BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MICHAEL ENG, MONICA ENG,
and KATHERINE L. LOFTUS,
Petitioners,

vs.

WALLOWA COUNTY,
Respondent,

and

STEVEN W. BILBEN,
Intervenor-Respondent.

LUBA No. 2017-062

FINAL OPINION
AND ORDER

Appeal from Wallowa County.

Daniel Kearns, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Reeve Kearns.

No appearance by Wallowa County.

Rebecca J. Knapp, Enterprise, filed the response brief and argued on behalf of intervenor-respondent.

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

REMANDED 12/28/2017

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

Petitioners appeal a decision by the county board of commissioners denying their local appeal of certain county decisions concerning a dwelling approval on a 38-acre parcel zoned for forest use.

FACTS

The facts and legal environment surrounding this appeal are quite complex.

A. The Subject Property

On January 7, 1993, intervenor-respondent Steven Bilben (Bilben) acquired the subject property, a vacant 38-acre parcel zoned Timber/Grazing (T/G). The T/G zone, the current version of which was adopted in 2012, is a forest/agricultural zone that in relevant part allows a dwelling in several circumstances authorized by statutes at ORS 215.705 to 215.750. The property is bordered on the east by the Lostine River, and on the three sides by large parcels owned by the state of Oregon, which are part of the Lostine Wildlife Area. Legal access to the property is via an unimproved county right-of-way, the O.F. Mays Road, which dead-ends at the property's northern border.

Adjacent to the subject property to the north is a six-acre property that petitioners Michael Eng and Monica Eng (the Engs) acquired in July 2014. The Eng property is a long, narrow parcel sandwiched between the O.F. Mays Road right-of-way and the Lostine River. The Eng parcel is zoned for rural

residential use and is developed with a dwelling that is located within 30 feet of the O.F. Mays Road right-of-way. Adjacent to the Eng property to the north is a five-acre property owned by petitioner Katherine L. Loftus (Loftus), which is also sandwiched between the O.F. Mays Road and the Lostine River. But the Loftus property also has frontage on Lostine River Road. An existing private roadway travels south from Lostine River Road and meanders across the Loftus property and the Eng property to the subject property, in part using the O.F. Mays Road right-of-way. The Loftus property is also zoned for rural residential use and developed with a dwelling, located approximately 50 feet west of the O.F. Mays Road right-of-way and the existing private roadway. The Loftus property is more than 750 feet north of the subject property.

B. The 1997 Land Use Compatibility Decision

In 1997, Bilben sought Oregon Department of Environmental Quality (DEQ) approval to site a septic system on the subject property, to serve a two-bedroom residential cabin. DEQ submitted a land use compatibility statement (LUCS) form to the county, requesting that the county advise whether the proposed land use is compatible with the county's comprehensive plan. On September 10, 1997, a county associate planner signed the LUCS, checking a box next to the phrase "Compatible with the LCDC acknowledged

comprehensive plan." Record 26-168.[1] In 1998, Bilben installed the DEQ-approved septic system.

C. The 2013 Zoning Permit

On November 27, 2013, Bilben applied to the county for a "zoning permit" for a dwelling on the subject property. Under Wallowa County Development Code (WCDC) Article 12, a "zoning permit" is a type of development approval intended for uses that are listed as a permitted use in the applicable zone.[2] Zoning permits are usually processed according to the procedures for "Ministerial Review" at WCDC Article 3, which do not require notice or hearing, unless the review authority determines that the proposal "may conflict with the purposes and intent of this ordinance" and thus should

[1] The record filed by the county in this appeal has a two-number pagination system whereby the first number appears to represent a related group of documents and the second number, separated by a hyphen, represents the page number within that group. For example "Record 26-168" means document group 26, page 168.

[2] WCDC Article 12.010, "Purpose," states:

> "The purpose of the Zoning Permit process is to ensure compliance with this ordinance by the establishment of any use or development which is permitted by the land use zone. Zoning Permits will be required prior to the construction, reconstruction, alteration, or change of use of a structure or lot and prior to issuance of an electrical permit for new residential service."

be processed under WCDC Article 5 "Public Hearing Review."[3] WCDC 12.020 sets out the approval standards for a zoning permit.[4]

---

[3] WCDC 12.015, "Review Procedure," provides:

> "Application for a Zoning Permit shall be subject to Ministerial Review. The Ministerial Review authority will refer the application to the public hearing review authority if: in the opinion of the Ministerial Review authority, the proposal may conflict with the purposes and intent of this ordinance or land use plan."

[4] WCDC 12.020, "Review Criteria," provides:

> "In granting a Zoning Permit the following criteria must be satisfied:
>
> "01. The proposed use is listed as a permitted use in the zone in which it is proposed for establishment.
>
> "02. The requirements of the zone in which the use is proposed have been met, such as: set backs, lot size, and other development requirements.
>
> "03. The application satisfies the pertinent criteria of Article 36, Salmon Habitat Restoration, or the review authority finds Ministerial Review to be adequate. In determining if the Ministerial Review is allowed, the review authority shall find all the following:
>
> "A. Except where excavation or fill does not exceed 50 yards, the proposed structure or use is at least 300 feet from any surface water (as identified on the USGS Topographical Map) and is at least 300 feet from wetlands (as identified on the National Wetlands Inventory); and
>
> "B. The structure or use will not be sited on a slope that exceeds 35 percent; and

On November 27, 2013, the county planning director signed the requested zoning permit for the proposed dwelling, and returned it to Bilben with a letter explaining:

> "Current rules would not allow for a dwelling on this tax lot. However, we have learned that a Land Use Compatibility Statement (LUCS) was issued on September 10, 1997 and the associated map showed not only a septic tank and drainfield, but a dwelling as well. Normally, a LUCS is not issued by this office unless a parcel has been issued a zon[ing] permit.
>
> "We have no record of a zon[ing] permit being issued for this parcel. However, given the issuance of the LUCS, it appears that this office felt this parcel was buildable and, at the time you purchased your property in 1993, in the T/G zone, this tax lot could be buildable.
>
> "Therefore, I am issuing a Zon[ing] Permit for a single family dwelling for the above referenced property." Record 22-21.

D. Events Between 2013 and 2016

In July 2014, the Engs purchased their property adjoining the subject property to the north. In their property search during 2013, the Engs

---

> "C. No road construction will be required in conjunction with the proposed use.
>
> "04. SALMON HABITAT RESTORATION: Applications must satisfy any applicable criteria of Article 36, Salmon Habitat Restoration.
>
> "05. SCENIC WATERWAYS, WILDLIFE HABITAT, WETLANDS AND RIPARIAN CORRIDORS: Applications must satisfy any applicable criteria of Article 28, Goal 5 and 6 Resource Overlay Zone."

communicated with Bilben and the county regarding acquiring the subject property and whether it was buildable. On November 21 or 22, 2013, Michael Eng had a conversation with the county planning director in which the director informed him that Bilben had applied for a zoning permit for a residence on the subject property, and that based on the 1997 LUCS the county believed it had no choice but to issue the zoning permit. Record 21-20 to 21-21.

In the summer of 2015, Bilben hired an excavator, Terry Jones, to install a domestic water well on the subject property. In a conversation with Michael Eng, Jones informed Eng that Bilben was working on "perfecting" the zoning permit by installing a domestic water well. Record 21-22. The Engs had previously given Bilben permission to cross their property as needed to access the subject property. Over the course of nine days between November 11, 2015, and December 8, 2015, Jones constructed a well on the subject property. Jones used portions of the private roadway on the Loftus and Eng parcels and the O.F.Mays Road right-of-way to move well-drilling equipment to the site and, after the well was constructed, to remove the well-drilling equipment. In between, Jones also used the private roadway and O.F. Mays Road to transport workers to and from the site.

E. 2016 Perfecting Letter

Under WCDC Article 12, a zoning permit expires four years from the date of issuance unless it is "perfected" by completing two of four substantial development actions, including installing a septic system and domestic water

well. WCDC 12.030. On June 22, 2016, the county issued a letter acknowledging that Bilben had "perfected" the 2013 zoning permit, by constructing the septic system and domestic water well. We refer to this letter as the 2016 perfecting decision. No notice of the 2016 perfecting decision was provided to the Engs or Loftus.

F. 2016 Appeal to the Planning Commission

In September 2016, Michael Eng had conversations with a utility company representative about a supposed utility easement over the Eng property to serve development on Bilben's parcel. On September 21, 2016, Michael Eng conducted title research into the utility easement, and discovered that the easement did not in fact run over the Eng property. On the same date, Eng visited the county planning office and requested copies of all land use development approvals on the Bilben property, and was given copies of the (1) 1997 LUCS, (2) the 2013 zoning permit, and (3) the 2016 perfecting decision. The next day, September 23, 2016, the Engs informed their neighbor Loftus of the existence of those three decisions.

WCDC Article 7 authorizes appeals of planning director decisions to the county planning commission.[5] For decisions that are "not noticed," WCDC

[5] WCDC 7.020.01 provides, in relevant part:

> "A decision of a review authority pursuant to this ordinance may be appealed by parties with standing to appeal (WCOA 1.065(101)) for noticed decisions, and by parties who are adversely affected (WCOA 1.065(005)) for decisions which are

7.020.01.B(02) requires that the appeal must be received within "21 days of the date a person knew or should have known of the decision." On October 7, 2016, the Engs and Loftus filed an appeal of the 2013 zoning permit, which possibly also included the 2016 perfecting decision, to the planning commission.

On October 25, 2016, the planning commission conducted a hearing on the appeal. On February 28, 2017, the planning commission issued a decision denying the appeal on the grounds that the Engs and Loftus did not have "standing" to appeal the 2013 zoning permit under WCDC Article 7, because the planning commission concluded that the Engs and Loftus knew or should have known of the 2013 zoning permit more than 21 days before filing their appeal. *See* n 5; Record 26-68.

---

not noticed. Appeals must be received within the prescribed time limits:

> "A. For decisions which are noticed the appeal period shall be no less than 12 days from the date of decision and the final date to accept appeals shall be part of the notification. * * *
>
> "B. For decisions which are not noticed an appeal must be received:
>
> "(01) Within 21 days of the date of action specified on the permit; or
>
> "(02) Within 21 days of the date a person knew or should have known of the decision."

G. 2017 Appeal to the County Board of Commissioners

Petitioners appealed the planning commission decision to the county board of commissioners. On June 5, 2017, the commissioners denied petitioners' appeal of the 2013 zoning permit as untimely filed under WCDC Article 7, based on the following conclusions:

> "2. Mr. and Mrs. Eng were on actual notice of the existence of the Zon[ing] Permit not later than July 14, 2014, and would not have received written notice if it had been sent as they were not the owners of the adjacent property at the time the notice would have been given.
>
> "3. Mr. and Mrs. Eng's appeal is untimely as it was filed more than 21 days after they had actual notice of the existence of the Zon[ing] Permit.
>
> "4. Mrs. Loftus was put on inquiry notice not later than December 8, 2015 when, as a result of the frequent travels of the well drilling vehicles past her residence on a road that could only serve either the Eng property or the Bilben property, the reasonable person would have conducted further investigation into the potential purposes of the traffic activities.
>
> "5. Mrs. Loftus' appeal is untimely as it was filed more than 21 days after she knew or should have known of the existence of the Zoning Permit." Record 6-2 to 6-3.

Thereafter, petitioners appealed to LUBA the decision before us, the commissioners' June 5, 2017 final decision denying their local appeal.

FIRST ASSIGNMENT OF ERROR

Petitioners' October 7, 2016 local appeal to the planning commission challenged "the Planning Department's decision, issued June 22, 2016, to

approve a perfected Zon[ing] Permit (Reference #1024) for Tax Lot #1401." Record 26-301. We understand petitioners to argue that their initial local appeal challenged two separate decisions: the 2013 zoning permit and the 2016 perfecting decision. However, the planning commission decision addresses only the 2013 zoning permit, without separately addressing the 2016 perfecting decision or evaluating whether petitioners' appeal of the 2016 perfecting decision was timely.

The board of commissioners' decision also addresses only whether petitioners' appeal of the 2013 zoning permit was timely under WCDC 7.020.01, and does not address whether petitioners' appeal of the 2016 perfecting decision was timely. Under the first assignment of error, petitioners argue that the county erred in failing to address and resolve petitioners' appeal of the 2016 perfecting decision.

Bilben responds in relevant part that petitioners waived the right to present this issue on appeal to LUBA, because they either (1) failed to raise any issues regarding the 2016 perfecting decision during the proceedings before the planning commission and board of commissioners, as required by ORS 197.761(1), or (2) failed to specify any issue regarding the 2016 perfecting decision in their appeal of the planning commission decision to the board of commissioners, and thus failed to exhaust available administrative remedies, as required by ORS 197.825(2)(a) and *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382, 284 (2003).

We agree with Bilben that petitioners failed to exhaust local remedies with respect to the 2016 perfecting decision during the proceedings below, and thus any issues raised in this appeal regarding the 2016 perfecting decision are beyond our scope of review, under *Miles*, 190 Or App at 510. ORS 197.825(2)(a) obligates a petitioner to exhaust all administrative remedies available by right, prior to appealing the final decision to LUBA. In *Miles*, the Court of Appeals held that as a corollary of ORS 197.825(2)(a) LUBA's scope of review is limited to those issues that were identified in the notice of local appeal, at least where the local code requires specification of issues in a local appeal. *Id.*

WCDC 7.020.03 requires that the appeal document shall include an "identification of the decision sought to be reviewed" and "the specific grounds for appeal as they relate to the approval criteria." In their initial appeal to the planning commission, petitioners referenced the "perfected Zoning permit," but did not clearly identify the 2016 perfecting decision as a separate decision to be appealed, in addition to the 2013 zoning permit. Record 26-301. The planning commission apparently did not understand the appeal to challenge both decisions, because its decision addressed only the 2013 zoning permit. If petitioners believed this omission was error, it was incumbent on petitioners under WCDC 7.020.03 to identify that omission as one of the "specific grounds for appeal" to the board of commissioners. However, the appeal documents petitioners submitted to appeal the planning commission decision to the board

of commissioners did not identify any issues regarding the 2016 perfecting decision, or even mention that decision. Record 26-53, 26-93 to 98. Accordingly, we agree with Bilben that petitioners failed to exhaust the issue raised under the first assignment of error, by failing to identify any issue regarding the 2016 perfecting decision in their local appeal to the board of commissioners. That issue is thus not with LUBA's scope of review, under the reasoning in *Miles*. 190 Or App at 510.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Under the second assignment of error, petitioners argue that the county erred in concluding that their local appeal of the 2013 zoning permit was untimely filed.

Petitioners' arguments on this point are complex, and embedded in a complex statutory scheme, but the underlying principle is simply stated: that a local government cannot rely on its own failure to provide notice and a hearing, required to approve a "permit" decision as defined at ORS 215.402(4), to defeat a petitioner's ability to achieve standing to appeal that decision. *Flowers v. Klamath County*, 98 Or App 384, 388, 780 P2d 227 (1989). *Flowers* concerned a situation where the county's failure to provide notice and hearing required of a "permit" decision prevented the petitioners from meeting the statutory requirements for standing before LUBA, to appeal the county's decision directly to LUBA. In the present case, petitioners seek to extend that

general principle to a local appeal proceeding, arguing that the county cannot use its failure to provide notice and hearing with respect to the 2013 zoning permit, to defeat petitioners' ability to achieve standing to challenge that failure in a local appeal of the 2013 zoning permit.

A. The 2013 Zoning permit was an ORS 215.402(4) "Permit"

A critical premise to petitioners' argument is that the 2013 zoning permit approved residential development of forest land, and that such an approval necessarily constitutes a "permit" as defined at ORS 215.402(4), *i.e.*, the "discretionary approval of a proposed development of land[.]"[6] ORS 215.416(3) and (5) require the county to provide at least one hearing on an application for a "permit," with notice to persons as required by other statutes. ORS 215.416(11) sets out an alternative path whereby the county can initially approve an application for a "permit" *without* a hearing, if it provides post-decision notice and the opportunity for persons entitled to notice and those adversely affected or aggrieved by the decision to file an "appeal."[7] Because

---

[6] ORS 215.402(4) defines "permit" in relevant part to mean the "discretionary approval of a proposed development of land under ORS 215.010 to 215.311, 215.317, 215.327 and 215.402 to 215.438 and 215.700 to 215.780 or county legislation or regulation adopted pursuant thereto."

[7] ORS 215.416(11)(a) provides, in relevant part:

> "(A) The hearings officer or such other person as the governing body designates may approve or deny an application for a permit without a hearing if the hearings officer or other designated person gives notice of the decision and provides

the 2013 zoning permit was a "permit" as defined at ORS 215.402(4), petitioners argue, the county was obligated to, at a minimum, follow local procedures that implement ORS 215.416(11), *i.e.*, provide notice to persons entitled to notice, and offer an opportunity for such persons, and anyone else adversely affected or aggrieved by the decision, to file a local appeal. We understand petitioners to argue that the county's local appeal procedures at WCDC 7.020 must be applied consistently with ORS 215.416(11) and related statutory requirements, and those local appeal procedures and standards cannot place obstacles to local appeal of a permit decision that the statute itself does

---

> an opportunity for any person who is adversely affected or aggrieved, or who is entitled to notice under paragraph (c) of this subsection, to file an appeal.
>
> "(B) Written notice of the decision shall be mailed to those persons described in paragraph (c) of this subsection.
>
> "(C) Notice under this subsection shall comply with ORS 197.763 (3)(a), (c), (g) and (h) and shall describe the nature of the decision. In addition, the notice shall state that any person who is adversely affected or aggrieved or who is entitled to written notice under paragraph (c) of this subsection may appeal the decision by filing a written appeal in the manner and within the time period provided in the county's land use regulations. A county may not establish an appeal period that is less than 12 days from the date the written notice of decision required by this subsection was mailed. The notice shall state that the decision will not become final until the period for filing a local appeal has expired. The notice also shall state that a person who is mailed written notice of the decision cannot appeal the decision directly to [LUBA] under ORS 197.830."

not impose. Accordingly, petitioners argue, the county cannot use its failure to act consistently with the procedural requirements of ORS 215.416 to deny petitioners standing to file a local appeal under WCDC 7.020.

Bilben responds that the 2013 zoning permit did not "approve" anything, and for that reason alone is not a "permit" as defined at ORS 215.402(4). According to Bilben, it was the 1997 LUCS that approved a dwelling on the property, and the 2013 zoning permit simply acknowledged that earlier approval.

However, a LUCS decision does not, in itself, approve or deny a proposed land use. *See, e.g., Curl v. Deschutes County*, 69 Or LUBA 186, 193-94 (2014) (discussing the differences between a LUCS decision and a "permit" decision). In itself, a LUCS decision simply determines whether and how a proposed land use (some aspect of which requires a state agency permit, such as a DEQ septic permit) is categorized and treated under the local government's comprehensive plan and land use regulations. For example, whether under the acknowledged zoning and land use regulations the land use is allowed without review, allowed with review, conditionally allowed, prohibited, etc. In the present case, the form that DEQ sent to the county gave the county a binary choice: whether the proposed single-family dwelling is "compatible with the LCDC acknowledged comprehensive plan" or "not compatible with the LCDC acknowledged comprehensive plan." Record 26-168. The associate planner who issued the 1997 LUCS put a check-mark in the

box opposite "compatible with the LCDC acknowledged comprehensive plan." That check-mark presumably was accurate: the T/G zone in 1997 (as it does today) did allow dwellings under certain circumstances, subject to applicable approval standards in WCDC Article 16 that implement statutory standards for dwellings on forest lands. Record 22-23 to 22-27 (1995 version of the T/G zone). But the 1997 LUCS cannot reasonably be construed to *approve* a dwelling under those applicable approval standards, or any standards. At most, it simply performs the basic function of a LUCS, and informs DEQ that a dwelling is not prohibited under the county's comprehensive plan and land use regulations, and *can be* approved consistent with the plan and land use regulations, if the applicant files the appropriate application with the county. The only decision in the record that purports to actually *approve* a dwelling on the subject property is the 2013 zoning permit. Accordingly, we disagree with Bilben that the 2013 zoning permit is not a "permit" as defined at ORS 215.402(4) because the 1997 LUCS, and not the 2013 zoning permit, "approved" the proposed dwelling.

Bilben next argues that the 2013 zoning permit is not a "permit" as defined at ORS 215.402(4) because a dwelling is a permitted use in the T/G zone, and a decision to approve a permitted use is not, generally, a "permit" decision for purposes of ORS 215.402(4). *See Richmond Neighbors for Responsible Growth v. City of Portland*, 67 Or LUBA 115, 121 (2013) (a building permit for a use that is indisputably a use permitted outright in the

applicable zone is not a "permit" as defined under the cognate to ORS 215.402(4) applicable to cities). However, while the T/G zone lists various types of dwellings that can be authorized as "permitted" uses, those dwellings cannot accurately be described as uses that are permitted outright. They would more accurately be viewed as permitted with review. All dwellings allowed in the T/G zone are subject to local standards implementing several statutes and administrative rules that include somewhat discretionary approval standards. *See* WCDC 16.015(04) (dwellings on lots lawfully created prior to January 1, 1985, implementing ORS 215.705); WCDC 16.015(05) and (06) (dwellings on large tracts, implementing ORS 215.740); and WCDC 16.015(07) (dwellings on forest land under the "template test," implementing ORS 215.750). Notably, the definition of "permit" at ORS 215.402(4) specifically identifies approval of development under ORS "215.700 to 215.780 or county legislation or regulation adopted pursuant thereto" as a "permit" decision. *See* n 6. That range includes ORS 215.705 through 215.750, and for that reason alone a decision approving a dwelling under those statutes or local regulations adopted to implement those statutes is, *ipso facto*, a permit decision.

In addition, as petitioners note, the dwellings allowed in the T/G zone must establish compliance with, among other things, WCDC Article 36, Salmon Habitat Restoration, which presumably implements Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Space), as well as the "requirements of the Wallowa County Comprehensive Land Use

Plan and Zoning Articles." Petitioners argue, and Bilben does not dispute, that WCDC Article 16 (Timber Grazing) and the county comprehensive plan include provisions applicable to dwellings on forest land that require a discretionary evaluation. *See, e.g.,* Wallowa County Comprehensive Plan (WCCP) Goal 4, Policy 4 (conversion of timbered lands to residential uses will be approved according to several guidelines, including that the "proposed use will not interfere seriously with the physical, social, economic and environmental considerations.").

It is true that the 2013 zoning permit decision did not actually apply any T/G standards to evaluate the proposed dwelling, under the apparent (but unexplained) theory that the county was legally obligated by its issuance of the 1997 LUCS decision to approve a dwelling on the subject property, even if, as the planning director stated, "[c]urrent rules would not allow for a dwelling on this tax lot." Record 26-189. Regardless of the correctness of that theory (an issue that the county did not address in the decision before us, and an issue that we do not reach), there can be no dispute that discretionary approval standards in the county's code and comprehensive plan apply *as a matter of law* to any proposal to construct a dwelling on the subject property, even if the planning director failed to apply those standards to approve or deny the dwelling in the 2013 zoning permit.

Accordingly, we agree with petitioners that the 2013 zoning permit decision was a "permit" decision as defined at ORS 215.402(4). It follows that

in issuing that decision the county was required to follow local procedures that are consistent with the statutory standards and procedures for issuing a "permit" decision, including ORS 215.416. As explained above, those statutory standards and procedures require at a minimum that the county provide written notice of the decision to persons entitled to notice (as relevant here, persons owning property within 750 feet of the property being developed) and the opportunity for such persons, and others adversely affected or aggrieved by the decision, to appeal the initial decision to a higher review authority.

B. Written Notice of the 2013 Zoning Permit Decision

The WCDC includes three procedural tracks: (1) ministerial review at WCDC Article 3, (2) administrative review at WCDC Article 4, and (3) public hearing review at WCDC Article 5. As noted, the ministerial review provisions at WCDC Article 3 do not require notice to any party other than the applicant. The provisions for administrative review at WCDC Article 4 appear to correspond to the process for issuing a permit decision without a hearing at ORS 215.416(11), with an initial decision by the planning director after notice and opportunity to comment, followed by the opportunity to appeal that decision to the planning commission, which is apparently the county body designated to conduct initial land use hearings. The provisions for public hearing review at WCDC Article 5 set out the procedures for the planning commission to conduct a hearing on a land use application, consistent with

ORS 215.416(3). All three procedural tracks allow local appeal of the resulting decision to a higher review body, pursuant to WCDC Article 7.

In issuing the 2013 zoning permit, the planning director did not choose either of the two WCDC procedural tracks that appear to be consistent with ORS 215.416.[8] Instead, the planning director appeared to follow the ministerial review track at WCDC Article 3, which does not require written notice to anyone but the applicant, but which does allow appeal to the planning commission.

Had the county followed one of the two WCDC procedures that implement ORS 215.416, the county would have mailed written notice of either the decision or a hearing to persons who own property within 750 feet of the subject property and at a minimum offered an opportunity for such persons, as

---

[8] As far as we can tell, an application for a "zone permit" does not necessarily dictate that the county must process that application under the ministerial review track in WCDC Article 3. Under the WCDC, the planning director apparently has some discretion to choose which track to follow to issue a zone permit, depending on the proposed use and its impacts, and it appears that applications for "zone permits" can be processed under ministerial review, administrative review, or public hearing review procedures. For example, WCDC 12.015 provides that the planning director will refer the application to the public hearing review authority if the planning director concludes that the proposal may conflict with the purposes and intent of the WCDC or WCCP. *See* n 3. Given the planning director's statement in the 2013 zone permit that "[c]urrent rules would not allow for a dwelling on this tax lot" (Record 26-189), it is arguable that the WCDC itself would have required a public hearing process for a dwelling approval on the subject property, even if ORS 215.416 did not.

well as any person who is adversely affected or aggrieved by the decision, to file a local appeal within the local appeal period, which cannot be less than 12 days. *See* n 5.

ORS 215.416(11) does not specify a *maximum* duration for the local appeal period, and WCDC Article 7 is somewhat unusual in allowing a potentially open-ended local appeal period. As noted, under WCDC 7.020(1)(B)(02) for decisions "which are not noticed," a local appeal may be filed "[w]ithin 21 days of the date a person knew or should have known of the decision," which is the appeal period the county applied in the present case. In LUBA's experience, it is more typical for local appeal periods implementing ORS 215.416(11) to authorize a local appeal only within a fixed period, *e.g.*, within 12 days of the date of the decision, or within 12 days of the date notice of the decision is mailed to persons entitled to notice. Indeed, the statutory scheme for land use review of which ORS 215.416(11) is a part contemplates a finite local appeal period. To understand why, we must examine that statutory scheme in some detail.

Where a local government follows the requirements of ORS 215.416(11) to approve a permit without a hearing, it provides notice to persons entitled to notice and opportunity for such persons, and others adversely affected or aggrieved by the decision, to file a local appeal of the initial decision on the permit application. That right of local appeal must be exhausted, prior to appealing the final decision to LUBA. ORS 197.825(2)(a) (LUBA's

jurisdiction is "limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review"). The final decision resulting from exhausting that local appeal process can then be appealed to LUBA in the normal course, under the appeal deadlines at ORS 197.830(9) (generally 21 days from the date of the final decision or the date of mailing notice of the final decision).

Where no person files a local appeal of a permit decision made without a hearing that was processed under ORS 215.416(11), the county's initial decision thereby becomes final and cannot be appealed directly to LUBA, with three limited exceptions set out in ORS 197.830(4).[9] ORS 197.830(4) sets out

---

[9] ORS 197.830(4) provides:

> "If a local government makes a land use decision without a hearing pursuant to ORS 215.416 (11) or 227.175 (10):
>
> "(a) A person who was not provided notice of the decision as required under ORS 215.416(11)(c) or 227.175 (10)(c) may appeal the decision to the board under this section within 21 days of receiving actual notice of the decision.
>
> "(b) A person who is not entitled to notice under ORS 215.416(11)(c) or 227.175(10)(c) but who is adversely affected or aggrieved by the decision may appeal the decision to the board under this section within 21 days after the expiration of the period for filing a local appeal of the decision established by the local government under ORS 215.416(11)(a) or 227.175(10)(a).
>
> "(c) A person who receives notice of a decision made without a hearing under ORS 215.416(11) or 227.175 (10) may appeal the decision to the board under this section within 21 days

three circumstances where a permit decision made without a hearing can be directly appealed to LUBA. All three circumstances necessarily presume that the period for filing local appeals has expired.

In circumstances (like the present one) where a local government fails to recognize that it is rendering a decision on a "permit" as defined at ORS 215.402(4), and therefore fails to even attempt to comply with the standards and procedures at ORS 215.416 for making a permit decision, then adversely affected persons who belatedly learn about the decision can file a direct appeal of that permit decision to LUBA, pursuant to ORS 197.830(3).[10] *Willhoft v.*

> of receiving actual notice of the nature of the decision, if the notice of the decision did not reasonably describe the nature of the decision.
>
> "(d) Except as provided in paragraph (c) of this subsection, a person who receives notice of a decision made without a hearing under ORS 215.416(11) or 227.175(10) may not appeal the decision to the board under this section."

[10] ORS 197.830(3) and (4) provide:

> "(3) If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416 (11) or 227.175 (10), or the local government makes a land use decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:
>
> "(a) Within 21 days of actual notice where notice is required; or

City of Gold Beach, 38 Or LUBA 375, 389 (2000). ORS 197.830(3) provides two appeal deadlines: (1) 21 days from the date of "actual notice where notice is required," and (2) 21 days from the date that the petitioner "knew or should have known of the decision where no notice is required." Where ORS 197.830(3) applies to provide a direct right of appeal to LUBA, consistency with ORS 197.825(2)(a) dictates that there are no administrative remedies available by right to exhaust. *See Comrie v. City of Pendleton*, 45 Or LUBA 758, 772 (2003) (land use decisions appealed to LUBA pursuant to ORS 197.830(3) or (4) are not subject to the ORS 197.825(2)(a) exhaustion requirement). Typically, where ORS 197.830(3) applies, any fixed local appeal period has expired by the time the petitioner gains "actual notice" of the decision or encounters circumstances that would, to a reasonable person, constitute knowledge or constructive knowledge of the decision. Thus, where ORS 197.830(3) applies, the underlying decision has become final, in the sense that no local appeal is available.

Sometimes, however, a local government may voluntarily *choose* to provide a local appeal on a permit decision after the local appeal period has expired, even though the local code does not expressly provide for a belated local appeal after the underlying decision has become final. In that rare

---

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

circumstance, the petitioner must pursue the local appeal thus provided, and any appeal of the underlying decision directly to LUBA under ORS 197.830(3) will be dismissed. *Tarjoto v. Lane County*, 137 Or App 305, 904 P2d 641 (1995); *see also Comrie*, 45 Or LUBA at 770-71 (discussing the "sea change" that *Tarjoto* represents with respect to prior caselaw concerning the exhaustion requirement, in circumstances where the local government issues a "permit decision" without complying with the statutory procedures governing a "permit" decision).

In the present case, WCDC 7.020.01.B(01) represents the (perhaps even rarer) circumstance where a local government has expressly adopted a local appeal period that is *not* a fixed period, but which potentially allows an adversely affected person the right to file a local appeal after the underlying decision has otherwise become final, under circumstances where, but for WCDC 7.020, that person could appeal the underlying decision directly to LUBA under ORS 197.830(3).

We understand petitioners to argue that, where a local government chooses to provide a right of local appeal to persons who would otherwise be entitled to appeal the underlying decision directly to LUBA under ORS 197.830(3), the county cannot impose on those persons more exacting standing, timing or other requirements that the statute itself would not impose on a direct appeal to LUBA. Petitioners argue that the county erred in denying petitioners a local appeal under WCDC 7.020, based on limitations that would not have

applied to bar petitioners from appealing the 2013 zoning permit directly to LUBA under ORS 197.830(3)(a) or (b).

Specifically, petitioners argue that because the county failed to provide the required written notice of the 2013 zoning permit to property owners within 750 feet of the subject property, including to the Engs' predecessors-in-interest, a direct appeal to LUBA would be available under ORS 197.830(3)(a), which allows an appeal within 21 days of the date of "actual notice where notice is required." Petitioners argue that LUBA has interpreted "actual notice" for purposes of ORS 197.830(3)(a) to mean (1) written notice of the decision or (2) a copy of the decision itself. *Jones v. Douglas County*, 63 Or LUBA 261, *aff'd* 247 Or App 81, 270 P3d 278 (2011). Petitioners contend that the county has yet to provide "actual notice" in the form of the legally required written notice, or its equivalent, to the owners of property within the mandatory notice range. If the county now did so, petitioners argue, the Engs would be entitled to receive that notice, as the current owners of their property.

From that premise, petitioners argue that the county erred in denying the Engs' local appeal under WCDC 7.020, based on the conclusion that the Engs had "actual notice" of the 2013 zoning permit not later than July 14, 2014, more than 21 days prior to filing their local appeal, and thus that their local appeal was untimely filed. Record 6-2. According to petitioners, the "actual notice" standard the county applied to the Engs is much more rigorous than the

"actual notice" standard LUBA applies under ORS 197.830(3)(a) for a direct appeal of a decision to LUBA, where notice of the decision is required.

We generally agree with petitioners that the county cannot apply more rigorous standing or timely appeal requirements for (1) local appeals of permit decisions than are authorized under ORS 215.416(11) or (2) local appeals of permit decisions under circumstances where, but for the local appeal, the petitioner would have the right to directly appeal the permit decision to LUBA under ORS 197.830(3).

However, we disagree with petitioners that the county in fact applied a more rigorous standing or timely appeal standard to the Engs than LUBA would have applied to the Engs if no right of local appeal existed, and they had directly appealed the 2013 zoning permit to LUBA under ORS 197.830(3). The flaw in petitioners' argument is that the "actual notice where notice is required" language in ORS 197.830(3)(a) applies to persons who were entitled to written notice, and the Engs were not entitled to written notice of the 2013 zoning permit at the time the county issued that decision, because at that time they did not own property within 750 feet of the subject property. Because the Engs were not entitled to written notice, the timeliness of a hypothetical LUBA appeal by the Engs under ORS 197.830(3) would be evaluated under the "knew or should have known" standard at ORS 197.830(3)(b), not the "actual notice" standard at ORS 197.830(3)(a). As discussed below, the county applied to the

Engs the code-based analogue to the "knew or should have known" standard at ORS 197.830(3)(b).

With respect to petitioner Loftus, petitioners acknowledge that her property is located more than 750 feet from the subject property, and thus not within the mandatory notice area under ORS 197.763 and county code. Nonetheless, petitioners argue that Loftus owned her property in 2013, and that she was entitled to written notice of the 2013 zoning permit because the only access to the proposed residential development on the subject property is via portions of the O.F. Mays Road, which is adjacent to her property and located 50 yards from her dwelling, or the continued permissive use of a portion of Loftus' private roadway. Petitioners cite *Schrader v. Deschutes County*, 39 Or LUBA 782, 786-87 (2001), for the proposition that, where an application for development proposes to create a new access road via easement or permit on property adjoining the property to be developed, the mandatory notice area includes lands within the prescribed distance of the proposed access road.

However, *Schrader* does not assist petitioners, because the 2013 zoning permit did not approve a new access road, or indeed say anything about access to the subject parcel.[11] Petitioners have not demonstrated that the county was

[11] We understand that Bilben has filed a separate conditional use permit application with the county to improve O.M. Hays Road to provide physical access to the subject property without using any portion of the petitioners' properties, and that the county is currently processing that application in a proceeding to which petitioners are parties.

required to provide notice of the 2013 zoning permit to Loftus under ORS 197.763, ORS 215.416(11) or any other statute or code provision cited to us.

C. Knew or Should Have Known of the Decision

The county applied the "knew or should have known" test at WCDC 7.020.01.B(02) to the Engs and Loftus, and concluded that no petitioner filed a timely appeal under that test. Both ORS 197.830(3)(b) and WCDC 7.020.01.B(02) use the same language, "knew or should have known of the decision," and apply it in similar circumstances, where "no notice is required" (ORS 197.830(3)(b)), and where decisions are "not noticed" (WCDC 7.020.01.B. The similarity is probably not a coincidence. Although no statute requires that the county provide a potentially belated local appeal for persons entitled to appeal a decision directly to LUBA under ORS 197.830(3)(b), the county has apparently decided to structure its standing requirements and deadlines for filing a local appeal to offer a right of local appeal to the same set of persons who otherwise would have standing and statutory authority to appeal an initial county decision directly to LUBA under ORS 197.830(3)(b).

LUBA has interpreted the "should have known" language in ORS 197.830(3)(b) to apply "where a petitioner does not have knowledge of the decision, but observes activity or otherwise obtains information reasonably suggesting that the local government has rendered a land use decision[.]" *Rogers v. City of Eagle Point*, 42 Or LUBA 607, 616 (2002); *see also Rogue Advocates v. Jackson County*, 282 Or App 381, 385 P3d 1262 (2016)

(assuming without deciding that *Rogers* correctly construes ORS 197.830(3)(b)). In that circumstance, the petitioner is placed on "inquiry notice." As we explained in *Rogers*, "inquiry notice" means that:

> "If the petitioner makes timely inquiries and discovers the decision, the 21-day appeal period begins on the date the decision is discovered. Otherwise, the 21-day appeal period begins to run on the date the petitioner is placed on inquiry notice." *Id.*

In the present case, the county appears to interpret the "knew or should have known" test in WCDC 7.02001.B(02) in the same way LUBA has interpreted ORS 197.830(3)(b), concluding for example that petitioner Loftus was "put on inquiry notice not later than December 8, 2015" by the fact that vehicles associated with well-drilling on the subject property traveled past her dwelling to and from the subject property. Record 6-2. As discussed above, the county cannot apply its local appeal thresholds to a person otherwise entitled to appeal the underlying permit decision directly to LUBA under ORS 197.830(3) in a manner that is more restrictive than ORS 197.830(3). Accordingly, for purposes of this appeal, the phrase "knew or should have known of the decision" as used in WCDC 7.020.01.B(02) has the same meaning as the same phrase used in ORS 197.830(3)(b).[12]

---

[12] Consequently, to the extent the commissioners' decision includes an interpretation of the "knew or should have known" language in WCDC 7.020.01.B(02), that interpretation would not be entitled to deferential review before LUBA, under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 243 P3d 775 (2010).

1. Whether the Engs Knew or Should Have Known of the Decision

As applied to the Engs, the county found that "Michael and Monica Eng were aware of the existence of the Bilben Zon[ing] Permit prior to the purchase of their adjacent property in July 2014." Record 6-2. This conclusion was based primarily on the testimony of Michael Eng. Eng related that on or about November 22, 2013, he had a conversation with the planning director informing him that the county was about to issue a zoning permit to Bilben for a residence on the subject property. Eng acknowledged that, by July 2014, they knew that "according to the Planning Department, the abutting Bilben property could be developed." Record 21-21. Finally, in July 2015, the well-drilling contractor installing a well on the subject property informed Eng that Bilben was digging the well in order to perfect a "Zon[ing] Permit" for a dwelling. Record 21-22. Petitioners argue that this information was insufficient to place the Engs on "inquiry notice," and that the Engs did not have reason to suspect that the county had issued a zoning permit for a dwelling on the subject property until September 21, 2016, when Michael Eng visited the planning office and obtained a copy of the zoning permit.

We disagree with petitioners. Given the totality of the information the Engs possessed by July 2015, no other conclusion is possible than that by that date the Engs had actual, subjective knowledge, or at least should have known, that the county had issued a decision approving a dwelling on the subject parcel. Under WCDC 7.020.01.B(02), they were obliged to make timely

inquiries within 21 days thereafter to discover the decision, and file a local appeal no later than 21 days after that date of discovery. The Engs failed to conduct timely inquiries to discover the 2013 zoning permit, and did not discover the document until over a year after they knew or should have known of its existence. Accordingly, as to the Engs the deadline for filing the local appeal expired a year or more before they filed their appeal. Petitioners have not demonstrated that the county erred in finding that the Engs' local appeal was untimely filed under WCDC 7.020.01.B.

2. Whether Loftus Should Have Known of the Decision

With respect to petitioner Loftus, there is no dispute she did not "know" about the 2013 zoning permit until Michael Eng informed her on September 22, 2016.[13] However, the county concluded that she had constructive knowledge of the 2013 zoning permit, finding that a reasonable person would have noticed the truck traffic in November and December 2015 associated with

---

[13] Petitioners' attorney summarized Loftus' testimony on this point:

> "* * * Mrs. Loftus testified that she was unaware of the Zon[ing] Permit before it was brought to her attention by Mr. Eng on or after September 22, 2016. When asked if she heard a well drilling truck pass near her house in 2015, she testified that she had not. When asked if she had heard well drilling on the Bilben property during this time, she became confused and indicated that she was not sure. She explained that during this time she was deeply involved in caring for her dying husband in her home." Record 21-2.

digging a well on the Bilben property and would thereby be placed on "inquiry notice" that the county had approved development of the Bilben property:

> "4. Mrs. Loftus was put on inquiry notice not later than December 8, 2015 when, as a result of the frequent travels of the well drilling vehicles past her residence on a road that could only serve either the Eng property or the Bilben property, the reasonable person would have conducted further investigation into the potential purposes of the traffic activities.
>
> "5. Mrs. Loftus' appeal is untimely as it was filed more than 21 days after she knew or should have known of the existence of the Zon[ing] Permit." Record 6-2 to 6-3.

The record apparently does not include specific testimony regarding the "well drilling vehicles" that passed by the Loftus dwelling, or the frequency or nature of that traffic. However, we understand the parties to agree on the following: on November 11, 2015, the well-drilling contractor drove a well-drilling rig of some kind south over the O.M. Mays right-of-way within 50 feet of Loftus' dwelling, in the direction of the Engs' parcel and the subject property. On seven subsequent days over a 30-day period trucks carrying workers passed the Loftus dwelling, on their way to and from the well-drilling site. After completing the well on December 8, 2015, the contractor drove the well-drilling rig north along the O.M. Mays right-of-way past the Loftus dwelling. Based on that evidence, the county concluded that a reasonable person residing in the Loftus dwelling would have noted that traffic and "would have conducted further investigation into the potential purposes of the

traffic activities[,]" and ultimately discovered that the county had approved a dwelling on the Bilben property. Record 6-2.

Petitioners argue, and we agree, that the county misapplied the "knew or should have known test" in WCDC 7.020.01.B(02), by imposing a more rigorous standard than would be applied under the ORS 197.830(3)(b) equivalent. Under our cases, a person is placed on "inquiry notice" if the person receives information, such as observing construction activity on the subject property, that would indicate to a reasonable person that the local government has likely approved some kind of permit authorizing development. *See Abadi v. Washington County*, 35 Or LUBA 67, 72 (1998) (adjoining landowner observes retaining wall constructed on development site); *Willhoft*, 38 Or LUBA at 393 (a person who daily drives by the development site and observes construction is placed on inquiry notice); *Lekas v. City of Portland*, 68 Or LUBA 501 (2013) (21-day appeal period under ORS 197.830(3)(b) runs from the date the petitioners discover that the city issued a building permit authorizing construction they observed); *Phillips v. City of Corvallis*, __ Or LUBA __ (LUBA No. 2016-123, May 3, 2017) (property owner who acknowledges an email from the developer of nearby property announcing the commencement of off-site grading required of a subdivision approval is placed on inquiry notice of the subdivision approval). However, we have never held that observations of *off-site* traffic traveling toward and away from the

direction of the subject property are sufficient in themselves to place a person on "inquiry notice."

As petitioners argue, the county applied the "should have known" test in a manner suggesting that a reasonable person residing on the Loftus property would have (1) observed the well-drilling rig passing on November 11, 2015 and December 8, 2015, (2) identified the truck as a well-drilling rig, (3) deduced that other truck traffic carrying workers on seven occasions between November 11, 2015 and December 8, 2015, were associated with the well-drilling rig, (4) deduced that the rig and workers were drilling a well on the Bilben property rather than the Engs property or on nearby state land, (5) deduced that the rig was drilling a well to serve development rather than a well to serve some other use that is not development, and (6) ultimately concluded that the county had likely issued a development permit of some kind on the Bilben property. In our view, that chain of inferences is simply too attenuated to place a reasonable observer on the Loftus property on "inquiry notice" for purposes of ORS 197.830(3)(b) and WCDC 7.020.01.B(02), and thereby to start a 21-day time period to investigate whether the county had approved a development permit on the Bilben property.

To elaborate, we believe that information sufficient to place a petitioner on "inquiry notice" must, at a minimum, allow the petitioner to identify the property on which development is approved. If a petitioner is first required to conduct factual inquiries to find out whether observed traffic could be related

to development somewhere in the neighborhood, and if so the exact location of that development, the 21-day clock may expire before the petitioner has sufficient information to make effective inquiries with the local government.

In addition, the nature of the activities observed must indicate to a reasonable person that the local government has likely issued a *land use approval* of some kind. *Grimstad v. Deschutes County*, 74 Or LUBA 360, 369 (2016), *aff'd* 283 P3d 648, 389 P3d 1197 (2017) (observation of surveying stakes is insufficient to place the adjoining property owner on "inquiry notice" that the county had earlier approved a legal lot verification for the property, given that surveying may occur for reasons having nothing to do with a land use approval). If the nature of the observed activity is such that it need not require local government land use approval at all, observation of that activity is not sufficient in itself to place the petitioner on "inquiry notice." In the present case, even if a reasonable person would recognize that a truck passing by on November 11, 2015 and December 8, 2015, carried well-digging equipment, and even if the person would surmise that the truck is heading to or from the Bilben property in order to dig a well, the activity of digging a well does not itself require county land use approval. A landowner can drill a well for many reasons, including to provide water for resource uses or for other purposes that do not involve development requiring a county land use approval.

Loftus testified that she had no knowledge of the 2013 zoning permit or development of the Bilben property until September 22, 2016, when Michael

Eng told her of the 2013 zoning permit. Her local appeal was timely filed within 21 days of that date. Accordingly, the county erred in dismissing her appeal as untimely filed under WCDC 7.020.01.B(02).

D. Adversely Affected

Petitioners argue that petitioner Loftus is "adversely affected" by the 2013 zoning permit, within the meaning of ORS 215.416(11), ORS 197.830(3) and WCDC 7.020.01. WCDC 1.065(005) defines "adversely affected" to mean "[a] party's use and enjoyment will be negatively impacted by a land use decision due to identified consequences from the proposed use or development. Examples of adverse affects may include noise, odors, increased traffic, or potential flooding."

Bilben disputes that petitioner Loftus is adversely affected by the 2013 zoning permit, and therefore has standing to file a local appeal under WCDC 7.020.01. However, we need not resolve the parties' dispute on this point, because the county adopted no findings regarding whether either set of petitioners is "adversely affected" by the 2013 zoning permit, and the county did not deny the local appeal on that basis. To the extent that question is an issue on remand, the county may consider it in the first instance. However, we note that if that issue arises on remand, for the reasons set out above to the extent the local definition of "adversely affected" is more stringent or is interpreted to be more stringent than the statutory term "adversely affected" as used in ORS 215.416(11) and ORS 197.830(3), the county cannot impose a

more stringent standing requirement on a local appeal of a permit decision as defined at ORS 215.402(4) than is imposed under ORS 215.416(11), or a more stringent standing requirement on a local appeal of a permit decision under circumstances where the petitioner would otherwise have the right of direct appeal to LUBA under ORS 197.830(3).

The second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

Under the third assignment of error, petitioners request that if LUBA remands the decision denying one or more petitioners a local appeal of the 2013 zoning permit, LUBA should "make clear to respondent" that the 2013 zoning permit is "ineffective until the procedures required by ORS 197.763, 215.416 and WCDC Article 4 or 5 are provided." Petition for Review 43. However, the 2013 zoning permit is not the decision that was appealed to us, and the merits or outcome of any local appeal that the county may afford petitioner Loftus is not within the scope of this appeal, which concerns only whether the county erred in concluding that petitioners' local appeal was untimely filed.

The third assignment of error is denied.

CONCLUSION

While we deny the third assignment of error, the unusual posture of this appeal has required that we resolve an issue that likely will be presented in the

local appeal that the board of county commissioners will be required to provide for petitioner Loftus.

If petitioner Loftus argues to the board of county commissioners (as she has argued to LUBA) that the disputed dwelling cannot be approved on the subject property under the applicable T/G standards, that potentially dispositive question would seem logically to be among the first questions for the board of commissioners to consider on remand. We express no position on the correct answer to that question.

However, in resolving the first subassignment of error under the second assignment of error to resolve petitioners' challenges to the board of commissioners' standing rulings, LUBA has already agreed with petitioners that the 2013 zoning permit decision is a "permit" decision as ORS 215.402(4) defines that term. Under ORS 215.416(3), the county should have provided a hearing before rendering that 2013 zoning permit decision. Alternatively, under ORS 215.416(11), the county could have given notice of the 2013 zoning permit decision in accordance with ORS 215.416(11)(c) and, in the event of a local appeal, a *de novo* appeal hearing in accordance with ORS 215.416(11)(a)(E). It is undisputed that the county did neither. Therefore, if petitioners argue to the board of county commissioners that the 2013 zoning permit decision should be reconsidered by either the planning director, planning commission, or board of county commissioners, after the county provides the statutorily required hearing or notice and opportunity for a *de*

novo local appeal (as petitioners has argued to LUBA), LUBA has already decided the merits of that contention.

The county's decision is remanded.