BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PETER J. BALK,
Petitioner,

vs.

MULTNOMAH COUNTY,
Respondent.

LUBA No. 2000-017

FINAL OPINION
AND ORDER

Appeal from Multnomah County.

John R. Osburn, Portland, and John M. Junkin, Portland, represented petitioner.

Sandra N. Duffy, Assistant Chief County Attorney, Portland, represented respondent.

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

TRANSFERRED 05/09/2000

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioner appeals a decision by a county planning director that land use approval for a dwelling in conjunction with forest operations has lapsed.

FACTS

On August 5, 1993, petitioner's predecessors in interest obtained a permit to site a single-family dwelling in conjunction with forest management on two aggregated tax lots totalling approximately 40 acres in the county's commercial forestry zone.[1] That approval included a condition that the approval for the dwelling would expire on January 7, 1995, if no building permit was issued by that date.[2] On December 20, 1994, the county approved a site plan to place a 14 by 75-foot manufactured home approximately 200 feet from the west and south property lines. A building permit is not required to site a manufactured dwelling; a "set-up" permit is required. The former owners failed to obtain the necessary "set-up" permit from the City of Portland to site the manufactured dwelling until May 1995.[3]

During the summer of 1997, petitioner acquired ownership of the property. On October 24, 1997, the city and petitioner entered into a stipulated agreement establishing a process for determining when the siting of the manufactured home had been completed. The county was not a party to this agreement, nor was it informed that the agreement was made.

On October 8, 1999, the county code enforcement planner issued an initial notice of violation to petitioner. The notice of violation alleged that the manufactured dwelling had

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[1]There is some discrepancy in the record as to whether the property includes 30 or 40 acres; however, the size of the property has no bearing on our decision.

[2]Condition 7 of the permit approval provides:

> "This approval will expire on January 7, 1995 if building permits have not been issued by that date." Motion to Dismiss, Exhibit One, 2.

[3]The county contracts with the City of Portland to administer building permits pertaining to the siting of manufactured homes.

been illegally sited, because the requisite land use permit expired prior to the issuance of the necessary building permits. The code enforcement planner concluded that the set-up permit was the functional equivalent of the building permit and, because the initial set-up permit was not issued until after January 7, 1995, the land use approval for the dwelling was void. The notice of violation also alleged that the manufactured dwelling had not been sited in accordance with the approved site plan. The notice of violation ordered petitioner to remove the manufactured dwelling and all associated improvements from the property. Petitioner appealed the code enforcement planner's decision to the county planning director, who affirmed the code enforcement planner's decision.

This appeal followed.

REQUEST FOR ORAL ARGUMENT

Petitioner requests a telephone conference to allow him to orally address the county's arguments in its motion to dismiss.

OAR 661-010-0065(3) provides, in relevant part:

> "* * * A party that desires a telephone conference on a motion shall include a request for a telephone conference in its motion or response. The Board may, at its discretion, conduct a telephone conference with the parties to consider any motion."

We do not believe that a telephone conference is necessary to address the motion or its response. Therefore, the request for a telephone conference is denied.

MOTION TO DISMISS

ORS 197.825 provides, in relevant part:

> "(1) Except as provided in * * * subsection * * * (3) of this section, the Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government, * * * in the manner provided in ORS 197.830 to 197.845.
>
> "* * * * *
>
> "(3) Notwithstanding subsection (1) of this section, the circuit courts of this state retain jurisdiction:

> "(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[.]"[4]

The county moves to dismiss this appeal because LUBA does not have jurisdiction to review code enforcement decisions. The county contends that the planning director's decision does not apply any land use regulations; it merely determines that one of the requisite conditions of approval of the August 5, 1993 permit has not been satisfied.

Petitioner responds that the planning director's decision is a land use decision subject to our review because it determines that particular plan policies, goals and land use regulations lead to the conclusion that set-up permits are the equivalent of building permits and that, because no set-up permit was issued on or before January 7, 1995, the land use approval for the dwelling had lapsed.

The planning director's decision states, in relevant part:

> "[T]he MCC 11.15.2050 in effect in 1993 allowed a residential use in a Commercial Forest Use (CFU) zone in conjunction with a primary use, including a mobile or modular home, subject to various criteria. On August 5, 1993, Petitioner's predecessor in interest * * * received approval, under PRE 78-92, [for] a single-family residence in conjunction with [a] forest management operation on the subject property * * *.
>
> "Under Condition 7 of PRE 78-92, the approval expired on January 7, 1995 if the applicant had not been issued building permits by that date. * * * [O]n December 20, 1994, Multnomah County * * * approved the Site Plan Map showing a 14 foot by 75 foot manufactured home on the premises. * * * Petitioner * * * appears to claim this approval to be the equivalent of the

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[4]ORS 197.015(10)(a)(A) defines "land use decision" to include:

> "A final decision or determination made by a local government * * * that concerns the adoption, amendment or application of:
>
> "(i) The goals;
>
> "(ii) A comprehensive plan provision; [or]
>
> "(iii) A land use regulation[.]"

> issuance of a building permit since no building permit was required for the manufactured home. * * * Thus, according to Petitioner, he was free anytime after the Site Plan Map approval to apply for a 'Set-up' permit.
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> "The Director finds, however, that approval of the site plan is not the equivalent of the issuance of a permit. The condition specifically required that not only the site plan be approved but the building permits be *issued* by the deadline. * * *
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> "The Director also finds that the 'set-up' permit for a manufactured home described by Petitioner is the equivalent [of] the building permit required in Condition 7 of the land use approval. As such, the Petitioner's predecessor did not timely apply for the 'Set-up' permit since the application was not submitted to the City of Portland until May 26, 1995, well after the January 7, 1995 deadline. * * * To find otherwise would allow a property owner to claim the ability to wait indefinitely to apply for the 'Set-up' permit and, thus, circumvent the expressed deadline in the land use approval.
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> "* * * * *
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> "In addition to the lack of legal status of the home, the Initial Notice of Violation alleges that the size and placement of the home and driveway do not comply with the original land use approval. Petitioner claims the size and location of each substantially complies with the requirements of PRE 78-92.
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> "The Director upholds the Initial Notice of Violation and finds that the size and location of the home and driveway do not comply with the permit approval. The home is twice the size of that approved and was placed twice the approved distance from the south property line. Additionally, the length of the driveway is twice the distance approved on the Site Plan Map. Doubling the size and length is not substantial compliance with the approval in PRE 78-92 or the Site Plan Map.
>
> "* * * * *
>
> "Therefore, because the original land use approval in PRE 78-92 expired; the 'Set-up' permit was issued in error; and, the size and placement of the home and driveway do not comply with the approval in PRE 78-92, Petitioner is to remove the driveway, structure and related utilities." Motion to Dismiss, Exhibit Eight, 3-5 (emphasis in original).

Mar-Dene Corp. v. City of Woodburn, 33 Or LUBA 245, *aff'd* 149 Or App 509, 944 P2d 976 (1997) concerned a permit condition that required an agreement between property owners and government entities regarding access onto a state highway. The relevant permit condition of approval required that the agreement be approved prior to the issuance of

building permits for the development. However, the city issued building permits without the agreement when it became apparent that the parties would not be able to reach consensus. The petitioner, an adjacent property owner, sought enforcement of the condition two years after the building permit was issued, and after the approved development had been constructed. The city determined that it lacked the authority to enforce the condition of approval. LUBA concluded that the city's determination that it did not have the authority to further enforce the condition of approval was not a land use decision because that determination did not apply any land use standards.

In *Weeks v. City of Tillamook*, 113 Or App 285, 832 P2d 1246 (1992), the petitioners requested that the city council decide whether a permit had expired because building permits had not been issued within one year of approval. The permit decision had been the subject of various appeals, and those appeals had not been resolved during the one-year permit period. The city council determined that, under the zoning code, the permit was not finally approved until all appeals had been exhausted, and thus, the one-year period had not yet started. The Court of Appeals held that where a local government answers a discrete land use question applying certain provisions of the zoning ordinance to a particular permit's conditions of approval, a land use decision is made. *Weeks*, 113 Or App at 289.

We believe the present situation is more like *Mar-Dene Corp.* than *Weeks*. In this case, petitioner has not argued that the county applied any particular provision of the county's land use regulations to the present situation. The planning director's decision determined that the approved site plan was not the equivalent of a "building permit" as that term was used in the decision approving the dwelling, and thus no "building permit" was approved prior to January 7, 1995, as condition 7 required. That determination is a factual determination unconnected, as far as we can tell, to any comprehensive plan provision or land use regulation. Like the city council in *Mar-Dene Corp.*, the county only determined whether a particular condition of approval in a prior land use decision had been satisfied.

Because the county's decision in this case does not apply or interpret any comprehensive plan policy or land use regulation, it is not a land use decision. Therefore, we do not have jurisdiction to review the county's decision to determine whether it was correctly decided.

MOTION TO TRANSFER

Petitioner has moved to transfer the subject appeal to the Multnomah County Circuit Court, in the event we find that we do not have jurisdiction. Accordingly, the appeal is transferred.