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

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BRIAN BURCHAM,)	
)	
Petitioner,)	LUBA Nos. 84-089
)	84-095
vs.)	
)	FINAL OPINION
YAMHILL COUNTY,)	AND ORDER
)	
Respondent.)	

Appeal from Yamhill County.

Margaret D. Kirkpatrick, Portland, filed the Petition for Review and argued the cause on behalf of petitioner. With her on the brief were Stoel, Rives, Boley, Fraser & Wyse.

Daryl Garrettson, McMinnville, filed a response brief and argued the cause on behalf of Respondent County.

John W. Hitchcock, McMinnville, filed a response brief and argued the cause on behalf of Respondent-Applicant Evelyn LaCroix.

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

REMANDED 03/22/85

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioner appeals grant of lot of record approvals for two
4 parcels of land in Yamhill County.¹ The approvals were given
5 by the county planning director pursuant to Section 1204.01 to
6 1204.04 of the Yamhill County Zoning Ordinance.² The
7 approvals, Lot of Record Exception 61-84 and Lot of Record
8 Exception 64-84 (hereinafter, LOR), on appeal here are
9 consolidated for our review.

10 JURISDICTION AND STANDING

11 Standing is an issue in this case. Respondent argues
12 petitioner has no standing to appeal these decisions to the
13 Land Use Board of Appeals. Its argument, however, is a
14 replication of its jurisdictional claim that the decisions at
15 issue are not land use decisions subject to LUBA review. We
16 rejected that claim in our order denying respondent's motion to
17 dismiss of January 22, 1985. We now believe there is an
18 additional reason for us to conclude the decisions are subject
19 to our review.

20 The county urges strongly that the actions on appeal here
21 are not land use decisions because they fall within the acts
22 described in ORS 197.015(10)(b). The statute provides that the
23 definition of a "land use decision"

24 "[d]oes not include a ministerial decision of a local
25 government made under a clear and objective standards
26 land use regulation and for which no right to a
hearing is provided by the local government under ORS

1 215.402 to 215.438 or 227.168 to 227.185."
2 We did not find the county's argument persuasive in our
3 discussion of the issue in the order of January 22, 1985, and
4 we do not find it persuasive now. As explained below, the
5 county ordinance does provide for a hearing as part of its
6 appeal mechanism. We believe this appeal mechanism, including
7 the right to a hearing, places the decisions on review here
8 into the category of contested cases as described in ORS
9 215.402 to ORS 215.438. For this reason, the lot of record
10 decisions are not decisions "for which no right to a hearing is
11 provided...."

12 The county ordinance at Section 1404.01 provides a right of
13 appeal of any decision by an affected party. The ordinance
14 states:

15 "...where it is alleged that there is error in any
16 order, requirement, decision or determination made by
17 the Director in the interpretation of this Ordinance,
18 an appeal therefrom may be made by an affected party
only to the Board on a form prescribed by the
Director." Yamhill County Zoning Ordinance, Section
1404.01.³

19 Respondent insists this provision does not apply to lot of
20 record decisions because in such cases, "affected party" in
21 Section 1404.01 refers only to the applicant for the lot of
22 record determination. The county says no other person may
23 appeal a lot of record decision under this subsection of the
24 county zoning ordinance. We disagree.

25 If the county wished to restrict the right to appeal to
26 applicants, as it now contends, it could easily have done so in

1 the zoning ordinance. It did not. Instead, it made appeals
2 available to "an affected party." We construe the term
3 "affected party" to have its ordinary meaning, i.e., appeals
4 are available to those, including but not limited to the
5 applicant, who can demonstrate the challenged decision
6 significantly affects their interests.

7 Section 1404.01, however, does include language suggesting
8 the applicant is indeed not the only affected party. There is
9 a limitation in Section 1404.01 on those who may appeal a
10 decision:

11 "An affected party who has had an opportunity to
12 request a hearing, pursuant to the Type B application
13 procedure as set forth in Section 1301, and has not so
14 requested a hearing, shall have waived his right to
15 appeal the decision of the Director to the Board."

16 Section 1301, referred to supra, includes procedures for
17 appeal by persons other than the applicant. For example, in
18 the "Type B" procedure, persons owning land adjoining the
19 property subject to an application may request a hearing. See
20 Yamhill County Zoning Ordinance, Section 1301.01(b). If the
21 affected party referred to in Section 1404.01 included only the
22 applicant, there would be no purpose in stating that those who
23 failed to request a hearing under Section 1301 are thereby
24 denied an avenue of appeal under Section 1404.01.

25 We conclude, therefore, that the "affected party" referred
26 to in Section 1404.01 includes more than the applicant for the
administrative determination in question. Anyone who can
demonstrate an affect on his or her interest may appeal.

1 Secondly, we find petitioner has demonstrated he is such an
2 affected party under the terms of the ordinance. Petitioner
3 claimed the decision granting the lot of record approvals makes
4 possible development which will cause injury to petitioner's
5 interest. Petitioner says that if, pursuant to lot of record
6 approvals, the applicants obtain building permits and construct
7 buildings on the lots,

8 "traffic will increase along the road, resulting in
9 greater maintenance costs, increased traffic and
10 associated traffic hazards, and increased noise and
11 dust in the vicinity of petitioner's house." Petition
12 for Review at 2.

13 Petitioner also asserts approval of the lots of record will set
14 precedent for other such approvals in the area resulting in
15 additional development. This additional development will
16 increase "negative traffic impacts in petitioner's
17 neighborhood," according to petitioner. Petition for Review
18 at 3. Petitioner adds that he is aggrieved by the decisions
19 because he advised the county in writing that the properties
20 did not meet applicable criteria for lot of record approval
21 and, nonetheless, respondent granted the approvals.

22 These claims are sufficient to qualify petitioner as an
23 "affected party" under Section 1404.01.⁴ Accordingly, the
24 exemption relied on by the county in ORS 197.015 is not
25 applicable. The decisions in question are reviewable land use
26 decisions.

27 One other issue requires our attention. ORS 197.825(2)(a)
28 limits our review of land use decisions to

1 "those cases in which the petitioner has exhausted all
2 remedies available by right before petitioning the
board for review."

3 In LOR 61-84, petitioner was advised of the planning director's
4 decision to approve the lot of record exception. When
5 petitioner attempted to appeal the decision to the Yamhill
6 County Commission, however, the planning department declined
7 the appeal, stating the county ordinance provided no mechanism
8 for appeal of a lot of record decision. The attempted appeal
9 and rejection of the same occurred on October 24, 1984.

10 Petitioner does not state the date he received notice of
11 the decision in LOR 64-84, but we understand that notice was
12 received after Respondent County had rejected petitioner's
13 appeal of LOR 61-84. As we understand the record, petitioner
14 did not attempt to file an appeal of LOR 64-84 with the county.

15 Ordinarily, a potential petitioner is obliged to attempt to
16 exercise all rights of appeal existing within the local
17 government before appealing to LUBA. Lyke v. Lane County, ____
18 Or LUBA ____ (LUBA No. 83-121, Slip Opinion 5/03/84). See Yoder
19 v. City of West Linn, ____ Or LUBA ____, (LUBA No. 84-103, Slip
20 Opinion of 2/01/85). In LOR 61-84, petitioner made this
21 attempt. We do not believe failure to make a similar attempt
22 in LOR 64-84 precludes petitioner from bringing the issue to us
23 under the circumstances of this case. It is clear from the
24 circumstances surrounding the attempted appeal of LOR 61-84,
25 that an appeal of LOR 64-84 to the county would have been
26 futile. We do not believe petitioner is obliged to engage in

1 exercises of futility. See Fifth Avenue Corporation v.
2 Washington County Board of Commissioners, 282 Or 591, 581 P2d
3 50 (1978).

4 ASSIGNMENT OF ERROR No. 1

5 "Respondent Failed to Follow the Procedures Required
6 by Statute and Ordinance for Review of Land Use
Applications."

7 Petitioner claims the county was obliged by its zoning
8 ordinance, particularly Section 1301.01, to provide interested
9 parties with a public hearing.⁵ The planning department
10 denied petitioner's attempt to appeal the decision in LOR No.
11 61-84. Petitioner claims his right to appeal in LOR No. 64-84
12 was also denied because the county failed to provide the
13 petitioner with any information about his appeal rights. He
14 was therefore unable to introduce evidence to show the lots in
15 question did not meet the criteria for a lot of record
16 exception, according to petitioner.

17 We agree petitioner was entitled to appeal LOR 61-84 and
18 LOR 64-84. Petitioner was improperly denied a right to present
19 evidence and obtain a ruling on whether the application met the
20 requirements for a lot of record exception. As explained
21 above, Section 1404.01 of the ordinance provides a right of
22 appeal to an affected party when it is alleged an error was
23 made by the planning director.

24 We conclude this matter must be remanded to Yamhill County
25 to permit petitioner to prosecute an appeal of LOR 61-84 and
26 LOR 64-84 in accordance with Section 1404.01 of the zoning

1 ordinance.

2 ASSIGNMENT OF ERROR NO. 2

3 "Respondent Failed to Make the Findings of Fact
4 Required to Support a Land Use Decision."

5 ASSIGNMENT OF ERROR NO. 3

6 "Applicants' Lots Do Not Meet the Criteria for Lot of
7 Record Approval Set Forth in Senate Bill 419 and the
8 Zoning Ordinance.

9 "1. The lots were not lawfully transferred to the
10 present owners.

11 "2. Single-family dwellings were not permitted on
12 Applicants' lots when Applicants acquired them."

13 The record in this case contains no findings of fact or
14 conclusions of law explaining the administrator's decisions to
15 grant the requested approvals. The record filed by the county
16 includes very little information on the lots and nothing that
17 would allow us to review the adequacy of the decision under the
18 county's ordinance. On remand, the county will be in a
19 position to review the applications under its appeal procedures
20 and to adopt findings of fact and conclusions of law explaining
21 the decision. This Board will then be available to review it
22 for error, if a further appeal is filed. We therefore sustain
23 the second assignment of error.

24 Petitioner's third assignment of error goes to the merits
25 of whether or not the lot of record approvals were properly
26 given under applicable county ordinance criteria. Without a
more complete factual record and an order containing findings
of fact and conclusions of law, we are not able to consider

1 petitioner's complaints. We are, therefore, unable to answer
2 petitioner's third assignment of error.⁶

3 This matter is remanded to the Yamhill County Board of
4 Commissioners.

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FOOTNOTES

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4 One parcel is 4.7 acres in size and the other is 6.5 acres
5 in size.

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7 Section 1204.04 et seq of the Yamhill County Zoning
8 Ordinance controls the issuance of lot of record approval under
9 the following standards:

10 "Mandatory Issuance of Residential Building Permits on
11 Certain Lots of Record.

12 "A. The County may not deny a permit for the
13 construction or placement of a principal dwelling
14 on, and the requirements of Section 1204.06
15 through 1204.09 of this Ordinance shall not be
16 mandatory for, any lot of record which:

17 "1. Is located within the unincorporated area of the
18 County, outside of the Willamette River Greenway,
19 outside of areas designated on the Comprehensive
20 Plan as being in a flood plain or geologic hazard
21 area, or designated for urban, industrial or
22 commercial development; and

23 "2. Was lawfully created by or transferred to the
24 present owner by a deed or sales contract
25 executed after December 31, 1964 and before
26 January 1, 1975; and

"3. Meets all applicable requirements for
establishment of a dwelling, such as sanitation
and building code requirements, which are not the
result of zoning, rezoning, adopting or amending
a Comprehensive Plan or changing the text of a
zoning code; and

"4. If located in an area designated on the
Comprehensive Plan as "AFLH" or "CF", has been on
farm or forest deferral for a total of not more
than four (4) years.

"B. If greater than possessory interests are held in
two (2) or more contiguous lots of record by the
same person, parents, children, brothers,
sisters, spouses, or a single partnership or

1 business entity, separately or in tenancy in
2 common, for the purposes of subsection
3 1204.04(A), such contiguous lots of record shall
4 be considered a single lot of record."

5 This section follows 1983 Oregon Laws, Chapter 826,
6 Sections 14 and 15.

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Section 1404.01 reads:

"Appeals from Decisions of the Planning Director.

"Where it is alleged that there is error in any order,
requirement, decision or determination made by the
Director in the interpretation of this Ordinance, an
appeal therefrom may be made by an affected party only
to the Board on a form prescribed by the Director.
Such written appeal shall be filed with the Director
within fifteen (15) days of the decision on a proposed
action and shall be accompanied by the appropriate
filing fee. Upon receipt of a complete appeal
request, a public hearing before the Board shall be
scheduled and public notice mailed and published
according to the public notice requirements contained
in Section 1402. An affected party who has had an
opportunity to request a hearing, pursuant to the Type
B application procedure as set forth in Section 1301,
and has not so requested a hearing, shall have waived
his right to appeal the decision of the Director to
the Board.

"A. Board Action.

"In hearing and deciding such an appeal:

"1. The Board may affirm, modify or reverse all
or part of the action of the Director so
long as such action is in conformity with
the Ordinance;

"2. The Board shall make findings based on the
testimony or other evidence received by it
as justification for its action; and

"3. The Board, on its own motion, may order
review of any decision of the Director
within fifteen (15) days of the decision,
pursuant to Section 1403 for Board review."

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The effect on petitioner is sufficient to place him in the class of adversely affected or aggrieved parties referred to in ORS 197.830(3). As such, petitioner has standing to bring these proceedings. See Warren v. Lane County, supra and Jefferson Landfill v. Marion County, 297 Or 280, 686 P2d 310 (1984).

We do not understand Respondent County to challenge petitioner's standing for failure to make an "appearance" before the county. Such an appearance is required under ORS 197.830(3)(b). However, we note petitioner did object to the grant of lot of record approvals in writing and attempted to make an appearance, whether orally or in writing, at every opportunity provided for by the county. We believe these efforts satisfy the statutory requirement.

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Section 1301.01 of the zoning ordinance provides that all applications received under the ordinance must be reviewed under an A, B or C type procedure. Each procedure provides interested parties with the right to a hearing either before a decision is made, or afterwards in the form of an appeal to the county board of commissioners. See also our discussion in our Order Denying Motion to Dismiss, January 22, 1985.

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For some discussion of the factual history of the land use difficulties surrounding "Eagle Point Ranch." See Yamhill County v. Ludwick, 294 Or 778, 663 P2d 398 (1983). Included in the case, is a discussion of what is meant by the term "legal lots of record," as the term appeared in a earlier section of the Yamhill County Zoning Ordinance.