BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MURPHY CITIZENS ADVISORY COMMITTEE, Petitioner, vs. JOSEPHINE COUNTY, Respondent, and COPELAND SAND & GRAVEL, INC., Intervenor-Respondent.	LUBA No. 92-234 FINAL OPINION AND ORDER

Appeal from Josephine County.

Matthew G. Fawcett, Medford, filed the petition for review and argued on behalf of petitioner.

No appearance by respondent.

James Dole, Grants Pass, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Schultz, Salisbury, Cauble & Versteeg.

SHERTON, Chief Referee, participated in the decision.

HOLSTUN, Referee, concurring.

KELLINGTON, Referee, dissenting.

DISMISSED 06/24/93

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

Petitioner appeals a stipulated agreement entered into as part of circuit court mandamus proceedings brought against the county under ORS 215.428(7).[1] The nature of this stipulated agreement is central to this decision and is explained in more detail, infra.

MOTION TO INTERVENE

Copeland Sand & Gravel, Inc. moves to intervene in this appeal proceeding on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

Intervenor-respondent (intervenor) submitted an application to the county for site review and development permit approval for a rock crushing and asphalt and cement batching facility on the subject Rural Industrial zoned property. The planning director approved the application, subject to some 34 conditions adopted by the Site Review Committee. Record 187-91. Petitioner and others appealed

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[1]ORS 215.428(7) provides:

> "If the governing body of the county or its designate does not take final action on an application for a permit * * * within 120 days after the application is deemed complete, the applicant may apply to the circuit court of the county where the application was filed for a writ of mandamus to compel the governing body or its designate to issue the approval. The writ shall be issued unless the governing body shows the approval would violate a substantive provision of the county comprehensive plan or land use regulations as defined in ORS 197.015."

the planning director's decision to the county planning commission. The planning commission denied the appeal.

Petitioner appealed the planning commission's decision to the board of commissioners. After the close of the board of commissioners' public hearing, the commissioners continued their deliberations to a later time. Apparently, the time set for those deliberations was beyond the 120 day time period provided by ORS 215.428(1).

On September 22, 1992, intervenor filed a mandamus proceeding under ORS 215.428(7), naming the county board of commissioners, planning commission and planning director as defendants. In that circuit court proceeding, intervenor also asked the circuit court to "stay" any further county proceedings on intervenor's development permit application. The circuit court issued the requested stay, ordering the county to take no further action on intervenor's development permit application. Record 33. The circuit court also issued an alternative writ of mandamus requiring the county either to issue final development permit approval, according to the terms of intervenor's application, or to show cause why the county should not be required to do so. Record 37.

The board of commissioners conducted no further proceedings on intervenor's application. However, on December 2, 1992, the county and intervenor entered into a stipulation that "the [development] permit will subsequently issue subject to the conditions in" the planning

commission's May 4, 1992 decision, which were incorporated by reference into the stipulation.[2] Record 11. This appeal followed.[3]

JURISDICTION

We previously issued an order denying intervenor's motion to dismiss this appeal. Murphy Citizens Advisory Comm. v. Josephine County, ___ Or LUBA ___ (LUBA No. 92-234, Order on Motion to Dismiss, May 18, 1993). Intervenor continues to contend this Board lacks jurisdiction to review the challenged stipulation, and asks that we reconsider the jurisdictional question. We do reconsider and, for the reasons stated below, conclude the challenged stipulation is

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[2]Although the December 2, 1992 stipulation carries the caption of the circuit court proceeding, the intervenor-defendant in that circuit court proceeding (petitioner in this appeal proceeding) was not a party to it.

[3]After this appeal was filed, on January 21, 1993, the circuit court issued a final judgment in the mandamus proceeding. This judgment states that the following is "ordered adjudged and decreed":

> "[The county has] complied with the terms of the Alternative Writ of Mandamus issued by the court on September 22, 1992, (the writ) by virtue of the Stipulation filed December 2, 1992, wherein [the county] and Relator agreed that the requested development permit would issue subject to the referenced conditions.
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> "Further consideration of this matter is rendered moot because of [the county's] compliance with the writ.
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> "Consistent with the stipulation, and the effect thereof, each party shall bear its own attorney fees and costs in connection herewith." Josephine County Circuit Court, Case No. 92-CV-0206, Judgment 1-2.

Petitioner appealed the circuit court's decision to the court of appeals. However, the court of appeals has not yet issued a decision in that appeal.

not a "land use decision" subject to our review.

After a mandamus proceeding has been initiated pursuant to ORS 215.428(7), local governments retain jurisdiction to make a "land use decision" on a pending permit application at any time before the circuit court issues a final judgment in the mandamus proceeding.[4] Edney v. Columbia County Board of Commissioners, 119 Or App 6, 12, ___ P2d ___ (1993) (Edney). A "land use decision," even if made while circuit court mandamus proceedings are pending, is reviewable by this Board under ORS 197.825(1). Id. Therefore, the question we must decide in this case is whether the challenged stipulation is a "land use decision," i.e. a final decision by the county board of commissioners concerning the application of the county comprehensive plan and land use regulations to intervenor's permit application (ORS 197.015(10)(a)(A)), or simply a document submitted to the circuit court as part of the mandamus proceedings.

The stipulation bears the caption of the circuit court mandamus proceeding. Further, the stipulation was entered into by the county defendants at a time when the circuit court had issued an order staying further county proceedings on intervenor's permit application.[5] Record 33. There is

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[4]If the local government makes such a land use decision, the circuit court loses jurisdiction over the mandamus proceedings, even though the local government's decision is untimely under ORS 215.428(7). Id.

[5]Under ORS 34.130(5), a circuit court has discretion to stay the administrative proceeding from which a pending mandamus proceeding arose.

no indication in the record that the county defendants intended to violate the circuit court ordered stay.

In addition, the stipulation itself does not state that the board of commissioners (the decision maker in the pending county proceeding) approves or grants the requested development permit. Rather, the stipulation expresses an agreement or promise that "[t]he permit will subsequently issue subject to the conditions in this stipulation." (Emphasis added.) Record 11. Nothing in the Josephine County Zoning Ordinance (JCZO) or Josephine County Land Use Hearing Rules (LUHR) states that a land use decision on a development permit application can be made by a stipulation between the county decision maker and the applicant.

Also, LUHR 17(13) requires that with regard to appeals from planning commission decisions, "[t]he Board [of Commissioners] shall make written Findings and Conclusions as part of its written decision." Although the challenged stipulation incorporates the conditions set out in the planning commission's May 4, 1992 decision on the subject application, it does not include any findings or conclusions, as required by LUHR 17(13).

In view of the statutory interpretation expressed by the court of appeals in Edney, supra, favoring local government making of land use decisions and review by LUBA over the writ of mandamus alternative offered by ORS 215.428(7), it might be argued that a circuit court should not use its discretion under ORS 34.130(5) to stay local government land use proceedings. However, the circuit court did stay the county land use proceedings in this case, and it is not within our authority to declare such a stay invalid.

Based on the above, we conclude the challenged stipulation is not a land use decision by the county on intervenor's permit application, but rather a promise by the county to take some action in the future,[6] made as part of and in an effort to settle, the pending circuit court mandamus proceeding.[7] Therefore, we lack jurisdiction to review the challenged stipulation.

The May 18, 1993 Order on Motion to Dismiss in this matter is vacated.

This appeal is dismissed.

Holstun, Referee, concurring.

The stipulation signed by the lawyers for two of the three parties to the circuit court mandamus proceeding described above is not a land use decision subject to LUBA review.[8] That stipulation is an agreement, which, if the

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[6]We express no opinion on whether such a future county action approving or issuing the requested development permit pursuant to the stipulated agreement and the circuit court judgment in the mandamus proceeding would be a land use decision subject to our review. However, we note that in Gearhard v. Klamath County, 22 Or LUBA 377 (1991), we determined that where a challenged county order approving a permit is mandated by an order of the circuit court issued pursuant to a writ of mandamus under ORS 215.428(7), the county's decision is not a "land use decision," because the county was not required to apply its comprehensive plan and land use regulations in adopting that decision.

[7]The circuit court's dismissal of the mandamus proceeding, in reliance on the stipulated agreement between the county defendants and intervenor, is subject to review by the court of appeals, and petitioner is pursuing such review.

[8]I assume the county's lawyer consulted with her client before signing and submitting the stipulation. I also assume, because there is nothing in

circuit court's decision is affirmed on appeal, presumably would bind the county and could be enforced by the circuit court if the county should fail to perform as promised in the stipulation. The stipulation is not a final decision of any sort.

The dissent characterizes the stipulation as a "stipulation decision." If, by that characterization, the dissent means to suggest the county intended that the stipulation itself constitutes a decision on the merits of the original permit application, I see nothing in the words of the stipulation to support such a suggestion.[9] It is simply an agreement to grant a development permit, in lieu of a circuit court decision ordering the county to do so as a consequence of its failure to take timely action on the

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the stipulation suggesting otherwise, that the board of county commissioners agreed with the course of action set out in the stipulation as a satisfactory way to terminate the mandamus proceedings.

[9]The body of the stipulation provides, in its entirety, as follows:

"Relator and Defendants stipulate and agree as follows:

"1. By virtue of ORS 215.428, Relator has demanded a development permit (the permit) for Relator's rock crushing and processing facility * * *.

"2. The permit is subject to those site review conditions set forth by the Josephine County Planning Commission dated May 4, 1992, attached as Exhibit A and by this reference incorporated herein.

"3. Defendants withdraw defendants' Motion to Quash * * * and Answer * * *. The permit will subsequently issue subject to the conditions in this stipulation.

"4. The parties shall bear each party's own attorney fees and costs in connection herewith." Record 11-12.

application. We previously determined a county decision entered pursuant to a circuit court order to approve a permit under ORS 215.428(7) is not a land use decision. See Gearhard v. Klamath County, supra. Neither is the challenged stipulation that the county will issue a development permit in the future (a stipulation entered as part of a circuit court proceeding under ORS 215.428(7)) a land use decision. While some confusion on the point may be understandable, the stipulation simply is not a final decision of the board of county commissioners on the merits of the application, which it would have to be to constitute a land use decision in this case.

For the reasons explained in Edney, supra, the board of county commissioners clearly had the authority to make a land use decision on the merits in this matter, although as I read the circuit court's stay, had such a land use decision been made, the county probably would have violated the terms of the stay.[10] Therefore, had the board of commissioners actually granted the development permit approval originally requested, in whole or in part, or denied that development permit approval, such a decision

[10]The stay prohibited further "local proceedings." I assume the purpose of the stay was to preclude the issuance of a land use decision by the county, not just to preclude additional public hearings or deliberations by the board of county commissioners. In light of the reasoning and holding in Edney, the circuit court may well have erred in issuing such a stay. In any event, neither the existence of the circuit court stay nor its legal propriety is critical to my view that the stipulation challenged in this appeal is not a land use decision.

clearly would have been a land use decision subject to this Board's review. However, the challenged stipulation simply is not such a decision. Whatever the stipulation is, it is a creature of the circuit court mandamus proceeding, rather than a creature of the county's land use proceedings, and it will fly or die with appellate court review of the circuit court's decision.

Kellington, Referee, dissenting.

On May 18, 1993, this Board issued an order determining it has jurisdiction over this appeal. Murphy Citizens Advisory Comm. v. Josephine County, supra, (Murphy CAC). In the Murphy CAC order, we rejected most if not all of the arguments stated above in the majority opinion. The crux of our order in Murphy CAC is as follows:

> "In Edney, [supra, 119 Or App at 11-12], the court of appeals held that where a local government makes a final decision on a pending development permit application before a final judgment is issued in a mandamus proceeding under ORS 215.428(7), the decision of the local government makes mandamus relief unnecessary, and the local government decision is subject to LUBA review. The court in Edney, supra, 119 Or App at 12, explained:
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> > "'[T]he clear point from our reasoning [in prior cases] is that review through the LUBA process is the norm, the mandamus remedy under ORS 215.428(7) is the exception and that resort to circuit court is not permissible once a county decision has been made and the overriding purpose of ORS 215.428(7) has thereby been achieved. That point is no

> less compelling if the land use decision is made while a mandamus action is pending than it is if an untimely decision is made before the action is brought. In both instances, the preferred method of review has become fully available, and the need for compulsory relief has ceased to exist.' (Emphasis in original.)

"We recognize that Edney differs from the instant case because in Edney, the circuit court had not ordered the county to stop its local proceedings on the pending permit application. However, under the legal principle articulated in Edney, a local government retains authority to make a decision on a pending permit application at any time prior to entry of a circuit court judgment in a mandamus proceeding under ORS 215.428(7). Therefore, we do not believe the presence of a circuit court order ordering a local government to stop proceedings on a pending development permit is dispositive here.

"Although the challenged decision was adopted by the county to settle the pending mandamus action, it is also a final decision on a pending permit application which was made prior to the time the circuit court issued its final judgment. Moreover, in the circuit court's final judgment, the court did not issue the preemptory writ ordering the county to approve the application. Rather, the circuit court determined the mandamus proceeding was rendered moot by the stipulated agreement of the applicant and the county. * * *.

"Here, the challenged decision to approve the application was not made pursuant to an order of the circuit court that left the county with no discretion to deny it. Rather, the challenged decision approves the permit application, subject to the conditions of approval imposed by the planning commission in its earlier decision. Presumably, the county could refuse to issue the development permit if intervenor failed to comply with those conditions of approval. Thus, the challenged decision involves the exercise of discretion and, therefore, is not excluded from

> our jurisdiction under ORS 197.015(10)(b)(A)." (Footnotes omitted. First emphasis supplied; second emphasis in original.) Murphy CAC, slip op at 4-6.

In my view, the majority decision is not supportable in view of the Edney decision. Here, there is no dispute that the board of county commissioners was the final decision maker before whom a permit application for development approval was pending. Local public hearings before both the planning commission and board of county commissioners had occurred and were finished on that pending permit application. Only the final deliberation of the board of county commissioners on the pending permit application, and consequent written decision, remained to be accomplished before the applicant instituted the mandamus proceeding. Further, there is no dispute that the challenged stipulation decision was made at the direction, and on behalf of, the county board of county commissioners. The challenged stipulation decision in fact approves, subject to conditions, the disputed application for land use approval, and the decision was made prior to the final adjudication of the pending mandamus proceeding.[11] Finally, the mandamus proceeding ended on the basis of the circuit court's pronouncement that the challenged stipulation decision made

[11]To me, this is apparent from reading the language of the challenged stipulation decision together with the circuit court judgment determining that further mandamus proceedings are moot because of the challenged stipulation decision.

further mandamus proceedings moot, not on the basis of the issuance of an alternative or preemptory writ.

In determining this Board's jurisdiction over a challenged local government decision, the inquiry does not necessarily depend upon what the local government should have done. Rather what the local government actually did is relevant and, sometimes, is dispositive. See Byrnes v. City of Hillsboro, 101 Or App 307, 312-13, 790 P2d 552 (1990), adhered to 104 Or App 95 (1990) ("* * * the way in which the ordinance was applied, rather than the way it should have been applied is determinative of jurisdiction." Id.) In this regard, it seems to me, the first inquiry should be whether the county made a decision on a pending permit application for development approval and not on the manner in which the decision was made. The fact that the circuit court stayed the completion of the local proceedings on the pending development application did not make it impossible for the local decision maker -- the board of county commissioners -- to make a land use decision on that pending permit application, subject to our jurisdiction. Here, the board of county commissioners did make a decision on the pending permit application for development approval. While the challenged stipulation decision was not made in the context of traditional local proceedings (because the circuit court had forbidden the county from conducting such proceedings), but instead was adopted in a manner allowable

by the circuit court, in my view, this bears little on the question of our jurisdiction.

To me, the critical questions are (1) whether the challenged stipulation decision was made under the discretionary local and statutory authority of the county to approve or disapprove the pending permit application, or (2) whether it was made under the command of the circuit court pursuant to ORS 215.428(7) to approve the application.[12] If the challenged decision was made pursuant to the county's discretionary authority to approve or disapprove the disputed permit application for development, then I believe this Board has jurisdiction over it. In this regard, two aspects of this appeal persuade me that the challenged stipulation decision was made under the discretionary authority of the county to approve or disapprove the permit application and, therefore, is subject to our jurisdiction. Those two aspects are the language of the challenged stipulation decision itself and the reasoning and holding of Edney.

With regard to the language of the challenged stipulation decision, it clearly does not approve outright the disputed permit application for development. Rather, the challenged decision approves the permit application

[12]No party argues that there is any other potential basis for the challenged stipulation decision other than the two possibilities outlined above.

subject to several conditions of approval. This does not sound like a decision of a circuit court ordering the approval of the development application by writ of mandamus under ORS 215.428.

With regard to the Edney decision, the court of appeals acknowledged that it is possible to read the applicable statutes to permit a party's institution of mandamus proceedings under ORS 215.428 to deprive a local government of its authority to make a land use decision concerning a pending application. However, after an exhaustive review of statutory policy and appellate precedents, the court of appeals determined that the retention of local government authority to make land use decisions, appealable through the LUBA process, is strongly favored up until the time of the "final adjudication" of a mandamus proceeding by a circuit court. Here, as in Edney, when the county approved the pending permit application subject to various conditions of approval:

> "* * * the need for compulsory relief * * * ceased to exist."[13] Edney, supra, 119 Or App at 12.

In sum, having drawn the jurisdictional line where the Edney court did, it seems to me that the challenged stipulation decision, made by the highest local decision

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[13]The circuit court judgment at least impliedly recognizes this principle by determining that the challenged stipulation decision renders further mandamus proceedings moot.

making authority on a pending permit application, before the final adjudication of the mandamus proceeding, is a land use decision appealable to this Board.

One further point merits comment. The majority opinion suggests, and the concurring opinion states that the approval of the permit application, subject to the issuance of the actual permit when listed conditions are satisfied, should be characterized as merely a promise or agreement by the local government to make a decision in the future. The idea that the challenged stipulation decision is not final appears to be based solely upon the context in which the challenged stipulation decision was made and the motives of the local decision maker in making that decision. At a minimum, in my view, this analysis confuses the determination of whether a challenged decision is a land use decision subject to our review, with the concept of finality.[14] If the challenged stipulation decision is a land use decision, which I believe it is under Edney, then it is surprising indeed that the conditional approval of a pending permit application by the highest local authority is not a final decision, simply because of the context in which

[14]The statutory definition of a "land use decision" subject to our jurisdiction contains several elements. As relevant here, those elements are that the decision challenged at LUBA must (1) be "final," and (2) apply comprehensive plan provisions or land use regulations, something a decision on a permit application clearly must do. See ORS 215.402(4). Nevertheless, while the challenged stipulation decision must be both final and apply plan provisions or land use regulations, to me, these determinations are analytically distinct.

the decision is made or the local government's motives for adopting the decision.

I respectfully dissent.