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BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PAUL WELLS,
Petitioner,

vs.

YAMHILL COUNTY,
Respondent.

LUBA No. 2005-176

FINAL OPINION
AND ORDER

Appeal from Yamhill County.

Paul Wells, Newberg, filed the petition for review.

Rick Sanai, Assistant County Counsel, McMinnville, filed the response brief and argued on behalf of respondent.

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

AFFIRMED

04/27/2006

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

NATURE OF THE DECISION

Petitioner appeals an assistant county counsel decision denying his local appeal of a code enforcement complaint.

FACTS

In an earlier order, we set out the relevant facts in this appeal:

“Petitioner entered into a 99-year lease with the Yamhill County Communications Agency (YCOM) that allows YCOM to place and operate police/fire/public safety radio equipment on a small portion of petitioner’s property. YCOM planned to modify some of the antennae and determined that it did not need additional land use approvals to make the modifications. Petitioner filed a complaint with the county seeking to force YCOM to get land use approvals or remove the antennae. In a November 3, 2005 letter, the county planning division manager refused to require YCOM to apply for land use approvals. In that letter, the manager determined that YCOM did not need any permits or approvals to replace or add additional antennae to a tower, so long as the tower height was not being increased. Petitioner then wrote a letter to the county planning director stating that the decision not to require land use approvals and enforce the zoning ordinance is the same thing as issuing a permit and requesting that his complaint and documentation be returned in order to allow him to pursue an appeal to the board of county commissioners. In a November 9, 2005 letter to petitioner, county counsel stated that no local appeal was available and that the ‘matter is closed.’ On November 17, 2005, petitioner nonetheless filed a local appeal of the planning manager’s November 3, 2005 decision that no land use approvals were required for YCOM’s changes to the tower and antennae. On November 21, 2005, county counsel again wrote to petitioner stating that there was no local appeal available and that the matter was closed. On November 25, 2005, petitioner wrote a letter to the chair of the board of county commissioners, with his appeal documents attached, and arguing that the board of county commissioners could review planning manager decisions. On December 5, 2005, the board chair wrote back to petitioner stating that there was no local appeal available. On December 12, 2005, petitioner filed this appeal with LUBA.” *Wells v. Yamhill County*, ___ Or LUBA ___ (LUBA No. 2005-176, Order, February 9, 2006) slip op 1-2 (footnotes omitted).

MOTION TO DISMISS

While it was not initially clear from petitioner’s notice of intent to appeal, the challenged decision in this appeal is the assistant county counsel’s November 21, 2005 letter

1 denying petitioner’s request for a local appeal of the planning director’s November 3, 2005
2 decision. As previously noted, the planning director concluded in that decision that no
3 enforcement of the Yamhill County Zoning Ordinance (YCZO) was warranted in this case
4 because YCOM did not need any additional approvals to modify the antennae on the
5 communications tower. The county moves to dismiss this appeal for a number of reasons.

6 The county argues that the assistant county counsel does not have the authority to
7 make such decisions, and therefore the assistant county counsel cannot be a “final decision
8 maker” under LUBA’s rules.¹ The county does not argue that someone other than the
9 assistant county counsel made the decision to deny petitioner’s local appeal or that
10 petitioner’s appeal is still pending. There is no dispute that (1) petitioner filed an appeal, (2)
11 the appeal was rejected, and (3) petitioner’s appeal fee was returned. There is also no dispute
12 that the assistant county counsel was the person who denied the appeal. If the assistant
13 county counsel acted without authority in rejecting petitioner’s appeal, that is a matter for the
14 county to correct. Unless and until the county takes some action to disavow the assistant
15 county counsel’s November 21, 2005 decision, we will assume that the assistant county
16 counsel had authority to take the action that he took.

17 The county also argues that because county counsel did not sign the letter, it cannot
18 be a “final decision.”² The November 21, 2005 letter is on “Office of County Counsel”
19 letterhead. The letter concludes:

¹ OAR 661-010-0010(4) provides:

“‘Final decision maker’ means the governing body, or a person, commission or other entity authorized by the governing body, that makes the final decision.”

² OAR 661-010-0010(3) provides:

“‘Final decision’: A decision becomes final when it is reduced to writing and bears the necessary signatures of the decision maker(s), unless a local rule or ordinance specifies that the decision becomes final at a later date, in which case the decision is considered final as provided in the local rule or ordinance.”

1 “Yours sincerely,
2 “/S/ Rick Sanai
3 “Rick Sanai
4 “Assistant County Counsel.” Record 3.

5 There is no dispute that the decision was reduced to writing and prepared for the
6 assistant county counsel’s signature. The assistant county counsel does not argue that the
7 letter does not represent his decision or that someone else issued the letter in his name
8 without his permission. In the circumstances presented in this appeal, we believe the
9 signature stamp on the letter is the equivalent of the assistant county counsel’s signature.

10 The county further argues this appeal must be dismissed because the assistant county
11 counsel’s November 21, 2005 decision simply repeats the planning director’s November 3,
12 2005 decision, and the notice of intent to appeal was filed more than 21 days after that
13 November 3, 2005 decision. The county is correct that when a local government merely
14 repeats a previously issued decision, that repetition of a previously issued decision is
15 generally not a new decision that may be appealed to LUBA. *Lloyd Dist. Community Assoc.*
16 *v. City of Portland*, 30 Or LUBA 390, 395, *aff’d* 141 Or App 29, 916 P2d 884 (1996). The
17 assistant county counsel’s November 21, 2005 letter, however, is not merely a reiteration of
18 the planning director’s November 3, 2005 decision. On the contrary, it is a rejection of
19 petitioner’s attempt to appeal that decision to the county commissioners. The November 21,
20 2005 letter is also not merely a repetition of the assistant county counsel’s earlier November
21 9, 2005 letter in which he states there is no local appeal available. Record 14. When the
22 assistant county counsel wrote the November 9, 2005 letter, petitioner had not yet appealed
23 the planning director’s decision. The assistant county counsel could not reject an appeal that
24 had not yet been filed. Petitioner’s notice of intent to appeal was filed within 21 days of the
25 assistant county counsel’s November 21, 2005 letter, and was therefore timely filed. The

1 assistant county counsel’s decision to reject the local appeal was a final decision concerning
2 application of a land use regulation and, therefore, is a land use decision.³

3 The county’s motion to dismiss is denied.⁴

4 Before turning to petitioner’s assignment of error it may be possible to avoid some
5 analytical confusion if we emphasize what we have decided in denying the county’s motion
6 to dismiss and what we have not decided. We have decided that we agree with petitioner that
7 the assistant county counsel’s November 21, 2005 decision that petitioner has no right of
8 appeal under YCZO 1401.01 is a land use decision that is subject to our review jurisdiction.
9 However, we have not yet decided that the county erred in concluding that petitioner had no
10 right under YCZO 1401.01 to appeal the planning director’s November 3, 2005 decision to
11 the board of county commissioners. We turn to that question now.

12 **ASSIGNMENT OF ERROR**

13 YCZO 1404.01 provides in pertinent part:

14 “Appeals From Decisions of the Commission or the Planning Director.

15 “Where it is alleged that there is error in any order, requirement, decision or
16 determination made by the Director in the interpretation of this ordinance, an
17 appeal therefrom may be made by an affected party only to the Board [of
18 County Commissioners] on a form prescribed by the Director. Such written
19 appeal shall be filed with the Director within fifteen (15) days of the decision

³ ORS 197.015(10)(a) defines “land use decision” to include:

“(A) 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[.]”

⁴ The county also argues that the appeal should be dismissed because the planning director’s November 3, 2005 letter is not a land use decision. The county decision that is before us in this appeal is the assistant county attorney’s November 21, 2005 decision, not the planning director’s November 3, 2005 letter.

1 on a proposed action and shall be accompanied by the appropriate filing fee.
2 Upon determination that the appeal request is complete and in order, a public
3 hearing before the Board shall be scheduled and public notice mail and
4 published according to the public notice requirements in Section 1402.”

5 Petitioner argues that he attempted to appeal a decision made by the planning
6 director, and that under YCZO 1401.01 he is entitled to a local appeal. Petitioner’s argument
7 is plausible. The planning director interpreted the zoning ordinance in concluding that no
8 land use approvals are needed to modify the antennae on the property leased from
9 petitioner.⁵ If YCZO 1404.01 is literally read to authorize an appeal of *any* allegedly
10 erroneous decision by the planning director that includes an interpretation of the YCZO, it
11 would appear that his November 3, 2005 decision is subject to appeal under YCZO 1404.01.
12 The county responds, however, that YCZO 1404.01 only grants a right to appeal decisions of
13 the planning director that are *land use decisions*. According to the county, when the
14 planning director makes decisions that are not *land use decisions*, those decisions may not be
15 appealed pursuant to YCZO 1404.01.⁶

16 The planning director’s decision makes a judgment regarding whether the added
17 antennae required land use approvals under the YCZO that were not secured before the
18 antennae were installed. For lack of a better term, we will refer to decisions like the planning
19 director’s decision as “enforcement decisions.” Local government enforcement decisions are
20 rendered in many different ways and may or may not result in a decision that is also a land
21 use decision that is reviewable by LUBA. *Johnston v. Marion County*, ___ Or LUBA ___
22 (LUBA No. 2005-083, February 9, 2006). A local government’s enforcement decision

⁵ The planning director’s letter states: “Our office interprets that there is a need for land use approval only when a new tower is being constructed or when an existing tower is being raised in height.” Record 20.

⁶ The county’s argument fails to appreciate that the term “land use decision” is a defined term. ORS 197.015(10). *See* n 3. As defined by statute, a land use decision must be a “final” decision. If there is a right to appeal a planning director’s decision under YCZO 1401.01, that decision would not be a “final” decision and, for that reason alone, could not be a land use decision. We assume what the county means to say is that YCZO 1401.01 only provides a right to appeal decisions that will become land use decisions if they are not appealed.

1 clearly can be a land use decision. *ODOT v. Mosier*, 161 Or App 252, 259-60, 984 P2d 351
2 (1999); *Putnam v. Klamath County*, 19 Or LUBA 616, 619-20 (1990). If the enforcement
3 decision is a land use decision that is not appealed or is affirmed on appeal, the question of
4 whether there is or is not a land use law violation is resolved by the land use decision. In any
5 subsequent circuit court enforcement action that might be necessary to remove an illegal land
6 use, the circuit court would simply be asked to enforce the land use decision; the circuit court
7 would not be asked to decide whether the land use decision was correct, and the circuit court
8 would not be asked to decide whether there was a land use law violation.

9 On the other hand, a local government's initial determination whether or not an
10 existing use violates its land use laws may be nothing more than a preliminary determination
11 by a local official that may or may not lead to a circuit court enforcement action if the
12 property owner does not agree to correct the alleged violation voluntarily. This kind of
13 enforcement decision is not a land use decision appealable to LUBA. *Clackamas County v.*
14 *Marson*, 128 Or App 18, 20-21, 874 P2d 110 (1994); *Wygant v. Curry County*, 110 Or App
15 189, 192, 821 P2d 1109 (1991); *Yost v. Deschutes County*, 37 Or LUBA 653, 659-60 (2000).
16 In cases where a local government has made such a preliminary determination that there is a
17 local land use law violation, but the local government has not reached that conclusion via a
18 land use decision, an action in circuit court may be necessary if the landowner does not agree
19 to take action to correct the violation. To prevail in such a circuit court enforcement action,
20 the local government will be required to demonstrate to the circuit court's satisfaction that a
21 land use law violation exists, because there would be no prior land use decision to establish
22 that the land use law violation exists.

23 We understand the county to argue that the planning director's November 3, 2005
24 letter decision is the latter kind of enforcement decision, *i.e.* one that is not adopted as a land
25 use decision. We also understand the county to argue that YCZO 1401.01 only provides a
26 right of appeal to the board of county commissioners to challenge decisions that will

1 otherwise become land use decisions if they are not appealed. We understand the county to
2 argue that its November 3, 2005 enforcement decision is not such a decision.

3 While it might be possible to interpret YCZO 1401.01 more broadly, we agree with
4 the county that YCZO 1401.01 is reasonably interpreted to provide a right of appeal only for
5 decisions that would otherwise become land use decisions. If the planning director's
6 November 3, 2005 decision is not a such a decision, the county's conclusion that YCZO
7 1401.01 does not provide a right to appeal such decisions to the board of county
8 commissioners must be affirmed.

9 **A. The YCZO**

10 The YCZO does not have any formal procedure for adopting enforcement decisions.
11 The only provision in the YCZO that deals expressly with how violations of the YCZO are
12 corrected is YCZO 1406.01, which is based on ORS 215.185 and provides:

13 "In the event a building or other structure is, or is proposed to be, located,
14 constructed, maintained, repaired, altered, or used, or any land is, or is
15 proposed to be, used, in violation of an ordinance or regulation designed to
16 implement the Yamhill County Comprehensive Plan, the governing body of
17 the county or a person whose interest in real property in the county is or may
18 be affected by the violation, may, in addition to other remedies provided by
19 law, institute injunction, mandamus, abatement, or other appropriate
20 proceedings to prevent, temporarily or permanently enjoin, abate, or remove
21 the unlawful location, construction, maintenance, repair, alteration or use."

22 The lack of any formal procedure in the YCZO for issuing enforcement decisions lends some
23 support to the county's argument regarding the scope of YCZO 1401.01. The presence of
24 YCZO 1406.01, which appears to direct the county and any other affected person to proceed
25 directly to circuit court to remedy any perceived land use law violations, also supports the
26 county's view that the planning director's November 3, 2005 letter should not be viewed as
27 an appealable decision under YCZO 1401.01.

1 **B. Yamhill County Citation Ordinance**

2 Yamhill County Ordinance 755 is entitled “Yamhill County Citation Ordinance 755”
3 (YCCO 755).⁷ YCCO 755 establishes procedures by which the county enforces all of its
4 ordinances, including the YCZO.⁸ YCCO 755 § 5 identifies the persons who are authorized
5 to issue citations, conduct investigations and seek administrative inspection warrants. YCCO
6 755 § 6 authorizes the planning director to issue warnings of alleged violations. YCCO 755
7 § 7 authorizes the planning director to issue citations. If warnings and citations do not
8 produce the desired result, YCCO 755 § 9 authorizes the county to prosecute violations of its
9 ordinances in circuit court.⁹ In any court hearing to enforce county ordinances under YCCO
10 755, “[t]he county shall have the burden of proof of the alleged violation by a preponderance
11 of the evidence.”¹⁰ YCCO 755 § 15(4).

12 YCCO 755 is entirely consistent with the county’s position that the planning
13 director’s November 3, 2005 decision is not the kind of decision for which an appeal is
14 provided under YCZO 1401.01. Rather, YCCO 755 operates outside the YCZO, and
15 establishes a procedure whereby in any contested enforcement decision, the county has the
16 burden of proof to establish to the circuit court’s satisfaction that a land use violates the
17 YCZO. The county has this burden in circuit court, notwithstanding any decision the

⁷ Although a copy YCCO 755 is not included in the record, a copy is appended to the county’s brief in this matter. We take official notice of YCCO 755.

⁸ YCCO 755 also provides for enforcement of the county’s solid waste ordinance, land division ordinance, building, mechanical, plumbing and electrical ordinance, laws regarding rights of way, and the county parks ordinance. YCCO 755 § 4.

⁹ YCCO 755 §9 provides:

“The Yamhill County Counsel, Yamhill County District Attorney, and the citing officer or deputy shall have authority to prosecute a person cited for committing a violation enforceable under this ordinance. *All prosecutions shall be brought in Yamhill County Circuit Court.*” (Emphasis added.)

¹⁰ YCCO 755 does not provide any right of local appeal to challenge county decisions to issue warnings, citations or prosecute violations in circuit court.

1 planning director may have made earlier that leads the county to initiate enforcement action
2 in circuit court. YCCO 755 does not establish a procedure whereby the county adopts its
3 enforcement decisions as land use decisions, and it is clear under YCCO 755 that an action in
4 circuit court is the exclusive means by which the county may enforce its ordinances. The
5 planning director's November 3, 2005 determination was made pursuant to the scheme
6 provided by YCCO 755. Determinations made under that scheme are clearly not land use
7 decisions. It follows that the county correctly determined that petitioner has no right to
8 appeal its enforcement decision to the board of county commissioners under YCZO 1401.01.

9 The county's decision is affirmed.