

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

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2
3
4
5 GARRETT WYGANT,)
6)
7 Petitioner,)
8) LUBA No. 91-071
9 vs.)
10) FINAL OPINION
11 CURRY COUNTY,) AND ORDER
12)
13 Respondent.)
14

15
16 Appeal from Curry County.
17

18 John C. Babin, Brookings, represented petitioner.
19

20 M. Gerard Herbage, Gold Beach, represented respondent.
21

22 KELLINGTON, Chief Referee; HOLSTUN, Referee; SHERTON,
23 Referee, participated in the decision.
24

25 DISMISSED 09/26/91
26

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

1 Kellington, Chief Referee.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the Curry Country Board of
4 Commissioners approval of the following motion, as shown in
5 the minutes of a May 6, 1991 board of commissioners meeting:

6 "[Commissioner] Werschkul moved the county seek
7 injunctive relief for the clean up of what is
8 known as the Brookings Auto Salvage; that the
9 Board [of Commissioners] in review of the record
10 has determined that it is not a grandfathered use;
11 that the standard be to that of a residential
12 community." Record 10.

13 The record shows this motion, after an amendment not
14 relevant here, was passed by unanimous vote of the county
15 commissioners. Record 11.

16 **FACTS**

17 This appeal stems from petitioner's application for
18 county¹ approval of a Division of Motor Vehicles (DMV)
19 wrecking certificate for existing automobile wrecking
20 operations occurring on petitioner's 12 acre parcel zoned
21 for residential use. In order to lawfully engage in the
22 business of motor vehicle wrecking, a person must have a
23 wrecking certificate issued by the DMV. Under ORS
24 822.110(4) and 822.140, before the DMV may issue a wrecking
25 certificate, the applicant must obtain, and submit to the
26 DMV, local government approval of such wrecking certificate.

¹The wrecking yard is located approximately one mile from the City of Brookings.

1 See Bradbury v. City of Independence, 18 Or LUBA 552 (1989).

2 Between the time of petitioner's application for county
3 approval of a DMV wrecking certificate and the appealed May
4 6, 1991 decision, the board of commissioners held several
5 meetings concerning the application. On July 30, 1990, the
6 county approved petitioner's application for a DMV wrecking
7 certificate, subject to several conditions. Sometime prior
8 to September 24, 1990 (one of the dates on which the board
9 of commissioners met to discuss petitioner's application),
10 the DMV advised the county that it rejected the conditional
11 county approval of petitioner's application for a wrecking
12 certificate. Apparently, the DMV took the position that it
13 would only accept unqualified county approval or denial.
14 Record 128.

15 On May 6, 1991, the board of commissioners determined
16 that the county should seek injunctive relief against
17 petitioner's operations on the subject parcel. Petitioner
18 appeals this decision.²

19 **MOTION TO DISMISS**

20 ORS 197.825(3)(a) provides:

21 "Notwithstanding subsection (1) of this section
22 [relating to the jurisdiction of the Land Use
23 Board of Appeals], the circuit courts of this
24 state retain jurisdiction:

²We note there is no dispute that on June 6, 1991, after the notice of intent to appeal in this appeal proceeding was filed, the county filed a complaint in the Curry County Circuit Court seeking an injunction against petitioner's activities on the subject parcel.

1 "(a) To grant declaratory, injunctive or mandatory
2 relief in proceedings arising from decisions
3 described in ORS 197.015(10)(b) or
4 proceedings brought to enforce the provisions
5 of an adopted comprehensive plan or land use
6 regulations * * * [.]"

7 The county moves to dismiss this appeal on the basis
8 that the challenged decision is not a final land use
9 decision over which this Board has review authority. The
10 county argues the challenged decision is simply a directive
11 from the governing body to the county's legal counsel to
12 seek injunctive relief on behalf of the county, against
13 activities occurring on petitioner's property. The county
14 contends it has not made any final land use decision, within
15 this Board's review authority, concerning petitioner's
16 activities. Rather, the county argues it has simply elected
17 to enforce its zoning regulations in the circuit court
18 pursuant to ORS 197.825(3)(a). The county contends that in
19 this appeal, petitioner has essentially done no more than to
20 appeal the filing of the complaint in the circuit court,
21 something this Board has previously determined is not a land
22 use decision. Haynie v. City of Ashland, 14 Or LUBA 152
23 (1985).

24 Petitioner contends the challenged decision is a land
25 use decision within the meaning of ORS 197.825(1) and
26 ORS 197.015(10),³ over which this Board has review

³ORS 197.825 provides in relevant part:

1 authority. Petitioner characterizes the challenged decision
2 as a land use decision resulting from nearly a year of
3 county hearings and meetings concerning petitioner's
4 application for county wrecking certificate approval.
5 Petitioner contends the challenged decision is one which
6 determines that petitioner's use of his property is unlawful
7 under applicable zoning regulations and applicable land use
8 statutes, and is thus reviewable by this Board.

9 As far as we can tell, the only application submitted
10 to the county was the application for approval of the DMV

"(1) Except as provided in ORS 197.320 and subsections (2) and (3) of this section, the board shall have exclusive jurisdiction to review any land use decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845.

"(2) The jurisdiction of the [Land Use Board of Appeals]:

"(a) Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review * * *.

"* * * * *"

ORS 197.015(10)(a)(A) provides that the term "land use decision" includes:

"A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

"(i) The goals;

"(ii) A comprehensive plan provision;

"(iii) A land use regulation * * *

"* * * * *"

1 wrecking certificate. The county acted on that application
2 by approving the wrecking certificate subject to several
3 conditions on July 30, 1990. No other application was
4 submitted, even though the DMV advised the county it would
5 not accept the county's conditional approval of the
6 application. Accordingly, this is not a case where a permit
7 application is pending which is bound to lead to a local
8 land use decision. See Campbell v. Bd. of County
9 Commissioners, 107 Or App 611, 617, ___ P2d ___ (1991).

10 The only decision on appeal here is one directing the
11 county counsel to file a complaint in the circuit court to
12 seek to enforce county zoning regulations.⁴ We do not
13 believe the challenged decision is one over which we have
14 review authority. The challenged decision does not purport
15 to apply county land use regulations as a final land use
16 decision resolving issues relevant to an application
17 requesting land use approval. As far as we can tell, the
18 challenged decision is one to direct injunctive proceedings

⁴The motion approved by the board of county commissioners did include a statement that the existing auto wrecking operation "is not a grandfathered use." We view this statement in the nature of an explanation of why the board of county commissioners was directing that injunctive proceedings be brought in circuit court, rather than a final determination by the county that the subject use is not entitled to some form of nonconforming use status under county land use regulations. As noted in the text, no application for determination of nonconforming use status had been filed. Further, there is no indication in the record that the county proceedings below were conducted for the purpose of making a final determination regarding whether petitioner's use of the subject property is entitled to nonconforming use status.

1 be brought under ORS 197.825(3)(a).⁵

2 Accordingly, this appeal is dismissed.

3

⁵We express no view concerning whether the county must first make a land use decision that petitioner's use of his property violates applicable zoning requirements before instituting circuit court proceedings. See Campbell v. Bd. of County Commissioners, *supra*; Sauvie Island Agricultural v. GGS (Hawaii), Inc., 107 Or App 1, ___ P2d ___ (1991); Doughton v. Douglas County, 90 Or App 49, 750 P2d 1174 (1988). We only determine here that the county did not render such a land use decision.