BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TERRY WOLFGRAM and
NANCY WOLFGRAM,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent,

and

WILDWOOD ESTATES, LLC,
Intervenor-Respondent.

LUBA No. 2006-073

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Daniel J. Stotter, Eugene, filed the petition for review and argued on behalf of petitioners.

No appearance by Douglas County.

Stephen Mountainspring, Roseburg, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Dole, Coalwell, Clark, Mountainspring, Mornarich and Aitken, PC.

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

REMANDED 09/14/2006

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

Petitioners appeal an Oregon Department of Environmental Quality (DEQ) Land Use Compatibility Statement (LUCS).

FACTS

Intervenor-respondent Wildwood Estates, LLC (Wildwood) wishes to develop an eight-lot subdivision in rural Douglas County. On January 12, 2005, Wildwood submitted its application to the county for subdivision and technical review for an eight-lot subdivision. Record 5.[1] We understand that technical review is required as part of the county's subdivision approval process because the property is subject to the county's Beaches and Dunes Overlay zone.

Sometime before August 5, 2005, Wildwood began grading portions of the property. From the record, the extent, nature and purpose of that grading is not clear. Wildwood suggests it was just clearing some existing trails and doing minimal grading necessary to facilitate survey work preparatory to submitting its subdivision application. But there are also suggestions in the record that Wildwood's grading may have been the initial steps in developing the planned subdivision road system.

On August 5, 2005, DEQ sent Wildwood a warning letter that its grading activity required a National Pollutant Discharge Elimination System (NPDES) Permit. Record 63-64. The letter stated "[t]he department observed ground disturbance activities of one to five acres consisting of at least three (3) new roads and two (2) large culverts placed in Clear Creek." Record 63. The letter stated the NPDES Permit application must be submitted within 10 days. Wildwood's NPDES Permit Application was received by DEQ 10 days

[1] The subdivision application is not included in the record. The February 28, 2006 decision that ultimately grants tentative approval for the subdivision states that the application was submitted on January 12, 2006. At oral argument petitioners stated that the reference to 2006 is an error and the application was in fact submitted on January 12, 2005.

later, on August 15, 2005.

On December 12, 2005, DEQ sent a letter to the County asking if the county had signed a LUCS for the proposed subdivision. Record 70. The DEQ LUCS form explains that a LUCS "is the process used by the DEQ to determine whether DEQ permits and other approvals affecting land use are consistent with local comprehensive plans." Record 38. *See* OAR 340-018-0050 (describing generally how DEQ uses LUCS to ensure its actions are consistent with local comprehensive plans). Copies of DEQ's December 12, 2005 letter to the county were sent to Wildwood and to petitioners.

On December 28, 2005, Wildwood sent a letter to DEQ thanking DEQ for providing a copy of the December 12, 2005 letter to the county and claiming that Wildwood was unaware that anything was missing from the NPDES permit application. Record 69. Wildwood stated in its letter that the only grading activity it had completed on the property "was conducted to clear trails that had become overgrown for the purposes of fire protection and/or to facilitate surveying and topographical mapping." *Id.* Also, on December 28, 2005, Wildwood submitted a LUCS to the county and the county approved the LUCS on the same day.[2] The LUCS that the county approved on December 28, 2005 is the decision that is before us in this appeal.

On February 28, 2006, the county planning director issued a decision that grants tentative subdivision and technical review approval for Wildwood's eight-lot subdivision. On March 3, 2006, petitioners appealed that decision to the county planning commission.[3] At oral argument, petitioners advised LUBA that the planning commission denied their appeal and that the planning commission's decision is now pending on appeal before the Douglas County Board of Commissioners.

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[2] We describe the county's LUCS decision in greater detail later in this decision.

[3] That appeal is not included in the record, but Wildwood attached a copy to its response brief in this appeal.

On April 19, 2006, the Coos Bay office of DEQ faxed a number of documents related to Wildwood's DEQ NPDES permit to petitioners. One of those documents was the LUCS with the county's December 28, 2005 approval. Petitioners claim they did not know of the December 28, 2005 county approval of the LUCS until it received this document from DEQ on April 19, 2006. Petitioners filed their appeal of that decision with LUBA on April 27, 2006.

MOTION TO DISMISS, AFFIDAVIT OF COUNSEL AND MOTION FOR EVIDENTIARY HEARING

Wildwood moves to dismiss this appeal, alleging that the challenged LUCS decision is not a land use decision and that petitioners' lack standing to appeal because they failed to file a timely appeal. We reject those arguments in our discussion of the second assignment of error below.

In response to Wildwood's standing challenges, petitioners filed an Affidavit of Counsel and a Motion for Evidentiary Hearing, in which they (1) allege that they did not receive actual or constructive notice of the challenged December 28, 2005 LUCS decision until they received certain documents from DEQ on April 19, 2006 and (2) offer evidence in support of that allegation. Wildwood's standing challenge is based on the alleged sufficiency of the county's February 28, 2006 subdivision decision to provide petitioners actual notice or constructive notice of the county's December 28, 2005 LUCS decision. But for the alleged sufficiency of the county's February 28, 2006 decision to provide petitioners actual notice or constructive notice of the county's December 28, 2005 LUCS decision, we do not understand Wildwood to dispute the facts alleged in the Affidavit of Counsel or the Motion for Evidentiary Hearing. In our discussion of the second assignment of error below, we reject Wildwood's argument that the county's February 28, 2006 subdivision decision was sufficient to provide petitioners actual or constructive notice of the county's December 28, 2005 LUCS decision. It is therefore unnecessary for us to resolve the parties' dispute concerning the Affidavit of Counsel or the Motion for Evidentiary Hearing.

SECOND ASSIGNMENT OF ERROR

A. Introduction

There are many points of dispute between the parties. Most of them do not need to be resolved to decide this appeal. One exception is the scope of the county decision that is before us in this appeal. The parties agree that the decision before us in this appeal is the December 28, 2005 LUCS decision. But the parties have very different ideas about what that decision approves or certifies to DEQ. Although Wildwood suggests otherwise, and petitioners could have described the appealed decision with more precision, the LUCS decision does not grant tentative subdivision approval. The December 28, 2005 LUCS decision simply certifies to DEQ that certain unspecified grading activity is consistent with county land use requirements.

Although the record and the parties' arguments in this appeal are confusing, there are only three questions that need to be answered to decide this appeal. First, is the LUCS a land use decision? We conclude that it is. Second, did petitioners file a timely appeal? We conclude that they did. Third, once the scope of the grading activity that is proposed under the NPDES permit is determined, are the county's findings and the record the county submitted in this appeal adequate to explain why the county decided those activities are allowed under the county's comprehensive plan and land use regulations? We conclude that they are not.

B. The LUCS is a Land Use Decision

As defined by ORS 197.015(11)(a)(A), a decision is a land use decision if it is a "final decision," that "concerns the * * * application of * * * [a] comprehensive plan provision * * * or [a] land use regulation."[4] One of the questions the county was required to

[4] ORS 197.015(11)(a)(A) provides that a land use decision includes:

> "A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

answer in approving the LUCS was whether the activities proposed under the requested DEQ permit comply "with all applicable local land use requirements." The county effectively answered that they do. That decision necessarily is a land use decision if it is a final decision, and not subject to any of the exceptions set out at ORS 197.015(11)(b). As far as we can tell there is no right of local appeal regarding the county's December 28, 2005 LUCS decision and it is a final decision.

Wildwood argues that the challenged LUCS decision qualifies for one or more of the exceptions to the ORS 197.015(11)(a) definition of "land use decision" that are provided by ORS 197.015(11)(b)(A), (B) or (D).[5] We conclude below that it is not possible from the challenge decision to determine what activities the county thought its LUCS approval authorized or what land use standards, if any, applied to those activities. Therefore, it is not possible to determine whether one or more of the ORS 197.015(11)(b)(A), (B) or (D) exceptions applies.

"(i) The goals;

"(ii) A comprehensive plan provision;

"(iii) A land use regulation; or

"(iv) A new land use regulation[.]"

[5] As relevant, ORS 197.015(11)(b) provides that a "land use decision:"

"Does not include a decision of a local government:

"(A) That is made under land use standards that do not require interpretation or the exercise of policy or legal judgment;

"(B) That approves or denies a building permit issued under clear and objective land use standards;

"* * * * *

"(D) That determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility that is otherwise authorized by and consistent with the comprehensive plan and land use regulations[.]"

Based on the parties' arguments, we conclude that the December 28, 2005 LUCS decision is a land use decision and subject to our jurisdiction under ORS 197.825(1).[6]

C. The Notice of Intent to Appeal was Timely Filed

Under ORS 197.830(9), the deadline for filing a notice of intent to appeal generally expires 21 days after a land use decision become final. The county did not provide a hearing before it signed the LUCS decision. The parties appear to agree that the deadline for petitioners to file their notice of intent to appeal in this matter is therefore governed by ORS 197.830(3), which provides, as relevant:

> "If a local government makes a land use decision without providing a hearing, * * * a person adversely affected by the decision may appeal the decision to [LUBA] under this section:
>
> "(a) Within 21 days of actual notice where notice is required; or
>
> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

Wildwood disputes petitioners' claim that they did not know about the LUCS decision until April 19, 2006. Wildwood contends that regardless of whether ORS 197.830(3)(a) or (b) applies here, petitioners obtained "actual notice" under ORS 197.830(3)(a) or constructive notice under ORS 197.830(3)(b) when they received a copy of the county's February 28, 2006 decision granting tentative subdivision and technical review approval, shortly after that decision was rendered. There is no dispute that the county provided petitioners a copy of that February 28, 2006 decision more than 21 days before this appeal was filed. That decision includes a five-page memorandum and a page that explains the local appeal process. Record 1-4.[7] That decision also includes a 23-page findings

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[6] ORS 197.825(1) provides in relevant part that "the Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845."

[7] The record only includes three of the five pages.

document. Findings addressing a plan policy that requires the county to consider "Hazards to life, public and private property, and the natural environment which may be caused by the proposed use," begin on Record page 15. There are eleven bulleted findings, and the tenth of those eleven bulleted findings is set out below:

> "■ On December 28, 2005, the application [sic] submitted their land use compatibility statement for a 1200C National Pollutant Discharge Elimination System general permit. This permit is processed locally via the Department of Environmental Quality (DEQ). The DEQ review will assure that any storm water discharge meets state and Federal standards."

Wildwood contends that the above finding was sufficient to give petitioners actual notice of the County's December 28, 2005 LUCS under ORS 197.830(3)(a) or constructive notice under ORS 197.830(3)(b).

Initially, although Wildwood refers to and characterizes the above "finding" as "notice" of the December 28, 2005 LUCS decision, it is not a "notice." It is a "finding" that is buried in the middle of 23 pages of findings that were adopted in approving Wildwood's application for tentative subdivision and technical review approval. That finding does not refer to a December 28, 2005 county decision. It refers to a "land use compatibility statement" that the "application" submitted to DEQ. Assuming the petitioners could be expected to understand that finding to explain that the "applicant" submitted the land use compatibility statement to DEQ on December 28, 2005, there is no particular reason why petitioners should know that the LUCS had been approved by the county. There is certainly no indication in the quoted finding that the county had taken any action on that land use compatibility statement.

The petitioners subsequently contacted DEQ on April 19, 2006 and found out about the county's December 28, 2005 LUCS decision. Given that the finding is buried in the middle of the subdivision approval decision and the finding does not purport to be "notice" of anything, it is not sufficient to constitute "actual notice" of the December 28, 2005 county

LUCS decision under ORS 197.830(3)(a). *Frymark v. Tillamook County*, 45 Or LUBA 685 696-98 (2003). Assuming the less stringent constructive notice standard in ORS 197.830(3)(b) applies rather than the actual notice standard in ORS 197.830(3)(a), Wildwood does not explain why a month and a half is an unreasonable amount of time to discover the finding and then follow-up and make an inquiry with DEQ that leads to discovery of the December 28, 2005 LUCS. *See Willhoft v City of Gold Beach*, 38 Or LUBA 375, 389-90 (2000) (describing the discovery obligation under ORS 197.830(3)(b)). Given the ambiguity of the finding and its location in a related but different decision, we conclude that a month and a half is a reasonable amount of time for petitioners to have discovered the December 28, 2005 LUCS decision. Petitioners' notice of intent to appeal was filed within 21 days after petitioners knew or should have known of the December 28, 2005 LUCS decision and, therefore, the appeal was timely filed.

D. The County's Findings

In their second assignment of error, petitioners allege the county's decision is not supported by adequate findings.

Before turning to the county's findings, it is somewhat unclear what grading activities were to be authorized by the NPDES Permit and were the subject of the LUCS. As we have already noted, Wildwood suggests those activities were merely some incidental clearing of existing trails for fire protection and survey access reasons. There is absolutely no evidence to support that suggestion except Wildwood's December 28, 2005 letter. However, the documents in the record that apparently were submitted in response to DEQ's August 5, 2005 warning letter do not appear to be so limited. In particular, as petitioners point out, the NPDES Permit application itself indicates the project is an eight-lot subdivision. Record 57. The NPDES Permit application requires an "Erosion and Sediment Control Plan." Record 57. Wildwood's application indicates that such a plan is included with the application. *Id*.

The only erosion and sediment control plan included in the record appears at Record 58-62.[8] That is an erosion and sediment control plan for the roads and lot improvements that will be necessary to develop the subdivision; it is not an erosion and control plan for incidental clearing of existing trails.[9] While the record in this case is confusing, it generally supports petitioners' assertion that in signing the LUCS on December 28, 2005, the county certified that the grading that will be necessary to develop the subdivision is consistent with county land use requirements.[10]

With the above understanding of what the county was asked to certify as being consistent with county land use requirements, we turn to the county's findings in support of its December 28, 2005 LUCS decision. Section 2 is the part of the LUCS form that is completed by the county. We set out Section 2 of the LUCS form below. All of the relevant entries made by the county in its December 28, 2005 decision are shown in bold lettering.

> "SECTION 2 – TO BE FILLED OUT BY CITY OR COUNTY PLANNING OFFICIAL
>
> "5. The facility proposal is located: __inside city limits __inside UGB **X** outside UGB
>
> "6. Name of the city or county that has land use jurisdiction (the legal entity responsible for land use decisions for the subject property or land use): **Douglas County**

[8] Another copy of this plan appears at Record 40-44, but in response to argument by petitioners and concessions by Wildwood, we struck that copy of the plan in our June 28, 2006 Order regarding petitioners' record objections.

[9] In addition, as we discuss below, the worksheet that the county references in its December 28, 2005 LUCS decision states that it is a "LUCS FOR GRADING OF SUBDIVISION." Record 67.

[10] If the county really understood that it was only being asked to certify that incidental grading of a few existing trails on the subject property was consistent with county land use regulations, it can explain the basis for that understanding on remand and explain why such grading would be consistent with the county's land use requirements. The record simply does not support that view of the NPDES Permit application and the LUCS. Even if it did, the county's December 28, 2005 LUCS decision does not explain why even that limited grading would be consistent with county land use regulations.

"7. Does the business or facility comply with all applicable local land use requirements?

"**X** Yes: attach findings to support the affirmative compliance decision (as required by Oregon Administrative Rules (OAR) 660, Division 31). **Per P/D 05-338 file and W/S 2005-1958**

"__ No: attach findings for noncompliance, and identify requirements the applicant must comply with before LUCS compatibility can be determined.

"8. Planning Official Signature: **Stefanie Morgan** Title: **PLANNER**

Print Name: **STEFANIE MORGAN** Telephone No.: **541 440-4289**
Date: **12-28-05**

"* * * * *

"Please Note: A LUCS approval cannot be accepted by DEQ until all local requirements have been met. Written findings of fact for all local decisions addressed under Item No. 7 above must be attached to the LUCS." Record 66 (emphasis in original deleted).

As far as we can tell, despite the clear indication that findings needed to be attached to support any county certification that the activities proposed in the LUCS are consistent with local land use requirements, there were no findings attached to the December 28, 2005 LUCS. The reference to P/D 05-338 file and W/S 2005-1958 are not sufficient to explain the county's decision. P/D 05-338 is Wildwood's subdivision application file. On December 28, 2005, that subdivision had not yet been approved and the February 28, 2006 findings presumably did not yet exist. Even if they did, there is no reason to believe they were attached to the December 28, 2005 LUCS. The reference to W/S 2005-1958 is equally inadequate. That appears to be a reference to the document that appears on the next page of the Record, at Record 67. That document identifies Wildwood as the applicant and includes the following line:

"Improvement: LUCS FOR GRADING OF SUBDIVISION

But the document at Record 67 does not make any attempt to explain why the grading requested in the LUCS is consistent with local land use requirements.

The county's findings are simply inadequate to demonstrate that the proposed grading is consistent with all county land use requirements, as it certified in its December 28, 2005 LUCS decision. The second assignment of error is sustained.[11]

FIRST AND THIRD ASSIGNMENTS OF ERROR

In their first assignment of error, petitioners assume the challenged LUCS decision is a "permit," as that term is defined by ORS 215.402(4).[12] If the December 28, 2005 LUCS decision is an ORS 215.402(4) "permit," petitioners contend the county erred by failing to provide a prior public hearing on the LUCS, as required by ORS 215.416(3), or notice of the decision and an opportunity for a local appeal, as required by ORS 215.416(11). In their third assignment of error, petitioners allege the county's December 28, 2005 LUCS decision is not supported by substantial evidence.

We question petitioners' assumption that the LUCS decision is a "permit" decision within the meaning of ORS 215.402(4). *See Tirumali v. City of Portland*, 41 Or LUBA 231, 240, *aff'd* 180 Or App 613, 45 P3d 519, *rev den* 334 Or 632 (2002) (explaining that not all quasi-judicial land use decisions necessarily are "permit" decisions under ORS 227.160(2), which applies to cities and is the statutory analog of ORS 215.402(4)). It seems to us much more likely that the county's decision to grant preliminary subdivision approval for this rural subdivision, which is now pending before the board of county commissioners, is the "permit"

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[11] It seems obvious to us that now that the subdivision has received tentative approval, the county's duty on remand in completing an adequate LUCS will presumably be simplified somewhat, and the likelihood of an appeal of such a LUCS decision will be reduced, particularly if that tentative approval is ultimately sustained on appeal. However, it seems equally obvious to us that any new LUCS decision by the county in advance of a final resolution of petitioners' appeal of the tentative subdivision plan approval decision is likely to spawn another LUBA appeal to challenge such a LUCS decision. Given that likelihood, it would seem that a delay in approving the LUCS, if possible, or a request for a more limited NPDES Permit and LUCS to allow the unauthorized grading to remain pending final resolution of the tentative subdivision decision would be the most prudent course of action.

[12] As relevant, ORS 215.402(4) provides:

> "'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. * * *"

decision in this matter, *i.e*. the "discretionary approval" of this "proposed development of land." *See* n 12. However, because the county's decision must be remanded in any event, we need not and do not consider petitioners' first assignment of error.

Neither do we consider petitioners' third assignment of error, in which petitioners argue the county's decision is not supported by substantial evidence. We have already concluded that the county's decision is not supported by adequate findings, which explain what if any land use requirements it applied in approving the disputed LUCS. Until the nature of those requirements is known, review of petitioners' evidentiary challenge is premature because we cannot know for sure what evidence is relevant. *See DLCD v. Columbia County*, 15 Or LUBA 302, 305 (1987) (where findings are inadequate, no purpose is served in addressing additional allegations that findings are not supported by substantial evidence); *McNulty v. City of Lake Oswego*, 14 Or LUBA 366, 373 (1986), *aff'd* 83 Or App 275, 730 P2d 628 (1987) (same).

We do not consider petitioner's first and third assignments of error.

The county's decision is remanded.