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

KALMIOPSIS AUDUBON SOCIETY OF)
CURRY COUNTY,)
)
Petitioner,)
)
vs.)
)
CURRY COUNTY,)
)
Respondent,)
)
and)
)
PATRICIA COKE,)
)
Intervenor-Respondent.)

LUBA No. 94-056
FINAL OPINION
AND ORDER

Appeal from Curry County.

Neil S. Kagan, Portland, filed the petition for review and argued on behalf of petitioner.

No appearance by respondent.

Allen L. Johnson, Eugene, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Johnson & Kloos.

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

DISMISSED 08/25/94

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

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county order correcting a mistake
4 in, and reapproving, an earlier decision.

5 **MOTION TO INTERVENE**

6 Patricia Coke moves to intervene on the side of
7 respondent in this appeal proceeding. There is no objection
8 to the motion, and it is allowed.

9 **FACTS**

10 The subject property is zoned Timber. The Curry County
11 Board of Commissioners adopted Order No. 9462 (Order One),
12 which became final on February 16, 1994, approving a
13 partition of, and three nonresource dwellings on, the
14 subject property. No appeal of Order One was filed with
15 this Board. Sometime after Order One became final, the
16 county discovered that Order One included two identical
17 pages of findings and, correspondingly, omitted a page of
18 approved findings. In other words, Order One has two
19 consecutive pages with the same page number, the proper page
20 having been inadvertently omitted. Upon discovering the
21 mistake, the county planning department removed the
22 duplicate page and inserted the correct page. Thereafter,
23 on March 17, 1994, the county mailed copies of the properly
24 collated decision to the parties (Order Two). On April 6,
25 1994, a notice of intent to appeal was filed with this Board
26 challenging Order Two.

1 The signature pages of Order One and Order Two are
2 identical. Both decisions are dated February 7, are signed
3 by two county commissioners, and the signature line for the
4 third county commissioner is blank on both orders. The
5 substance of the two decisions are the same, except that the
6 duplicate findings pages in Order One are corrected in Order
7 Two in favor of the sequence of findings adopted by the
8 county during the original proceedings on the disputed
9 application. The headings on Orders One and Two are the
10 same except for three things. Order Two has "Amended Order"
11 typed on the top of the caption; in the blank following
12 "Order No." Order Two has the number 9473; and, underneath
13 that line, the following words are typed: "Replaces [Order
14 One] Filed 9 Feb. 1994." Record 3. As far as we can tell,
15 the county commissioners conducted no hearings or meetings
16 concerning Order Two.

17 **MOTION TO DISMISS**

18 Intervenor-respondent moves to dismiss this appeal on
19 the basis that the challenged decision is not a land use
20 decision as that term is defined in ORS 197.015(10)(a).¹

¹As relevant here, "land use decision" is defined by ORS 197.015(10)(a) as follows:

"(A) 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;

1 Intervenor argues Order One is the county's land use
2 decision. According to intervenor, Order Two is simply a
3 restatement of Order One which does no more than correct a
4 clerical mistake and, therefore, is not a land use decision.
5 Smith v. Douglas County, 17 Or LUBA 809, 816-17, aff'd 98 Or
6 App 379, rev den 308 Or 608 (1989). Intervenor contends the
7 instant appeal is an impermissible collateral attack on the
8 unappealed land use decision the county adopted in Order
9 One. Id.

10 Petitioner essentially contends that because the
11 caption of Order Two states it amends and replaces Order
12 One, Order Two is a new, appealable land use decision
13 adopted by the county.²

14 Petitioner's challenges could have been, but were not,
15 made in an appeal of Order One. Order One approves uses
16 that are identical to those reapproved in Order Two. Order
17 Two does no more than to correct a clerical error in Order
18 One. There is no new record to support Order Two, and
19 nothing in the record establishes that the board of
20 commissioners even actually adopted Order Two. While

"(iii) A land use regulation; or

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

"* * * * *"

²Petitioner does not dispute that the substance of Order Two is identical to Order One and that Order Two adds the omitted page of findings and removes the erroneously duplicated page found in Order One.

1 somewhat unclear, we believe that in the context of what
2 transpired below, the term "replaces" added to the caption
3 in Order Two means that Order Two simply "corrects" Order
4 One.³ We agree with intervenor that this situation is
5 similar to Smith, supra, and the appealable land use
6 decision was adopted by the county in Order One.⁴ See
7 Sahagian v. Columbia County, ___ Or LUBA ____ (LUBA
8 No. 93-167, June 14, 1994). The time for appealing that
9 land use decision (Order One) cannot be extended simply
10 because the county issued another order correcting clerical
11 errors in Order One. Cf 1000 Friends of Oregon v. LCDC
12 (Clatsop Co.), 301 Or 622, 724 P2d 805 (1986).

13 This appeal is dismissed.

14

³Nothing suggests the county commission repealed Order One, and we do not believe that it did.

⁴Potential policy ramifications associated with adopting petitioner's view of the appealability of Order Two are aptly set out in intervenor's Motion to Dismiss as follows:

"* * * Here the clerical error in the findings was discovered and corrected shortly after [Order One] was issued. But what if the error had not been caught and corrected for another month or even a year? How many final land use decisions are adopted with a page or an exhibit or a paragraph of findings missing? Should the correction of such clerical errors, months or years down the road, be allowed to override the statutory policy favoring finality, certainty and diligence that is reflected in the 21-day filing deadline? * * * Intervenor respectfully submits that the authority to extend the filing deadline is preempted * * *." Motion to Dismiss 7-8.