

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34

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

TOM PILLING and CROOK COUNTY,)
)
Petitioners,)
)
vs.)
) LUBA Nos. 91-098 and 91-099
LAND CONSERVATION AND)
DEVELOPMENT COMMISSION and) FINAL OPINION
DEPARTMENT OF LAND CONSERVATION) AND ORDER
AND DEVELOPMENT,)
)
Respondents.)

Appeal from Crook County.

Tom Corr, Prineville, represented petitioner Crook County.

Tom Pilling, Terrebonne, appeared in his own behalf.

Larry Knudsen, Salem, represented respondents.

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

DISMISSED 10/17/91

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a hearings officer's decision
4 approving a Crook County Comprehensive Plan amendment and a
5 mining permit.¹

6 **FACTS**

7 On March 1, 1990, the Land Conservation and Development
8 Commission (LCDC) initiated an enforcement order proceeding
9 against Crook County.² See ORS 197.319 to 197.335. A
10 hearings officer was appointed to conduct the enforcement
11 order proceedings and make a recommendation to LCDC. ORS
12 197.328. The parties to the 1990 enforcement order
13 proceedings entered into a stipulation concerning the terms
14 of the enforcement order.³ The parties' stipulation
15 included an agreement that LCDC would appoint a hearings
16 officer to make decisions concerning mining permits during
17 the interim period required for the county to complete

¹The comprehensive plan amendment adds certain property to the plan's inventory of aggregate sites, and the mining permit allows the applicant to conduct an aggregate extraction operation on the property.

²The asserted basis for the enforcement order was the county's failure to submit a timely periodic review order. See ORS 197.640 to 197.647.

³The parties to the 1990 enforcement order stipulation included the Department of Land Conservation and Development (DLCD), R.L. Coats (see n 4, infra), and petitioners Crook County and Tom Pilling.

1 periodic review of its plan.⁴

2 The hearings officer recommended that LCDC adopt the
3 stipulated enforcement order, and, on June 22, 1990, LCDC
4 adopted the enforcement order, as stipulated by the parties
5 and recommended by the hearings officer. The enforcement
6 order was not appealed to the Court of Appeals. ORS
7 197.335(2). In accordance with the stipulation, a mining
8 permit hearings officer (hereafter permit hearings officer)
9 was appointed.⁵

10 On February 15, 1991, R.L. Coats submitted applications
11 for (1) a comprehensive plan amendment to place certain
12 property in the Lone Pine area of the county on the plan
13 inventory of aggregate sites, and (2) a mining permit. See
14 n 4, supra. The subject property is zoned Exclusive Farm
15 Use (EFU-2).⁶ On June 27, 1991, the permit hearings officer
16 approved the requested plan amendment and mining permit.
17 Petitioners in this appeal challenge the permit hearings
18 officer's decision.

⁴The stipulation also provided that R.L.Coats could file an application for an aggregate mining permit thirty days after the enforcement order was entered.

⁵We refer to this hearings officer as the permit hearings officer to distinguish him from the hearings officer who presided over the enforcement order proceedings.

⁶Mining for aggregate and other subsurface resources is permissible in EFU zones. ORS 215.213(2)(d)(B); 215.283(2)(b)(B). However, a permit for the mining of aggregate on EFU zoned land may only be issued for a site on an inventory in an acknowledged comprehensive plan. ORS 215.298(2).

1 **RELATED PROCEEDINGS**

2 Before turning to the jurisdictional questions
3 presented in this appeal we note the existence of two
4 related proceedings. First, the parties advised the Board
5 that an appeal of the permit hearings officer's decision is
6 pending before the Court of Appeals.⁷ Secondly, the Crook
7 County Court is entertaining a local appeal of the permit
8 hearings officer's decision and apparently is reviewing the
9 permit hearings officer's decision as though it is properly
10 viewed as the equivalent of a decision of the county
11 planning commission.⁸ In summary, the permit hearings
12 officer's decision has been appealed to three different
13 review tribunals -- the Court of Appeals, LUBA, and the
14 Crook County Court.⁹

⁷With exceptions not relevant in this appeal, final orders in state agency contested case proceedings are appealable directly to the Court of Appeals. ORS 183.482(1). If the permit hearings officer is viewed as DLCD's hearings officer, and if his decision is a final decision in a contested case proceeding, the Court of Appeals would have exclusive jurisdiction for review of the permit hearings officer's decision. Id.

⁸Crook County Zoning Ordinance § 9.030 provides that planning commission decisions may be appealed to the county court. In his appeal of the permit hearings officer's decision to the county court, petitioner Pilling alleges the permit hearings officer was not granted authority to amend the county's comprehensive plan.

⁹The county urges that this Board delay making a decision concerning its jurisdiction in this matter. DLCD urges that we not delay consideration of the jurisdictional issue. We see no particular purpose that would be served by our delaying until the county court or the Court of Appeals consider whether they have jurisdiction over the permit hearings officer's decision. Our decision in this matter, if appealed to the Court of Appeals, could be consolidated with the appeal concerning the permit hearings officer's decision now pending at that court.

1 **JURISDICTION**

2 The jurisdictional question turns on whether the permit
3 hearings officer appointed by LCDC pursuant to the
4 enforcement order was acting on behalf of the county or LCDC
5 and whether his decision is a final decision. Although
6 there could be more possibilities, we believe the permit
7 hearings officer's decision is one of the following:

- 8 1. A final decision of the county. (This is the
9 only theory that results in LUBA having
10 jurisdiction over the challenged decision.
- 11 2. A not-yet-final decision of the county,
12 subject to review by the county court.
- 13 3. A final decision of DLCD.¹⁰
- 14 4. A not-yet-final decision of DLCD.

15 **A. LUBA's Jurisdiction Only Includes Final Decisions**
16 **of Crook County**

17 LUBA's jurisdiction extends only to land use decisions.
18 ORS 197.825(1). Petitioners have the burden of establishing
19 LUBA's jurisdiction by showing that the challenged decision
20 is a land use decision. Billington v. Polk County, 299 Or
21 471, 475, 703 P2d 232 (1985); Wagner v. Marion County, 15 Or
22 LUBA 260, 268, aff'd 85 Or App 220 (1987).

23 ORS 197.015(10) provides in part:

24 " 'Land use decision':

25 "(a) Includes:

¹⁰DLCD includes "the Land Conservation and Development Commission, the director and their subordinate officers and employees." ORS 197.075.

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

5 "(i) The goals;

6 "(ii) A comprehensive plan provision;

7 "(iii) A land use regulation; or

8 "(iv) A new land use regulation[.]

9 "* * * * *" (Emphasis added.)

10 There is no dispute that the challenged decision
11 applies the goals as well as the county's comprehensive plan
12 and land use regulations. Therefore, if the permit hearings
13 officer's decision is a decision of Crook County and is a
14 final decision (possibility number 1, supra), LUBA has
15 jurisdiction over the challenged decision under ORS
16 197.825(1).¹¹

17 If the permit hearings officer was acting on behalf of
18 the county and his decision is not a final decision
19 (possibility number 2, supra), LUBA lacks jurisdiction
20 because the decision is not final, as required by ORS

¹¹Petitioner Pilling points out that LUBA may have jurisdiction over decisions that do not fall within the statutory definition of "land use decision" where such decisions will have a significant impact on present or future land use. See Billington v. Polk County, 299 Or 471, 475, 703 P2d 232 (1985); City of Pendleton v. Kerns, 294 Or 126, 133-134, 653 P2d 996 (1982). However, to be a significant impacts test land use decision, the decision still must be a final decision. See Hemstreet v. Seaside Improvement Comm., supra, 16 Or LUBA 748, 751, aff'd 93 Or App 73 (1988); CBH v. City of Tualatin, 16 Or LUBA 399, 405 n 7 (1988). Also, for the reasons explained in subsection B, the decision also must be a decision of the county.

1 197.015(10)(a)(A).¹² Hemstreet v. Seaside Improvement
2 Comm., supra.

3 **B. LUBA Lacks Jurisdiction Over LCDC Decisions**

4 With exceptions not relevant to this appeal, final
5 orders in state agency contested case proceedings are
6 appealable directly to the Court of Appeals. ORS 197.482.
7 If the permit hearings officer is correctly viewed as DLCD's
8 hearings officer, and if his decision is a final decision in
9 a contested case proceeding (possibility number 3, supra),
10 the Court of Appeals has exclusive jurisdiction to review
11 the permit hearings officer's decision.¹³

12 If the permit hearings officer's decision is the
13 decision of DLCD, but is not yet final (possibility number
14 4, supra), LUBA lacks jurisdiction for the additional reason
15 that its review is limited to final decisions of state
16 agencies. ORS 197.015(10)(a)(B).¹⁴

¹²Presumably the county is relying on this theory in considering the pending appeal of the permit hearings officer's decision before the county court. If the county is correct in this theory, LUBA presumably would have jurisdiction over the county court's decision, once it becomes final.

¹³In addition, as explained above, LUBA's jurisdiction is limited to land use decisions. ORS 197.015(10)(a)(B) explicitly excludes decisions of LCDC from the statutory definition of "land use decision." See Oregonians in Action v. LCDC, 103 Or App 35, 795 P2d 1098 (1990). See also ORS 197.825(2)(c) (LUBA does not have jurisdiction over matters subject to review by DLCD under ORS 197.430 to 197.455 and 197.640 to 197.650).

¹⁴During a conference call with the parties, respondents suggested that the permit hearings officer's decision, although a decision of DLCD, might not be a final decision and for that reason might not be appealable to the Court of Appeals. If we understand respondent's suggestion correctly, the permit hearings officer's decision might be viewed as a requirement that

1 **C. The Challenged Decision**

2 As explained above, this Board only has jurisdiction in
3 this matter if the permit hearings officer's decision is a
4 final decision of Crook County concerning the comprehensive
5 plan amendment and mining permit. We turn to the relevant
6 language of the stipulated enforcement order, pursuant to
7 which the permit hearings officer was appointed.

8 "3. Until such time as a final periodic review
9 order has been approved by the Department of
10 Land Conservation and Development[,] decisions
11 to permit the mining of aggregate shall be
12 made by a hearings officer as provided in
13 paragraph 4 below and shall be based on the
14 requirements of Statewide Planning Goal 5,
15 OAR 660, division 16, and all other relevant
16 provisions of state law. The hearings
17 officer also shall apply all provisions in
18 existing Crook County ordinances which the
19 hearings officer determines to be consistent
20 with Goal 5, OAR 660, division 16, and all
21 other relevant provisions of state law.

22 "4. A hearings officer responsible for deciding
23 aggregate mining permits shall be selected by
24 the hearings officer in these [enforcement
25 order] proceedings and shall be appointed by
26 the Land Conservation and Development
27 Commission. The hearings officer shall be
28 knowledgeable and independent. The parties
29 shall have the right to comment on a proposed
30 hearings officer prior to the officer's
31 selection."¹⁵

the county take certain actions and would not become final until the required action is taken by the county, or perhaps additional enforcement action is taken by LCDC under ORS 197.319 through 197.335 to compel such action. We do not consider these suggestions further in this decision.

¹⁵The record in this proceeding has not been filed. The enforcement order is attached to the parties' motions filed in this proceeding.

1 Petitioners argue the parties never intended the above
2 quoted language to give the permit hearings officer
3 authority to make final land use decisions for the county.
4 Petitioners contend the parties always contemplated that the
5 permit hearings officer's decisions would be subject to
6 review by the county court.¹⁶

7 There is nothing in the above quoted enforcement order
8 language to suggest that LCDC intended the permit hearings
9 officer to simply assume the role of the county planning
10 commission and render decisions subject to review by the
11 county court. The enforcement order includes no reference
12 to the planning commission or to review of the permit
13 hearings officer's decisions by the county court before such
14 decisions become final.¹⁷ To the contrary, the enforcement
15 order language clearly envisions that the permit hearings
16 officer would issue a final decision on requests for land
17 use approvals necessary to conduct mining operations.¹⁸

¹⁶Petitioners also contend that newspaper articles and notices of hearings show that initially the permit hearings officer also shared this view of his role. Even if petitioners are correct in this contention, it is the language of the enforcement order, not interpretations of the meaning of that order by the permit hearings officer or others, that governs the jurisdictional issue in this appeal.

¹⁷Similarly, the copy of the permit hearings officer's decision provided to the Board by the parties includes no notice of local appeal rights and includes no language suggesting further action or review by the county court is required before the decision becomes final.

¹⁸The quoted language explicitly refers to "aggregate mining permits." It is less clear to us whether the quoted language is properly read to encompass comprehensive plan amendments such as adopted in the challenged

1 The next question is whether the permit hearings
2 officer is properly viewed as a county decision maker. The
3 enforcement order does not explicitly identify on whose
4 behalf the permit hearings officer is to act. However, we
5 believe it is reasonably clear from the enforcement order
6 language that the permit hearings officer is acting on
7 behalf of DLCD. The permit hearings officer was appointed
8 by LCDC, not the county.¹⁹ The permit hearings officer was
9 appointed pursuant to LCDC's authority to enforce the
10 statewide planning goals under ORS 197.319 through 197.335.
11 To conclude that the permit hearings officer was to be a
12 county decision maker, requires us to ignore the manner in
13 which he was selected and appointed and to read in language
14 that is not there. We may not do so. See ORS 174.010
15 (reviewing body construing statutes is "not to insert what
16 has been omitted, or to omit what has been inserted"). We
17 conclude the permit hearings officer acted on behalf of
18 DLCD, and for that reason this Board lacks jurisdiction.

19 The question of our jurisdiction in this matter is made

decision. However, we are not required to determine whether the enforcement order language can be read to grant the permit hearings officer authority to amend the county's comprehensive plan in the manner it was amended in the challenged decision.

¹⁹We are cited to nothing which indicates the county granted LCDC authority to appoint a hearings officer to act on the county's behalf, and the county was only given the right to "comment on a proposed hearings officer" before LCDC made its appointment. We also note that, although he was not selected as the permit hearings officer, one of the persons the enforcement hearings officer recommended for appointment as the permit hearings officer is, and at that time was, a member of LCDC.

1 a much closer question by virtue of questions we have
2 concerning LCDC's authority to appoint a permit hearings
3 officer to displace county land use decision makers. We
4 note those questions briefly below.

5 The relevant statutory provision governing LCDC
6 enforcement orders, ORS 197.335(3)(a), provides as follows:

7 "If [LCDC] finds that in the interim period during
8 which a local government * * * would be bringing
9 itself into compliance with [an enforcement order]
10 it would be contrary to the public interest * * *
11 to allow the continuation of some or all
12 categories of land use decisions, it shall as part
13 of its [enforcement order] order, limit, prohibit
14 or require the approval by the local government of
15 applications for subdivisions, partitions,
16 building permits or land use decisions until the
17 plan, land use regulation or subsequent land use
18 decisions are brought into compliance. The
19 commission may issue an order that requires review
20 of local decisions by a hearings officer or the
21 department before the local decision becomes
22 final." (Emphasis added.)

23 We question whether the above quoted provisions of
24 ORS 197.335(3)(a) authorize LCDC to appoint a hearings
25 officer to make final decisions on behalf of the county, or
26 on behalf of DLCD for the county. Under the second sentence
27 of ORS 197.335(3)(a), LCDC clearly may require review of
28 county land use decisions by DLCD or a hearings officer
29 before those county land use decisions became final.
30 Pursuant to the first sentence of ORS 197.335(3)(a), LCDC
31 presumably could also appoint a hearings officer to make
32 certain kinds of land use decisions and require, as part of
33 the enforcement order, that once such decisions have been

1 rendered by the appointed hearings officer, the county
2 governing body approve them. Therefore, under
3 ORS 197.335(3)(a), it seems clear LCDC may "review" county
4 land use decisions and perhaps compel the county to adopt
5 certain decisions. However, we see no express language in
6 the statute clearly granting LCDC authority to wholly
7 displace the county as the decision maker authorized to
8 render final land use decisions.

9 ORS 215.050, 215.060 and 215.431 also may present
10 problems. ORS 215.050 and 215.060 require that the county
11 governing body have hearings on and adopt comprehensive plan
12 amendments. Although ORS 215.431 provides an exemption from
13 the requirements that the county governing body hold
14 hearings and adopt comprehensive plan amendments, the
15 exemption does not apply to lands "designated under" Goals 3
16 (Agricultural Lands) or 4 (Forest Lands). As the subject
17 property is zoned EFU, it presumably is "designated under"
18 Goal 3. If these statutes are applicable in the
19 circumstances presented in this case, only the Crook County
20 Court has authority to amend the comprehensive plan
21 provisions governing the subject property.

22 For purposes of determining our jurisdiction, we must
23 look to the challenged decision. Whether the challenged
24 decision exceeded the decision maker's jurisdiction is an
25 issue to be considered on the merits. For purposes of
26 determining our jurisdiction in this case, the critical

1 question is whether the decision is Crook County's. For the
2 reasons explained above, we conclude that it is not.
3 Therefore, while we have questions about LCDC's authority to
4 appoint a hearings officer to act on DLCD's behalf and
5 render final land use decisions pending completion of
6 periodic review, we believe LCDC made such an appointment.
7 Whether the enforcement order exceeds LCDC's statutory
8 authority is a question we lack jurisdiction to consider.

9 **D. Conclusion**

10 Because the challenged decision is a decision of DLCD,
11 this appeal must be dismissed. During a conference call,
12 petitioner Crook County suggested that if LUBA lacks
13 jurisdiction, it might be proper for this Board to transfer
14 this appeal to the Crook County Circuit Court. ORS
15 19.230(4) provides, in part, as follows:

16 "A notice of intent to appeal filed with the Land
17 Use Board of Appeals pursuant to ORS 197.830 and
18 requesting review of a decision of a municipal
19 corporation made in the transaction of municipal
20 corporation business that is not reviewable as a
21 land use decision as defined in ORS 197.015(10)
22 shall be transferred to the circuit court and
23 treated as a petition for writ of review. * * * "
24 (Emphases added.)

25 Petitioner Crook County has neither moved to transfer
26 this appeal to Crook County Circuit Court pursuant to
27 OAR 661-10-075(10), nor argued that the challenged decision
28 is properly reviewed pursuant to ORS chapter 34 (Writ of
29 Review). Assuming we are correct that the challenged
30 decision is that of DLCD (a state agency), ORS 19.230(4) is

1 inapplicable because it is limited to decisions of municipal
2 corporations. Additionally, transfer to Crook County
3 Circuit Court would serve no purpose, because exercises of
4 quasi-judicial functions by state agencies may not be
5 challenged in writ of review proceedings.²⁰ ORS 34.040. We
6 therefore do not transfer this appeal to Crook County
7 Circuit Court.

8 This appeal is dismissed.

²⁰The challenged decision appears to be correctly characterized as a quasi-judicial decision, and petitioner Crook County does not contend otherwise.