BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PORTLAND AUDUBON SOCIETY, DENNIS TYLKA and 1000 FRIENDS OF OREGON,	)	LUBA No. 85-032
Petitioners,	)	FINAL OPINION AND ORDER
vs.	)	
CLACKAMAS COUNTY,	)	
Respondent.	)	

Appeal from Clackamas County.

Mark J. Greenfield, Portland, filed the petition for review and argued the cause on behalf of petitioners.

Michael E. Judd, Oregon City, filed a response brief and argued the cause on behalf of Clackamas County.

Edward I. Engel, Portland, filed a response brief and argued the cause on behalf of Respondents Seller, Peters and Marshall. With him on the brief were Goldsmith, Siegel, Engel & Littlefield.

Michael A. Holstun, Salem, filed a response brief on behalf of the Department of Land Conservation and Development.

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

DISMISSED 08/20/85

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

Opinion by Kressel.

NATURE OF THE DECISION

Petitioners appeal a comprehensive plan map amendment designating the boundaries of a wetland.

FACTS

In August, 1982, 58 acres near the unincorporated Welches community were designated a "Study Area" on respondent's Mt. Hood Community Plan. Approximately two years later, after field studies were completed, respondent adopted Order 84-837. The order deleted the study area designation and classified 18 of the 58 acres as wetlands. Development is prohibited on these lands.

In Portland Audubon Society v. Clackamas County, 12 Or LUBA 269 (1984) petitioners challenged Order 84-837. We remanded the order to the county, stating:

> "The county should make findings clarifying whether or not man-made wetlands were a consideration in establishment of the 18-acre Welches Wetland boundary. (Citation omitted.) There must also be findings supported by substantial evidence in the record justifying the wetland boundaries including the forest opening on the Peters-Seller property, and the boundary segment outside the Peters-Seller property. In addition, the county should explain how the definition of wetland is to be interpreted when both upland and wetland plant indicators are present as discussed above." 12 Or LUBA at 279.

The governing body took up our remand order at a public hearing on February 27, 1985. At the conclusion of the hearing, Order 85-365 (the order challenged in this appeal) was adopted.

In pertinent part, Order 85-365 can be summarized as follows:

1. The county makes no regulatory distinction between natural and man-made wetlands. Both are to be classified as wetlands on the plan map.

2. In interpreting the plan's "wetland" definition, the key factor is the extent to which wetlands species cover a site. An area is a wetland if there is a preponderance of wetland plant coverage.

3. The area known as the forest opening on the Peters-Seller property should not be classified as wetlands because, according to an expert's report, there is not a prevalence of wetland obligate species.

4. A staff prepared map of the Peters-Seller property correctly establishes the wetland boundaries on that property.[1] Record at 2-3.

MOTION TO DISMISS

The individual respondents move to dismiss the appeal of Order 85-365. In support of the motion, they rely on ORS 197.825(2)(a). The statute reads:

"(2) The jurisdiction of the board [LUBA]:

"(a) Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review"

Respondents claim that petitioners should have sought reconsideration of Order 85-365 by the Clackamas County governing body before invoking our review jurisdiction. In the context of ORS 197.825(2)(a), they claim reconsideration was a remedy "available by right" to petitioners. We agree, for the reasons stated below.

We have addressed claims under ORS 197.825(2)(a) in several recent cases. In Lyke v. Lane County, 11 Or LUBA 117 (1984), petitioners sought our review of a county hearings officer's approval of a zone change. Relying on the statutory exhaustion rule, we held petitioners should have sought review of that decision by the county governing body before appealing it to this Board. We reached this conclusion even though the ordinance in question did not entitle petitioners to obtain review of the decision by the governing body, but instead gave the body discretion over whether the appeal should be entertained. We construed ORS 197.825(2)(a) to encourage resolution of land use controversies at the local level when possible, an objective thwarted by petitioners' direct appeal to this Board.

Our dismissal of the appeal in Lyke was sustained by the Court of Appeals. Lyke v. Lane County, 70 Or App 82, 688 P2d 411 (1984). In pertinent part, the Court's opinion states:

> "The exhaustion requirement, as interpreted, requires that petitioners use all local remedies before invoking state jurisdiction, furthering the legislative goal of resolving land use issues at the local level whenever possible. The critical issue is not whether a procedure is required by the county or whether the county must accept review, but whether there is a procedure available to ask for local review and the right to ask is unconditionally granted." 70 Or App at 86 (emphasis in original).

The local remedy petitioners should have pursued in Lyke was an appeal to the governing body of a hearing officer's decision. Two subsequent cases involving ORS 197.825(2)(a)

focused attention on the remedy at issue in this case, i.e., a petition for reconsideration of a decision by the governing body.

In Yoder v. City of West Linn, ___ Or LUBA ___, (LUBA No. 84-103, February 1, 1985) petitioner unsuccessfully opposed a conditional use permit application before the city council. After the council's decision was appealed to this Board, we took up the question whether, under the city zoning code, reconsideration by the council was a remedy "available by right" which petitioner should have first exhausted. After reviewing the code and the court's policy discussion in Lyke v. Lane County, supra, we answered this question affirmatively. The appeal was therefore dismissed.

Two features of the zoning code involved in Yoder influenced our decision to classify reconsideration as a remedy covered by the statutory exhaustion requirement. First, the code authorized interested parties to petition for reconsideration, thereby making the remedy available. See Fifth Avenue Corp. v. Washington County, 282 Or 591, 618-21, 581 P2d 50 (1978). We contrasted the availability of the remedy under the city code with a more restrictive reconsideration provision we had considered in a prior case.[2] While the provision in Yoder authorized a party to petition the city council for reconsideration, the provision in the prior case authorized reconsideration only on motion by a member of the governing body. Noting the difference between

the two provisions, we stated:

> "Although the local provision at issue in Columbia River Television involved a rehearing procedure, we did not dismiss the appeal, as we do here, under the exhaustion requirement of ORS 197.825(2)(a). This is because in Columbia River Television we were cited to no provision in the zoning code permitting a potential petitioner to request the governing body to undertake a rehearing. Rehearing was available exclusively upon motion of the county board. Thus, in contrast to this case, the Multnomah County Code provided no remedy 'available by right' under ORS 197.825(2)(a) to the petitioner. Because such a remedy is provided in the City of West Linn Development Code, the present appeal must be dismissed under ORS 197.825(2)(a)." Yoder v. City of West Linn, supra, Slip Op. at 5, n. 1 (emphasis in original).

The second significant feature of the code at issue in Yoder was the requirement that the governing body take action on a petition for reconsideration. This requirement was critical to our characterization of the remedy as one available by right to petitioner. Stated in other terms, we construed ORS 197.825(2)(a) to apply where the local ordinance extended two rights to a petitioner for reconsideration: (1) the right to request relief from local officials, and (2) the right to a response to that request.[3] Had the code in Yoder permitted the city counsel to disregard or shelve the petition for reconsideration indefinitely, we would not have characterized the remedy as one available to petitioner "by right" under ORS 197.825(2)(a).

We stressed the importance of the right to a governmental response to a petition for reconsideration in Spalding v. Josephine County, ___ Or LUBA ___ (LUBA No. 85-028) (Order

Denying Motion to Dismiss, July 25, 1985), a case arising after Yoder was decided. There, as in Yoder, respondents claimed that petitioners' failure to seek reconsideration of the county's decision warranted dismissal of the appeal to this Board under ORS 197.825(2)(a). However, after reviewing the ordinance in question, we denied the motion for dismissal. We stated:

> "This rehearing provision is unlike the one under review in Yoder v. City of West Linn, ___ Or LUBA ___, (LUBA No. 84-103, Slip Op. dated February 1, 1985). In Yoder, we held a petitioner had failed to exhaust administrative remedies where the local ordinance provided a request for rehearing must be granted or denied by the governing body. Here, in contrast, the permissive language of Section 17 of the Josephine County Rules allows the governing body to ignore a petition for rehearing for an indefinite period. Therefore, while rehearing may be available in Josephine County, it is not a remedy 'available by right.'" Order Denying Motion to Dismiss at 2 (emphasis in original).

The foregoing cases reflect our view that reconsideration is a remedy subject to the statutory exhaustion requirement where the applicable ordinance (1) authorizes the petitioner to invoke the remedy and (2) requires the local tribunal to respond by granting or denying the petition. We turn next to the ordinance governing reconsideration in the present case, analyzing it in terms of this two-part standard.

Respondent's ordinance provides:

"1304.09 REHEARING:

"A. The Board of County Commissioners may rehear a matter before it either on its own motion or upon a petition for rehearing submitted within ten (10) days of its action by an aggreived (sic) party in the manner provided for by subsection

1304.04 for notices of review, provided, however, that no fee need accompny (sic) such petition.

"B. However, no petition or motion for a rehearing shall be granted unless a majority of the Board of County Commissioners consents.

"C. If rehearing be granted, the application shall be heard as a new review except that all testimony and evidence theretofore received shall be included in the record.

"D. No action shall be reheard more than once.

"E. The Board of County Commissioners shall act upon the request within sixty (60) days of receipt thereof, unless such time limitation be extended with the consent of the parties. If no action is taken within sixty (60) days without such consent, the decision of the Board of County Commissioners is deemed final."

We construe this ordinance, as in Yoder, to make rehearing a remedy "available by right" to petitioners. Paragraph A authorizes a party aggrieved by the governing body's decision to petition for rehearing. This is sufficient to make the remedy "available" as that term is used in ORS 197.825(2)(a). Lyke v. Lane County, supra, 70 Or App at 86; see also, Fifth Ave. Corp. v. Washington County, supra. Paragraph E of the ordinance establishes a time period within which action on a petition for rehearing must be taken by the governing body. If no action is taken, the petition is deemed denied. Because the ordinance requires disposition of a rehearing petition, and sets a time limit for that action,[4] we believe the remedy should be characterized as one available to petitioner "by right," in the terminology of ORS 197.825(2)(a).

Petitioners urge us to deny the motion to dismiss for two

reasons, neither of which is persuasive. First, they claim ORS 197.825(2)(a) was not intended to apply to petitions for reconsideration, but was intended only to prevent direct appeals to LUBA of decisions made by first-level decisionmakers, such as hearings officers and planning commissions. However, the legislative history they cite in support of this argument does not convince us that this limitation should be read into the statute. The statutory language broadly requires exhaustion of "all remedies available by right." Reconsideration can be such a remedy, as we have discussed above.

Petitioners' second argument is that a petition for reconsideration of Order 85-365 would have been futile. They argue this case falls within the rule, recognized in some administrative law and related cases, that an available administrative remedy need not be pursued if an adverse decision is certain. See Fifth Ave. Corp. v. Washington County, supra, 282 Or at 621; Gilstrap v. Mitchell Bros. Truck Lines, 270 Or 599, 612, 529 P2d 370, cert den 421 US 1011 (1975); Albright v. Employment Appeals Board, 32 Or App 379, 382-384, 574 P2d 344 (1978).

As noted, the statute governing our jurisdiction requires a petitioner to exhaust "all remedies available by right" at the local level. ORS 197.825(2)(a). The exhaustion requirement is explicit and inclusive in scope. As a result, it is not clear if the futility exception petitioners rely on, which is an

outgrowth of decisional law unrelated to the statute in issue, can be applied. Cf. Fish and Wildlife Department v. LCDC, 288 Or 203, 210-13, 603 P2d 1391 (1979) (Statutory language, not general principles, governed whether LCDC could require petitioners to exhaust local remedies). However, assuming the exception can be read into the statute, we conclude petitioners have not demonstrated that a request for rehearing in this case would have been futile.

The futility claim is grounded on the fact that respondent twice (Orders 84-837 and 85-365) rejected petitioners' claims that much of the 58 acre study area should receive a wetlands designation. Petitioners also direct our attention to certain comments by county commissioners, which petitioners claim indicate hostility to their arguments. Given these circumstances, petitioners argue no purpose would be served by requiring yet a third attempt to change the outcome.

Petitioners' characterization of the two orders adopted by the county is accurate in a general sense. That is, the orders designate as wetlands considerably less of the 58 acre study area than advocated by petitioners. However, as petitioners themselves point out, the orders also reflect changes and clarifications of the county's position on central issues. For example, Order 84-837 suggested that only naturally-occuring wetlands were to be classified "wetlands" under the acknowledged comprehensive plan. Portland Audubon Society v. Clackamas County, 12 Or LUBA at 271-72. The order adopted on

remand, however (Order 85-365), accepted petitioners' argument that no distinction could be made between man-made and naturally occuring wetlands. Similarly, Order 85-365 increased the designated wetland to some degree, based on new evidence presented to the governing body.

Given the changes in the county's position, we cannot conclude that a petition for rehearing of Order 85-365 would have been futile. Even if reversal of the county's position was unlikely, the possibility remained that on rehearing, respondent might alter Order 85-365 so as to change the nature of the proceeding before this Board in significant ways. For example, in their appeal to LUBA, petitioners claim that the expert evidence relied on by the county does not reasonably support the decision to place the "forest opening area" outside the wetlands boundary. Much of petitioners' attack points out apparent inconsistencies and contradictions in the expert testimony. See petition at 16-20. Had these detailed points been made in a petition for rehearing, respondent would have been in a position to either take additional evidence and/or adopt explanatory findings on the issues raised. In either event, the appeal could have reached this board with a more complete, well-organized record.

Under these circumstances, we cannot agree that the filing of a petition for rehearing under Section 1304.09 of respondent's zoning ordinance would have been futile. We conclude, therefore, that we lack jurisdiction over this

appeal. ORS 197.825(2)(a). As stated in Lyke v. Lane County, supra,

> "Moreoever, our decision is thoroughly consistent with the purposes underlying the exhaustion doctrine. * * * 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." 70 Or App at 87 (quoting 11 Or LUBA at 123-124).

The appeal is dismissed.

FOOTNOTES

1

Order No. 85-365 addresses certain other issues raised on remand by petitioners, although the order notes that these issues were "not raised in the appeal to LUBA and are not contained in the remand by LUBA and are therefore not appropriate for determination at this time." Record at 3-4. The issues concern whether the county has satisfied the Goal 2 coordination requirement in reaching the challenged decision, whether the county's definition of wetland is consistent with the LCDC definition contained in Goal 5, and whether allowable development on the areas not designated as wetlands will have a significant impact on the area designated as wetlands.

2

See Columbia River Television v. Multnomah County, 11 Or LUBA 241 (1984); reversed, 299 Or 325, ___ P2d ___ (1985).

3

We believe the Court of Appeals had these two components in mind when it stated, in Lyke v. Lane County:

> "The critical issue is not whether a procedure is required by the county or whether the county must accept review, but whether there is a procedure available to ask for local review and the right to ask is unconditionally granted." 70 Or App at 86 (emphasis in original).

4

We recognize that the 60 day period provided under the county ordinance can significantly delay completion of the decisionmaking process. However, we do not believe that this potential problem is grounds for failing to apply the explicit exhaustion requirement in ORS 197.825(2)(a). Further, we note the legislature has adopted specific measures to speed up local decisionmaking and to provide relief where local procedures are unduly time consuming. See ORS 215.428.