

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CHRISTOPHER HUESSY,
5 *Petitioner,*

6
7 vs.

8
9 TILLAMOOK COUNTY,
10 *Respondent.*

11
12 LUBA No. 2008-037

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Tillamook County.

18
19 David B. Smith, Tigard, filed the petition for review and argued on behalf of
20 petitioner.

21
22 William K. Sargent, Tillamook, represented respondent.

23
24 HOLSTUN, Board Member; BASSHAM, Board Chair, participated in the decision.

25
26 RYAN, Board Member, did not participate in the decision.

27
28 REMANDED

01/09/2009

29
30 You are entitled to judicial review of this Order. Judicial review is governed by the
31 provisions of ORS 197.850.

1 Holstun, Board Member.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county decision that denies his attempted local appeal of a county
4 decision not to issue a building permit.

5 **FACTS**

6 We take the facts from our earlier order denying the county's first motion to dismiss:

7 "In 2001, petitioner obtained [county] approval to build a residence on
8 portions of several lots petitioner owned with his wife near the Wilson River
9 in rural Tillamook County. Apparently at the county's request, he built the
10 residence astride the lot lines of several lots he owned. Subsequent to the
11 residence's completion the Oregon Department of Forestry (ODF) obtained a
12 prescriptive easement over petitioner's property for an access roadway. In
13 2005, the residence was destroyed by arson.

14 "After obtaining a demolition permit to remove the remains of the burned
15 residence, petitioner applied in February 2006 for a building permit to restore
16 the dwelling. In March 2006, the county planning director informed
17 petitioner that he could not replace the residence in the original location,
18 apparently because it encroached into the ODF easement and because it
19 crossed lot lines. After exchanging numerous letters, in November 2007
20 petitioner attempted to appeal the denial of the building permit to the planning
21 commission. On January 24, 2008, the planning department rejected
22 petitioner's attempt to appeal the building permit denial to the planning
23 commission, stating that the county's action was not a land use decision and
24 therefore no local appeal was available. On February 5, 2008, petitioner
25 attempted to appeal the denial of an appeal before the planning commission to
26 the board of county commissioners. On February 22, 2008, the county
27 rejected petitioner's attempted appeal and again stated that there was no right
28 of local appeal. On March 4, 2008, petitioner appealed the board of county
29 commissioner's rejection of his local appeal to LUBA." *Huessy v. Tillamook*
30 *County*, ___ Or LUBA ___ (LUBA No. 2008-037, October 24, 2008, Order)
31 slip op 1-2.

32 **MOTION TO DISMISS**

33 In our October 24, 2008 Order quoted above, we considered the county's first motion
34 to dismiss this appeal, in which the county argued that its refusal to issue a building permit to
35 petitioner is not a land use decision because it was made under "land use standards which do
36 not require the exercise of policy or legal judgment" or "approves or denies a building permit

1 issued under clear and objective land use standards.”¹ The county took the position that the
2 underlying building permit falls within the ORS 197.015(10)(b)(A) and (B) exceptions to the
3 statutory definition of “land use decision.” Based on its position that the county’s underlying
4 building permit denial decision is not a land use decision, the county took the position in its
5 first motion to dismiss that petitioner had no right to a local appeal of that decision and that
6 petitioner’s appeal in this matter should be dismissed.

7 In our October 24, 2008 Order we noted that the decision that is before LUBA in this
8 appeal is not the planning director’s decision to deny petitioner’s building permit application.
9 The only decision that is before LUBA in this appeal is the county’s decision to deny
10 petitioner’s attempt to appeal that planning director decision to the planning commission.
11 We noted that “[t]he parties seem to believe the answer to whether petitioner has a right to a
12 local appeal turns on whether the underlying [planning director’s] decision to deny the
13 requested building permit is a land use decision.” Slip op at 2. In our October 24, 2008
14 Order we assumed “for purposes of this order that the parties’ belief is correct,” but we

¹ ORS 197.015(10) provides, in part:

“‘Land use decision’:

“(a) Includes:

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

“* * * * *

“(iii) A land use regulation; * * *

“* * * * *;

“(b) Does not include a decision of a local government:

“(A) That is made under land use standards that do not require interpretation or the exercise of policy or legal judgment;

“(B) That approves or denies a building permit issued under clear and objective land use standards[.]”

1 ultimately concluded that LUBA has jurisdiction over this appeal. *Id.* Although we continue
2 to believe we have jurisdiction in this matter, we should not have assumed the parties' belief
3 was correct. Under that belief, the analytical focus is on the wrong decision (the planning
4 director's decision) and the critical question is avoided (Is the county's decision to deny
5 petitioner a local appeal a land use decision?) Whether the planning director's decision
6 qualifies as a "land use decision," as ORS 197.015(10)(a) defines that term, has nothing to do
7 with whether the county's subsequent decision to deny petitioner a local appeal of that
8 decision is a land use decision. In fact, as defined by ORS 197.015(10)(a), the planning
9 director's decision to deny petitioner's application for a building permit could only be a
10 "land use decision" if it was the county's *final* decision in this matter. *See* n 1. If the
11 planning director's decision to deny petitioner's building permit application was the county's
12 *final* decision in this matter that would mean petitioner has no right to a local appeal to
13 challenge the planning director's decision.

14 In our October 24, 2008 Order, we suggested that the proper focus in resolving the
15 county's jurisdictional challenge is on Tillamook County Land Use Ordinance (LUO)
16 10.020, which governs appeals of actions or rulings of the planning director. The county
17 subsequently filed a second motion to dismiss in this appeal, arguing that petitioner's local
18 appeal was not timely filed under LUO 10.020. If the county is correct that petitioner's
19 attempted local appeal was not timely filed, that would mean that petitioner failed to exhaust
20 an available remedy, and this appeal would have to be dismissed for that reason. ORS
21 197.825(2)(a); *Burke v. Crook County*, 45 Or LUBA 516, 519 (2003); *Ramsey v. City of*
22 *Portland*, 28 Or LUBA 763, 768 (1994).

23 LUO 10.020 sets out the requirements for appealing an action or ruling by the
24 planning director:

25 "An action or ruling by the DIRECTOR pursuant to this Ordinance may be
26 APPEALED by parties to the decision, as defined in Section 8.020 (8), within
27 12 days after notification of the decision is mailed to said parties. Written

1 notice of the APPEAL shall be filed in the Department. If the APPEAL is not
2 filed within the 12-day period, the action or ruling of the DIRECTOR shall be
3 final. If an APPEAL is filed, the Commission shall receive a report and
4 recommendation thereon from the DIRECTOR, and shall hold a public
5 hearing on the APPEAL. Other actions of the DIRECTOR may be
6 APPEALED within 21 days after such an action or decision is reduced to
7 writing.” (Capitalization in original.)

8 The county argues that the county planning director denied petitioner’s application
9 for a building permit on March 13, 2006. Although that letter stated the proposed
10 replacement dwelling could not be built within the original footprint of the demolished
11 residence, the letter does not deny the building permit application. In fact, the March 13,
12 2006 letter states that the county would continue to work with petitioner. Record 157-59.
13 Any doubt that the March 13, 2006 letter was not an action or ruling to deny the building
14 permit is eliminated by the continuing correspondence between petitioner’s attorneys and the
15 county regarding the status of the building permit. Record 33, 51, 55, 75, 123, 125.

16 It appears that the county never expressly denied the building permit application. The
17 closest that the county came to denying petitioner’s building permit application is the
18 planning director’s February 23, 2007 letter to petitioner’s attorney where the planning
19 director explains why he believes the building permit application cannot be approved as
20 proposed. The letter, however, does not deny the building permit but rather explains what
21 must be done to approve the building permit and states that the application may be denied in
22 the future.

23 “The situation can be remedied. * * * However, to obtain a permit [the
24 applicants] need to revise their plans in accordance with present requirements,
25 which they have been resisting for several years. * * * We will tickle [the file]
26 for review in thirty days, if the * * * setback and property line issues [are not
27 addressed] then we should probably deny [the application.]” Record 52.

28 Petitioner’s attorney finally sent a letter dated April 3, 2007, requesting that the
29 county “either approve, or deny in writing, land use approval” for the building permit.
30 Record 37. The county apparently did not respond to petitioner’s April 3, 2007 letter, and

1 on November 8, 2007, petitioner appealed the director's refusal to grant building permit
2 approval to the county planning commission. Record 17-21.

3 Given these circumstances, we believe it is most accurate to view the county's actions
4 as resulting in a *de facto* denial of petitioner's building permit application. That *de facto*
5 denial became effective for purposes of appeal under LUO 10.020 on November 8, 2007,
6 when petitioner filed his local appeal after his April 3, 2007 request for a written decision on
7 his building permit application went unanswered. Petitioner's local appeal was timely under
8 LUO 10.020.

9 As discussed above, the county subsequently denied petitioner's attempted local
10 appeal to the planning commission, on January 24, 2008. Although the denial of that
11 attempted appeal was issued by planning director, we believe it is correct to view that denial
12 as having been an action or ruling that was rendered on behalf of the planning commission.
13 LUO 10.030 provides:

14 "An action or ruling of the [PLANNING] COMMISSION pursuant to this
15 Ordinance may be APPEALED to the BOARD within 12 days after the
16 Department's notification of the Commission's action to the applicant.
17 Written notice of the APPEAL must be filed with the BOARD, and a copy
18 sent to the Department. If the APPEAL is not filed within the 12-day period,
19 the [PLANNING] COMMISSION'S decision shall be final. If an APPEAL is
20 filed, the BOARD shall receive a report and recommendation from the
21 Director, and shall hold a public hearing on the APPEAL." (Capitalization in
22 original.)

23 Petitioner then attempted to appeal the county's January 24, 2008 decision to the
24 board of county commissioners on February 5, 2008, within the 12-day period required by
25 LUO 10.030. Petitioner's appeal to the board of county commissioners was timely under
26 LUO 10.030. Petitioner therefore timely filed all required local appeals.²

² Petitioner also timely appealed the board of county commissioner's refusal to hear his local appeal to LUBA.

1 Finally, we do not understand the county to argue that the county’s final decision to
2 deny petitioner’s request for a local appeal in this matter does not qualify as a land use
3 decision, as that term is defined by ORS 197.015(10)(a). *See* n 1. The county’s arguments in
4 that regard have been directed exclusively at the underlying building permit decision. The
5 county’s point may be that it believes the LUO requirements that the planning director is
6 relying on to deny the building permit “do not require interpretation or the exercise of policy
7 or legal judgment” or are “clear and objective land use standards.” *See* n 1. Even if the
8 county is correct about that, under LUO 10.020, petitioner is entitled to a local appeal to the
9 planning commission to have the planning commission decide whether the planning director
10 correctly applied the LUO in denying the disputed building permit.

11 The county’s second motion to dismiss is denied.

12 **FIRST ASSIGNMENT OF ERROR**

13 The only question presented in this appeal is whether petitioner is entitled to a local
14 appeal of the planning director’s refusal to issue a building permit. Petitioner attempted to
15 appeal the planning director’s *de facto* denial of his building permit application. As
16 discussed above, the attempted local appeal pursuant to LUO 10.020 was timely. As we
17 have explained, the county takes the position that a local appeal was not available because
18 the decision whether to issue or deny the building permit is not a land use decision. We see
19 nothing in the language of LUO 10.020 that restricts the right to a local appeal of a planning
20 director “action or ruling” in any way.

21 In addition, the negative implication of the county’s position is that petitioner would
22 only be entitled to a local appeal if the planning director’s decision was a “land use
23 decision,” as ORS 197.015(10)(a) defines that term. As we have already explained, that is
24 simply a legal impossibility, because as ORS 197.015(10)(a) defines the term “land use
25 decision,” a land use decision must be the county’s *final* decision. The planning director’s
26 decision could not be the county’s final decision in this matter while petitioner was timely

1 exercising his rights of local appeal under LUO 10.020 and 10.030. The county improperly
2 denied petitioner a local appeal of the planning director's decision not to issue the requested
3 building permit.

4 The first assignment of error is sustained.³

5 **SECOND ASSIGNMENT OF ERROR**

6 In the second assignment of error, petitioner asks LUBA to determine whether the
7 planning director misconstrued the LUO in denying his application for a building permit.
8 The only decision before LUBA, however, is the county's refusal to grant petitioner's
9 request for a local appeal of the planning director's decision. Petitioner is entitled to a
10 decision from the planning commission that explains whether it agrees with the planning
11 director's decision. That planning commission decision presumably will identify the LUO
12 provisions that the planning director applied to conclude that the building permit cannot be
13 approved as requested and indicate whether the planning commission agrees with the
14 planning director's interpretation and application of the LUO. Once the county has entered a
15 final decision with supporting findings, at the conclusion of the local appeal that petitioner is
16 entitled to, that decision may be appealed to LUBA if petitioner is dissatisfied with the
17 county's final decision. Until petitioner has been permitted to exhaust the local remedies he
18 is entitled to, a decision by LUBA on the merits is premature. ORS 197.825(2)(a); *Lyke v.*
19 *Lane County*, 70 Or App 82, 86-87, 688 P2d 411 (1984).

20 We do not reach the second assignment of error.

21 The county's decision is remanded.

³ Petitioner's first assignment of error actually assigns error to the county's position that the planning director's denial of his building permit application is not a land use decision. Petitioner does not explicitly assign error to the county's refusal to allow petitioner's appeal of the planning director's decision to proceed to the planning commission. But the county's position that the planning director's denial of petitioner's building permit application is not a land use decision is the only reason the county ever gave petitioner for not allowing petitioner's attempted appeal of the planning director's decision to proceed to the planning commission. We therefore treat the first assignment of error as challenging the county's refusal to allow petitioner's appeal to proceed to the planning commission.