BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KERWIN DOUGHTON, Petitioner, vs. DOUGLAS COUNTY, Respondent.	LUBA No. 86-015 FINAL OPINION AND ORDER ON REMAND

Remand from the Court of Appeals.

Robert Liberty, Portland, filed a memorandum in support of the petition and argued on behalf of petitioner.

Paul G. Nolte, Roseburg, filed a memorandum in support of the response brief and argued on behalf of respondent.

BAGG, Referee; DuBAY, Chief Referee; HOLSTUN, Referee; participated in the decision.

REMANDED 08/17/87

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

Opinion by Bagg.

NATURE OF THE DECISION

Petitioner appeals a building permit for a single family dwelling on a 21.6 acre parcel zoned for exclusive farm use.

PROCEDURAL HISTORY AND FACTS

This case is before us on remand from the Court of Appeals. In Doughton v. Douglas County, (Luba No. 86-015, August 8, 1986) we held that the challenged action was not a "land use decision" subject to our review. We reasoned that the county building permit approval was a ministerial act excluded from the definition of land use decision by ORS 197.015(10)(b).[1] The Court of Appeals reversed and remanded holding that ORS 197.015(10)(b) does not apply to the county's decision to issue a building permit for a dwelling in conjunction with farm use, and, therefore, does not divest our jurisdiction over petitioner's appeal. Doughton v. Douglas County, 82 Or App 444, 728 P2d 887 (1986).

The facts are as stated in our opinion in Doughton v. Douglas County, supra:

> "Prior to April 1983, the parcel was part of a 43 acre tract owned by Respondent James Clendenin. The tract was divided in half as a result of a partition application approved by the county on April 12, 1983. The application included a farm management plan for the gradual development of a commercial nursery on the two parcels. After the approval, Clendenin sold the parcel involved in this appeal to Respondent Orlando.
>
> "Orlando applied for a building permit to erect a farm-related dwelling on the parcel. In October 1983, county officials signed a 'zoning clearance worksheet' indicating that the requested building permit complied

with zoning regulations. However, the building permit was not issued until December 19, 1985. The county issued the permit without public notice or hearing.

"Petitioner owns a nursery adjacent to the tract partitioned by Clendenin in 1983. In March 1985, Petitioner urged the county to rescind approval of the partition on grounds that Clendenin had failed to implement the approved farm management plan and neither parcel had been put to farm use. However, the approval was not rescinded. Petitioner filed this appeal after learning of the building permit issued in December, 1985." Doughton v. Douglas County, supra. Slip Opinion at 2.

FIRST ASSIGNMENT OF ERROR

"Douglas County exceeded its jurisdiction and acted unconstitutionally by authorizing construction of a farm dwelling without providing petitioner notice and an opportunity to be heard."

SECOND ASSIGNMENT OF ERROR

"Douglas County improperly construed ORS 215.203(2)(a) and 215.283(1)(f), corresponding provisions of its zoning ordinance, and ORS 215.402 and 215.416 in authorizing construction of a farm dwelling without providing petitioner notice and an opportunity to be heard."

THIRD ASSIGNMENT OF ERROR

"Douglas County failed to follow applicable procedures, to the prejudice of petitioner's substantial rights, by authorizing construction of a farm dwelling without providing petitioner notice and an opportunity to be heard."

The Douglas County Land Use and Development Ordinance lists as a permitted use in the FC district

"one single family dwelling and other buildings and accessory uses customarily provided in conjunction with farm use on a property meeting the minimum requirements of Section 3.4.200 [property development standards]." Section 3.4.050(4).

This provision echos ORS 215.283(1)(f) allowing establishment

of "dwellings and other buildings customarily provided in conjunction with farm use" on land zoned for exclusive farm use.

In October, 1983, the Douglas County Planning Department issued a "zoning clearance" stating that no zoning restrictions applied which would prohibit issuance of the building permit. The building permit was issued on December 19, 1985.

In the first three assignments of error, petitioner argues the county failed to notify petitioner that a permit for a farm related dwelling on property adjacent to his own was under consideration. Petitioner claims he was entitled to notice and the chance to object to issuance of the permit under ORS 215.402, et seq. Petitioner asserts the determination whether a particular dwelling qualifies as farm related under the county code requires county officials to review the application to determine not only what farm uses are on the property, but whether the proposed dwelling is of a kind customarily provided in conjunction with that farm use. Petitioner's view is that in so doing, the county is exercising the authority given to it in ORS 215.010 to 215.438 to act on "permit" applications. That is, because the county must exercise discretion in granting or denying a request for a dwelling in conjunction with farm use, the county's decision is a discretionary approval of a development of land under ORS 215.402. Such actions require notice and hearing. ORS 215.416.[2]

In addition, petitioner claims that failure to provide this notice deprives petitioner of due process of law under the

Fourteenth Amendment of the United States Constitution, citing Fasano v. Washington County Commission, 264 Or 574, 502 P2d 23 (1973).

Petitioner finds support in Matteo v. Polk County, 14 Or LUBA 67 (1985). In Matteo, we held that in order to find a dwelling was customarily provided in conjunction with farm use, the county was required to find that the parcel must be wholly devoted to farm use.[3] This holding followed an earlier decision involving the same parties in which we held that before a farm dwelling could be established on agricultural land, the farm on which the dwelling was proposed must be an existing farm operation. Matteo v. Polk County, 11 Or LUBA 259 (1984). Petitioner claims these two cases illustrate clearly that fact finding and legal analysis is required before deciding if a particular parcel is devoted to farm use and a particular proposed dwelling is customarily provided in conjunction with farm use.[4]

We agree with petitioner that to issue a building permit for a farm dwelling, county officials must analyze the farm use on the subject property and also answer the subjective question of whether the proposed dwelling is "customarily" provided in conjunction with farm use. The question for us is whether or not the analysis required involves the exercise of "discretion" as that term is used in ORS 215.402(4).[5]

As noted earlier, the statute provides that a "permit" "means discretionary approval of a proposed

> development of land under ORS 215.010 to 215.483 or county legislation or regulation adopted pursuant thereto."

The permits defined by ORS 215.402(4) are subject to a number of specific statutory requirements, e.g., notice and a public hearing. ORS 215.416. What is meant by "discretionary approval," as those words are used in ORS 215.402(4), is not further defined in ORS Chapter 215. The determination whether an approval is discretionary must be made without clear statutory standards.[6]

A "discretionary act" has been defined as one

> "which requires exercise in judgment and choice and involves what is just and proper under the circumstance." Blacks Law Dictionary, 5th Ed., 1979.

We believe determining whether a proposed dwelling is "customarily provided in conjunction with farm use" involves the exercise of judgment and discretion. In this context, the discretion referred to in ORS 215.402(4) is the exercise of judgment in determining whether the facts presented warrant a finding that the subjective criteria for classifying farm dwellings are satisfied.

Because the county's analysis requires significant judgmental analysis under the farm dwelling standards in statute and case law, approval of the proposed farm dwelling falls within the definition of "permit" found in ORS 215.402(4). The county was therefore obliged to provide notice to adjacent property owners (under its own ordinance) and an opportunity for hearing. The county did neither. This

circumstance requires a remand.

We hasten to note, however, that our holding is limited to 1) the language in the Douglas County Code, and 2) the facts in this case. We do not suggest that other permitted uses are affected by the analysis involved in this case. That is, we do not wish to suggest that issuance of building permits for other permitted uses are necessarily permits under ORS 215.402, et seq.

The county next argues petitioner is too late to appeal this case. The building permit was issued on December 19, 1985. The county argues that the clearance to issue a building permit was performed in 1983, and petitioner is too late to appeal the decision. Petitioner has only 21 days from the date this land use decision was made to file a notice of intent to appeal with this Board. ORS 197.830(7).

In League of Women Voters v. Coos County, 82 Or App 673, 729 P2d 588 (1986) the Court of Appeals held that the time to appeal a land use decision does not begin until any required notice of the final decision is given to all parties. Because notice was not given to anyone, petitioner's appeal filed on March 6, 1986, the day petitioner obtained actual knowledge of the issuance of the decision, was timely.

In this case, petitioner was not a "party." He had no opportunity to become a party because the county did not apply its quasi-judicial permit procedures. However, petitioner's ownership of the adjacent property would entitle him to notice

and, presumably, party status under the county ordinance.

We therefore sustain petitioner's Assignments of Error 1 and 2. We also sustain petitioner's third assignment of error alleging the county failed to follow applicable procedures resulting in prejudice to petitioner's substantial rights. Petitioner is given rights to notice and a hearing under ORS 215.402 - 215.422. The county's failure to afford petitioner those rights, even while acting under color of its own ordinance, was error and prejudiced petitioner's substantial rights.

With respect to petitioner's claim that he has been denied rights protected by the Fourteenth Amendment to the United States Constitution, we note petitioner's right to due process is based on a claim of entitlement under state law to notice and hearing. In 1000 Friends of Oregon v. Wasco County Court, 80 Or App 532, 723 P2d 1034, review allowed (1986), the court said

> "[b]y statute, petitioners have standing to challenge the county's action if it violates those laws. Their interest is therefore one to which they have a legitimate claim of entitlement under state law. It is thus a property interest to which the Due Process Clause applies. See ORS 197.830(3); Jefferson Landfill Comm. v. Marion Co., 297 Or 280, 282 n 1, 284, 686 P2d 310 (1984)."

We therefore agree with petitioner that to the extent petitioner was denied his entitlement under state law to notice and hearing, his right to due process under the Fourteenth Amendment was denied.[7]

FOURTH ASSIGNMENT OF ERROR

> "Respondent exceeded its jurisdiction and improperly construed ORS 215.203(2)(a), 215.283(1)(f) and section 1.090 and 3.4.050(4) of its zoning ordinance in approving the subject dwelling without finding that the dwelling was customarily provided in conjunction with farm use or that the subject property was currently employed for the primary purpose of making a profit in money from farm use."

In this assignment of error, petitioner complains the county erred by issuing the permit without a finding that the proposed dwelling is customarily provided in conjunction with farm use. Petitioner also argues the county failed to make a finding that the property was currently employed for the primary purpose of making a profit in money from farm use.

We agree. The county did not make the necessary findings showing that (1) the property was in farm use as defined in ORS 215.203(2)(a) and Section 1.090 of the county zoning ordinance, and (2) that the dwelling proposed is of a kind customarily provided in conjunction with such farm use. This error requires a remand for the development of proper findings. Matteo v. Polk County, supra, 14 Or LUBA 67.

FIFTH ASSIGNMENT OF ERROR

> "Douglas County's decision is not supported by substantial evidence."

Petitioner claims the record lacks substantial evidence from which the Board can piece together support for the county's decision. We agree. On remand, we assume the county will conduct proceedings and develop a record to support whatever decision the county makes on the building permit.

FOOTNOTES

[1] ORS 197.015(10) states, in pertinent part:

"(10) 'Land use decision':

* * *

"(b) Does not include a ministerial decision of a local government made under clear and objective standards contained in an acknowledged comprehensive plan or land use regulation and for which no right to a hearing is provided by the local government under ORS 215.402 to 215.438 or 227.160 to 227.185."

[2] "'Permit' means discretionary approval of proposed development of land under ORS 215.010 to 215.438 or county legislation or regulation adopted pursuant thereto." ORS 215.402(4).

The hearings requirement is found in ORS 215.416. ORS 215.416(1) provides persons may apply for permits. ORS 215.416(3) requires that a hearings officer shall hold at least one public hearing on the application (with the exception of certain circumstances under which no public hearing is required, but an appeal of the hearings officer's decision must then be provided).

[3] But see the concurring opinion of Referee DuBay; Matteo, supra, 14 Or LUBA at 75-78.

[4] In Polk County, a farm dwelling was treated as a conditional use, and the question of whether the application for a farm dwelling fell within ORS 215.402 to 215.422 was not before us.

[5] Respondent notes that agreement with petitioner's position would result in referral of any outright permitted use to a notice and hearing procedure. We do not agree. The question of whether a use is "customarily provided in conjunction with

farm use" demands a review of facts. Issuance of a permit for a grocery store, for example, involves only a review of the application. No issue exists beyond the question of whether the proposed structure is a grocery store. On the other hand, as the Court of Appeals recognized, prior decisions of this Board make it clear the factual showing required to approve a farm dwelling makes such decisions different in nature. Doughton v. Douglas County, supra at 449. Indeed the court suggested that its prior decisions undercut any argument that the standards that must be applied to permit dwellings on farmland are clear and objective. Id. at p. 4.

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Whether to characterize a decision as "ministerial" under ORS 197.015(10)(b) is similarly uncertain due to the lack of a precise statutory definition. See, Hudson v. City of Baker (Order Denying Motion to Dismiss), ___ Or LUBA ___ (LUBA No. 87-031, August 12, 1987). In remanding this case to the Board, the Court of Appeals said "ministerial decisions" are really nondiscretionary or minimally discretionary applications of established criteria rather than decisions over which any significant factual or legal judgment may be exercised. Doughton, supra, at 449.

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In answer to the due process argument, respondent says there is no case holding the adjacent landowner has a constitutional right to notice and hearing on a pending permitted use application. Due process rights exist in cases where an adjoining landowner seeks a change in land use designation or asks for a conditional use, according to the county. Fasano v. Board of Washington County Commission, 264 Or 574, 507 P2d 23 (1973). Respondent concludes that as there is no change in land use designation or other extraordinary application pending here, there is no due process right. Because no due process right exists, respondent claims petitioner has no right to notice and a hearing. For the reason stated in the text, due process applies to the county's issuance of the building permit.