BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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| TED LIEB and PATTY DUNCAN, Petitioners, vs. LANE COUNTY and JORGE MURILLO, Respondents. | LUBA No. 83-131 FINAL OPINION AND ORDER |

D. Michael Wells, Eugene, filed the petition for review and argued the cause on behalf of petitioners.

William A. Van Vactor, Eugene, filed a brief and argued the cause on behalf of Respondent County.

Michael E. Farthing, Eugene, filed a brief and argued the cause on behalf of Respondent-Intervenor Murillo.

KRESSEL, Referee, BAGG, Chief Referee, DUBAY, Referee participated in the decision.

DISMISSED 05/03/84

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1983, ch 827.

Opinion by Kressel.

NATURE OF THE DECISION

Petitioners appeal an order of the Lane County Land Use Hearings Officer rezoning a portion of a 5.7 acre lot near their property from AGT (Agricultural, Grazing and Timber) to M-2 (Light Industrial).

FACTS

In August 1983, Respondent Murillo applied for a zone change to permit a light industrial use on the lot in question. The zone change proceeding was conducted by the Lane County Hearings Officer. During the proceeding, a recommendation was received from the Eugene City Planning Department that only a portion of the lot should be rezoned. The hearings officer followed this recommendation. Accordingly, the rezoning order applied a new designation to a part of the property. About four acres remained in the AGT zoning designation. The rest of the property was designated M-2/ICU/SR.[1]

The hearings officer's decision was issued on November 15, 1983. The decision advised interested parties that the deadline for filing an appeal to the county commission was November 28, 1983. The deadline for appeal to the Land Use Board of Appeals was stated to be December 6, 1983. Petitioners did not appeal to the county commission, but instead filed a notice of intent to appeal with this Board on December 6, 1983. The notice states the decision sought to be

reviewed "decision final on November 15, 1983..." Notice of Intent to Appeal at 1.

JURISDICTION

After briefs were filed and oral argument was presented, the Board asked the parties to file supplemental briefs on the question of its jurisdiction in light of ORS 197.825(2)(a). The statute, enacted in 1983, provides in pertinent part as follows:

> "(2) The Jurisdiction of the Board:
>
> "(a) Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the Board for review."

As could be expected, Respondent Murillo took the position the Board lacked jurisdiction over the appeal because of petitioners' failure to first appeal the hearings officer's decision to the governing body of Lane County. Petitioners, however, argued no such appeal was required by ORS 197.825(2). They contended that under the Lane County Code, appeal of a rezoning decision to the governing body is not "available by right", but is instead a discretionary remedy. A brief filed by the county on this issue urged the Board to accept petitioners' position.

For the reasons set forth below, we find the Board lacks jurisdiction over this appeal. We believe ORS 197.825(2)(a) required petitioners to appeal the hearings officer's decision to the Lane County Commission before seeking state agency

review.

EXHAUSTION OF LOCAL REMEDIES UNDER ORS 197.825(2)(a)

Petitioners' direct appeal of the county hearings officer's decision to this Board brings into play the doctrine that "[o]rdinarily those who seek judicial relief must show they have exhausted their administrative remedies." Fifth Avenue Corporation v. Washington County, 282 Or 591, 614, 581 P2d 50 (1978). The Court of Appeals has described the reasons for application of the doctrine as follows:

> "(a) the 'first-level' decision-making process is not prematurely interrupted; (b) the local body with specialized expertise and with the most information available to it is given full opportunity to determine factual and policy questions with which it is familiar; (c) compromise solutions are promoted; (d) issues and facts are clarified and a complete and well-organized record is made; (e) protracted and expensive litigation may be avoided. See K. Davis, Administrative Law Treatise, §20.00 (1958); cf. Fifth Avenue Corp. v. Washington Co., 282 Or 591, 614, 581 P2d 50 (1978); Bay River v. Envir. Quality Comm., 26 Or App 717, 554 P2d 620 (1976). Fish and Wildlife Dept. v. LCDC, 37 Or App, 607, 614, 588 P2d 80 (1978), revsd., 288 Or 203, 603 P2d 1371 (1979).

The present case does not involve judicial review of agency action, and for this reason much of the decisional law pertaining to the exhaustion doctrine is of limited applicability.[2] Fish and Wildlife Department v. LCDC, 288 Or 203, 209-210, 603 P2d 1371 (1979). Although this Board performs an adjudicative function, (Valley & Siletz Railroad v. Laudahl, ___ Or ___, ___ P2d ___ (April 17, 1984) (slip op.), it is not a court. It is an agency created by the legislature

and as such, it is governed by legislative directives and limitations. Illustrative of this point is the Supreme Court's holding in Fish and Wildlife Department v. LCDC, supra. In that case an analysis of the applicable statutes governing the Land Conservation and Development Commission led to a ruling the agency could not dismiss an appeal because of the petitioner's failure to exhaust available remedies at the county level. The court stated:

> "An agency has the powers conferred upon it by statute. Hypothetically, the legislature could instruct LCDC to review local subdivision decisions only if all the local remedies had been vigorously pursued. This course would minimize post-hoc intrusion into local land use planning. By the same token it could instruct LCDC to review decisions without regard to local exhaustion. This would ensure that the decisions, though locally made, would be consistent with state objectives. Or the legislature could leave the option to LCDC to formulate its own rule. As we read the statutes, in the present circumstances review is to be granted without procedural preconditions. 288 Or at 210 (footnote omitted).

Manifestly, a different legislative mandate governs our analysis of the exhaustion question presented in this appeal. As previously noted, the legislature has expressly conditioned this Board's jurisdiction over appeals on the exhaustion of "...all remedies available by right" at the local level. ORS 197.825(2)(a). The general policy inherent in the statute is clear - intervention by the state should commence only after opportunities provided at the local level for addressing land use disputes have been pursued.[3] The policy echoes the broader statement of legislative intent set forth in ORS

197.005(3) that "...cities and counties should remain as the agencies to consider, promote and manage the local aspects of land conservation and development for the best interests of the people within their jurisdiction."

Petitioners and the county take the position direct appeal of the Lane County Hearings Officer's decision to this Board is authorized by ORS 197.825(2)(a), when that statute is read in conjunction with the Lane County Code. In their view, the county code grants the county hearings officer final decisionmaking authority and makes appeal to the governing body a purely elective or discretionary remedy (i.e., not one "available by right"). Petitioners urge us to read ORS 197.825(2)(a) to permit them to file a direct appeal in the interest of accelerated land use decisionmaking - an interest expressly embodied in state law. See e.g., ORS 197.805. To this argument, the county adds we should permit direct appeal because to do so would be consistent with one of the underlying purposes of the exhaustion doctrine, i.e., assuring that the decisionmaking agency (here, the county) has had the chance to bring its special expertise to bear on the questions presented. As the county puts it:

> "Here the purposes behind the exhaustion requirement have been fulfilled. No premature decision, lacking agency expertise was issued. To the contrary, an administrative agency decision complete with agency expertise [the expertise of the hearings officer] has been issued." Brief of Respondent Lane County Concerning Exhaustion of Administrative Remedies at 2.

We agree our analysis of the application of ORS

197.825(2)(a) to this case must take into account Lane County's procedures for decisionmaking in contested land use cases. The applicable county procedures are the starting place for determination of whether any local remedies were "available by right" to petitioners after the hearings officer issued his order on November 15, 1983.

As we read the county code, the critical provisions appear in §§14.505, 14.510 and 14.600. In pertinent part, those sections read as follows:

"14.505 Appealable Decisions and Manner of Review.

"(1) * * *

"(2) Decisions by the Hearings Official pursuant to LC 14.300 above may be appealed to the Board. Upon Director acceptance of such an appeal, the Board may elect to hear or not to hear the appeal, and shall follow LC 14.600 below in deciding whether or not to hear the appeal. Appeals heard by the Board shall be reviewed according to LC 14.400 above.

"(3) An appeal to the Board shall not be a jurisdictional requirement for any judicial or agency review of a decision by the Hearings Official."

"14.510 Appeal Period.

"A decision by the Director or Hearings Official, once reduced to writing and signed, shall become final unless appealed as provided in LC 14.500(1) above, within 10 days of the date of signing of the decision. * * *"

* * *

"14.600 Elective Board Review Procedure.

"(1) Purpose. This section establishes the procedure and criteria which the Board shall follow in deciding whether or not to conduct an on the record hearing for an appeal of a decision by the Hearings Official.

"(2) Initiating an Elective Review. Following the acceptance of an appeal from a Hearings Official decision and following an indication from the Hearings Official not to reconsider the decision, the Board shall determine whether or not they (sic) wish to conduct an on the record hearing for the appeal.

"(3) Hearing Deadline. The determination mentioned in LC 14.600(2) above shall be held by the Board within 14 days of the expiration of the appeal period from the Hearings Official decision.

"(4) Decision Criteria.

"(a) Within seven days of the determination mentioned in LC 14.600(2) above, the Board shall adopt a written decision to have a hearing on the record for the appeal or not to further review the appeal.

"(b) The order shall show compliance with one or more of the following criteria:

"i. The issue is of Countywide significance.

"ii. The issue will reoccur with frequency and there is a need for policy guidance.

"iii. The issue involves a unique environmental resource.

"iv. The Planning Director or Hearings Official recommends review.

"(5) On the Record Appeal. If the Board's decision is to hear the appeal on the record, then such a hearing shall be:

"(a) Scheduled for a hearing date within the Board and within 14 days of the date of the Board's decision.

"(b) * * *"

In our view, the foregoing code provisions make an appeal to the county commission a remedy "available by right" to a petitioner who opposes a decision by the Lane County Hearings

Officer. Although it is clear the county commission is not obligated to accept every appeal filed under §14.505(2), the code does obligate the commission to respond to every appeal request. See §14.600(2) and (4), supra. In other words, the code affords a petitioner the opportunity, i.e., the right, to set a local-level appeal in motion. In our view, the procedure outlined in the code provides a sufficiently available local remedy for the purposes of the exhaustion requirement contained in ORS 197.825(2)(a). We believe the legislature intended that petitioners should avail themselves of such local procedures before invoking state agency jurisdiction.[4]

Despite the arguments made by petitioners and the county, see page 6, supra, our decision on this question neither interferes with the goal of accelerated land use decisionmaking, nor is inconsistent with the purposes underlying the exhaustion doctrine. The county code provides a clear-cut, time-limited procedure for the determination of whether an appeal will be reviewed by the county commission. Circumvention of that procedure by direct appeal to this Board avoids a delay of a few weeks at most. Importantly, however, the small saving of time comes at the expense of a critical feature of the state's land use program - the direct participation of local elected officials in matters of local concern.[5]

Moreover, our decision is thoroughly consistent with the purposes underlying the exhaustion doctrine. See page 4,

supra. First, by requiring a petitioner to pursue an available local remedy, we permit the county decisionmaking process to run its course without interruption. Second, we make it possible for the governing body, which is the legislative source of the ordinances initially applied by the hearings officer, to clarify and determine factual and policy issues presented by land use controversies. Third, we open the door to the increased possibility of compromise and the avoidance of land use litigation. Finally, by our approach under ORS 197.825(2)(a), we promote the opportunity for development of a more complete, well-organized record.

Petitioners make one additional argument against application of the statutory exhaustion requirement, but we reject the argument. They direct our attention to authorities recognizing an exception to the exhaustion rule where pursuit of the additional agency-level remedy would be futile, i.e., where it is certain exhaustion of the additional remedy would result in an adverse decision. See, Albright v. Employment Appeals Board, 32 Or App 379, 382, 574 P2d 344 (1978); Metropolitan Service District v. Board of Commissioners of Washington Co., 1 Or LUBA 282, 286 (1980). Petitioners claim the futility exception is applicable here because, after they filed their appeal to this Board, they offered, unsuccesstully, to drop the state-level appeal if the county commission would agree to review the hearings officer's decision.

In support of their argument, petitioners have provided us

with correspondence indicating as follows: (1) on December 28, 1983 counsel for petitioners conditionally offered to dismiss the LUBA appeal, (2) on January 3, 1984 county counsel agreed to present the proposal to the county commission but stated a negative recommendation would probably be made because the county had already incurred the expense of filing the record with LUBA and (3) on January 19, 1984 county counsel advised petitioners' counsel the commission had declined the proposal.

Assuming, arguendo, ORS 197.825(2)(a) should be read to include a futility exception, we do not believe this case warrants excusing petitioners' failure to pursue a timely appeal before the Lane County Commission. The facts presented do not indicate an appeal filed pursuant to the code would certainly have been rejected by the commission. Rather, the facts indicate only that after the appeal period had expired and after the county had incurred the expense of filing the record in the LUBA proceeding, the commission declined to accept petitioners' proposal. These circumstances present no basis for us to depart from the express exhaustion requirement of ORS 197.825(2)(a). Were we to find them sufficient to fall within the futility doctrine we would be converting the doctrine from one of narrow scope to one having few limits. Albright v. Employment Appeals Board, supra, 32 Or App at 382-383.

Based on the foregoing, this appeal must be dismissed for lack of jurisdiction under ORS 197.825(2)(a).

Dismissed.

FOOTNOTES

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1 The rezoning included two overlay classifications, ICU (Industrial-Commercial Urbanizing) and SR (Site Review).

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2 Perhaps this is not to our disadvantage, considering the chaotic state of the case law pertaining to the doctrine. As Professor Davis puts it in a recent treatise:

> "The oft-repeated statement that administrative remedies must be exhausted is false about as often as it is true. The most quoted pronouncement about exhaustion is the unqualified statement of "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938). That statement is the law about half the time, and determining whether it is the law in any particular circumstances is usually difficult and often impossible." KC Davis, Administrative Law Treatise (1982 Supp), §20.11 at 280 (1982).

One respected federal judge has referred to a problem of exhaustion, combined with jurisdiction (as in the present case) and mootness as "a veritable nightmare." Ellis v. Blum, 643 F2d 28, 70 (2d Cir 1981) (Friendly, J.).

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3 Even before enactment of ORS 197.825(2)(a), our decisions consistently applied the exhaustion rule to appeals of local government actions. The decisions were based on the idea, reiterated in this opinion, that state policy favoring local decisionmaking precludes intervention by a state agency until all local level procedures have been pursued. Griffiths v. City of Portland, 1 Or LUBA 192 (1980); City of Beaverton v. Washington County, 7 Or LUBA 121 (1983).

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4 We note this legislative policy is at odds with Lane County Code §14.505(3), quoted at page 7 of this opinion. The statute requires available local remedies to be pursued, while the code appears to authorize avoidance of such remedies. To

the extent the two laws are in conflict, it is clear the local ordinance must give way. Bryant v. Clackamas County, 56 Or App 442, 448, 643 P2d 649 (1982); Overton v. Benton County, 61 Or App 667, 658 P2d 574 (1983).

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[5] In its brief, the county stresses that the code's criteria for commission review of land use appeals are worded so as to make review available only in unusual cases. Whether or not this is an accurate characterization of the criteria, the county's argument is beside the point. The important point for purposes of ORS 197.825(2)(a) is that the appeal remedy is available until the county commission evaluates the request under the code criteria. Under ORS 197.825(2)(a), appeal to this Board is permissible only after the county commission has either (1) elected not to review an appeal or (2) elected to hear an appeal and conducted the necessary proceedings to reach a final determination.