

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

3
4 BRYAN SEITS,
5 *Petitioner,*

6
7 vs.

8
9 YAMHILL COUNTY,
10 *Respondent,*

04/20/18 AM 8:54 LUBA

11
12 and

13
14 HENRY MILLER and ARAMINTA MILLER,
15 *Intervenors-Respondents.*

16
17 LUBA No. 2017-132

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Yamhill County.

23
24 James D. Howsley, Lake Oswego, represented petitioner.

25
26 Timothy S. Sadlo, Assistant County Counsel, McMinnville, represented
27 respondent.

28
29 John T. Bridges, Newberg, represented intervenors-respondents.

30
31 RYAN, Board Chair; BASSHAM, Board Member; HOLSTUN Board
32 Member, participated in the decision.

33
34 DISMISSED

04/20/2018

35
36 You are entitled to judicial review of this Order. Judicial review is
37 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a Commercial Access Construction Checklist/Inspection Form signed by the county public works director and a fire official from Tualatin Valley Fire & Rescue.

FACTS

We take the facts from the parties' pleadings.¹ In 2017, the county planning commission approved an application from intervenors-respondents Henry Miller and Araminta Miller (intervenor) for a conditional use permit (CUP) to operate a new commercial winery and tasting room on intervenor's property, in an existing pole building located at the end of an existing driveway. A public right-of-way, Big Fir Lane, is located between petitioner's property and intervenor's property, but it is not fully developed. As a result, intervenor proposed to use an existing private access easement, which extends over petitioner's property, to serve the new commercial uses. The existing private access easement is 12 feet wide and approximately 1,000 feet long. Response to Motion to Dismiss, Exhibit B.

The CUP included several conditions, two of which are relevant to this appeal. First, Condition 10 states:

¹ Our January 22, 2018 order granted the county's motion for an extension of time to file the record, and the county has not yet transmitted the record in this matter.

1 "Prior to operation, the water supply and access will be required to
2 meet the Newberg Rural Fire Department standards. Private
3 driveways located on [petitioner's property] shall not be used for
4 turnouts and the applicant shall provide an alternative turnout that
5 is at least 10 feet wide and 30 feet long that is inspected and
6 approved by the Newberg Rural Fire Department." Response to
7 Motion to Dismiss, Exhibit D.

8 Second, Condition 13 states:

9 "Modification of any of the above conditions requires approval
10 under Section 1202.05 of the Yamhill County Zoning Ordinance
11 [YCZO]. Violation of any of the above conditions may result in
12 revocation of the [CUP] with the process detailed in Section
13 1202.07 and 1202.08 of the [YCZO]." *Id.*

14 Petitioner participated in the proceedings before the planning commission
15 meeting and did not appeal the planning commission's decision to the county
16 board of commissioners. Reply to Response to Motion to Dismiss 1. The CUP
17 decision is therefore final.

18 According to the county, an applicant for a building permit for a
19 commercial structure is required to submit a signed Commercial Access
20 Construction Checklist/Inspection Form (Construction Checklist) as part of a
21 building permit application. Motion to Dismiss 2. The Construction Checklist
22 does two things. First, an applicant is required to obtain an approved access
23 permit from the county public works department, approving access to the
24 property from the public road. Second, after the driveway access is fully
25 constructed in accordance with the requirements listed on the Construction
26 Checklist, an applicant is required to obtain an inspection and approval of the

1 fully constructed driveway from the local fire department, in this case, Tualatin
2 Valley Fire & Rescue.²

3 In June 2017, intervenor submitted the Construction Checklist to the
4 county public works department and the local fire department. The public
5 works official signed the Construction Checklist on June 28, 2017, and wrote
6 in the access permit number, “EO-156-17.” Response to Motion to Dismiss,
7 Exhibit E.

8 An official from Tualatin Valley Fire & Rescue signed the Construction
9 Checklist on June 30, 2017, but crossed out the pre-printed words “Final
10 Approval” on the form and replaced them with the following handwritten
11 notation:

12 “Temp[orary] approval only – complete access per agreed
13 requirements and contact for final inspection.” *Id.*

14 On December 29, 2017, petitioner filed a notice of intent to appeal the
15 challenged decision.

16 **MOTION TO DISMISS**

17 The county moves to dismiss the appeal on several bases. First the
18 county argues that the Construction Checklist is not a “final decision” by the
19 county, as defined in ORS 197.015(10)(a), and therefore does not fall within

² Apparently, Tualatin Valley Fire & Rescue, and not the Newberg Rural Fire Department, now provides fire services for the subject property. Response to Motion to Dismiss 2.

1 LUBA’s jurisdiction.³ ORS 197.015(10)(a), in relevant part, defines “land use
2 decision” to include:

3 “(A) A final decision or determination made by a local
4 government * * * that concerns the adoption, amendment or
5 application of:

6 “(i) The goals;

7 “(ii) A comprehensive plan provision;

8 “(iii) A new land use regulation;

9 “(iv) A new land use regulation[.]”

10 The county argues that the Construction Checklist makes clear that the
11 approval by the fire official is not a “final decision” because it states that the
12 approval is temporary and requires further action and a final inspection.

13 Further, the county contends that even if the Construction Checklist is a
14 “final decision,” the Construction Checklist is not a “land use decision”
15 because it does not apply a comprehensive plan provision, a land use
16 regulation, or a new land use regulation, within the meaning of ORS
17 197.015(10)(a). Rather, the county argues, the Construction Checklist is
18 intended to implement a provision of the county’s building code that requires a
19 structure for which a building permit is sought to have “suitable access for fire
20 protection equipment or otherwise meet[] fire protection standards.” Yamhill

³ Petitioner does not argue the challenged decision constitutes a “significant impact” land use decision. *Peterson v. Klamath Falls*, 279 Or 249, 253-54, 566 P2d 1193 (1977); *City of Pendleton v. Kerns*, 294 Or 126, 134, 653 P2d 992 (1982); *Billington v. Polk County*, 299 Or 471, 480, 703 P2d 232 (1985).

1 County Ordinance 514.⁴ According to the county, the county’s building code
2 has not been adopted as part of the county’s land use code, and therefore the
3 Construction Checklist is not a land use decision. Also according to the county,
4 a decision by a fire official, who is not a county employee, is not a decision by
5 the county at all, and any fire access standards that the local fire official applied
6 are standards of the fire district, and not county comprehensive plan or land use
7 regulations.

8 Petitioner responds that the challenged decision is a land use decision
9 because it modifies Condition 10 of the CUP and accordingly, pursuant to
10 Condition 13 of the CUP, such a modification was required to be processed as
11 a land use decision. We quote Condition 10 again here:

12 “Prior to operation, the water supply and access *will be required to*
13 *meet the Newberg Rural Fire Department standards.* Private
14 driveways located on [petitioner’s property] shall not be used for
15 turnouts and the applicant shall provide an alternative turnout that
16 is at least 10 feet wide and 30 feet long that is inspected and
17 approved by the Newberg Rural Fire Department.” Response to
18 Motion to Dismiss, Exhibit D (emphasis added.)

⁴ Yamhill County Ordinance 514, Section 6 provides:

“(1) No person shall be entitled to a building permit unless the structure for which a permit is sought has suitable access for fire protection equipment or otherwise meets fire protection standards.”

1 Petitioner argues the county’s approval of the Construction Checklist is a
2 “waiver” of Condition 10.⁵ Response to Motion to Dismiss, Attachment E.
3 According to petitioner, the county has “unlawfully waived” Condition 10
4 without requiring a modification of the CUP or a new conditional use permit
5 application. Response to Motion to Dismiss 7.

6 It is petitioner’s burden to establish jurisdiction. *Billington v. Polk*
7 *County*, 299 Or 471, 480, 703 P2d 232 (1985). We conclude that petitioner has
8 not established that the fire official’s approval of the Construction Checklist is
9 a “final” decision by the county within the meaning of ORS 197.015(10)(a).
10 The notation on the Construction Checklist demonstrates that any approval
11 granted is “temp[orary].”

⁵ According to petitioner, intervenor’s private access easement, which crosses petitioner’s property, does not meet the applicable standards because the private access easement is only 12 feet wide, and the applicable standards require the driveway to be 20 feet wide. Response to Motion to Dismiss 4.

The Construction Checklist provides:

“Road Width and Vertical Clearance: Access roads shall have an unobstructed driving surface width of not less than 20 feet and an unobstructed vertical clearance of not less than 14 feet (Diagram 1).” Motion to Dismiss, Attachment (bold in original).

Diagram 1 is a diagram entitled “Width and Clearance.” Diagram 1 shows an emergency vehicle on a “12 foot drivable surface,” surrounded by two ditches, with a total clearance of 20 feet in width, by 14 feet in height, and states, “20 ft Drivable surface.” *Id.*

1 In addition, we conclude that even if we assume for purposes of the
2 opinion that the decision is a “final decision” of “the county,” petitioner has not
3 established that the Construction Checklist applies a comprehensive plan or
4 land use regulation, and thus that it is a land use decision. First, as the county
5 points out, the fire official is an employee of the local fire district and is not a
6 county employee and therefore, we doubt has the authority to issue a decision
7 on behalf of the county. More importantly, the Construction Checklist makes
8 clear that the fire official did not conclude that intervenor’s driveway access
9 conforms with the “Driveway Construction Requirements” included on the
10 Construction Checklist, including the requirement set out in n 5. Rather, the
11 fire official provided “temp[orary] approval only,” and required intervenor to
12 complete the driveway access in accordance with “agreed requirements,” and to
13 contact the fire official for “final inspection.”

14 Second, even if we assume that the fire official had the authority to issue
15 a decision on behalf of the county, and even if we assume that the decision is a
16 “final decision” within the meaning of ORS 197.015(10)(a), petitioner has not
17 established that the Construction Checklist applies a comprehensive plan
18 provision or a land use regulation. Petitioner does not argue that the
19 requirements set out in the Construction Checklist are land use regulations, and
20 accordingly a decision regarding whether the driveway access meets the
21 requirements set out in the Construction Checklist is not a land use decision.

1 Finally, we disagree with petitioner that the decision is a modification or
2 a waiver of Condition 10. As noted, we doubt that a fire official of a local fire
3 department, who is not a county employee, has the authority to waive a
4 condition of approval in a previous county decision on a conditional use
5 permit. Second, Condition 10 requires the driveway access to meet the
6 “Newberg Rural Fire Department standards.” *See* n 2. Even if the fire official
7 had issued final approval of the access, and even if that access unquestionably
8 did not meet the standards of the Newberg Rural Fire Department, or the
9 requirements in the Construction Checklist, the end result would not be that
10 Condition 10 of the CUP had been modified or waived. The end result would
11 be that the fire official may have issued an incorrect decision regarding the
12 Newberg Rural Fire Department or other applicable standards. But that does
13 not convert an incorrect decision regarding those standards into a modification
14 or waiver of Condition 10, or otherwise make that incorrect decision a land use
15 decision within the meaning of ORS 197.015(10)(a).⁶

16 Petitioner has not filed a motion to transfer the appeal to circuit court, in
17 the event LUBA concludes it lacks jurisdiction over the appeal. Accordingly,
18 the appeal is dismissed. *Miller v. City of Dayton*, 22 Or LUBA 661, 666, *aff’d*
19 113 Or App 300, 833 P2d 299, *rev den* 314 Or 573 (1992).

⁶ Our disposition of the appeal makes it unnecessary to address the county’s alternative argument that the Construction Checklist is subject to the “ministerial exception” to LUBA’s jurisdiction at ORS 197.015(10)(b)(A) and (B).