supporting that conclusion and ordered that Condition 1 be corrected to state 24 rather than 12 months.

Petitioners argue that the commission's decision clearly applied Section 25(3), and is thus a land use decision unless it falls within the ORS 197.015(11)(b)(B) exception for land use standards that do not require interpretation or the exercise of legal or policy judgment. According to petitioners, modifying a condition of tentative subdivision plat approval to resurrect a decision that, by its terms, has expired is a discretionary decision that requires interpretation and the exercise of legal judgment.

Intervenors argue that in making the determination that the 12-month term in Condition 1 was a mistake, the planning commission did not apply any land use regulation, but rather simply conducted a factual inquiry into whether the planning commission intended to impose a 12 month as opposed to the code-required 24-month deadline. The planning commission concluded that it did not have that intent, for the reasons explained in the findings attached to the challenged order. Intervenors argue that the planning commission decision does not concern the application of any land use regulation, and to the extent it does, the decision does not involve any land use standard that requires interpretation or the exercise of legal or policy judgment.

As intervenors note, LUBA has held that a decision that merely corrects a clerical error in a previously issued final land use decision is not itself an appealable land use decision. *Kalmiopsis Audubon Society v. Curry County*, 27 Or LUBA 640, *aff'd* 131 Or App 308, 884 P2d 894 (1994). While affirming that conclusion on the facts of that case, the Court of Appeals went on to state that:

> "Assuming *arguendo* that the second order was *also* appealable, the only issues that petitioner could have raised in an appeal from it would be those that could not have been raised in an appeal from the first. *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992). Petitioner does not suggest that the issues it elected to raise in its appeal concerned matters that were peculiar to the [corrected material] from the first order or matters that could not reasonably have been raised in the absence of that [material]. LUBA stated that '[p]etitioner's challenges could have been, but were not, made in an appeal of [the first order].' Petitioner does not contend otherwise, and it demonstrates no error." 131 Or App at 312 (emphasis in original, footnote omitted).

Based on that language in the Court's opinion, it seems at least theoretically possible to appeal a decision that purports to correct a clerical error in an unappealed decision, as long as the petitioner demonstrates that the correction qualifies as a land use decision and the appeal is narrowly focused on the correction itself. Here, petitioners argue that they wish only to challenge whether the challenged decision was in fact a mere "correction" of a "clerical error." Petitioners state:

> "Petitioners do not seek review of any issue already decided in the 2004 decision—petitioners are well aware that the time for appeal of that decision has long since passed. Petitioners seek merely to enforce the terms of the 2004 decision *as they were written*. Because the county believed the 'correction' decision at issue was neither a 'resurrection' (which would require application of the land use regulations applicable in 2006, rather than in 2004) nor an 'extension' (which would require application of the land use regulations specifically applicable to extensions) of the 2004 decision, a decision by LUBA that the planning commission's determination was in error would necessarily require the applicant and the county to begin anew with the correct procedures and criteria." Response to Motion to Dismiss 6-7 (emphasis in original).

The challenged decision at least applies Section 25(3), which is a land use regulation, and to that extent the decision satisfies the ORS 197.015(11)(a)(A) definition of "land use decision." Section 25(3) itself is a mandatory requirement that the county impose a 24-month period on the validity of tentative plat approvals. In the abstract, at least, the text of Section 25(3) does not appear to require interpretation or exercise of legal or policy judgment.

However, the planning commission did not simply apply Section 25(3). As noted, the planning director initially determined that the 2004 decision had expired by its terms, and could not be revived or extended under the county's code. The planning commission disagreed with that view, concluding instead that the 2004 decision was still valid because the 12 month period in Condition 1 had been imposed in error. That planning commission conclusion involved a significant degree of legal judgment under the present circumstances. No party cites to us any provision in the county's code that authorizes the planning commission to "correct" a "clerical error" in the terms of an otherwise final decision. Assuming without deciding that the planning commission has the implicit authority to do so, determining whether the error is in fact a mere "clerical error" or something more substantive may require a significant degree of discretion and legal judgment, in which case that alone could take the decision outside the narrow ambit of ORS 197.015(11)(b)(B). More importantly, in the present case the alleged error involves a modification of Condition 1 in a manner that arguably has the effect of reviving a tentative plat that had expired by its own terms. We express no opinion on whether that modification is properly viewed as correction of a clerical error and whether the planning commission has the authority to make that correction after the deadline specified in Condition 1 had expired. However, because those are debatable legal questions that were explicitly and implicitly resolved by the challenged decision, we conclude that the planning commission decision does not fall within the scope of the ORS 197.015(11)(b)(B) exception to our jurisdiction. Accordingly, the motion to dismiss LUBA No. 2006-091 is denied.

Review proceedings were suspended pending resolution of the county's motion to dismiss. The next event in this appeal is the filing of the petition for review. Accordingly, the petition for review is due 21 days, and the response brief due 42 days, from the date of this order. The Board's final opinion and order is due 77 days from the date of this order.

Dated this 6th day of October, 2006.

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Tod A. Bassham
Board Chair