xBEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TUALITY LANDS COALITION,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
WASHINGTON COUNTY,	)	LUBA Nos. 91-035 and 91-036
	)	
Respondent,	)	FINAL OPINION
	)	AND ORDER
and	)	
	)	
RICHARD PETERS, STEPHEN ASHBY and PHILLIP HERGERT,	)	
	)	
Intervenors-Respondent.	)	

Appeal from Washington County.

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

David C. Noren, Hillsboro, filed a response brief and argued on behalf of respondent.

Virginia L. Gustafson, Portland, filed a response brief and argued on behalf of intervenors-respondent. With her on the brief was Garvey, Schubert & Barer.

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

DISMISSED (LUBA No. 91-035)
REVERSED (LUBA No. 91-036) 11/12/91

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioner appeals county planning department decisions approving a commercial building permit and a final development approval application for an asphalt batch plant.

FACTS

In a previous order, we explained the facts in this appeal as follows:[1]

> "The property at issue * * * is 1.69 acres in size and is currently zoned Future Development (FD-10). In 1988, an application was submitted to the county for 'Special Use Approval and Conceptual Development Review for an Asphalt Batch Plant' on the subject property (first development application). On March 14, 1989, after a public hearing, the county approved the first development application (1989 development approval decision). This decision included the following statement:
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> > "'Final approval shall be obtained through the Type I procedure. A development application, accompanied by two sets of final plans, necessary written material and documents, and application fee * * * shall be submitted.' Record (036) 60.
>
> "The 1989 development approval decision also outlined several steps which the applicant needed to take prior to construction and operation of the batch plant. Essentially, those steps require the applicant to submit a 'Type I development application for final development review approval'

[1]The county submitted two separate records in this appeal proceeding, as the case was consolidated after the time for the submission of the record had passed. Consequently, in this opinion, we refer to the record prepared for LUBA No. 91-035 as "Record (035) ___" and the record prepared for LUBA No. 91-036 as "Record (036) ____."

including (1) a master plan for parking, (2) a landscaping plan, and (3) dedication of right of way and other easements. In addition, the applicant was required to obtain an access permit and a DEQ Air Contaminant Discharge Permit, and to waive certain rights of remonstrance. Record (036) 60-61. Finally, the 1989 development approval decision also requires the applicant to obtain a building permit for the proposed batch plant. Record (036) 36. The 1989 development approval decision was not appealed, and is not the subject of these consolidated appeals.

"At the time the first development application was submitted to the county, the subject land was zoned 'Land Extensive Industrial' (MAE). Record (036) 46. On October 23, 1990, the subject property was rezoned to FD-10. While the MAE zone allowed asphalt batch plants, apparently the FD-10 zone does not.

"On December 26, 1990, the county received an application for a 'Development Review for an Asphalt Batch Plant' (second development application) on the subject property. Record (036) 40. The second development application purported to satisfy the requirements and conditions of the 1989 development approval decision. The second development application was processed by the county according to Type I procedures. The second development application proposed a batch plant with different features than were approved in the 1989 development approval decision. On January 7, 1991, a county planner signed a 'Type I Approval' for the second development application (* * * 1991 development approval decision), including those features of the proposal different from those approved in the 1989 development approval decision. No public hearing was conducted prior to issuance of the * * * 1991 development approval decision, and no notice of the decision was given to anyone other than the applicant. Petitioner appeals the county's * * * 1991 development approval decision in LUBA No. 91-036.

"On February 13, 1991, the county received an

> application for a 'Commercial Building Permit' for the batch plant foundation. Record (035) 17. On March 8, 1991, the county issued the requested 'Commercial Building Permit' for the batch plant foundation (building permit decision). Record (035) 001. No public hearing was held prior to the issuance of this decision, and no notice of the decision was given to anyone other than the applicant. Petitioner appeals the March 8, 1991 building permit decision in LUBA No. 91-035. * * *" (Footnotes omitted.) Tuality Lands Coalition v. Washington County, ___ Or LUBA __ (LUBA Nos. 91-035 and 91-036, Order on Motion for Evidentiary Hearing and Depositions, August 29, 1991), slip op 2-4.

MOTIONS TO DISMISS

Respondent and intervenors-respondent (respondents) argue the land use decision that was properly subject to appeal to this Board occurred in 1989, when the county adopted the 1989 development approval decision. Respondents state the 1989 development approval decision approved the two stage process utilized by the county in adopting the challenged decisions regarding the disputed batch plant. Citing J.P. Finley & Son v. Washington County, ___ Or LUBA ___ (LUBA No. 90-018, June 8, 1990) (Finley), respondents contend petitioner was required to appeal the 1989 development approval decision concerning the disputed batch plant, if it was dissatisfied with the subsequent processes outlined in that decision. According to respondents, petitioner's appeals in this consolidated proceeding are untimely because they essentially appeal issues that could have been resolved in an appeal of the

1989 development approval decision.

Petitioner argues this appeal is distinguishable from the situation presented in Finley. Petitioner contends:

> "Under the unusual * * * facts of this case, Petitioner could not have known the County was going to rezone the property the next year and thereby render the asphalt batch plant illegal. Petitioner could not have known that Washington County would be obliged to interpret and apply ORS 215.428(3)[2] to the [second development] application in 1991. Even if Petitioner had appealed the [1989 development approval decision] on the grounds it improperly classified the remaining decisions as being nondiscretionary under [the local code], LUBA would not, could not, have ruled on the questions of whether the county's authorization of a nonconforming use required 'interpretation or the exercise of factual, policy, or legal judgment.' ORS 197.015(10)(b).
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> "There can be no waiver of the chance for a hearing when the subject matter of that hearing is unknown." Petitioner's Response to Motion to Dismiss 3.

We agree with petitioner. Under the unusual circumstances presented here, that petitioner did not appeal the 1989 development approval decision does not preclude an appeal of the challenged decisions.

The basis for petitioner's contention that the 1991 development approval decision is discretionary and,

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[2]ORS 215.428(3) states, in part:

> "* * * Approval or denial of the [permit] application shall be based upon the standards applicable at the time the application was first submitted."

therefore, not properly made subject to a procedure which provides no hearing or opportunity for anyone other than the applicant to appeal, is that the 1990 zone change to the FD-10 zoning district made the proposed batch plant illegal on the subject property.[3] According to petitioner, this zone change made the county's determination of which zoning standards apply to the second development application discretionary. At the time of the 1989 development approval decision, there was no way for petitioner, or any of its members, to have known that such a zone change would occur. Under these circumstances, petitioner could not have challenged the county's decision to approve the batch plant notwithstanding the FD-10 zoning standards, in an appeal of the 1989 development approval decision.

Further, in Finley, the underlying approval was for a phased Planned Unit Development (PUD) which authorized the subsequent approval of later submitted drainage and grading plans pursuant to a "Type I" process. In Finley, there was a Washington County Community Development Code (CDC) section devoted to the PUD master plan approval process. Here, there is nothing to which we are cited in either the county's plan or land use regulations which in 1989 authorized approval of a master plan for the siting a batch

[3]We explain below that we believe applicable requirements of the FD-10 and MAE zones are "standards or criteria" as those terms are used in ORS 215.428(3).

plant. Finally, we are cited to nothing either authorizing or describing the intended effect of the 1989 "conceptual" development approval decision. Consequently, the 1989 development approval decision did not result in an overall master plan approval designed to govern all further aspects of the development processes relating to the batch plant.

Respondents also argue the challenged building permit decision and the 1991 development approval decision are not land use decisions because neither require the exercise of "factual, policy or legal judgment" under ORS 197.015(10)(b)(A) and (C). We determine separately below whether the building permit and development permit decisions are land use decisions, subject to our review.

A. Building Permit Decision

ORS 197.015(10)(a) provides, in relevant part:

"'Land Use Decision' includes:

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

"(i) The goals;

"(ii) A comprehensive plan provision;

"(iii) A land use regulation; * * *

"* * * * *."

ORS 197.015(10)(b)(C) provides that land use decisions over which this Board has jurisdiction do not include a decision of a local government:

"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."[4]

We have stated that the approval of a building permit is a "land use decision" only if the building permit approval decision involves the application of the goals, a comprehensive plan or a land use regulation and does not qualify as a ministerial decision under ORS 197.015(10)(b).[5] Flowers v. Klamath County, 17 Or LUBA 1078, 1087 (1989).

The application for a building permit at issue in this appeal states the following regarding the requisites for obtaining the permit:

> "To obtain your [building] permit you will need the following: 1) Approval for your septic system from the Health Department or approval to install your sewer from Unified Sewerage Agency * * *, 2) Electrical permit application filled out by your electrical contractor * * *, 3) Plumbing permit filled out by your plumbing contractor * * *." Record 17.

The parties do not argue any land use standard is required to be applied for the county to issue a building permit for construction of the challenged batch plant, and we do not see that any such standards are applicable. As far as we can tell, all determinations concerning whether

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[4]This statute was amended during the 1991 legislative session. However, the amendments were not yet effective at the time the challenged decisions were made.

[5]In 1989, the "ministerial" decision exception of ORS 197.015(10)(b) was replaced by the similarly worded exceptions of ORS 197.015(10)(b)(A) and (C). Or Laws 1989, ch 761, § 1.

and under what circumstances the proposed batch plant is a permitted use are made during the county's development review processes, and not during the building permit processes. Consequently, the only determinations necessary for the county to make to issue a building permit are whether the applicant has certifications concerning septic approval and electrical and plumbing permits. These determinations do not involve application of the goals, comprehensive plan or land use regulations. We conclude the issuance of the building permit for the batch plant is not a land use decision subject to our review. ORS 197.015(10)(a)(A).

The motion to dismiss LUBA No. 91-035 is granted.

B. 1991 Development Approval Decision

ORS 197.015(10)(b)(A) provides that land use decisions over which this Board has jurisdiction do not include a decision of a local government:

> "Which is made under land use standards which do not require interpretation or the exercise of factual, policy or legal judgment[.]"

Petitioner contends the 1991 development approval decision is a land use decision subject to our review because it required the exercise of factual and legal judgment. Petitioner contends the county was required to exercise factual and legal judgment to interpret and apply ORS 215.428(3) in order to decide which zoning requirements are applicable to the second development application.

Specifically, the county was required to determine whether the MAE zone, which governed the 1989 development approval decision, also governed the second development application filed in 1990, after the property was rezoned to FD-10.

Respondents argue that ORS 215.428(3) is clear and its interpretation and application requires no exercise of factual or legal judgment. Respondents contend that under ORS 215.428(3), the standards in effect at the time an application is filed govern all subsequent approvals connected to that application. Here, according to respondents, that determination was simple -- under ORS 215.428(3), the 1989 development application froze all standards to be applied to any future approvals envisioned by the 1989 development approval decision.

We agree with petitioner that the county exercised factual and legal judgment in interpreting and applying ORS 215.428(3) to the second development application. There is no dispute that the second development application was filed after the MAE zone had been replaced by the FD-10 zone. Relevant standards applicable to the approval of the second development application require the county to determine the proposal's consistency with the comprehensive plan and to determine that the proposed use is allowed by the underlying zone.[6] The uncertainty concerning whether the MAE or FD-10

[6]ORS 215.416(4) provides that a permit application may not be approved if "the proposed use of land is found to be in conflict with the

zone standards govern the second development application makes the county's approval of the second development application not subject to the exception to our jurisdiction established by ORS 197.015(10)(b)(A).

The motion to dismiss LUBA No. 91-036 is denied.

THIRD ASSIGNMENT OF ERROR

> "The county violated ORS 215.416(3),(5) and (11) by making a discretionary land use decision without providing notice or notice of the an [sic] decision and an opportunity for a hearing on appeal."

We determine above that the challenged 1991 development approval decision required the county to exercise legal and factual judgment. Consequently, the county exercised discretion in adopting the 1991 development approval decision. Accordingly, the county approved a "permit" as that term is defined by ORS 215.402(4).

In approving a permit, ORS 215.416 requires the county to do one of two things. The county is required to either (1) give notice of and conduct a public hearing prior to

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comprehensive plan of the county and other applicable ordinance provisions." Further, CDC 104 requires that "all use or development of land * * * shall comply with the Washington County Comprehensive Plan [plan] * * *." In addition, CDC 403-2.2 requires that "all development * * * shall provide * * * a statement that [t]he development is permitted in the primary district[.]" Finally, CDC 406-1.1 provides:

> "[t]he Review Authority shall evaluate all building and site plans, including detached dwelling units, for conformance to the following standards:
>
> "* * * * *
>
> "The development is permitted within the primary district[.]"

final action on a permit, or (2) provide notice of the decision and an opportunity to appeal a permit decision made without a hearing, to persons who would have had a right to notice if a hearing had been held. There is no dispute that the county provided petitioner with neither a hearing nor an opportunity to appeal the 1991 development approval decision. Further, there is no dispute that at least some of petitioner's members would have been entitled to notice if a public hearing had been scheduled.

Consequently, we conclude the county erred in failing to provide either a public hearing prior to making the 1991 development approval decision or an opportunity to appeal that decision.

The third assignment of error is sustained.

FIRST ASSIGNMENT OF ERROR

> "The County violated ORS 215.416(4), CDC 104-1, CDC 309-5, CDC 403-2.2A and CDC 406-1.1 by approving the 1990 Application for an asphalt batch plant, a use not permitted in the FD-10 district."

Petitioner contends the county misconstrued the applicable law by granting development approval for a use not permitted in the FD-10 zone. The primary issue under this assignment of error is what standards are applicable to approval of the second development application? Specifically, the issue is whether under ORS 215.428(3), the standards in effect at the time the 1989 development application was submitted govern approval of the second

development application, which was submitted in 1990. Whether the standards in effect at the time the first (1989) or second (1990) development application was filed apply is important to this appeal because there is no dispute that prior to the filing of the second development application, the underlying zone was changed to a zone which does not allow asphalt batch plants.

ORS 215.428(3) requires the county to apply the standards in effect at the time a development application is first submitted, to that development application. However, there is nothing in ORS 215.428(3) which requires the county to apply the standards in effect at the time one application is submitted to a distinct and subsequent application. For purposes of ORS 215.428(3) then, the question is whether the second development application was a separate and distinct application from the application submitted in 1989.

Petitioner contends the second development application submitted in 1990 was a distinct application from the first application submitted in 1989, on the following bases:

> "In addition to separate application forms, the existence of a second application is confirmed by (1) the County's statement in its 1989 staff report and decision of the need for the applicant to file another 'application' to follow up on the [1989 development approval decision], * * * (2) [i]ntervenor[s'] own characterization of the material it submitted in December 1990 as an 'application,'* * * (3) the fact that two applications were subject to different review procedures (the first [development] application was assigned to be processed under a Type II

> process * * *, while the second application was assigned to 'Procedure Type' I), * * * (4) separate and different findings of fact and conclusions of law, * * * and (5) each application led to a decision which was subject to a separate appeal process and period." Petition for Review 28.

Further, petitioner notes the second development application was an "application" in the sense that it was on a form called "Development Application," and after the space on that application form entitled "Proposed Development Action" is written "Development Review for Asphalt Batch Plant." Petition For Review 29.

We agree with petitioner that the second development application was an "application" as that term is used in ORS 215.428(3). In addition, we believe that applicable requirements of the FD-10 zone, including the list of uses allowed in that zone, are "standards and criteria" as those terms are used by ORS 215.428(3).

Therefore, we agree with petitioner that the approval standards in effect at the time the second development application was submitted are the applicable approval standards governing the second development application. Under CDC 403-2.2 and 406-1.1, quoted supra, development approval can only be granted for uses which are permitted in the zoning district. Because the second development application was submitted in 1990, after the MAE zone was replaced by the FD-10 zone, the FD-10 zone standards apply to the second development application and not the standards

of the MAE zone. There is no dispute that batch plants are not allowed in the FD-10 zone. Accordingly, we believe the county erroneously interpreted and applied the applicable law (ORS 215.428(3), CDC 403-2.2 and 406-1.1) to require that the MAE standards, rather than the FD-10 standards, govern approval of the second development application.

The first assignment of error is sustained. Because the decision is prohibited as a matter of law, we must reverse the county's decision. OAR 661-10-071(1)(c).

SECOND ASSIGNMENT OF ERROR

> "The county violated CDC 207-6.6, CDC 423-2.2, 423-4 and the conditions of approval established by the 1989 [development approval] decision by approving the 1990 application without the submission of a DEQ air contaminant discharge permit."

Our decision under the first assignment of error requires that we reverse the challenged 1991 development approval decision. Under these circumstances, no purpose is served in determining whether the county also erred in adopting the 1991 development approval decision because it failed to require the submission of a DEQ permit.

The second assignment of error is denied.

The appeal in LUBA No. 91-035 is dismissed. The county decision appealed in LUBA No. 91-036 is reversed.