BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MIKE R. LOVE, FRANCIS W. MOON, SUSAN L. WOOD,
BENJAMIN D. JENSEN, and DON DOELLING,
Petitioners,

vs.

KLAMATH COUNTY,
Respondent.

LUBA No. 2006-174

FINAL OPINION
AND ORDER

Appeal from Klamath County.

Mike R. Love, Francis W. Moon, Susan L. Wood, Benjamin D. Jensen and Don Doelling, Chiloquin, filed the petition for review. Mike R. Love argued on his own behalf. Christine M. Cook, Portland, argued on behalf of Francis W. Moon and Susan L. Wood.

W. Daniel Bunch, Michael P. Rudd, Klamath Falls, filed the response brief. With them on the brief was Brandsness, Brandsness & Rudd, PC. Michael P. Rudd argued on behalf of respondent.

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

REMANDED 06/11/2007

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a letter from Klamath County counsel to petitioner Love.

FACTS

The county counsel's letter that is the subject of this appeal was written to one of the petitioners in response to petitioners' complaints to the county that a neighboring property, approximately 19 acres in size, has been developed with a motorcycle track.. The property is located in the Rural Residential (R-5) zoning district.

We set out the relevant portions of the challenged letter in our order in *Love v. Klamath County*, __ Or LUBA __ (LUBA No. 2006-174, Order, April 9, 2007), in which we denied the county's motion to dismiss:

> "Petitioners appeal a county counsel letter to petitioner Love stating, among other things, that the county will not take action to regulate or stop use of a property located near petitioner Love's property as a motorcycle track and that such use of the property as a motorcycle track is a permitted use under the Klamath County Land Development Code (KCLDC). * * *
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> "The challenged decision is a three-page letter that sets forth the county's position regarding the disputed motorcycle track. The letter explains what county counsel believes to be the background history of the complaints regarding use of the property. The letter further explains that the track operator has not applied for any permits, and the county does not intend to hold any hearings on the matter. As material here, the letter states:
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> > 'Please accept this letter as indication that Klamath County does not presently intend to cite the property owner or the tenant, nor does the County intend to file any proceeding to abate the track. You may also accept this letter as an interpretation of the KCLDC to the extent that it reflects the determination that reasonable personal use of motorcycles, to include the construction of a riding track, is allowed in the R-5 zone.'"

Id. at __ (slip op 1-2).

FIRST ASSIGNMENT OF ERROR

In their first assignment of error, petitioners argue that the county erred in its interpretation of the Klamath County Land Development Code (KCLDC), when it found that reasonable personal use of motorcycles, including the construction of a motorcycle riding track, is a permitted use in the R-5 zone. Petitioners argue that under the applicable provisions of the KCLDC, the construction of a motorcycle riding track required either site plan review or a conditional use permit. At the outset, we note that although the county counsel's letter is not particularly clear, when the text and context of the letter are read in their entirety, we understand the county to have decided that (1) a tenant occupant of the property has developed a motorcycle track on the property, and (2) that as far as the evidence shows the use of the track is a "personal (hobby) use" by those occupants of the property, and for that reason construction of the riding track did not require site plan review.

KCLDC Article 51.220 lists permitted uses in the R-5 zone. It provides as relevant here:

> "The following uses shall be permitted *subject to site plan review of Article 41*, and all other applicable standards, criteria, rules, and statutes governing such uses:
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> " * * * * *
>
> "H. Accessory Buildings and Uses * * *" (emphasis added).[1]

Article 41.020 of the KCLDC requires review of a site plan for, as relevant here, "[a]ny development, or change of land use * * *."[2]

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[1] KCLDC Article 11.030 defines "Accessory Buildings and Uses" in relevant part as "[b]uildings and uses that are incidental and subordinate to the main use of the property, and are established only subsequent to the main property use."

[2] KCLDC Article 11.030 defines "Develop" as "[t]o bring about growth or availability, to construct or alter a structure, to conduct a mining operation, *to make a physical change in the use or appearance of land*, to divide land into parcels, or to create or terminate rights to access." (Emphasis added) KCLDC Article 11.030 defines "Development" as "[t]he act, process or result of developing."

Respondent answers first that the county counsel's interpretation of its code is entitled to deference under ORS 197.829(1), citing *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003).[3] Second, respondent maintains that a certain amount of "hobby" use of property is allowed without rising to the level of an "accessory use" for which site plan review under KCLDC may be required.

We reject respondent's contention that its interpretation of the KCLDC is entitled to deference under ORS 197.829(1). Because the challenged decision was made by county counsel rather than the county's governing body, we owe that interpretation no particular deference under ORS 197.829. *Gage v. City of Portland*, 319 Or 308, 877 P2d 1187 (1994). The standard of review of the county counsel's interpretation is whether that interpretation is correct. *McCoy v. Linn County*, 90 Or App 271, 275-76, 752 P2d 323 (1988) (LUBA's acceptance or rejection of local interpretation is determined by whether interpretation is right or wrong).

We agree with petitioners that the county's interpretation of the KCLDC to allow development of the motorcycle track without site plan review is incorrect. Undisputed evidence in the record indicates that the motorcycle track, including jumps, was developed with a bulldozer on approximately 7-8 acres of the 19 acre property. Supplemental Record 2.

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[3] ORS 197.829(1) provides:

> "The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
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> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
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> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
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> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

Those development activities appear to fall within the definition of "development" set forth in KCLDC Article 11, and thus, site plan review is required under KCLDC Article 41.020. *See* n 2. It may well be that, as the county concludes, the track was developed by the occupants of the property rather than the owner. However, under the KCLDC, the identity of the party developing the property is not relevant in determining whether a use described in KCLDC Article 51.2 requires site plan review.

Petitioners' alternative theory for assigning error to the county's decision is that the motorcycle track requires a conditional use permit under KCLDC Article 51.230, which lists uses in the R-5 zone requiring a conditional use permit. However, petitioners do not explain which provision of KCLDC Article 51.230 would require a conditional use permit for construction or operation of the motorcycle track. Rather, petitioners argue that the procedures for considering an application for a conditional use permit would have provided a "mechanism for the handling of the track." Absent any argument that a specific provision of KCLDC Article 51.030 applies to the motorcycle track, we decline to find a basis for reversal or remand in petitioners' argument that a conditional use permit is required.

The first assignment of error is sustained, in part.

SECOND THROUGH FIFTH ASSIGNMENTS OF ERROR

In petitioners' second assignment of error, they complain that the county does not have a noise ordinance and has failed to enforce its "dust ordinance" and its nuisance ordinance. In their third assignment of error, petitioners cite various provisions of ORS Chapter 197 and argue that the county has failed to follow Goals 1 and 2 of the Klamath County Comprehensive Plan. In their fourth assignment of error, petitioners argue that the county failed to address environmental concerns raised by petitioners related to development in a flood hazard overlay zone. In their fifth assignment of error, petitioners assert that the county has not dealt with petitioners in a fair and objective manner.

The arguments in the second through fifth assignments of error challenge actions or failures to take action by the county that are not part of any decision rendered in the county counsel's letter and, consequently, are not before us in this appeal. None of those arguments provide a basis for reversing or remanding the county's decision that a motorcycle track is a permitted use in the R-5 zone, which is the only decision before us in this appeal.

Petitioners' second through fifth assignments of error are denied.

CONCLUSION

Because we sustain petitioners' first assignment of error in part, the county's decision must be remanded. We remand the county's decision, because the county erred in concluding that site plan review is not required for the disputed motorcycle track. We are cited to no basis in the record to reach any other conclusion than that the disputed motorcycle track is "development," as that word is defined in KCLDC Article 11, and that site plan review is therefore required under KCLDC Article 41.020.

Although we remand the county's decision, based on the above-identified error, it is important to recognize an underlying issue that is not directly presented in this appeal, but seems to be an essential part of petitioners' dispute with the county. Petitioners appear to assume that if they can demonstrate to the county that the activities on the subject property violate the county's zoning ordinance in some way, upon such a demonstration the county would be legally *obligated* to initiate enforcement action against the owners or occupant of the property. Both the county and any owners of real property whose interests are affected by such a violation clearly have a *right* to initiate legal action to enforce the county's zoning ordinance. ORS 197.825(3)(a); 215.185(1).[4] But we are aware of no statute or local law that

[4] ORS 197.825(3) provides in relevant part::

"[T]he circuit courts of this state retain jurisdiction:

"(a) To grant declaratory, injunctive or mandatory relief in proceedings * * * brought to enforce the provisions of an adopted comprehensive plan or land use regulations[.]"

obligates the county to initiate enforcement action against any violation of its zoning ordinance that is called to its attention. Indeed, ORS 215.185(3) appears to provide to the contrary.[5]

The county's decision is remanded.

ORS 215.185(1) provides in part:

> "In case a building or other structure is, or is proposed to be, located, constructed, maintained, repaired, altered, or used, or any land is, or is proposed to be, used, in violation of an ordinance or regulation designed to implement a comprehensive plan, the governing body of the county or a person whose interest in real property in the county is or may be affected by the violation, may, in addition to other remedies provided by law, institute injunction, mandamus, abatement, or other appropriate proceedings to prevent, temporarily or permanently enjoin, abate, or remove the unlawful location, construction, maintenance, repair, alteration, or use."

[5] ORS 215.185(3) provides:

> "Nothing in [ORS 215.185] requires the governing body of a county or a person whose interest in real property in the county is or may be affected to avail itself of a remedy allowed by this section or by any other law."