BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRITZ VON LUBKEN, JOANN VON LUBKEN, and VON LUBKEN ORCHARDS, INC., Petitioners, vs. HOOD RIVER COUNTY, Respondent, and BROOKSIDE, INC., Intervenor-Respondent.	LUBA No. 90-062 FINAL OPINION AND ORDER

Appeal from Hood River County.

Steven L. Pfeiffer and Michael R. Campbell, Portland, filed the petition for review, and Michael R. Campbell argued on behalf of petitioners. With them on the brief was Stoel Rives Boley Jones and Grey.

Sally A. Tebbet, Hood River, filed a response brief and argued on behalf of respondent.

B. Gil Sharp, Hood River, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Sharp and Durr.

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

AFFIRMED 11/05/90

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners seek review of the county administrator's refusal to process their appeal of a planning commission decision approving development plans for a golf course.

MOTION TO INTERVENE

Brookside Inc., the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

In Von Lubken v. Hood River County, ___ Or LUBA ___ (LUBA No. 89-023, September 8, 1989) (Von Lubken I), we remanded the county's first decision approving a conditional use permit for the intervenor's golf course. On remand, the county again approved a conditional use permit for the golf course. The county's second approval was challenged in Von Lubken v. Hood River County, ___ Or LUBA ___ (LUBA No. 90-031, August 22, 1990) (Von Lubken II). We affirmed the county's decision in Von Lubken II and our opinion is presently on appeal before the Court of Appeals. Von Lubken v. Hood River County, CA A66473.

The Hood River Comprehensive Plan (plan) includes policies which require that the proposed golf course be compatible with and buffered from adjoining horticultural uses. In Von Lubken I, we rejected petitioners' challenges to certain conditions of approval which were imposed by the

county to assure compliance with those plan policies.[1] Following our remand in Von Lubken I, the county planning commission conducted a number of work sessions to consider whether development plans proposed by intervenor are adequate to comply with the above mentioned conditions of approval.[2] Petitioners participated in these work sessions and presented evidence and argument concerning the adequacy of intervenor's proposals to comply with the conditions of approval. On January 4, 1990, the planning commission approved intervenor's comprehensive site plan for the golf

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[1]In Von Lubken I, we noted petitioners specifically challenged the following conditions:

> "C. The applicant will retain a qualified golf course designer or a landscape architect to prepare a final comprehensive plan showing all uses approved in A. above including buffering adjacent to farm lands. The plan to be reviewed and approved by the Planning Commission. The person retained will ensure the project is implemented according to the Comprehensive Plan.
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> "* * * * *
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> "J. Buffers will be provided adjacent to all lands in agricultural use pursuant to the requirements of the County's Buffer Requirements (Article 50) of the Hood River County Zoning Ordinance. The professional golf course designer will also assist in providing measures to ensure protection of adjacent agricultural lands and not create management problems for adjacent orchardists." Von Lubken I, supra, slip op at 25 n 6.

[2]The county did not take action to approve the conditional use permit following our remand in Von Lubken I until February 5, 1990. We assume the county proceeded with consideration of intervenor's plans to comply with the conditions of approval in advance of its decision to approve the conditional use permit because petitioners' challenges to those conditions of approval were rejected in Von Lubken I.

course.

On January 19, 1990, petitioners filed an appeal of the planning commission's decision with the county administrator. On March 23, 1990, the secretary to the county administrator refunded the filing fee petitioners filed with their January 19, 1990 notice of appeal. Petitioners sent the filing fee back to the county and requested an explanation of the status of their appeal. On April 11, 1990, the county administrator again refunded petitioners' filing fee and explained that because no public hearing was held before the planning commission in approving the site plan for the golf course, there was no right to appeal that decision to the board of county commissioners. This appeal followed.

JURISDICTION

Respondent and intervenor-respondent (respondents) argue this Board lacks jurisdiction in this matter because the planning commission's January 4, 1990 decision did not concern application of Hood River County's comprehensive plan or land use regulations and, therefore, is not a land use decision.[3] Respondents contend the planning commission

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[3]ORS 197.015(10)(a) provides that land use decisions include:

> "(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;

only determined whether intervenor's development plans comply with certain conditions of approval specified by the county in its decisions granting conditional use permit approval. Respondents further contend the challenged decision is not a land use decision because it is not a "final" decision, as required by ORS 197.015(10)(a). According to respondents, the planning commission's decision did not become final until July 13, 1990, when the planning director advised intervenor that intervenor had complied with all conditions of approval.

Even if respondents' arguments concerning the nature and finality of the planning commission's January 4, 1990 decision are correct, questions we need not and do not decide, the decision challenged in this appeal is the county administrator's April 11, 1990 decision which determined that under the Hood River County Zoning Ordinance (HRCZO) petitioners have no right to appeal the planning commission's decision to the board of county commissioners. In reaching that decision, the county administrator was required to apply HRCZO Article 61, which governs board of

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"(ii) A comprehensive plan provision;

"(iii) A land use regulation; or

"(iv) A new land use regulation; or

"(B) A final decision or determination of a state agency other than the commission with respect to which the agency is required to apply the goals * * *"

county commissioners' review of decisions by lower level county decision makers. The county administrator's decision is therefore a land use decision subject to our review. ORS 197.015(10)(a); 197.825(1).[4]

FIRST ASSIGNMENT OF ERROR

> "The County Administrator Had No Authority Under the HRCZO to Determine the Appealability of the Planning Commission's Decision."
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> HRCZO § 61.00 provides:
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> "The decision of the hearings body[5] or officer shall be final unless an appeal is filed within 15 days of initial action with the Director of Records and Assessments or if three members of the Board of Commissioners order review within 15 days of action."

Petitioners argue HRCZO § 61.00 simply identifies who an appeal is to be filed with and does not authorize the county administrator to determine whether the decision

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[4]ORS 197.015(10)(b)(A) excludes decisions "[w]hich [are] made under land use standards which do not require interpretation or the exercise of factual or legal judgment" from the statutory definition of "land use decision." Respondent suggests the challenged decision is not a land use decision because it falls within the exemption provided by ORS 197.015(10)(b)(A). We disagree. The county administrator's determination concerning the availability of an appeal to the board of county commissioners under HRCZO Article 61 required the exercise of legal judgment.

[5]Petitioners explain that the term "hearings body" is intended to include the "planning commission." The planning commission is authorized to appoint subcommittees of the planning commission to conduct hearings and in doing so is a "hearings body." We understand petitioners to argue the planning commission as a whole is also a "hearings body" when it conducts hearings. Respondents do not dispute the point.

sought to be appealed is appealable.[6]

Respondent cites Article IX of the Hood River County Charter, which creates the office of county administrator and specifies that the county administrator is responsible for "carrying out the policies established by the Board of Commissioners." Respondent also appends to its brief the county administrator's job description from the county's administrative code. Respondent contends these documents demonstrate the county administrator is granted broad authority and is "more than a mere processor of appeals." Respondent's Brief 4.

The charter and administrative code do not explicitly grant the county administrator authority to determine whether appeals filed under HRCZO § 61.00 attempt to challenge decisions which are not appealable under HRCZO Article 61. In addition, we have some question whether the admittedly broad administrative powers given the county administrator are intended to include authority to make such decisions. However, the very expansive interpretation respondent advances in its brief is not inconsistent with with the charter and administrative code. Fifth Avenue Corp v. Washington Co., 282 Or 591, 599, 581 P2d 50 (1978); Green v. Hayward, 275 Or 693, 706, 552 P2d 815 (1976); McCoy v.

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[6]Although HRCZO § 61.00 states that appeals are to be filed with the "Director of Records and Assessments," there is no dispute that appeals under HRCZO § 61.00 are properly filed with the county administrator.

Linn County, 90 Or App 271, 275, 752 P2d 323 (1988). We agree with respondent that the county administrator has authority to refuse to process appeals filed under HRCZO § 61.00, where the county administrator determines the challenged decision is not subject to appeal under HRCZO Article 61.[7]

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "Respondent's Refusal to Process Petitioners' Appeal to the Board of Commissioners Was Unlawful as a Matter of Law Because the HRCZO Provides That Any Decision of the Planning Commission May be Appealed to the Board of Commissioners by Filing an Appeal Within 15 Days of the Decision."

Petitioners contend that under HRCZO § 61.00, quoted supra, a decision of the planning commission does not become final if an appeal is filed with the county administrator within 15 days. Petitioners contend they filed such an appeal in this case on January 19, 1990. Petitioners argue neither HRCZO Article 61 nor any other county regulatory

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[7]We consider whether the county administrator was correct in his determination that the planning commission's January 4, 1990 decision is not subject to appeal under HRCZO Article 61 in our discussion of the second assignment of error. Even if the county administrator lacks such authority, we agree with intervenor that such a lack of authority would not provide a basis for reversal or remand in this case. As intervenor correctly notes, if we determine that the planning commission's decision is subject to appeal under HRCZO § 61.00, the decision must be remanded so that the county commissioners can consider the appeal. On the other hand, if we determine that the planning commission's decision is not subject to appeal under HRCZO § 61.00, the county administrator's error was harmless error and no purpose would be served by reversing or remanding the county administrator's decision.

provision limits the type of planning commission decisions that may be appealed to the board of county commissioners under HRCZO Article 61. Petitioners contend HRCZO § 61.06 provides that under HRCZO Article 61 the board of county commissioners may review "final actions or rulings by the initial hearings body or officers" and specifies no limitation of the decisions subject to such review.

Petitioners go on to argue that they made numerous appearances during the planning commission's work sessions and presented evidence and argument in support of their view that the intervenor's plans are inadequate to comply with the conditions of approval in the county's original decision granting conditional use approval. Therefore, petitioners contend, they have standing to bring the appeal under HRCZO § 61.06 and their appeal should have been processed.[8] In sum, petitioners contend the county administrator erroneously determined that appeals under HRCZO Article 61 are limited to decisions for which a public hearing before the hearings body is required by the HRCZO.

Respondents first contend that while HRCZO Article 61 does not explicitly state that the decisions subject to review under that article are limited to those for which public hearings before the hearings body are required, that

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[8]We do not understand respondents to dispute that if a local appeal of the planning commission's January 4, 1990 decision were available under HRCZO Article 61, petitioners appeared during the proceedings that led to that decision and would have standing to bring such an appeal.

limitation is clear when HRCZO Article 61 is read together with the preceding HRCZO Article 60. Respondents contend that when HRCZO Articles 60 and 61 are read together, it is clear that an appeal to the board of commissioners is only available to challenge decisions rendered following a public hearing under HRCZO Article 60. Respondents contend that HRCZO Article 60 does not require the planning commission to hold a public hearing prior to determining whether intervenor's site plan complies with the conditions of approval and petitioners, therefore, are not entitled to an appeal under HRCZO Article 61.

HRCZO § 60.01 provides as follows:

> "The Planning Commission shall be the hearings body and make decisions on the following actions: (1) Zone Changes; (2) Comprehensive Plan Amendments; (3) Appeal of Director's Decision; (4) Review of Director's Decision (hearing process);[9] (5) Review of Historic Preservation Applications (hearings process); (6) Initial Planned Unit Development (PUD) approval; (7) Initial Subdivision approval; and (8) Delegation of Planning Commission authority to a hearings officer."

Respondents contend the planning commission's decision that intervenor's development plans are sufficient to comply with the conditions of approval which were upheld in Von Lubken I does not fall within the categories of decisions in HRCZO § 60.01 for which the planning commission must hold public

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[9]We are unable to determine the significance or meaning of the parenthetical "(hearing process)."

hearings.

Reading HRCZO Articles 60 and 61 together, those articles strongly suggest that the decisions which are appealable to the board of commissioners under HRCZO Article 61 are decisions that have already been subjected to one or more public hearings before the planning director, or the planning commission or both.

As noted earlier in this opinion, HRCZO § 61.00 states:

> "The decision of the hearings body or officer shall be final unless an appeal is filed within 15 days of initial action with the Director of Records and Assessments or if three members of the Board of Commissioners order review within 15 days of action."

We believe the only reasonable interpretation of the reference in HRCZO § 61.00 to "decision[s] of the hearings body or officer" is that it refers to decisions rendered by hearings bodies and hearings officers under HRCZO Article 60. Decisions concerning compliance of particular site plans with conditions of approval included in a conditional use permit are not among the decisions the planning commission is required to make following the administrative procedures set forth in HRCZO Article 60. See HRCZO § 60.01, quoted supra.

HRCZO § 60.04 establishes notice requirements for public hearings on administrative actions. HRCZO § 60.08 establishes procedures for hearings and provides that the hearings body may deny, approve or approve a request with

conditions. HRCZO § 60.14 specifies limits on conditions of approval but does not require that subsequent decisions concerning compliance with conditions of approval must themselves be processed as administrative actions under HRCZO Article 60. To the contrary, HRCZO § 60.14 strongly suggests additional steps to assure compliance with conditions of approval will not proceed by way of public hearings under HRCZO Article 60.

HRCZO § 60.14(A) simply provides that conditions of approval must "be fulfilled within the time setforth [sic] in the approval." HRCZO § 60.14(D) provides that conditions of approval may be set forth in a contract between the board of commissioners and the applicant and HRCZO § 60.14(F) permits the county to require a bond to assure performance. We have difficulty envisioning how decisions concerning performance of such contracts could be subject to the procedures established in HRCZO Article 60. Reading HRCZO § 60.14 in context with the balance of HRCZO Article 60, we agree with respondents that following approval of an administrative action under HRCZO Article 60, actions taken to comply with any conditions of such approval are not required to follow the administrative procedures set forth in HRCZO Article 60.[10]

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[10]HRCZO § 72.30(C) includes similar provisions governing imposition of conditions of approval by the planning director. As with conditions imposed under HRCZO Article 60, subsequent decisions concerning

Respondents argue at length that the county is entitled to follow a two step process in considering the conditional use permit for intervenor's golf course. According to respondents, LUBA has already determined that the county properly completed the first step when it determined that applicable criteria governing the conditional use permit were met and imposed conditions to assure additional actions necessary to achieve compliance with those criteria were carried out. Von Lubken I, supra, slip op at 24-25. Having satisfied the first step in granting conditional use approval for the disputed golf course, respondents contend the county is entitled to rely on county planning staff and the planning commission to assure development of technical solutions to satisfy the conditions of approval imposed in granting approval of the conditional use permit. Respondents further contend that under existing statutes and appellate court cases, the county may consider and approve intervenor's proposals as satisfying the conditions of approval administratively, without notice and public hearing.

In our decision in Von Lubken I, we relied on Meyer v. City of Portland, 67 Or App 274, 678 P2d 741, rev den 297 Or 82 (1984) in determining that the county properly found compliance with applicable compatibility and buffering

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satisfaction of conditions of approval imposed under HRCZO § 72.30(C) do not appear to require notice and public hearings.

requirements and deferred responsibility for developing particular technical solutions to the planning commission. Von Lubken I, supra, slip op at 24. See also Kenton Neighborhood Assoc. v. City of Portland, ___ Or LUBA ___ (LUBA No. 88-119, June 7, 1989), slip op 24; Vizina v. Douglas County, 16 Or LUBA 936, 948 (1988); Margulis v. City of Portland, 4 Or LUBA 89, 96-98 (1981). Our decision in Von Lubken I was not appealed by petitioners. Therefore, we agree with respondents that the county was thereafter entitled to review and approve plans submitted by intervenor to comply with the conditions of approval administratively, without notice and a public hearing.[11] Meyer v. City of Portland, supra, 59 Or App at 282 n 6.

The second assignment of error is denied.

The county's decision is affirmed.

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[11]Petitioners correctly point out the county may not avoid its notice and public hearing obligations under ORS chapter 215 by delegating discretionary permit decisions to the planning commission and then making those decisions at a later date without an opportunity for public hearing. See Flowers v. Klamath County, ___ Or LUBA ___ (LUBA No. 88-124, January 18, 1990); Dack v. City of Canby, ___ Or LUBA ___ (LUBA No. 88-073, December 16, 1988); Kunkel v. Washington County, 16 Or LUBA 407 (1988); Doughton v. Douglas County, 15 Or LUBA 576, aff'd 88 Or App 198 (1987). However, for the reasons expressed in our decision in Von Lubken I, we disagree with petitioners that the county did so in this case.