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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

CHARLOTTE MILLS,)
)
Petitioner,)
)
vs.)
)
CITY OF YACHATS,)
)
Respondent,)
)
and)
)
NORMAN M. FORRESTER,)
)
Intervenor-Respondent.)

LUBA No. 94-161
FINAL OPINION
AND ORDER

Appeal from City of Yachats.

Charlotte Mills, Yachats, filed the petition for review. Richard W. Scholl, Newport, argued on behalf of petitioner.

No appearance by respondent.

John Dumas, Yachats, filed the response brief and argued on behalf of intervenor-respondent.

HOLSTUN, Chief Referee; SHERTON, Referee; KELLINGTON, Referee, participated in the decision.

REMANDED 03/01/95

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a building permit and the city
4 council's decision that there is no right under the Yachats
5 Zoning and Land Use Ordinance (YZLUO) to appeal building
6 permit decisions.

7 **MOTION TO INTERVENE**

8 Norman M. Forrester, the applicant below, moves to
9 intervene in this appeal proceeding on the side of
10 respondent. There is no opposition to the motion, and it is
11 allowed.

12 **FACTS**

13 We set out the material facts in our earlier order
14 denying respondent's motion to dismiss. Mills v. City of
15 Yachats, ___ Or LUBA ___ (LUBA No. 94-161, Order on Motion
16 to Dismiss, October 5, 1994). We therefore do not repeat
17 all of those facts here and list only the critical events
18 that led to this appeal.

- 19 1. On June 23, 1994 the city planning commission
20 voted to approve the disputed building
21 permit.
- 22 2. On June 30, 1994, a notation of the planning
23 commission action was entered on the
24 application for the disputed building
25 permit.¹
- 26 3. By letter dated July 8, 1994, petitioner

¹A notation at the top of the building permit suggests the building permit was actually issued on July 12, 1994.

1 attempted to appeal the planning commission's
2 June 23, 1994 decision.

3 4. On July 14, 1994, the city council determined
4 there is no right to a local appeal of the
5 building permit decision.

6 5. On July 22, 1994, petitioner filed an action
7 in circuit court to enjoin construction of
8 the dwelling authorized by the disputed
9 building permit.

10 6. On August 11, 1994, the minutes of the July
11 14, 1994 city council meeting were approved.

12 7. On August 30, 1994, petitioner filed her
13 notice of intent to appeal in this matter at
14 LUBA.

15 **PRELIMINARY ISSUES**

16 **A. Standing**

17 Intervenor-respondent (respondent) challenges
18 petitioner's standing, alleging petitioner failed to make
19 the statutorily required appearance below. ORS
20 197.830(2)(b).

21 The July 8, 1994 letter by which petitioner attempted
22 to appeal the planning commission's decision concerning the
23 disputed permit satisfies the requirement for a local
24 appearance. Petitioner has standing in this appeal.

25 **B. Circuit Court Proceeding**

26 In our prior order on the motion to dismiss, we
27 rejected respondent's arguments that this Board lacks
28 jurisdiction over this matter by virtue of the pending
29 circuit court proceeding. According to respondent, the
30 circuit court rendered judgment "in favor of defendants and

1 against plaintiffs on November 16, 1994." Respondent's
2 Brief 4. We have not been provided a copy of the circuit
3 court's decision and we understand the circuit court's
4 decision is on appeal to the Court of Appeals. We therefore
5 adhere to our prior conclusion that respondent fails to
6 demonstrate the pendency of the circuit court proceeding has
7 any bearing on whether LUBA has jurisdiction over the city
8 council decision challenged in this appeal.

9 **DECISION**

10 We explained the central question presented in this
11 appeal in our prior order on respondent's motion to dismiss:

12 "Petitioner obtained actual knowledge of the
13 challenged building permit decision no later than
14 July 22, 1994, when she sought injunctive relief
15 in circuit court to prevent construction of the
16 dwelling authorized by the building permit. [T]he
17 city council determined there is no right to a
18 local appeal to challenge the disputed building
19 permit. If the city council is correct in this
20 contention, the deadline for petitioner to file
21 her notice of intent to appeal challenging that
22 building permit expired not later than 21 days
23 after July 22, 1994 (i.e., not later than August
24 12, 1994) and petitioner's August 31, 1994 notice
25 of intent to appeal was not timely filed.^[2]

²As relevant, ORS 197.830(3) provides:

"If a local government makes a land use decision without providing a hearing * * * a person adversely affected by the decision may appeal the decision to [LUBA] under this section:

"(a) Within 21 days of actual notice where notice is required;
or

"(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

1 Forest Park Neigh. Assoc. v. City of Portland, 26
2 Or LUBA 636, 640 (1994); Smith v. Douglas County,
3 17 Or LUBA 809, 813-16 (1989) (pursuit of a
4 nonexistent local right of appeal does not suspend
5 the date a land use decision becomes final for
6 purposes of appeal to LUBA).

7 "On the other hand, if the city council's August
8 11, 1994 decision erroneously denied petitioner a
9 local appeal to challenge the disputed building
10 permit, petitioner was merely attempting to
11 exhaust local remedies, as ORS 197.825(2)(a)
12 requires. In that event, petitioner's notice of
13 intent to appeal was timely filed with 21 days of
14 the city council's decision, and the challenged
15 decision must be remanded so that the city council
16 can provide petitioner the required appeal.

17 "In summary, the only issue potentially remaining
18 to be resolved in this appeal is whether the city
19 council erred in determining there is no right to
20 a local appeal concerning a building permit
21 decision. If petitioner does not * * *
22 demonstrate that determination was in error, this
23 appeal must be dismissed. If petitioner does
24 successfully challenge that determination in this
25 appeal, the city council's decision must be
26 remanded, so that the city council can provide
27 petitioner a local appeal of the building permit
28 decision." (Original footnotes omitted.) Mills
29 v. City of Yachats, supra, slip op at 3-4.

30 In arguing the city council is required to provide a
31 local appeal of the planning commission decision in this
32 matter, petitioner relies on YZLUO 14.100(1), which
33 provides:

34 "Any action or ruling of the Planning Commission
35 pursuant to this ordinance may be appealed to the
36 City Council within fifteen (15) days after the
37 Planning Commission has rendered its decision. If
38 the appeal is not filed within the fifteen-(15)
39 day period, the decision of the Planning
40 Commission shall be final." (Emphasis added.)

1 The critical question is whether the planning
2 commission's June 23, 1994 decision is an "action or ruling
3 of the Planning Commission pursuant to [the YZLUO]." If it
4 is, petitioner was entitled to a local appeal of the
5 planning commission's decision to the city council under
6 YZLUO 14.100(1).

7 The planning commission's June 23, 1994 minutes
8 describe the planning commission's action in this matter as
9 follows:

10 **"Permits Recommended for Approval**

11 "In the absence of the Planner, the City Recorder
12 read the building and sign permits which had been
13 approved by the City Planner and a building permit
14 approved by Linda Davis, Planning Consultant for
15 the City:

16 "A. Building Permits	
17 "8th & Hwy 101	New SFD
18 "575 Aqua Vista Drive	Replace Deck
19 "295 radar Road	New SFD
20 "Yachats Fire Dept.	Additional Bay
21 " <u>689 Coolidge Lane</u>	<u>New SFD</u> ^[3]

22
23 "B. Sign Permits
24 "Shear Artistry

25
26 "* * * * *

27 "Wells read the memo from Linda Davis regarding
28 the Forrester building permit. The Commission
29 discussed the parking for this property. A motion
30 was made to approve Linda Davis's recommendation
31 to grant a building permit for 689 Coolidge Lane

³The disputed building permit authorizes a single family dwelling at 689 Coolidge Lane and is referred to later in the quoted minutes as the "Forrester building permit."

1 since Ordinance 73E requirements have been met.
2 Aye 5, No 1 * * *." (Emphasis added.) Minutes of
3 the City of Yachats June 23, 1994 Planning
4 Commission Meeting 1-2.

5 The city council's decision rejecting petitioner's attempt
6 to appeal the planning commission's decision is as follows:

7 "It was the consensus of the Council that a
8 building permit cannot be appealed, it is an
9 administrative decision and not subject to the
10 appeal process."

11 The June 23, 1994 decision clearly is an action or
12 ruling of the planning commission. However, respondent
13 contends it was not an action or ruling pursuant to the
14 YZLUO. We do not understand respondent to take the position
15 that approval of a building permit is not an action under
16 the YZLUO.⁴ Respondent contends the decision on the
17 building permit was rendered by planning staff after the
18 planning commission took its action on June 23, 1994.
19 Respondent contends the planning commission's June 23, 1994
20 decision does not itself approve the building permit.⁵

21 The planning commission minutes state the planning
22 commission voted to "approve" the planning consultant's
23 "recommendation to grant the building permit." Respondent

⁴That would be a difficult position to justify, since the YZLUO presumably controls whether the uses of the subject property for which a building permit may be sought are allowable.

⁵The first part of the above quoted minutes suggest that the building and sign permits discussed later in the minutes had already been approved by planning staff and the planning consultant. However, the record includes no indication that the disputed building permit was approved prior to June 23, 1994, and no party argues that it was.

1 cites no other YZLUO or other provision identifying another
2 decision maker who approves the building permits. The
3 building permit application itself refers to the planning
4 commission action and the findings supporting that action as
5 the basis for granting the building permit. In short, the
6 city could hardly have done more to give the appearance that
7 the planning commission's June 23, 1994 decision was the
8 city action which "approved" the building permit.

9 In view of the above, we conclude petitioner was
10 entitled under YZLUO 14.100(1) to appeal the planning
11 commission's June 23, 1994 decision to the city council. We
12 do not consider petitioner's contentions that the
13 development allowed under the disputed building permit
14 violates certain YZLUO criteria. These contentions are for
15 the city council to address in the first instance. Neither
16 do we consider petitioner's arguments that application of
17 those criteria involves sufficient discretion to make the
18 exception to LUBA's review jurisdiction for building permits
19 issued under "clear an objective standards" inapplicable.
20 ORS 197.015(10)(b)(B). These arguments may be raised if the
21 city's ultimate decision concerning the building permit,
22 following this remand, is again appealed to LUBA.

23 Finally, in remanding the city council's decision
24 denying petitioner's appeal, we also do not determine the
25 issue of whether, under the YZLUO, the planning commission
26 is the proper city decision maker to approve building

1 permits. We only decide that the planning commission did so
2 in this case, and petitioner therefore has a right to appeal
3 the planning commission's decision to the city council under
4 YZLUO 14.100(1).

5 The city council's decision is remanded.