BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PJT, INC.,
Petitioner,

vs.

JACKSON COUNTY,
Respondent.

LUBA No. 2002-014

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Richard B. Thierolf, Jr., Medford, filed the petition for review and argued on behalf of petitioner. With him on the brief was Jacobson, Thierolf and Dickey, PC.

No appearance by Jackson County.

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

REMANDED 08/29/2002

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 that denies its request for a determination that it has a valid previously issued land use approval to construct a farm dwelling on an approximately 43-acre parcel that is zoned for exclusive farm use (EFU).

FACTS

A. February 24, 1978 Zoning Clearance Sheet

The record includes a February 24, 1978 "Zoning Clearance Sheet." Record 107. That document indicates that a dwelling would be allowed on the subject property, but comments that the county needs a "notarized statement that the dwelling will be used in conjunction with a farm use." *Id.*[1]

B. The 1979 Board of Commissioners' Decision

In March of 1979, petitioner's predecessor initiated action to obtain a septic installation permit to construct a dwelling on the subject property. That septic installation permit application apparently was denied, and the planning department decision denying the application was appealed to the Board of County Commissioners (BOC) under local procedures that were in effect at the time.[2] On May 29, 1979, the BOC reversed the denial. The BOC found that the subject property is suitable for farm use and that the dwelling would

[1] The county has not appeared in this appeal and petitioner does not provide anything from the 1978 version of Jackson County Land Development Ordinance (LDO) that would explain the legal significance of a Zoning Clearance Sheet. However, the Zoning Clearance Sheet itself explains it "indicates a staff opinion or interpretation with regard to uses permitted within the zoning districts as provided by county ordinance." Record 107. Later the Zoning Clearance Sheet further explains "the above information is subject to change from legislative or judicial acts of the county governing body * * *." *Id.*

[2] At the time those procedures were adopted, the county's comprehensive plan and land use regulations had not yet been acknowledged and, therefore, the statewide planning goals applied directly to individual land use decisions. The procedures established the process the county followed to determine on a case-by-case basis whether applications for land use approval complied with statewide planning goals.

be compatible with farm use of the property for several reasons. The BOC May 29, 1979 decision then adopted the following conclusion:

> "Based on the above findings, this appeal is approved and the Department of Planning and Development shall issue the building and septic permits in accordance with applicable rules and regulations. However, the dwelling shall be located on the poorer Carney clay soils near the east side of the lot." Record 113.

C. Changes in Local Law

Over the 17 years that followed the May 29, 1979 decision no building or septic permits were issued for a single-family dwelling. During that period of time, the LDO provisions governing approval of farm dwellings were amended, as were separate LDO provisions that specifically govern the legal effect of previous official actions. We describe key changes in these LDO provisions before discussing the renewed efforts to develop a dwelling on the subject property that began in 1996.[3]

1. Placement of Dwellings on Preexisting Parcels or Lots (LDO 218.130(1))

The version of LDO 218.130 that was in effect in 1982 governed "Placement of Dwellings on Preexisting Parcels or Lots Smaller than Ten Acres in Size." Record 39. As relevant, LDO 218.130(1) provided:

> "Any dwelling on a parcel which is smaller than ten acres shall be permitted only *if*:
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> "* * * * *
>
> "e) The parcel was reviewed by the County and found to be consistent with Statewide Planning Goal 3." *Id.*[4] (Emphasis added.)

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[3] We have done the best we can with the prior versions of the LDO that are included in the record. We cannot be sure that there have not been other amendments to the LDO that might have some bearing on the disputed application.

[4] A 1984 Zoning Clearance Sheet relies on this code provision and the 1979 BOC decision to conclude that a dwelling would be allowed on the property. Record 103. Apparently no building permit or septic permit was sought based on that Zoning Clearance. As a September 20, 2001 planning staff report points out, the subject property is more than 10 acres, so it is not readily apparent why LDO 218.130(1)(e) would support a finding

By 1989, LDO 218.130 had been amended. As relevant, the 1989 version of LDO 218.130 provided:

> "A dwelling on a legally created parcel or lot in an [EFU] zone shall be permitted *only* if:
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> "A) The dwelling meets the standards and procedures for approval of a farm or nonfarm dwelling in conformance with the requirements of this district as demonstrated in a farm or nonfarm dwelling application; or
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> "* * * * *
>
> "E) The parcel was reviewed by the County and found to be consistent with Statewide Planning Goal 3, pursuant to review procedures adopted by the County set forth in Section 15.020." Record 38 (emphasis added).

The 1989 version of LDO 218.130 does not appear to be limited to parcels and lots of 10 acres or less. Assuming the 1989 version of LDO 218.130 applied to the subject 43-acre parcel and assuming that LDO 218.130(E) was broad enough to include the 1979 BOC's decision in this matter, it would appear that LDO 218.130(E) (1989) and the 1979 BOC decision, read together, might have provided a continuing basis for issuing building and septic permits to permit construction of a dwelling on the subject property.

However, according to a planning staff report in the record, LDO 218.130(E) was repealed in 1994. Record 70. If that is true, and we do not understand petitioner to dispute the point, it would appear that LDO 218.130(E) is no longer available as a basis for approving the requested dwelling. In fact, the current version of the LDO does not include a section 218.130 at all.

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that the 1979 BOC decision supports a conclusion that a dwelling would be allowed on the subject 43-acre parcel. Because neither the Zoning Clearance nor the September 20, 2001 planning staff report constitute final county decisions, we need not and do not resolve the question. The discussion of LDO 218.130 is included to provide regulatory context for determining the continuing legal effect of the 1979 BOC decision.

2. Previous Official Actions (LDO 205.060)

LDO 205.060 was adopted in 1980. That section of the LDO describes the continuing legal effect of many different kinds of previously adopted land use decisions. Record 41.[5] LDO 205.060 (1980) appears to be a savings provision that specifically authorizes development under certain previously granted land use approvals, even though such development would not be allowed under subsequent amendments of the LDO. Decisions such as the BOC 1979 decision do not appear to be directly addressed by LDO 205.060 (1980), but septic permits are specifically addressed by LDO 205.060(4) (1980):

> "Septic permits for residential use, issued prior to the effective date of this ordinance, shall be considered as a commitment to use the land for a single-family residential purpose. A residence shall be allowed, but considered nonconforming in those instances where the zoning ordinance no longer allows the use as a permitted use. The residence, however, shall conform to all other setback, building height, special site plan, and fire safety provisions of the zoning ordinance." Record 41.

It is reasonably clear that if a septic permit had been issued prior to the effective date of LDO 205.060 (1980), petitioner would have been entitled to construct a single-family dwelling on the subject property. However, neither petitioner nor any predecessor was issued a septic permit prior to the effective date of LDO 205.060.

A modified version of LDO 205.060 is now codified at LDO 258.060. Like its predecessor, LDO 258.060 appears to allow development that was authorized by previously approved land use decisions, notwithstanding subsequent changes in the LDO that would preclude or limit such development. There is still no express provision directly addressing decisions such as the 1979 BOC decision, but LDO 258.060(5) continues to protect and assign specific legal significance to previously issued septic permits:

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[5] LDO 205.060(1), (2) and (3) (1980) specifically mention conditional use permits, variances, temporary mobile home permits, permits allowing reduction of parcel size, and permits authorizing change or alteration of a nonconforming use, commitments to rezone, building permits and mobile home set-ups.

> "Septic installation permits for residential use, which were issued, or renewed, prior to November 10, 1982, shall constitute a commitment to the use of the land for a single-family dwelling when one of the following requirements is met:
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> "A) The property is within a non-resource zoning district.
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> "B) The property is within a resource zone (OSR, WR, EFU or FR) and the original septic installation permit was reviewed by the County and found to be in conformance with applicable Statewide Planning Goals.
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> "When such a situation exists, the dwelling must meet all applicable siting requirements for the district in which it is proposed."

Under the current version of LDO 258.060 petitioner would be entitled to construct a dwelling on its property if petitioner or its predecessor had been issued a new or renewed septic installation permit prior to November 10, 1982. We do not understand petitioner to claim that such a septic installation permit was issued prior to November 10, 1982.

D. Post 1996 Renewed Effort to Secure Approval for a Dwelling

On April 19, 1996 and July 5, 2000, two of petitioner's predecessors were advised that no effective approval for a dwelling on the subject property remained in effect and that approval of a dwelling on the subject property would require compliance with existing standards for approval of a dwelling on the property.

On July 30, 2001, petitioner's immediate predecessor submitted a land use application requesting that the county confirm that the 1979 BOC decision described above was legally sufficient to authorize construction of a dwelling on the subject property at this time. That request was denied by the county planning department on September 20, 2001. Petitioner's appeal of that planning department decision was denied by the county hearings officer on January 22, 2002, and this appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

A. Petitioner's Legal Theory

Before turning to the challenged decision, we do not understand petitioner to take the position that the disputed dwelling must be approved because it meets the currently applicable approval criteria that would have to be satisfied to approve a farm dwelling on the property for the first time under the current LDO. Rather, petitioner takes the position that the 1979 BOC decision is a quasi-judicial land use decision that approves a dwelling on the subject property. Petitioner reasons that because the 1979 BOC decision is not time-limited it remains a valid land use approval and requires the county to grant building and septic permits to construct the disputed dwelling.

B. The Hearings Officer's Decision

The challenged decision is brief. It sets out some of the relevant facts and states:

> "The Hearings Office finds that this matter does not require the review of any substantive criteria.
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> "* * * * *
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> "There is no question that in May of 1979 the then entitled Department of Planning and Development was ordered by the Board of Commissioners 'to issue the building and septic permits (for the subject property) in accordance with applicable rules and regulations.' The record does not show that such permits were ever issued. It is not for the Hearings Officer to speculate as to why the permits were not issued. Neither is it for the Hearings Officer to equate a Board order with a permit, as they are not the same, and, furthermore, the order was not unconditional or self-executing as the permits were to be issued only 'in accordance with applicable rules and regulations.' Accordingly, it is the conclusion of the Hearings Officer that no building and septic permits have ever been issued on the subject property and that, accordingly, no homesite approval survives." Record 9-10.

The hearings officer's decision apparently concludes that the 1979 BOC decision was not itself a septic permit or a building permit, and that on its face the decision is not self-executing. Therefore, the hearings officer ultimately concludes, "no homesite approval survives." However, there is no explanation why the hearings officer's initial conclusions

about the nature of the 1979 BOC decision necessarily lead to the ultimate conclusion that it no longer survives as a legally effective approval for a dwelling. As discussed below, the 1979 BOC decision appears to constitute a permit, *i.e.*, the "discretionary approval of a proposed development of land," as defined at ORS 215.402(4). The fact that the decision itself is not a septic permit or building permit, and that it contemplates subsequent issuance of such permits in accordance with the rules and regulations applicable to such permits, says nothing one way or another regarding the continued validity or possible expiration of the 1979 BOC decision. We agree with petitioner that the hearings officer's decision fails to include an adequate explanation for why the 1979 BOC decision no longer authorizes building and septic permits to construct the dwelling that petitioner seeks to construct.

The hearings officer's decision does not address the September 20, 2001 staff report, which apparently takes the position that the above-described LDO amendments, read together, operate to terminate any approval for a dwelling that was granted by the 1979 BOC decision. If we understand that staff report correctly, its makes two important points. First, while the 1989 version of LDO 218.130(E) might have provided a basis for determining that the 1979 BOC decision is sufficient to preserve a current legal right to construct a dwelling on the property, it has been repealed and therefore no longer does so. Second, while the existing version of LDO 258.060 might provide a basis for concluding the 1979 BOC decision continues to confer a current right to construct a dwelling on the subject property, petitioner fails to meet the condition precedent for taking advantage of that LDO provision. That is, because a septic installation permit was not issued prior to November 10, 1982, under LDO 258.060(5) petitioner is not entitled to construct a single-family dwelling on the property based on the 1979 BOC decision.

The reasoning in the September 20, 2001 planning staff report was disputed by petitioner's representative below. However, the hearings officer neither adopts the planning staff report reasoning nor discusses petitioner's criticisms of that staff report below. The

hearings officer's decision does not discuss any of the above-mentioned LDO provisions and, in fact, states that "this matter does not require review of any substantive approval criteria." Record 9.

C. The Petition for Review

Like the hearings officer's decision, the petition for review fails to address the changes in the LDO described above. We assume that failure is attributable to petitioner's argument that the 1979 BOC decision directing the planning department to issue septic and building permits is a final quasi-judicial land use decision that, on its face, imposes no time limit for requesting the septic and building permits that the planning department is directed in the 1979 order to approve. Had there been no subsequent changes in the LDO, we likely would agree with petitioner. The 1979 BOC decision certainly appears to be "discretionary approval of a proposed development of land," within the meaning of ORS 215.402(4), and no time limit is specified in the 1979 BOC decision for seeking septic and building permits. Assuming it is properly viewed as a land use "permit," within the meaning of ORS 215.402(4), and assuming no subsequent change in law affecting the continuing validity of that permit, petitioner would likely be entitled to rely on that permit as sufficient to approve construction of a dwelling on the property.

The difficulty with petitioner's position in this appeal is that the law has changed. Petitioner's apparent position that once a quasi-judicial land use permit is issued without a specific deadline for implementation it can never be unilaterally terminated by subsequent changes in law is simply wrong.[6] *Rochlin v. Multnomah County*, 35 Or LUBA 333, 339

[6] Petitioner relies, in part, on our decision in *Rochlin v. Multnomah County*, 35 Or LUBA 333 (1998) to support its position. Aside from some factual similarities, we do not see how *Rochlin* has any bearing on the question presented in this appeal that assists petitioner. The relevant question in *Rochlin* was whether the county was required by subsequent Land Conservation and Development Commission (LCDC) rules to extinguish previously issued permits for farm dwellings that had no expiration date, as the petitioners in that case argued. The county ordinance at issue in that appeal provided for the first time that those permits would expire in two years if the holders of the permits did not substantially comply with the farm management plans that led to approval of the permits and thereafter seek building permits for the farm dwellings within one year.

(1998); *Struve v. Umatilla County*, 12 Or LUBA 54, 57 (1984); *see Twin Rocks Watseco v. Sheets*, 15 Or App 445, 447-51, 516 P2d 472 (1973) (building permit alone does not vest an absolute right to construct the authorized use).

Under the "vested rights" principles set out in *Clackamas Co. v. Holmes*, 265 Or 193, 508 P2d 190 (1973), an applicant may take substantial steps to construct development that is authorized by existing law and thereby obtain a vested right to complete that development notwithstanding changes in law that would prohibit that development. *Webber v. Clackamas County*, 42 Or App 151, 153-54, 600 P2d 448 (1979); *Eklund v. Clackamas County*, 36 Or App 73, 80-81, 583 P2d 567 (1978). That is not what happened here.

More to the point in this case, local governments may also take explicit action to shield or preserve prior land use permits from subsequent changes in law without requiring that substantial steps be taken to construct the development that is authorized by a prior land use permit.[7] We understand the September 20, 2001 staff report to take the position that the county's decision to adopt specific LDO provisions to shield or preserve certain prior land use permits (and thereby shield the uses those prior land use permits authorize from subsequent changes in law) means that uses that are approved by prior land use permits that those LDO provisions *do not shield or preserve from subsequent changes in law* are not shielded from those changes in law and must therefore comply with existing law.

We further understand the staff report to take the following positions. First, while LDO 218.130(E) (1989) appears to have expressly preserved decisions like the 1979 BOC decision, LDO 218.130(E) was repealed in 1994. Second, petitioner failed to take advantage

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The Petitioners argued that LCDC's rules precluded such additional time to implement the prior permits. Relying on the wording of the rule that expressly provide that LCDC's rules did not apply to permits issued pursuant to applications filed before 1994, such as the ones at issue in that case, we rejected the petitioners' argument.

[7] In doing so, local governments may also act to limit the period for acting on previously issued approvals that did not include an expiration period. *See e.g. Rochlin*, 35 Or LUBA at 336 (adopting a two-year expiration period for existing farm dwelling permits that were issued without an expiration date).

of LDO 205.060 (1980) by securing a septic installation permit, and LDO 205.060 has also been repealed. Third, LDO 258.060(5) would preserve the approval granted by the 1979 BOC decision if the owner of the subject property had been issued a septic installation permit before November 10, 1982, but that did not happen. Finally, we understand the staff report to conclude that because none of these LDO provisions preserve the approval granted by the 1979 BOC decision, that decision no longer authorizes petitioner to construct a dwelling without first satisfying the approval criteria that apply to petitioner's property under the current LDO.

D. Conclusion

The above discussion is included primarily to assist the parties on remand. We agree with petitioner that the hearings officer's decision fails to include an adequate explanation for why the 1979 BOC decision does not operate to currently authorize the dwelling that petitioner seeks to construct.[8] However, we believe the reasoning noted in the September 20, 2001 staff report may supply the explanation that is missing from the hearings officer's decision.[9] In this circumstance, we believe a remand is necessary to allow the hearings officer to explain why he believes the 1979 BOC decision does not continue to authorize a dwelling on the subject property.[10]

The county's decision is remanded.

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[8] It may be that petitioner contends that the 1979 BOC decision was sufficient to constitute, or to obviate the need for, a septic installation permit. To the extent petitioner makes that argument, the hearings officer's decision appears to reject it, although we cannot be sure because the hearings officer's decision fails to cite or discuss the relevant LDO provisions. Nothing we decide in this opinion is intended to foreclose consideration of that question on remand.

[9] As we have also noted, we also cannot be sure that we have all intervening changes in local legislation that may have a bearing on whether the 1979 BOC decision continues to authorize a dwelling on the subject property.

[10] We do not mean to suggest the hearings officer is bound to reach the same conclusion on remand. *See* n 8. However, whatever conclusion he reaches must be explained with reference to the LDO provisions he relies on in reaching that conclusion.