

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 GARY DORALL and JEAN DORALL,  
5 *Petitioners,*

6  
7 vs.

8  
9 COOS COUNTY,  
10 *Respondent,*

11 and

12  
13  
14 TIOGA SPORTS PARK ASSOCIATION, INC.,  
15 *Intervenor-Respondent.*

16  
17 LUBA No. 2006-083

18  
19 FINAL OPINION  
20 AND ORDER

21  
22 Appeal from Coos County.

23  
24 Daniel J. Stotter, Eugene, filed the petition for review and argued on behalf of  
25 petitioners.

26  
27 No appearance by Coos County.

28  
29 Andrew H. Stamp, Lake Oswego, filed the response brief and argued on behalf of  
30 intervenor-respondent.

31  
32 RYAN, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,  
33 participated in the decision.

34  
35 DISMISSED

11/21/2006

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

**NATURE OF THE DECISION**

Petitioners appeal the Coos County Board of Commissioners’ approval and execution of a “Concession Agreement”<sup>1</sup> with Tioga Sports Park Association, an Oregon nonprofit corporation (intervenor), dated August 3, 2005, which generally provides for the development and operation by intervenor of a public safety training and recreation park on land owned by Coos County.

**MOTION FOR EVIDENTIARY HEARING**

Petitioners filed a motion for an evidentiary hearing pursuant to OAR 661-010-0045(2). In view of our disposition of the jurisdictional issue below, the motion is denied.

**FACTS**

After several years of negotiation with intervenor (and/or predecessors of intervenor), the Coos County Board of Commissioners entered into the concession agreement on August 3, 2005. Record 384-90, 141-144, 39-97, 1-29, and 30-32. The concession agreement provides that its purpose is to “contract for services and facilities necessary or desirable to the development and operation of shooting facilities at the Tioga Sports Park.” Record 3.

The county acquired the land that is the subject of the concession agreement in March 2000 pursuant to a land exchange. Intervenor-Respondent’s Brief 18. The land is currently zoned Forest Zone (F). It is undisputed that the Forest Zone does not allow the use intervenor seeks, without a conditional use permit.

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<sup>1</sup> The full title of the document as shown on its cover page is “Concession Agreement between Coos County, a political subdivision of the State of Oregon, and Tioga Sports Park Association, an Oregon non-profit corporation, for the Development, Operation and Maintenance of the Tioga Sports Park, a Public Safety Training and Recreation County Park. August 3, 2005.” Record 2. We refer to the agreement herein as the “Concession Agreement.”

1     **JURISDICTION**

2             Intervenor contends that LUBA does not have jurisdiction over this appeal, and asks  
3 us to dismiss the appeal. Petitioners contend that LUBA has jurisdiction over this appeal  
4 because the concession agreement is: (1) a land use decision pursuant to ORS  
5 197.015(11)(a)(A); (2) a development agreement pursuant to ORS 94.508(2); and (3) a  
6 discretionary land use permit pursuant to ORS 215.402(4). Petition for Review 3.  
7 Petitioners have the burden of demonstrating that the appealed decision is a land use decision  
8 subject to LUBA’s jurisdiction. *Rohrer v. Crook County*, 38 Or LUBA 8, 11, *aff’d* 169 Or  
9 App 587, 9 P3d 162 (2000). We discuss each of the above noted alternative theories for  
10 jurisdiction below.

11             **A.     Statutory Land Use Decision**

12             ORS 197.015(11)(a)(A) defines a land use decision to include:  
13             “A final decision or determination made by a local government or special  
14             district that concerns the adoption, amendment or application of:  
15             “(i)     The goals;  
16             “(ii)    A comprehensive plan provision;  
17             “(iii)   A land use regulation; or  
18             “(iv)   A new land use regulation [.]”

19             We understand petitioners to argue that the concession agreement concerns the  
20 application of the county’s zoning ordinance, which is a land use regulation. A decision  
21 “‘concerns’ the application of a plan provision or land use regulation if (1) the decision  
22 maker was required by law to apply its plan or land use regulations as approval standards,  
23 but did not, or (2) the decision maker in fact applied plan provisions or land use regulations.”  
24 *Jaqua v. City of Springfield*, 46 Or LUBA 566, 574 (2004) (citing *Bradbury v. City of*  
25 *Independence*, 18 Or LUBA 552, 559 (1989)).

1           Petitioners contend that the concession agreement authorizes uses of the property that  
2 are not currently allowed under Coos County Zoning and Land Development Ordinance  
3 (CCZLDO) Article 4.8 and Article 3.2.350 without a conditional use permit. However,  
4 petitioners do not point to anything in the concession agreement that purports to authorize  
5 use of the property. To the contrary, the concession agreement contains at least four  
6 provisions that require intervenor to comply with all local and state development regulations,  
7 including land use, zoning, building, sanitation, environmental, safety, and health codes.  
8 Record 4, 7, 8, 10. In addition, the concession agreement allows the county to terminate the  
9 agreement if intervenor has failed to “obtain all necessary approvals to begin construction of  
10 facilities by December 31, 2007.” Record 13. One such approval is a conditional use permit  
11 to use the property for the purposes set forth in the concession agreement. The agreement  
12 clearly contemplates that any development of the property for the uses described in the  
13 agreement will require future land use approvals, including a conditional use permit.

14           In *ZRZ Realty Company v. City of Portland*, 49 Or LUBA 309, 320-21 (2005), we  
15 concluded that an amendment to a contract that initially memorialized aspirations about the  
16 intended use of a property was not a land use decision, where the agreement and the  
17 amendment anticipate that future land use approvals were needed, and the continuation of the  
18 agreement was contingent on those approvals being obtained. *See also Crist v. City of*  
19 *Beaverton*, 31 Or LUBA 202, *aff’d* 143 Or App 79, 922 P2d 438 (1996) (preannexation  
20 agreement to provide utility services not a land use decision where it was conditioned on  
21 planned unit development approval). The concession agreement in this case is similar to  
22 the contract amendment at issue in *ZRZ Realty*. Petitioners have not carried their burden of  
23 establishing that the concession agreement is a land use decision as defined in ORS  
24 197.015(11)(a)(A).

1           **B.       ORS 94.504 Development Agreement**

2           Petitioners argue that the concession agreement is a “development agreement” under  
3           ORS 94.508(2), and by definition, such development agreements are land use decisions.<sup>2</sup>  
4           Intervenor answers, and we agree, that the concession agreement does not meet the statutory  
5           requirements of ORS 94.504 and is not a statutory development agreement. As far as we  
6           can tell, the county entered into the concession agreement pursuant to statutory authority  
7           which allows the county to enter into property contracts, rather than pursuant to ORS 94.504.

8           First, it is clear that the concession agreement was not intended to meet the lengthy  
9           and detailed requirements of ORS 94.504(1)–(8). For example, ORS 94.504(8)(b) specifies  
10          that the maximum duration of a development agreement with a county is seven years. The  
11          concession agreement provides for a total term including extensions of 100 years. Record 3.  
12          In addition, ORS 94.504 *et seq.* authorizes local governments to enter into a development  
13          agreement “with any person having a legal or equitable interest in real property for the  
14          development of that property.” ORS 94.504(1). Intervenor asserts that at the time the  
15          concession agreement was executed, intervenor did not have a legal or equitable interest in  
16          the property that is the subject of the agreement.

17          We have noted that ORS 94.504 does not provide the exclusive avenue for a local  
18          government to adopt a development agreement. *ZRZ Realty Company*, 49 Or LUBA at 318.  
19          For example, a local government may enter into contracts pursuant to authority granted in its  
20          charter or other statutory authority. There is no indication in the concession agreement that  
21          the parties intended it to constitute a development agreement under ORS 94.504, and in fact  
22          the concession agreement does not meet the statutory requirements. We also see no reason to  
23          question intervenor’s assertion that the county and intervenor entered into the concession  
24          agreement pursuant to other statutory authority allowing the county to enter into property

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<sup>2</sup> ORS 94.508(2) provides that the approval of a development agreement entered into under ORS 94.504 is a land use decision.

1 contracts. The concession agreement is not a development agreement as that term is used in  
2 ORS 94.504 *et seq.*

3 **B. Discretionary Permit Under ORS 215.402(4)**

4 Petitioners also assert that the concession agreement is a discretionary land use permit  
5 pursuant to ORS 215.402(4).<sup>3</sup> Petitioners do not explain, other than their bare assertion, why  
6 the concession agreement amounts to a discretionary permit under ORS 215.402(4).<sup>4</sup>  
7 Intervenor explained at oral argument that after the concession agreement was entered into,  
8 intervenor submitted an application for a conditional use permit that was later withdrawn,  
9 and no application is currently pending. Intervenor also maintained at oral argument that its  
10 recent uses of the property for firing guns and the posting of no trespassing signs were done  
11 in connection with testing for “noise impacts” in preparing to submit a new conditional use  
12 permit application.

13 Petitioners allege to us that intervenor has recently engaged in certain activities on the  
14 property that require prior conditional use approval under the CCZLDO. Petitioners also  
15 allege that the intervenor and the county believe the concession agreement authorizes such  
16 activities without prior conditional use approval. Petitioners have moved for an evidentiary  
17 hearing to establish that those allegations are factual.

18 It may be, as petitioners allege, that intervenor has engaged in and is engaging in  
19 activities that require prior conditional use approval. It may also be that intervenor and the  
20 county are relying on the concession agreement to authorize such activities. We need not

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<sup>3</sup> ORS 215.402(4) defines permit as follows:

“‘Permit’ means discretionary approval of a proposed development of land under ORS 215.010 to 215.311, 215.317, 215.327 and 215.402 to 215.438 and 215.700 to 215.780 or county legislation or regulation adopted pursuant thereto[.]”

<sup>4</sup> The county would be required in most if not all cases to apply its comprehensive plan or land use regulations in approving an ORS 215.402(4) permit. It is the application of these land use standards that would make a statutory permit a land use decision.

1 and do not decide whether petitioners’ allegations are factual, because even if we assume that  
2 petitioners’ allegations are factual, petitioners have not established that there is anything in  
3 the concession agreement itself that can be read to authorize any activities in advance of  
4 required county land use approvals. As relevant here, the jurisdictional issue is whether the  
5 concession agreement actually authorizes or approves activities without required land use  
6 permits, not whether intervenor or the county (or petitioners for that matter) believe it  
7 authorizes or approves activities without required land use permits.

8 As we have already explained, the concession agreement expressly requires  
9 intervenor to secure any required land use approvals before engaging in the activities that are  
10 the subject of the concession agreement. If intervenor is engaging in activities that require  
11 conditional use approval without first securing that approval, those activities would appear to  
12 be a violation of both the concession agreement and the CCZLDO. Such violations may give  
13 a person with standing a right to seek an injunction against such activity in circuit court. *See*  
14 ORS 197.825(3) (notwithstanding LUBA’s exclusive jurisdiction over land use decisions, the  
15 circuit courts retain jurisdiction to grant injunctive relief in “proceedings brought to enforce  
16 the provisions of an adopted comprehensive plan or land use regulations.”). Similarly, if the  
17 county has local provisions for enforcing its comprehensive plan or land use regulations,  
18 those enforcement provisions may be available. *See Putnam v. Klamath County*, 19 Or  
19 LUBA 616, 619 (1990). However, such violations do not convert the concession agreement  
20 into a land use decision.

21 Petitioners have not established that the concession agreement is a land use decision.  
22 Petitioners have not met their burden of demonstrating that we have jurisdiction over the  
23 matter. Accordingly, this appeal is dismissed.