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

FRANCES GEARHARD, VERNON GEARHARD,)
BARBARA LUND, and LARRY LUND,)

Petitioners,)

vs.)

KLAMATH COUNTY,)

Respondent.)

LUBA No. 91-181

FINAL OPINION
AND ORDER

Appeal from Klamath County.

William M. Ganong, Klamath Falls, represented
petitioners.

Reginald Davis, Klamath Falls, represented respondent.

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

DISMISSED 11/29/91

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

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a Klamath County Board of
4 Commissioners order approving a conditional use permit for
5 operation of a mineral extraction site.

6 **FACTS**

7 On July 1, 1988, Frank and Peggy Wallace (applicants)
8 applied to the county for a conditional use permit to
9 "excavate, crush, screen and process rock and sand for use
10 as fill, construction, asphalt and/or concrete aggregate
11 [sic]" on land zoned Exclusive Farm Use - Cropland (EFU-C).
12 Record 732. On December 19, 1988, applicants filed a
13 petition for a writ of mandamus in Klamath County Circuit
14 Court pursuant to ORS 215.428.¹ On June 20, 1991, the
15 circuit court issued an Order for Issuance of Writ of
16 Mandamus, directing the county to "immediately issue the
17 Conditional Use Permit * * * as applied for on July 1,

¹ORS 215.428 provides in relevant part:

"(1) [T]he governing body of a county or its designate shall take final action on an application for a permit or zone change * * * within 120 days after the application is deemed complete.

* * * * *

"(7) If the governing body of a county or its designate does not take final action on an application for a permit or zone change within 120 days after the application is deemed complete, the applicant may apply in the circuit court of the county where the application was filed for a writ of mandamus to compel the governing body or its designate to issue the approval. * * *"

1 1988." Record 889. On September 23, 1991, the circuit
2 court issued a further order directing that "the Conditional
3 use Permit pursuant to the Writ of Mandamus which is the
4 subject of this case be issued immediately and without
5 conditions or restrictions * * *." Record 899. On
6 October 3, 1991, pursuant to the circuit court's orders, the
7 county board of commissioners adopted the challenged order
8 approving the conditional use permit.

9 **MOTION TO DISMISS**

10 Respondent contends this Board lacks jurisdiction to
11 review the challenged order because it is not a "land use
12 decision" as defined in ORS 197.015(10)(a).² According to
13 respondent, a final determination in the subject matter was
14 made by the Klamath County Circuit Court, not the county.
15 Respondent argues that the county was required to approve
16 the subject conditional use permit as a result of the Order
17 for Issuance of a Writ of Mandamus issued by the Klamath

²ORS 197.015(10)(a) defines "land use decision" as including:

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

"(i) The goals;

"(ii) A comprehensive plan provision;

"(iii) A land use regulation; or

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

"* * * * *"

1 County Circuit Court.

2 Petitioners argue the decision is a land use decision
3 as defined in ORS 197.015(10)(a). Petitioners argue the
4 challenged order was issued by the county, not the Klamath
5 County Circuit Court.³ Petitioners further argue there are
6 several provisions in the Klamath County Land Development
7 Code which apply to the issuance of conditional use permits
8 in the EFU-C zone.

9 This Board has exclusive jurisdiction to review "land
10 use decisions" of local governments. ORS 197.825(1).
11 However, we agree with respondent that the challenged
12 decision is not a "land use decision," as defined in ORS
13 197.015(10).⁴ In this instance, the county's approval of
14 the subject conditional use permit was mandated by an order
15 of the circuit court issued pursuant to a writ of mandamus
16 issued under ORS 215.428(7). In issuing the challenged
17 order, the county was required to obey the order of the
18 circuit court and was not required to apply its

³According to petitioners, under Doughton v. Douglas County, 90 Or App 49, 750 P2d 1174 (1988), circuit courts do not have authority to make land use decisions.

⁴The appellate courts have recognized an alternative test for identifying land use decisions subject to LUBA review, generally referred to as the "significant impact test." Billington v. Polk County, 299 Or 471, 479, 703 P2d 232 (1985); City of Pendleton v. Kerns, 294 Or 126, 133, 653 P2d 992 (1982). However, we do not believe this alternative test applies to decisions which a county is required to issue by a circuit court pursuant to writ of mandamus under ORS 215.483. See Parmenter v. Wallowa County, ___ Or LUBA ___ (LUBA No. 90-034, June 11, 1990), slip op 7 n 5; Oregonians in Action v. LCDC, ___ Or LUBA ___ (LUBA No. 90-028, April 9, 1990), slip op 3.

1 comprehensive plan or land use regulations in adopting that
2 order.

3 Respondent's motion to dismiss is granted.⁵

4 This appeal is dismissed.

⁵A motion to intervene in this proceeding on the side of petitioners was filed by Leslie Hartley Lowe and Allan Ford Lowe. Respondent opposes the motion to intervene. However, because this Board does not have jurisdiction to review the challenged decision, it also does not have jurisdiction to consider whether movants are entitled to intervene in an appeal of the challenged decision.