BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JEANNE BIGGERSTAFF and CARR BIGGERSTAFF,
Petitioners,

vs.

YAMHILL COUNTY,
Respondent,

and

RANDY HOPP,
Intervenor-Respondent.

LUBA Nos. 2008-109, 2008-110, 2008-111 and 2008-112

FINAL OPINION
AND ORDER

Appeal from Yamhill County.

Charles Swindells, Portland, filed the petition for review and argued on behalf of petitioners.

Fredric Sanai, McMinnville, filed a response brief and argued on behalf of respondent.

Samuel R. Justice, McMinnville, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Haugeberg, Rueter, Gowell, Fredricks, Higgins & McKeegan, P.C.

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

DISMISSED 03/10/2009

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 decisions by the county approving four replacement dwellings on land zoned Exclusive Farm Use.

BACKGROUND

A brief chronology of the events leading to the challenged decisions is necessary in order to frame the issues that must be decided in this appeal. In 2005, intervenor's predecessor in interest, Johnson, received an order from the county under ORS 197.352 (2005) (Measure 37), waiving the application of county land use regulations that affected his right to develop his Exclusive Farm Use (EF-20) zoned property with residences. In September, 2007, the county issued Land Use Compatibility Statements that determined that the proposed construction of dwellings on the property was compatible with the county's Measure 37 waiver. Record 13, 30, 46, 64. On October 4, 2007, the county issued Johnson building permits to build dwellings on the property. The county issued a final inspection and approval of the dwellings between November 17 and November 19, 2007. Record 2, 20, 38, 54. On November 21, 2007, the county issued the challenged decisions allowing replacement dwellings on the subject property. Nearly eight months later, on July 8, 2008, petitioners appealed the challenged decisions to LUBA.

Shortly after the county approved the disputed replacement dwellings, on December 6, 2007, Ballot Measure 49, now codified at ORS 195.300 *et seq*, took effect. Sometime after the effective date of Measure 49, Johnson applied to the county for a determination as to whether he had a vested right under Oregon Laws 2007, Chapter 424, Section 5(3) to develop his property with dwellings. On November 20, 2008, Yamhill County Circuit Judge Collins issued a decision upholding the county's vested rights hearings officer's decision that Johnson had a common law vested right to complete the use described in Johnson's Measure

37 waiver. Record 86-87. That decision was appealed to the Court of Appeals, and review is pending.

JURISDICTION

A. Introduction

LUBA has exclusive jurisdiction to review land use decisions. ORS 197.825(1).[1] As defined by ORS 197.015(10), a land use decision must be a "final" decision that "concerns the adoption, amendment or application of" one or more of the land use planning standards identified at ORS 197.015(10)(a)(A).[2] The county previously moved to dismiss these appeals. The county asserted two legal theories in its motion to dismiss. First, the county argued, the appeals were not timely filed under ORS 197.830(3)(b).[3] Second, the county

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[1] ORS 197.825(1) provides in part:

> "[T]he 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."

[2] As relevant, 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 [statewide planning] goals;
>
> "(ii) A comprehensive plan provision;
>
> "(iii A land use regulation; or
>
> "(iv) A new land use regulation[.]"

[3] ORS 197.830(3) provides:

> "If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416 (11) or 227.175 (10), or the local government makes a land use decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:

argued, even if the appeals were timely filed, the challenged decisions are not "land use decisions" subject to LUBA's jurisdiction because the challenged decisions fall within the exception for building permits found at ORS 197.015(10)(b)(B).[4]

In responding to the county's motion to dismiss, petitioners pointed to Yamhill County Zoning Ordinance (YCZO) 402.02(M), which authorizes replacement dwellings on EFU-zoned land if the criteria set forth in the ordinance are met.[5] Petitioners argued that the challenged decisions approving the replacement dwellings are land use decisions because

> "[t]he replacement approvals challenged in these appeals either implicitly determined or should have explicitly determined that the requirement of lawful establishment was met. This required determination that the dwellings to be replaced were lawfully established concerns the application of a land use regulation and the exercise of legal and factual judgment, and is therefore a

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> "(a) Within 21 days of actual notice where notice is required; or
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> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

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

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

[5] YCZO 402.02(M) mirrors the language of ORS 215.283(1)(s) and provides in relevant part:

> "In the Exclusive Farm Use District, the following uses shall be permitted subject to the standards and limitations set forth in subsection 402.09 and any other applicable provisions of this ordinance:
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> " * * * * *
>
> "(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; * * *."

land use decision over which LUBA has exclusive review jurisdiction." Petitioners' Response to Motion to Dismiss 2.

In a December 2, 2008, order, we denied the county's motion to dismiss. *Biggerstaff v. Yamhill County*, __ Or LUBA __ (LUBA Nos. 2008-109, 110, 111 and 112, December 2, 2008). First, we concluded that based on the facts presented in petitioner Carr Biggerstaff's uncontested affidavit, the appeal was timely filed. Second, we rejected the county's contention that the challenged decisions fell within the exception for building permits issued under clear and objective standards found at ORS 197.015(10)(b)(B)[6] We did not address in our order, however, whether the challenged decisions fell within the exception to our jurisdiction for decisions made under land use standards that do not require interpretation or the exercise of policy or legal judgment.[7] ORS 197.015(10)(b)(A). For the reasons explained below, we now conclude that the challenged decisions fall within that exception to our jurisdiction.

B. ORS 197.015(10)(b)(A)

As the party seeking review by LUBA, petitioner has the burden of establishing that LUBA has jurisdiction. *Billington v. Polk County*, 299 Or 471, 475, 703 P2d 232 (1985). As explained above, in their earlier response to the county's motion to dismiss, and in their single assignment of error in the petition for review, petitioners maintain that the challenged decisions are land use decisions because the determination of whether the dwellings to be replaced were "lawfully established" under YCZO 402.02 requires the exercise of policy or

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[6] We also rejected the county's related argument that the challenged decisions are not land use decisions because the building inspector who issued them does not have authority to issue land use decisions. *Biggerstaff v. Yamhill County*, __ Or LUBA __ (LUBA Nos. 2008-109, 110, 111 and 112, December 2, 2008, Order at 5).

[7] ORS 197.015(10)(b)(A) provides that a "land use decision" does not include a decision by a local government:

> "That is made under land use standards that do not require interpretation or the exercise of policy or legal judgment[.]"

legal judgment. In support of their contention that the challenged decisions are land use decisions, petitioners argue:

> "The lawful status of the structures to be replaced is unclear because the Measure 37 waivers under which the structures were erected became invalid upon passage of Ballot Measure 49 (2007). *Corey v. DLCD*, 344 Or 457, 184 P3d 1109 (2008). * * * Development undertaken pursuant to Measure 37 is only lawful in the wake of Measure 49 if the holder of the Measure 37 waiver has a common law vested right to complete and continue the use described in the waiver. ORS 195.305. * * *" Petitioners' Response to Motion to Dismiss 3.

The problem with petitioners' argument is that they view the county's decisions that were made prior to the effective date of Measure 49 through post-Measure 49 glasses. But the relevant question to be answered in the present appeal is whether *on November 21, 2007*, the date the decisions were made, the person or body making the determination was required to exercise policy or legal judgment in determining whether the dwellings to be replaced were lawfully established. On the date the decisions were made, Measure 49 had not taken effect. The fact that Measure 49 has now taken effect does not mean that on November 21, 2007, the county was required to exercise policy or legal judgment in determining whether the dwellings were lawfully established. Moreover, even if Measure 49 had the effect of invalidating Johnson's Measure 37 waivers that allowed the original dwellings to be constructed, *see Corey v. DLCD*, 344 Or 457, 184 P3d 1109 (2008) (Measure 49 deprived Measure 37 waivers of any continuing validity), the fact remains that prior to the effective date of Measure 49, building permits were issued for the original dwellings and pursuant to those building permits the original dwellings had been placed on the property.

Petitioners do not explain why the county employee that approved the replacement dwellings had to exercise policy or legal judgment in determining whether the dwellings that were to be replaced were lawfully established. In fact, it appears that all that employee needed to determine was whether valid building permits had been issued for the original dwellings. As noted above, the county issued building permits for the original dwellings on

October 4, 2007, and the original dwellings received final inspection approval between November 17 and November 19, 2007. Absent any explanation from petitioners, we fail to see what interpretation or exercise of policy or legal judgment was involved in making a determination on November 21, 2007 that the original dwellings were "lawfully established" based on the existence of valid building permits for those dwellings. As such, the challenged decisions are not "land use decisions" as defined in ORS 197.015(10).

To summarize, we recognize that when Measure 49 took effect approximately two weeks after approval of the disputed replacement dwellings, its effectiveness created a great deal of legal uncertainty regarding the continuing legal relevance of Measure 37 waivers, actions that may have been taken under those waivers and decisions that may have been issued pursuant to those waivers. If the county had been required to confront that legal uncertainty in issuing the disputed replacement dwellings permits, those decisions would almost certainly require the exercise of legal judgment and ORS 197.015(10)(b)(A) almost certainly would not apply here.[8] However, the source of that legal uncertainty postdates the decisions that are before us in this appeal. That legal uncertainty does not operate retroactively to make the November 21, 2007 decisions something other than what they were on the date they were rendered.

Other than arguing that Measure 49 had some retroactive impact on the challenged decisions, petitioners do not explain why, on the date those decisions were rendered, the county was required to exercise policy or legal judgment in making the decisions. Because we have rejected petitioners' argument that Measure 49 operated to retroactively require

[8] We reject the county's suggestion in its response brief that all decisions on applications for replacement dwellings in EFU zones fall under the ORS 197.015(10)(b)(A) exception to the definition of land use decision. Respondent's Brief 13-14. *See e.g., Hegele v. Crook County*, __ Or LUBA __ (LUBA No. 2007-167, February 19, 2008) (decision approving a replacement dwelling was a land use decision that the county also treated as a permit decision); *Bradley v. Washington County*, 44 Or LUBA 36, *aff'd* 187 Or App 502, 68 P3d 274 (2003) (appeal of hearings officer decision denying replacement dwelling application).

policy or legal judgment on the part of the county, petitioners have not sustained their burden of establishing that LUBA has jurisdiction over the decisions.

Because we determine that the challenged decisions are not land use decisions, we need not address petitioners' arguments that the challenged decisions are also decisions approving "permits" as defined in ORS 215.402.[9]

The appeals are dismissed.

[9] We also need not address petitioners' motion to strike and motion to take evidence not in the record.