

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

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4
5 JAMES VanGRINSVEN and ROBIN HURT,
6 *Petitioners,*

7
8 vs.

9
10 KLAMATH COUNTY,
11 *Respondent.*

12
13 LUBA No. 2009-041

14
15 FINAL OPINION
16 AND ORDER

JAN08'10 PM12:27 LUBA

17
18 Appeal from Klamath County.

19
20 Jim VanGrinsven and Robin Hurt, Fort Klamath, filed the petition for review and
21 represented themselves.

22
23 Mark S. Bartholomew, Medford, represented respondent.

24
25 BASSHAM, Board Chair; HOLSTUN, Board Member; RYAN, Board Member,
26 participated in the decision.

27
28 TRANSFERRED 01/08/2010

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

1 Bassham, Board Chair.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a letter from a county planner advising petitioners that an earlier
4 land use approval has expired.

5 **MOTION TO DISMISS**

6 The county moves to dismiss this appeal on the grounds that the challenged decision
7 is not a land use decision subject to LUBA's jurisdiction and, alternatively, that this appeal
8 has been rendered moot by a subsequent county decision. For the reasons set out below, we
9 agree with the county that the challenged decision is not a "land use decision" as defined at
10 ORS 197.015(10)(a).

11 The challenged decision is a February 27, 2009 letter from a county planner to
12 petitioners, informing petitioners that a prior August 28, 2008 "Land Use Compatibility
13 Statement" (LUCS) has expired, due to petitioners' failure to obtain septic approvals that the
14 planner believed were required as a condition under the August 28, 2008 LUCS decision.
15 The history of the dispute between petitioners and the county is long and convoluted, but in
16 brief petitioners own and operate a motel and recreational vehicle campground, served by an
17 on-site septic system. In 2007 petitioners filed structural permit applications with the county
18 building department seeking approval to expand and remodel an existing grocery/deli area,
19 with new sinks, freezers and other improvements. The building department issued an
20 approval in January 2008, and petitioners started and substantially completed construction.
21 However, at some point the county planning department became concerned regarding the
22 scope and nature of the project, and prior to final inspections the county requested that
23 petitioners file a site plan review application, to address parking and other issues. After some
24 back and forth communication with the county, petitioners eventually filed the requested site
25 plan review application on June 23, 2009. In reviewing that application, the county

1 apparently became concerned regarding the adequacy of the existing septic system and
2 whether it required upgrades to handle the grocery/deli expansion.

3 On August 28, 2008, the county issued a LUCS on a pre-printed form that was
4 apparently intended to approve the site plan review application, with conditions.¹ Under the
5 heading of “Required Conditions,” the August 28, 2008 LUCS sets out three conditions,
6 including “SIGN OFF REQUIRED BY ONSITE & BLDG.” Record 48. On-Site is
7 apparently the county department responsible for sanitary septic approvals. A pre-printed
8 part of the LUCS states that “This clearance shall expire and become null and void if the
9 building or work authorized is not commenced within 180 days from the date indicated above
10 (UBC Sec. 106.4.4).” A handwritten note attached to the LUCS states in part that “Here is
11 your Planning approval. Thank you for working with us. On-Site (Debbie) will need to sign
12 this once your septic is all taken care of.”

13 Following the issuance of the August 28, 2008 LUCS, the county conducted several
14 sub-inspections of the completed work on the expanded grocery/deli, but final inspection was
15 withheld, apparently because county staff believed that septic upgrades might be necessary.
16 The county and petitioners continued to exchange correspondence and e-mails on the septic
17 issue, but petitioners were apparently unable to convince the county that no upgrade was
18 necessary.

19 Finally, on February 27, 2009, approximately 180 days after the LUCS was issued, a
20 county planner sent petitioners the following letter that is the subject of this appeal:

21 “Please accept this letter as follow up documentation to the issuance of
22 Planning Department approval regarding a deli expansion for Jo’s Motel.

¹ A Land Use Compatibility Statement, or LUCS, is generally speaking a document issued by a local government at the request of a different permitting agency, such as the Department of Environmental Quality (DEQ), to determine whether a proposal pending before the *agency* is consistent with the local government’s comprehensive plan and land use regulations. It is not clear whether the August 28, 2008 LUCS was issued at the request of DEQ or a similar agency. It appears that the county uses a LUCS as a vehicle to approve certain land use applications made to the county, such as a site plan review application.

1 “For reference, the Planning Department issued a Land Use Compatibility
2 Statement (LUCS08-0681) on August 28, 2008. This approval is good for 180
3 days to allow you time to secure proper Septic and Building permits. This
4 land use approval had conditions, which require final signatures from the On-
5 Site Sanitation Department and Building Department. Because permits were
6 never issued as required by this approval, we must notify you that your
7 Planning approval has expired, effective February 24, 2009.

8 “To avoid an enforcement action because your land use approval has expired,
9 please submit a Commercial Site Plan Review application, new application fee
10 (\$397), and a new site plan to the Planning Department within 10 days. If you
11 do not supply us with a completed application and fees within 10 days, you
12 will be subject to enforcement action.” Record 27.

13 **A. Land Use Decision**

14 The county argues first that the February 27, 2009 letter does not concern the
15 application of any county comprehensive plan provision or land use regulation, and therefore
16 does not fall within the definition of “land use decision” at ORS 197.015(10)(a)(A).²
17 According to the county, the February 27, 2009 letter simply determines that a condition of
18 approval in the August 28, 2008 LUCS has not been met, and that the LUCS therefore
19 expired under its own terms. The county argues that neither determination concerns the
20 application of a county plan provision or regulation, and therefore the February 27, 2009
21 letter is not a land use decision. *See Mar-Dene Corp. v. City of Woodburn*, 149 Or App 509,
22 514-15, 944 P2d 976 (1997) (a determination that a condition of permit approval is satisfied
23 is not a land use decision); *Balk v. Multnomah County*, 38 Or LUBA 1, 7 (2000) (a

² As relevant here, LUBA’s jurisdiction is restricted to land use decisions. ORS 197.825(1). In relevant part, ORS 197.015(10)(a)(A) defines a “land use decision” as

“[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;
- “(iii) A land use regulation; or
- “(iv) A new land use regulation[.]”

1 determination that a permit has expired is not a land use decision where the decision does not
2 apply a comprehensive plan or land use regulation).

3 Petitioners respond that the February 27, 2009 letter is a land use decision because it
4 concerns the application of the county Land Development Code (LDC) Article 14, which
5 governs enforcement and revocation of permits. According to petitioners, the determination
6 that the LUCS had expired under its own terms was, in essence, a revocation of the LUCS,
7 and therefore the county was required to apply the procedures to revoke the LUCS set out in
8 LDC Article 14, but failed to do so. In addition, petitioners argue that even if no source of
9 local authority was cited in the February 27, 2009 letter, the planner has authority to act only
10 pursuant to the LDC, and therefore the letter “concerned” the application of that LDC
11 authority.

12 Generally, a decision “concerns” the application of a land use regulation within the
13 meaning of ORS 197.015(10)(a) when in making the decision the local government (1)
14 actually applies the regulation or (2) should have, but did not, apply the regulation. *Jaqua v.*
15 *City of Springfield*, 46 Or LUBA 566, 574 (2004). The only potentially applicable land use
16 regulations petitioners identify are the LDC Article 14 standards that govern enforcement and
17 revocation of permits. Petitioners do not cite to any specific LDC Article 14 regulation that
18 arguably applies to a determination that a permit has *expired*, or that the county should have
19 applied in issuing the February 27, 2009 letter. However, we understand petitioners to argue
20 that Article 14 provides the only authority for the county to take action to enforce a condition
21 of approval attached to the August 28, 2008 LUCS, and therefore the county was required to
22 follow the enforcement and revocation processes set out in Article 14, which require notice
23 and a hearing. The county’s failure to apply the revocation process in Article 14 is the
24 subject of petitioners’ third assignment of error in the petition for review.

25 LDC 14.030(B) sets out the four “responsibilities and powers” of the “code
26 enforcement officer,” who is the county planning director or his/her designee:

- 1 “1. To review with affected individuals the provisions of this code in order
2 to obtain voluntary compliance with its provisions.
- 3 “2. To issue citations to appear before the Klamath County Circuit Court
4 or the Wood River Justice Court for violations of applicable
5 ordinances.
- 6 “3. To initiate all necessary proceedings to forfeit bond or cash deposits.
- 7 “4. To initiate enforcement hearings in front of the Hearings Officer to
8 revoke approvals granted under this code.”

9 The action taken under the February 27, 2009 letter does not fit within any of these four
10 described powers. Under LDC Article 14, as we understand it, the only way the code
11 enforcement officer can take steps to “enforce” a condition of approval or “revoke” a permit
12 is to initiate an enforcement hearing in front of the hearings officer. The February 27, 2009
13 letter advises petitioners what they must do “[t]o avoid an enforcement action,” which makes
14 it plain that the letter is not intended to “enforce” the August 28, 2008 LUCS or initiate an
15 enforcement action. Similarly, the February 27, 2009 letter does not state or suggest that it
16 “revokes” the LUCS or is intended to initiate a revocation proceeding. The gist of the letter
17 is to inform petitioners that the county has taken the position that the August 28, 2008 LUCS
18 has expired under its own terms. Therefore, we disagree with petitioners that in issuing the
19 February 27, 2009 letter the county should have applied the enforcement or revocation
20 provisions of LDC Article 14, and thus petitioners have not demonstrated that the letter
21 “concerned” the application of LDC Article 14.

22 Finally, as noted above, petitioners contend that the planner who wrote the February
23 27, 2009 letter must have done so pursuant to some express authority under the LDC, and
24 therefore the letter “concerns” the application of that authorizing LDC provision. Petitioners
25 do not identify any such provision. However, whether some explicit code provision
26 authorizes county staff to issue letters informing permittees that the county believes their
27 permit has expired, or whether staff have implicit authority to do so under the LDC, we do
28 not believe the mere exercise of such authority is sufficient in itself to make a staff action

1 “concern” the “application” of a land use regulation within the meaning of
2 ORS 197.015(10)(a). Otherwise, every conceivable action taken by county staff under color
3 of the authority of its land use code could constitute a land use decision. The mere exercise
4 of such authority does not necessarily involve the “application” of a comprehensive plan or
5 land use regulation.

6 Petitioners have the burden of demonstrating that LUBA has jurisdiction over the
7 challenged decision. For the above reasons, petitioners have not demonstrated that the
8 February 27, 2009 letter concerns the application of a comprehensive plan provision or land
9 use regulation, or otherwise is a land use decision or other decision subject to our
10 jurisdiction.

11 **B. Mootness**

12 As noted above, the county argues in the alternative that this appeal should be
13 dismissed as moot, based on a letter from the county planning director to petitioners dated
14 November 24, 2009. In that letter, which is attached to the county’s motion, the planning
15 director states:

16 “The purpose of this letter is to reaffirm what we have previously discussed
17 regarding LUCS08-0681 that was issued by the Klamath County Planning
18 Department on August 28, 2008. Specifically, the expiration date of this
19 LUCS is now moot, because the subject work to be done—Interior
20 Grocery/Deli expansion—has now been completed and all required final
21 inspections have been passed. Additionally, I consider all of the conditions as
22 set forth in LUCS08-0681 to have been met.

23 “It is my sincere hope that this resolves your remaining concerns regarding the
24 expiration date, completion and approval of work contained in LUCS08-
25 0681.”

26 The county argues that even if the February 27, 2009 letter is a land use decision that
27 LUBA’s review of that decision and any remand would have no practical effect, given that
28 the county planning director has now determined that final inspections of the project are
29 complete, and that the county considers all conditions set forth in the August 28, 2008 LUCS

1 to be met. *See Davis v. City of Bandon*, 19 Or LUBA 526, 527 (1990) (LUBA may dismiss
2 an appeal of a land use or limited land use decision as moot where it determines that LUBA’s
3 review would have no “practical effect”).

4 Petitioners dispute that the November 24, 2009 letter has the effect of rendering
5 appeal of the February 27, 2009 letter moot. However, we need not and do not address that
6 dispute. We have concluded above that the February 27, 2009 letter is not a land use decision
7 subject to LUBA’s jurisdiction. As discussed below, petitioner has moved to transfer this
8 appeal to circuit court in the event LUBA determines that it lacks jurisdiction over the
9 challenged decision, and we grant that motion. Therefore, the circuit court is the appropriate
10 forum in which to resolve the county’s argument that the appeal of the February 27, 2009
11 letter is now moot.

12 **MOTION TO TRANSFER**

13 Petitioners move to transfer this appeal to circuit court, in the event LUBA determines
14 that the February 27, 2009 letter is not reviewable as a land use decision. OAR 661-010-
15 0075(11)(c) provides that if LUBA

16 “determines the appealed decision is not reviewable as a land use decision or
17 limited land use decision as defined in ORS 197.015(10) or (12), the Board
18 shall dismiss the appeal unless a motion to transfer to circuit court is filed as
19 provided in subsection (11)(b) of this rule, in which case the Board shall
20 transfer the appeal to the circuit court of the county in which the appealed
21 decision was made.”

22 The county does not oppose transfer to circuit court. Because we have determined that the
23 February 27, 2009 letter is not a land use decision or other decision subject to LUBA’s
24 jurisdiction, the motion to transfer is granted.

25 **MOTION TO CONSOLIDATE**

26 Petitioners have filed a motion to consolidate this appeal with LUBA No. 2009-114,
27 which challenges a set of September 2009 county decisions that appear to renew the August

1 28, 2008 LUCS approval and to approve a new site plan.³ Petitioners argue that the February
2 27, 2009 letter and the September 2009 approvals are closely related and the appeals of those
3 decisions will involve similar issues. However, we have already concluded that we lack
4 jurisdiction over the February 27, 2009 letter and have granted petitioners' contingent motion
5 to transfer this appeal to circuit court. The motion to consolidate is denied.

6 **CONCLUSION**

7 For the reasons set out above, this appeal is transferred to Klamath County Circuit
8 Court.

³ Although the county does not argue this point, that the county has apparently renewed the August 28, 2008 LUCS may be an additional reason to conclude that petitioners' appeal of the February 27, 2009 letter, which declares that the August 28, 2008 LUCS has expired, is now moot.