BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WILLIAM KUHN and MARTHA LEIGH KUHN,
Petitioners,

vs.

DESCHUTES COUNTY,
Respondent,

and

JEFF DOWELL and PAT DOWELL,
Intervenors-Respondents.

LUBA No. 2008-080

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Pamela Hardy, Bend, filed the petition for review and argued on behalf of petitioners.

Laurie E. Craghead, County Legal Counsel, Bend, filed a joint response brief and argued on behalf of respondent. With her on the brief were Robert S. Lovlien, Helen L. Eastwood and Bryant, Lovlien & Jarvis, P.C.

Robert S. Lovlien and Helen L. Eastwood, Bend, filed a joint response brief and Helen L. Eastwood argued on behalf of intervenors-respondents. With them on the brief were Bryant, Lovlien & Jarvis, P.C. and Laurie E. Craghead.

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

REMANDED 03/11/2009

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

Petitioners appeal a county land use hearings officer decision that dismisses their local appeal of a land use compatibility statement and a building permit that authorizes intervenors to remodel the interior of their dwelling.

FACTS

Petitioners and intervenors live in houses on adjoining 4.3-acre parcels bordering Sisemore Road. They have had a number of disputes over the years. One of those disputes concerns the location of intervenors' house on their parcel. A complete recitation of the facts in this case, and the parties' different views regarding those facts, is unnecessary. We include an abbreviated discussion of the facts below that is necessary to understand our resolution of intervenors' jurisdictional challenge and our resolution of petitioners' third assignment of error.

A. 1980 Conditional Use Approval

The subject property is zoned F-2 (Forest Use Zone) and is subject to two combining or overlay zones, the WA (Wildlife Area Combining Zone) and the LM (Landscape Management Combining Zone). Petitioners' and intervenors' predecessor-in-interest John Barton (Barton) requested conditional use approval for a cluster development. In a February 18, 1980 letter to the county, Barton explained:

> "* * * The two home sites on the 4.3 acre parcels must be kept within 400 ft. of Sisemore Road. This restriction assures the plot plan will be effective in maintaining the desired cluster effect. * * *" Record 582.

Barton was granted conditional use approval for the cluster development on April 3, 1980. That conditional use approval did not mention a 400-foot setback,[1] but it did include the following conditions of approval:

> "1. The applicant shall receive an approved partition for two residential lots, with the remaining lot to be held in joint ownership prior to the sale of any lots.
>
> "2. Prior to the sale of any lot a written agreement shall be recorded which establishes an acceptable homeowners association or agreement assuring the maintenance of common property in the partition.
>
> "* * * * *
>
> "4. Any buildings shall conform to section 4.180 concerning the Landscape Management Combining Zone of PL-15
>
> "* * * * *.
>
> "5. All necessary permits shall be received prior to the construction of any buildings.
>
> "* * * * *." Record 113.

Condition number 2 above requires establishment of a "homeowners association or agreement" before any lots are sold. Petitioners contend there is no such homeowners association or agreement. Intervenors contend that condition number 2 has been satisfied.[2]

B. 1980 Partition Approval

In 1980 Barton requested county approval to partition the 43-acre subject property into two 4.3-acre parcels and an undevelopable remainder parcel that was to be jointly owned by the owners of the two 4.3-acre parcels. Barton was granted tentative partition plat

[1] To be clear, as we explain later in this opinion, the 400 foot maximum setback reflected on the partition plat that created intervenors' parcel is a requirement that buildings be set back *no more than 400 feet* from Sisemore Road.

[2] Intervenors take the position that a January 29, 1997 letter from petitioners to the county demonstrates that petitioners are aware that the county had by that time determined that previously recorded deed restrictions satisfied condition number 2. Supplemental Record 756.

approval on May 13, 1980 and final plat approval on November 12, 1980. The approved final plat includes the following notation:

"MAX. BLDG. SETBACK 400' FROM SISEMORE RD." Record 591.

Although the final plat was approved on November 12, 1980 it was not recorded at that time. The final plat was not recorded until October 5, 2004, almost 24 years later.

C. 1987 Development of Petitioners' Parcel

Petitioners acquired their parcel in 1987, secured approval of a property line adjustment and built a house on their parcel. According to the hearings officer's decision, the property line adjustment decision included a condition that required that "deed restrictions required by the 1980 cluster development conditional use approval be recorded with the Deschutes County Clerk" before a building permit could be issued for petitioners' property. Record 64.[3] The development of the house on petitioners' property is not at issue in this appeal.

D. 1989-1997 Acquisition and Development of Intervenors' Parcel

Intervenors acquired their parcel in 1989. In 1992, intervenors filed an application for approval of a landscape management site plan, which was necessary to construct a house on their parcel. A note on the site plan states that "[t]he house site will <u>not</u> be more than <u>400 ft</u>. from Sisemore Road." Record 533 (underlining in original). In a February 10, 1992 letter from the Community Development Department to intervenor Jeff Dowell, the county takes the position that the conditional use and partition approvals "establish a maximum setback from Sisemore Road of 400 feet." Record 565. The findings supporting the county's approval of the site plan include the following discussion under a "SITE DESCRIPTION" heading:

[3] Although we cannot be sure, we suspect the referenced "deed restrictions" are what intervenors believe had the effect of satisfying condition number 2 of the 1980 conditional use approval. *See* n 2.

> "The subject parcel was created by a Conditional Use Permit * * * and Minor Partition * * * for two nonforest dwelling sites on the 43.1 acre total parcel. These approvals established the two parcels for building sites which required a maximum 400' setback from Sisemore Road retaining approximately 33 acres for the protection and preservation of wildlife in the area." Record 174.

Although the county and intervenors appear to have had a shared understanding that intervenors' proposed dwelling was to be sited no further than 400 feet from Sisemore Road, the county's March 10, 1992 decision granting approval of the landscape management site plan does not include a condition of approval to that effect. Record 176.

The building permit that authorized construction of intervenors' house was issued on July 22, 1994. According to the hearings officer's decision, intervenors' "dwelling received final inspection and approval from the Building Division on February 11, 1997 [and the] record indicates the dwelling was constructed more than 400 feet from Sisemore Road." Record 65 (footnote omitted).

E. Petitioners' 2002 Civil Action Against Intervenors

In 2001 petitioners filed a civil action against intervenors. Among other things, petitioners sought a declaratory ruling that intervenors' "dwelling on the subject property was unlawful because it was built more than 400 feet from Sisemore Road." Record 65. Petitioners also sought an injunction requiring that defendants enter into the homeowners association or agreement mentioned in the 1980 conditional use approval. In its 2002 decision, the circuit court ruled in part:

> "Plaintiffs have not established that the Defendants' property is in violation of the Deschutes County Code as alleged.
>
> "Plaintiffs have not established that the location of the existing building on Defendants' property is in violation of a requirement that the building be entirely within 400 feet of Sisemore Road measured perpendicularly from the front (east end) property line.
>
> "* * * * *
>
> "Defendants are ordered to enter into the required 'homeowners association or agreement assuring the maintenance of common property' as set forth in the

> conditions required with respect to the conditional use permit. At a minimum, this agreement shall provide that any property taxes and any maintenance costs with regard to the common property be shared equally." Record 116-18.

On appeal, the circuit court's decision was affirmed without opinion. *Kuhn v. Dowell*, 196 Or App 787, 106 P3d 699 (2004).

F. Intervenors' 2007 Building Permit Application

On July 23, 2007, intervenors sought county approval of a building permit to allow them to remodel the existing dwelling on their property. The county approved the building permit on July 24, 2007. According to the hearings officer, on August 8, 2007, petitioners filed an appeal with the county "Planning Division" challenging the July 24, 2007 building permit and a land use compatibility statement (LUCS) that was issued in conjunction with that building permit. Record 67. It is that appeal that led to the hearings officer decision that is before LUBA in the current appeal.

One day later, on August 9, 2007, petitioners filed a separate appeal with the "Building Division." *Id*. The hearings officer explains in her decision that petitioners will be allowed to advance any arguments they have regarding alleged violations of the building codes in the county appeal that was filed with the Building Division. Record 69. The hearings officer found that the only potentially cognizable issues in the appeal that was filed with the Planning Division concern county land use regulations. *Id*.

G. The Hearings Officer's Decision

As potentially relevant in this appeal, the hearings officer first found that the 2002 circuit court decision described above bars petitioners "from relitigating the issue of the lawfulness of the [intervenors'] dwelling location[.]" Record 72. The hearings officer then concluded that the building permit and LUCS do not qualify as a "land use decision," as that term is defined by ORS 197.015(10). Finally, the hearings officer determined that the July 24, 2008 building permit and LUCS constituted a "development action," rather than a "land

use action," as the Deschutes County Code defines those terms. The hearings officer ultimately concluded that because the July 24, 2007 building permit and LUCS constitute a development action and because under the Deschutes County Code only applicants have standing to appeal such development actions, petitioners' August 8, 2007 appeal to the Planning Division must be dismissed. The hearings officer dismissed the appeal on March 26, 2008, and this appeal followed.

JURISDICTION

As relevant here, LUBA's jurisdiction is limited to land use decisions. ORS 197.825(1).[4] Petitioners argue that the disputed building permit and LUCS fall within the ORS 197.015(10)(a) definition of "land use decision," because the county was required to apply its land use regulations in approving the building permit and LUCS. Petitioners contend the exceptions to the statutory definition of land use decision set out in ORS 197.015(10)(b) do not apply to the disputed building permit and LUCS.[5] Intervenors

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[4] ORS 197.825(1) provides:

> "Except as provided in ORS 197.320 and subsections (2) and (3) of this section, 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."

[5] As potentially relevant here, the statutory definition of the term "land use decision" at ORS 197.015(10) provides:

> "'Land use decision':
>
> "(a) Includes:
>
> "(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;

contend that in approving the disputed building permit and LUCS the county was only required to apply "land use standards that do not require interpretation or the exercise of policy or legal judgment" or "clear and objective land use standards," so that the building permit and LUCS fall within the exceptions set out at ORS 197.015(10)(b)(A) and (B) and therefore do not qualify as a land use decision reviewable by LUBA.

Petitioners and intervenors both fail to recognize that the decision that is before LUBA in this appeal is the hearings officer's decision to dismiss petitioners' local appeal, not the July 24, 2007 building permit and LUCS that petitioners sought to appeal to the hearings officer. In dismissing petitioners' local appeal of the July 24, 2007 building permit and LUCS, the hearings officer applied Titles 18 and 22 of the Deschutes County Code. Record 74-77. Title 18 is the county's zoning code. Title 22 sets out the county's development procedures. If the hearings officer had resolved petitioners' appeal on the merits, she almost certainly would have had to apply Deschutes County Code Title 17, which is the county's subdivision and partition ordinance. Titles 17, 18 and 22 are clearly "land use regulations," as ORS 197.015(11) defines that term, and we do not understand any party to argue otherwise.[6] We also do not understand any party to argue that the provisions of Titles 17, 18 and 22 that the hearings officer applied or should have applied are "land use standards

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> "* * * * *
>
> "(b) 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[.]"

[6] ORS 197.015(11) provides:

> "'Land use regulation' means any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan."

that do not require interpretation or the exercise of policy or legal judgment" or are "clear and objective land use standards," within the meaning of ORS 197.015(10)(b)(A) and (B). To the extent intervenors take that position, we reject it.

The hearings officer's decision in this matter is a land use decision, and LUBA has jurisdiction to review that decision.

THIRD ASSIGNMENT OF ERROR

In one of their subassignments of error under the third assignment of error, petitioners argue the hearings officer erred by dismissing their local appeal. If we sustain that subassignment of error, the hearings officer's decision will have to be remanded so that the hearings officer can issue a decision on the merits of that local appeal. We therefore turn to that subassignment of error first.

Deschutes County Code (DCC) 22.04.020 distinguishes between "land use actions" and "development actions." We briefly discuss each of those concepts below before turning to the hearings officer's decision in this matter.

A. Land Use Actions

The DCC 22.04.020 definition of "land use action" is set out below:

> "'Land use action' includes any consideration for approval of a quasi-judicial plan amendment or zone change, any consideration for approval of a land use permit, and any consideration of a request for a declaratory ruling (including resolution of any procedural questions raised in any of these actions)."

Under the above definition, a decision on a "land use permit" is a "land use action." DCC 22.04.020 provides the following definition of "land use permit:"

> "'Land use permit' includes any approval of a proposed development of land under the standards in the County zoning ordinances or subdivision or partition ordinances involving the exercise of significant discretion in applying those standards.
>
> "By way of illustration, 'land use permit' includes review of conditional use permits, landscape management plans, farm or nonfarm dwellings, forest management plans, partition, master plan, river setback exception, riverfront design review, site plan, site plan change of use, modification of approval,

solar access, solar shade exception, subdivision, and subdivision variance and variance."

DCC Chapter 22.32 sets out rights of local appeal. As potentially relevant in this appeal, DCC 22.32.010(A)(2) provides the following persons a right to appeal land use actions:

> "In the case of an appeal of an administrative decision without prior notice, a person entitled to notice, a person adversely affected or aggrieved by the administrative decision, or any other person who has filed comments on the application with the Planning Division[.]"

B. Development Actions

DCC 22.04.020 provides the following definition of "development action:"

> "'Development action' means the review of any permit, authorization or determination that the Deschutes County Community Development Department is requested to issue, give or make that either:
>
> "A. Involves the application of a County zoning ordinance or the County subdivision and partition ordinance and is not a land use action as defined [in DCC 22.04.020]; or
>
> "B. Involves the application of standards other than those referred to in [paragraph A], such as the sign ordinance.
>
> "For illustrative purposes, the term 'development action' includes review of any condominium plat, permit extension, road name change, sidewalk permit, sign permit, setback determination, and lot coverage determination."

For development actions, the right of local appeal is much more limited. DCC 22.32.050 provides:

> "Notice of the hearing date set for appeal shall be sent *only to the applicant*. *Only the applicant, his or her representatives, and his or her witnesses shall be entitled to participate*. Continuances shall be at the discretion of the Hearings Body, and the record shall close at the end of the hearing." (Emphasis added.)

C. Petitioners' Argument

Since both a "land use action" and a "development action" can require the county to apply its land use regulations, the primary difference between the two kinds of actions

appears to be that a land use action requires the "exercise of significant discretion in applying those [land use regulation] standards" and a development action does not require the "exercise of significant discretion." One significant consequence of that classification is that persons who are "adversely affected or aggrieved" by land use actions can appeal under DCC 22.32.010(A)(2), whereas under DCC 22.32.050 only the applicant is "entitled to participate" in an appeal of a development action.

According to petitioners, intervenors sought the disputed building permit under DCC 18.40.020, which allows alterations of lawfully established dwellings if certain criteria are met.[7] Petitioners concede that applying the five criteria set out in DCC 18.40.020(M)(1) through (5) in this case does not require the exercise of significant discretion. But petitioners contend the county was required to exercise significant discretion to determine, as it presumably did, that the existing dwelling qualifies as a "lawfully established" dwelling. Petitioners contend that because intervenors' dwelling is located more than 400 feet from Sisemore Road and because intervenors' parcel was sold and the dwelling was built before the homeowners association or agreement required by condition number 2 in the 1980

[7] DCC 18.40.020 lists a number of uses that are permitted outright in the F-2 zone, including the following:

"M. Alteration, restoration or replacement of a *lawfully established* dwelling that:

"1. Has intact exterior walls and roof structure;

"2. Has indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system;

"3. Has interior wiring for interior lights;

"4. Has a heating system; and

"5. In the case of replacement, is removed, demolished or converted to an allowable use within three months of completion of the replacement dwelling." (Emphasis added.)

conditional use approval was recorded, the existing dwelling was not "lawfully established, within the meaning of DCC 18.40.020(M)."[8]

D. The Hearings Officer's Decision

As relevant here, the hearings officer provided the following explanation for her decision that the challenged building permit and LUCS do not constitute a land use action:

> "The staff report argues, and the Hearings Officer concurs, that the county's 2007 issuance of the LUCS and building permit for an interior remodel of the Dowells' existing dwelling was not a 'land use action.' For the reasons discussed [earlier, the LUCS and building permit] did not involve a quasi-judicial plan amendment, zone change or declaratory ruling. And it did not involve a 'land use permit' because it did not require the exercise of significant discretion in applying standards. Alterations to existing dwellings are permitted outright in the F-2 Zone under Section 18.40.020(M) based on *clear and objective standards* (i.e., the presence of intact exterior walls and roof structure, and certain indoor plumbing, wiring and heating systems), and are permitted outright in the LM Zone under Section 18.84.030 and in the WA Zone under Section 18.88.030 if permitted outright in the underlying (F-2) Zone. The conditional use and LM site plan approval decisions did not include any conditions of approval establishing a maximum dwelling setback from Sisemore Road. And the partition plat included a building line 400 feet from Sisemore Road, so review under that partition also was under clear and objective standards." Record 75 (emphasis in original, footnote omitted).

Based on her conclusion that the building permit and LUCS are not a land use action and her conclusion that petitioners therefore were not entitled to appeal the building permit and LUCS under DCC 22.32.010(A)(2), the hearings officer dismissed petitioners' appeal.

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[8] Petitioners also contend that similar determinations are required by DCC 15.04.150 and DCC 18.128.420. DCC 15.04.150 provides as follows:

> "No building permit or mobile home placement permit shall be issued if the parcel of land upon which the building or mobile home is to be erected or located on, or is located on, would be in violation of DCC Title 17, the subdivision title or DCC Title 18, the zoning title. * * *"

DCC 18.128.420 provides as follows:

> "Building permits for all or any portion of a conditional use shall be issued only on the basis of the plan as approved by the Planning Director or Hearings Body. Any substantial change in the approved plan shall be submitted to the Planning Director or the Hearings Officer as a new application for a conditional use."

E. Conclusion

We conclude that the hearings officer erred by dismissing petitioners' appeal, for two reasons.

1. The Building Permit and LUCS are a Land Use Action

First, while we recognize that the parties and the county have very different views regarding whether the existing dwelling was "lawfully established," there can simply be no doubt that the exercise of significant discretion was required to determine that the existing dwelling was lawfully established. There are no findings supporting the building permit and LUCS—at least no party has pointed them out to us.[9] So we do not know why the Building and Planning Divisions determined that the existing dwelling was lawfully established.

There does not appear to be any dispute that the dwelling on intervenors' property is more than 400 feet from Sisemore Road, notwithstanding the note on the 1980 final plat and the language in the 1992 site plan application and approval. The dispute appears to be whether siting the house more than 400 feet from Sisemore Road when it was constructed between 1994 and 1997 results in a dwelling that was not "lawfully established," within the meaning of DCC 18.40.020(M). The county and perhaps the circuit court appear to rely heavily on the undisputed fact that when the dwelling was approved and built between 1994 and 1997 the final plat had not been recorded. Intervenors also appear to rely in part on an unappealed 1997 final approval of the building permit for the dwelling that expressly recognized that the dwelling was more than 400 feet from Sisemore Road and nevertheless granted final approval. Petitioners appear to rely heavily on the fact that the final partition plat was recorded in 2004, after the circuit court rendered its decision in 2002, and that the county's and circuit court's apparent reasoning that the 400-foot maximum setback was not

[9] In fact, as far as we can tell, neither the building permit nor the LUCS are included in the record that the county transmitted to LUBA in this appeal.

enforceable at the time the dwelling was approved may no longer be a sufficient basis for concluding that the dwelling was lawfully established.

We agree with the hearings officer that a decision about whether the dwelling is set back more than 400 feet from Sisemore Road probably does not call for the exercise of much judgment. But as our attempt to understand and characterize some of the parties' arguments above shows, determining whether the construction of intervenors' dwelling more than 400 feet from Sisemore Road means that dwelling was not lawfully established requires the exercise of considerable legal and factual analysis and judgment.

Finally, as petitioners correctly point out, the hearings officer's decision does not expressly address the possible significance of condition of approval 2 in the 1980 conditional use approval. While the county may consider that condition to have been satisfied by deed restrictions that apparently were recorded before 1997, the building permit decision does not address that question or the potential significance of the circuit court's 2002 decision that orders intervenors to enter into the homeowners association or agreement that was required by that condition of approval. Even if condition of approval number two has never been satisfied, that may simply mean *sale of the parcels* to petitioners and intervenors was inconsistent with that condition. Condition number 2 may have no bearing on the legality of the dwellings that have been constructed on those parcels. Regardless of the county's ultimate conclusion about the legal import of condition of approval 2, we agree with petitioners that significant discretion will be required to determine the existing dwelling was "lawfully established," within the meaning of DCC 18.40.020(M), notwithstanding petitioners' contention that the homeowners association or agreement required by condition number 2 of the 1980 conditional use approval has never been recorded.

Because we conclude that the July 24, 2007 building permit and LUCS were land use actions, petitioners had a right to seek an appeal of those decisions under DCC 22.32.010(A)(2). Although we do not decide the question here, petitioners appear to have

standing to appeal under DCC 22.32.010(A)(2) as "adversely affected or aggrieved" persons. It follows that the county's decision must be remanded so that the hearings officer can issue a decision on the merits if she concludes that petitioners have standing to pursue the appeal under DCC 22.32.010(A)(2) as adversely affected or aggrieved persons.

2. DCC 22.16.010.

The second reason why we believe the hearings officer erred in dismissing petitioners' local appeal is based on DCC Chapter 22.16, which sets out procedures for development actions. DCC 22.16.010 authorizes the planning director to decide that an application for a development action will be treated as a land use action.[10] On August 8, 2007 the planning department sent petitioners the following e-mail message:

> "[T]he issuance of this permit required land use sign off. You can appeal that sign-off (which is a land use decision), under an administrative appeal. That will bring the matter before the Hearings Officer and you will have your opportunity to present your perspective on the greater land use issues. My understanding is that really is where your concern lies. There is a $250 fee to bring this appeal, which you can apply for in our Bend Office. I believe your e-mail below will satisfy any time limit on bringing the appeal that may exist." Record 649.

The county counsel's office also sent an e-mail message on August 8, 2007, taking the position that, contrary to the planning department's e-mail message, petitioners' earlier e-mail message was not sufficient to "preserve any appeal rights." Record 648. The county counsel's office took no position regarding whether the building permit constituted a land use action and advised petitioners to "seek * * * legal counsel for the appropriate appeal process." *Id*.

After petitioners appeal was filed on August 8, 2007, the county scheduled a hearing on the appeal for September 24, 2007. That public hearing was continued to November 14,

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[10] DCC 22.16.010(B) provides:

> "The Planning Director has the discretion to determine that for the purposes of DCC Title 22 a development action application should be treated as if it were a land use action application."

2007. The record closed, subsequently was reopened by the hearings officer, and then closed a second time on January 2, 2008. The hearings officer issued her decision dismissing petitioners' appeal on March 26, 2008, concluding the challenged decision is a development action that petitioners have no right to appeal. The hearings officer specifically noted in her decision that she was not bound by the planning department's "interpretation or opinion of the nature of the county's LUCS and building permit issuance." Record 75 n 6.

We agree with the hearings officer that she is not bound by the planning department's view about whether the July 24, 2007 building permit and LUCS qualify as a land use action rather than a development action. However, under DCC 22.16.010(B) the planning department is authorized to treat development actions as land use actions. We conclude that the planning department's August 8, 2007 e-mail message to petitioners was effective to constitute a *de facto* exercise of the authority granted by DCC 22.16.010(B). Petitioners simply took advantage of the appeal that the planning division told them was available. Therefore, even if the July 24, 2007 building permit and LUCS are correctly characterized as a development action, the planning department's August 8, 2007 e-mail message constituted a decision on behalf of the planning director to treat the building permit and LUCS as a land use action for purposes of appeal. Because the planning director is authorized to treat development actions as land use actions, petitioners did not err by exhausting the appeal that the county made available to petitioners, rather than attempting to appeal the July 24, 2007 building permit and LUCS directly to LUBA or to circuit court. *See Tarjoto v. Lane County*, 137 Or App 305, 904 P2d 641 (1995) (where county voluntarily provides a local appeal in circumstances where there might not have been a right to a local appeal, that local appeal must be exhausted before appealing to LUBA).

Petitioners' third assignment of error is sustained in part.[11]

The county's decision is remanded.

[11] Because we sustain petitioners' subassignment of error challenging the hearings officer's decision that petitioners had no right of local appeal, we need not and do not consider petitioners' remaining arguments under the third assignment of error or petitioners' other assignments of error.