

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

3
4 VERNON LEE EGGE,
5 *Petitioner,*

6
7 vs.

8
9 LANE COUNTY,
10 *Respondent.*

11
12 LUBA No. 2014-031

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Lane County.

18
19 Bill Kloos, Eugene, filed the petition for review on behalf of petitioner.
20 With him on the brief was the Law Office of Bill Kloos, PC.

21
22 Sebastian Tapia and H. Andrew Clark, Office of Lane County Legal
23 Counsel, Eugene, filed the response brief on behalf of respondent.

24
25 BASSHAM, Board Member; RYAN, Board Chair; HOLSTUN, Board
26 Member, participated in the decision.

27
28 TRANSFERRED 07/02/2014

29
30 You are entitled to judicial review of this Order. Judicial review is
31 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a county hearings officer’s decision imposing a fine on petitioner for violation of a condition of land use permit approval.

FACTS

Petitioner owns a gravel mining operation on two lots. In 2004, the county board of commissioners adopted Ordinance No. PA 1217, which rezoned Petitioner’s property from F-2/Impacted Forest Lands to QM/Quarry and Mine Operations. At the same time, Petitioner applied for a discretionary permit for the operation of the gravel mine. The permit was approved subject to Condition 4, which states that “[n]o truck traffic shall use McKenzie View Drive east of Egge Road.” Record 403. In October 2013, on the basis of complaints by nearby residents, county officials issued a warning to petitioner, advising that failure to comply with Condition 4 would result in a fine. Petitioner filed a land use application requesting relief from Condition 4, but in the meantime continued using the access prohibited by Condition 4. On December 3, 2013, the county planning director issued an enforcement order imposing a fine on petitioner for violation of Condition 4. Petitioner appealed the order to the county hearings officer.

The hearings officer held a public hearing on the appeal on February 6, 2014, and issued a final order on March 27, 2014. The hearings officer found, and petitioner does not dispute in this appeal, that petitioner’s trucks used McKenzie View Drive in violation of Condition 4. Under Lane Code (LC) 16.263, a failure to comply with a condition of a discretionary permit may be

1 subject to an administrative civil penalty.¹ Enforcement of civil penalties is
2 governed LC Chapter 5, the LC’s administrative enforcement chapter. LC
3 5.017(5) sets forth a list of factors to be used in calculating the appropriate
4 penalty.² The hearings officer calculated a daily fine of \$990 based in part on a

¹ LC 16.263 provides:

“Failure to comply with any of the requirements of this chapter may be subject to an administrative civil penalty as provided by LC 5.017. *Failure to comply with a condition of an approved Special Use application or other discretionary permit issued pursuant to the requirements of any of the sections of this chapter may also be subject to an administrative civil penalty.* Continued failure to comply with this chapter 10 days from the mailing of the notice of the failure to comply by registered or certified mail to the last known address of the alleged responsible person or after personal service, and continued failure to comply after an order has been entered constitutes a separate failure to comply for each day the occurrence continues. The Manager of the Lane County Land Management Division, Department of Public Works, or said Manager’s duly authorized representatives, shall have the authority to issue a notice of failure to comply.” (Emphasis added.)

² LC 5.017(5) provides:

“Except for cases involving commercial gain, no monetary penalty imposed under this section shall exceed \$1,000 per day. For cases involving commercial gain, no monetary penalty imposed under this section shall exceed \$2,500 per day. In imposing a penalty authorized by this chapter, the Director shall consider:

“(a) The responsible person’s past history in taking all feasible steps or procedures necessary or appropriate to correct the violation or failure to comply;

1 point system set out in the Lane Manual (LM), section 5.020, which the
2 hearings officer concluded implemented and elaborated on the factors set forth
3 in LC 5.017(5).

4 This appeal followed.

5 **JURISDICTION**

6 The petition for review includes a single assignment of error arguing that
7 the hearings officer applied the wrong law when she calculated the amount of
8 the penalty using the point system in the Lane Manual. Instead, petitioner
9 argues, the officer should have calculated the fine using only the factors set
10 forth in LC 5.017(5). In its response brief, the county disputes that the hearings
11 officer erred in calculating the fine, but in the jurisdictional portion of the
12 response brief also argues that the hearings officer's decision is excluded from
13 the definition of "land use decision" and therefore is not subject to LUBA's
14 jurisdiction. For the reasons set out below, we agree with the county that we
15 lack jurisdiction over the challenged decision.

“(b) Any prior violations of, or failures to comply with statutes, rules, orders and permits;

“(c) The gravity and magnitude of the failure to comply;

“(d) Whether the failure to comply was repeated or continuous;

“(e) Whether the cause of the failure to comply was an inadvertent, negligent or an intentional act;

“(f) The alleged responsible person's cooperativeness and efforts to correct the failure to comply;

“(g) Whether or not the case involves commercial gain; and

“(h) Any relevant rule of the Director.”

1 As relevant here, LUBA has exclusive jurisdiction over “land use
2 decisions.” ORS 197.825(1). Decisions to enforce a local government’s land
3 use regulations can constitute “land use decisions” subject to LUBA’s
4 jurisdiction. *Putnam v. Klamath County*, 19 Or LUBA 616, 619 (1990). ORS
5 197.015(10)(a)(A) defines a “land use decision” in relevant part as a final
6 decision or determination made by a local government that concerns the
7 application of a “land use regulation.” As defined in ORS 197.015(11), a land
8 use regulation means “any local government zoning ordinance, land division
9 ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance
10 establishing standards for implementing a comprehensive plan.”

11 LC Chapter 16 is the county’s land use and development code. As noted,
12 the hearings officer’s decision appears to concern the application of LC 16.263,
13 which is presumably a land use regulation as defined at ORS 197.015(11).³
14 *See* n 1. For that reason, the challenged decision meets the definition of “land
15 use decision” at ORS 197.015(10)(a), unless some exclusion applies.

16 ORS 197.015(10)(b)(A) excludes from the definition of “land use
17 decision” a decision of a local government “[t]hat is made under land use
18 standards that do not require interpretation or the exercise of policy or legal
19 judgment.” The county argues that the hearings officer’s decision falls within
20 the exclusion at ORS 197.015(10)(b)(A), because the decision was not made
21 under any land use standard that requires interpretation or the exercise of
22 policy or legal judgment. Specifically, the county argues that the terms of

³ No party contends in this appeal that either LM 5.020 or LC 5.017(5) are land use regulations as defined at ORS 197.015(11).

1 Condition 4 are unambiguous, and no interpretation or exercise of policy or
2 legal judgment is required to determine that petitioner violated Condition 4.

3 Petitioner responds that Condition 4 is not a “land use standard” for
4 purposes of ORS 197.015(10)(a)(B), and that the relevant “land use standard”
5 is LC 5.017(5). We understand petitioner to contend that LC 16.263, a land
6 use regulation, invokes the factors used to calculate a fine at LC 5.017(5), and
7 that LC 5.017(5) is therefore a “land use standard” for purposes of ORS
8 197.015(10)(b)(A). Further, petitioner argues that the factors in LC 5.017(5)
9 grant the county considerable discretion in determining the amount of the
10 penalty, and that any decision under LC 5.017(5) therefore does not fall within
11 the exclusion to the definition of land use decision, at ORS 197.015(10)(b)(A).

12 Petitioner is correct that Condition 4 is not a land use regulation as
13 defined in ORS 197.015(11) or a land use standard of any kind for purposes of
14 ORS 197.015(b)(A). Generally, a determination that a condition of land use
15 approval has or has not been complied with does not result in a land use
16 decision, unless that determination involves the direct application of a land use
17 regulation. *See Mar-Dene Corp. v. City of Woodburn*, 149 Or App 509, 513,
18 944 P2d 976 (1997) (a decision that determines only that a condition had been
19 substantially complied with is not a land use decision). Thus, if a challenged
20 decision involves only a determination that a permit holder violated a condition
21 of permit approval, the decision is not subject to LUBA’s jurisdiction.

22 In the present case, the hearings officer’s decision involves more than a
23 determination that petitioner violated Condition 4. As noted, the decision also
24 concerns at least the nominal application of a land use regulation, LC 16.263
25 specifically the second sentence of LC 16.263. The second sentence of LC
26 16.263 provides that “[f]ailure to comply with a condition of an approved

1 Special Use application or other discretionary permit issued pursuant to the
2 requirements of any of the sections of this chapter may also be subject to an
3 administrative civil penalty.” *See* n 1. Petitioner does not contend that LC
4 16.263 itself requires interpretation or the exercise of legal or policy judgment,
5 or that direct application of LC 16.263 is sufficient to avoid application of the
6 ORS 197.015(10)(b)(A) exclusion from the ORS 197.015(10)(a) definition of
7 land use decision. LC 16.263 does not specify how an administrative civil
8 penalty for violating a condition is applied, or what standards are used to
9 calculate the penalty. However, the first sentence of LC 16.263 points to one
10 source of such standards: LC 5.017. As noted, LC 5.017 is not a land use
11 regulation, but we understand petitioner to argue that LC 5.017 is “invoked” by
12 LC 16.263, and therefore LC 5.017(5) constitutes a “land use standard” for
13 purposes of ORS 197.015(10)(b)(A).

14 It is not clear to us the difference, if any, between a “land use regulation”
15 as defined at ORS 197.015(11) and a “land use standard” referenced in ORS
16 197.015(10)(b)(A). However, we need not decide that question, because we
17 conclude that LC 5.017(5) does not constitute a “land use standard” within the
18 meaning of ORS 197.015(10)(b)(A), under any characterization of that term.

19 As its terms suggest, a “land use standard” for purposes of ORS
20 197.015(10)(b)(A) is a standard that a local government applies to make
21 decisions about the use of land. However, application of the factors set out in
22 LC 5.017(5) does not result in a decision about the use of land. Instead, the
23 purpose and effect of the LC 5.017(5) factors are essentially punitive in nature,
24 used exclusively to determine the appropriate size of the financial penalty to be
25 levied against persons who have been adjudged to violate a provision of the
26 Lane Code or, in this case, to violate a condition of a prior land use approval.

1 The only aspect of the hearings officer’s decision that arguably concerns
2 the use of land is the undisputed determination that petitioner has violated
3 Condition 4 of the 2004 land use permit, by allowing his trucks to access
4 McKenzie View Drive east of Egge Road. However, as discussed above, the
5 factual determination that a condition of approval has or has not been complied
6 does not, in itself, result in a decision subject to LUBA’s jurisdiction, under the
7 reasoning in *Mar-Dene Corp.*

8 In sum, petitioner has not established that the hearings officer’s decision
9 applied any “land use standard” within the meaning of ORS 197.015(10)(b)(A),
10 or at least any land use standard that requires interpretation or the exercise of
11 legal or policy judgment. Accordingly, we agree with the county that the
12 hearings officer’s decision to impose a fine on petitioner for violating
13 Condition 4 is excluded from LUBA’s jurisdiction pursuant to ORS
14 197.015(10)(b)(A).

15 Petitioner has filed a contingent motion to transfer this appeal to circuit
16 court, in the event LUBA determines that the Board lacks jurisdiction. The
17 circuit court has jurisdiction over decisions described in ORS
18 197.015(10)(b)(A). ORS 197.825(3). Accordingly, the motion to transfer is
19 granted.