BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ANDREW SCHOB and LAURA SCHOB, Petitioners, vs. DESCHUTES COUNTY, Respondent, and JOHN BELL, Intervenor-Respondent.	LUBA No. 92-101 FINAL OPINION AND ORDER

Appeal from Deschutes County.

Greg Hendrix, Bend, filed the petition for review and argued on behalf of petitioners. With him on the brief was Hendrix & Chappell.

No appearance by respondent.

William F. Gary, James E. Mountain, Jr., and Milo R. Mecham, Eugene, filed the response brief. With them on the brief was Harrang, Long, Watkinson, Arnold & Laird. James E. Mountain, Jr. argued on behalf of intervenor-respondent.

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

AFFIRMED 10/13/92

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners appeal a decision of the board of county commissioners' concerning the validity of a previously issued landscape management permit.

MOTION TO INTERVENE

John Bell, the applicant for the subject landscape management permit, moves to intervene in this appeal on the side of respondent. There is no objection, and the motion is allowed.

FACTS

The subject property is owned by intervenor and is zoned Exclusive Farm Use, 20 Acre Minimum (EFU-20) and Landscape Management Combining Zone (LM). Petitioners' property adjoins the subject property to the east. The two properties are separated by an irrigation ditch. Access to both properties is from Johnson Road.

On March 3, 1988, intervenor submitted an application to the county Community Development Department for the construction of a 400-foot fence along the eastern edge of his property. On March 10, 1988, the county issued a building permit for an eight foot metal fence to be located on top of a 15 foot rock berm created by the tailings from the excavation of the irrigation ditch. The building permit was issued without reviewing the proposal for compliance with the criteria of the LM zone.

On April 13, 1988, the county issued a stop work order directing intervenor to "Stop Work or Use on This Structure At Once." Record 111. At this point, framing for the eight foot fence was completed. On April 19, 1988, the planning director issued an administrative decision approving the fence with conditions that it have a maximum height of six feet from the top of the rock berm and be either faced with a natural wood material, painted a neutral color or made of non sight obscuring wire material. Record 662. On June 17, 1988, the planning director issued an amended decision clarifying that no part of the fence may exceed the six foot maximum. Record 660. The planning director's decision, as amended, is hereafter referred to as permit LM 88-3.

No local appeal of the planning director's decision was filed. However, on June 24, 1988, intervenor filed suit against the county in circuit court, requesting a declaratory judgment that the March 10, 1988 building permit remained valid and that the county be enjoined from issuing stop work orders or in any way interfering with construction under the building permit. Over two and one half years later, on March 7, 1991, the circuit court entered a judgment vacating the stop work order as improperly issued, but holding the court did not have jurisdiction over the land use issues raised in intervenor's complaint. Record 333.

After the court's judgment was issued, intervenor

resumed work on the fence. Work on the fence was completed on or about July 15, 1991. In early August, 1991, planning department staff inspected the fence and determined it to be in compliance with permit LM 88-3.

In the meantime, petitioners had asked the county to make a formal determination concerning whether under the Deschutes County Zoning Ordinance (DCZO), permit LM 88-3 had expired prior to the completion of the fence. The board of commissioners held a hearing on petitioners' request and, on April 16, 1992, issued the challenged decision finding that permit LM 88-3 was still valid when intervenor completed construction of the fence.

STANDING

Intervenor concedes petitioners satisfy the standing requirements of ORS 197.830(2). However, intervenor contends petitioners lack standing because they are not "aggrieved" by the county's final decision, as required by ORS 215.422(2). Intervenor argues petitioners are not aggrieved because the county found they do not have a recognized interest in the challenged decision.

ORS 197.830(2) requires that to have standing to appeal a land use decision to LUBA, a petitioner must appear before the local government and file a notice of intent to appeal. ORS 215.422(2) provides, with regard to county proceedings on discretionary permit applications:

> "A party aggrieved by the final determination may have the determination reviewed [by LUBA] in the

manner provided in ORS 197.830 to 197.845." (Emphasis added.)

Prior to 1989, ORS 197.830(2) and (3) required that in order to have standing to appeal a land use decision to LUBA, a petitioner must be "adversely affected" or "aggrieved" by the decision. ORS 215.422(2), and the parallel provision of ORS 227.180(2) for cities, were not changed in 1989, when the requirement that a petitioner be adversely affected or aggrieved was removed from ORS 197.830. In Lowrie v. Polk County, 19 Or LUBA 564 (1990), we declined to decide whether ORS 215.422(2) imposes an additional standing requirement, because the local record demonstrated that petitioner was aggrieved and, therefore, had standing regardless of whether ORS 215.422(2) imposes an additional standing requirement. We stated:

> "The test for determining whether a person is 'aggrieved' was explained by the Oregon Supreme Court in Jefferson Landfill [Comm. v. Marion County], 297 Or 280, 284, 686 P2d 310 (1984), as follows:
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> > "'FIRST PART (applicable to all petitioners before LUBA in quasi-judicial proceedings):
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> > "'1. The person filed a notice of intent to appeal; and
> >
> > "'2. The person appeared orally or in writing before the local land use decision-making body.
> >
> > "'SECOND PART (as a person 'aggrieved'):
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> > "'1. The person's interest in the decision was recognized by the local

land use decision-making body;

"'2. The person asserted a position on the merits; and

"'3. The local land use decision-making body reached a decision contrary to the position asserted by the person.' (Emphasis supplied.)

"In Warren v. Lane County, 297 Or [290, 300-01, 686 P2d 316 (1984)], the court further explained:

> "'In [Jefferson Landfill] we noted that this construction of 'aggrieved' gives to the local land use decision-makers a gate-keeping responsibility for appeal to LUBA. Local decision-makers, by ordinance or otherwise, may determine who will be admitted or excluded as an interested person or limited to the status of disinterested witness in a quasi-judicial proceeding. * * * If the decision-makers have not made such a determination, by ordinance or otherwise, it will be assumed that when a person appears before the local body and asserts a position on the merits, the person has a recognized interest in the outcome.'" Lowrie v. Polk County, 19 Or LUBA at 567.

Establishing limitations on the interests a local government will recognize in its land use proceedings is a function of a local government's "gate-keeping" responsibility. Warren v. Lane County, supra; Jefferson Landfill, supra. The only ordinance provision cited by the parties that is arguably related to this gate-keeping function is Deschutes County Development Procedures Ordinance (DPO) 22.24.080, which provides in relevant part:

"STANDING

> "1. Any interested person may appear and be heard in a land use action hearing.
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> "2. Any person appearing on the record at the hearing or presenting written evidence in conjunction with an administrative action or hearing shall have standing and shall be a party.
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> "* * * * *"

There is no dispute that petitioners appeared and entered testimony into the record at the board of commissioners' October 29, 1991 hearing regarding the validity of the subject permit. Accordingly, under DPO 22.24.080.2, petitioners have standing in, and are a party to, the county proceedings.

Intervenor's argument that petitioners' interest in the matter below was not recognized by the county is based on the following findings in the challenged decision:

> "* * * interest[s] of [petitioners], as property owners, and others similarly situated are not within the class of interests intended to be protected by the LM provisions. Pursuant to the County's comprehensive plan, the LM provisions apply only to selected roads and rivers in the County. * * * It is clear that the LM provisions are intended to protect the interests of those who view the landscape from those protected vantage points. * * *
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> "* * * * *" Record 7-8.

Viewed in context, we do not believe the above quoted findings are an expression of the county's gate-keeping function. Rather, they explain the county's interpretation of the purpose of its LM code provisions. The findings do

not specifically state that petitioners lack any cognizable interest in the county proceedings (to which they are parties under DPO 22.24.080.2). The findings explain that it is views from certain roads and rivers, not from the property of petitioners and other land owners, that are protected by the LM provisions.

Because petitioners asserted a position on the merits contrary to the challenged decision during the county proceedings, and petitioners' interest in the county proceedings is recognized under the DPO, we conclude petitioners are aggrieved by the challenged decision. Therefore, regardless of whether ORS 215.422(2) imposes an additional standing requirement, petitioners have standing in this appeal.

FIRST ASSIGNMENT OF ERROR

> "Deschutes County has no authority to deem a permit 'suspended;' LM 88-3 expired under the terms of the DCZO."

As applicable to permit LM 88-3,[1] DCZO Section 26 provides:

> "DURATION OF PERMIT. All land use permits shall be valid for a period of one year after the date of approval, unless a longer duration is granted as part of the approval. The date of the approval is the date the final written decision is mailed

[1]The version of the DCZO applicable to permit LM 88-3 is Deschutes County Ordinance No. 82-011, as amended by Ordinance No. 88-05. ORS 215.428(3).

to the parties."[2]

The challenged decision states the county finds DCZO Section 26 to be applicable, and goes on to state:

> "[D]ue to the stop work order issued by the County on April 19, 1988, the running of the one-year time period on [permit LM 88-3] was suspended. That suspension was in effect from the time the stop work order was issued until the time the stop work order was vacated by the judgment entered in [intervenor's] suit on March 7, 1991. The [county's] determination in this regard is based upon principles of equity and fairness, to wit:
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> "[I]t would not be equitable to issue a stop work order and having done so later find that the permit expired due to [the] Permitee's failure to complete the project at which the stop work order was directed within the one-year period. [Petitioners] argue the stop work order was directed at the 8-foot fence and not the 6-foot fence that was ultimately constructed. The * * * terms of the stop work order did not distinguish between a 6-foot fence and a 8-foot fence.
>
> "* * * * *
>
> "* * * The issue is one of <u>suspension</u> of the running of the time period [established by DCZO Section 26], due to equitable considerations that need not be embodied in the County's procedures ordinance." (Emphasis in original.) Record 6-7.

Petitioners' arguments that permit LM 88-3 expired prior to intervenor completing the subject fence are based primarily on their contention that the county improperly based its decision to the contrary on general principles of

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[2]In addition, DCZO Section 27 provides that permits may be extended by the planning director prior to expiration, for a period of up to one year. However, there is no dispute that permit LM 88-3 was never extended pursuant to this provision of the DCZO.

equity rather than the provisions of the DCZO. Petitioners also argue the stop work order did not prevent construction of a six-foot fence in compliance with permit LM 88-3.

We do not agree with petitioners' underlying premise that the county's decision is improperly based on general principles of equity, rather than the DCZO. The decision properly finds DCZO Section 26 is the code provision applicable to the expiration of permit LM 88-3. The decision proceeds to determine how DCZO Section 26 applies to the facts of this case. It concludes that the one year period of permit validity established by DCZO Section 26 does not include periods during which a county stop work order is directed against the subject development. Read in this manner, the reference in the decision to "principles of equity and fairness" merely indicates the county intends to interpret the DCZO in a fair and equitable manner.

In Clark v. Jackson County, 313 Or 508, 515, ___ P2d ___ (1992), the Oregon Supreme Court stated:

> "[I]n reviewing a county's land use decision, LUBA is to affirm the county's interpretation of its own ordinance unless LUBA determines that the county's interpretation is inconsistent with express language of the ordinance or its apparent purpose or policy. LUBA lacks authority to substitute its own interpretation of the ordinance unless the county's interpretation was inconsistent with that ordinance, including its context."

We do not believe it is inconsistent with the language, purpose or policy of DCZO Section 26 to interpret the one

year period during which a permit remains valid not to include time when the permittee is prevented from carrying out the permit due to a stop work order issued by the county. Further, we agree with intervenor that until the stop work order was vacated by the circuit court, it prevented all work on the subject fence. Finally, there is no question that the fence was completed, in compliance with permit LM 88-3, within one year after the stop work order was vacated. Consequently, the challenged decision correctly concludes permit LM 88-3 did not expire prior to completion of the fence.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners challenge the county's finding that they and other similarly situated property owners "are not within the class of interests intended to be protected by the LM provisions." Record 7.

We determine, supra, the challenged finding does not provide a basis for concluding petitioners lack standing to appeal the challenged decision. Additionally, the challenged finding is not relevant to determining whether permit LM 88-3 expired prior to completion of the subject fence. Therefore, even if the finding were in error in some way, that would not provide a basis for reversing or remanding the challenged decision.

The second assignment of error is denied.

The county's decision is affirmed.