BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PETER BARTELL
and LINDA BARTELL,
*Petitioners,*

vs.

WASHINGTON COUNTY,
*Respondent.*

LUBA No. 2001-196

FINAL OPINION
AND ORDER

Appeal from Washington County.

E. Michael Connors, Portland, represented petitioners.

Alan A. Rapplyea, Senior Assistant County Counsel, Hillsboro, represented respondent.

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

DISMISSED 08/14/2002

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

Opinion by Holstun.

**INTRODUCTION**

We recite the complicated procedural history of this case as context for the parties' positions before us. This matter began in 1994, when petitioners filed an application to subdivide their property. The county did not take final action on petitioners' application within the 120 days required by ORS 215.428(1) (1995).[1] Pursuant to the statutory remedy, petitioners obtained a peremptory writ of mandamus from the Washington County Circuit Court ordering the county to approve the application and grant preliminary plat approval.[2] The county subsequently granted preliminary subdivision approval, in accordance with the peremptory writ, but appealed the circuit court's decision to the Court of Appeals. The circuit court's decision was affirmed. *State ex rel Coastal Management v. Washington Cty.*, 159 Or App 533, 979 P2d 300 (1999) (*Coastal I*).

The permit issued by Washington County in response to the peremptory writ of mandamus granted preliminary plat approval and required construction to commence within two years or the permit would expire. Petitioners did not take any further action on the subdivision or request an extension, because they understood that the county had a longstanding practice of tolling such construction commencement requirements while the underlying permit is on appeal. During an informal discussion between county counsel and petitioners' attorney in January 1999, county counsel informed petitioners' counsel that the permit would expire in approximately three weeks—on January 28, 1999. Unknown to petitioners, the county had reinterpreted its code through an official code interpretation process to reverse its practice of tolling time requirements while a permit was under appeal.

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[1] That statute was modified and renumbered as ORS 215.427(1) in 1999.

[2] Apparently, petitioners filed their petition for writ of mandamus after the county had rendered an oral decision to deny the application, but before it had been reduced to writing as a final decision. ORS 215.429(4) would now prevent such a course of action.

Petitioners were not given prior notice of the proceeding that led to the official interpretation and were not given contemporaneous notice of the official interpretation itself. By the time petitioners learned of the new interpretation, it apparently was too late to commence construction of the subdivision before the two-year preliminary plat approval expired.[3]

On January 7, 1999, petitioners sent a letter to the county asking for confirmation that the time for commencing construction had been tolled by the appeal or, in the alternative, for an extension of the two-year deadline. In a letter dated January 11, 1999, county counsel responded to petitioners' letter stating that the time period was not tolled by the ongoing appeal and that petitioners would have to apply for an extension under Washington County Development Code (CDC) 201-5, which allows extensions if there have been no substantial changes in law.[4] On January 20, 1999, county counsel sent another letter to petitioners reiterating the county's position that petitioners' preliminary plat approval would expire on January 28, 1999, and that the applicable code section for seeking an extension was CDC 201-5. Petitioners responded with a letter dated January 27, 1999, which took the position that the two-year deadline did not apply to the preliminary plat approval and, alternatively, specifically requested an extension of time under article 6 of the CDC, which petitioners believed to be the applicable provision.[5] The county never responded to the January 27, 1999 letter.

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[3]According to petitioners, the county subsequently amended its ordinance to provide explicitly for the tolling of permit expirations during appeals. As a practical matter, if the county is correct that the changed interpretation governs petitioners' preliminary subdivision plat approval, it apparently would only apply to petitioners.

[4] The parties appear to believe that changes to Statewide Planning Goal 11 (Public Facilities and Services) would preclude petitioners from obtaining an extension under this section of the CDC.

[5] CDC 610-2.1 (1999) apparently would allow an extension as a matter of course upon request.

> "A preliminary review shall expire within two years from the date of its approval unless a request for a final review, which includes all required information, or a request for an extension is filed with the County prior to expiration."

On January 28, 1999, the day the preliminary plat approval was set to expire, petitioners filed another petition for writ of mandamus with the circuit court. Petitioners' legal theory in this mandamus proceeding was that the county's failure to grant an extension was an attempt to subvert the circuit court's mandamus judgment. According to petitioners, the county did not make a land use decision, but instead acted in defiance of the circuit court's mandamus judgment, and therefore the matter was subject to the court's review under its inherent authority to uphold and enforce its judgments. The circuit court agreed with petitioners and found that it had continuing jurisdiction over the matter, denying the county's motion to dismiss. The circuit court ordered the county to toll the preliminary plat approval expiration period while appeals were pending. The county appealed the circuit court decision, and the Court of Appeals reversed the circuit court, holding that the circuit court did not have jurisdiction and that jurisdiction over the county's decision in this matter lay with LUBA. *State ex rel Coastal Management v. Washington Cty.*, 178 Or App 280, 36 P3d 993 (2001) (*Coastal II*), *rev den* 334 Or 190 (2002). After the Court of Appeals reversed the circuit court's decision, petitioners filed this appeal on December 21, 2001, challenging "that land use decision of Respondent described in the Court of Appeals decision in [*Coastal II*]." Notice of Intent to Appeal 1.

**MOTION TO DISMISS**

The county moves to dismiss this appeal, arguing that the appeal should be dismissed because it was not timely filed. ORS 197.830(9); OAR 661-010-0015. According to the county, petitioners were aware of the county's decision to deny the extension request in early 1999, at the latest. Because petitioners did not file the notice of intent to appeal in this case until December 21, 2001, the county argues this appeal must be dismissed as untimely filed. Petitioners agree that the appeal should be dismissed, but argue that the appeal should be dismissed because it is premature. According to petitioners, the county counsel's letters of January 11 and January 20, 1999, were not final land use decisions, and the county never

made a decision on their January 27, 1999 request for an extension. Because the county has not yet made a final decision, petitioners assert that the appeal must be dismissed as premature.[6]

**A. Scope of Court of Appeals' Decision**

The county's motion to dismiss is based almost entirely on the Court of Appeals' decision in *Coastal II*. According to the county, the Court of Appeals determined that the circuit court did not have jurisdiction because the county's denial of petitioners' request was a land use decision.

> "* * * Accordingly, a decision under the CDC concerning the expiration of a permit approval, such as a preliminary plat approval, is a 'land use decision' under ORS 197.015(10)." *Coastal II*, 178 Or App at 285.

The definition of "land use decision" in ORS 197.015(10) includes, among other things, "a *final* decision or determination made by a local government." (Emphasis added.) According to the county, because the Court of Appeals held that the denial of the extension request was a land use decision, and because a land use decision, by definition, is a final decision, the Court of Appeals conclusively determined that the county made a final land use decision in 1999. The county asserts this appeal must be dismissed because petitioners did not appeal that final land use decision in a timely manner.

Petitioners argue that the county reads too much into the Court of Appeals' decision. According to petitioners, the court merely decided that the circuit court did not have jurisdiction because the case involved a land use matter, which would be subject to LUBA's jurisdiction when the county rendered a final decision. Petitioners assert that the Court of Appeals did not decide the proper disposition of the referenced land use matter. According to petitioners, once the Court of Appeals determined that the case involved a land use matter

[6] Petitioners also assert that the county's decision is not final because they still have an available local appeal. Due to our disposition of the motion, we need not address that issue.

its job was done and it had no reason to determine whether the county, in fact, had adopted a final decision resolving that matter. Petitioners state that the court expressly recognized that no final decision had been made regarding the January 27, 1999 letter, or at least that the issue remained in dispute.

> "* * * The parties do not refer us to any further correspondence or document identified as a decision or order on the [January 27, 1999] extension request." *Id*. at 284.

> "* * * In addition, the county's decision to deny the extension request was not memorialized in a written order or other document purporting to convey a decision. [Petitioners] question whether the county ever did, in fact, effectively deny their extension request." *Id*. at 287.

While there certainly is language in *Coastal II* to support both parties' contentions, we believe the court's conclusion accurately illustrates its position on the matter:

> "Finally, [petitioners'] concern that the county's rejection of its request for an extension was procedurally flawed does not affect LUBA's jurisdiction. LUBA's authority depends on the nature of the action to be reviewed, not on how well it was executed, or for that matter, whether it was effectively executed. The county's decision not to extend the preliminary plat approval constituted a land use decision, review of which was subject to LUBA's exclusive jurisdiction under ORS 197.825(1)." *Id.* at 288 (citation omitted).

We do not read the preceding paragraph to foreclose the possibility that the county has not rendered a final, appealable decision on petitioners' January 27, 1999 request. The court states that the rejection of petitioners' request may have been procedurally flawed. The court also states that the rejection may not have been well, or even effectively, executed. We understand the court's holding to be that whatever the county did, it was a land use matter, and jurisdiction to decide any legal issues that may be raised by the county's decision in that matter, including *whether* a final decision was made, lies with LUBA. *See Clackamas County v. Marson*, 128 Or App 18, 20, 874 P2d 110, *rev den* 319 Or 572 (1994) (in most occasions involving jurisdictional issues, "the problem has been that land use decisions *or*

*matters* that are subject to the *land use decision and review process* have been erroneously brought in circuit court.") (emphasis added).[7]

**B. Finality**

Under ORS 197.825(1), LUBA has exclusive jurisdiction to review "land use decisions." A land use decision is defined as a "final decision" made by a local government. ORS 197.015(10)(a)(A). As discussed earlier, we do not believe the Court of Appeals decided whether the county's purported denial of petitioners' request for an extension was a "final decision." We therefore turn to that issue.

OAR 661-010-0010(3) defines "final decision" as follows:

> "A decision becomes final when it is reduced to writing and bears the necessary signatures of the decision maker(s) * * *."[8]

The only written documents in the record that could constitute final decisions are the January 11, 1999 and January 20, 1999 letters from county counsel. Neither letter, however, purports to be a final decision, nor could either letter be construed as such. The January 11, 1999 letter (1) states that the period for commencing construction is not tolled by the ongoing appeal, (2) identifies the CDC section that county counsel believes applies, and (3) indicates that petitioners' permit will expire if an extension is not obtained.

> "* * * Your clients may apply for a Type II action for an extension under CDC 201-5. This application must be in before the permit expires." Motion to Dismiss, Exhibit B, p 1.

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[7]Although it is not necessary for our decision, we note that the county itself argued that the issue of finality was not before the Court of Appeals in *Coastal II*:

> "* * * The issue of whether [petitioners] have a viable LUBA appeal is not part of the record. It has never been decided and is neither necessary nor appropriate to decide in this case." County's Reply Brief p. 2, *Coastal II*.

[8] OAR 661-010-0010(3) was amended and applies to all appeals filed in the year 2002 forward. Although the prior rule applies to this appeal, the quoted portion we refer to is present in both versions of the rule and the amendments would have no affect on our disposition. Furthermore, CDC 207-2 also provides that a county decision does not become final "until it has been reduced to writing and signed by the Review Authority or its designee."

The January 20, 1999 letter reiterates that the permit will expire on January 28, 1999, and that petitioners have until that date to file for an extension.

> "* * * The permit expires on January 28, 1999. * * * Your client has until that date to file for final plat approval* * *. You also stated that your client could file for an extension under CDC 610-2.1(A)(4) and that this extension would be different than the extension provided under CDC 201-5. I agree that your client could file for an extension, however, the extension reference in Article VI would be processed under the requirements of CDC 201-5." Motion to Dismiss, Exhibit B, p 6.

As both letters make clear, county counsel expressed to petitioners his position that (1) the ongoing appeal did not toll the two-year deadline, (2) petitioners could file for an extension, and (3) any extension request would be processed pursuant to CDC 201-5. We are cited no local legislation that authorized county counsel to make final, appealable land use decisions regarding the applicability or extension of the two-year time limit. Although the letters take the position that the two-year deadline applies, neither letter purports to be a final decision denying an extension request under CDC 610-2.1(A)(4) or CDC 201-5. In fact, both letters predate petitioners' January 27, 1999 request and anticipate that an extension request will be filed in the near future. That is precisely what occurred. Petitioners filed a timely request that the county confirm that the two-year deadline does not apply or grant an extension of that deadline. The county has not adopted a written decision responding to that request. To the extent the county has orally responded to the January 27, 1999 request, we have no way of knowing when that oral response occurred or the substance of that response. In the current posture of this case, we conclude that a final, reviewable decision has not yet been rendered by the county.[9]

We recognize that petitioners' decision immediately to seek a mandamus remedy on January 28, 1999, is the most likely explanation for the county's initial failure in 1999 to

[9]At various stages of this case before the circuit court, LUBA, and the Court of Appeals, the county has argued that the request was denied because the appropriate appeal fee did not accompany the request. If there is a written decision to that effect, it has not been provided to LUBA.

provide a written response to petitioners' January 27, 1999 letter. The county likely has not rendered a written response since the Court of Appeals' decision in *Coastal II*, because to do so would be inconsistent with the legal positions it has taken in moving to dismiss this appeal. However, the need for the county to make such a written response before an appeal at LUBA can proceed in this matter is not an empty formality. Unless and until the county does so, we simply have no reviewable county decision that responds to petitioners' request that the county find the two-year deadline does not apply or extend that deadline. We might assume that a county decision responding to the January 27, 1999 letter will likely reflect the positions taken in the county counsel's letters that predate petitioners' January 27, 1999 request and the positions taken by county counsel in support of its motion to dismiss this appeal. In the interests of hastening a final resolution of this protracted dispute, it is tempting simply to make that assumption and proceed with this appeal. Nevertheless, we conclude it would be improper for us to attempt to review in this appeal what we think the county's reasoning may be for not granting petitioners' January 27, 1999 requests. In the current posture of this dispute, were we to proceed with this appeal, a remand requiring that the county approve, deny or reject the January 27, 1999 request and explain the reasons for its action would likely be our only option.

Finally, notwithstanding the risk of further complicating this matter, we feel it is necessary to make three additional points. First, petitioners have filed yet another mandamus proceeding under ORS 215.429, requesting that the circuit court order the county to *approve* its application.[10] The county argues that the pending mandamus request should be denied for a number of reasons. We express no opinion here regarding the merits of petitioners' pending mandamus proceeding. Second, in the event petitioners' pending mandamus request

[10] Petitioners' legal theory in that mandamus proceeding is that the January 27, 1999 letter constitutes an application for a permit and that the county failed to make a decision on that application within 150 days, as ORS 215.427(1) requires. We are informed that this mandamus proceeding has been delayed to allow time for LUBA to render a decision in this appeal.

under ORS 215.429 is denied, and the court refuses to order the county to *approve* petitioners' January 27, 1999 request, it may be that the circuit court could require in the pending mandamus proceeding or in yet another mandamus proceeding under ORS 34.130 that the county issue a reviewable written decision of some sort (presumably a denial or rejection of the January 27, 1999 request) so that decision could be reviewed by LUBA. Third, in the event a mandamus remedy is not available to compel the county to issue a reviewable decision, it may be that an appeal to LUBA would be available even if the county action was not embodied in a written decision. The county may not evade review of a land use decision by refusing to reduce it to writing. *Crist v. City of Beaverton*, 143 Or App 79, 83-4, 922 P2d 1253 (1996); *see Friends of the Creek v. Jackson County*, 165 Or App 138, 141, 995 P2d 1204 (2000) (questioning whether the fact that an application happens to have been acted on in the form of written decision is determinative of LUBA's jurisdiction).[11]

This appeal is dismissed.

[11] We do not intend to suggest that the county has attempted to evade review of its decision in this case. As explained above, the county apparently has not yet made a decision on the January 27, 1999 request because petitioners immediately sought a mandamus remedy on January 28, 1999.