

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 JOSEPH ESTREMADO and JOYCE)
5 ESTREMADO,)
6)
7 Petitioners,)
8)
9 vs.)
10)
11 JACKSON COUNTY,)
12)
13 Respondent,)
14)
15 and)
16)
17 THOMAS LOWELL,)
18)
19 Intervenor-Respondent.)

LUBA No. 96-059

FINAL OPINION
AND ORDER

20
21
22 Appeal from Jackson County.

23
24 Richard H. Berman, Medford, represented petitioners.

25
26 Arminda J. Brown, County Counsel, Medford, represented
27 respondent.

28
29 James R. Dole, Grants Pass, represented intervenor-
30 respondent.

31
32 HANNA, Chief Referee; GUSTAFSON, Referee; LIVINGSTON,
33 Referee, participated in the decision.

34
35 DISMISSED 11/18/96

36
37 You are entitled to judicial review of this Order.
38 Judicial review is governed by the provisions of ORS
39 197.850.

1 Hanna, Chief Referee.

2 **NATURE OF DECISION**

3 Petitioners appeal three county orders approving the
4 site plans for proposed dwellings on three parcels zoned
5 Woodland Resource, and a fourth order approving a lot line
6 adjustment adjusting the boundaries common to the three
7 parcels.

8 **MOTION TO INTERVENE**

9 Thomas Lowell (intervenor), the applicant below, moves
10 to intervene on the side of respondent. There is no
11 opposition to the motion, and it is allowed.

12 **MOTION TO DISMISS**

13 Intervenor moves to dismiss this appeal for lack of
14 jurisdiction because the challenged orders are excluded from
15 the definition of a "land use decision" pursuant to ORS
16 197.015(10)(d).¹

17 **FACTS**

18 On December 11, 1992, intervenor filed applications

¹ORS 197.015(10)(d) became effective on September 9, 1995, and provides, in relevant part:

"(10) 'Land use decision':

** * * * *

"(d) Does not include:

"(A) A writ of mandamus issued by a circuit court in accordance with ORS 215.428(7) or 227.178(7); or

"(B) A local land use approval in response to a writ of mandamus."

1 with the county for site plan review of six dwellings on
2 parcels zoned for forest use. In May 1994, the county
3 planning department notified all interested parties of its
4 intent to approve the site plans. Intervenor also filed an
5 application for a lot line adjustment to adjust the
6 boundaries common to three of the parcels, and on June 27,
7 1994, the planning department notified the interested
8 parties of its intent to approve that application.
9 Petitioners timely filed requests for hearings on all seven
10 of intervenor's applications, and on August 2, 1994,
11 hearings were held before the hearings officer. However,
12 the county did not take final action on intervenor's
13 applications within 120 days after the applications were
14 deemed complete, and intervenor filed a mandamus action with
15 the Jackson County Circuit Court.

16 On January 20, 1995, intervenor obtained an alternative
17 writ of mandamus from the Jackson County Circuit Court
18 pursuant to ORS 215.428(7), ordering the county to either
19 approve intervenor's applications or show cause why such
20 approvals would violate a substantive provision of the
21 county's comprehensive plan or land use regulations. In
22 paragraph nine of the alternative writ of mandamus, the
23 court ordered a stay on all further proceedings before the
24 county on intervenor's applications:

25 "ORS 34.130(5) allows the court the discretion to
26 stay further proceedings by or before [the
27 county]. The court stays such proceedings.

1 Continuing such proceedings would be inefficient,
2 confusing, and a waste of resources. * * * If [the
3 county] rule[s] on the applications before hearing
4 the writ, such rulings would have no legal effect
5 inasmuch as this court's ruling must preempt that
6 executive branch action. Furthermore, * * * all
7 the parties should be permitted and/or required to
8 submit this matter solely to this court."
9 Intervenor's Motion to Dismiss, Exhibit 1, page 3.

10 As required by the alternative writ, the county
11 appeared at a show cause hearing on March 27, 1995 and
12 contested issuance of a peremptory writ of mandamus. On
13 April 27, 1995, the circuit court issued an order allowing
14 the hearings officer to prepare a draft decision regarding
15 the applications without violating the previously imposed
16 stay on proceedings. The court ordered that any decision of
17 the hearings officer would not be binding or final, "nor
18 shall it be deemed or considered any proceeding, or portion
19 thereof, before Jackson County on or relating to
20 [intervenor's] applications." Petitioners' Answer to Motion
21 to Dismiss, Exhibit 2. In its April 27, 1995 order, the
22 court also provided that the stay on proceedings would
23 "otherwise remain in full force and effect." Id. According
24 to the affidavit submitted by petitioners, in May 1995 the
25 hearings officer drafted a decision approving the three site
26 plan review applications and the one lot line adjustment
27 which are the subject of this appeal. Id., Exhibit 3.

28 On October 18, 1995, the circuit court issued an order
29 granting intervenor partial summary judgment and ordering
30 the issuance of a peremptory writ of mandamus commanding

1 approval of the three site plan review applications that are
2 at issue in this appeal. On November 13, 1995, petitioners
3 moved the court for reconsideration of its October 18, 1995
4 order, and moved for partial summary judgment in their favor
5 regarding the four applications that are the subject of this
6 appeal. Petitioners argued that the hearings officer's
7 decision approving the four applications rendered the
8 mandamus action moot regarding those applications, and that
9 dismissal was required because the peremptory writ had no
10 practical effect. Petitioners relied on the Oregon Supreme
11 Court's decision in Murphy Citizens Advisory Committee v.
12 Josephine County, 319 Or 477, 878 P2d 414 (1994) (Murphy I),
13 in which the court held that the pendency of a mandamus
14 action did not deprive the county of jurisdiction to
15 stipulate that the underlying application would be approved.
16 The court in Murphy I went on to hold that the resulting
17 stipulation amounted to a final land use decision that was
18 appealable to LUBA. Id. at 482-83. The circuit court
19 agreed with petitioners, and on December 11, 1995, vacated
20 its earlier order granting intervenor a peremptory writ of
21 mandamus, and granted petitioners' motion for partial
22 summary judgment on the four subject applications.

23 Shortly thereafter, intervenor moved the court for
24 reconsideration of its December 11, 1995 order, based on the
25 December 27, 1995 decision of the Court of Appeals in Murphy
26 Citizens Advisory Committee v. Josephine County, 138 Or App

1 334, ___ P2d ___ (1995) (Murphy II). Intervenor also argued
2 that the newly amended version of ORS 197.015(10)(d)
3 legislatively overruled the Oregon Supreme Court's decision
4 in Murphy I. The circuit court agreed with intervenor that,
5 under Murphy II, the initiation of a valid mandamus
6 proceeding under ORS 215.428(7) vests jurisdiction in the
7 circuit court, and supersedes all local government land use
8 decision-making procedures on the subject application.
9 Reply to Petitioners' Objection to Intervenor's Motion to
10 Dismiss, Exhibit 1, 9-11. On January 16, 1996, the circuit
11 court issued an order granting intervenors' motion for
12 relief from order of summary judgment, and ordering that
13 "Jackson County shall issue approvals of the applications
14 designated in the first, third, fourth, and seventh claims
15 of the writ not later than February 29, 1996." Motion to
16 Dismiss, Exhibit 6. The court also dismissed those four
17 claims with prejudice. Id. On February 26, 1996, the
18 county issued the four approvals, and on February 28, 1996,
19 the county planning director sent copies of the approvals to
20 the parties with a cover letter stating that "[i]n
21 accordance with the Order of Circuit Court Judge Karaman
22 dated January 16, 1996, Jackson County issues the attached
23 approvals." Answer to Motion to Dismiss, Exhibit 1. This
24 appeal followed.

25 **DISCUSSION**

26 Intervenor argues that this appeal must be dismissed

1 for lack of jurisdiction because ORS 197.015(10)(d)(B)
2 specifically excludes from the definition of a land use
3 decision "[a] local land use approval in response to a writ
4 of mandamus." Petitioners respond that the county decisions
5 at issue in this appeal were not made "in response to a writ
6 of mandamus," and therefore the jurisdictional bar of ORS
7 197.015(10)(d)(B) does not apply. According to petitioners,
8 the county retained jurisdiction to make a land use decision
9 approving the applications after the inception of the
10 mandamus action, and the approvals were made independently
11 of the mandamus proceeding. Petitioners also argue that the
12 circuit court's January 16, 1996 order directing the county
13 to approve the applications at issue was not a writ of
14 mandamus, and in fact dismissed four of the claims in the
15 alternative writ.

16 The county's approvals of the applications were clearly
17 issued in response to the circuit court's January 16, 1996
18 order, which directs that the county "shall issue approvals
19 of the applications * * * not later than February 29, 1996."
20 Motion to Dismiss, Exhibit 6. On February 28, 1996, the
21 county planning director sent copies of the approvals to the
22 parties with a cover letter stating that "[i]n accordance
23 with the Order of Circuit Court Judge Karaman dated January
24 16, 1996, Jackson County issues the attached approvals."
25 Answer to Motion to Dismiss, Exhibit 1. Although
26 petitioners are correct that the court's January 16, 1996

1 order is not itself a writ of mandamus, this argument
2 elevates form over substance. The order represents the
3 court's final action on four claims in a mandamus
4 proceeding, directs the county to issue the described
5 approvals, and has the practical effect of reinstating the
6 court's peremptory writ of mandamus that was previously
7 issued on October 18, 1995.

8 We are also unpersuaded by petitioners' argument that
9 the county retained jurisdiction to make a land use decision
10 approving the applications after the inception of the
11 mandamus action. In paragraph nine of the alternative writ
12 of mandamus dated January 20, 1995, the court specifically
13 exercised its authority under ORS 34.130(5) to impose a stay
14 upon all further proceedings by the county on the
15 applications at issue. Although the court issued a
16 subsequent order allowing the hearings officer to prepare a
17 draft decision regarding the applications without violating
18 the stay on proceedings, that order specifically provided
19 that any decision of the hearings officer would not be
20 binding or final, and that the stay on county proceedings
21 would remain "in full force and effect." Petitioners'
22 Answer to Motion to Dismiss, Exhibit 2.

23 Because we find that the applications at issue in this
24 appeal were approved by the county in response to a writ of
25 mandamus, under ORS 197.015(10)(d)(B) those approvals did
26 not result in a land use decision subject to this Board's

1 jurisdiction.

2 Intervenor's motion to dismiss is granted.