BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRANK JOHNSTON and KATHY JOHNSTON,
Petitioners,

vs.

MARION COUNTY,
Respondent.

LUBA No. 2005-083

FINAL OPINION
AND ORDER

Appeal from Marion County.

Daniel B. Atchison, Salem, represented petitioner.

Jane Ellen Stonecipher, County Counsel, Salem, represented respondent.

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

DISMISSED 02/09/2006

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

Opinion by Davies.

NATURE OF THE DECISION

Petitioners appeal a county counsel letter refusing to revoke previously issued building permits.

FACTS

The challenged decision is a letter dated May 16, 2005, from county counsel to petitioners' attorney in response to a letter seeking clarification regarding the status of three building permits. On December 8, 2004, the county issued building permits for three duplexes to Blossom Properties, Inc. (Blossom Properties), the owner of property abutting petitioners' property. Petitioners objected to the issuance of those building permits at the time, in part because the proposed construction of the duplexes required the use of easements over petitioners' property, which is zoned single family residential (RS). In a related appeal involving an application to partition the Blossom Properties property, we summarized the relevant facts as follows:

> "The property is a narrow rectangle with the long boundaries running north to south. Streets adjoin the northern and southern boundaries; residential lots adjoin the eastern and western boundaries. The property is split zoned with the northern half zoned Urban Development (UD) and the southern half zoned Limited Multiple Family Residential (RL). There is an existing single-family residence near the northern boundary. The remainder of the property is vacant.
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> "Petitioner applied to partition the property into three parcels. Petitioner proposes to split the northern UD-zoned portion into two parcels, one for the existing residence and one for a proposed new single-family residence. As noted, petitioner proposes to build three duplexes on the remaining southern RL-zoned parcel.[1] Access to the new single-family residence and the duplexes would be by two 20-foot access easements that pass between lots 11 and 12 and lots 13 and 14 of the subdivision to the east. Intervenors own lot 13. The two access easements are approximately 100 feet apart. The planning director approved the partition application. Intervenors appealed to

[1] The three proposed duplexes referenced in *Blossom Properties* are the duplexes at issue in the present case.

> the hearings officer who denied the application. On appeal, the board of county commissioners upheld the hearings officer's decision and adopted his findings rejecting the application." *Blossom Properties, Inc. v. Marion County*, ___ Or LUBA ___, (LUBA No. 205-077, September 20, 2005) slip op 2 (footnote omitted).

Concurrent with the county planning director's approval of the partition at issue in that previous appeal, the county issued the building permits at issue in this appeal. Petitioners appealed the partition approval to the county hearings officer who reversed the planning director and denied the partition for the reasons discussed below. Following denial of the partition by the hearings officer, petitioners' attorney wrote to the county planning director on March 16, 2005, requesting immediate revocation of the building permits and requesting that a stop work order be issued ordering Blossom Properties to cease construction. Record 9-11. Meanwhile, Blossom Properties had appealed the hearings officer's decision, and on April 27, 2005, the board of commissioners affirmed the hearings officer's denial of the partition application. On April 28, 2005, petitioners' attorney delivered a letter to the planning director and the county counsel, again requesting that the county require that the work be stopped and "to enforce the Marion County code." Record 7-8. Finally, on May 10, 2005, petitioners' attorney once again requested that county counsel revoke the dwelling permits.[2] County counsel responded on May 16, 2005 that the easements were sufficient for development that did not require a partition and the building permits would not be revoked. This appeal of county counsel's May 16, 2005 letter followed.

The county's denial of the partition application was based, in part, on a local code provision applicable to partitions that requires a minimum 25-foot access easement. Marion County Urban Zoning Ordinance (MCUZO) 33.68(a). Because Blossom Properties instead

[2] The May 10, 2005 letter provides: "I urge you to advise Mr. Anderson to require Blossom Properties to comply with the MCUZO, and revoke the erroneously issued dwelling permits." Record 4.

proposed two separated 20-foot easements, the county found the proposal did not provide the minimum 25-foot easement, and the application failed to comply with that standard.[3] The county also denied the partition based on a finding that the proposed access easements were located on RS-zoned property that does not allow the duplexes proposed for Blossom Properties' RL-zoned property. In *Roth v. Jackson County*, 38 Or LUBA 894 (2000), we held that an access road located in a suburban residential zone could not be established because the access road was an accessory use to the proposed winery, and wineries were not allowed in that suburban residential zone. *See also Bowman Park v. City of Albany*, 11 Or LUBA 197, 203 (1984) ("an access road to an industrial site is an accessory industrial use which cannot be established on residentially zoned land"). In denying the partition, the county concluded:

> "The *Roth* and *Bowman Park* cases are similar to the case here. Although multi-family and single family uses are both residential, the nature of the uses is different, with different impacts. For the purpose of this partitioning case, the hearings officer finds the partition application cannot be approved under *Roth* * * *."[4] Record 35.

County counsel's May 16, 2005 letter outlines her position that the 20-foot access easement "can be used for development that does not require partitioning or subdivision approval." Record 1. The letter explains that is because the code provision relied upon by the county to deny the partition, MCUZO 33.68(a), only applies to partitions and subdivisions. The letter also explains that when the board of commissioners made its partition decision, it was not aware that duplexes, the use to which the easements would provide access, are permitted uses in the RS zone. Accordingly, county counsel stated that

[3] Our decision in *Blossom Properties* affirmed that decision.

[4] We did not address this issue in *Blossom Properties*.

the reasoning in *Roth* and *Bowman Park* is not applicable, and does not require revocation of the building permits.[5] This appeal of the May 16, 2005 letter followed.

MOTION TO DISMISS

Petitioners' notice of intent to appeal (NITA) provides:

> "Notice is hereby given that petitioners intend to appeal that land use decision of respondent regarding issuance of dwelling permit Nos. 04-06944, 04-06945, and 04-06946, which became final on May 16, 2005, and which involves the respondent's interpretation of the Marion County Urban Zoning Ordinance that accessory use prohibited in the underlying zone may be allowed. * * *"

The county argues that "[t]he decision to issue dwelling permits became final the day the permits issued," *i.e.*, on December 8, 2004. Motion to Dismiss Appeal 3.[6] According to the county, petitioners had notice of the issuance of the permits by March 16, 2005, at the latest, when its attorney first requested in writing that they be revoked. Because petitioners' NITA was filed more than 21 days after the challenged building permits became final, the county argues that the appeal is untimely and must be dismissed pursuant to ORS 197.830(9).[7] Petitioners do not dispute that the NITA was filed more than 21 days after the building permits became final. Petitioners respond that they are not appealing the original issuance of the duplex building permits, but rather the county's refusal to revoke those permits as

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[5] Petitioners dispute that the duplexes are allowable uses on RS-zoned property. The county's partition decision, which is also in the record in the present case, states:

> "Duplexes are allowed only on single corner lots in the RS zone. * * * This application is for six dwelling units on one lot and would not be allowed in the RS zone." Record 34.

Neither petitioners' nor the applicant's properties are single corner lots.

[6] We do not understand petitioners' NITA to allege that the building permits became final on May 16, 2005 – only that the alleged "land use decision" *regarding* the issuance of those permits became final on May 16, 2005. We address the question whether the May 16, 2005 letter is a "land use decision" later in this opinion.

[7] ORS 197.830(9) provides, in relevant part:

> "A notice of intent to appeal a land use decision or limited land use decision shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final. * * *"

expressed in county counsel's May 16, 2005 letter. The county responds that if petitioners are appealing the decision not to revoke the permits, that is an enforcement decision and therefore not a land use decision subject to LUBA's jurisdiction. According to the county, petitioners are requesting that the county enforce its code by revoking the building permits, and under ORS 197.825(3), only the circuit court has jurisdiction to enforce comprehensive plans and land use regulations.[8]

Initially, we agree with petitioners that they are not appealing the original building permits. The NITA clearly references the land use decision "*regarding* the issuance of dwelling permit[s] * * * *which became final on May 16, 2005*." (Emphasis added.) We believe it is clear that petitioners are challenging the decision made by the county not to revoke the building permits, not the original issuance of those building permits.

A. ORS 197.825(3)(a)

The county argues that even if petitioners are appealing the decision not to revoke the building permits rather than the decision not to approve them in the first place, LUBA does not have jurisdiction because it is an enforcement matter over which the circuit courts have jurisdiction pursuant to ORS 197.825(3)(a). The county misunderstands the nature of the grant of authority given to the circuit courts under ORS 197.825(3)(a). The statute does not, as the county argues, divest LUBA of jurisdiction in all cases involving enforcement of local comprehensive plans and land use regulations. On the contrary, the statute provides an additional remedy for enforcement of violations of local plans and regulations. In other

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[8] ORS 197.825(3) provides, in pertinent part:

> "(3) Notwithstanding [LUBA's exclusive jurisdiction to review land use decisions under ORS 197.825(1)], the circuit courts of this state retain jurisdiction:
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> > "(a) To grant declaratory, injunctive or mandatory relief in proceedings arising from decisions described in ORS 197.015(10)(b) or proceedings brought to enforce the provisions of an adopted comprehensive plan or land use regulations[.]"

words, the statute does not restrict LUBA's jurisdiction; it merely clarifies that the circuit courts retain jurisdiction over certain proceedings. An enforcement proceeding may therefore be brought in either circuit court or at the local level. The proper forum for the proceeding is determined by the nature of the proceeding rather than the nature of the issues.

In *Putnam v. Klamath County*, 19 Or LUBA 616 (1990), we held that enforcement proceedings may be brought either at the local level or in the circuit courts. In *Putnam*, the board of county commissioners upheld a hearings officer enforcement decision that found the petitioner in violation of local land use regulations. The county moved to dismiss the LUBA appeal of that decision arguing that under ORS 197.825(3)(a) only the circuit courts had jurisdiction over such enforcement proceedings. We explained that although the county could have proceeded directly in circuit court, it could also proceed at the local level:

> "Although the *local government* proceedings that led to the decision challenged in this appeal may be properly characterized as 'proceedings brought to enforce the provisions of an adopted * * * land use [regulation],' we do not believe ORS 197.825(3)(a) operates to give the circuit court review jurisdiction over the county decision challenged in this proceeding. ORS 197.825(3)(a) simply provides the *additional* remedy that judicial proceedings may be instituted to seek 'declaratory, injunctive or mandatory relief' where plan or land use regulation violations are alleged.
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> "As we interpret ORS 197.825(3)(a), it would allow the county to file a complaint in circuit court, and seek declaratory, injunctive or mandatory relief concerning alleged violations of its plan or land use regulations from the circuit court, without first conducting local proceedings or issuing a decision such as the one challenged in this proceeding. However, we do not interpret ORS 197.825(3)(a) to *require* the county to proceed in this manner - particularly where the county has adopted a procedure for conducting local proceedings and reaching decisions concerning alleged violations of its land use regulations. Where a local government conducts local hearings, applies its land use regulations, and enters a written decision determining whether a violation of those land use regulations exists; it renders a land use decision, and this Board has review jurisdiction. ORS 197.825(3)(a) neither precludes a local government from making the initial determination concerning alleged violations of its plan or land use regulations by way of a land use decision, nor deprives this Board of jurisdiction to review that decision should the local government elect to proceed in that manner." *Id*. at 619-20 (emphases in original) (footnote omitted).

See also ODOT v. City of Mosier, 161 Or App 252, 260, 984 P2d 351 (1999) (city initiated decision concerning zoning ordinance violation authorized by local ordinance); *Watson v. Clackamas County*, 27 Or LUBA 164, 168 (1994) ("if a land use decision is made in a county proceeding to enforce its land use regulations * * * LUBA has exclusive jurisdiction for initial review of that land use decision").

As the cases quoted above illustrate, when a local government enforces its own land use regulations through its own procedures, those actions may result in land use decisions that can be appealed to LUBA, and ORS 197.825(3)(a) does not divest LUBA of jurisdiction. When local governments decide to pursue enforcement of their local land use regulations in circuit court pursuant to ORS 197.825(3)(a), however, jurisdiction properly lies with the circuit court. *Clackamas County v. Marson*, 128 Or App 18, 22, 874 P2d 110 (1984); *Wygant v. Curry County*, 110 Or App 189, 192, 821 P2d 1109 (1991); *Haynie & Krahel v. City of Ashland*, 14 Or LUBA 152, 154 (1985). Furthermore, a decision made by a local government to proceed in circuit court is not itself a land use decision regarding enforcement of the local regulations, even if some mention of the regulations involved occurs. *Wygant*, 110 Or App at 192. The only decision in such situations is in essence a tactical determination to have the land use enforcement issues decided in circuit court.

Unlike the cases discussed above, the present case involves a decision by the county *not* to pursue enforcement of its land use regulations because it does not believe a violation exists. The only case of which we are aware involving a local government decision not to initiate enforcement proceedings is *Yost v. Deschutes County*, 37 Or LUBA 653 (2000). In *Yost*, the petitioner appealed a county planning staff determination, made in response to petitioner's enforcement request, that the intervenors' rental use of their house was permissible in a rural residential zone. We stated that local government decisions to initiate enforcement actions under ORS 197.825(3)(a) are not land use decisions subject to LUBA

jurisdiction. We stated the following with regards to decisions not to initiate an action under ORS 197.825(3)(a):

> "As a general proposition, we agree with the county that a county decision concerning whether to take action to enforce its land use regulations is not itself a land use decision subject to review by LUBA, whether the decision is affirmative or negative. An exception to that general proposition might exist, where a local government has adopted procedures for conducting local proceedings to enforce its comprehensive plan or land use regulations. If such a local procedure necessarily leads to a final decision that falls within the ORS 197.015(10)(a) definition of land use decision, that decision would be reviewable by LUBA." *Id*. at 659-60.

Our reference and discussion in that case to ORS 197.825(3)(a) was ultimately irrelevant to our holding, because the challenged decision in that case had nothing to do with circuit court enforcement under ORS 197.825(3)(a). The planner's decision in *Yost* was made under a local code regulation that specifically provided that such decisions were "informal," were not final, and could not be relied upon by other persons. We therefore dismissed the case because no final land use decision was made that satisfied the definition in ORS 197.015(10). We did not dismiss the case because ORS 197.825(3)(a) divested us of jurisdiction.

The general proposition we glean from the preceding cases is that when a local government makes a decision to enforce its regulations or not to enforce its regulations *in circuit court*, that decision of where to contest (or not contest) the land use issues, is not a land use decision as defined by ORS 197.015(10). Because such decisions are not land use decisions, we do not have jurisdiction to review them. Conversely, when a local government makes a decision to enforce its regulations (or that no violation exists) *at the local level*, that decision may be a land use decision subject to our review provided it meets the statutory definition of a "land use decision." To qualify as a statutory land use decision under ORS 197.015(10)(a) a decision must (1) apply land use standards, (2) be a final decision, and (3) be reduced to writing.

In the present case, petitioners did not ask the county to enforce its regulations in circuit court pursuant to ORS 197.825(3)(a).[9] Petitioners asked the county to enforce its own land use regulations and revoke previously issued building permits. We believe it is clear that the decision states the county's position why *the county* believes the building permits are in accord with its ordinances and why no enforcement is warranted. We do not see that the decision can be read to explain the county's position for not enforcing its land use regulations in circuit court pursuant to ORS 197.825(3)(a). As we have explained, when a local government makes such a decision enforcing its own regulations or finding no violations exist, LUBA has jurisdiction to review that decision *if the decision otherwise meets the definition of a land use decision*.

The county has a procedure for making determinations under the MCUZO and modifying prior determinations regarding conformance with the MCUZO.[10] We agree with petitioners that a decision rendered under such a procedure could be a land use decision if it meets the statutory definition or otherwise qualifies as a "land use decision." We turn now to that question.

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[9] The parties are already involved in circuit court proceedings regarding the properties. It is unclear to us whether the circuit court proceedings involve an enforcement action pursuant to ORS 197.825(3)(a).

[10] MCUZO 42.01 provides:

> "The Zoning Administrator is authorized to issue determinations regarding conformance of existing or proposed uses on a particular lot with the requirements of this ordinance * * *."

MCUZO 42.02 provides:

> "A determination includes, but is not limited to, written information provided by the Zoning Administrator regarding the application of this ordinance to a specific lot such as an indication of conformance with applicable provisions of this ordinance in official correspondence or on a State agency permit, building permit, mobile home siting permit, occupancy permit, or similar document. (See Chapter 30 for procedures for clarifying the applicability of this ordinance under general circumstances). Oral information is not a determination and cannot be considered the basis for any act in violation of this ordinance."

B. Land Use Decision

LUBA has jurisdiction to review "land use decisions." Pursuant to ORS 197.015(10)(a), a land use decision includes:

> "(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
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> "(i) The goals;
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> "(ii) A comprehensive plan provision;
>
> "(iii) A land use regulation; or
>
> "(iv) A new land use regulation;
>
> (B) A final decision or determination of a state agency other than the commission with respect to which the agency is required to apply the goals; or
>
> (C) A decision of a county planning commission made under ORS 433.763[.]"

ORS 197.015(10)(b) provides that the definition of land use decision:

> "(b) Does not include a decision of a local government:
>
> "(A) Which is made under land use standards which do not require interpretation or the exercise of policy or legal judgment;
>
> "(B) Which approves or denies a building permit issued under clear and objective land use standards."

1. MCUZO Chapter 42

We address petitioners' argument regarding MCUZO Chapter 42 first. Petitioners argue that the MCUZO Chapter 42 procedure applies and that they invoked that procedure. According to petitioners, the May 16, 2005 letter is therefore a land use decision applying that procedure. The county argues petitioners did not and could not invoke that procedure in requesting that the building permits be revoked, because determinations associated with

building permits are excluded from the provision. MCUZO 42.03.[11] We agree with the county that that exclusion precludes petitioners from invoking MCUZO Chapter 42, even assuming that they attempted to do so, to allow the county to reconsider previously issued building permits or to revoke building permits even if the county determined that the building permit was improperly issued. We conclude, therefore, that the May 16, 2005 letter was not a land use decision based on that provision.

2. Finality

The county also argues, generally, that "[i]f a land use decision was made in this matter * * * it was made when the dwelling permits were issued." Motion to Dismiss Appeal 3. It argues that the subsequent letter explaining why it did not agree with petitioners' position concerning the validity of those dwelling permits is not a final decision. *Id*

Petitioners argue that the May 16, 2005 letter is a land use decision because it concerns the application of a land use regulation. While that is true, in order to be a land use decision, the decision must also be a "final" decision. ORS 197.015(10)(a)(A). When a local government merely repeats a previously issued decision, it does not make a new decision that may be appealed to LUBA. In *Lloyd Dist. Community Assoc. v. City of Portland*, 30 Or LUBA 390, *aff'd* 141 Or App 29, 916 P2d 884 (1996), the city made an initial determination on February 21, 1995. On May 9, 1995, the city sent a letter repeating its earlier determination. The petitioner then challenged the May 9, 1995 letter. We stated:

> "Even if the [February 21 determination did] constitute a land use decision, [it] did not occur through the May 9, 1995 notice. That notice *does no more than reiterate a determination the city previously made*. Other than a statement of appeal rights, the May 9, 1995 notice *contains no new analysis, information or decision*. It is not an independently appealable decision. Even

[11] MCUZO 42.03 provides, in relevant part:

> "**REQUESTS FOR A DETERMINATION.** The following procedures shall apply to requests for written determinations not associated with a State agency permit, building permit, mobile home siting permit, occupancy permit or similar action."

> assuming the city's February 21, 1995 determination was a land use decision, *an affirmation of a previous land use decision does not create a new appealable decision*." *Id*. at 395 (emphases added).

In the present case, county counsel's letter discusses the permissibility of development on the subject property without partition or subdivision approval. Regarding petitioners' argument that because duplexes are not permitted on their RS property, the use of RS zoned property for access to the duplexes on RL zoned property is prohibited, county counsel stated:

> "At the hearing on [*Blossom Properties*], the board made it clear that the decision on the partitioning application was not intended to affect the development currently underway on the RL zoned property. It should be noted that the board was unaware that MCUZO §2.01(d)(3) provides that duplexes are a permitted use, subject to standards, in the RS zone. It appears therefore, that, even a strict interpretation of the rulings in *Bowman Park* * * * and *Roth* * * *, would not be applicable to the current development. Use of the easements across [petitioners' property] as access to the duplexes under construction on the RL zoned property does not violate the Marion County zoning ordinance." Record 1-2.

Despite petitioners' attempts to recharacterize the May 16, 2005 letter as a refusal to revoke the building permits due to the hearings officer and board of county commissioner (and now LUBA) denial of the partition, it is merely a collateral attack on the original building permit decisions. If the building permit decisions were not land use decisions, we do not see how a letter refusing to revoke those permits could itself be a land use decision. If the building permit decisions were land use decisions, then county counsel's letter merely reaffirms those decisions. In either event, the May 16, 2005 letter is not a final land use decision.

Accordingly, this appeal is dismissed.