

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

AUG 8 3 28 PM '84

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

JOHN G. STRUVE,)
)
Petitioner,)
)
vs.)
)
UMATILLA COUNTY, OREGON,)
a Municipal Corporation,)
)
Respondent,)
)
and)
)
UMATILLA COUNTY ROAD)
DEPARTMENT, a Department)
of Umatilla County, Oregon,)
a Municipal Corporation,)
)
Respondent-)
Participant.)

LUBA No. 83-017

FINAL OPINION
AND ORDER OF DISMISSAL

Appeal from Umatilla County.

Alex M. Byler
Attorney at Law
222 S.E. Dorion Ave.
Pendleton, OR 97801
Attorney for
Petitioner

Stuart Spring
Umatilla County Counsel
Umatilla County Courthouse
Pendleton, OR 97801
Attorney for
Respondent County

Michele Hallman
Attorney at Law
43 S.E. Third
Pendleton, OR 97801
Attorney for Respondent-Participant,
Umatilla County Road Department

KRESSEL, Referee; BAGG, Chief Referee; DUBAY, Referee.

DISMISSED 08/08/84

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

NATURE OF REQUESTED RELIEF

1 Petitioner moves to dismiss this appeal on grounds the
2 challenged decision is moot. We allow the motion.

3 FACTS

4 At issue is a zoning permit allowing the Umatilla County
5 Road Department to replace a bridge known as the Struve Bridge
6 in southwest Pendleton, just outside the city limits. The
7 bridge was built in the 1950's and serves as the only route
8 into the city for a residential area of about 300 families. It
9 is 12 feet wide, has no sidewalks and is constructed of steel
10 and wood. The permit authorizes its replacement by a 25 foot
11 wide concrete structure, with new bridge abutments and 4 foot
12 sidewalks.

13 The board of county commissioners approved the permit on
14 December 30, 1982. Thereafter, petitioner appealed the
15 decision to this Board. During the pendency of the appeal,
16 however, the following actions were taken.

- 17 1. On March 2, 1983 the city and the county entered
18 a joint management agreement, by which they
19 allocated land planning responsibilities in areas
20 near the city, referred to as "urban growth
21 areas" and "urban transition areas."¹ A map
describing these areas was made part of the
agreement. The Struve Bridge is within the urban
growth area described in the agreement.
- 22 2. Under paragraph 5 of the agreement, the county
23 pledged to amend its comprehensive plan and
24 zoning code as applied to the urban growth area.
25 The amendments would establish Pendleton's
Comprehensive Plan and Zoning Ordinance,
including the zoning maps, as the controlling
land use documents for the area.

1 4. Paragraph 5 of the agreement established the
2 Pendleton Planning Commission as the "Pendleton
3 Urban Growth Area Planning Commission" and
4 appointed the city's planning department as the
5 administrative arm of the commission. All land
6 use applications for the urban growth area,
7 including plan and zoning amendments,
8 subdivisions, variances, conditional uses and
9 zoning permits were to be filed with Pendleton
10 Urban Growth Area Planning Staff.

6 5. On March 2, 1983, the county carried out
7 paragraph 5 of the agreement by adopting, as an
8 emergency measure, Ordinance No. 83-02, an
9 amendment to the zoning ordinance. The amendment
10 adopted the Pendleton Comprehensive Plan, Zoning
11 Ordinance and Subdivision Ordinance for
12 application within the Pendleton Urban Growth
13 Area as described in the agreement.

11 As a result of these actions the land at issue in this
12 appeal became subject to Pendleton's R-1 (Low Density
13 Residential) and F-H (Flood Hazard) zoning classifications. In
14 the R-1 District, a conditional use permit is required for,
15 among other things, any "governmental structure or land use,"
16 and any "public and semi-public use." Article IV, Section
17 15(I), Pendleton Zoning Ordinance of 1983. Issuance of such a
18 permit requires prior review at a planning commission²
19 hearing and a finding of conformance with the Pendleton
20 Comprehensive Plan, as well as other approval criteria. Id at
21 Section 132. Uses, subject to F-H District regulations, must
22 also be reviewed by the planning commission. Id at Section 84.

23 ISSUES

24 In the motion to dismiss, petitioner contends the
25 replacement for the Struve Bridge, although approved by the
26 county in 1982 under county regulations, became subject to the

1 above-described permit requirements as of March 2, 1983. He
2 directs our attention to the fact that neither the joint
3 management agreement nor Ordinance 83-02 exempts proposed
4 structures in the urban growth area, such as the bridge in
5 question, from these requirements. Accordingly, he argues the
6 challenged permit was superseded and the present appeal should
7 be dismissed as moot.³

8 In response to the motion, respondents do not dispute that
9 the land was rezoned R-1/F-H as of March 2, 1983 or that a
10 bridge is a public use requiring a conditional use permit in
11 the R-1 Zone.⁴ However, they maintain the permit issued by
12 the county for the Struve Bridge replacement is exempt from the
13 subsequently enacted requirements. We disagree for the reasons
14 set forth below.

15 DISCUSSION

16 As a general rule, a permit or license does not create
17 irrevocable rights, but instead is subject to modification or
18 revocation by subsequent changes in the law. Twin Rocks
19 Defense Committee v. Sheets, 15 Or App 445, 448, 516 P2d 472
20 (1973), rev den (1974); cf Carmel Estates, Inc. v. LCDC, 51 Or
21 App 435, 439, 625 P2d 1367 (1981), rev den (1981) (dismissing
22 appeal of LCDC Order as moot on grounds reviewing court applies
23 current law, not on which a challenged decision was based). In
24 Twin Rocks, supra, the Court of Appeals found this general
25 administrative law principle reflected in provisions of the
26 County Zoning Enabling Statute, ORS Chapter 215. Those

1 provisions, noted the court, balance the interests of the
2 public in effective land use planning against the interests of
3 permit holders by subjecting the latter to changes in zoning
4 law unless the permit has been "substantially acted upon." 15
5 Or App at 448. See, also Robert Randall Co. v. City of
6 Milwaukie, 32 Or App 631, 634, 575 P2d 170 (1978). The Oregon
7 Supreme Court made a similar point by emphasizing that the
8 statutes protect the "lawful use" of land from restrictive
9 zoning amendments. Polk County v. Martin, 292 Or 69, 76, 636
10 P2d 952 (1981). It follows that mere intended uses are not
11 protected. See ORS 215.130(5); Parks v. Board of County
12 Commissioners of Tillamook County, 11 Or App 177, 197, 501 P2d
13 85 (1973). Respondents' argument that permit holders who act
14 in good faith should be given protection from changes in legal
15 requirements is not in line with the policy reflected in the
16 current law.⁵

17 There is no claim the zoning permit for the Struve Bridge
18 replacement has been substantially acted upon by the county
19 road department. We assume the use is still in the planning
20 stages only. If so, it does not enjoy statutory protection
21 from the changes in law brought about by adoption of the joint
22 management agreement and county Ordinance 83-02.

23 Ultimately, the claim the Struve Bridge replacement is
24 exempt from the post-1982 changes in zoning law rests on the
25 argument the changes were intended by the enacting body to be
26 inapplicable to proposed uses for which zoning permits had

1 already been issued. Assuming a county may exempt such uses
2 from new zoning requirements, we believe the intent to create
3 an exemption must be clearly expressed. See Parks v. Board of
4 County Commissioners of Tillamook County, supra, 11 Or App at
5 197 (policy disfavoring creation of non-conforming uses calls
6 for strict construction of law). We have previously noted that
7 neither the joint management agreement nor Ordinance 83-02
8 express such an intention. However, respondents point out that
9 after adoption of those documents, the county enacted a new
10 land development code (Ordinance 83-05) containing the
11 following provision:

12 "EXISTING AGREEMENTS AND ZONING PERMITS

13 This Ordinance does not repeal, abrogate or impair any
14 existing easements, covenants, deed restrictions, or
15 zoning permits or other agreements such as preliminary
16 plat and partition approvals, conditional use permits,
17 non-conforming use (sic) subject to Chapter 6,
18 temporary special permits, or special exceptions,
19 except as modified in Section 6.010 (non-conforming
20 use). However, where this ordinance imposes greater
21 restrictions, the provisions of this Ordinance shall
22 prevail." Section 1.060, Ordinance 83-05.

23 Respondents strongly urge us to read the quoted provision as
24 "the latest expression of the county's intent" to protect the
25 permit at issue here from the reach of the amendments
26 pertaining to the urban growth area. Respondents' Second
27 Response in Opposition to Motion to Dismiss at 4. However, the
28 circumstances militate against our doing so. Manifestly,
29 Ordinance No. 83-05 was enacted after the joint management
30 agreement and Ordinance No. 83-02. As we read the record,

1 those documents, not the subsequently adopted provisions of
2 Ordinance No. 83-05, changed the regulations governing land use
3 in the urban growth area. As a consequence, we believe it is
4 inappropriate to read Section 1-060 of Ordinance No. 83-05 as
5 an expression of intent concerning the status of the zoning
6 permit in issue. Rather, we read that section to exempt
7 outstanding permits, approvals, agreements, etc. only from the
8 requirements established by Ordinance No. 83-05.⁶

9 We conclude the zoning permit issued by the county on
10 December 30, 1982 was superseded in March, 1983 by new
11 requirements governing uses in the Pendleton Urban Growth
12 Area. Those requirements prevent construction of the bridge in
13 question until conditional use and flood hazard permits are
14 obtained from the Pendleton Urban Growth Area Planning
15 Commission. Under the circumstances, our review of the
16 validity of the permit issued in December, 1982 would be
17 pointless. It is appropriate, therefore, to dismiss this
18 appeal as moot. Carmel Estates, Inc. v. LCDC, supra; Card v.
19 Flegel, 16 Or App 783, 554 P2d 596 (1976). See also, 1000
20 Friends v. Douglas County, 4 Or LUBA 24, 36, (1981).

21 Appeal Dismissed.

FOOTNOTES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1

The agreement defines these terms as follows:

"Urban Growth Area: That area of land extending from the city's corporate limits to the city's urban growth boundary, as referenced and mapped on the city's comprehensive plan, and within which the city may annex land and allow its development in an orderly and efficient manner.

"Urban Transition Areas: Areas extending beyond the city's Urban Growth Boundary (UGB) and/or city's corporate limits as referenced and mapped on the city's comprehensive plan, within which the city may not annex land, but which the city will consider as the highest priority areas for future extension of the UGB to include additional area for low-density residential development." Agreement at 1-2.

2

Under the joint management agreement, requests for permits in the urban growth area are ruled on by the Pendleton Planning Commission, whose membership is expanded to include one member of the county planning commission. However, appeals are determined by the county board of commissioners. Paragraph 5, Joint Management Agreement of March 2, 1983.

3

Petitioner also argues the Pendleton Comprehensive Plan prohibits construction of a bridge at the location approved by the county in 1982. However, in view of our determination the plan conformance issue must be decided by the Pendleton Urban Growth Area Planning Commission pursuant to the joint management agreement and Ordinance No. 83-02, we do not reach this contention.

4

Respondents do contend that a bridge is not a "transporation and communication facility," another conditional use listed in the R-1 Zone. However, since it is clear the use is a "public use" under Article IV, Section 15(I), their contention is of no consequence.

1
5

2 The parties have not addressed, and we therefore do not
3 consider what significance ORS 215.110 has to the issue under
4 discussion. The statute provides "No retroactive ordinance
5 shall be enacted under the provisions of this section."

6
6

7 Our position is reinforced by the fact Ordinance No. 83-05
8 applies only to portions of the unincorporated area. See
9 Section 1.020, Ordinance No. 83-05. This fact, in conjunction
10 with the provision of Section 1.060 that existing "agreements"
11 are not repealed, abrogated or impaired, suggests Ordinance No.
12 83-05 was not intended to have effect in the urban growth area
13 designated by the joint management agreement.
14
15
16
17
18
19
20
21
22
23
24
25
26