BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ANDREW MILLER, Petitioner, vs. MULTNOMAH COUNTY, Respondent, and ARNOLD ROCHLIN, Intervenor-Respondent.	LUBA No. 97-105 FINAL OPINION AND ORDER

Appeal from Multnomah County.

Dorothy S. Cofield, Portland, filed the petition for review and argued on behalf of petitioner.

Sandra N. Duffy, Chief Assistant County Counsel, Portland, filed a response brief on behalf of respondent. Laurie Craghead argued on behalf of respondent.

Arnold Rochlin, Portland, filed a response brief and argued on his own behalf.

GUSTAFSON, Chief Administrative Law Judge; LIVINGSTON, Administrative Law Judge, participated in the decision.

REMANDED 11/05/97

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

Opinion by Gustafson.

NATURE OF THE DECISION

Petitioner appeals the county's denial of a conditional use permit to build a template dwelling in a forest zone.

MOTION TO INTERVENE

Arnold Rochlin moves to intervene on the side of the county. There is no opposition, and the motion is allowed.

FACTS

In July 1996 petitioner submitted a conditional use permit application for a template dwelling in a forest zone. At the preapplication conference, planning department staff informed petitioner that because the county had not yet adopted the 1994 amendments to OAR chapter 660, division 6, the county would apply both its preexisting template dwelling test as well as the template dwelling test under OAR 660-06-027(1)(d). Under OAR 660-06-027(1)(d), a dwelling is allowed in a forest zone when as few as three dwellings are present on at least 11 parcels found within a 160-acre template oriented in any direction. The county's template test is more restrictive than the state template test in that the county's test is satisfied only if five other dwellings are present on at least 11 parcels found within a 160-acre template oriented along section lines.

Petitioner's application was deemed complete on January 2, 1997. On March 5, 1997, the county hearings officer denied petitioner's template dwelling application on the

grounds that only three other dwellings existed within the 160-acre template, and thus it failed the county's template test requiring at least five other dwellings within the template.

On April 1, 1997, the county board of commissioners (county board) conducted a de novo appeal of the hearings officer's denial of the application, and, at the close of the hearing, made oral findings and conclusions and voted to affirm the hearings officer's decision. The county board ordered the hearings officer to amend her findings in two minor particulars.

On April 28, 1997, the hearings officer signed the amended decision and forwarded it to the county board. The "final order" was presented to the county for approval on May 8, 1997. It states in relevant part:

> "IT IS HEREBY ORDERED that the Hearings Officer's decision dated March 1, 1997 regarding CU 7-96 and SEC 33-97 is amended * * * (see attached amended Hearings Officer decision dated April 28, 1997) and is AFFIRMED.
>
> "DATED this 8th day of May, 1997, nunc pro tunc April 1, 1997.
>
> "BOARD OF COUNTY COMMISSIONERS
> "FOR MULTNOMAH COUNTY, OREGON
>
> "/s/ Beverly Stein"

At the May 8, 1997 hearing, petitioner objected to dating the order nunc pro tunc to April 1, 1997, the date on which the county rendered its oral decision to deny the

application. Petitioner argued that the 120-day period for the county to take final action on his application under ORS 215.428(1)[1] had passed on May 2, 1997, and that retroactive dating of the county's order would deny petitioner the right to seek a statutory remedy for violations of the 120-day rule: a 50 percent refund of his application fee, pursuant to ORS 215.428(7).[2]

The county counsel advised the county board that the oral decision on April 1, 1997 is the final action for purposes of the 120-day rule. The county then voted to approve the order as dated nunc pro tunc to April 1, 1997.

---

[1]ORS 215.428(1) states:

> "(1) * * * [T]he governing body of a county or its designate shall take final action on an application for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 215.422, within 120 days after the application is deemed complete."

[2]ORS 215.428(7) provides:

> "* * * [I]f the governing body of the county or its designate does not take final action on an application for a permit, limited land use decision or zone change within 120 days after the application is deemed complete:
>
> "(a) The county shall refund to the applicant either the unexpended portion of any application fees or deposits previously paid or 50 percent of the total amount of such fees or deposits, whichever is greater. The applicant is not liable for additional governmental fees incurred subsequent to the payment of such fees or deposits. However, the applicant is responsible for the costs of providing sufficient additional information to address relevant issues identified in the consideration of the application.
>
> "* * * * *"

This appeal followed.[3]

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the county board misconstrued the applicable law when it treated the oral decision on April 1, 1997, as its "final action" for purposes of the 120-day rule at ORS 215.428(1), and thus it improperly denied petitioner's request for a 50 percent refund pursuant to ORS 215.428(7)(a). Further, petitioner argues that when the county dated its final order nunc pro tunc to April 1, 1997 it did so for the purpose of avoiding the 120-day rule. Accordingly, petitioner argues that the decision must be reversed and the county ordered to approve his application, as required by ORS 197.835(10)(a)(B).[4]

A. Final Action

For purposes of ORS chapter 215, counties may determine by rule when their decisions become final. Columbia River Television v. Multnomah Co., 299 Or 325, 334, 702 P2d 1065 (1985). In the absence of a county rule defining when an

---

[3]Petitioner did not choose to seek a writ of mandamus under ORS 215.428(7)(b).

[4]ORS 197.835(10)(a)(B) provides that:

> "The board shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds:
>
> "* * * * *
>
> "(B) That the local government's action was for the purpose of avoiding the requirements of ORS 215.428 or 227.178."

action becomes final for purposes of ORS 215.428(1), the action is final when the decision on the application is made. Bigej Enterprises v. Tillamook County, 115 Or App 425, 838 P2d 1095 (1992), modified and adhered to on reconsideration, 118 Or App 342 (1993).

In Bigej, the decision was reduced to writing and signed on the 120th day, but not mailed until the 123rd day. The county's code did not define when a decision of the board of commissioners became final. The court of appeals held that, in the absence of a local rule defining when a decision becomes final for purposes of ORS 215.428, the court would

> "* * * give effect to the plain meaning of ORS 215.428 that an action is 'final' when the application is deemed complete and the decision on the application is made, not when it is mailed." 115 Or App at 431 (emphasis added).

In the present case petitioner argues that the county code does define finality for purposes of ORS 215.428. Multnomah County Code (MCC) 11.15.8280 provides that:

> "A. The [county board] may affirm, reverse or modify the decision of the Planning Commission or Hearings Officer and may grant approval subject to such modifications or conditions as may be necessary to carry out the Comprehensive Plan or to achieve the objectives of MCC .8240(D).
>
> "B. The [county board] shall state all decisions upon the close of its hearing or upon continuance of the matter to a time certain.
>
> "C. Written findings of fact and conclusions, based upon the record, shall be signed by the

> Presiding Officer of the [county board] with a decision within five business days following announcement of the decision under subsection (B) above.
>
> "D. The [county board's] decision shall be final at the close of business on the tenth day after the Decision, Findings of Fact and Conclusions have been filed under subsection (C) above, unless the Board on its own motion grants a rehearing under MCC. 8285(A).
>
> "E. The [county board] shall render a decision within 120 days from the time the application is accepted as being complete * * *." (Emphasis added.)

The county responds that MCC 11.15.8280 defines "finality" only for purposes of appellate review. The county reasons that the writing and signature requirements of MCC 11.15.8280(C) are necessary only for appellate review because the decision must be in writing to know what to challenge on appeal. In contrast, the only purpose of ORS 215.428(1), according to the county, is to compel a timely decision, a purpose equally well served when the county renders an oral decision. The county thus argues that ORS 215.428(1), rather than MCC 11.15.8280, supplies the applicable standard for finality. The county then relies on Bigej for the proposition that ORS 215.428(1) only requires that the decision be "made," a requirement that, according to the county, is met by an oral decision.

We disagree with the county that MCC 11.15.8280 does

not define "finality" for purposes of ORS 215.428(1).[5] MCC 11.15.8280 does not expressly or impliedly limit its scope to appellate review, and the restatement of the 120-day requirement at MCC 11.15.8280(E) within the code section defining finality strongly suggests that MCC 11.15.8280 determines finality for purposes of the 120-day rule.

Even if the county is correct that MCC 11.15.8280 does not define finality for purposes of 120-day rule, we are not persuaded by the county's reading of ORS 215.428(1) or its attempt to extend Bigej beyond its facts. The county's argument in both instances ignores the requirement in ORS 215.248(1) that the action be "final." The county does not dispute that it could have changed its oral decision at any time between April 1, 1997, and the date the decision became "final" under its ordinance. The county cites no impediment to the county board's reconsideration of its oral decision before or during the May 8, 1997 meeting, when it signed the written decision. Further, under MCC 11.15.8280(D), the decision became final ten days after the county filed the written, signed decision with the county clerk. Until those events transpire, the county could have reheard the decision on its own motion pursuant to MCC 11.15.8285. Under these circumstances, we are not persuaded that the oral decision

---

[5]The challenged decision does not expressly or impliedly interpret MCC 11.15.8280. In the absence of a local interpretation, we are authorized to determine whether the city's decision is correct. ORS 197.829(2).

on April 1, 1997 was "final" for purposes of ORS 215.428(1).

For the foregoing reasons, we conclude that the challenged decision became "final" for purposes of ORS 215.428(1), either under the county's ordinance or directly under ORS 215.428(1), more than 120 days after petitioner completed his application. It follows that petitioner is entitled, under ORS 215.428(7)(a), to a refund of 50 per cent of his application fee. We turn now to whether the county acted with the purpose of avoiding the 120-day requirement, and thus whether we should reverse the decision and order the county to grant approval of the application. ORS 197.835(10)(a)(B).

B. Purpose to Avoid the 120-day Requirement

Petitioner argues that the county board acted with the purpose of avoiding the 120-day requirement when it "backdated" the order signed May 8, 1997 nunc pro tunc to April 1, 1997. For evidence of this purpose, petitioner cites to an explanation by county counsel when the county board asked the purpose of dating the order nunc pro tunc April 1, 1997. The county counsel responded:

> "It is the procedure that the County uses to make sure that a decision is made by the [county board] within the 120 days, which you did do. * * * [W]hen you make the oral decision that is the act the final action of the [county board] that needs to happen. * * * Then it is simply ministerial when you send the planning department off to create the final document which is what you are approving today. You are indicating that this order now comports with the decision that you made

on April 1st. * * *."

Petitioner characterizes the above as an admission that the county sought to circumvent the 120-day rule by backdating its written decision to the date of the oral decision.

Intervenor disputes that such conduct constitutes acting with the purpose to avoid the 120-day rule in violation of ORS 197.835(10)(a)(B). According to intervenor, the county board issued the order May 8, 1997 under the belief that it had already taken final action within the 120-day period when it announced its oral decision on April 1, 1997. Thus, according to intervenor, the county board did not backdate the final decision for the purpose of avoiding the 120-day rule, but rather, as the county counsel explained, to show that the final decision comports with the prior oral decision.

Stated somewhat differently, intervenor argues that ORS 197.835(10)(a)(B) applies only when the county's purpose in denying the application is to avoid the 120-day rule. According to intervenor, the county had a legitimate reason to deny the application, and decided to do so, more than a month before the 120-day period elapsed. Intervenor argues that the county's purpose in denying the application had nothing to do with trying to avoid the 120-day requirement, and backdating the order has no effect, one way or another, on the reasons for the denial. Intervenor's position, in sum, is that ORS 197.835(10)(a)(B) applies only when

petitioner demonstrates that the local government denies an application in bad faith in a deliberate attempt to avoid the 120-day requirement.

The arguments, as framed, turn on the proper interpretation of ORS 197.835(10)(a)(B), an issue of first impression.[6] In interpreting a statute, we first examine the text and context of the statute to determine the legislature's intent. PGE v. Bureau of Labor and Industries, 317 Or 606, 610-11, 859 P2d 1143 (1993).

The text tends to support intervenor's reading that the "action" ORS 197.835(10)(a)(B) is intended to discourage is a denial of the application in order to avoid the 120-day rule:

> "The board shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds:
>
> "* * * * *
>
> "(B) That the local government's action was for the purpose of avoiding the requirements of ORS 215.428 or 227.178." (Emphasis added.)

We discern nothing in the context of ORS 197.835(10)(a)(B) relevant to this inquiry. Because the text and context do not make the legislature's intent certain on this point, we consider the legislative history. PGE, 317 Or at 611-12.

---

[6]ORS 197.835(10)(a)(B) stems from 1995 Oregon Laws ch. 812, section 5 (Senate Bill 245).

As initially proposed, Senate Bill 245 would have eliminated the mandamus remedy at ORS 215.428(7) and replaced it with automatic approval if the local government failed to take final action by the 120th day. Subsequent revisions softened this approach in favor of the requirement, now codified at ORS 215.428(7)(a), that the county must refund 50 percent of the application fee if the county exceeds the 120-day period.

Senate Bill 245 section 5, amending ORS 197.835(10), was added later in response to a concern that counties would begin denying applications "when they reached the 118th day" to avoid refunding the fees. Testimony of Kelly Ross, Oregon Association of Realtors, before the Senate Water and Land Use Committee, February 8, 1995, Tape 24, Side A, 326. The chairman of the committee commented that the amendments to ORS 197.835(10) are "a way of putting some teeth" into the refund incentive for counties to meet the 120-day requirement. Id. at 390. The committee adopted those amendments without further discussion, and the bill passed the House and Senate and in conference without discussion or amendment relevant to this case.[7]

[7]As proposed originally, section 5 allowed LUBA to reverse a local government's denial when that action was "for the primary purpose of avoiding the requirements of ORS 215.428 or 227.178." (Emphasis added). The emphasized language was deleted, without discussion, during consideration in the House. See Minutes of the House Natural Resources Committee, May 1, 1995, 17. The amendment obviously suggests an intent that a petitioner need not prove avoiding the 120-day requirement was the

The scenario that prompted the amendments to ORS 197.835(10), and their connection with the refund provision, indicate that the purpose of ORS 197.835(10)(a)(B) is to discourage counties from spuriously denying applications to avoid refunding application fees. The legislative history does not suggest that ORS 197.835(10)(a)(B) is intended to apply where the local government makes a decision, timely or untimely, based solely on the merits of the application. In other words, we agree with intervenor that ORS 197.835(10)(a)(B) is not intended to apply to good faith denials on the merits.

Accordingly, we conclude that the county's action in this case does not constitute acting "for the purpose of avoiding" the 120-day rule within the meaning of ORS 197.835(10)(a)(B). First, petitioner does not dispute that the oral decision to deny the application on April 1, 1997, was made on the merits, without consideration of the 120-day rule. Nothing in the record cited to us indicates that the county was motivated at any time to deny the application to avoid violating the 120-day rule or to avoid refunding fees. Petitioner has failed to demonstrate that the county's denial was in whole or in part for the purpose of avoiding the requirements of ORS 215.428.

---

primary purpose. We do not discern the amendment to have any relevance to the issue before us.

For the same reasons we conclude that the county's backdating of the final decision nunc pro tunc under these circumstances is not an action within the ambit of ORS 197.835(10)(a)(B). The legislative history indicates that ORS 197.835(10)(a)(B) is intended to discourage spurious, bad faith denials. The record indicates that the county board issued the order nunc pro tunc in the good faith belief that it had already complied with ORS 215.428, not in an attempt to avoid the requirements of that statute.[8]

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

Petitioner assigns as error the county's application of its more restrictive template test, in addition to the

---

[8]We question, under our conclusion above that "final action" for purposes of ORS 215.428 means an action that has become final, whether entry of an order nunc pro tunc can affect the finality of a county's action. A nunc pro tunc entry can only make a record of what was actually done, or enter an order that should have been entered on that date as a matter of course and as a legal duty. Turley v. Farmers Insurance Exch., 259 Or 612, 615, 488 P2d 406 (1971); Korgan v. Walsleben, 127 Or App 625, 631, 874 P2d 1334 (1994). A nunc pro tunc entry cannot create what did not happen, or make valid what was invalid. Korgan, 127 Or App at 631.

In the present context, ORS 215.428(1) requires not an action per se but an action that has become "final," i.e. not subject to reconsideration. That status occurs under the MCC when the county board signs a written decision and files it with the county clerk, and no motion for rehearing is granted within ten days thereafter. See Rochlin v. Multnomah County, 25 Or LUBA 637, 641 (1991). Under our analysis, it is clear that finality did not occur within the 120 days. It follows that a nunc pro tunc order in these circumstances would create what did not happen, and therefore dating an order nunc pro tunc cannot confer "finality" on an action for purposes of ORS 215.428(1).

template test contained in the statute and administrative rule.

In Evans v. Multnomah County, ___ Or LUBA ___ (LUBA No. 96-198, October 7, 1997), we resolved an identical challenge to application of the same forest template ordinance. We concluded in Evans that the county has authority to impose standards in addition to or more restrictive than those set forth in the statute and administrative rule. Id. at slip op 12-13. For the reasons expressed in Evans, we conclude here that the county did not err in applying its forest template ordinance.

The second assignment of error is denied.

The county's decision is remanded.