BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PAUL FRYMARK, CHARLEEN FRYMARK,
THOMAS STUMPF, HOWARD PINKSTAFF,
VIRGINIA PINKSTAFF, RUSSELL SIMONIS,
IRENE SIMONIS, N. JIM MARTIN
and J. KENNEDY,
Petitioners,

vs.

TILLAMOOK COUNTY,
Respondent,

and

NETARTS BAY RV PARK
AND MARINA, LLC,
Intervenor-Respondent.

LUBA No. 2003-012

FINAL OPINION
AND ORDER

Appeal from Tillamook County.

Andrew H. Stamp, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Martin, Bischoff, Templeton, Langslet & Hoffman LLP.

William K. Sargent, County Counsel, Tillamook, and Ty K. Wyman, Portland, filed a joint response brief. With them on the brief was Dunn, Carney, Allen, Higgins & Tongue LLP. William K. Sargent argued on behalf of respondent. Ty K. Wyman argued on behalf of intervenor-respondent.

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

REMANDED 10/09/2003

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a county decision approving a building permit to construct several signs advertising or identifying a Recreational Vehicle (RV) park and marina.

REPLY BRIEF

Petitioners move to file a reply brief, to reply to a jurisdictional challenge in the response brief. There is no opposition to the proposed reply brief, and it is allowed.

FACTS

We take the following facts, which we believe to be undisputed, from the record and the parties' pleadings and briefs. Intervenor-respondent (intervenor) owns and operates an RV park and marina on tax lots 3300 and 2700, which are zoned Residential Manufactured Dwelling (NT-RMD). An RV park or "recreational campground" is a conditional use in that zone, and intervenor's RV park is operated on those tax lots pursuant to a conditional use permit originally granted in 1969. Intervenor also leases tax lot 3402, a lot located across Bilyou Avenue from tax lots 3300 and 2700 that is also zoned NT-RMD. At some point intervenor's predecessors began using tax lot 3402 for overflow parking for marina customers and RV park visitors and guests, however, tax lot 3402 has not been used for RV parking, storage or camping. Also at some point a 4-foot by 8-foot sign advertising the RV park and marina was placed on tax lot 3402. Tax lot 3402 is otherwise undeveloped.

Tillamook County Land Use Ordinance (TCLUO) 3.344(2)(g) allows as an outright permitted use in the NT-RMD zone "[s]igns, subject to Section 4.020." TCLUO 4.020(5) allows certain kinds of signs "other than off-site advertising SIGNS" in specific zone districts, including the NT-RMD zone.[1] Off-site advertising signs are separately regulated under TCLUO 4.021.

[1] TCLUO 4.020(5) provides, in relevant part:

In June 2002, intervenor applied to the county for a building permit to construct three signs on tax lots 2700 and one sign on tax lot 3402. Intervenor proposed to replace the existing 4-foot by 8-foot sign on tax lot 3402 with a 10-foot wide by 14-foot tall illuminated sign advertising the RV park and marina. The proposed sign would be placed on poles so that the top of the sign is 18 feet above grade. After a county senior planner signed off on the building permit application, the county building official issued the building permit in July 2002. No notice of the application or decision was provided to adjoining and nearby property owners.

Intervenor constructed the sign on tax lot 3402 in August 2002. A neighbor, Brinker, inquired with the county as to the circumstances and basis for approval of the sign. County planning staff ultimately indicated that the county would reconsider its decision and asked county counsel to opine whether staff had made the correct decision in approving the sign on tax lot 3402. On November 27, 2002, county counsel wrote a memorandum to the planning department stating that, in his opinion, the county correctly approved the disputed the sign on tax lot 3402.

The county counsel's memorandum was provided to Brinker, who thereafter filed an appeal of the building permit decision with LUBA. Brinker later withdrew the appeal. *Brinker v. Tillamook County*, ___ Or LUBA ___ (LUBA No. 2002-172, February 18, 2003).

> "In [a number of zones, including NT-RMD], SIGNS, other than off-site advertising SIGNS, shall be limited to the following kinds, which may be directed towards each facing street or located at needed points of vehicular access where such access points are over 200 feet apart.
>
> ""* * * * *
>
> "(k) A SIGN or SIGNS not exceeding a total of 200 square feet identifying a mobile home park, recreational campground, primitive campground, commercial farm, or community identification."

Sometime after January 1, 2003, petitioners in this appeal learned of the building permit decision and, on January 21, 2003, appealed that decision to LUBA.[2]

JURISDICTION

The county and intervenor (together, respondents) argue that the challenged decision is a building permit "issued under clear and objective land use standards" and thus not a "land use decision" subject to LUBA's jurisdiction. ORS 197.015(10)(b)(B).[3] According to respondents, petitioners fail to establish that any of the land use standards the county applied or should have applied in approving the challenged building permit are ambiguous or unclear. In particular, respondents fault petitioners for failing to articulate alternative plausible interpretations for any of the land use standards involved in the county's decision.

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[2] Petitioners assert, supported by affidavits, that they each own property within 250 feet of tax lot 3402, and that they are "adversely affected" by the decision. Petitioners argue that their appeal is proper under ORS 197.830(3)(a) or (b), which allow a person adversely affected by a land use decision made without a hearing to appeal that decision to LUBA "[w]ithin 21 days of actual notice where notice is required" or "[w]ithin 21 days of the date a person knew or should have known of the decision where no notice is required." Neither intervenor nor the county have raised a jurisdictional challenge to petitioners' standing under ORS 197.830(3) or argued that the appeal is untimely or otherwise improper under that statute. *See Frymark v. Tillamook County*, ___ Or LUBA ___ (LUBA No. 2003-012, Order, August 7, 2003) (denying intervenor's motion to take evidence regarding petitioners' standing and knowledge of the decision). As discussed below, intervenor and the county appear to limit their jurisdictional challenge to an argument that the building permit decision is not a land use decision as defined at ORS 197.015(10).

[3] ORS 197.015(10)(a)(A) defines a "land use decision" in relevant part 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; or
>
> "(iv) A new land use regulation[.]"

ORS 197.015(10)(b)(B) excludes from the definition of "land use decision" a decision by a local government "[w]hich approves or denies a building permit issued under clear and objective land use standards[.]"

See Tirumali v. City of Portland, 169 Or App 241, 246, 7 P3d 761 (2000) (the "clear and objective" exception to LUBA's jurisdiction at ORS 197.015(10)(b)(B) is not met where the standards applied to approve the building permit include a term, "finished grade," that can plausibly be interpreted in more than one way).

We disagree with respondents that the challenged decision falls within the exception to our jurisdiction at ORS 197.015(10)(b)(B). As explained below, petitioners' principal argument on the merits is that the sign approved by the challenged decision is not allowed in the NT-RMD zone at all. The challenged decision itself is does not indicate why county planning staff believed that the disputed sign is permitted on tax lot 3402. In the petition for review, petitioners articulate several possible theories under which the county might conclude that the disputed sign is permitted on the subject property.[4] Petitioners challenge each of those theories. We need not here resolve the parties' dispute on that point. For purposes of the jurisdictional question we need only observe that the applicable criteria cited to us are neither clear nor objective, as applied to the facts in this case.

Nor do we see that *Tirumali* requires petitioners to engage in a formal exercise of setting out alternative plausible interpretations of the terms in the applicable approval criteria. Petitioners have adequately demonstrated that the challenged decision was not made pursuant to clear and objective land use standards, for purposes of ORS 197.015(10)(b)(B). Respondents do not dispute that the challenged decision is otherwise a "land use decision" as defined by ORS 197.015(10)(a)(A). Accordingly, we have jurisdiction.

[4] Petitioners posit that the county might have believed that (1) tax lot 3402 is part of the same property or subject to the same conditional use permit as intervenor's RV campground on tax lots 2700 and 3300, and thus the sign is a primary use in the NT-RMD zone under TCLUO 3.344(2)(g) and 4.020; (2) the sign is an "accessory use" to intervenor's RV campground and marina, notwithstanding TCLUO 1.030, which defines "accessory use" as a use located on the same property as the primary use; or (3) the sign is a lawful expansion, alteration or replacement of a nonconforming use on tax lot 3402, *i.e.*, the previously existing sign.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Petitioners contend that, for the same reasons the challenged decision is a land use decision, it is also a "permit" as defined by ORS 215.402.[5] Accordingly, petitioners argue, the county erred in adopting the decision without providing the notice and opportunity for a hearing required for permit decisions under ORS 215.416. In addition, petitioners argue that the county failed to adopt the findings required by ORS 215.416(9) in approving a permit.

Respondents argue that the challenged decision is not a "permit" as defined by ORS 215.402 because it did not require the exercise of any discretion. Respondents repeat their arguments that the decision was issued under clear and objective criteria and argue that, for the same reasons the challenged decision is *not* a land use decision, it also is not a "permit" as defined by ORS 215.402(4).

Following the court's determination that the building permit at issue in *Tirumali* was a land use decision, this Board addressed the question of whether the building permit approval in that case was also a "permit" as defined in ORS 227.160(2), the statutory analogue to ORS 215.402(4) applicable to cities. We held, in *Tirumali v. City of Portland*, 41 Or LUBA 231, 240, *aff'd* 180 Or App 613, 45 P3d 519, *rev den* ___ Or ___ (2002), that

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[5] ORS 215.402(4) defines "permit" as follows:

> "'Permit' means discretionary approval of a proposed development of land under ORS 215.010 to 215.311, 215.317, 215.327 and 215.402 to 215.438 and 215.700 to 215.780 or county legislation or regulation adopted pursuant thereto. 'Permit' does not include:
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> "(a) A limited land use decision as defined in ORS 197.015;
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> "(b) A decision which determines the appropriate zoning classification for a particular use by applying criteria or performance standards defining the uses permitted within the zone, and the determination applies only to land within an urban growth boundary;
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> "(c) A decision which determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility which is otherwise authorized by and consistent with the comprehensive plan and land use regulations; or
>
> "(d) An [expedited land division] under ORS 197.360 (1)."

not all building permit decisions that fall within our jurisdiction as land use decisions are also statutory "permits":

> "The cases where this Board or the Court of Appeals has determined that approval or denial of a building permit involves the kind of discretion that renders it a 'permit' as defined in ORS 227.160 or 215.402 have tended to involve circumstances where there is some question as to the nature of the proposed use or whether the use is permitted at all in the zone. *See Doughton v. Douglas County*, 82 Or App 444, 728 P2d 887 (1986) (a determination whether a dwelling is customarily provided to support a farm use requires significant factual, policy and legal judgment and is therefore a permit); *Hollywood Neigh. Assoc. v. City of Portland*, 22 Or LUBA 789 (1991) (determination that a methadone clinic is a permitted use as a 'medical clinic' in a commercial zone requires significant discretion and is therefore a permit); *Pienovi v. City of Canby*, 16 Or LUBA 604, 606 (1988) (nonconforming use determination is a permit decision). Each of the decisions in those cases, and many others like them found to be permit decisions under ORS 227.160 or ORS 215.402, involve the exercise of legal, factual or policy discretion of a kind that brings them within the ambit of a statutory 'permit.' However, as far as we can tell, we have never held that a building permit for a use that is unquestionably a permitted use in the applicable zone is also a statutory 'permit,' solely because in issuing that building permit the local government interpreted an ambiguous term in a land use regulation that applies to that permitted use. Here, the only 'discretion' the city exercised involved an interpretation whether the term 'finished surface' in the code definition of the term 'grade' is limited to a paved surface or also includes nonpaved surfaces where fill has been placed. We do not believe that an interpretation of such a code provision under such circumstances is the type of 'discretionary approval' that results in a 'permit' under ORS 227.160(2)." *Id.* (footnote omitted).

The present case bears more resemblance to the decisions at issue in *Doughton*, *Hollywood Neigh. Assoc.* and *Pienovi*, cited in the passage above, than the decision at issue in *Tirumali*. Unlike *Tirumali*, the kind of discretion exercised in the present case does not involve an ambiguous term in a land use regulation that governs the height or a similar characteristic of a use indisputably permitted outright in the applicable zone, but rather a fundamental question regarding whether the use approved by the decision is in fact allowed at all under applicable zoning regulations. In implicitly resolving that question, the county

decision maker necessarily exercised the kind of discretion that brings the decision within the ambit of a statutory "permit."[6]

Accordingly, we agree with petitioners that the challenged decision is a "permit" as defined by ORS 215.402(4). It follows that the county erred in failing to provide the notice and opportunity for hearing required for permit decisions, and in failing to adopt a decision supported by the findings required by ORS 215.416(9).

The first and second assignments of error are sustained.

THIRD THROUGH EIGHTH ASSIGNMENTS OF ERROR

The third through sixth assignments of error challenge the county's implicit conclusion that the disputed sign on tax lot 3402 is a permitted use in the NT-RMD zone.[7] The seventh assignment of error argues that the three signs on tax lots 2700 and 3300 approved by the challenged decision are inconsistent with a condition of approval for the RV park's conditional use permit. The eighth assignment of error challenges the evidentiary support for the county's implicit conclusion that the disputed sign satisfies the criteria for on-site signs regulated under TCLUO 4.020(3).

Petitioners state that the third through eighth assignments of error are precautionary in nature, and argue that these assignments should not be resolved if the Board sustains the first or second assignments of error and remands the decision to the county to provide the proceedings required by ORS 215.416. We agree. Following the remand required by our resolution of the first and second assignments of error, the county must provide the notice

[6] As discussed below, we do not reach the merits of the parties' dispute regarding whether the sign on tax lot 3402 is a permitted use, and we express no opinion on that question. We hold here only that the county's implicit resolution of that question under the regulations that apply to the facts in this case required the exercise of discretion.

[7] The third assignment of error argues that the disputed sign is an "off-site advertising sign" regulated under TCLUO 4.021, rather than an "on-site" sign regulated under TCLUO 4.020, and thus prohibited in the NT-RMD zone. The fourth and fifth assignments of error argue that the disputed sign does not qualify as an "accessory use" to intervenor's RV park and marina. The sixth assignment of error contends that the sign does not qualify as a permitted alteration, expansion, or replacement of a lawful non-conforming use.

and an opportunity for hearing required by ORS 215.416. If the issues raised on remand include those raised under the third through eighth assignments of error, as seems likely, the county's decision on remand will address those issues. It would be premature under these circumstances for the Board to resolve these assignments of error. *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137, 148, *aff'd* 183 Or App 581, 54 P3d 636 (2002).

The county's decision is remanded.