BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HAROLD HARDESTY,
Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

ROSALIND SCHRODT and GARY SCHRODT,
Intervenors-Respondents.

LUBA No. 2008-168

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Christian E. Hearn, Ashland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Davis Hearn Saladoff & Bridges, P.C.

G. Frank Hammond, County Counsel, Medford, filed a response brief and argued on behalf of respondent.

Rosalind Schrodt and Gary Schrodt, Ashland, filed a response brief and argued on their own behalf.

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

RYAN, Board Member, did not participate in the decision.

DISMISSED 01/06/2009

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

Petitioner appeals a county decision that grants an electrical permit.

INTRODUCTION

Petitioner moves to strike all but page 7 of intervenors-respondents' (intervenors') brief:

> "In reviewing intervenors' brief and its attachments (one apparently from a neighbor, one apparently from Intervenors' friend in California, and one from Intervenors' tenant) all constitute facts outside the Record and/or matters irrelevant to the issues before the Board." Motion to Strike 1-2.

In a similar vein, the county moves to strike petitioner's summary of facts, "because it contains a great number of assertions not supported in the Record." Respondent's Brief 4.

Because the five-page record in this appeal includes only the appealed electrical permit, a receipt for payment of the permit application fee, two computer screen printouts and the one-page application, it is unsurprising that the parties felt compelled to provide a factual background that goes beyond the record. Our disposition of this appeal has not been affected by the extra-record evidence that the parties have included in their briefs, and we find it unnecessary to rule on the motions to strike.

The disputed electrical permit was approved to allow intervenors to install a 200 amp sub panel and four branch circuits in an existing warehouse that is located on intervenors' property. Intervenors' property lies just outside the City of Ashland on land zoned Rural Residential (RR-5) by Jackson County. Petitioner and intervenors have had disputes about various matters, including intervenors' use of the subject property, for many years.

The dispositive question in this appeal is whether LUBA has jurisdiction to review the challenged electrical permit. We conclude below that we do not have jurisdiction. In reaching that conclusion we have considered the five-page record in this appeal. With limited exceptions, LUBA's review is generally confined to the local record. ORS

197.835(2)(a). One statutory exception is that LUBA may consider extra-record evidence pursuant to a motion to take evidence under OAR 661-010-0045. The statutory grounds for motions to consider extra-record evidence under ORS 197.835(2)(a) do not include disputed questions of fact regarding LUBA's jurisdiction, and no party has moved to take evidence under OAR 661-010-0045. However, on a number of occasions, we have held that LUBA may also consider extra-record evidence, even without a motion under OAR 661-010-0045, for the limited purpose of determining whether LUBA has jurisdiction to review the decision on appeal. *Yost v. Deschutes County*, 37 Or LUBA 653, 658 (2000); *Leonard v. Union County*, 24 Or LUBA 362, 377 (1992); *Hemstreet v. Seaside Improvement Comm.*, 16 Or LUBA 630, 631-33 (1988). In considering whether we have jurisdiction in this matter, we have also considered two extra-record land use decisions concerning the subject property. The first land use decision is a May 22, 1990 planning director decision that grants conditional use approval for a manufacturing use on intervenors' property. The second land use decision is a November 13, 2006 county hearings officer decision that returns petitioner's appeal of a county planning division decision concerning intervenors' property to the planning division.

FACTS

The subject property includes approximately 2.39 acres and was the site of a slaughterhouse for many years. The county considers the slaughterhouse building to be a historic structure. In 1990, intervenors received conditional use approval and a Historical Landmark Use Permit to use an existing barn and the slaughterhouse for manufacturing and warehousing. Apparently the primary purpose for the 1990 application for conditional use approval was to authorize intervenors to manufacture birdfeeders and operate a showroom for sales. However, the 1990 conditional use approval decision also states that "applicant also intends to rent the existing refrigerator portion of the structure for food product storage."

According to the 2006 land use decision, in 1991, intervenors requested an amendment of the 1990 conditional use permit to remove the barn and construct a 21,000 square foot "warehouse/manufacturing building" in place of the barn. According to the 2006 land use decision, that 1991 application was approved.[1]

According to the 2006 land use decision, in 1997 intervenors sought approval of a second amendment to the 1990 conditional use permit, to allow additional uses in the slaughterhouse building. According to the 2006 land use decision, that 1997 application was in response to an enforcement action initiated by petitioner. According to the 2006 land use decision, that 1997 application was approved in 1999.[2]

In 2004 extensive amendments to the Jackson County Land Development Ordinance (LDO) took effect. Under those amendments, petitioner contends that intervenors' commercial and industrial use of their property is now a nonconforming use rather than an approved conditional use.

According to the 2006 land use decision, intervenors subsequently sought county approval to allow the warehouse/manufacturing building to be used for a number of specified uses. A dispute arose about the procedure for reviewing intervenors' request and the criteria that must be applied to approve the request. On appeal of the planning division's decision to the county hearings officer, the hearings officer concluded, among other things, that the planning division's decision on the request is reviewable by the board of county commissioners, not the hearings officer. The hearings officer returned the decision "to the Planning Division for referral to the Board of Commissioners."[3]

---

[1] Neither the county nor any other party has provided us with a copy of that 1991 conditional use decision. The county appears to take the position that there was no 1991 conditional use approval decision

[2] Neither the county nor any other party has provided LUBA with a copy of that 1999 decision.

[3] Apparently the planning division decision has never been forwarded to the board of commissioners and the parties appear to dispute the status and legal significance of the hearings officer's 2006 decision.

As we have already noted, the decision that is before us in this appeal is one page long and does not convey much information. After an entry entitled "Type of Work" the decision indicates "Alteration." After an entry entitled "Type of Use" the decision indicates "Commercial." The decision then gives the following "Project Description:"

> "200 AMP SUB PANEL AND 4 BRANCH CIRCUITS FOR REFRIGERATION UNIT IN EXISTING WAREHOUSE BUILT UNDER 1991-1023-B2." Record 1.

JURISDICTION

A. Petitioner's Burden

It is petitioner's burden to establish that LUBA has jurisdiction to review the appealed electrical permit. *Billington v. Polk County*, 299 Or 471, 475, 703 P2d 232 (1985), *Wetzel v. City of Eugene*, 48 Or LUBA 491, 499 (2005); *Bowen v. City of Dunes City*, 28 Or LUBA 324, 330 (1994). As relevant here, LUBA's jurisdiction is limited to land use decisions. ORS 197.825(1). As defined by ORS 197.015(10)(a), the challenged decision is a land use decision if it is a final county decision that "concerns the * * * application of * * * [a] land use regulation." A decision "concerns" the application of a land use regulation if (1) the decision maker was required by law to apply its land use regulations as approval standards, whether it did so or not, or (2) the decision maker in fact applied land use regulations. *Jaqua v. City of Springfield*, 46 Or LUBA 566, 574 (2004). Even if a decision falls within the ORS 197.015(10)(a) definition of land use decision, certain decisions that would otherwise be land use decisions are excepted from the statutory definition of land use decision if they are governed by standards that do not require the exercise of legal or policy judgment or by clear and objective standards. ORS 197.015(10)(b).[4]

---

[4] ORS 197.015(10)(b) provides that the ORS 197.015(10)(a) definition of land use decision does not include a local government decision:

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

B. Petitioner's Argument

Petitioner argues that the county should have treated the application as an application to alter or modify a nonconforming use, which is governed by discretionary criteria at LDO Chapter 11. Petitioner contends the county should have followed a Type 2 procedure, which provides an opportunity for public participation, and instead erroneously followed a Type 1 procedure, which does not provide an opportunity for public participation. We understand petitioner to argue that because the LDO is a land use regulation, and LDO Chapter 11 should have been applied in this matter and requires the application of subjective standards and the exercise of significant legal judgment, the challenged decision is a land use decision.

C. The Appealed Decision

The precise nature of the electrical permit decision and what that permit decision authorizes could be clearer. The electrical permit clearly authorizes installation of a 200 amp panel and four circuits. Whether the electrical permit also authorizes the referenced "Refrigeration Unit," or determines that the "Refrigeration Unit" is permitted by the LDO or a previously issued land use permit is much less clear from the decision itself. From the project description quoted above, it appears that the 200 amp panel will be located in the "warehouse/manufacturing building" rather than the slaughterhouse. We cannot tell whether the referenced refrigeration unit already exists in the warehouse/manufacturing building or is to be added after the electrical panel is installed. Apparently, the warehouse/manufacturing building was authorized by the decision that is referred to as "1991-1023-B2." Record 1, 3, 4, 5. That decision is not included in the record and no party has provided us with a copy of that decision. Therefore we do not know whether that decision authorized a refrigeration unit.

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

D. The County's Argument

The county argues that it did not issue the electrical permit as a Type I land use decision in this matter. The county argues the electrical permit decision is not a decision that was issued under the LDO at all. As the county correctly notes, the challenged electrical permit expressly states that it neither authorizes any violation of county law nor authorizes any particular use of the subject property.[5] At oral argument the county took the position that the electrical permit simply has no bearing on whether intervenors have land use approval for a refrigeration unit or any use that may be made of that refrigeration unit. Intervenors either have such land use approval or they do not. If intervenors do not have land use approval for a refrigeration unit, petitioner is free to ask the county to initiate an enforcement action under LDO 1.8.1 and 1.8.2, as he apparently has in the past.[6] The county

---

[5] The following language appears at the bottom of the electrical permit:

> "Issuance of this permit does not authorize violations of any of the provisions of the codes, ordinances, or laws of Jackson County or the State of Oregon, *nor does the issuance of this permit authorize the existing land use on this property*." Record 1 (emphasis added).

[6] LDO 1.8.1 provides that it is a violation of county law to use property in a manner that is "not in accordance with" the LDO or a permit issued under the LDO. LDO 1.8.2 provides:

> **General Enforcement Provisions and Penalties**
>
> "A) When a violation of this Ordinance is documented to exist on a property, the County will deny any and all development permits, unless such application addresses the remedy for the violation, or the violation has otherwise been corrected.
>
> "B) The County will not approve any application for a land use permit when a local, state, or federal land use enforcement action has been initiated on property, or other reliable evidence of such pending action exists. Such violations must be corrected prior to application for a land use or development permit on that property, unless the violation can be remedied as part of the development action.
>
> "C) A violation of any provision of this Ordinance will be deemed a nuisance. Nothing in this ordinance shall affect the ability of the County to pursue any action, suit, and/or remedy as otherwise provided under Oregon and County law, including but not limited to injunction, mandamus, abatement, fines, damages, or other appropriate proceedings to prevent, temporarily or permanently enjoin, abate, or remove unlawful location of development, construction, maintenance, repair, alteration, use, or land division.

also notes that ORS 215.185(1) gives affected property owners the right to file an action to "enjoin, abate, or remove" any unlawful use of property.[7] According to the county, the disputed electrical permit simply authorizes an electrical panel, not the use or project that the electrical panel may enable.

The county appears to be correct that the challenged electrical permit simply recognizes that the electrical panel that the disputed electrical permit authorizes will be used to supply power to a refrigeration unit, but the challenged electrical permit does not authorize the anticipated refrigeration unit or take any position concerning the permissibility of a refrigeration unit use on the property. If the county's description of what the electrical permit does is accurate, and we conclude that it is, petitioner has not established that the electrical permit applied or should have applied LDO Chapter 11. Petitioner has not established that the disputed electrical permit concerns the application of the LDO or any other land use standard that would cause the electrical permit to qualify as a "land use decision," as ORS 197.015(10)(a) defines that term.

The county goes on to point out that ORS 479.550(1) provides that "no person shall work on any new electrical installation for which a permit has not been issued." Under the Codified Ordinances of Jackson County § 1420.01, the county has adopted the state building code. The State Buildings Codes Division's administrative rules are codified at OAR Chapter 918.

> "D) Justice court, circuit court and the County Code Enforcement Hearings Officer have concurrent jurisdiction over prosecutions."

[7] ORS 215.185(1) provides:

> "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. * * *"

Under ORS 197.180(1) state agencies are required to ensure that their "programs affecting land use" are carried out in a manner that is "compatible with" local government comprehensive plans and land use regulations. OAR 918-001-0045 sets out how the State Building Codes Division goes about verifying that the project for which an electrical permits is requested is compatible with local government land use regulations. Although petitioner does not cite or rely on OAR 918-001-0045 in arguing that the challenged electrical permit is a land use decision, we note that under OAR 918-001-0045 it appears that in certain circumstances an electrical permit could be a land use decision. Specifically, if an electrical permit is "for construction involving a new building, an addition or change in the use of a building," then verification may be required to establish that the "project" is permitted under the local government's land use regulations without "specific land use approval" or that "the project has final land use approval." OAR 918-001-0045(5).[8] If any such verifications were

[8] OAR 918-001-0045(5) provides:

> "Electrical Permits: When an electrical permit, including a temporary electrical permit is used for construction involving a *new building, an addition or change in the use of a building is involved*:
>
> "(a) The applicant for a permit may provide the type of land use verification required in section (3) of this rule at the time the permit is obtained; or
>
> "(b) Verification must be provided to the electrical inspector prior to or not later than ten calendar days after the first inspection. The inspector will require the contractor, owner of the project or primary user of the project to provide verification, with either:
>
> "(A) A related structural, park construction or manufactured dwelling permit issued involving the same project;
>
> "(B) A written acknowledgment by the city or county planning agency that the project has final land use approval;
>
> "(C) A copy of the local land use permit or a letter from the local planning agency that the project has land use approval or is otherwise permitted under the jurisdiction's comprehensive plan and does not require specific land use approval; or

actually included as part of an electrical permit decision itself, that might well be sufficient to make the electrical permit a land use decision, as ORS 197.015(10)(a) defines that term. But if such verifications were contained in separately issued letters or other writings, those letters or writings might well be land use decisions while an electrical permit that merely relies on those letters or writings likely would not be a land use decision.

The county argues that the challenged electrical permit does not concern "construction involving a new building, an addition or change in the use of a building" and that OAR 918-001-0045(5) is therefore not implicated. We understand the county to contend that unless OAR 918-001-0045(5) applies, an electrical permit may be issued without any need to determine whether the project that the electrical permit is sought in conjunction with has any required permits or is allowed under the applicable comprehensive plan or land use regulations. As we earlier noted, petitioner neither cites nor relies on OAR 918-001-0045 in arguing that LUBA has jurisdiction to review the disputed electrical permit. As we also noted earlier, it is petitioner's burden to establish that we have jurisdiction to review the challenged electrical permit. Without some assistance from petitioner, we will not consider whether OAR 918-001-0045(5) applies here and we also do not consider what the jurisdictional consequences might be if OAR 918-001-0045(5) does apply.

Finally, at oral argument, we understood petitioner to argue for the first time that intervenors' use of the subject property is currently in violation of the LDO and the county was therefore required to apply the LDO to determine whether the proposal corrects those violations. *See* n 6 (LDO 1.8.2(A)). There is no support for petitioner's suggestion that intervenors' current use of their property is in violation of the LDO, and we do not consider

---

> "(D) Verification of approval may be communicated from the local planning agency to the inspector by telephone or facsimile so long as a letter or other written verification as required above is received by the inspector within ten calendar days of the first inspection." (Emphasis added.)

arguments that are presented for the first time at oral argument. OAR 661-010-0040(1); *DLCD v. Douglas County*, 28 Or LUBA 242, 252 (1994)

This appeal is dismissed.[9]

[9] Petitioner did not file a motion under OAR 661-010-0075(11) to request that LUBA transfer this matter to circuit court in the event LUBA determined that it does not have jurisdiction.