BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DOUG YOST,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

AL MILLS and SELA BURKHOLDER MILLS,
Intervenors-Respondent.

LUBA No. 99-106

DOUG YOST,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent.

LUBA No. 99-197

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Greg Hendrix, Bend, represented petitioner.

Bruce W. White, Bend, represented respondent.

Gerald A. Martin, Bend, represented intervenors-respondent.

HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member, participated in the decision.

DISMISSED 02/03/2000

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

Petitioner appeals a June 14, 1999 county planning staff determination that intervenors-respondent's rental use of their house is a permissible use in the Rural Residential (RR-10) zoning district.

MOTION TO INTERVENE

Al Mills and Sela Burkholder Mills (intervenors) move to intervene on the side of respondent in LUBA No. 99-106. There is no opposition to the motion, and it is allowed.

INTRODUCTION

Petitioner contends that intervenors are using their home as a hotel or as a residential commercial use, neither of which is allowed in the county's RR-10 zoning district where the disputed property is located. Petitioner attempted to convince the county to take enforcement action against intervenors to require that intervenors cease such use of their property. The county refused to do so. In this consolidated appeal, petitioner challenges that refusal.

A. LUBA No. 99-106

Petitioner filed a notice of intent to appeal in LUBA No. 99-106 on July 6, 1999. That notice of intent to appeal includes the following:

> "Notice is hereby given that petitioner intends to appeal that land use decision by Deschutes County Senior Planner Kevin Harrison made on or about June 14, 1999, determining that a transient vacation rental operation is not a 'residential commercial use' and the determination that said same transient vacation rental operation is a permitted 'residential use' in the RR-10 zone. * * *" Notice of Intent to Appeal (LUBA No. 99-106) 1.

On November 19, 1999, the county filed a motion to dismiss LUBA No. 99-106. The county also took the position that there is no local government record in LUBA No. 99-106.

As relevant in this appeal, LUBA's review jurisdiction is limited to land use decisions. ORS 197.825(1). The county argues that the challenged decision in this matter is

not a "land use decision," within the meaning of ORS 197.015(10)(a).[1] The county argues that, by its nature, a decision not to institute an action to enforce its land use regulations is not a "land use decision," within the meaning of ORS 197.015(10)(a). The county also argues the decision challenged in LUBA No. 99-106 does not fall within the ORS 197.015(10) definition of land use decision because it is not a "final" decision under either the Deschutes County Code (DCC) or OAR 661-010-0010(3).[2]

B. LUBA No. 99-197

Shortly after petitioner filed his response to the county's motion to dismiss in LUBA No. 99-106, petitioner filed a second appeal (LUBA No. 99-197). Petitioner's second appeal challenges the same decision that is identified in LUBA No. 99-106, but states that the

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[1]As relevant, ORS 197.015(10) provides:

> "'Land use decision':
>
> "(a) Includes:
>
> "(A) A final decision or determination made by a local government or special district that concerns the * * * application of:
>
> " * * * * *
>
> "(iii) A land use regulation[.]"

[2]The requirement that a land use decision be the local government's "final" decision is imposed by ORS 197.015(10)(a). Later in this opinion, we address the county's argument that the challenged decision is not a "final" decision under the DCC. OAR 661-010-0010(3) imposes the following requirements for a "final decision":

> "'Final decision': Unless a local rule or ordinance specifies that the decision becomes final at a later time than defined in this section, a decision becomes final
>
> "(a) when it is *reduced to writing*, bears the necessary signatures of the decision maker(s), and
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> "(b) if written notice of the decision is required by law, when written notice of the decision is mailed to persons entitled to notice." (Emphasis added.)

The county contends the decision challenged in LUBA No. 99-106 does not qualify as a "final" decision under OAR 661-010-0010(3) because it is not in "writing."

decision was reduced to writing in a December 6, 1999 memorandum that is attached to the notice of intent to appeal in LUBA No. 99-197.[3]

MOTION TO CONSIDER EVIDENCE OUTSIDE THE RECORD AND MOTION TO STRIKE

The county attached a number of documents to its motion to dismiss and filed a separate motion, pursuant to OAR 661-010-0045, requesting that LUBA consider those attached documents for purposes of determining whether we have jurisdiction in this matter. Petitioner's response to the motion to dismiss and petitioner's supplemental response to the motion to dismiss also include a number of attached documents. The county moves to strike some of petitioner's attached documents.

The county's first motion to strike concerns (1) a tax authority certificate, (2) a transient room tax return and (3) an affidavit signed by petitioner. The county states two bases for its objection to our consideration of these documents. First, the county objects that petitioner did not file a separate motion pursuant to OAR 661-010-0045 requesting that we consider documents that are not included in the local government record. Second, the county objects that petitioner does not make it clear that the evidence should only be considered for purposes of the jurisdictional question presented by the motion to dismiss.

The county's second motion to strike concerns the December 6, 1999 memorandum attached to petitioner's supplemental response to the county's motion to dismiss in LUBA No. 99-106. That memorandum is the same memorandum that is attached to the notice of intent to appeal in LUBA No. 99-197. The December 6, 1999 memorandum is the document that petitioner alleges is the writing that embodies the decision that is challenged in this appeal. The county argues that we should not consider that memorandum because it was

[3]That December 6, 1999 memorandum is not signed by the planner who petitioner claims made the June 14, 1999 decision challenged in LUBA Nos. 99-106 and 99-197. The memorandum is addressed to the board of county commissioners and describes petitioner's requested enforcement action as well as a sign, certain site improvements, and a dock and stairs that apparently were constructed without required permits. The memo also describes steps that have been and are being taken to correct alleged code violations.

filed more than 14 days after the county's motion to dismiss was filed. The county also argues that it should not be considered because that document is not included in the record in LUBA No. 99-106 and petitioner did not file a motion pursuant to OAR 661-010-0045 to request that LUBA consider evidence outside the record.[4]

We do not believe petitioner's failure to file a separate motion to consider the documents that are attached to his response and supplemental response to the motion to dismiss precludes our consideration of those documents for purposes of determining whether we have jurisdiction in these appeals. *Leonard v. Union County*, 24 Or LUBA 362, 377 (1992); *Hemstreet v. Seaside Improvement Comm.*, 16 Or LUBA 630, 631-33 (1988). Neither do we believe that petitioner's failure to call our attention to the December 6, 1999 memorandum within 14 days of the date the county filed the motion to dismiss in LUBA No. 99-106 precludes our consideration of that memorandum. The memorandum did not *exist* until more than 14 days *after* the county filed the motion to dismiss in LUBA No. 99-106. In addition, the memorandum constitutes the written decision that is challenged in LUBA No. 99-197.[5]

In determining whether we have jurisdiction in this matter we consider all of the documents that have been submitted by the parties. However, we agree with the county that our consideration of those documents must be limited to the issue of whether we have jurisdiction in this matter.

MOTION TO DISMISS

The county filed its motion to dismiss in LUBA No. 99-106 before the notice of intent to appeal was filed in LUBA No. 99-197 and before we consolidated those appeals. Because the same decision is challenged in both appeals, we consider our jurisdiction over

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[4]No local record has yet been filed in LUBA No. 99-197.

[5]Because the December 6, 1999 memorandum is the written decision that is challenged in LUBA No. 99-197, OAR 661-010-0025(1) would require that it be included in the record of that appeal.

LUBA No. 99-197 on our own motion. *Interlachen, Inc. v. City of Fairview*, 25 Or LUBA 618, 621 (1993); *CBH Company v. City of Tualatin*, 16 Or LUBA 399, 401 n 6 (1988).

In considering whether we have jurisdiction over this appeal, we first note the distinction that is maintained in the statutes between the process for review of land use decisions and the process that is followed to enforce comprehensive plans and land use regulations. ORS 197.825(3) makes it clear that notwithstanding LUBA's exclusive jurisdiction to review land use decisions, circuit courts retain jurisdiction to enforce comprehensive plans and land use regulations:

> "Notwithstanding [LUBA's exclusive jurisdiction to review land use decisions under ORS 197.825(1)], the circuit courts of this state retain jurisdiction:
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> "(a) To grant declaratory, injunctive or mandatory relief in proceedings arising from decisions described in ORS 197.015(10)(b) or proceedings brought to enforce the provisions of an adopted comprehensive plan or land use regulations[.]"

Under ORS 197.825(3)(a), had the county elected to file an action to enforce its land use regulations against intervenors, the circuit court would have jurisdiction over such an action and could consider any relevant land use issues that might arise in such an action. *Clackamas County v. Marson*, 128 Or App 18, 22, 874 P2d 110 (1994). Moreover, such a decision by the county to file such an enforcement action would not itself be a land use decision subject to review by LUBA, absent a "pending related matter that must result in or be resolved by a land use decision." *Wygant v. Curry County*, 110 Or App 189, 192, 821 P2d 1109 (1991).

Both *Marson* and *Wygant* involved cases where the county decided to initiate enforcement actions under ORS 197.825(3)(a), whereas this appeal concerns a decision *not to initiate* such an action. The county recognizes that factual difference, but argues as follows:

> "If, without making a land use decision, a county is able to determine that code enforcement proceedings should be initiated, then surely a county can

> informally determine-without making a land use decision-that a given situation does not warrant the initiation of code enforcement proceedings." Motion to Dismiss 6.

As a general proposition, we agree with the county that a county decision concerning whether to take action to enforce its land use regulations is not itself a land use decision subject to review by LUBA, whether the decision is affirmative or negative. An exception to that general proposition might exist, where a local government has adopted procedures for conducting local proceedings to enforce its comprehensive plan or land use regulations. If such a local procedure necessarily leads to a final decision that falls within the ORS 197.015(10)(a) definition of land use decision, that decision would be reviewable by LUBA. *See ODOT v. City of Mosier*, 161 Or App 252, 260, 984 P2d 351 (1999) (city initiated quasi-judicial decision concerning zoning ordinance violation found to be authorized by zoning ordinance and within the enforcement activities authorized by ORS 227.280).[6] We next consider whether the decision that is challenged in this appeal was rendered pursuant to such a local procedure.

Petitioner does not expressly argue that the decision challenged in this appeal was rendered pursuant to an established county procedure for making decisions concerning whether to take action to enforce county land use regulations. In any event, the county argues that the June 14, 1999 decision not to initiate enforcement action as requested by petitioner is not a "final" county decision of any kind under the DCC. For that reason alone, the county argues, the challenged decision could not be a "land use decision," as that term is defined by ORS 197.015(10)(a), because the statute requires that a land use decision must be a "final" decision. *See* n 2.

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[6]ORS 215.185 provides parallel enforcement authority for counties. *See* n 8. In *Marson*, the Court of Appeals specifically left open the question of "what effect, if any," a decision pursuant to such a procedure might have in subsequent enforcement actions such as those envisioned by ORS 197.825(3)(a). *Marson*, 128 Or App at 24.

The DCC identifies two kinds of quasi-judicial decisions, "development actions" and "land use actions."[7] Land use actions include requests for declaratory rulings. Development actions and land use actions must be initiated by an application submitted in accordance with DCC 22.08.010 and 22.08.020. As relevant here, DCC 22.08.010 and 22.08.020 require that the applicant be the property owner or someone authorized by the property owner to submit the application. Under DCC 22.40.020, only the property owner, permit holders and the planning director may initiate a request for a declaratory ruling. We do not understand petitioner to argue that he submitted an application for a development action, land use action or declaratory ruling under DCC 22.08.010 and 22.08.020 or 22.40.020 or that he is entitled to do so. We also do not understand petitioner to dispute the county's position that the challenged decision is not a "development action," "land use action" or "declaratory ruling" under the DCC.

The county next points out that DCC 22.20.005 removes any possible doubt that a decision such as the one challenged in this appeal, which concerns the meaning of the DCC

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[7]DCC 22.04.030 defines "development action" as follows:

> "'Development action' means the review of any permit, authorization or determination that the Deschutes County Community Development Department is requested to issue, give or make that either:
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> "A. Involves the application of a County zoning ordinance or the County subdivision and partition ordinance and is not a land use action * * *; or
>
> "B. Involves the application of standards other than those referred to in subsection A, such as the sign ordinance.
>
> "For illustrative purposes, the term 'development action' includes review of any condominium plat, permit extension, road name change, sidewalk permit, sign permit, setback determination, and lot coverage determination."

DCC 22.04.035 defines "land use action" as follows:

> "'Land use action' includes any consideration for approval of a quasi-judicial plan amendment or zone change, any consideration for approval of a land use permit, and any consideration of a request for a declaratory ruling (including resolution of any procedural questions raised in any of these actions)."

but is made *outside* the context of a development action, land use action or declaratory ruling process, is not a land use decision. DCC 22.20.005 provides:

> "Any informal interpretation or determination, or any statement describing the uses to which a property may be put, made outside the declaratory ruling process (DCC Chapter 22.40) or outside the process for approval or denial of a land use permit (DCC Chapters 22.20 - 28) shall be deemed to be a supposition only. Such informal interpretations, determinations, or statements shall not be deemed to constitute final county action effecting a change in the status of a person's property or conferring any rights, including any reliance rights, on any person."

DCC 22.20.005 makes it clear that the planner's decision that enforcement action is not warranted in this matter is "informal" and may not be relied on by "any person" to require that the county act in accordance with the decision. The planner that adopted the decision challenged in this appeal could change his mind at any time. Moreover, under DCC 22.20.005, the county is not bound by any of the planner's decisions in any event, and could ultimately pursue an entirely different position from any position expressed by the planner.

We conclude that such an informal decision is not a final land use decision within the meaning of ORS 197.015(10)(a). For that reason, the June 14, 1999 planner's decision is not subject to review by LUBA. We recognize that petitioner argues that such a result means that he is unable to obtain a final, reviewable *land use decision* concerning the permissibility of intervenors' use of their property under the county's land use regulations. However, we are aware of no statutory or other authority that dictates that petitioner is entitled to have that question resolved through a land use decision that is reviewable by LUBA. To the contrary, the Court of Appeals' decision in *Marson* effectively rejects that position. This does not necessarily mean that petitioner is without a forum to argue that the county is improperly failing to enforce its land use regulations. ORS 215.185 specifically provides a judicial remedy, where property is used in a way that violates the county's land use regulations.[8] As

[8]ORS 215.185(1) provides:

previously noted, ORS 197.825(3)(a) specifically provides that such judicial actions to enforce land use regulations may proceed notwithstanding LUBA's exclusive jurisdiction to review land use decisions.

CONCLUSION

County decisions to initiate or not to initiate action to enforce their land use regulations are not land use decisions, provided such decisions are not rendered pursuant to local land use procedures that make them land use decisions. In this case, the county's land use regulations do not make such decisions land use decisions. To the contrary, they specifically provide that such decisions are not land use decisions because they are not final county decisions of any kind. Because the decision challenged in this consolidated appeal is not a land use decision, we do not have jurisdiction and this consolidated appeal is dismissed.[9]

> "In case a building or other structure is, or is proposed to be, located, constructed, maintained, repaired, altered, or used, or any land is, or is proposed to be, used, in violation of an ordinance or regulation designed to implement a comprehensive plan, the governing body of the county or a person whose interest in real property in the county is or may be affected by the violation, may, in addition to other remedies provided by law, institute injunction, mandamus, abatement, or other appropriate proceedings to prevent, temporarily or permanently enjoin, abate, or remove the unlawful location, construction, maintenance, repair, alteration, or use. * * *"

We note the existence of this potential remedy, but we express no view concerning whether petitioner has standing to pursue it.

[9]In view of our disposition of this appeal we need not also decide whether the decision as appealed in LUBA No. 99-106 should be dismissed solely because it is not in writing, as required by OAR 661-010-0010(3). We also need not decide whether, as petitioner alleges, the December 6, 1999 memorandum has the legal effect of reducing the June 14, 1999 decision to writing.