BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KIRPAL LIGHT SATSANG, Petitioner, vs. DOUGLAS COUNTY, Respondent, and ROSEBURG RESOURCES, COALITION FOR THE PRESERVATION OF RURAL COMMUNITY LIFE, JOHN THENNES, and PAMELA THENNES, Intervenors-Respondent.	LUBA No. 88-082 FINAL OPINION AND ORDER ON REMAND

Appeal from Douglas County.

Allen L. Johnson, Eugene, filed a memorandum on remand on behalf of petitioner. With him on the memorandum was Johnson and Kloos.

Paul G. Nolte, Roseburg, represented respondent.

Edward J. Sullivan and Peggy Hennessy, Portland, filed a memorandum on remand on behalf of intervenors-respondent. With them on the memorandum was Mitchell, Lang & Smith.

HOLSTUN, Referee; SHERTON, Chief Referee, participated in the decision.

REMANDED 01/22/90

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

Opinion by Holstun.

PROCEDURAL HISTORY AND ISSUES ON REMAND

Our decision in this case was remanded by the Court of Appeals. Kirpal Light Satsang v. Douglas County, ___ Or LUBA ___ (LUBA No. 88-082, January 18, 1989), remanded 96 Or App 207, 772 P2d 944, modified on reconsideration 97 Or App 614, rev den 308 Or 382 (1989) (Kirpal). Petitioner appeals the county's denial of land use approval to allow construction of a private boarding school for kindergarten and elementary school students. The facts, as stated in our prior opinion, are as follows:

> "The proposed Lighthouse School would be constructed on a 2.5 acre portion of a 305 acre parcel in the county's Farm-Forest (FF) zone. The school proposal includes a multipurpose building, classroom building, two student dormitories, and three staff housing modules.
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> "* * * On September 2, 1987, petitioners filed with the county a 'Planning and Sanitation Clearance Worksheet for Construction.' On that date petitioner also submitted a document entitled 'USE PERMIT APPLICATION FOR KIRPAL LIGHT SATSANG INC. LIGHTHOUSE SCHOOL,' with a number of supporting documents.
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> "On September 9, 1987, the county amended its land use and development ordinance (LUDO) to make private schools a conditional use rather than a permitted use in the FF zone. By letter dated September 11, 1987, the county planning department stated it received the planning clearance worksheet and supporting data submitted by petitioner on September 2, 1987 and requested that the applicant submit additional information. The county specifically requested information to establish whether the proposed school would meet Oregon Board of Education standards. The planning

> department also advised petitioners of the September 9, 1988 LUDO amendments and stated petitioner's application would be 'subject to the requirements of the conditional use process.'
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> "On November 23, 1987, petitioner submitted a document entitled "PERMIT APPLICATION FOR KIRPAL LIGHT SATSANG INC. LIGHTHOUSE SCHOOL." Attached to that document was a completed conditional use permit application form and a number of supporting documents." (Footnotes and record citations omitted.) Kirpal, supra, slip op at 2-3.

At the public hearings concerning petitioner's request before the planning commission and board of county commissioners, petitioner contended that its request was entitled to be judged by the LUDO substantive standards applicable on September 2, 1987, i.e., as a permitted use in the FF zone. The planning commission and board of commissioners rejected petitioner's contention, applied the plan and LUDO standards made applicable to applications for schools in the FF zone by the September 9, 1987 LUDO amendments and denied the application. This appeal followed.

Petitioner's first five assignments of error[1] all rely

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[1]As we explained in our original decision:

> "In its first three assignments of error, petitioner alleges the board of commissioners erred by applying the post September 9, 1987 LUDO approval standards applicable to schools in the FF Zone, rather than the pre September 9, 1987 standards. In its fourth assignment of error, petitioner argues the county erroneously determined the issue of applicability of the pre September 9, 1987 LUDO standards was not properly before it. Under the fifth assignment of error, petitioner contends the county erred in failing to sustain its

on its contention that the documents it submitted to the planning department on September 2, 1987 constituted an "application" for a "permit" that was made "complete" within 180 days and that the application was, therefore, entitled to be judged by "the standards and criteria what were applicable at the time the application was first submitted."[2] ORS 215.428(3). ORS 215.428(3) provides as follows:

> "If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."[3]

We concluded in our prior opinion that only the November 23, 1987 conditional use permit application, not the September 2, 1987 request, was before the planning

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> first 30 assignments of error below 'on the ground that the planning commission had erroneously applied substantive standards and criteria not applicable under [the] former LUDO [section], and * * * in repeating the same error itself.' * * *" Kirpal, supra, slip op at 5.

[2]The terms "application" and "complete" are not defined in ORS chapter 215. As defined by ORS 215.402(4):

> "'Permit' means discretionary approval of a proposed development of land under ORS 215.010 to 215.293 and 215.317 to 215.438 or county legislation or regulation adopted pursuant thereto." (Emphasis added.)

[3]Douglas County's comprehensive plan and land use regulations were acknowledged under ORS 197.251 prior to September 2, 1987.

commission and board of county commissioners.[4] Kirpal, supra, slip op at 11. Based on that conclusion, we rejected petitioner's first five assignments of error, concluding the county correctly rejected petitioner's contention that the pre September 9, 1987 LUDO standards must be applied. Because we determined the September 2, 1987 request was not before the planning commission and board of commissioners and, therefore, was properly not considered in the challenged decision, we did not determine whether the September 2, 1987 submittal constituted a "completed" "application" for a "permit" within the meaning of ORS 215.428(3). Kirpal, supra, slip op at 6-7.

In reversing and remanding our decision, the Court of Appeals identified the issues this Board must decide on remand as follows:

> "The threshold questions in this case are whether the September application was properly before the county before September 9 and whether it qualified for disposition in accordance with ORS 215.428. If the answers are no, that ends the case. If the answers are yes, the director had no authority to do what LUBA understood him to have intended. Under ORS 215.428(3), the county could not require petitioner to replace its application for a

[4]We based our conclusion largely on our interpretation of the county planning director's September 11, 1987 letter to invite petitioner to submit a new application for a conditional use permit and petitioner's compliance with that invitation by submitting a conditional use permit application on November 23, 1987. We suggested in our opinion, that the county may never have taken final action on the September 2, 1987 submittal. The Court of Appeals disagreed with our analysis, concluding we gave "undue weight" to the planning director's letter, a document the court believed to be "essentially irrelevant." Kirpal, 96 Or App at 212.

> permitted use with one for a conditional use after the county amended the ordinance to make the use conditional instead of permitted. The county could request additional information pursuant to ORS 215.428(2), but it would then be required to act on the initial application after the information was supplied and the application became 'complete.' ORS 215.428(1)." Kirpal, 96 Or App at 212.[5]

In its decision on reconsideration, the court emphasized that it expressed no view concerning whether the September 2, 1987 application constituted a request for land use approval involving the type of discretion that would make it an application for a "permit" entitled to the protection provided under ORS 215.428. Kirpal, 97 Or App at 616-617. The court also clarified that LUBA is to determine "whether there was a viable permitted use application, and what exactly it was for * * *." Id. at 617.

Restating the court's direction to facilitate consideration of arguments advanced by the parties in their memoranda on remand, our task on remand is to answer the following questions:

1. Did the documents submitted by petitioner on September 2, 1987 constitute an "application," as that term is used in ORS 215.428(3)?

2. If the documents constituted an "application"

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[5]The court explicitly rejected our finding that the September 2, 1987 submittal was not before us for review, concluding there was "no reviewability problem" in our considering whether the September 2, 1987 submittal constituted a permit application entitled to disposition under ORS 215.428(3). Id. See n 4, supra.

> for land use approval, was the requested approval "discretionary," as that term is used in ORS 215.402(4), so that the application was a "permit" application entitled under ORS 215.428(3) to be judged by the standards in effect on the date the application was submitted, i.e., as a permitted rather than a conditional use?

A third question presented in petitioner's sixth assignment of error and not answered in our prior opinion or by the Court of Appeals--whether the county correctly found the petitioner waived its right to assert that the pre September 9, 1987 standards must be applied to its application--must also be addressed on remand. Kirpal, 96 Or App at 213, n 4. Because it would be unnecessary for the Board to determine the two questions stated above if we conclude the petitioner waived its right to assert the protection provided in ORS 215.428(3), we address the waiver issue first.

DECISION

A. Did Petitioner Waive any Rights it May Have Had Under ORS 215.428(3)?

Under the sixth assignment of error, petitioner argues the county erroneously found it waived any rights it may have to have its request reviewed as a permitted use under the LUDO standards in existence before September 9, 1987. Petitioner contends the record shows it did not make a knowing and voluntary waiver of its rights under ORS 215.428(3).

Intervenors correctly note petitioner represented to

the board of commissioners during August 1987 legislative public hearings on the proposed LUDO amendments ultimately adopted on September 9, 1987 that it agreed with the amendments and would proceed under the conditional use permit process. Record 371. Intervenors further note petitioner submitted a conditional use permit application in November 1987 without indicating in any way that it claimed a right to disposition under ORS 215.428(3). Citing Newcomer v.Clackamas County, 92 Or App 174, 186-187, 758 P2d 369, aff'd as modified 94 Or App 33, 764 P2d 927 (1988), intervenors contend that by waiting until the February 18, 1988 planning commission hearing to claim rights under ORS 215.428(3), and in view of petitioner's representations to the county commissioners and apparent agreement to county review of its proposal as a conditional use, petitioner waived its right to claim it is entitled to disposition of its application under ORS 215.428(3).

We agree with petitioner. The statements petitioner made during the August 1987 legislative hearings show petitioner expressed support for the proposed changes which were ultimately adopted, but they do not demonstrate petitioner was aware of rights it may have had under ORS 215.428(3) by virtue of the September 2, 1987 submittal. As petitioner correctly notes, the planning department's September 11, 1989 letter similarly makes no suggestion of a waiver of rights under ORS 215.428(3). More importantly, unlike the situation presented in Newcomer v. Clackamas County, supra, where the petitioner's representation to the county that it was abandoning a legal argument prevented the county from having an opportunity to address the issue in its decision, here petitioner asserted its right to disposition under ORS 215.428(3) before both the planning commission and board of commissioners. Both bodies had an opportunity to address the issue and did so. Intervenors and the county certainly were not lured "into an abbreviated presentation at the local level through the pretense of abandoning an issue." Newcomer v. Clackamas County, 92 Or App at 187. In these circumstances, we find petitioner did not waive any rights it may have under ORS 215.428(3).

The sixth assignment of error is sustained.

B. Was the September 2, 1987 Submittal an Application?

The documents submitted by petitioner on September 2, 1987 included a "USE PERMIT APPLICATION FOR KIRPAL LIGHT

SATSANG INC. LIGHTHOUSE SCHOOL," Record 874-892, and a "Planning and Sanitation Clearance Worksheet for Construction" (worksheet), Record 873.

The Court of Appeals stated that the question is not whether the one page worksheet constitutes an application, rather the question is whether the worksheet and the "use permit application" submitted on September 2, 1987 constitute an "application," so that the protection afforded under ORS 215.428(3) is extended if the requested approval is discretionary. Kirpal, 96 Or App at 210. Therefore, in this opinion we consider the worksheet together with the "use permit application" submitted in support of the planning clearance requested by the "worksheet."

Intervenors argue:

> "Petitioner's label (i.e., 'Use Permit Application') does not transform preliminary planning clearance documents into a discretionary permit application when no such application was required or provided for under the zoning ordinance. The 'Use Permit Application' was not made on a planning department form, was not submitted at planning department direction, was not preceded by a pre-application conference, and was not accompanied by an application fee."[6]

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[6]In a footnote, intervenors quote LUDO 2.060, which provides:

> "Applications for development approval shall be made pursuant to applicable sections of this ordinance on forms provided by the Director.
>
> "* * * * *
>
> "All applications shall be accompanied by the required fee."

Intervenors' Memorandum on Remand 4-5.

We described in some detail the nature of the documents submitted by petitioner on September 2, 1987, Kirpal, supra, slip op at 14-15, n 3 and 4, and do not repeat those descriptions in full here. The "Use Permit Application" is actually five documents, including "(1) a plot plan, (2) a letter explaining proposed uses and justification for the uses, (3) a resource management plan, (4) a completed resource management plan questionnaire and (5) a copy of [an] August 17, 1987 letter to petitioner [advising petitioner that building permits and planning clearances would be required to construct the proposed school]." Id. at 15.

Worksheets are not mentioned in the LUDO, but are required by the county to secure building permits for permitted uses. Record 853; Intervenors' Brief 8, n 5 ("The Planning Clearance Worksheet process is merely a land-use checkoff for a building permit. Therefore, if any building permit for a school were to issue, planning clearance would be required.").[7]

Intervenors point out in their brief that LUDO 3.52.025 provides:

> "No [building] permit shall be issued by the Building Official or any government agency for the construction, erection, location, maintenance,

[7]Respondent joined in the intervenors' brief.

> repair, alteration or enlargement, or the change of use of a structure or property that does not conform to the requirements of this ordinance."

We understand intervenors to contend in their brief that whether a building permit for a permitted use is allowed under the county's plan and land use regulations is determined through completion of the worksheet. We find nothing in the LUDO or other county land use regulations to which we are cited that suggests otherwise. Apparently, although the LUDO does not explicitly mention the worksheet, the county implements LUDO 3.52.025 by requiring worksheet approval prior to issuance of a building permit. It also appears that issues of compliance with the plan and LUDO, including a determination whether an application is for a permitted use, are resolved by the worksheet approval.[8]

We have no trouble agreeing with intervenors that petitioner's designation of the documents submitted with the worksheet as a "Use Permit Application" is not sufficient, in and of itself, to make the documents an "application" for a "permit." However, we reject intervenors' suggestion that the facts (1) the "Use Permit Application" is not on a planning department form; (2) it was not submitted at planning department direction;[9] (3) it was not filed after a

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[8]The last line on the worksheet states "Planning approval shall be valid for one (1) year from the date of clearance." Record 873.

[9]Actually, as petitioner points out, both the worksheet and the resource management questionnaire included in the "Use Permit Application" are

pre-hearing conference; and (4) it was not accompanied by an application fee have any significant bearing on whether the submittal is an application within the meaning of ORS 215.428(3).

Although ORS chapter 215 includes no definition of the term "application," we believe the meaning intended is apparent when the statute is read as a whole. The statute provides permit applicants protection from changing approval standards. In order for a person to qualify as a permit applicant, we believe it is necessary to initiate the county's permit approval process. A person initiates the permit approval process by making known to the county, with reasonable certainty, (1) what the person seeks approval for, and (2) that the person requests that the county take action to grant land use approval. Although we believe it is reasonable for a county to require a permit applicant to utilize whatever forms and procedures are made available by the county for making it known that a request for land use approval is being initiated, we do not believe the county may rely on its lack of forms or procedures to argue that an applicant, who has otherwise made its request for discretionary approval known, has failed to initiate a permit approval request.

In this case, on September 2, 1987, petitioner

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planning department forms. Further, the worksheet and letter of justification were submitted pursuant to direction provided by the planning department on August 17, 1987.

submitted all forms the planning department identified and made available for initiating its request for approval for the school. The petitioner also submitted detailed information in support of its request on September 2, 1987 and submitted additional information requested by the planning department within 180 days.[10] We conclude petitioner did everything that was required of it under ORS 215.428(3) to submit an application on September 2, 1987 and make it complete within 180 days.[11]

If the approval petitioner sought on that date is properly characterized as "discretionary approval," within the meaning of ORS 215.402(4), then petitioner's application was for a "permit" and petitioner was entitled to have it considered under the approval standards existent on September 2, 1987, not the amended approval standards adopted on September 9, 1987.

C. Was the Approval Petitioner Sought on September 2 Discretionary Approval Within the Meaning of ORS 215.402(4)?

The question whether a local government decision

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[10]We do not understand respondent or intervenors-respondent to contend that if the September 2, 1987 submittal is an application for a permit, petitioner failed to submit "requested additional information within 180 days." ORS 215.428(3).

[11]We also agree with petitioner that nothing in Smith v. Douglas County, ___ Or LUBA ___ (LUBA No. 89-013, June 9, 1989) (Smith), aff'd 98 Or App 379, rev den 308 Or 608 (1989), suggests a different result. In Smith we found the LUDO provided no local right of appeal for denial of worksheet clearance, making the local decision final and appealable to LUBA, provided the denial is a land use decision.

applying its plan or land use regulations involves discretion typically arises in cases where our jurisdiction is an issue. Flowers v. Klamath County, 98 Or App 384, 391-392, ___ P2d ___ (1989); Doughton v. Douglas County, 82 Or App 444, 449, 728 P2d 887 (1986), rev den 303 Or 74 (1987); Bell v. Klamath County, 77 Or App 131, 134-135, 711 P2d 209 (1985); Kunkel v. Washington County, 16 Or LUBA 407, 411-413 (1988); Hudson v. City of Baker 15 Or LUBA 650, 654-655 (1987); Dames v. City of Medford, 10 Or LUBA 179, 182 (1984).

This Board has exclusive jurisdiction to review land use decisions. ORS 197.825(1). Prior to amendments adopted in 1989, ORS 197.015(10) provided:

> "'Land use decision':
>
> "(a) Includes:
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> "(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
>
> "(i) The goals;
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> "(ii) A comprehensive plan provision;
>
> "(iii) A land use regulation; or
>
> "(iv) A new land use regulation; * * *
>
> "* * * * *
>
> "(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."[12]

Under ORS 197.015(10)(b), decisions that would otherwise be land use decisions subject to our review jurisdiction are exempted from our review jurisdiction if they

> "are really nondiscretionary or minimally discretionary applications of established criteria rather than decisions over which any significant factual or legal judgment may be exercised. If particular decisions can automatically flow from the existence of general standards which are unaffected by factual variables, the decisions are within the statute's scope." Doughton v. Douglas County, 82 Or App at 449.

A similar analysis is required to determine whether, due to the discretionary nature of a decision, the decision is a

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[12]As amended by Or Laws 1989, chapter 761 section 27, ORS 197.015(10)(b) now provides:

> "[Land use decision d]oes not include a decision of a local government:
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> "(A) Which is made under land use standards which do not require interpretation or the exercise of factual, policy or legal judgment.
>
> "(B) Which approves, approves with conditions or denies a subdivision or partition, as described in ORS chapter 92, located within an urban growth boundary where the decision is consistent with land use standards; or
>
> "(C) Which approves or denies a building permit made under land use standards which do not require interpretation or the exercise of factual, policy or legal judgment."

However, the change in statutory language in ORS 197.015(10)(b) has no bearing on the issues to be resolved on remand in this case.

"permit" as defined in ORS 215.402(4) ("discretionary approval of a proposed development of land * * *").[13] See n 2, supra. If the approval requested by petitioner's September 2, 1987 submittal is correctly characterized as discretionary, as petitioner argues, then petitioner was entitled to have its application considered in accordance with ORS 215.428(3), i.e., as a request for a permitted use in the FF zone.[14]

On September 2, 1987, when petitioner's application was submitted, LUDO 3.5.050 provided in part:

> "In the FF zone, the following uses and activities and their accessory buildings and uses are permitted subject to the general provisions and exceptions set forth by this ordinance:
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> "* * * * *
>
> "(6) Public or private schools, including all buildings essential to the operation of a school."

Petitioner contends that deciding whether its September

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[13]We note that if the decision is a permit as defined in ORS 215.402(4), the permit applicant and other parties are entitled to a public hearing before the decision, or notice of the decision and a right to obtain a public hearing through an appeal. ORS 215.416(3) and (11). Failure to provide an opportunity for a hearing, by right or through appeal, when issuing a permit, is an error that requires remand. Flowers v. Klamath County, ___ Or LUBA ___ (LUBA No. 88-124, January 18, 1990); Kunkel v. Washington County, supra,; see Smith v. Douglas County, 98 Or App 379, 382-383, ___ P2d ___ , rev den 308 Or 608 (1989). However, compliance with ORS 215.416(3) and (11) is not an issue in this case.

[14]The Court of Appeals made it clear the fact a use is permitted outright under the applicable land use regulations does not mean a county's decision to approve or deny permission to construct or otherwise implement the use cannot be discretionary and, therefore, a permit under ORS 215.402(4). Kirpal, 97 Or App at 616.

2, 1987 application proposed

> "a school and whether all of the related buildings are in fact essential to the operation of the school is a complex question necessarily involving the exercise of discretion by the local decisionmaking body. In this case, Douglas County had not adopted a definition of 'private school' at the time of the application and was still looking for guidance on just what a school is when the rules changed on September 9, 1987." Petition for Review 5-6.

We agree with petitioner. Cf. Highway 213 Coalition v. Clackamas County, ___ Or LUBA ___ (LUBA No. 88-060, December 15, 1988) (remanding the county's decision to adopt findings explaining why proposed use was properly viewed as a school). The decision whether petitioner's proposal qualified as a private school is guided by no standards in the LUDO. Similarly, whether the several proposed dwellings, multi-use building and other outbuildings for school and storage use are permitted under LUDO 3.5.050(6) or other LUDO provisions is guided by no standards, aside from the requirement of LUDO 3.5.050(6) that they "be essential to the operation of a school."

The decision the county is required to reach in applying LUDO 3.5.050(6) to petitioner's September 2, 1987 application is as discretionary as the decisions at issue in Flowers v. Klamath County, supra (whether a medical waste incinerator is properly classified as a scrap operation); Doughton v. Douglas County, supra (whether a single family dwelling is customarily provided in conjunction with farm

use); Kunkel v. Washington County, supra (whether an emergency disposal site for up to 27,000 dead animals is a farm use); Hudson v. City of Baker, supra (whether an insulation incinerator is a use that may result in a nuisance); Dames v. City of Medford, supra (whether a decision to widen roadway complies with plan goal to encourage and preserve historic areas); Pienovi v. City of Canby, ___ Or LUBA ___ (LUBA Nos. 87-112 and 87-113, April 14, 1988) (whether an existing gravel operation is a nonconforming use).

Based on our conclusion that the county decision required to approve or deny petitioner's September 2, 1987 application involves significant discretion, we conclude that petitioner's application was for a "permit" as that term is defined in ORS 215.402(4) and, therefore, petitioner was entitled to have that permit application judged by the approval criteria and standards in existence on September 2, 1987. ORS 215.428(3). It follows that the county's application of the conditional use standards adopted on September 9, 1989 was error, and petitioner's first five assignments of error are sustained.

The county's decision is remanded.[15]

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[15]Review by this Board and the appellate courts to determine whether decisions (such as decisions to approve or deny applications for building permits for uses permitted outright) involve discretion presents obvious problems. It can result in decisions the local government thought to be exempt from LUBA review and public hearing requirements being found subject to both. Flowers v. Klamath County, supra; Smith v. Douglas County, supra.

It may also, as in this case, result in an applicant for a building permit having protection under ORS 215.428(3) that other applicants for building permits involving nondiscretionary standards do not have. However, any uncertainty engendered by the possibility of such review is a creature of the statutes that make applicability of the jurisdictional exception in ORS 197.015(10)(b), the public hearing requirements in ORS 215.416(3) and (11), and the certainty of approval standards provision in ORS 215.428(3) turn on whether particular decisions are discretionary.