

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

JAN28'10 AM11:05 LUBA

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4 STEVE DIERKS and BARBARA DIERKS,
5 *Petitioners,*

6
7 vs.

8
9 JACKSON COUNTY,
10 *Respondent.*

11
12 LUBA No. 2009-135

13 ORDER DENYING MOTION TO DISMISS

14 Petitioners appeal a county decision that authorizes a fuelbreak reduction. The county
15 moves to dismiss, arguing that the challenged decision is not a land use decision. For the
16 reasons that follow, we agree with petitioners that the challenged decision is a land use
17 decision. Therefore, we deny the county's motion to dismiss.

18 **A. Introduction**

19 Under ORS 197.825(1), LUBA has exclusive jurisdiction to review "land use
20 decisions." As defined by ORS 197.015(10)(a)(A), and as relevant here, a land use decision
21 includes:

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

24 "* * * * *

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

26 We do not understand the county to argue that the challenged decision is not final or that the
27 decision does not apply the Jackson County Land Development Ordinance (LDO), which is a
28 "land use regulation," as ORS 197.015(11) defines that term. A final county decision that
29 applies a land use regulation is a land use decision unless one of the exclusions set out at
30 ORS 197.015(10)(b) applies. The county argues that the exclusion set out at ORS
31 197.015(10)(b)(A) applies. Under ORS 197.015(10)(b)(A), a decision "[t]hat is made under

1 land use standards that do not require interpretation or the exercise of policy or legal
2 judgment” is not a land use decision.

3 **B. The Challenged Decision**

4 The record in this appeal (and the decision that is before us in this appeal) is made up
5 of one page—a county form entitled: “Fuelbreak Reduction Authorization.” That form has
6 blank spaces and boxes at the top of the form for the applicant to identify the property owner
7 and the address of the property.¹ There are blanks for other information on the top part of the
8 form, and these entries have been completed to request that the 100-foot fuelbreak required
9 by LDO 8.7.4 on the east side of the applicant’s dwelling be reduced from 100 feet to 50
10 feet.² Apparently the fuelbreak to the north, south and west will remain 100 feet. The
11 remaining bottom part of the form is replicated below:

12 **“(To Be Completed By Fire District or ODF [Oregon Department of Forestry])”**

13 “FUEL BREAK REDUCTION: Approved Denied

14 “Comments/Conditions: _____

15 “FIRE SAFETY INSPECTION: Approved Denied

16 “Comments/Conditions: _____

17 “Authorized By: _____ Title: _____

18 “District: _____ Date: _____

19 In the decision on appeal: (1) the “Approved” boxes are checked; (2) the
20 Comments/Conditions lines are blank; (3) there is a signature in the Authorized By line; (4)
21 the entry in the Title line is “Fire Chief;” (5) the entry in the District line is “FD #5;” and the
22 entry in the Date line is “11/18/09.” As far as we can tell, the fire chief of Fire District

¹ A box on the form is checked to indicate that at “Plot Plan” was attached to the form. If a plot plan was submitted to the county with the completed form, no party has provided LUBA with a copy of that plot plan and it is not included in the one-page record.

² We discuss the LDO fuelbreak requirements later in this order.

1 Number 5 completed the bottom part of the form on November 18, 2009 and indicated that
2 he approved the requested fuelbreak reduction and first safety inspection. There are no
3 signatures on the form, except the fire chief's signature.

4 **C. The County's Fuelbreak Regulations**

5 LDO Section 8.7 is entitled "Wildfire Safety." LDO 8.7.1(B) requires a minimum
6 primary fuelbreak of 50 feet and a minimum secondary fuelbreak of 50 feet. LDO 8.7.4 and
7 8.7.5 authorize the county to reduce the LDO 8.7.1 minimum fuelbreak requirements and are
8 set out below:

9 8.7.4 "Fuelbreak Reductions

10 "The County, upon receipt of a written authorization from the fire
11 district having jurisdiction, * * * *may approve* a reduction in the width
12 of the fuelbreak as prescribed by the agency. The written authorization
13 will be made on forms supplied by the County and be signed by the
14 Fire Chief * * * with authority to make fuelbreak reduction decisions,
15 or their designee. Such authorizations will be processed as a Type 1
16 permit. Authorization to reduce the fuelbreak requirement will not,
17 however, release an applicant from compliance with any other
18 applicable standard of this Ordinance.

19 "When a Type 1 fuelbreak reduction for a structure is not authorized
20 by a fire district * * *, a fuelbreak reduction *may be approved* by the
21 County under a Type 2 review when the applicant documents, and the
22 County confirms through a site inspection, that one or more of the
23 following conditions affect development of the proposed use:

24 "A) A stream or irrigation canal, road, topographic feature, or other
25 site characteristic serves as an adequate fuelbreak;

26 "B) A better fire suppression and prevention strategy is proposed by
27 the applicant; or

28 "C) Because of parcel or lot configuration, a portion of the
29 fuelbreak would be located on an adjoining property, and an
30 adjustment of the building site is not practicable.

31 **"8.7.5 "Conditional Approval Requirements When Deemed Necessary**

32 "The County's decision to authorize a fuelbreak reduction or *approve* a
33 fire safety inspection will *consider the advice of the fire protection*

1 *district, * * ** and may impose additional standards or conditions and
2 require technical information as needed to assure compliance.” (Italics
3 and underlining added.)

4 The fire chief is an employee of Fire District Number 5. Since the fire chief is not an
5 employee of the county, he could not render a county land use decision.³ Stripped to its
6 essence, the county argues that the county’s approval of a fuelbreak reduction automatically
7 flowed from, or entirely depended upon, the fire chief’s authorization of the reduction, and
8 therefore was a county decision that was “made under land use standards that do not require
9 interpretation or the exercise of policy or legal judgment,” within the meaning of ORS
10 197.015(10)(b)(A).⁴

11 If the LDO actually delegated the fuelbreak reduction decision to the fire district or
12 required that the county grant any fuelbreak reduction that the fire district authorized, we
13 likely would agree with the county that it was not required under the LDO to exercise any
14 “policy or legal judgment” in this matter. However, the LDO does not appear to delegate the
15 fuelbreak reduction decision in this matter to the fire district, and while the county may well

³ Although the challenged decision is only signed by the fire chief, the county does not dispute that the challenged decision is a county decision. See n 4.

“The decision to issue the fuel break reduction authorization by the planning staff should be distinguished from the decision of the fire district to issue a written authorization.” Motion to Dismiss 4.

⁴ Attached to the county’s motion to dismiss is an affidavit signed by a county planner, which includes the following statements:

“2. Applicant submitted the [form] with the top portion of the form completed to Jackson County on November 3, 2009. On November 18, 2009 the Fire Chief for Fire District Number 5 completed and signed the bottom part of [the form] and returned it to Jackson County. * * *

“3. On November 18, 2009, Respondent Jackson County issued [the] Fuelbreak Reduction Authorization, to applicant. Neither I nor any other member of the County staff exercised any policy or legal judgment in issuing the Fuelbreak Reduction Authorization to applicant.

“4. Fire District Number 5 is a special district, and it is a governmental unit distinct from Jackson County. To the best of my knowledge the Fire Chief is an employee of the fire district, and he is not an employee of Jackson County.”

1 have simply gone along with the fire chief's authorization, the LDO does not appear to
2 require that the county go along with the fire district's authorization of a fuelbreak reduction.

3 Under the first paragraph of LDO 8.7.4 quoted above, the applicant receives
4 "authorization" from the fire district, but it is the county that "may approve" a fuelbreak
5 reduction that is authorized by the fire district. The "may approve" language in the first
6 paragraph suggests it is the county that is to approve the application and that the county may
7 also refuse to approve a fuelbreak reduction that the fire district authorizes. That is made
8 even clearer by the second paragraph of LDO 8.7.4, under which "a fuelbreak reduction may
9 be approved by the County," without fire district authorization, if the county finds that the
10 conditions set out in subsections A through C exist.

11 Finally, while LDO 8.7.5, also quoted above, does not completely follow the fire
12 district "authorization"/county "approval" distinction in LDO 8.7.4, LDO 8.7.5 makes it
13 reasonably clear that it is the county that makes the decision to grant or deny a fuelbreak
14 reduction, and the fire district is simply providing "advice" to the county, which is the
15 ultimate decision maker regarding requested fuelbreak reductions.

16 The only remaining question becomes whether the county's decision to approve or
17 deny a fuelbreak reduction is a decision "[t]hat is made under land use standards that do not
18 require interpretation or the exercise of policy or legal judgment." If so, it is not a land use
19 decision. As far as we can tell, while the county is required to consider the fire district's
20 advice, the LDO imposes few boundaries on the county decision maker's exercise of
21 discretion in making fuelbreak reduction decisions under LDO 8.7.4 and 8.7.5, and therefore
22 those code provisions are not "land use standards that do not require interpretation or the
23 exercise of policy or legal judgment." It follows that the county's decision does not fall
24 within the exemption provided by ORS 197.015(10)(b)(A).

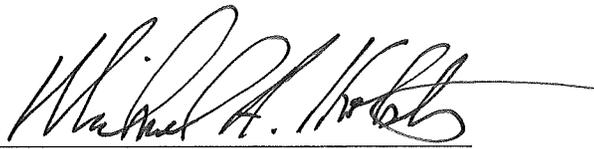
25 The county's motion to dismiss is denied.

1 On January 4, 2010, the same date we received the record from the county, we issued
2 an order suspending the briefing schedule until the county's motion to dismiss was resolved.
3 Because we deny the motion to dismiss, it is necessary to restart the briefing schedule.⁵

4 The petition for review shall be due 21 days from the date of this order. The
5 respondent's brief shall be due 42 days from the date of this order. The Board's final opinion
6 and order shall be due 77 days from the date of this order.

7 Dated this 28th day of January, 2010.
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Michael A. Holstun
Board Member

⁵ Although our order suspending the briefing schedule did not expressly suspend the deadline for petitioner to object to the record that was received by LUBA on January 4, 2010, petitioner shall have 14 days from the date of this order to object to that record. If petitioner files a record objection, we will establish a new briefing schedule after those objections are resolved.