

JUN 9 5 03 PM '89

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

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2
3 THOMAS SMITH, JR.,)
4 Petitioner,) LUBA No. 89-013
5 vs.) FINAL OPINION
6 DOUGLAS COUNTY,) AND ORDER
7 Respondent.)

8 Appeal from Douglas County.

9 Bill Kloos, Eugene, filed the petition for review and
10 argued on behalf of petitioner. With him on the brief was
Johnson and Kloos.

11 Paul G. Nolte, Roseburg, filed a response brief and argued
on behalf of respondent.

12 HOLSTUN, Chief Referee; SHERTON, Referee, participated in
13 the decision.

14 AFFIRMED 06/09/89

15 You are entitled to judicial review of this Order.
16 Judicial review is governed by the provisions of ORS 197.850.
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1 Opinion by Holstun.

2 NATURE OF THE DECISION

3 Petitioner seeks review of a February 10, 1989 decision by
4 the Douglas County Planning Director (director) refusing to
5 process further petitioner's appeal of the director's
6 December 27, 1988 letter concerning petitioner's request for
7 approval to construct a church.

8 FACTS

9 Petitioner owns a 63 acre tract in the Exclusive Farm
10 Use-Grazing (FG) zone. Petitioner wishes to construct a church
11 building on the property.

12 On September 4, 1987, petitioner filed a "Planning and
13 Sanitation Clearance Worksheet for Construction" (worksheet)
14 with the county planning department.¹ Prior to September 4,
15 1987, petitioner submitted a separate application for a
16 conditional use permit to use an existing rural residence on a
17 separate parcel as a church. See Smith v. Douglas County, ___
18 Or LUBA ___ (LUBA No. 88-016, June 15, 1988), rev'd in part and
19 aff'd in part 93 Or App 503 (1988), rev allowed 307 Or 340
20 (1989). In addition, a separate worksheet was filed earlier to
21 request approval to construct a church on a separate 82 acre
22 tract. Only the September 4, 1987 worksheet is at issue in
23 this appeal.

24 On September 10, 1987, the director sent a letter advising
25 petitioner that "worksheet clearance * * * cannot be approved"
26 because the proposed use exceeded a density condition imposed

1 when the 63 acre tract was divided in 1985. Record 11. In
2 that letter, the Director also advised petitioner that on
3 September 9, 1987, the county amended the Douglas County Land
4 Use and Development Ordinance (LUDO). Prior to the September
5 9, 1987 amendment, churches were a use permitted outright in
6 the FG zone. After the September 9, 1987 amendment, churches
7 in the FG zone required a conditional use permit. The
8 September 10, 1987 letter continued:

9 "Your applications^[2] will be held until you
10 determine the course of action you wish to pursue. I
11 imagine that you only want to construct one church.
12 Please advise on which parcel you would like to pursue
13 the application for a church. You will then need to
14 have a pre-application conference, and apply for a
15 conditional use or other appropriate land use action.
16 You may call this office at your convenience to make
17 an appointment.

18 "If you intend to pursue your original conditional use
19 permit request, you will need to appeal the Planning
20 Commission's decision. The procedures for such action
21 will be included with the finding of fact sent to
22 you. If you intend to pursue construction of a church
23 on the second parcel (63.07 acres), you would need to
24 satisfy the conditions of approval of the partition,
25 and file for a conditional use permit prior to
26 issuance of the worksheet clearance. If you wish to
pursue the construction of a church on the third
parcel (82 acres), you need to provide an accurate
description as to where the church is proposed to be
located and submit a conditional use permit
application addressing the appropriate criteria."
Record 12.

27 Petitioner did not correspond further with the county
28 concerning the September 4, 1987 worksheet for almost 15
29 months.³ On December 2, 1988, petitioner requested that the
30 county continue processing the worksheet. In his December 2,
31 1988 letter to the county, petitioner's attorney argued (1) the

1 density limitation cited in the county's September 10, 1987
2 letter was not violated by the proposed church; and (2) the
3 county is required by ORS 215.428(3) to apply the LUDO as it
4 existed prior to the September 9, 1987 amendment in processing
5 the worksheet, i.e., the preamendment FG zone which allowed
6 churches as a use permitted outright, rather than the current
7 FG zone which requires a conditional use permit for churches.⁴

8 On December 27, 1988, the director responded by letter to
9 petitioner's December 2, 1988 letter as follows:

10 * * * * *

11 "I am responding to your letter of December 2, 1988,
12 and our telephone conversation of December 23, 1988.
13 I have investigated your inquiry and find that, in
14 order for your client to use the parcel * * * for a
15 church, you will have to comply with the final
16 decision which was made September 10, 1987, and
17 conveyed to you in my prior letter on that date. Your
18 client needs to apply for a conditional use permit.

19 "Contrary to what you imply in your letter to me, no
20 application has ever been made for use of the property
21 as a church.^[5] The information necessary to
22 establish a church on the property is contained in
23 LUDO Article 39 and such other information required
24 for conditional uses in the particular zone where the
25 church is to be located.

26 "If you have any further questions regarding this
matter, or would like to pursue an application, please
feel free to contact our office.

* * * * * (Emphasis added). Record 5.

On January 4, 1989, petitioner filed a notice of appeal of
the director's December 27, 1988 letter. In a letter by the
director, dated February 10, 1989, the county advised the
petitioner that his January 4, 1989 notice of appeal would not

1 be processed and petitioner's appeal fee was returned. The
2 county again stated the September 4, 1987 worksheet was not an
3 application for a permit. The county further explained that
4 its decision on September 10, 1987 to require that petitioner
5 submit an application for a conditional use permit was not
6 appealed, and the January 4, 1989 notice of appeal, therefore,
7 presented no issues properly reviewable by the county planning
8 commission or board of commissioners. Record 1-2. This appeal
9 followed.

10 INTRODUCTION

11 The petition for review contains five assignments of
12 error. The first, second and third assignments of error all
13 assert the county erred by concluding the September 4, 1987
14 worksheet is not an "application" for a "permit" as those terms
15 are used in ORS 215.402 and 215.428.⁶

16 Petitioner's fourth assignment of error challenges
17 statements in the county's December 27, 1988 and February 10,
18 1989 letters that the September 10, 1987 letter from the county
19 was a final decision denying development approval.

20 Petitioner's fifth assignment of error alleges the county
21 erred by refusing to process his January 4, 1989 notice of
22 appeal to the planning commission. We first address
23 petitioner's fifth assignment of error.

24 FIFTH ASSIGNMENT OF ERROR

25 Petitioner claims he appealed the director's December 27,
26 1988 letter to the planning commission in accordance with LUDO

1 Section 2.400.4. Petition for Review 8. LUDO Section 2.400
2 provides for appeals of "administrative actions" of the
3 director.

4 Petitioner claims that the county's refusal to approve the
5 worksheet falls within the LUDO definition of administrative
6 action. The LUDO definition of administrative action is as
7 follows:

8 "An 'Administrative Action' means a proceeding
9 pursuant to this ordinance:

10 "a. in which the legal rights, duties or
11 privileges of specific parties are
12 determined, and any appeal or review
13 thereof, pursuant to the provisions of this
14 ordinance; * * *

15 "* * * * *" (Emphasis added.) LUDO Section 1.090.

16 Petitioner cites no other authority in the LUDO, or elsewhere,
17 for his appeal of the director's December 27, 1988 letter.

18 The county argues the December 27, 1988 letter is a final
19 decision denying the requested worksheet clearance.⁷

20 According to the county, the petitioner misconstrues the LUDO
21 as providing a right of appeal of the December 27, 1988
22 director's decision to the planning commission. The county
23 argues the LUDO provides no such right of appeal. Therefore,
24 according to the county, petitioner should have appealed the
25 December 27, 1988 letter to LUBA rather than attempt to appeal
26 that letter to the planning commission.

Chapter two of the LUDO establishes "procedures for
approval of development required by [the LUDO], appeals * * * ,

1 and review of any decision by higher authority." LUDO

2 Section 2.010. LUDO Section 2.060 provides in pertinent part:

3 "Application for development approval shall be made
4 pursuant to applicable sections of this ordinance on
5 forms provided by the Director. An application shall
6 be complete, contain the information required by these
7 regulations and address the appropriate criteria for
8 review and approval of the request. All applications
9 shall be accompanied by the required fee.

7 "1. The Director shall have the authority to
8 review, and approve or deny the following
9 applications which shall be Administrative
10 Actions: [A list of 22 separate
11 administrative actions (a through v) follows
12 including requests for variance,
13 subdivision, conditional use permit,
14 alteration or repair of a nonconforming use,
15 etc. Worksheets are not listed.]

12 "2. The Director shall have the authority to
13 review and approve or deny the following
14 matters which * * * shall be ministerial
15 actions: [The ten ministerial actions
16 listed include final subdivision plat
17 approval, final planned unit development
18 approval, minor amendments to subdivisions
19 and partitions, etc. Worksheets are not
20 listed.]" (Emphasis added).

17 LUDO Sections 2.060.3 through 2.060.5 specify matters over
18 which the Hearings Officer, Planning Commission and Historic
19 Resource Review Committee have decision making authority, and
20 worksheets are not mentioned in these sections either. LUDO
21 Sections 2.090 and 2.100 require the director, within 45 days,
22 to act or hold a hearing on requests for "ministerial actions"
23 and "administrative actions," respectively.

24 The LUDO provides no right of appeal of ministerial actions
25 of the director. Appeals of administrative actions by the
26 director are controlled by LUDO Section 2.400, which provides

1 in pertinent part:

2 "1. Administrative Actions taken by the Director
3 shall be subject to review by the Hearings
4 Officer or Commission, pursuant to [LUDO Section]
5 2.060.3.c, and .4.c, [8]" respectively.

6 "2. Any person or entity who files a timely written
7 statement may appeal a decision of the Director
8 relevant to an Administrative Action. * * *

9 "* * * * *"

10 We conclude the LUDO provides for appeals only from
11 administrative actions of the director. Although we tend to
12 agree with petitioner that the county's decision determined
13 petitioner's "legal rights" and "duties," petitioner ignores
14 the above-emphasized portion of the definition of
15 administrative action. Under the LUDO, administrative actions
16 include only "proceedings pursuant to this ordinance [i.e., the
17 LUDO]." Worksheets are not mentioned anywhere in LUDO Chapter
18 two. Worksheets are not listed as an administrative action
19 under LUDO Section 2.060.1.a through v or as a ministerial
20 action under LUDO Section 2.060.2.a through j.

21 No party to this proceeding points to anything in the LUDO
22 establishing a procedure for granting worksheet clearance for
23 approval of churches as a permitted use in the FG zone.⁹

24 Because worksheets are not listed as an administrative action
25 the director is empowered to take under LUDO Section 2.060.1,
26 they are not decisions of the director which the LUDO provides
27 may be appealed in LUDO Sections 2.400, 2.060.3.c and
28 2.060.4.c. No party identifies any other LUDO provisions that

1 provide a right to appeal a decision by the director denying
2 worksheet approval, and we find none.¹⁰ The county acted
3 correctly in refusing to process petitioner's notice of
4 appeal. The fifth assignment of error is denied.

5 FOURTH ASSIGNMENT OF ERROR

6 Petitioner challenges the county's statements (which the
7 county now concedes are erroneous, see n 7) in its December 27,
8 1988 and February 10, 1989 letters that its September 10, 1987
9 letter was a final appealable decision.

10 We agree with the county that the December 27, 1988 letter
11 made clear and final the county's decision that the
12 September 4, 1987 planning clearance worksheet was denied, and
13 a conditional use permit application was required for a church
14 in the FG zone.¹¹ The December 27, 1988 letter was,
15 therefore, a final decision appealable to this Board, because
16 there remained no available remedy under the LUDO (see Fifth
17 Assignment of Error, supra).

18 Petitioner may not, in an appeal of the county's
19 February 10, 1989 letter, collaterally attack decisions that
20 were made by the county in an earlier decision (i.e., the
21 December 27, 1988 letter) which was not appealed to LUBA. Dyke
22 v. Clatsop County, ___ Or LUBA ___ (LUBA No. 88-110, March 8,
23 1989), slip op 7-8; Corbett/Terwilliger/Lair Hill Neighborhood
24 Association v. City of Portland, ___ Or LUBA ___ (LUBA Nos.
25 86-063/064, September 9, 1987), slip op 5; Cope v. City of
26 Cannon Beach, 15 Or LUBA 546, 549 (1987). Therefore, we reject

1 petitioner's challenge to the county's statement in its
2 December 27, 1988 letter that its September 10, 1987 letter was
3 a final appealable decision.

4 The challenged statement was repeated in the county's
5 February 10, 1989 letter. We do not believe the county made a
6 new decision on the matter of the finality of its September 10,
7 1987 letter. That portion of the February 10, 1989 letter is
8 simply a restatement of the decision that was made by the
9 county on December 27, 1988. Because petitioner did not file a
10 timely appeal to this Board of the December 27, 1988 letter, he
11 may not challenge the statement in this appeal of the February
12 10, 1989 letter.

13 The fourth assignment of error is denied.

14 FIRST THROUGH THIRD ASSIGNMENTS OF ERROR

15 In its December 27, 1988 letter, the county determined (1)
16 the worksheet was not an application for a discretionary permit
17 within the meaning of ORS 215.402(4) and 215.428; (2) the
18 worksheet was, therefore, not entitled to be reviewed under the
19 LUDO standards in effect when the worksheet was first
20 submitted; and (3) a conditional use permit is required to
21 allow a church on petitioner's FG zoned property. Petitioner
22 attempts, in his first three assignments of error, to challenge
23 each of these determinations.

24 We agree with the county that its December 27, 1988 letter
25 was a final decision. Because, as we conclude under our
26 discussion of the fifth assignment, there was no further

1 administrative remedy available to petitioner under the LUDO,
2 that decision was a final decision appealable to this Board.
3 As petitioner did not appeal that decision, he may not
4 challenge those determinations in his appeal of the
5 February 10, 1989 decision. Dyke v. Clatsop County, supra;
6 Corbett/Terwilliger/Lair Hill Neighborhood Association v. City
7 of Portland, supra; Cope v. City of Cannon Beach, supra.
8 The first, second and third assignments of error are denied.
9 The county's decision is affirmed.

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FOOTNOTES

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The worksheet (Record 13) is a one page county form with space for "Applicant Provided Information," "Planning Department Provided Information," and "Sanitation Provided Information." The worksheet includes a space for the planning department to grant "clearance" and specifies at the bottom of the form "[p]lanning approval shall be valid one (1) year from the date of clearance." Only the "Applicant Provided Information" portion of the worksheet in the record is completed.

In this opinion, we use the term "worksheet" as a shorthand reference encompassing both the county form bearing that title and the petitioner's request for whatever approval the county required on September 4, 1987 to build a church in the FG zone.

2

We understand the county's reference to "applications" to be a reference to the conditional use permit application and the two worksheets.

3

During this time period, local proceedings on the conditional use permit application for use of an existing residence on a separate parcel as a church were conducted, and the board of commissioners ultimately denied the conditional use permit. The county's denial of the conditional use permit was challenged in Smith v. Douglas County, supra.

4

ORS 215.428(3) provides:

"If the application [for a permit or zone change] was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

ORS 215.402(4) defines "permit" as follows:

"'Permit' means discretionary approval of a proposed

1 development of land under ORS 215.010 to 215.438 or
2 county legislation or regulation adopted pursuant
thereto."

3 _____
5

4 We understand this portion of the Director's December 27,
1988 letter to express a position that no "application" for a
5 "permit" within the meaning of ORS 215.402(4) and 215.428(3)
had ever been submitted.

6 _____
7 6

8 See n 4 and 5, supra.

9 _____
7

10 In its brief, the county concedes its September 10, 1987
letter was not a final decision of any kind.

11 _____
8

12 LUDO Section 2.060.3 and 2.060.4 provide as relevant:

13 "3. The Hearings Officer shall have the authority to
review and approve or deny the following matters * * *

14 * * * * *

15 "c. Appeal of Director's decision made pursuant
16 to [LUDO Section] 2.060.1.a, b, i, j, k, l,
m, q, s, v.

17 * * * * *

18 "4. The Planning Commission shall have the authority
19 to review and approve or deny the following
matters * * *

20 * * * * *

21 "c. Appeal of Director's decision pursuant to
22 [LUDO Section] 2.060.1.c, d, e, f, g, h, n,
o, r, * * *."

23 _____
9

24 We note petitioner does not argue under any of his
25 assignments of error that the director lacked authority to
render a final decision denying worksheet clearance.

26 /////

1 _____
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2 We cannot tell whether this is an oversight in the LUDO, as
3 petitioner appears to suggest, or whether it is a conscious
4 omission by the county. However, the reason for the omission
5 is irrelevant for purposes of deciding whether the county
6 correctly applied the LUDO in refusing to process petitioner's
7 notice of appeal to the planning commission.

8 _____
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9 This decision was reasonably clear in the September 10,
10 1987 letter. We agree with the parties that the September 10,
11 1987 letter was not a final decision in this matter based
12 largely on the portion of the letter advising petitioner that
13 the worksheet "will be held until you determine the course of
14 action you wish to pursue." Record 12.

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