



1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the planning department's issuance  
4 of a building permit for a previously approved nonforest  
5 dwelling in the county's Woodland Resource (WR) zoning  
6 district.

7 **FACTS**

8 On July 23, 1992, Jackson County conditionally approved  
9 an application for a nonforest dwelling on a parcel  
10 zoned WR. Around that time, the county also approved a lot  
11 line adjustment making the subject parcel somewhat larger.

12 On January 19, 1993, the Land Conservation and  
13 Development Commission (LCDC) approved an enforcement order  
14 requiring the county, among other things, to adopt an  
15 ordinance limiting the duration of nonforest dwelling  
16 approvals in certain resource zoning districts, including  
17 the WR zoning district. See LCDC Enforcement Order  
18 93-EO-833, p. 24. The county appealed a portion of the  
19 enforcement order to the court of appeals.<sup>1</sup> Thereafter, it  
20 appears LCDC filed a request for declaratory and injunctive  
21 relief against the county, to enforce the enforcement order  
22 in its entirety, in the Marion County Circuit Court.<sup>2</sup> On

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<sup>1</sup>Apparently, the county only appealed that portion of the enforcement order limiting the duration of nonresource dwelling approvals in certain zones.

<sup>2</sup>We do not have sufficient documentation concerning the circuit court proceeding to know the substance of that proceeding. While the record in

1 July 7, 1994, as part of that circuit court proceeding, the  
2 county and LCDC entered into the following stipulation:

3       "\* \* \* Jackson County is preliminarily enjoined,  
4 during the pendency of this matter, from issuing  
5 building permits on the properties in dispute in  
6 this lawsuit. The parties further stipulate and  
7 agree that this injunction applies to: 1) All  
8 properties as to which dwelling approvals were  
9 issued in forest resource (FR), woodland resource  
10 (WR) and exclusive farm use (EFU) zones between  
11 January 30, 1992 and December 13, 1992. The  
12 parties stipulate and agree that this injunction  
13 shall last throughout the pendency of this  
14 lawsuit, and that no further appearance shall be  
15 required by the defendant Jackson County. The  
16 parties further move the court for an order  
17 staying this matter during the pendency of Jackson  
18 County's appeal, presently pending in the Oregon  
19 Court of Appeals, of enforcement order 92-EO-833  
20 of the Land Conservation and Development  
21 Commission."

22       "\* \* \* \* \*

23       "Based upon the stipulation of the parties hereto,  
24 the court hereby orders as follows:

25       "1) The defendant, Jackson County, is  
26 preliminarily enjoined, during the pendency  
27 of this lawsuit, from issuing building  
28 permits as to properties in forest resource  
29 (FR), woodland resource (WR), or exclusive  
30 farm use (EFU) zones on which dwelling  
31 permits were issued between January 30, 1992  
32 and December 13, 1992 or as to which  
33 applications for dwelling permits were  
34 received between January 30, 1992 and  
35 December 13, 1992;

36       "\* \* \* \* \*

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this appeal proceeding has not yet been submitted by the county, it is not clear that documentation concerning the circuit court proceeding would be included in the record of the county's approval of the disputed building permit in any event.

1           "3) This matter is stayed pending the outcome of  
2           the appeal of Land Conservation and  
3           Development Commission enforcement order 92-  
4           EO-833, presently pending in the Oregon Court  
5           of Appeals."           Petitioner's Motion For  
6           Submission of Record and Resistance to  
7           Respondent's Motion to Dismiss, Appendix 1,  
8           pp. 2-3.

9           On October 18, 1994, respondent issued the disputed  
10          building permit.   Apparently, no notice was given of the  
11          issuance of the building permit and no hearing was conducted  
12          thereon.   This appeal follows the planning department's  
13          issuance of the building permit.

14          **INTRODUCTION**

15          The county moves to dismiss this appeal, alleging this  
16          Board lacks review authority over the challenged decision.  
17          In response to the county's motion to dismiss, petitioner  
18          repeatedly asserts the county's 1992 approval of a nonforest  
19          dwelling on the subject parcel was erroneous.   However, no  
20          appeal of the 1992 nonforest dwelling approval was filed  
21          and, therefore, we may not at this point review the legal  
22          sufficiency of the 1992 nonforest dwelling approval.

23          Petitioner also appears to argue we should review the  
24          1992 nonforest dwelling approval decision because the county  
25          failed to provide adequate notice of that decision.  
26          However, the decision identified in the notice of intent to  
27          appeal is the 1994 decision approving the building permit,  
28          not the 1992 decision approving the nonforest dwelling.  
29          Therefore, whether the 1992 decision is or was potentially

1 appealable due to inadequate notice is not an issue  
2 cognizable in this appeal proceeding.<sup>3</sup>

3 This situation is distinguishable from Dyke v. Clatsop  
4 County, 97 Or App 70, 775 P2d 331, rev den 308 OR 592  
5 (1989), in which the county contemporaneously approved a  
6 conditional use permit and an exception to a Statewide  
7 Planning Goal. The court determined the notice of intent to  
8 appeal was broad enough to encompass both decisions. The  
9 court stated where the subject of one enactment is a  
10 required component of a decision finalized in another, the  
11 fact that the two decisions are memorialized separately does  
12 not mean they are not really one decision for purposes of an  
13 appeal to LUBA. Nothing in Dyke suggests that had the  
14 county several years later approved a building permit, the  
15 exception and conditional use permit would have become fair  
16 game for a LUBA appeal. Here, the last zoning decision  
17 necessary to allow the proposed nonforest dwelling was the  
18 1992 conditional use permit decision.

19 The only decision we may consider here is the approval

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<sup>3</sup>Even if we were to construe the notice of intent to appeal to challenge the 1992 nonforest dwelling decision, petitioner does not show the notice of intent to appeal was timely filed. Petitioner fails to establish that she was entitled to notice of the 1992 decision and failed to receive such notice. League of Women Voters v. Coos County, 82 Or App 673, 681 729 P2d 588 (1986). Further, even if the county failed to provide petitioner with required notice of the hearing in the proceedings leading to the 1992 decision, petitioner fails to establish that she appealed the 1992 decision within 21 days of the date she received actual notice of the 1992 decision or knew or should have known of the 1992 decision. See ORS 197.830(3); Leonard v. Union County, 24 Or LUBA 362, 374-76 (1992).

1 of the building permit.

2 **DECISION**

3 LUBA has "exclusive jurisdiction to review any land use  
4 decision \* \* \*."<sup>4</sup> ORS 197.825(1). ORS 197.015(10)(a)(A)  
5 provides the term "land use decision" includes:

6 "A final decision or determination by a local  
7 government \* \* \* that concerns the \* \* \*  
8 application of:

9 "(i) The [statewide planning] goals;

10 "(ii) A comprehensive plan provision; [or]

11 "(iii) A land use regulation[.]

12 " \* \* \* \* "

13 However, ORS 197.015(10)(b)(B) provides that the term  
14 "land use decision" does not include a local decision

15 "[w]hich approves or denies a building permit  
16 issued under clear and objective land use  
17 standards."

18 The county argues the issuance of the disputed building  
19 permit is not a land use decision because it was issued  
20 under clear and objective standards.

21 Petitioner asserts the building permit was not issued  
22 pursuant to clear and objective standards for three reasons.  
23 First, petitioner argues the county was required to consult  
24 the circuit court stipulation to determine whether the

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<sup>4</sup>ORS 197.825(1) also gives LUBA jurisdiction to review "limited land use decisions," as defined in ORS 197.015(12). However, no party contends the challenged decision is a limited land use decision, and we do not see that it is.

1 building permit should be issued. Petitioner's only  
2 argument in this regard is that the county failed to comply  
3 with the circuit court stipulation, and this constitutes a  
4 "blatant disregard" of it. If the circuit court stipulation  
5 is still in effect, the challenged decision violates it.  
6 However, the circuit court stipulation is clear and  
7 objective. Reviewing violations of a clear and objective  
8 standard applicable to the issuance of a building permit is  
9 explicitly removed from our review authority by  
10 ORS 197.015(10)(b)(B). Therefore, petitioner's remedy lies  
11 elsewhere.

12 Second, petitioner argues the county is required to  
13 apply the LCDC enforcement order to approve the disputed  
14 building permit, and that the enforcement order is not clear  
15 and objective. However, we are cited to nothing in the  
16 enforcement order governing the issuance of building  
17 permits, and we are aware of nothing in the order that  
18 governs them. At most, the enforcement order requires the  
19 county to adopt an ordinance limiting the duration of  
20 nonresource dwelling approvals, such as the unappealed 1992  
21 decision. However, no party argues such an ordinance has  
22 been adopted, and we are not aware of one. The enforcement  
23 order clearly does not purport to apply to the issuance of  
24 building permits, in any case. Because the enforcement  
25 order does not establish land use standards for the issuance  
26 of building permits, it is not relevant to determining

1 whether the challenged decision satisfies  
2 ORS 197.015(10)(b)(B).

3 Finally, petitioner argues:

4 "The approval of Applicant's request for nonforest  
5 dwelling was conditional. \* \* \* Conditions to be  
6 met prior to issuance of a permit requiring  
7 discretionary review [by the planning department]  
8 included:

9 "1) The proposed dwelling shall be located as  
10 noted on the map submitted with the  
11 application \* \* \*.

12 "2) Whether wetlands requirements were met.

13 "3) Whether accurate topographic information was  
14 submitted for review by the Building Division  
15 so that adequate structural standards could  
16 be applied.

17 "\* \* \* \* \*"<sup>5</sup> Petitioner's Response to Motion to  
18 Dismiss 5.

19 We assume petitioner refers to the following conditions  
20 of approval included in the 1992 nonforest dwelling  
21 approval:

22 "1) The proposed dwelling shall be located as

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<sup>5</sup>In this regard, petitioner also argues:

"It is also significant that there is no well on [the subject property] and a legal judgment would have to be made whether a building permit can be issued for a tax lot with no water rights, but which has a Class II stream running through it. Will the applicant be drawing water from the stream?"  
Petitioner's Response to Motion to Dismiss 6.

This does not establish the planning department approved the building permit based on anything other than clear and objective standards. Further, petitioner's rhetorical question sheds no light on whether discretionary standards were necessarily applied in the issuance of the disputed building permit.

1 shown on the map submitted with the  
2 application.

3 \* \* \* \* \*

4 "8) This site may include wetlands within its  
5 boundaries. Fill or removal activities in  
6 wetlands or other waters of the State  
7 typically require a permit from the Division  
8 of State Lands and/or the Army Corps of  
9 Engineers. Within 35 days of submitting a  
10 completed application, the Division of State  
11 Lands will notify you as to whether you need  
12 to apply for a state Removal-Fill permit.  
13 Jackson County is not liable for any delays  
14 in the processing of a state or federal  
15 permit.

16 "9) This parcel is characterized by generally  
17 steeply sloping land. At the time building  
18 permits are submitted for review by the  
19 Building Division, accurate topographic  
20 information will be required so that adequate  
21 standards can be applied.

22 \* \* \* \* \* Petitioner's Response to Motion  
23 Dismiss, Exhibit 3, pp. 4-6.

24 We understand petitioner to contend that these conditions  
25 imposed as part of the 1992 nonforest dwelling approval  
26 constitute discretionary land use standards which must be  
27 satisfied before the planning department issues a building  
28 permit.

29 Condition one simply requires examining a map included  
30 in the 1992 nonforest dwelling application to determine  
31 that the dwelling will be placed in the approved location.  
32 Regardless of whether condition one is properly considered a  
33 "land use standard" for issuance of the subject building  
34 permit, determining compliance with condition one does not

1 require the exercise of significant factual or legal  
2 judgment. Condition one is clear and objective. Heceta  
3 Water District v. Lane County, 24 Or LUBA 402, 408 (1993).

4 Condition eight is really not a condition of approval  
5 at all. It is no more than an advisory statement that if  
6 there are wetlands on the property, permits from certain  
7 state and federal agencies may be required. Thus, it does  
8 not establish or require compliance with any "land use  
9 standard."

10 Condition nine requires the provision of accurate  
11 information regarding topography, so that relevant  
12 provisions of the building code may be applied in issuing  
13 the building permit. Building or other structural code  
14 provisions are not "land use standards," as that term is  
15 used in ORS 197.015(10)(b)(B). Therefore, condition nine  
16 does not require that any "land use standard" be applied in  
17 issuing the subject building permit.

18 Petitioner has not demonstrated that the challenged  
19 decision approving a building permit is subject to any  
20 discretionary land use standards. Consequently, the  
21 challenged decision satisfies ORS 197.015(10)(b)(B) and,  
22 therefore, is not a land use decision.

23 This appeal is dismissed.