

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 JOHANNES BESSELING, CATHARINA  
5 BESSELING and NICK LAURANCE,  
6 *Petitioners,*

7  
8 vs.

9  
10 DOUGLAS COUNTY,  
11 *Respondent,*

12  
13 and

14  
15 GUY KENNERLY,  
16 *Intervenor-Respondent.*

17  
18 LUBA No. 2000-136

19  
20 FINAL OPINION  
21 AND ORDER

22  
23 Appeal from Douglas County.

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25 Nick Laurance, Winston, represented petitioners.

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27 Paul E. Meyer, Roseburg, represented respondent.

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29 James R. Dole, Grants Pass, represented intervenor-respondent.

30  
31 BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,  
32 participated in the decision.

33  
34 DISMISSED

12/04/00

35  
36 You are entitled to judicial review of this Order. Judicial review is governed by the  
37 provisions of ORS 197.850.

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**NATURE OF THE DECISION**

Petitioners appeal a decision by the county board of commissioners remanding a planning commission decision back to the planning commission.

**MOTION TO INTERVENE**

Guy Kennerly (intervenor), the applicant below, moves to intervene on the side of respondent in this appeal. There is no opposition to the motion, and it is allowed.

**FACTS**

The subject property consists of the southerly 3.77 acres of a 10.3-acre parcel near the unincorporated community of Dillard. The 3.77 acres at issue are situated adjacent to, but just outside of the Dillard Urban Unincorporated Area (UUA). The site is presently designated as Exclusive Farm Use–Grazing by the Douglas County Comprehensive Plan and is zoned Exclusive Farm–Grazing. The site is a flat, open industrial yard that has a long history of industrial use. The property is presently being used as a heavy equipment storage and maintenance yard allowed as a nonconforming use.

Intervenor applied to the county for a comprehensive plan amendment redesignating the property from agricultural to industrial, a zone change from Exclusive Farm Use-Grazing to Medium-Industrial, and an expansion of the Dillard UUA. Intervenor’s application for a comprehensive plan amendment sought a reasons exception to statewide planning goals 3 and 14. Intervenor intends to use the property for the repair, storage, and sale of heavy equipment.

The planning commission approved the entire application. Petitioners appealed the planning commission decision to the board of commissioners. With one exception, the board of commissioners upheld the planning commission’s decision. The board of commissioners found that intervenor’s alternative sites analysis, which is required to take an exception to Goal 14, is unsatisfactory. The board of commissioners remanded the matter back to the

1 planning commission, but purported to issue a final, appealable decision regarding all  
2 remaining issues. The board of commissioners' order and decision states, in part:

3 "Were it not for what we believe are problems with the applicant's alternative  
4 sites analysis, we would affirm the [planning commission's] decision and  
5 grant the plan map amendment, UUA boundary expansion, and zone change.

6 "Thus, we remand this matter to the [planning commission] for further  
7 analysis. *If any party wishes to appeal to LUBA the Board's decision to*  
8 *remand this order only on the alternative sites analysis or the Board's*  
9 *determination that all other decision making criteria are satisfied, he or she*  
10 *should do so now, within the time limits provided by statute, or he or she shall*  
11 *be foreclosed from doing so later."* Decision and Remand Order 7. (Emphasis  
12 added.)

13 This appeal followed.

#### 14 **MOTION TO DISMISS**

15 Intervenor moves to dismiss this appeal on the basis that the appealed decision is not  
16 a final land use decision subject to our jurisdiction.

17 ORS 197.015(10) requires a land use decision subject to LUBA's jurisdiction to be a  
18 *final* decision. There is no question that the board of commissioners' decision would be a  
19 final decision but for the remand of the alternative sites analysis. The issue before us is  
20 whether a local government may separate an otherwise unitary land use decision into  
21 different components, remand some components for further proceedings, and designate some  
22 components as immediately appealable to LUBA.

23 In *Tylka v. Clackamas County*, 20 Or LUBA 296 (1990), we determined that a  
24 hearings officer decision remanding a planning director decision for consideration of certain  
25 specified issues was not a "final" decision concerning portions of the planning director's  
26 decision that the hearings officer affirmed. In that case, the applicant applied for approval of  
27 a gravel drive and parking area for a recreational vehicle within a river conservation area. *Id.*  
28 at 296. The hearings officer affirmed the planning director's decision, except for two issues,  
29 and remanded the decision to the planning director for further proceedings concerning those

1 issues. *Id.* at 297-98. The petitioners appealed to LUBA. We held that the hearings  
2 officer’s decision was not final regarding any of the issues.

3 “\* \* \* the hearings officer remanded the subject application to the planning  
4 director only for further action on *certain issues*. Petitioners argue this means  
5 that the hearings officer’s decision is a final, legally effective decision with  
6 regard to those *issues* which are not the subject of the remand. However, we  
7 agree with respondent that the hearings officer (and, therefore, the county) has  
8 not yet made any *final* decision on the subject application. Only when all  
9 county procedures on the subject application are complete will the county  
10 have made its *final* decision on the application.” *Id.* at 301-02. (Emphasis in  
11 original) (footnotes omitted).

12 The only difference between this case and *Tylka* is that the board of commissioners  
13 expressly attempted to do what the petitioner in *Tylka* suggested was possible, *i.e.* split a  
14 single decision into separate, discrete components, some of which are final and immediately  
15 appealable to LUBA. The determination of when a local government decision is “final” is  
16 left to the local government, as long as the local government’s determination does not  
17 conflict with the applicable statutes or administrative rules. *City of Grants Pass v. Josephine*  
18 *County*, 25 Or LUBA 722, 726 (1993). In this case, however, as demonstrated by *Tylka*, the  
19 board of commissioners’ attempt to render one component of the decision appealable to  
20 LUBA is in direct conflict with ORS 197.015(10). Therefore, no part the board of county  
21 commissioners’ decision is a final land use decision subject to our jurisdiction.

22 Petitioners make two other arguments that merit a response. Petitioners argue that the  
23 board of commissioners violated the Douglas County Land Development Ordinance (LUDO)  
24 by remanding the matter without making certain required findings and conclusions.<sup>1</sup> Even if

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<sup>1</sup> LUDO 2.700(5) provides:

“The Board [of county commissioners] may remand the matter if it is satisfied that testimony or other evidence could not have been presented at the hearing below. In deciding such remand, the Board [of county commissioners] shall consider and make findings and conclusions respecting:

“a. Prejudice to parties;

1 petitioners are correct, they may not raise that issue with us until the county has made a final  
2 decision. *Tylka*, 20 Or LUBA at 301.

3 Petitioners also argue that further proceedings that do not address all the criteria in  
4 dispute are a waste of time and likely will not prevent a subsequent appeal to LUBA.  
5 However, if petitioners prevail on the issue of alternative sites in the further proceedings  
6 below, then another appeal to LUBA may not be necessary. In any event, while petitioners’  
7 desire to assert what they believe to be winning legal arguments regarding other issues is  
8 understandable, our jurisdiction “is authorized only after every opportunity provided at the  
9 local level for addressing land use disputes has been pursued \* \* \*.” *Lyke v. Lane County*,  
10 70 Or App 82, 85, 688 P2d 411 (1984). This limitation is required to ensure that land use  
11 disputes are resolved at the local level whenever possible. *Id.*

12 We realize this appeal was precipitated solely by the board of commissioners’  
13 erroneous attempt to finalize portions of the decision. However, despite the apparent  
14 preference of both petitioners and the county to proceed, we conclude the decision before us  
15 is not a final land use decision over which we have jurisdiction.

16 This appeal is dismissed.

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- “b. Convenience or availability of evidence at the time of the initial hearing;
  - “c. Surprise to opposing parties;
  - “d. Date notice was given to other parties as to an attempt to admit; and
  - “e. The competency, relevancy and materiality of the proposed testimony or other evidence.”