

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

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KERWIN DOUGHTON,)
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Petitioner,)
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vs.)
)
DOUGLAS COUNTY,)
)
Respondent.)

LUBA No. 86-015
FINAL OPINION
AND ORDER

Appeal from Douglas County.

Robert E. Stacey, Jr., Portland, filed the petition for review and argued on behalf of petitioner.

Paul G. Nolte, Roseburg, filed a response brief and argued on behalf of Respondent Douglas County.

Wallace D. Cegavske, Roseburg, filed a response brief on behalf of Participants James Clendenin and Thomas Orlando.

KRESSEL, Chief Referee; Bagg, Referee; DuBAY, Referee; participated in the decision.

DISMISSED 08/07/86

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

1 Opinion by Kressel.

2 NATURE OF DECISION

3 This appeal involves a building permit for a single family
4 dwelling on a 21.6 acre parcel zoned FC (Exclusive Farm
5 Use--Cropland).

6 FACTS

7 Prior to April 1983, the parcel was part of a 43 acre tract
8 owned by Respondent James Clendenin. The tract was divided in
9 half as a result of a partition application approved by the county
10 on April 12, 1983. The application included a farm management
11 plan for the gradual development of a commercial nursery on the
12 two parcels. After the approval, Clendenin sold the parcel
13 involved in this appeal to Respondent Orlando.

14 Orlando applied for a building permit to erect a farm-related
15 dwelling on the parcel. In October 1983, county officials signed
16 a "zoning clearance worksheet" indicating that the requested
17 building permit complied with zoning regulations. However, the
18 building permit was not issued until December 19, 1985. The
19 county issued the permit without public notice or hearing.

20 Petitioner owns a nursery adjacent to the tract partitioned by
21 Clendenin in 1983. In March 1985, Petitioner urged the county to
22 rescind approval of the partition on grounds that Clendenin had
23 failed to implement the approved farm management plan and neither
24 parcel had been put to farm use. However, the approval was not
25 rescinded. Petitioner filed this appeal after learning of the
26 building permit issued in December, 1985.

1 FIRST, SECOND, AND THIRD ASSIGNMENTS OF ERROR

2 Section 3.4.050(4) of the Douglas County Land Use and
3 Development Ordinance lists as a permitted use in the FC district

4 "One single family dwelling and other buildings and
5 accessory uses customarily provided in conjunction
6 with farm use on a property meeting the minimum
requirements of Sec. 3.4.200 [property development
standards]".

7 This provision is based on a statute pertaining to exclusive
8 farm use zoning (ORS 215.283(1)(f)). The statute allows
9 establishment of "the dwellings and other buildings customarily
10 provided in conjunction with farm use" on land zoned EFU.¹
11 The challenged building permit was issued pursuant to these
12 authorities.

13 The first three assignments of error concern the procedure
14 the county followed in issuing the building permit. Petitioner
15 argues that the county erred in failing to notify him that a
16 permit for a farm-related dwelling on property adjacent to his
17 was under consideration and in failing to give him an
18 opportunity to object. He claims he was entitled to these
19 procedural protections by ORS 215.402 et. seq. and the Due
20 Process Clause of the fourteenth amendment of the United States
21 Constitution.

22 Respondents answer that the procedural rights claimed by
23 petitioner have no legal foundation. As a preliminary matter,
24 however, Respondents contend that the challenge to the county's
25 decision comes too late. They argue that the land use decision
26 petitioner wishes to challenge is the decision to classify

1 the proposed development as a "dwelling customarily provided in
2 conjunction with farm use" under Section 3.4.200 of the
3 ordinance. Respondents claim that this decision was made in
4 October 1983, when zoning officials approved the zoning clearance
5 worksheet concerning the permit application. Accordingly,
6 Respondents urge us to dismiss this appeal.

7 The legislature has authorized this Board to review final
8 land use decisions. ORS 197.015(10); 197.825. The zoning
9 clearance worksheet is not such a decision. We regard it only as
10 a step in the county's review of the building permit application.

11 The record shows that Respondent Orlando applied for a
12 building permit to construct the dwelling. He did not apply for
13 a zoning clearance. Nor does the county direct our attention to
14 any procedure for the issuance of such a clearance, apart from
15 the procedure followed in the issuance of a building permit. We
16 conclude that a final decision to permit construction of the
17 dwelling was not made until December 19, 1985, when the permit
18 was issued.² We turn next to a question not raised by the
19 parties but one which merits threshold consideration, viz.,
20 whether issuance of the building permit is a "land use decision"
21 subject to our review.

22 ORS 197.015(10) (a) defines "land use decision" as

23 "A final decision or determination made by a local
24 government...that concerns the adoption, amendment or
application of:

- 25 (i) The goals;
26 (ii) A comprehensive plan provision;
(iii) A land use regulation

1 (iv)A new land use regulation...."

2 The issuance of the permit necessarily embodied the conclusion
3 that the application satisfied zoning regulations. See Section
4 303(a) Oregon State Structural Specialty Code and Fire and Life
5 Safety Regulations, 1985.³ See also, Parks v. Tillamook
6 County, 11 Or App 177, 203, 501 P2d 85 (1972). Thus, the
7 permit seems to fall within ORS 197.015(10) (a) (A) (iii) (final
8 decision concerning application of a land use regulation). See
9 Forman v. Clatsop County, 297 Or 129 681 P2d 786 (1984);
10 Medford Assembly of God v. City of Medford, 297 Or 138, 681 P2d
11 790 (1984). However, two provisions in ORS Chapter 197 cast
12 some doubt on this proposition.

13 ORS 197.015(10) (b), enacted in 1983, excludes from the
14 definition of "land use decision" a

15 "...ministerial decision of a local government made
16 under clear and objective standards contained in an
17 acknowledged comprehensive plan or land use regulation
and for which no right to a hearing is provided by the
local government under ORS 215.402 to 215.438...."

18 The legislative history of this provision is not extensive. We
19 surmise that the statute is intended to bar our review of post
20 acknowledgement actions where the decisionmaker exercises
21 little or no discretion and where a record-making hearing is
22 not held. These circumstances make the decision "ministerial"
23 in nature. See testimony of Robert Stacey on HB 2295 before
24 the House Committee on Energy and Environment, April 18, 1983.
25 Under ORS Chapter 197, the circuit courts retain jurisdiction
26 over disputes involving such actions. ORS 197.825(4) (a).

1 As a general rule, local building permit decisions would
2 seem to fall into the category covered by ORS 197.075(10)(b).
3 See Parks v. Tillamook County, supra. However, ORS
4 197.015(10)(b) does not categorically bar our review of all
5 building permit actions. Where action on a building permit is
6 not subject to "clear and objective standards," or where a
7 hearing on the permit is provided for at the local level, we
8 assume the action can be a reviewable land use decision.

9 Another provision in ORS chapter 197 directly addresses our
10 jurisdiction to review building permits. ORS 197.835(7) reads,
11 in pertinent part:

12 "(7) Notwithstanding any other provision of ORS
13 197.005 to 197.855, the board shall not review a
14 building permit issued under the state building code
15 as defined in ORS 456.750 for compliance with the
16 goals if the permit is issued:

17 (a) For land subject to an acknowledged comprehensive
18 plan and land use regulation;

19 * * *

20 (e) After June 30, 1983, unless the commission has
21 issued an order under ORS 197.320 requiring a
22 local government to continue to apply the goals
23 to building permits after that date." Emphasis
24 added.

25 We are advised that Respondent's plan and land use regulations
26 have been acknowledged by LCDC. Under ORS 197.835(7), the
building permit in question could therefore not be reviewed for
compliance with the statewide goals. Whether the permit is
reviewable in this forum on some other basis (e.g., failure to
comply with statutory law or the county ordinance) depends on

1 whether ORS 197.015(10)(b) applies.

2 The county ordinance does not provide for a hearing on a
3 building permit application under 3.4.050(4). Nor does the
4 parallel statute require a hearing prior to establishment of a
5 farm-related dwelling. See ORS 215.283(1)(F). Thus, one element
6 of ministerial decisionmaking under ORS 197.015(10)(b) is
7 present. We turn to the more difficult question of whether the
8 building permit involves "clear and objective standards."

9 Respondent Orlando sought approval of a "dwelling customarily
10 provided in conjunction with farm use." Section 3.4.050(4) of the
11 county ordinance classifies such a use as "permitted" in the FC
12 Zone. Under that section, conformance with certain "property
13 development standards" is required. These standards concern
14 minimum lot size, lot coverage, building setbacks, building height
15 and parking. The standards, which we quote in a footnote, are
16 stated in objective terms (with one exception not applicable to
17 this permit).⁴ Conformance with these standards can be
18 determined mathematically. Illustrative is the following
19 standard:

20 "Setbacks - No structure other than a fence or sign
21 shall be located closer than 30 feet from the
22 right-of-way of a public road and 10 feet from all
other property lines." Section 3.4.200, Land Use and
Development Ordinance.

23 There remains a question about whether the permit decision
24 can be considered ministerial under ORS 197.015(10)(b). The
25 question arises because of the difficulties in the classifying
26 a proposed dwelling as one that is "customarily provided in

1 conjunction with farm use."

2 Petitioner correctly states that the application could not
3 automatically be approved based on the farm use zoning of the
4 property. Recent cases have held that the application for a
5 farm-related dwelling must demonstrate that the property is
6 currently in farm use; Matteo v. Polk County, 11 Or LUBA 259,
7 aff'd; Polk County v. Matteo, 70 Or App 179, P2d (1984), and
8 that this type of farm use is customarily combined with a
9 residence. Matteo v. Polk County, ___ Or LUBA ___ (No. 85-037,
10 September 3, 1985). These inquiries require factfinding. They
11 may also present more complex questions of fact and law than
12 arise in most building permit cases. Compare Parks v.
13 Tillamook County, supra (little discretion involved in
14 measuring building proposal against 100 foot height limit).
15 However, a degree of factfinding and judgment is necessarily
16 involved whenever a building permit administrator considers
17 whether to classify a proposed use as one that is permitted in
18 a given zone.

19 The inquiries required where a building permit for a farm
20 related dwelling is proposed may involve factfinding and
21 interpretation of law by permit officials, but the question
22 here is whether these inquiries are "standards" as that term is
23 used in ORS 197.015(10)(b). As explained below, we answer this
24 question in the negative. Since the only standards governing the
25 permit are the objective "property development standards" in
26 Section 3.4.200 of the ordinance, we hold that the challenged

1 decision was a

2 "ministerial decision of a local government made under
3 clear and objective standards [the property
4 development standards in Section 3.4.200] contained in
5 an acknowledged comprehensive plan or land use
6 regulations and for which no right for a hearing is
7 provided by the local government under ORS 215.402 to
8 215.438...." ORS 197.015(10)(b).

9 We believe the distinction the legislature intended by
10 using the phrase "clear and objective standards " in ORS
11 197.015(10)(b) is between objectively measurable requirements
12 (e.g. lot size, setbacks, height limits, etc.) and more open
13 ended measures of a use's desirability (e.g. compatibility with
14 adjacent uses, consistency with broadly worded plan policies,
15 etc.). The former are classifiable as objective standards; the
16 latter are classifiable as subjective standards because of
17 their broad scope and the room they allow for the exercise of
18 discretion. The inquiries required in determining whether a
19 proposed farm-dwelling should be so classified in light of the
20 Matteo decisions, supra, by contrast, do not involve standards
21 in the sense that term is used in ORS 197.015(10)(b). Rather,
22 they concern the threshold question of how to classify the
23 proposal under the zoning ordinance so as to determine which
24 "standards" govern its approval. As already noted, every
25 building permit application requires such an analysis be made.
26 Although the degree of difficulty may vary from case to case,
the task is essentially the same - deciding whether the facts
presented in the application qualify the use for the zoning
treatment or classification sought by the applicant.⁵ We

1 doubt the legislature intended LUBA's jurisdiction to cover the
2 multitude of such administrative determinations.

3 The permit official's decision to classify the proposal as
4 a permitted use under Section 3.4.050(4) of the ordinance did
5 not entail the application of "standards" as the term is used
6 in ORS 197.015(10)(b). Since the standards governing
7 establishment of the dwelling (Section 3.4.200) are "clear and
8 objective" and since neither the acknowledged local ordinance
9 nor state law provide for review of the permit in a public
10 hearing, we believe the determination is ministerial. It thus
11 falls within the exception to what is a reviewable "land use
12 decision" under ORS 197.015(10)(b).

13 The circuit court, not LUBA, has jurisdiction to decide
14 whether the decision to classify the proposal as a "dwelling
15 customarily provided in conjunction with farm use" is correct.
16 ORS 197.825 (4)(a). The challenged action is not a "land use
17 decision." ORS 197.015(10)(b). The appeal is therefore
18 dismissed.

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1 FOOTNOTES

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4 ORS 215.283(1)(f) includes "dwellings and other buildings
5 customarily provided in conjunction with farm use" among those
6 that "may be established" in an exclusive farm use zone. Like the
7 county ordinance, the statute does not require public notice prior
8 to establishment of a farm-related dwelling. Compare ORS
9 215.213(4).

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12 The building permit was issued in December, 1985. Petitioner
13 filed this appeal over two months later, after construction
14 began. However, Respondents do not challenge the timeliness of
15 the appeal of the permit and we do not consider that question.
16 Respondents argue only that the appealable decision, if any, was
17 the approval of the zoning clearance worksheet. We reject that
18 argument.

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21 Section 303(a) of the code provides, in pertinent part:

22 "The application, plans, specifications, computations
23 and other data filed by an applicant for permit shall
24 be reviewed by the building official. Such plans may
25 be reviewed by other departments of this jurisdiction
26 to verify compliance with any applicable laws under
27 their jurisdiction. If the building official finds
28 that the work described in an application for a permit
29 and the plans, specifications and other data filed
30 therewith conform to the requirements of this code and
31 other pertinent laws and ordinances, and that the fees
32 specified in Section 304 have been paid, he shall
33 issue a permit therefore to the applicant."

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36 The ordinance is quoted below. Although the lot size
37 standard (3.4.200(1)) is not objective, that standard was applied
38 to the partition approved by the county in 1983. Conformance
39 with the lot size standard is not an issue in this case. The
40 remaining standards, which were the only standards applicable to
41 the building permit, are objective in nature.

42 "Section 3.4.200, Property Development Standards:

43 "1. Size - The creation of a lot or parcel shall be subject

1 to the following:

2 "a. The minimum lot or parcel size shall be 50 acres.

3 "b. The following exceptions may apply:

4 "(1) The minimum lot or parcel size may be reduced
5 to between 20 and 50 acres when approved
6 through the Administrative Action process
7 contained in Sec. 2.060.1.f and found to be
8 consistent with Agricultural Land Use Interim
9 Policy Implementation provision No. 8.a and 8.c
10 of the Comprehensive Plan and Article 42 of
11 this Ordinance.

12 "(2) "Lot or parcel size may be reduced below 20
13 acres through Administrative Action process
14 contained in Sec. 2.060.4.h and subject to the
15 provision of Article 42 of this Chapter and
16 Agricultural Land Use Interim Policy
17 Implementation No. 8.b and 8.c of the
18 Comprehensive Plan.

19 "(3) Lot or parcel size for non-farm related
20 dwellings approved through the Administrative
21 Action process, Sec. 2.060.1.h, may be
22 established commensurate with the proposed use
23 and site, ensuring that adequate sanitation
24 facilities can be accommodated, that negative
25 impacts to surrounding agricultural lands do
26 not occur, and is consistent with Agricultural
Land Use Interim Policy Implementation No. 8.d
of the Comprehensive Plan.

"c. Minor partitions which create parcels greater than
50 acres in size shall be reviewed by the Director
as a ministerial action to ensure conformance with
the provisions of this Ordinance.

20 "2. Coverage - No standard established.

21 "3. Setbacks - No structure other than a fence or sign shall
22 be located closer than 30 feet from the right-of-way of a
23 public road and 10 feet from all other property lines.

24 "4. Height - No standard established.

25 "5. Signs -

26 "a. Signs shall not extend over a public right-of-way or
project beyond the property line.

1 "b. Signs shall not be illuminated or capable of
2 movement.

3 "c. Signs shall be limited to thirty-two square feet in
4 area and shall describe only uses permitted and
conducted on the property which the sign is located."

5 "6 Parking - offstreet parking shall be provided in
6 accordance with Article 35."

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8 The problems presented by a permit request for a
9 farm-related dwelling can be compared to other situations where
10 the correct zoning classification is uncertain. For example, a
11 proposal to establish a gas station/car wash may raise doubt as
to which type of zone allows the use. If the car wash is
considered "accessory" to the gas station, the use might be
sited in a residential zone. If not, a commercially zoned site
might be required.

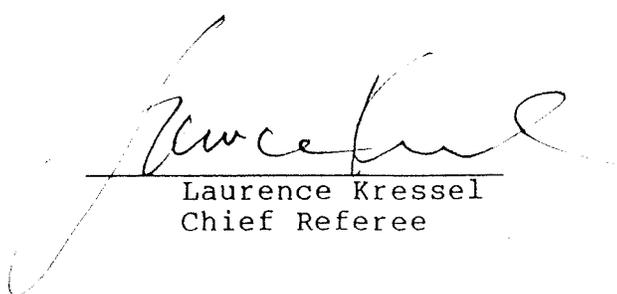
12 Absent a local provision requiring such determinations to
13 be at public hearings, we are aware of no reason why the
14 function cannot be administratively performed. See Medford
Assembly of God v. City of Medford, supra. We believe the
15 legislature intended to exempt such determinations from LUBA's
16 jurisdiction over land use decisions.
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1 question was raised on the Board's own motion after the
2 briefs were filed and after oral argument. Resolution of
3 the issue required research into the legislative history
4 of ORS 197.015(10)(b) and extensive additional research.
5 The case is therefore so complex that it is unreasonable
6 to expect adequate consideration within the agreed time
7 limit.

8
9 CONCLUSION

10 Based on the foregoing and in accordance with ORS
11 197.840(1)(d), the Board concludes that the ends of justice would
12 be served by granting a continuance until August 7, 1986. This
13 is a continuance of 6 days beyond the date previously agreed to by
14 the parties. For the above stated reasons, the need for the
15 continuance outweighs the best interests of the public and the
16 parties in having a decision within 77 days.

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19 Dated this 7th day of August, 1986

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25 Laurence Kressel
26 Chief Referee

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

KERWIN DOUGHTON,)
)
Petitioner,) LUBA No. 86-015
)
vs.) CONTINUANCE PURSUANT TO
) ORS 197.840 (1) (d)
DOUGLAS COUNTY,)
)
Respondent.)

FINDINGS

Pursuant to ORS 197.840(1)(d), the Board makes the following findings:

1. The final opinion in this appeal was due on July 25, 1986. That date was extended with the consent of the parties to August 1, 1986. Thereafter, the parties agreed to the Board's request of a few additional days' extension. However, an exact due date was not specified. The Board ultimately required until August 7, 1986 to issue its opinion.
2. The Board has required additional time beyond the original due date because of the complex and unusual nature of the issues. The case presents novel questions of law in that it requires the board to interpret a jurisdictional exception (ORS 197.015(10)(b) in the context of a building permit for a farm-related dwelling. The jurisdictional exception has not been judicially interpreted. The