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

MERVIN ARNOLD,)
)
 Petitioner,)
) LUBA No. 96-189
 vs.)
) FINAL OPINION
 COLUMBIA COUNTY,) AND ORDER
)
 Respondent.)

Appeal from Columbia County.

Mervin Arnold, Scappoose, represented himself.

Anne Corcoran Briggs, Assistance County Counsel, St. Helens, represented respondent.

GUSTAFSON, Referee; HANNA, Chief Referee, participated in the decision.

DISMISSED 12/04/96

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

1 Opinion by Gustafson

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's decision approving a
4 conditional use permit for a non-resource dwelling on
5 property zoned Primary Forest (PF-76).

6 **FACTS**

7 The applicant applied for a conditional use permit to
8 site a non-resource dwelling in a primary forest zone. The
9 county planning commission denied the request, and the
10 applicant appealed to the board of commissioners. When the
11 board of commissioners failed to act within 120 days of the
12 date the application was complete, the applicant brought a
13 mandamus proceeding in the Columbia County Circuit Court
14 pursuant to ORS 215.428(7).¹ The circuit court issued an
15 alternative writ of mandamus on September 10, 1996, and the
16 board of commissioners elected to approve the application on
17 September 18, 1996. This appeal followed.

¹ ORS 215.428(7) provides, in relevant part:

"If the governing body of the county or its designate does not take final action on an application for a permit, limited land use decision, or zone change within 120 days after the application is deemed complete:

** * * * *

"(b) 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. The writ shall be issued unless the governing body shows that the approval would violate a substantive provision of the county comprehensive plan or land use regulations as defined in ORS 197.015."

1 **MOTION TO DISMISS**

2 The county moves to dismiss this appeal for lack of
3 jurisdiction because the county's permit approval is not a
4 land use decision. The county argues that the approval was
5 made in response to a writ of mandamus, and is therefore
6 excluded from the definition of a land use decision pursuant
7 to ORS 197.015(10)(d)(B).²

8 Petitioner responds that the alternative writ of
9 mandamus issued by the circuit court allowed the county the
10 opportunity to appear and show cause why approving the
11 permit would violate a substantive provision of the
12 comprehensive plan or other land use regulations. However,
13 instead of appearing and contesting the issuance of a
14 peremptory writ, the county chose to issue an approval.
15 Petitioner argues that because the alternative writ did not
16 itself mandate immediate approval, the county's election to
17 approve the permit was not in response to a writ of

²ORS 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 mandamus, and is therefore not excluded from the definition
2 of a land use decision.

3 The substance of petitioner's argument appears to be
4 that ORS 197.015(10)(d)(B) applies only to peremptory writs
5 of mandamus, and not to alternative writs. Under ORS
6 34.150, writs of mandamus "shall be either alternative or
7 peremptory." An alternative writ commands the defendant to
8 either perform the required act, or appear before the
9 circuit court and show cause why it has not done so. A
10 peremptory writ commands the defendant to immediately
11 perform the required act, and provides no opportunity to
12 appear and present reasons why it should not be required to
13 act.

14 Petitioner's argument was rejected by the Oregon Court
15 of Appeals in Murphy Citizens Advisory Com. v. Josephine
16 County, 138 Or App 334 (1995); rev. allowed, 324 Or 18
17 (1996). In Murphy, the court held that ORS
18 197.015(10)(d)(B) applies to both alternative and peremptory
19 writs of mandamus, and that the jurisdictional bar created
20 by that statute applies "from the inception of a mandamus
21 action rather than its culmination." Id. at 339. The
22 ruling in Murphy is in accord with decisions of this Board
23 that predate the enactment of ORS 197.015(10)(d). See Milks
24 v. City of Eugene, 29 Or LUBA 502 (1995) (holding that the
25 city was divested of jurisdiction to make a land use
26 decision from the moment the intervenor filed a petition for

1 writ of mandamus with the circuit court).

2 Applying ORS 197.015(10)(d)(B) to the case at hand, we
3 find that LUBA jurisdiction is prohibited because the permit
4 at issue in this appeal was approved in response to a writ
5 of mandamus.³ The motion to dismiss is granted.

³Petitioner did not file a motion to transfer this matter to circuit court as allowed under OAR 661-10-075(11)(b) and ORS 19.230(4), so we express no opinion as to whether the circuit court would have jurisdiction to review the county's decision.