BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GARRISON F. TURNER
and CHRIS N. SKREPETOS,
Petitioners,

vs.

JACKSON COUNTY,
Respondent.

LUBA No. 2010-007

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Garrison F. Turner, Ashland, and Chris N. Skrepetos, Ashland, represented themselves.

G. Frank Hammond, Jackson County Counsel, Medford, represented respondent.

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

BASSHAM, Board Member; did not participate in the decision.

DISMISSED 07/22/2010

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 decision that, among other things, adopts new zoning and comprehensive plan maps for the county.

PRELIMINARY MATTERS

The record in this matter has not been filed by the county. Both petitioners and the county have attached a number of documents to their pleadings and ask that we consider those documents for the limited purpose of determining whether LUBA has jurisdiction in this matter. *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). We have done so. As far as we can tell, the critical facts are not in dispute and any contentions of fact that may be disputed do not affect our ultimate conclusion that LUBA does not have jurisdiction to review the ordinance on appeal.

Petitioners request a telephone conference on the county's motion to dismiss. There has already been a significant delay in ruling on the motion to dismiss, and we do not believe a telephone conference is necessary. Petitioners' request for a telephone conference is denied.

FACTS

Petitioners and the county have different positions regarding the current zoning of a 5.24-acre parcel. The events that have led to that disagreement and this appeal are set out below.

A. Petitioners' Position Concerning the Zoning of Tax Lot 1708

Sometime before 1999, a 5.24-acre property that the parties and we refer to as Tax Lot 1708 was zoned Exclusive Farm Use (EFU). On August 17, 1999, the county adopted a quasi-judicial decision that changed the comprehensive plan and zoning map designations for Tax Lot 1708. That August 17, 1999 decision approved statewide planning goal exceptions

to Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands) and applied comprehensive plan and zoning map designations that would have allowed rural residential development of Tax Lot 1708. The county's August 17, 1999 decision was appealed to LUBA and remanded. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 357 (2000). Petitioners contend the county has not taken any action since LUBA's remand in 2000 to rezone the property for rural residential use, and petitioners argue that Tax Lot 1708 therefore remains planned and zoned for exclusive farm use.

B. The County's Position Concerning the Zoning of Tax Lot 1708

On January 12, 2004, the county adopted four ordinances as part of a legislative effort to update the Jackson County Land Development Ordinance (LDO). Three of those ordinances were appealed to LUBA. One of the appealed ordinances was Ordinance 2004-3. Although LUBA remanded Ordinance 2004-2, Ordinances 2004-1 and 2004-3 were affirmed by LUBA. *Stevens v. Jackson County*, 47 Or LUBA 381, 409 (2004). Petitioner Skrepetos was one of the petitioners in that 2004 appeal, and no issue was raised in that 2004 appeal concerning the zoning of Tax Lot 1708.

Ordinance 2004-03 adopted comprehensive plan map and zoning map amendments to "* * * CONFORM WITH TEXT AMENDMENTS REVISING PLAN DESIGNATION AND ZONING DISTRICT NAMES * * *. Petitioners' Opposition to Jackson County's Motion to Dismiss, Exhibit 1, page 1. In the findings the county adopted to support Ordinance 2004-3, the county explained that no zoning map changes were proposed in Ordinance 2004-3 for EFU-zoned property.

> "No zoning map changes are proposed for properties zoned Forest Resource (FR), Woodland Resource (WR) Open Space Reserve (OSR) or Exclusive Farm Use (EFU). These zoning districts are applied in areas designated as either Forestry/Open Space or Agricultural Lands on the amended Comprehensive Plan Map." *Id*., page 9 (finding 3.2.3).

Nothing in the text of Ordinance 2004-3 purports to adopt statewide planning goal exceptions or to amend the zoning of any particular EFU-zoned property. Tax Lot 1708 is

not mentioned in Ordinance 2004-3, and Ordinance 2004-3 was adopted in large part to consolidate the 18 comprehensive plan and zoning maps that existed in 2004 into three zoning and comprehensive plan maps and rename some zoning districts. It appears that in consolidating those maps, the zoning for Tax Lot 1708 was shown as Rural Residential (RR-00) rather than EFU. The basis for that map change from EFU to RR-00 is not apparent from this record, and petitioners suggest it was either a simple mapping error or something more sinister. Whatever the reason for the zoning map change, the county now takes the position that because Ordinance 2004-3 adopted the new comprehensive plan and zoning maps and those maps show Tax Lot 1708 with RR-00 zoning, Tax Lot 1708 is in fact zoned RR-00.

C. County Permit Proceedings Regarding Tax Lot 1708

In 2008, petitioner Turner received notice that the owners of Tax Lot 1708 were seeking a setback variance to allow siting of a home on Tax Lot 1708. In opposing the variance request in 2008, petitioner Turner learned that the county was taking the position that Tax Lot 1708 was zoned RR-00, and petitioner Turner challenged that position. Petitioner Turner contends that the county conceded in 2008 that the property remained zoned EFU, notwithstanding Ordinance 2004-3, and the 2008 variance application was withdrawn.

In December 2009, petitioner Turner received notice of a second attempt to secure a setback variance for Tax Lot 1708. On January 7, 2010, petitioner Turner learned that the county now took the position that Tax Lot 1708 is zoned RR-00, by virtue of the zoning maps adopted by Ordinance 2004-3. As far as we are informed by the parties, that variance application remains pending before the county, and the county has not yet rendered a final decision concerning that variance application.

Petitioners filed this appeal on January 26, 2010 in which they seek LUBA review of Ordinance 2004-3.

MOTION TO DISMISS

This appeal is unusual. As we have already explained, petitioner Skrepetos appealed Ordinance 2004-3 in 2004, and our decision in that appeal affirmed Ordinance 2004-3. Petitioners in this appeal (including petitioner Skrepetos) attempt to appeal Ordinance 2004-3 for a second time. As far as we are aware, once LUBA has issued a final decision in an appeal of a land use decision, it has never allowed a second appeal of the same land use decision. Petitioners in this appeal contend the county's notice that preceded Ordinance 2004-3 was faulty and that faulty notice permits this belated second appeal. For the reasons explained below, we do not agree with petitioners.

A. ORS 197.830(9)

An appeal at LUBA is initiated by filing a notice of intent to appeal. ORS 197.830(1) and 197.830(2)(a). Ordinance 2004-3 was adopted on January 12, 2004, and notice of that ordinance was sent to the Department of Land Conservation and Development on January 16, 2004. Petitioners' notice of intent to appeal Ordinance 2004-3 was filed with LUBA on January 26, 2010. Because petitioner's notice of intent to appeal was filed over six years after the date the county mailed notice of its decision to adopt Ordinance 2004-3, the county contends that this appeal was not timely filed and must be dismissed.

Except in certain circumstances specified in ORS 197.830, the 21-day deadline for filing an appeal at LUBA is set out at ORS 197.830(9). *Thalman v. Marion County*, 58 Or LUBA 23, 24 (2008). ORS 197.830(9) provides in pertinent part:

> "A notice of intent to appeal a land use decision or limited land use decision shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final. *A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed not later than 21 days after notice of the decision sought to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS 197.615. * * *"* (Emphasis added.)

The county contends that it mailed notice to "parties entitled to notice under ORS 197.615" on January 16, 2004, and the deadline for appealing Ordinance 2004-3 expired 21 days later

on February 6, 2004. The county argues petitioners' January 26, 2010 notice of intent to appeal was filed almost six years after the ORS 197.830(9) deadline expired. If the deadline for petitioners' notice of intent to appeal is established by ORS 197.830(9), this appeal was not timely filed and must be dismissed.

B. ORS 197.830(3) and (6) and 197.620

The 21-day deadline established by ORS 197.830(9) begins to run when a land use decision is final or when notice of the decision is mailed or submitted to parties that are entitled to notice of a post-acknowledgment land use decision under ORS 197.615. ORS 197.830(3) delays the running of that 21-day deadline in two circumstances: (1) where a land use decision is made without a hearing and (2) where a notice of hearing does "not reasonably describe the local government's final action."[1]

Petitioners contend that the notice that preceded the county hearings on Ordinance 2004-3 contains no hint that the county proposed to rezone Tax Lot 1708 and for that reason the notice did not reasonably describe a county decision to rezone Tax Lot 1708. Petitioners argue their January 26, 2010 appeal was filed within 21 days after they first learned that the county took the position that Ordinance 2004-3 rezoned Tax Lot 1708 and for that reason their appeal was timely filed under ORS 197.830(3).

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[1] 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:
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> "(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."

Petitioners' defective notice argument could require that LUBA decide the merits of the parties' central dispute in the course of resolving whether LUBA has jurisdiction to resolve that dispute. The parties' central dispute is whether Ordinance 2004-3 in fact rezones Tax Lot 1708 from EFU to RR-00. Petitioners contend that if Ordinance 2004-3 in fact rezones Tax Lot 1708 to RR-00, as the county contends, the notice the county issued before hearings on that ordinance was inadequate because it did not give notice of such rezoning. The county's legal theory regarding the zoning of Tax Lot 1708 seems to be that although the text of Ordinance 2004-3 does not purport to adopt an exception to Goals 3 or 4 or rezone Tax Lot 1708, and in fact the findings that the county adopted in support of Ordinance 2004-3 appear to state that Ordinance 2004-3 does not change the zoning for any EFU-zoned property, the zoning for Tax Lot 1708 nevertheless was changed by Ordinance 2004-3 solely because the zoning map that was adopted by Ordinance 2004-3 shows Tax Lot 1708 as being zoned RR-00. Although we need not and do not decide whether the county's legal theory is correct, if we understand the facts in this case and the county's legal theory correctly, the county's interpretive position may be inconsistent with LUBA's and the Court of Appeals' reasoning in *Flying J. Inc. v. Marion County*, 49 Or LUBA 28, 36-37, *aff'd* 201 Or App 99, 117 P3d 1027 (2005). That question likely will have to be answered in the county's pending proceeding regarding the property owners' request for a setback variance, because the setbacks required in the EFU and RR-00 zones are different. But that question need not be answered here in ruling on the county's motion to dismiss.

For purposes of resolving the jurisdictional question presented in this appeal, we assume, without deciding, that the notice that preceded Ordinance 2004-3 "did not reasonably describe" a county decision to rezone Tax Lot 1708 so that if Ordinance 2004-3 in fact rezoned Tax Lot 1708, the 21-day deadline for petitioners to appeal Ordinance 2004-3 to LUBA under ORS 197.830(3) would commence when petitioners received "actual notice" or when petitioners "knew or should have known of the decision." However, even if we

assume petitioners' January 26, 2010 appeal was timely filed under ORS 197.830(3), ORS 197.830(6)(a) imposes a three-year statute of ultimate repose. We therefore must consider whether that statute applies in this case.

ORS 197.830(6) limits the extended appeal period that might otherwise apply under ORS 197.830(3) to three years after the date a land use decision is adopted:

> "(6)(a) Except as provided in paragraph (b) of this subsection, the appeal periods described in [ORS 197.830] (3), (4) and (5) * * * shall not exceed three years after the date of the decision.
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> "(b) If notice of a hearing or an administrative decision made pursuant to ORS 197.195 or 197.763 is required but has not been provided, the provisions of paragraph (a) of this subsection do not apply."

Because petitioners' January 26, 2010 notice of intent to appeal was filed more than three years after Ordinance 2004-3 was adopted, it was not timely filed, even if ORS 197.830(3) applies, unless ORS 197.830(6)(b) applies.

Petitioner contends that notice of a hearing pursuant to ORS 197.763 was required in this case and was not given. The procedures set out in ORS 197.763, including the detailed requirements for notices of hearing that are imposed by ORS 197.763(2) and (3), apply to "quasi-judicial land use hearings." ORS 197.763(1). ORS 197.763 does not apply to *legislative* land use decisions. *DeBell v. Douglas County*, 39 Or LUBA 695, 700 (2001). Petitioners contend that although Ordinance 2004-3 adopts zoning maps for the entire county it is properly viewed as a quasi-judicial decision, and the county's notice of hearing for Ordinance 2004-3 falls substantially short of the notice of hearing required by ORS 197.763.

Under the factors applied in *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 602-03, 601 P2d 769 (1979) to determine whether a local government decision is properly viewed as a legislative or as a quasi-judicial decision, it is clear that Ordinance 2004-3 is legislative. We set out and described the *Strawberry Hill 4 Wheelers* factors in *Sulllivan v. Polk County*, 49 Or LUBA 543, 548 (2005):

> "The three *Strawberry Hill 4 Wheelers* factors may be summarized as follows:

> "1. Is the process bound to result in a decision?
>
> "2. Is the decision bound to apply preexisting criteria to concrete facts?
>
> "3. Is the action directed at a closely circumscribed factual situation or a relatively small number of persons?
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> "The more definitely the questions are answered in the negative, the more likely the decision under consideration is a legislative land use decision. *Valerio v. Union County*, 33 Or LUBA 604, 607 (1997). Each of the factors must be weighed, and no single factor is determinative. *Estate of Gold v. City of Portland*, 87 Or App 45, 740 P2d 812 (1987)."

Petitioners contend the process that initiated Ordinance 2004-3 was bound to result in a decision, but we do not see that it was. Factor 1 supports a conclusion that that Ordinance 2004-3 is properly viewed as legislative. The 2004 update of the LDO was subject to preexisting criteria. But as we have noted in other cases, factor 2 is present in almost all if not all land use decisions. *Valerio v. Union County*, 33 Or LUBA at 607; *Churchill v. Tillamook County*, 29 Or LUBA 68, 71 (1995); *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477, 482 (1995). The final factor strongly supports a conclusion that Ordinance 2004-3 is properly viewed as legislative. An ordinance that adopts comprehensive plan and zoning maps for all of Jackson County is not directed at a closely circumscribed factual situation or a relatively small number of persons.

We understand petitioners to argue that Ordinance 2004-3 is properly viewed as quasi-judicial because it allegedly rezones 5.24-acre Tax Lot 1708. However, as the county correctly notes, our decisions have consistently rejected attempts to treat parts of jurisdiction-wide legislative decisions as quasi-judicial decisions. *OCAPA v. City of Mosier*, 44 Or LUBA 452, 468 (2003); *DeBell v. Douglas County*, 39 Or LUBA at 698-99; *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516, 655 (1999), *aff'd as modified* 165 Or App 1, 994 P2d 1205 (2000). In *NWDA v. City of Portland*, 47 Or LUBA 533, 569 (2004), we explained:

> "* * * We adhere to our holdings in *OCAPA*, *DeBell* and *D.S. Parklane Development, Inc.*, that, where a decision includes discrete determinations

> that, viewed in isolation, would constitute quasi-judicial decisions, whether the decision is viewed as legislative or quasi-judicial depends on the character of the whole decision. In other words, the entire decision will either be legislative or quasi-judicial, not a hybrid of both. * * *"

Applying that test here, there can be no dispute that Ordinance 2004-3 is legislative, even if Ordinance 2004-3 rezones Tax Lot 1708, because Ordinance 2004-3 also adopts zoning maps for the entire county. It follows that the ORS 197.830(6)(b) exception to the ORS 197.830(6)(a) three-year statute of ultimate repose does not apply. Therefore, even if petitioners were entitled to take advantage of ORS 197.830(3) in filing their notice of intent to appeal, the three year statute of ultimate repose applies in this case and petitioners' appeal was not timely filed.

Finally, petitioners also cite and attempt to rely on ORS 197.620(2).[2] ORS 197.620 simply displaces the ORS 197.830(2) requirement that a petitioner at LUBA must have "[a]ppeared" before the body that adopted a land use decision in cases that concern post-acknowledgment land use regulation or comprehensive plan amendments. ORS 197.620(1) substitutes a requirement that a petitioner must have "participated either orally or in writing" to have standing to appeal a post-acknowledgment comprehensive plan or land use regulation

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[2] ORS 197.620 provides:

> "(1) Notwithstanding the requirements of ORS 197.830 (2), persons who participated either orally or in writing in the local government proceedings leading to the adoption of an amendment to an acknowledged comprehensive plan or land use regulation or a new land use regulation may appeal the decision to the Land Use Board of Appeals under ORS 197.830 to 197.845. A decision to not adopt a legislative amendment or a new land use regulation is not appealable except where the amendment is necessary to address the requirements of a new or amended goal, rule or statute.
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> "(2) Notwithstanding the requirements of ORS 197.830 (2), the Director of the Department of Land Conservation and Development or any other person may file an appeal of the local government's decision under ORS 197.830 to 197.845, if an amendment to an acknowledged comprehensive plan or land use regulation or a new land use regulation differs from the proposal submitted under ORS 197.610 to such a degree that the notice under ORS 197.610 did not reasonably describe the nature of the local government final action."

amendment to LUBA for the generally applicable ORS 197.830(2) *appearance* requirement that applies to other kinds of land use decisions. *Century Properties, LLC v. City of Corvallis*, 51 Or LUBA 572, 586, *aff'd* 207 Or App 8, 139 P3d 990 (2006). ORS 197.620(2) authorizes a petitioner to appeal such post-acknowledgment land use decisions without participating or making an appearance in the proceedings that lead to decisions, where the notice that precedes the hearings on those decisions was deficient. *Northwest Aggregates Co. v. City of Scappoose*, 38 Or LUBA 291, 306 (2000); *OCAPA v. City of Mosier*, 44 Or LUBA at 469; *Torgeson v. City of Canby*, 19 Or LUBA 623, 628 n 3 (1990). Neither ORS 197.620(1) nor 197.620(2) obviates the requirement that a petitioner must file a notice of intent to appeal or that the notice of intent to appeal be *timely* filed in accordance with the applicable requirements of ORS 197.830(3), (6) and (9).

CONCLUSION

We clarify once again the issue that we decide in this case and the issue we do not decide. We decide only that the challenged decision is not a quasi-judicial land use decision, so that ORS 197.830(6)(b) does not apply, and petitioners' belated attempt to appeal Ordinance 2004-3 more than three years after the date the ordinance was adopted is time barred by ORS 197.830(6)(a), even if we assume their appeal would otherwise be timely filed under ORS 197.830(3). We need not and do not decide whether Ordinance 2004-3 had the legal effect of changing the zoning of Tax Lot 1708. That issue likely will arise in the pending variance proceeding affecting Tax Lot 1708. If it does, the county will have to address the issue, and any party who is dissatisfied with the county's resolution of that issue may appeal the county's decision to LUBA.

This appeal is dismissed.