BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOE RUTIGLIANO,
Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

JACKSON COUNTY CITIZENS LEAGUE,
Intervenor-Respondent.

LUBA No. 2002-054

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Stephen Mountainspring, Roseburg, filed the petition for review and argued on behalf of petitioner. With him on the brief was Dole, Coalwell, Clark, Mountainspring, Mornarich and Aitken, PC.

No appearance by Jackson County.

Christopher D. Crean, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Miller Nash, LLP.

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

BASSHAM, Board Member, concurring.

REMANDED 08/30/2002

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 his request for a comprehensive plan and zoning map amendment.

MOTION TO INTERVENE

Jackson County Citizens League moves to intervene on the side of respondent in this appeal. There is no opposition to the motion, and it is allowed.

MOTION TO ALLOW REPLY BRIEF

Petitioner moves for permission to file a reply brief. Petitioner's reply brief responds to new issues raised in intervenor-respondent's brief, and the motion is allowed.

FACTS

This matter is before us for the second time. In an earlier county decision, the county (1) granted an exception to Statewide Planning Goal 3 (Agricultural Lands) and (2) amended the comprehensive plan and zoning map to change the map designation from Exclusive Farm Use (EFU) to Rural Residential (RR-5).[1] That first decision was appealed to LUBA, where the focus was on the part of the decision that granted the Goal 3 exception. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 489 (2000). We concluded that the county had not adequately justified the Goal 3 exception and remanded the county's first decision. However, in doing so, we noted that this case is somewhat unusual in that, while the county's land use legislation at that time apparently required an exception from Goal 3 to change the map designation from EFU to another rural non-EFU map designation, the record

[1] As we discuss in more detail later in this opinion, the county has a single map that serves as both its comprehensive plan map and its zoning map. The county's comprehensive plan explains:

> "The Official Map, adopted as part of the Jackson County Comprehensive Plan, is a site-specific map. It displays both the zoning and comprehensive plan designations, which in most instances are one and the same. This is different from the traditional, generalized comprehensive plan map and separate, detailed zoning map. * * *" Record 226.

demonstrated that the soils on the subject property were not "agricultural lands," as Goal 3 defines that term. *Id*. at 505. We went on to say:

> "If the county now wishes to allow rural residential development on rural lands that do not qualify for protection under Goals 3 or 4, in situations like this one where there does not appear to be anything about the adjoining property that makes resource use of those lands impracticable, the county must do one of two things. First, it may be possible to interpret its comprehensive plan or land use regulations as not requiring an exception in the circumstances presented in this case. Second, if the comprehensive plan and [the Jackson County Land Development Ordinance (LDO)] cannot be interpreted in that manner, *the county may amend them to remove the requirement for an exception in the circumstances presented here*." *Id*. at 506 (emphasis added; footnote deleted).

Following our remand, the county amended its comprehensive plan and the LDO to eliminate the local requirement for an exception to Goal 3 to apply a non-EFU zone to property that is zoned EFU, if that property does not include agricultural lands that must be protected under Goal 3.[2] The central issue presented in this case is whether in reconsidering the application at the applicant's request, following our remand and following adoption of the exception amendments, the county erred by relying on ORS 215.427(3) to refuse to apply the exception amendments.[3] Petitioner contends the county erred by applying the old, now repealed, requirement for an exception to Goal 3 rather than the local law in effect on the date of the decision following remand, which includes the exception amendments. Intervenor contends that if petitioner wants to have his application reviewed under the amended comprehensive plan and LDO, he must submit a new application.

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[2] Apparently the county adopted a total of six ordinances to effect this amendment. Record 214-338. We refer to these ordinances collectively as the exception amendments.

[3] ORS 215.427(3) is a statutory requirement that counties apply the law that is in effect on the date an application for certain kinds of land use permits is submitted. We discuss this "fixed goal post" requirement at some length below.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Whether the appealed decision is governed by the comprehensive plan and LDO criteria that were in effect when the original application was first submitted in 1997 or the comprehensive plan and LDO criteria that were in effect when the appealed decision was adopted following our remand is a question of statutory construction. The relevant statute is ORS 215.427(3).[4] We set out the relevant portions of ORS 215.427 in the margin and describe our understanding of each section and how those sections relate to each other below, before returning to the relatively straightforward question presented in this appeal.[5]

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[4] What now appears at ORS 215.427 in revised form was formerly codified at ORS 215.428. Some of the cases we cite refer to the old statute.

[5] ORS 215.427 provides as follows:

> "(1) * * * The governing body of a county or its designee shall take final action on all * * * applications for a permit, limited land use decision or zone change, including resolution of all appeals * * *, within 150 days after the application is deemed complete, except as provided in subsections (3) and (4) of this section.
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> "(2) If an application for a permit, limited land use decision or zone change is incomplete, the governing body or its designee shall notify the applicant of exactly what information is missing within 30 days of receipt of the application and allow the applicant to submit the missing information. The application shall be deemed complete for the purpose of subsection (1) of this section upon receipt by the governing body or its designee of the missing information. * * *
>
> "(3) If the application [for a permit, limited land use decision or zone change] was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, *approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted*.
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> "(4) The period set in subsection (1) of this section may be extended for a reasonable period of time at the request of the applicant.
>
> "(5) The period set in subsection (1) of this section applies:
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> > "(a) Only to decisions wholly within the authority and control of the governing body of the county; and
> >
> > "(b) Unless the parties have agreed to mediation as described in ORS 197.319 (2)(b).

A. ORS 215.427

1. ORS 215.427(1) — 150-Day Deadline

As relevant here, ORS 215.427(1) requires that the county take final action on "applications for a permit, limited land use decision or zone change" within 150 days after a complete application is submitted.[6] Where a county fails to do so, ORS 215.429 authorizes the applicant to file a mandamus proceeding to force the county to approve the application and the county must approve the application unless it assumes the burden of demonstrating that to do so would violate a substantive provision of the comprehensive plan or land use regulations.

2. ORS 215.427(2) — Complete Applications

Although there is no issue in this appeal concerning whether the application was complete when it was submitted in 1997, this section is contextually relevant. It makes it

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> "(6) Notwithstanding subsection (5) of this section, the period set in subsection (1) of this section does not apply to an amendment to an acknowledged comprehensive plan or land use regulation or adoption of a new land use regulation that was forwarded to the Director of the Department of Land Conservation and Development under ORS 197.610 (1).
>
> "* * * * *
>
> "(8) A county may not compel an applicant to waive the period set in subsection (1) of this section or to waive the provisions of subsection (7) of this section or ORS 215.429 as a condition for taking any action on an application for a permit, limited land use decision or zone change except when such applications are filed concurrently and considered jointly with a plan amendment."

[6] There is no statutory definition of "zone change." A "'[p]ermit' means discretionary approval of a proposed development of land under [any of several cited statutes] or county legislation or regulation adopted pursuant thereto. * * *" ORS 215.402(4). ORS 197.015(12) defines "limited land use decision" as follows:

> "[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 * * *.
>
> "(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."

clear that for certain land use applications, *i.e.*, the same "applications for a permit, limited land use decision or zone change" that are subject to the 150-day deadline, the applicant is given certain statutory rights in completing an application that is not complete when it is initially submitted.

3. ORS 215.427(3) — Fixed Goal Posts

Prior to the adoption of ORS 215.427(3), a decision maker adopting a land use decision was required to apply the law in effect on the date the land use decision was adopted. This meant that if the applicable law changed after the application was submitted but before a final decision on the application was made, the applicant was required to demonstrate that the application complied with the changed law. *Gearhard v. Klamath County*, 7 Or LUBA 27, 30-31 (1982). ORS 215.427(3) changed this by adopting a fixed goal post rule for certain "applications." *Territorial Neighbors v. Lane County*, 16 Or LUBA 641, 658 n 5 (1988). Although ORS 215.427(3) does not expressly refer to "applications for a permit, limited land use decision or zone change," the statutory context makes it clear that the fixed goal post rule is limited to those kinds of land use applications.

4. ORS 215.427(4) — Applicant Requested Extensions of the 150-Day Deadline

ORS 215.427(4) provides that the applicant may request reasonable extensions of the 150-day deadline.

5. ORS 215.427(5) — Multi-Jurisdictional and Mediation Exceptions to 150-Day Deadline

Under ORS 215.427(5), a county is not required to act on "applications for a permit, limited land use decision or zone change" within 150 days where more than one jurisdiction must adopt the decision or the parties have entered mediation.

6. ORS 215.427(6) — 150-Day Deadline Inapplicable Where Acknowledged Comprehensive Plan or Land Use Regulations Must be Amended

ORS 215.427(6) makes it clear that where the existing acknowledged comprehensive plan and land use regulations do not already anticipate the "permit, limited land use decision or zone change," and the application will require that the acknowledged comprehensive plan or land use regulation must be amended to accommodate the desired "permit, limited land use decision or zone change," the 150-day deadline does not apply.

7. ORS 215.427(8) — No Compelled Waiver of 150-Day Deadline Except for Applications With Concurrent Comprehensive Plan Amendments

ORS 215.427(8) protects applicants from county-required waiver of the 150-day deadline, except where the "application for a permit, limited land use decision or zone change [is] filed concurrently and considered jointly with a plan amendment."

B. The Challenged Decision is More than a Zone Change

ORS 215.427 is almost entirely directed at requiring counties to render a final decision on an "application for a permit, limited land use decision or zone change" within 150 days. The fixed goal post rule is appended to a comprehensive statute that is almost entirely directed at ensuring that three kinds of land use applications receive a final decision within 150 days. The usual situation that the legislature envisioned in adopting and amending ORS 215.427 over the years is an "application for a permit, limited land use decision or zone change" that is already anticipated by the acknowledged comprehensive plan and land use regulations and therefore requires no post-acknowledgement comprehensive plan or land use regulation amendment.[7]

[7] Such post-acknowledgment amendments must be forwarded to the Department of Land Conservation and Development (DLCD) and are subject to the statutory procedural requirements set out at ORS 197.610 to 197.615. *Edney v. Columbia County Board of Commissioners*, 318 Or 138, 144, 863 P2d 1259 (1993). In this case the county provided DLCD notice of the application for a map amendment, as required by ORS 197.610.

However, ORS 215.427 also embodies a second important principle. Where the acknowledged comprehensive plan or land use regulations do not anticipate the "application for a permit, limited land use decision or zone change" and the acknowledged comprehensive plan or land use regulation must be amended to allow the application to be approved, the 150-day deadline does not apply. ORS 215.427(6) makes it clear that the 150-day deadline does not apply to an "application for a permit, limited land use decision or zone change," in that circumstance. *Edney v. Columbia County Board of Commissioners*, 318 Or at 143-44. To the extent that ORS 215.427(6) leaves anything to the imagination concerning whether the 150-day deadline might apply to an "application for a permit, limited land use decision or zone change," ORS 215.427(8) expressly provides that the 150-day deadline does not apply where such applications require a concurrent comprehensive plan amendment.[8]

As we have already explained, unlike most counties, which have separate comprehensive plan maps and zoning maps, Jackson County has a unified comprehensive plan and zoning map. Thus, unlike other counties where a proposed zoning map amendment might not always require a concurrent comprehensive plan map amendment, in Jackson County a request for a zoning map amendment will *always* require an amendment of the comprehensive plan map. Therefore, in Jackson County, the applicant for a comprehensive plan/zoning map amendment will never be able to insist on a final decision within 150 days. *See Edney*, 318 Or at 144-45 (anticipating this circumstance and stating that such avoidance of the 150-day rule might warrant legislative clarification but does not provide a basis for ignoring the statutory language). Based on our review of ORS 215.427 and our understanding of the county's unified map, that conclusion is unavoidable under the statute as it is presently written.

Prior Record 534. The county also provided DLCD notice of its first decision, which approved the requested map amendment. Prior Record 7.

[8] ORS 215.427(8) was adopted after the Oregon Supreme Court's decision in *Edney*. Or Laws 1995, ch 812, sec 2.

We turn now to the ultimately dispositive question in this appeal. That question is whether the county's decision in this appeal, which amends a unitary comprehensive plan and zoning map, is properly viewed as a "zone change." As we have already noted, the legislature has adopted statutory language, particularly subsections 6 and 8 of ORS 215.427, to make it absolutely clear that the 150-day deadline does not apply where an "application for a permit, limited land use decision or zone change," necessitates a "concurrent" comprehensive plan map amendment. However, the legislature did not adopt similar express language to make it clear that the fixed goal post requirement of ORS 215.427(3) does not apply to applications that by necessity include a corresponding comprehensive plan map amendment. The question is whether the legislature's failure to do so means that the fixed goal post rule applies to such multi-purpose applications.

We conclude that where a county has a unified zoning and comprehensive plan map, such that the zoning map cannot be amended without that amendment being *both* a "comprehensive plan change" and a "zone change," the fixed goal post rule does not apply. Our reason for reaching that conclusion is simple. The "application[s]" that are subject to the fixed goal post rule of ORS 215.427(3) are the same "applications for a permit, limited land use decision or zone change" that are subject to the 150-day deadline of ORS 215.427(1). If the legislature had intended to make combined applications for both comprehensive plan map amendments and zoning map amendments subject to the fixed goal post rule, it could have said so. No plausible argument has been presented in this appeal for construing the term "zone change" broadly enough to include a change to a unified map that is *both* a zoning map and comprehensive plan map.[9] The fact that ORS 215.427(6) and (8) go further and

[9] *In Hastings Bulb Growers, Inc. v. Curry County*, 25 Or LUBA 558, 563 (1993), we speculated that following a remand by LUBA a comprehensive plan map amendment would be subject to any changes in applicable law that postdated the application but that the related zoning map amendment would not be subject to changes in applicable law that postdated the application. That case has no conclusive or direct bearing on the narrow question presented in this appeal.

expressly state that the 150-day rule does not apply to concurrent comprehensive plan and zoning map changes does not mean that ORS 215.427(1) itself is not limited to applications for zone changes that do not also constitute comprehensive plan changes. While the application at issue seeks a "zone change," that is not all that it seeks. Because petitioner's application seeks more than a "zone change," it is not limited to one or more of the three kinds of land use applications described in ORS 215.427(1) and is not subject to the fixed goal post rule.

C. The Challenged Decision is not a Permit

The parties' more focused arguments concern whether the challenged decision should be subject to the fixed goal post rule because it is a "zone change." However, intervenor also suggests that petitioner's application is properly viewed as an application for a "permit," as ORS 215.402(4) defines that term. A permit is defined as "discretionary approval of a proposed development of land." *See* n 6. As petitioner correctly notes, while an application for a permit may be submitted in the future, the challenged application seeks only a change in the unified comprehensive plan and zoning map. Such an application is not an application for a "permit," within the meaning of ORS 215.402(4).

D. Judicial Estoppel

During the local proceedings petitioner on at least one occasion threatened to seek a writ of mandamus to compel the county to approve his application. ORS 215.429 provides applicants such a mandamus remedy, where the county fails to take action within 150 days, as required by ORS 215.427(1). As we have already explained, ORS 215.427(1) only applies to "applications for a permit, limited land use decision or zone change." Intervenor argues that having asserted that position below, petitioner is judicially estopped from claiming now that its application is for something other than a "permit, limited land use decision or zone change."

In *Hampton Tree Farms, Inc. v. Jewett*, 320 Or 599, 609-10, 892 P2d 683 (1995), the Supreme Court explained the principle of judicial estoppel as follows:

> "Judicial estoppel is a common law equitable principle that has no single, uniform formulation in the several jurisdictions in which it has been recognized. The purpose of judicial estoppel is 'to protect the judiciary, as an institution, from the perversion of judicial machinery.' The doctrine may be invoked under certain circumstances to preclude a party from assuming a position in a judicial proceeding that is inconsistent with the position that the same party has successfully asserted in a different judicial proceeding. Some courts have stated that judicial estoppel should apply when a litigant 'is playing fast and loose with the courts.' Other courts have said that judicial estoppel should be used only to preclude a party from taking an inconsistent position in a later proceeding if that party has 'received a benefit from the previously taken position in the form of judicial success.'" (citations and footnote omitted).

The Supreme Court then reduced the relevant inquiry in a case where a party asserts judicial estoppel to the following:

> "* * * That inquiry involves three issues: benefit in the earlier proceeding, different judicial proceedings, and inconsistent positions. 320 Or at 611.

In this case, intervenor does not get past the first issue. Intervenor suggests that petitioner's mandamus threat made the county act more quickly than it otherwise would have. However, petitioner responds:

> "[I]ntervenor's assertion that petitioner benefited by the county's acting more quickly is naïve: the application was filed February 24, 1997; the county's original decision was rendered January 5, 2000. [T]he county took 1,045 days to decide the matter the first time. LUBA remanded the county's original decision August 11, 2000; the county rendered the challenged decision April 17, 2002. [T]he county took 614 days to decide the matter the second time, when the issues were vastly simplified. Since ORS 215.427(1) requires a decision in [150] days, petitioner did not gain a time advantage." Reply Brief 2-3 (emphasis in original; record citations omitted).

We agree with petitioner that intervenor fails to demonstrate that petitioner gained any advantage by threatening a mandamus proceeding in this matter.[10]

[10] We also question whether the single, if prolonged, administrative proceeding in this matter satisfies the requirement for different judicial proceedings. We further question whether petitioner's threat to seek

The first and second assignments of error are denied.

THIRD AND FOURTH ASSIGNMENTS OF ERROR

We agree with petitioner that the reason the county gave for denying his application is erroneous. However, because the county reached the erroneous conclusion that the comprehensive plan and LDO standards in effect when the application was first submitted in 1997 apply to its decision following our remand, the county did not apply those amended comprehensive plan and LDO provisions. We are unable to determine whether petitioner satisfies those amended provisions as a matter of law, and for that reason reject petitioner's contention that we should reverse the county's decision and order it to approve the application. To the extent petitioner argues under these assignments of error that the reasons the county gives in its second decision for reversing its first decision and rescinding the ordinance that it adopted in its first decision are based on a misconstruction of ORS 215.427(3), we agree with petitioner. Petitioner is entitled to have his application decided based on the current version of the comprehensive plan and LDO with the exception amendments.[11]

The third and fourth assignments of error are sustained in part.

The county's decision is remanded.

Bassham, Board Member, concurring.

I write separately to note a potentially significant implication of our main holding in this case, which I understand to be that an application to amend the comprehensive plan

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mandamus is actually inconsistent with petitioner's position that ORS 215.427(3) does not apply in the way the county applied it here. However, in view of our agreement with petitioner that he received no benefit from the threatened mandamus, judicial estoppel does not apply here in any event.

[11] The parties appear to disagree about the applicability of the "law of the case" principle discussed in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992) in the county's proceedings on remand. Although we need not and do not decide the issue here, we see no reason why petitioner would not be able to assert in those proceedings on remand that any issues that have been raised and resolved in petitioner's favor in this matter to date and any issues that could have been raised in these proceedings to date but were not raised, may not be raised in the proceedings on remand.

designation and zoning designation on the county's map is more than a "zone change" and, therefore, the fixed goal post rule does not apply to the application.

Although our holding is expressly limited to the circumstances where the local government has a unified comprehensive plan and zoning map, it is arguable that the same issues can arise in the many jurisdictions with separate comprehensive plan and zoning maps. As noted in the text, an application for a zone change in Jackson County is necessarily also an application to amend the comprehensive plan map designation, at least where the zoning symbol and comprehensive plan map designation are the same, as they are in this case. In a dual map jurisdiction, an application for a zone change may or may not also include an application to amend the comprehensive plan map, depending on whether the plan amendment is necessary to effect the zone change. Nonetheless, it is not immediately clear to me why that distinction, or any other distinction between unified and dual map jurisdictions, would lead to a different result with respect to whether the fixed goal post rule applies to a combined application in a dual map jurisdiction. In other words, the same reasons described in the text for why a combined application in a unified map jurisdiction is not shielded from a post-application shift in the goal posts for zone changes might apply with equal force to a combined application in a dual-map jurisdiction.

If our holding extends beyond the circumstances of this case, then yet another issue arises. The fixed goal post rule applies to "permits, limited land use decisions, and zone changes." It is not uncommon for applicants to submit a combined application seeking (1) a comprehensive plan amendment, (2) a zone change, and (3) a permit for development under the requested designation and zone. For the same reasons described above why the fixed goal post rule does not apply to a zone change that is combined with a comprehensive plan amendment, it can be argued that the fixed goal post rule does not apply to a permit application that is combined with a comprehensive plan amendment.

If the logic of our holding today is extended to dual map jurisdictions and extended to include permit applications that are combined with comprehensive plan amendments, then our decision in this case is more significant and far-reaching than it first appears. Among other things, it would require that we limit or overrule a statement we made in *Hastings Bulb Growers, Inc.*, 25 Or LUBA at 563, where we suggested that following remand from LUBA a comprehensive plan map amendment would be subject to any changes in applicable law that postdated the application but that a related zoning map amendment would not be subject to such changes in applicable law.

On the other hand, there may be excellent reasons why our holding in this case should be confined to the circumstances of this case, or to unified map jurisdictions, or to zone changes (and not permits). The present case offers no opportunity to address or resolve these matters. Any resolution must await the proper case.