BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAN ROHRER,
Petitioner,

vs.

CROOK COUNTY,
Respondent,

and

DAN VAUGHAN and GELENE VAUGHAN,
Intervenors-Respondent.

LUBA No. 2000-039

FINAL OPINION
AND ORDER

Appeal from Crook County.

Aron D. Yarmo, Bend, represented petitioner.

Peter M. Schannauer, Prineville, represented respondent.

Daniel Kearns, Portland, represented intervenor-respondent.

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

DISMISSED 05/09/2000

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

Holstun, Board Member.

INTRODUCTION

A. November 10, 1999 Conditional Use Decision

On October 27, 1999, the county held a public hearing on intervenor Dan Vaughan's request for conditional use approval for a nonfarm residence on a 39.32-acre parcel in the county's exclusive farm use (EFU) zone.[1] On November 10, 1999, the planning commission issued a written decision that grants the requested conditional use approval. In granting that approval, the planning commission decision addresses a number of criteria in the Crook County Zoning Ordinance (CCZO). One of those criteria is CCZO 3.030(8)(C). In part, CCZO 3.030(8)(C) requires that the county find:

> "The proposed dwelling is to be situated on a lot or parcel, or a portion of a lot or parcel, which is generally unsuitable for the production of farm crops and livestock, considering the terrain, soil or land conditions, drainage and flooding, vegetation, and location and size of the lot or parcel."[2]

The November 10, 1999 decision includes findings of compliance with CCZO 3.030(8)(C), in which the county concludes, "the proposed homesite is generally unsuitable for the production of farm crops or livestock." Record 14. The decision also includes five conditions of approval. Condition 4 provides:

> "The proposed residence is to be on a part of the property which is unsuitable for agriculture." Record 15.

The November 10, 1999 decision was not appealed. Pursuant to that decision, intervenors later obtained a building permit. According to intervenors, the following events occurred.

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[1]Intervenors claim that petitioner was provided individual written notice of the October 27, 1999 planning commission hearing and attach documents to the motion to dismiss that support that claim.

[2]The omitted portion of CCZO 3.030(8)(C) imposes additional limitations on how the criterion is to be applied.

> "Petitioner, an adjacent neighbor, noticed the survey work and made a verbal inquiry with the county as to the appropriateness of the approved location for the home. In response to petitioner's phone call, the County's building department placed an informal 'hold' on intervenors' building permit, until the questions could be satisfactorily resolved." Intervenors' Motion to Dismiss 2.

B. March 15, 2000 and March 17, 2000 Letters

On March 15, 2000, the county planning director sent a letter to intervenors. The letter states, in part:

> "I have reviewed the Planning Commission's decision, interviewed [the] Assistant Planning Director * * *, and your letter explaining your building site complies with the Planning Commission decision.
>
> "I believe that based upon the above that the proposed building site is[,] of your property[,] the least suitable site for agriculture. * * *
>
> "By this letter, I am asking the Building Department to release its hold on your building permit. A copy of this letter will be mailed to your neighbor so that he understands my determination." Record 7.

Petitioner attempted to appeal the planning director's March 15, 2000 letter. On March 17, 2000, the planning director sent a letter to petitioner in which he explained that under the CCZO, "there is no authority to appeal * * * my [March 15, 2000] letter." Record 6.

C. Petitioner's Notice of Intent to Appeal

On March 24, 2000, petitioner filed his notice of intent to appeal. The notice of intent to appeal includes the following description of the challenged decision:

> "Notice is hereby given that petitioner intends to appeal that land use decision of respondent which gave building site approval to Dan & Gelene Vaughan for the placement of a nonfarm dwelling based upon the respondent's determination that the proposed building site was the 'least suitable site for agriculture' available on the Vaughans' property and respondent's denial of petitioner's attempt to appeal that building site approval decision to the Planning Commission. * * *" Notice of Intent to Appeal 1.

We understand the March 15, 2000 letter to be the decision that is challenged in this appeal and that it became final on March 17, 2000, when petitioner's attempted local appeal was denied.

DECISION

Under ORS 197.825(1), LUBA has exclusive jurisdiction, subject to limitations stated in ORS 197.825(2) and (3), over the review of "land use decisions" and "limited land use decisions" that meet the statutory definitions in ORS 197.015(10) and (12).[3] LUBA also has jurisdiction to review land use decisions that come within the significant impact test that is described in *Petersen v. Klamath Falls*, 279 Or 249, 566 P2d 1193 (1977), and *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982). As the party seeking LUBA review, the burden is on petitioner to establish that the appealed decision is a land use decision or limited land use decision. *Billington v. Polk County*, 299 Or 471, 475, 703 P2d 232 (1985); *City of Portland v. Multnomah County*, 19 Or LUBA 468, 471 (1990); *Portland Oil Service Co. v. City of Beaverton*, 16 Or LUBA 255, 260 (1987).

In their motion to dismiss, intervenors argue that the November 10, 1999 conditional use decision is the relevant land use decision in this matter and that decision was not appealed. Intervenors argue the March 15, 2000 letter is not a "land use decision," as that

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[3]As relevant, ORS 197.015(10)(a)(A) defines "land use decision" to include:

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

ORS 197.015(12) provides the following definition of "limited land use decision":

> "'Limited land use decision' is a final decision or determination made by a local government pertaining to a site *within an urban growth boundary* which concerns:
>
> "(a) The approval or denial of a subdivision or partition, as described in ORS chapter 92.
>
> "(b) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review." (Emphasis added.)

term is defined by statute. Neither, intervenors argue, is that letter a significant impacts test land use decision.

Because petitioner has not responded to intervenors' motion to dismiss, we need not discuss intervenors' arguments in detail.[4] As we just noted, it is *petitioner's* obligation to establish that we have jurisdiction over the challenged decision. A petitioner who fails to respond to an apparently meritorious motion to dismiss does not carry that burden. We briefly describe intervenors' key arguments.

Intervenors first argue that petitioner may not, in this appeal, challenge the November 10, 1999 conditional use decision or the building permit that was issued pursuant to that conditional use decision. We agree. *See Westlake Homeowners Assoc. v. City of Lake Oswego*, 25 Or LUBA 145, 148 (1993) (previously adopted decision that was not appealed to LUBA may not be challenged in an appeal of a subsequent decision to LUBA); *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 16 Or LUBA 49, 52 (1987) (same).

Intervenors also argue that because it was the November 10, 1999 conditional use decision that approved the disputed dwelling, the March 15, 2000 letter has little or no independent impact on land use and, therefore, does not qualify as a significant impacts test land use decision. Absent some argument to the contrary by petitioner, we agree with intervenors on this point as well.

Intervenors next argue that the challenged letter does not come within the relevant provisions of the statutory definition of "land use decision," because the challenged letter does not apply the statewide planning goals, a comprehensive plan provision or a land use regulation. *See* n 3. Intervenors argue that, at most, the challenged letter applies the

[4]Under OAR 661-010-0065(2) an opposing party may file a response to a motion "within 14 days from the date of service of a motion." The certificate of service attached to Intervenors' Motion to Dismiss states it was served on petitioner by mail on April 10, 2000. Petitioner initially represented himself in this appeal. On May 5, 2000, we received a letter stating that petitioner is now represented by counsel. However, as of the date of this final opinion and order, we have not received a response to the motion to dismiss.

November 10, 1999 conditional use permit and the building permit that was issued pursuant to that conditional use permit.

It appears that the letter applies the November 10, 1999 conditional use decision and the building permit, without also applying the statewide planning goals, a comprehensive plan or a land use regulation. Absent argument to the contrary from petitioner, we will assume that is the case. Such a decision is not a "land use decision," as the statute defines that term. *Balk v. Multnomah County*, ___ Or LUBA ___ (LUBA No. 2000-017, May 9, 2000), slip op 6.

Although intervenors do not specifically address the question of whether the challenged decision qualifies as a "limited land use decision," neither does petitioner's notice of intent to appeal claim that it is such a decision.[5] We therefore conclude the challenged decision is not a limited land use decision.

Petitioner fails to carry his burden to demonstrate that we have jurisdiction to review the challenged decision. Accordingly, this appeal is dismissed.

[5]Assuming the subject property is not located within an urban growth boundary, which appears to be the case, the challenged decision could not qualify as a limited land use decision. *See* n 3.