BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOE RUTIGLIANO,
Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

MARY-KAY MICHELSEN,
Intervenor-Respondent.

LUBA No. 2004-027

ORDER ON RECORD OBJECTION

In response to a precautionary record objection filed by petitioner, the county supplemented the record with copies of the record of the two prior LUBA appeals involving the proposal at issue in this appeal. Intervenor now objects to the inclusion of those records in the present appeal.

In the county decision that was the subject of the first appeal, the county approved an exception to Statewide Planning Goal 3 (Agricultural Lands) and changed the comprehensive plan and zoning map designation for the subject property from exclusive farm use (EFU) to Rural-Residential 5-acre minimum (RR-5). The county required that petitioner seek that statewide planning goal exception to Goal 3, even though the EFU-zoned subject property apparently does not qualify as agricultural lands, because a comprehensive plan policy that was in effect during the proceedings that led to the county's first decision in this matter required an exception to change the EFU zoning. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 489 (2000).

In the second appeal, we remanded the county's decision to continue to apply its comprehensive plan policy that required an exception to change EFU zoning, even though the county had repealed that policy following our first decision and even though the applicant asked the

county to reconsider the proposal under the amended comprehensive plan that did not mandate an exception for nonresourse land to be rezoned from EFU to RR-5. The key holding in the second appeal was that because this application involves an amendment to the county's unified comprehensive plan and zoning map it involves a comprehensive plan amendment and the ORS 215.427(3)(a) fixed goal post rule therefore did not apply. In our second decision, we concluded that the county must apply the local comprehensive plan standards in effect when it makes its decision. *Rutigliano v. Jackson County*, 42 Or LUBA 565 (2002). Following our decision in *Rutigliano*, the goal posts apparently have continued to change. From the intervenor's supplemental record objections, it appears that the applicant now would need an exception to apply RR-5 zoning to the property, but does not need an exception for RR-10 zoning. Apparently, intervenor modified the application following *Rutigliano* to seek RR-10 zoning under the county's current comprehensive plan.

When a decision is remanded by LUBA and a second decision on the same application is appealed, the record of the previous local proceedings is part of the record of the local government on remand, unless the local government expressly excludes that record. *Murphy Citizens Advisory Comm. v. Josephine County*, 27 Or LUBA 651, 652 (1994). Although intervenor argues that "[f]or all practical purposes this is an entirely new application," she does not dispute that the decision in this appeal approves an amended application rather than a new application. While the application has certainly been modified, intervenor is plainly incorrect that it is a *new* application. Intervenor also does not argue that the county expressly excluded the prior records in the local proceedings that led to the decision that is currently on appeal.

Intervenor's reliance on *Davenport v. City of Tigard*, 27 Or LUBA 243 (1994) and *Naumes Properties, LLC v. City of Central Point*, 45 Or LUBA 708 (2003), in arguing that the prior records need not be included in the record in this appeal is misplaced. Neither of those cases involved remand proceedings regarding the same application. Although intervenor suggests that *Davenport* might have involved the same application on remand, it did not. Our opinion clearly

states, "the decision challenged in this appeal is *the product of a new application* for development approval." 27 Or LUBA at 246 (emphasis added).[1] The record objection in *Naumes* involved whether materials from prior quasi-judicial land use actions should be included in the record of a legislative decision regarding the local code. Neither *Davenport* nor *Naumes* provides any support for intervenor's argument. Although the application in this case has been modified, perhaps even substantially modified, it is nonetheless accurately described as a continuation of the original application rather than a new application. Therefore, the previous records are properly part of the record in the present appeal unless they were specifically excluded by the county, which they were not.[2]

Intervenor's record objection is denied. The record is settled as of the date of this order. The petition for review is due 21 days from the date of this order. Response briefs are due 42 days from the date of this order. The Board's final opinion and order is due 77 days from the date of this order.[3]

Dated this 10th day of June, 2004.

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Michael A. Holstun
Board Chair

[1] In *Davenport*, we specifically stated that the law of the case doctrine did not apply in that case. 27 Or LUBA at 246. If the appeal had involved the same application, then the law of the case doctrine would have applied. Contrary to intervenor's assertion, there is no doubt that *Davenport* involved a new application. *See also Durig v. Washington County*, 40 Or LUBA 1, 8, *aff'd* 177 Or App 227, 34 P3d 169 (2001) (noting that *Davenport* involved a new application).

[2] Intervenor may well be correct that because the application has been modified, the prior records are irrelevant to the legal issues in the current appeal. While that might have provided a good reason for the county to specifically exclude those records, the county did not do so.

[3] Petitioner's motion for an award of attorney fees for responding to the record objection is denied.