BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WESTERN STATES DEVELOPMENT
CORPORATION, INC.,
Petitioner,

vs.

MULTNOMAH COUNTY,
Respondent,

and

ARNOLD ROCHLIN and CHRISTOPHER FOSTER,
Intervenors-Respondent.

LUBA No. 99-108

FINAL OPINION
AND ORDER

Appeal from Multnomah County.

Jeff H. Bachrach and Allison P. Hensey, Portland, filed the petition for review. Jeff H. Bachrach argued on behalf of petitioner. With them on the brief was Ramis Crew Corrigan and Bachrach.

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

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

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

AFFIRMED 03/27/2000

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 county decision denying its application for verification of three farm management plans.

MOTION TO INTERVENE

Arnold Rochlin and Christopher Foster move to intervene on the side of respondent. There is no opposition to the motions, and they are allowed.

FACTS

In 1989, the county approved three permits for farm dwellings on three separate parcels. The permits were granted under county procedures that required farm management plans for such permits.

In April 1998, the county adopted Ordinance 903. As relevant, Ordinance 903 provided that farm dwelling permits, such as the three 1989 farm dwelling permits, would expire two years after Ordinance 903 was adopted, unless the permit holder sought and received "Dwelling Approval Validation." Petition for Review Appendix 7. Ordinance 903 established procedures and substantive standards for securing such validation.[1]

Ordinance 903 was appealed to LUBA. LUBA rejected petitioners' assignments of error directed at the substantive provisions of Ordinance 903. *Rochlin v. Multnomah County*, 35 Or LUBA 333 (1998) (*Rochlin I*). However, LUBA sustained an assignment of error directed at the procedures that were required by Ordinance 903. *Rochlin I*, 35 Or LUBA at 341-48. LUBA remanded Ordinance 903 on December 7, 1998. LUBA's decision was appealed to the Court of Appeals and was affirmed without opinion on April 14, 1999. *Rochlin v. Multnomah County*, 159 Or App 681, 981 P2d 399 (1999) (*Rochlin II*).

[1]Ordinance 903 adopted Multnomah County Code (MCC) 11.15.2031(B), under which applicants are required to demonstrate "substantial compliance with the approved farm management plan."

On September 28, 1998 (after the county adopted Ordinance 903 but before *Rochlin I*), petitioner submitted the three applications that led to the decision challenged in this appeal. On January 6, 1999 (after *Rochlin I* but before *Rochlin II*), the planning director applied the standards that were adopted by Ordinance 903 and approved the three applications. Record 295-329. The planning director's decision was appealed to the county land use hearings officer. On May 7, 1999 (after *Rochlin II*) the hearings officer affirmed the planning director's decision. The hearings officer's decision was appealed to the Multnomah County Board of Commissioners.

In a June 17, 1999 decision, the board of commissioners observed that LUBA remanded Ordinance 903 based on LUBA's finding that the procedural requirements of Ordinance 903 conflicted with statutory quasi-judicial land use procedural requirements. The board of commissioners takes the position in the June 17, 1999 decision that it *could* sever and apply the portions of Ordinance 903 that LUBA did not find to be invalid, but was not *required* to do so. The board of commissioners elected not to sever and apply the substantive portions of Ordinance 903 and therefore denied the applications. This appeal followed.

ASSIGNMENT OF ERROR

Petitioner argues the county violated ORS 215.428(3) (1997) by refusing to apply MCC 11.15.2031(B).[2] *See* n 1. As relevant, ORS 215.428(3) (1997) provides:

> "If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

[2]ORS 215.427 was enacted in lieu of ORS 215.428 by the 1999 legislature. ORS 215.427(3) is identical to ORS 215.428(3) (1997).

A. Applicable Standards on the Date the Application was Complete

There is no dispute that the September 28, 1998 applications that led to the decision challenged in this appeal were submitted *after* Ordinance 903 was adopted and that they were complete when they were submitted. Therefore, under ORS 215.428(3) (1997), the board of commissioners was obliged to apply the standards and criteria that were adopted by Ordinance 903 to those permit applications unless LUBA's decision in *Rochlin I* remanding Ordinance 903 eliminates that obligation. The board of commissioners' decision does not identify or address ORS 215.428(3) (1997). The decision includes the following findings:

> "We find the following:
>
> "(1) That the Board [of Commissioners] has the legal discretion to sever and apply the portions of Ordinance 903.
>
> "(2) That the Board [of Commissioners] has the legal discretion to not sever Ordinance 903.
>
> "(3) We exercise our discretion to not sever and apply the portions of Ordinance 903 that were found to be valid." Record 13.

The decision goes on to direct that staff return with an ordinance to repeal Ordinance 903. Petitioner argues the above findings demonstrate that the board of commissioners failed to comply with ORS 215.428(3) (1997):

> "The point of the above-quoted [findings], and the county's reference to its 'legal discretion to sever' or not sever, are unclear. The concept of severance is not relevant here because, pursuant to ORS 215.428(3), the county must apply the applicable portions of [O]rdinance 903 that were in effect when the three applications were submitted. Simply asserting the right to sever or not sever portions of the remanded ordinance does not adequately explain or justify how the county had the legal authority to ignore ORS 215.428(3).
>
> "If the applications had been submitted *after* the adoption of [O]rdinance 903 was remanded to the county, *then* there could be a question as to whether the county would have to apply the valid portions of the ordinance and sever (not apply) the provisions found to be invalid by LUBA. * * *" Petition for Review 8 (emphasis in original).

The issue presented in this appeal concerns the scope of the protection against changes in permit approval standards and criteria that is given to permit applicants under ORS 215.428(3) (1997). We agree with petitioner that general severance principals have no material bearing on that question. Although the county failed to address ORS 215.428(3) (1997) specifically, no particular purpose would be served by remanding the county's decision for the board of commissioners to address the relevant statutory question first, since we would owe no deference to its interpretation and application of state law. *Marquam Farms Corp. v. Multnomah County*, 35 Or LUBA 392, 403 (1999); *Sensible Transportation v. Washington County*, 28 Or LUBA 375, 376 (1994).

If the words of ORS 215.428(3) (1997) are read literally and in isolation, they lend some support to petitioner's position that *Rochlin I* and *II* are irrelevant for purposes of determining whether the county must apply the "standards and criteria that were applicable at the time the application was first submitted." However, the question of whether the county is obligated to apply land use regulations that are not yet "acknowledged" is not specifically addressed by ORS 215.428(3) (1997).[3] To answer that question, ORS 215.428(3) (1997) must be viewed in context with ORS 197.625.

In *Von Lubken v. Hood River County*, 118 Or App 246, 248-49, 846 P2d 1178 (1993), the Court of Appeals determined that where an existing *acknowledged* land use regulation provision is repealed and replaced with a new land use regulation provision, the repealed

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[3]Under ORS 197.251, the Land Conservation and Development Commission issues orders to "acknowledge" that local government comprehensive plans and land use regulations comply with the statewide planning goals. Multnomah County's comprehensive plan and land use regulations have been acknowledged under ORS 197.251. Following initial acknowledgment, new and amended comprehensive plan and land use regulations are considered acknowledged 21 days after the decision adopting the new or amended comprehensive plan or land use regulation becomes final, if the decision is not appealed to LUBA. ORS 197.625(1). If a decision adopting new or amended land use regulations is appealed to LUBA, ORS 197.625(2) provides:

> "If the decision adopting an amendment to an acknowledged comprehensive plan or land use regulation or a new land use regulation is affirmed on appeal under ORS 197.830 to 197.855, *the amendment or new regulation shall be considered acknowledged upon the date the appellate decision becomes final*." (Emphasis added.)

acknowledged provision continues to apply until the amended provision is considered acknowledged under ORS 197.625. In other words, the court determined that the new land use regulation in that case, although effective, did not become "applicable" within the meaning of ORS 215.428(3) (1997) until it was considered acknowledged under ORS 197.625. Ordinance 903 does not present the same question that was presented in *Von Lubken*, since Ordinance 903 did not repeal and replace previously existing acknowledged county land use regulations. Nevertheless, the legislature's response to *Von Lubken* does have a bearing on the question presented in this appeal.

The legislature responded to *Von Lubken* by adopting Oregon Laws 1993, chapter 792, section 44, which is codified at ORS 197.625(3). As relevant, ORS 197.625(3) provides:

> "(a) Prior to its acknowledgment, the adoption of a new comprehensive plan provision or land use regulation or an amendment to a comprehensive plan or land use regulation is effective at the time specified by local government charter or ordinance and is applicable to land use decisions, expedited land divisions and limited land use decisions if the amendment was adopted in accordance with ORS 197.610 and 197.615 *unless a stay is granted under ORS 197.845*.
>
> "* * * * *
>
> "(c) *The issuance of a permit under an effective but unacknowledged comprehensive plan or land use regulation shall not be relied upon to justify retention of improvements so permitted if the comprehensive plan provision or land use regulation does not gain acknowledgment*." (Emphases added.)

Construing ORS 215.428(3) (1997) and ORS 197.625(3) together with ORS 197.625(2), *see* n 3, we conclude that the county correctly determined that the requested permits could not be granted, although we reach that conclusion for different reasons. Under ORS 215.428(3) (1997) and 197.625(3)(a), review of a permit application proceeds under the standards that are in effect when the permit application is submitted, even though the land use decision that adopted some or all of the relevant approval standards for the permit has

been appealed to LUBA. ORS 197.625(3)(a) makes it clear that a decision on such a permit application under unacknowledged standards and criteria is appropriate, unless LUBA has issued an order staying the appealed decision that adopted the standards and criteria pending LUBA review. However, ORS 197.625(3)(c) also makes it clear that any improvements that are made pursuant to such a permit decision may have to be removed, if the decision that adopted the standards and criteria is not affirmed by LUBA so that the land use regulation becomes acknowledged. In other words, a permit applicant who proceeds under unacknowledged land use regulations does so at his or her own risk that the unacknowledged standards and criteria may ultimately fail to be acknowledged. Under ORS 197.625(3), if the standards and criteria are not ultimately acknowledged, those standards and criteria cannot authorize any improvements and any improvements that have been made in reliance on a permit issued under those standards and criteria may have to be removed.

When the board of commissioners rendered its decision in this matter, LUBA's decision remanding Ordinance 903 was final. The board of commissioners determined that it was not going to readopt Ordinance 903, and the challenged decision directs staff to return with an ordinance specifically repealing Ordinance 903. There was no uncertainty about whether the land use regulations that were adopted by Ordinance 903 would become acknowledged. To the contrary, because LUBA's decision remanding Ordinance 903 was final, it was certain that there would be no final LUBA or appellate court decision affirming Ordinance 903 and the land use regulation provisions adopted by Ordinance 903 therefore could not become acknowledged under ORS 197.625. In this circumstance, we conclude that ORS 215.428(3) (1997) does not require that the board of commissioners apply the substantive provisions of Ordinance 903.

ORS 197.625(3)(a) and 215.428(3) (1997) do not require that the county apply a land use regulation that was in effect when the permit application is filed, where the ordinance that adopted the land use regulation is remanded by LUBA or the appellate courts before the

county makes a final decision on the permit. In that circumstance, the land use regulations that were adopted by the remanded ordinance cease to be "effective," within the meaning of ORS 197.625(3)(a). ORS 197.625(3)(a) specifically states that an unacknowledged land use regulation is not effective if, "under ORS 197.845," LUBA grants a stay of the decision that adopted that land use regulation pending LUBA review of that decision. If a LUBA order granting a stay of the decision pending LUBA review of the decision renders the land use regulations adopted by that decision ineffective, so does a final appellate decision remanding the decision.

B. LUBA's Decision Remanding Ordinance 903

We note that at oral argument petitioner suggested that our decision "remanding" Ordinance 930 had the legal effect of "affirming" the substantive portions of Ordinance 903 because the only assignment of error that LUBA sustained in *Rochlin I* challenged procedural requirements of that ordinance. From that suggestion, petitioner further suggested that the substantive provisions of Ordinance 903 are properly considered as being acknowledged under ORS 197.625(2). We reject both suggestions.

Our decision in *Rochlin I* likely would have provided the county with a basis for limiting its proceedings on remand to correcting the procedural provisions we found to be defective. *Beck v. City of Tillamook*, 313 Or 148, 152-53, 831 P2d 678 (1992). However, the county elected not to readopt Ordinance 903. Under ORS 197.625(2), the only way that the land use regulations that were adopted by Ordinance 903 could have become acknowledged was for Ordinance 903 to have been "affirmed on appeal under ORS 197.830 to 197.855[.]" Assuming without deciding that we *could have* limited our remand in *Rochlin I* to the defective procedural requirements of Ordinance 903, and specifically "affirmed" the parts of the ordinance that were not found to be defective, no party requested that we limit our remand in that way. Our decision in *Rochlin I* "affirmed" no part of Ordinance 903,

within the meaning of ORS 197.625(2). Therefore, no part of Ordinance 903 is considered acknowledged under ORS 197.625(2).

C. Conclusion

When the board of commissioners rendered its decision in this matter, LUBA's decision in *Rochlin I* remanding Ordinance 903 was final. Therefore, the land use regulations that were adopted by Ordinance 903 were no longer "effective" within the meaning of ORS 197.625(3)(a), and the county was no longer required to apply those land use regulations under ORS 215.428(3) (1997). The county did not violate either of those statutes by refusing to apply those land use regulations in the challenged decision. Petitioner offers no other basis for reversal or remand. Accordingly, the county's decision is affirmed.