

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3

4 HOOD RIVER SAND, GRAVEL & READY-)
5 MIX, INC. and HOWARD W. HOUSTON,)
6)
7 Petitioners,) LUBA No. 92-055
8)
9 vs.) FINAL OPINION
10) AND ORDER
11 OREGON DEPARTMENT OF GEOLOGY AND)
12 MINERAL INDUSTRIES,)
13)
14 Respondent.)

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17 Appeal from Oregon Department of Geology and Mineral
18 Industries.

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20 Steven L. Pfeiffer, Portland, represented petitioners.

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22 Larry Knudsen, Assistant Attorney General, Salem,
23 represented respondent.

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25 HOLSTUN, Referee; SHERTON, Chief Referee; KELLINGTON,
26 Referee, participated in the decision.

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28 DISMISSED 08/03/93

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30 You are entitled to judicial review of this Order.
31 Judicial review is governed by the provisions of ORS
32 197.850.

1 Opinion by Holstun.

2 Petitioners appeal a decision by respondent Department
3 of Geology and Mineral Industries (DOGAMI) granting a
4 "Provisional Surface Mining Permit."¹ Respondent moves to
5 dismiss, arguing that even if the challenged provisional
6 surface mining permit is properly viewed as a land use
7 decision, it is subject to appeal as an order in a contested
8 case and, ultimately, to review by the court of appeals, not
9 LUBA. We agree with respondent and dismiss the appeal.²

10 Under ORS 197.825(2)(d):

11 "[LUBA's jurisdiction does] not include those land
12 use decisions of a state agency over which the
13 Court of Appeals has jurisdiction for initial
14 judicial review under ORS 183.400, 183.482 or
15 other statutory provisions."

16 The question presented in this appeal is whether, assuming
17 the challenged decision is properly viewed as a land use
18 decision, "the Court of Appeals has jurisdiction for initial
19 judicial review under ORS 183.400, 183.482 or other
20 statutory provisions." If it does, LUBA does not have
21 jurisdiction to review the decision. See Interlachen, Inc.

¹DOGAMI is composed of a department "administered by a governing board composed of three citizens of Oregon appointed by the Governor." ORS 516.080. The powers and duties of the department are set out at ORS 516.030. The powers and duties of the governing board are set out at ORS 516.090.

²Respondent also argues the challenged decision is not a land use decision, regardless of the proper forum for review. We do not consider that question, because we agree with respondent's argument that we lack jurisdiction even if the challenged decision is a land use decision.

1 v. City of Fairview, ___ Or LUBA ___ (LUBA No. 92-157, July
2 19, 1993).

3 There is no dispute that the challenged decision is a
4 provisional surface mining permit, issued pursuant to
5 ORS 517.830(2). Appeals of such permits are governed by
6 ORS 517.890, which provides as follows:

7 "Appeals from determinations made by the
8 department in carrying out the provisions of ORS
9 517.700 to 517.951 and the rules and regulations
10 adopted thereunder shall be conducted in the
11 manner provided by the applicable provisions of
12 ORS 183.310 to 183.550 for appeals from orders in
13 contested cases." (Emphasis added.)

14 Petitioners do not dispute that orders in contested cases
15 are subject to review by the court of appeals. ORS
16 183.480(2); 183.482. Neither do we understand petitioners
17 to dispute that under ORS 183.480(2), 183.482 and
18 197.825(2)(d) (quoted supra), court of appeals review over
19 state agency land use decisions (that also qualify as
20 contested case orders) is exclusive.

21 However, petitioners argue that while DOGAMI's rules
22 provide that the applicant or permittee may request a
23 contested case hearing, interested or affected persons such
24 as petitioners are not given that right. OAR 632-30-056(1).
25 Petitioners contend that because no contested case hearing
26 was requested by the applicant or permittee, the challenged
27 decision is not an order in a contested case. Therefore,
28 petitioners reason, the decision is not subject to review by
29 the court of appeals, and LUBA has review jurisdiction.

1 Under petitioners' theory, the challenged decision is
2 an order in other than a contested case. We understand
3 petitioners to argue state agency orders in other than
4 contested cases would not be subject to the exception from
5 our review jurisdiction provided by ORS 197.825(2)(d),
6 quoted supra. Rather, such orders would be subject to
7 review either in circuit court under ORS 183.484 or by LUBA
8 under ORS 197.825(1) (if the order in other than a contested
9 case is a land use decision). We generally agree with
10 petitioners' understanding of the statutory provisions
11 governing jurisdiction for review of state agency orders in
12 other than contested cases. However, as explained below, we
13 do not agree that the challenged decision is reviewable by
14 this Board as an order in other than a contested case.

15 Petitioners and respondent disagree about whether a
16 contested case hearing was available to petitioners under
17 DOGAMI's rules. However, the important point is that the
18 statute provides that appeals of decisions such as the one
19 challenged in this case are governed by the statutory
20 provisions "for appeals from orders in contested cases."
21 ORS 571.890. The statutory reference is not limited to
22 appeals within the agency and the cited statutory provisions
23 set out procedures for appeals both within the agency and
24 from the agency's final decision to the court of appeals.

25 Petitioners' point that the agency may have committed
26 an error in not providing them a contested case hearing at

1 the agency level goes to the merits of the challenged
2 decision. Even if respondent erred in some way by not
3 providing petitioners a contested case hearing, that does
4 not convert the decision into an order in other than a
5 contested case over which this Board has jurisdiction,
6 assuming it is a land use decision. See Patton v. St. Bd.
7 Higher Ed., 293 Or 363, 366, 647 P2d 931 (1982) (agency
8 failure to follow contested case procedures goes to the
9 merits, "it does not control the court's jurisdiction"); see
10 also Oregon Env. Council v. Oregon State Bd. of Ed., 307 Or
11 30, 38, 761 P2d 1322 (1988). ORS 517.890 plainly provides
12 that all appeals of provisional surface mining permits are
13 governed by the provisions of "ORS 183.310 to 183.550 for
14 appeals from orders in contested cases." Thus, regardless
15 of whether contested case procedures were observed in all
16 required respects, appeal of the agency's final decision in
17 this matter is governed by ORS 183.480(2) and 183.482. ORS
18 183.480(2) and 183.482 provide that exclusive jurisdiction
19 to review DOGAMI's decision lies with the court of appeals.
20 Therefore, under those provisions and 197.825(2)(d), LUBA
21 does not have jurisdiction over this appeal.

22 This appeal is dismissed.