

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

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CLIFFORD LAMB,)	
)	
Petitioner,)	LUBA No. 85-042
)	
vs.)	FINAL OPINION
)	AND ORDER
LANE COUNTY,)	
)	
Respondent.)	

Appeal from Lane County.

Robert L. Liberty, Portland, filed the petition for review and argued the cause on behalf of petitioner.

Margie Hendriksen, Eugene, filed the response brief and argued the cause on behalf of Respondent Lane County.

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

DISMISSED 11/05/85

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

1 Opinion by Kressel.

2 NATURE OF THE DECISION

3 Petitioner seeks review of Lane County Order No.
4 85-5-8-18. The order concerns the Lane County Hearings
5 Officer's decision to deny a conditional use permit for a
6 forest-related dwelling in the county's F-2/RCP Impacted Forest
7 Zone.

8 FACTS

9 In 1984, a planning administrator approved the permit.
10 Petitioner appealed the decision to the Lane County Hearings
11 Officer, who reversed the administrative approval. The
12 reversal was based on the insufficiency of the applicant's
13 "forest management plan," a required element for a
14 forest-related dwelling under the county's zoning ordinance.
15 In denying the application, however, the hearings officer
16 expressly rejected a number of petitioner's contentions about
17 the meaning to be given certain provisions of the county's
18 rural comprehensive plan.

19 Petitioner and the permit applicant appealed the hearings
20 officer's decision to the Lane County Board of Commissioners.
21 The appeals were accepted for review on April 10, 1985.¹
22 However, on April 19, 1985, the applicant withdrew his appeal.
23 The parties agree the withdrawal included the permit
24 application itself. Despite these withdrawals, the county
25 commission took up petitioner's appeal of the hearings
26 officer's action. After reviewing the record, the commission

1 adopted the order at issue here.

2 Order 85-5-8-18 does not set forth findings of fact and
3 conclusions of law. Nor does the order take action on
4 petitioner's appeal, or approve or disapprove the requested
5 conditional use permit. Instead, the order briefly comments on
6 the correctness of various aspects of the hearings officer's
7 decision. The order reads as follows:

8 "WHEREAS, a [sic] on the record hearing was conducted
9 by the Board of County Commissioners on May 8, 1985,
in regular scheduled meeting; and

10 "WHEREAS, all parties eligible to be heard by the
11 Board were given legal notice of the hearing and given
a reasonable opportunity to testify; and

12 "WHEREAS, the Board carefully reviewed the record and
13 Mr. Best withdrew his appeal, and Mr. Liberty declined
to provide oral argument on behalf of Mr. Lamb; NOW

14 "THEREFORE, BE IT ORDERED that

15 "1. Staff and Hearings Official properly applied
16 policy 7 and Lane Code 16.211(3)(d). Policies 14
17 and 15 are not violated by this action. Lane
Code 16.211(3)(b)(iii) was met through actions on
the Forest deferral; and

18 "2. The Hearings Official exceeded his authority by
19 directing applicant to submit additional
20 information for a Forest Management Plan. The
Hearings Official through LC 14.535 is limited on
reconsideration."

21 JURISDICTION

22 Our jurisdiction is limited to the review of land use
23 decisions. ORS 197.825(1). The legislature has defined "land
24 use decision" to include:

25 "(A) A final decision or determination made by a local
26 government or special district that concerns the
adoption, amendment or application of:

Page "(i) The goals;

1 "(ii) A comprehensive plan provision;
2 "(iii) A land use regulation; or
3 "(iv) A new land use regulation; * * *"
4 ORS 197.015(10).

5 In support of a motion to dismiss the appeal, the county
6 argues that once the permit request and the appeal were
7 withdrawn by the applicant, the proceeding became advisory in
8 nature. Order No. 85-5-8-18 is characterized by the county as
9 notice of the governing body's concurrence in certain
10 plan-policy interpretations given by the hearings officer, but
11 not as a decision to apply those interpretations to a
12 particular proposal. Since the challenged determination does
13 not directly affect a specific land use proposal, the county
14 claims it falls outside the scope of "land use decision."

15 Petitioner responds to the county's jurisdictional
16 challenge by directing our attention to the Supreme Court's
17 application of ORS 197.015(10) in Medford Assembly of God v.
18 City of Medford, 297 Or 138, 681 P2d 790 (1984). In that case,
19 church officials had been notified by the city that their
20 operation of a school on church premises required a conditional
21 use permit. The officials then took advantage of a procedure
22 under the city's zoning ordinance to obtain an interpretation
23 that no conditional use permit was required. Eventually,
24 however, the interpretation they sought was turned down by
25 resolution of the city council.

26 Church officials appealed the city's resolution to LUBA but

1 their appeal was dismissed on jurisdictional grounds. LUBA
2 held that because the resolution neither granted nor denied a
3 land use permit, but merely advised church officials that a
4 permit was required, it was not a "land use decision" as
5 defined by ORS 197.015(10). On further appeal, however, LUBA's
6 dismissal of the appeal was reversed. The Supreme Court
7 described the city's resolution as a formal determination of
8 the manner in which the zoning ordinance applied to the use
9 conducted by the church. As a result, the city's determination
10 was a reviewable land use decision. The Court stated:

11 "The resolution is a 'land use decision' under ORS
12 197.015(10), which defines 'Land use decision' to
13 mean, among other things, a 'determination made by a
14 local government' concerning the 'application' of a
15 zoning ordinance. This formal determination is a
16 basis for LUBA review even though it is only
17 declaratory. The procedure provided by the city is
18 analogous to the declaratory order provided by the
19 state Administrative Procedure Act in ORS 183.410,
20 which serves as a basis for review in the Court of
21 Appeals. There is no occasion in this case to
22 consider whether a landowner might be able to compel a
23 city to issue such a reviewable order when the city
24 does not provide the kind of procedure that Medford
25 has provided. The Court of Appeals correctly
26 concluded that LUBA erred in holding that it lacked
jurisdiction of petitioner's appeal." 297 Or at
140-141. (Footnote omitted).

21 Although there are some parallels between the order at
22 issue here and the resolution challenged in Medford Assembly of
23 God v. City of Medford, supra, there are important
24 differences. In contrast to the resolution in the Medford
25 case, Order No. 85-5-8-18 is not the product of a formal
26 procedure for the declaration of a landowner's rights and

1 responsibilities under the zoning ordinance. Rather, as we
2 understand it, the county's order came about after the formal
3 procedure, i.e., review of a conditional use permit
4 application, was terminated by the permit applicant. The
5 proceeding after the withdrawal seems to have been improvised
6 in order to inform interested persons of the governing body's
7 views on certain policy issues likely to surface in the
8 future. However, petitioner has cited no ordinance or other
9 legal foundation for the procedure followed by the commission.
10 Correspondingly, petitioner cites no legal basis for giving
11 effect to the expression of the council's views in Order
12 85-5-8-18. We are aware of no such basis.

13 We have previously held that a determination made by local
14 officials after withdrawal of a permit application is advisory
15 in nature and is therefore not a reviewable final land use
16 decision. Robert Randall Construction Company v. City of
17 Wilsonville, 8 Or LUBA 185 (1980), Friends of Lincoln City v.
18 City of Newport, 5 Or LUBA 346 (1982). In Friends of Lincoln
19 City v. City of Newport, supra, we stated:

20 "With withdrawal of the subdivision application, the
21 city ordered the issue of a subdivision on the
22 property closed. With withdrawal of the subdivision
23 application, the city's proceedings on the application
24 became moot. There no longer was an applicant to whom
25 a permit might be granted. * * *

26 "We view the extensive finding discussing the merits
of the subdivision application to be surplusage. We
do not view the findings as having any more force and
effect than a memo from the city council to the
planning staff. To the extent that the 'memo' may
include statewide land use requirements, the memo may

1 come to haunt the city in a later proceeding, but the
2 memo itself is not appealable as a 'decision'. When
3 these findings are adopted in support of a land use
4 decision (if they are adopted), then the decision may
5 be subject to invalidation. We do not believe this
6 board has the power to declare mere words or
7 expression of opinion of a public body to be invalid."
8 5 Or LUBA at 351-52.

9 We continue to adhere to the view expressed above. The
10 statutory scheme gives us jurisdiction over final land use
11 decisions. The order in question is outside the scope of that
12 term, notwithstanding that in a broad sense, it "concerns" the
13 application of the Lane County Zoning Ordinance and
14 Comprehensive Plan. Neither ORS 197.015(10) nor Medford
15 Assembly of God v. City of Medford, supra, empower us to review
16 informal advisory determinations of this sort. See, Allen
17 Associates v. City of Beaverton, 11 Or LUBA 140 (1984).

18 When (and if) the county applies the policy interpretations
19 outlined in Order 85-5-8-18 to a specific proposal, or
20 incorporates those interpretations into the comprehensive plan
21 or other land use regulation, its decision to do so will be
22 reviewable in this forum.² The present appeal, however, must
23 be dismissed.

FOOTNOTES

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4 Under the Lane County Code, acceptance of an appeal from a
5 permit decision by the hearings officer is discretionary with
6 the governing body. See Lyke v. Lane County, 70 Or App 82, 698
7 P2d 411 (1984).

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10 Respondent makes the additional argument that petitioner is
11 not aggrieved or adversely affected by Order 85-5-8-18 and
12 therefore lacks standing under ORS 197.830(3)(c) to appeal the
13 order. To the extent the order has legal effect, the county
14 argues, it upholds the denial of a permit and therefore is
15 favorable to petitioner. The contention is that one who
16 obtains a favorable ruling cannot be adversely affected or
17 aggrieved.

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19 Dicta in Benton County v. Friends of Benton County, 294 Or
20 79, 653 P2d 1249 (1982) suggests that the county's
21 understanding of the scope of "aggrievement" in ORS 197.830(3)
22 may be unduly narrow. Justice Linde wrote "A person who wishes
23 to appeal a ruling in his favor, but one less favorable than
24 requested, is aggrieved without having to argue whether his
25 interests are 'adversely affected' by the partial victory."
26 294 Or at 87-88. However, we find it unnecessary to address
the standing challenge because of our disposition of this
appeal on jurisdictional grounds.