

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 RONALD E. DOYLE and JUDITH A. DOYLE
5 *Petitioners,*

6
7 vs.

8
9 COOS COUNTY,
10 *Respondent.*

11
12 LUBA No. 2005-049

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Coos County.

18
19 Ronald E. Doyle and Judith A. Doyle, Myrtle Point, represented themselves.

20
21 David R. Koch, County Counsel, Coquille, represented respondent.

22
23 HOLSTUN, Board Chair; BASSHAM, Board Member; DAVIES, Board Member,
24 participated in the decision.

25
26 DISMISSED 05/04/2005

27
28 You are entitled to judicial review of this Order. Judicial review is governed by the
29 provisions of ORS 197.850.

1 Holstun, Board Chair.

2 **NATURE OF DECISION**

3 Petitioners appeal the county's approval of an administrative conditional use permit for a
4 winery.

5 **FACTS**

6 Terry Luce and Evelyn Luce (the Luces) own property in the county's Rural Residential
7 (RR-5) zoning district. Apparently sometime early in 2004 the Luces began operating a winery on
8 their property without applying for county land use approval. Access to the Luces' property is
9 provided by a private easement, and petitioners have a right to use that same private easement for
10 access. One of the underlying disputes in this matter is petitioners' belief that the county has known
11 that the Luces were operating a winery without required county land use approvals, have taken no
12 action to stop them and have taken certain actions that seem to fail to recognize that an unauthorized
13 winery exists on the Luces' property. On June 30, 2004 the county amended the Coos County
14 Zoning and Land Development Ordinance (CCZLDO) to allow wineries as an administrative
15 conditional use in the RR-5 and certain other zoning districts.¹

16 On January 19, 2005, the county granted after-the-fact variances for certain structures on
17 the Luces' property, which are located within the setback that is required by the CCZLDO. In a
18 separately filed appeal, petitioners appealed that variance decision to LUBA on February 9, 2005.
19 *Doyle v. Coos County*, ___ Or LUBA ___ (LUBA No. 2005-034). That appeal is now pending
20 before LUBA.

21 On January 27, 2005, the Luces applied for administrative conditional use approval for their
22 winery. On March 2, 2005, petitioners requested that the county provide "a copy of Terry and

¹ Administrative conditional use decisions to allow wineries are subject to local appeal under CCZLDO 5.8.100. In the event of an appeal, a hearing is held before the county hearings body or the Board of County Commissioners.

1 Evelyn Luce’s ‘Conditional Use Permit’ for their existing winery called ‘Hawk’s View.’” Record
2 10. In a hand written note on petitioners’ request, the county responded as follows:

3 “No staff report at this time. This file has not yet been reviewed.” *Id.*

4 The county planning director approved the requested administrative conditional use permit
5 on March 17, 2005. The certificate of service that is included in the record indicates that it was
6 mailed to petitioners and others on March 17, 2005. On March 21, 2005, LUBA received
7 petitioners’ appeal of the administrative conditional use permit.

8 **MOTION TO DISMISS**

9 The county moves to dismiss this appeal, arguing that petitioners have not yet exhausted
10 their local appeal of the administrative conditional use permit. Under ORS 197.825(2)(a), LUBA
11 does not have jurisdiction where a petitioner has not “exhausted all remedies available by right
12 before petitioning [LUBA] for review[.]” The county attaches to its motion to dismiss, a copy of
13 petitioners’ local appeal of the administrative conditional use permit, which was filed with the county
14 on March 31, 2005. In addition to its request that LUBA dismiss this appeal, the county requests
15 an award of its costs and attorney fees. The county contends that petitioners either (1) knowingly
16 filed an appeal with LUBA after they received the county’s March 17, 2005 decision that advised
17 petitioners of their right to file a local appeal or (2) failed to seek dismissal of this appeal after they
18 became aware of their right to file a local appeal.

19 In resisting the county’s motion to dismiss and request for costs and attorney fees, we do
20 not understand petitioners to dispute that the county’s March 17, 2005 administrative conditional
21 use permit is presently the subject of a local appeal before the county. However, petitioners now
22 suggest that the county’s failure to comment on the Luces’ 2004 liquor license application, a zoning
23 clearance decision that is dated October 27, 2004 and possibly other actions or inactions on the
24 county’s part are properly viewed as appealable land use decisions.

25 Petitioners’ March 21, 2005 LUBA appeal of the county’s March 17, 2005 administrative
26 conditional use permit is premature, because petitioners have not yet exhausted their right to a local

1 appeal of that decision. ORS 197.825(2)(a). Notwithstanding the county's suggestion to the
2 contrary, petitioners' appeal of that March 17, 2005 decision appears to have been an honest
3 mistake. Although the certificate of service in the record indicates the administrative conditional use
4 permit was mailed to petitioners on March 17, 2005, petitioner have provided a copy of the
5 envelope that was used to mail that decision to petitioners, and it is postmarked March 22, 2005.
6 Petitioners contend that they did not receive that envelope until March 23, 2005, and we have no
7 reason to question that contention. As far as we can tell, petitioners did not know that the county
8 had rendered an administrative decision, for which there was a right of local appeal, when
9 petitioners filed their notice of intent to appeal with LUBA on March 21, 2005.

10 However, while the initial filing of the notice of intent to appeal may have been an honest
11 mistake, petitioner have offered no reason why LUBA has jurisdiction to entertain an appeal of that
12 administrative conditional use permit when a local appeal of that same administrative conditional use
13 permit is pending before the county. Petitioners' appeal of the county's March 17, 2005
14 administrative conditional use permit must be dismissed.

15 Petitioners' suggestion that their appeal may be directed at other county decisions and non-
16 decisions that petitioners contend may have had the legal effect of approving the disputed winery
17 without first providing a public hearing are difficult to understand. The county has now issued an
18 administrative conditional use permit to allow the disputed winery. If the county required that the
19 Luces apply for administrative conditional use approval and have now approved that application, it
20 would appear that the county does not believe it previously approved the disputed winery.

21 Petitioners' notice of intent to appeal appears to be directed at the decision on the
22 administrative conditional use approval.² Even if the notice of intent to appeal could be viewed as

² As relevant, the notice of intent to appeal provides the following description of the appealed decision:

“[N]otice is hereby given that petitioners intend to appeal Coos County's decision to permit a conditional land use, a winery in the Rural Residential-5 (RR-5) zone, and the County's decision not to hold a public hearing before permitting this land use. Petitioners learned of

1 ambiguous, if viewed in isolation, petitioners' response to the county's motion to dismiss makes it
2 clear that the subject of this appeal is the county's decision in response to the Luces' January 27,
3 2005 application for administrative conditional use approval:

4 "On March 19, 2005 when Petitioners filed the above-captioned appeal, 51 days
5 of 120 days permitted for application review under ORS 215.427 had lapsed and
6 Petitioners' Notice of Intent [to Appeal] correctly states they were 'not aware of
7 any notice of the decision mailed to any person.' Petitioners learned on March 2,
8 2005 that the County had received but not reviewed the winery application within
9 30 days of its receipt. To protect their rights to participate in a hearing at the local
10 level and assure that all appeals would be resolved in accord with ORS 215.427, as
11 well as to preserve their right to go to LUBA and avoid the expense of a mandamus
12 proceeding as described in ORS 215.429 Petitioners filed the Notice of Intent to
13 Appeal. * * *'" Petitioners Amended Response to Respondent's Motion to Dismiss
14 2-3.

15 We are not sure what to make of petitioners' concern that the time necessary to exhaust the
16 county's local appeal may exceed the 120-day deadline established by ORS 215.427 and allow the
17 applicant to file a mandamus action to compel county approval of the permit. However, even if
18 there is some basis for petitioners' concern, we fail to see how that concern could possibly provide
19 LUBA jurisdiction to consider an appeal of an administrative conditional use permit decision *before*
20 the county's local right of appeal has been exhausted. More importantly, in expressing that concern,
21 petitioners make it clear that the county's decision on the Luces' January 27, 2005 application is the
22 subject of this appeal, not some other unspecified decisions or non-decisions in 2004.

23 For the reasons described above, the county's motion to dismiss must be granted.

24 **THE COUNTY'S REQUEST FOR AN AWARD OF COSTS AND ATTORNEY FEES**

25 Although the county's request for recovery of its costs is premature, as the prevailing party
26 in this appeal, the county is entitled to an award of its costs for preparing the required number of

this decision on March 2, 2005 while working on another LUBA appeal on the same property[.]”

1 copies of the record in this appeal. The county may now file a cost bill in accordance with OAR
2 661-010-0075(1).³

3 The county's petition for attorney fees is also premature. If the county continues to believe
4 that petitioners' apparently good faith mistake in filing this appeal warrants an award of attorney
5 fees, or that their failure to voluntarily seek dismissal of this appeal after the availability of the local
6 appeal became known to them warrants an award of attorney fees, it may file a petition for attorney
7 fees in accordance with OAR 661-010-0075(1)(e).⁴

8 This appeal is dismissed.

³ In this regard we note that the county could have filed its motion to dismiss before preparing the record and thereby avoided incurring any costs in preparing the record in this appeal.

⁴ We also note that the county's petition for attorney fees includes no documentation of the attorney fees it contends that it has reasonably incurred. We therefore could not award attorney fees even if the petition for attorney fees was meritorious and was not premature.