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 Nos. 2010-028 and 2010-048

FINAL OPINION
AND ORDER

Appeal from Jackson County.

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

No appearance by Jackson County.

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

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

DISMISSED (LUBA No. 2010-028) 11/16/2010
REMANDED (LUBA No. 2010-048)

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

In this consolidated appeal, petitioner challenges two decisions. The first decision is a site plan review in which the county grants approval to enclose an area within an existing industrial warehouse (the Warehouse). In this opinion we refer to the first decision as the "enclosure decision." The second decision is a zoning information sheet that authorizes a new industrial use that will perform small engine repair and alteration within the Warehouse. In this opinion we refer to the second decision as the "small engine use decision."

MOTION TO INTERVENE

Rosalind Schrodt and Gary Schrodt (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

MOTIONS TO STRIKE

Both petitioner and intervenors move to strike portions of the other's brief that allegedly rely on evidence that is not included in the record. Although we have limited our review to the evidentiary record in this appeal, we elect not to try to rule on each of the parties' allegations regarding improper reliance on extra-record evidence.

MOTION TO FILE A REPLY BRIEF

Intervenors' response brief was filed on October 5, 2010. Under the prior version of OAR 661-010-0039 that was in effect when these appeals were filed, the deadline for petitioner to file a reply brief was "as soon as possible after the respondent's brief is filed." Petitioners' reply brief was filed by first class mail on October 12, 2010, and was received by intervenors on October 13, 2010. Oral argument in this appeal was held one day later, on October 14, 2010. Intervenors move to strike the reply brief, arguing it was not timely filed.

The deadlines that LUBA operates under frequently necessitate setting oral argument fairly soon after respondents file their response brief. In cases like this one where the response brief was filed close to the date set for oral argument, intervenors-respondents and

respondent may request sufficient time to file a written opposition to the requested reply brief. But so long as the reply brief is filed within the time set by our rules, the close proximity of the date of oral argument and the date the reply brief is filed does not provide a basis for striking the reply brief. Intervenors do not argue the reply brief was not filed "as soon as possible after" intervenors' response brief was filed. The reply brief is allowed.

INTRODUCTION

Intervenors own a 2.39 acre rural residential (RR-5)-zoned property located next to the City of Ashland city limits. Petitioner owns an adjoining property, and petitioner and intervenors have had a number of land use disputes over the years. We briefly describe below the key land use decisions that have led up to this appeal, before turning to petitioner's assignment of error.

A. 1990, 1991 and 1999 Conditional Use Permits

Intervenors' property is improved with a historic abattoir (slaughterhouse) building. In 1990, intervenors received conditional use approval for a business that manufactured and sold birdfeeders and approval to rent "a large refrigeration system for food product storage." Second Supplemental Record 84.[1] In 1991, intervenors received conditional use approval to demolish a barn and construct a 21,000-square foot industrial warehouse building (the Warehouse), and to provide associated parking. The 1991 conditional use permit also authorized a "multiple use area in the interior of the historic [abattoir] building." *Id*. Finally, in 1999, intervenors received conditional use approval for a number of specific uses, including; "dance, art, acting, music, yoga, martial arts, exercise, photography, writing,

[1] LUBA received the record in LUBA No 2010-028 on April 26, 2010. In this opinion we refer to that record as the First Record to distinguish it from the record in LUBA No. 2010-048, which was received by LUBA on June 24, 2010. The record in LUBA No. 2010-048 will be referred to in this appeal as the Second Record. The Supplemental Record supplements the record in LUBA No. 2010-028. The Second Supplemental Record supplements the record in both appeals.

nature handicrafts, gardening, sculpture classes, demonstrations, presentations, lectures workshops, performances, exhibitions and sales in the historic portion of the building." *Id*.

B. 2006 Planning Department Decision

In 2003, the county adopted significant amendments to the LDO. The 2003 RR-5 zone generally does not permit commercial and manufacturing uses. As a result of those LDO amendments, the county apparently took the position that the existing uses of the property became nonconforming uses and that alterations of those existing uses or approval of new uses on the property would require review and approval as alterations of a nonconforming use. Questions began arising when uses changed whether the changed use qualified as an already approved use under the 1990, 1991 and 1999 conditional use approvals, so that they could be approved through the county's Type I ministerial review (without notice to nearby property owners and without any opportunity for those property owners to request a hearing), or whether they constituted change in use that required approval as an alteration to a nonconforming use that required a discretionary Type II review (requiring notice to nearby property owners and an opportunity for those property owners to request a hearing). To avoid the uncertainty that went along with attempting to show that any proposed new or altered uses satisfy the criteria for alteration of nonconforming uses, in 2006 intervenors sought a "Planning Director's Interpretation," which the county describes as a "means of achieving a more flexible approach to different use requests * * *. Second Supplemental Record 85. The result of the intervenors requested interpretation was the 2006 Planning Department Decision. *Id*. at 83-94.

In the 2006 Planning Department Decision, the county concluded that some uses could be approved through a Type 1 ministerial review, while other uses would be considered an alteration of a nonconforming use and would require a Type II discretionary review for approval:

"[Intervenors] are approved for uses similar to those which have already been approved for the warehouse and historical abattoir building and are otherwise considered low impact activities associated with the zoning district as defined in the following conditions.

"1. The following uses are allowed in the Warehouse through a Type 1 [ministerial] review, and subject to the other conditions in this decision:

"Industrial Service – low impact as defined by the LDO * * *
"Manufacturing/Production – low impact as defined by the LDO
"Business & Professional Offices
"Processing of timber & forest products
"Firewood processing & sales
"Service and Repair Business (excluding repair & service of motor vehicles)
"Emergency medical center
"Medical/dental/optical clinic
"Studio: broad-casting/recording
"Recreation/sports club, private

"2. Other uses not listed in Condition #1 or not already allowed through prior approvals must be processed through an Alteration of a Non-Conforming Use review. Traffic stud[ies] may be required dependent upon the requested uses.

"* * * * *." Second Supplemental Record 93 (footnotes omitted).

At the conclusion of the 2006 Planning Department decision is the following notice:

"Notice of this decision is being sent to property owners in the vicinity of this property. [The applicant and property owners in the vicinity] have the right to appeal the decision within 12 days of the date this decision is mailed. The decision will be final on the 13th day, provided an appeal hearing has not been requested." *Id*. at 94.

Before the 12-day appeal period expired, petitioner appealed the 2006 Planning Department decision.

C. 2006 Hearings Officer's Decision

The planning department referred petitioner's appeal to the county land use hearings officer. Although the hearings officer's decision (the 2006 Hearings Officer's Decision) discusses the merits of the 2006 Planning Department decision, concluding that in some respects the planning department erred in its application of the LDO and in other respects

that it correctly applied the LDO, the 2006 hearings officer's decision ultimately concludes the appeal of the 2006 Planning Department Decision was improperly referred to the hearing officer and should have instead been referred to the board of county commissioners for review. The hearings officer's ultimate "Order" is set out below:

> "The Appeal is returned to the Planning Division for referral to the Board of Commissioners." Second Supplemental Record 77.

According to the parties, the appeal of the 2006 Planning Department Decision has never been referred to the Board of Commissioners. The county has not appeared in this appeal to explain why the 2006 Planning Department Decision has never been referred to the Board of Commissioners or what the county believes the legal consequence of that failure should be. Petitioner and intervenors take different positions regarding the explanation for the planning department's failure to refer petitioner's appeal to the board of commissioners. Petitioner contends that because its appeal of the 2006 Planning Department decision was timely filed and has never been resolved, the 2006 Planning Department Decision never became final and there will not be a final decision on 2006 Planning Department Decision until his appeal is referred to the board of county commissioners and resolved. Intervenors contend it was petitioner's obligation to take his appeal to the board of county commissioners, and because he never did so the 2006 Planning Department Decision is now final, and in this appeal of a county decision that applies the 2006 Planning Department Decision petitioner may not collaterally attack the 2006 Planning Department Decision.

ASSIGNMENT OF ERROR

Simply stated, we understand petitioner to contend that the enclosure decision and the small engine use decision both constitute alterations of a nonconforming use decisions which require a Type II discretionary review and require notice to nearby property owners and a right to request a hearing. Petitioners contend the county erred by approving both decisions via a Type I ministerial review, without notice to petitioner and without an opportunity for a hearing.

A. The Enclosure Decision (LUBA No. 2010-028)

LUBA's administrative rules require that a petition for review must "[s]tate why the challenged decision is a land use decision or a limited land use decision subject to the Board's jurisdiction." OAR 661-010-0030(4)(c). Petitioner's "Statement of LUBA Jurisdiction" is set out below:

> "The Board is vested with jurisdiction to hear this matter. ORS 197.825." Petition for Review 2.

Petitioner's statement of jurisdiction is inadequate. While ORS 197.825(1) provides that LUBA has exclusive jurisdiction to review land use decisions, the above jurisdictional statement from petitioner's petition for review provides no clue why petitioner believes the challenged decisions are land use decisions. Notwithstanding the shortcomings in petitioner's jurisdictional statement, it is reasonably clear from argument presented elsewhere in the petition for review that petitioner believes the challenged decisions are land use decisions because they are final county decisions that concern the application of the LDO, which is a land use regulation. ORS 197.015(10).[2] It is also clear that petitioner believes that statutory exception to the statutory definition of the term "land use decision" for certain decisions that require no exercise of factual or legal judgment does not apply here.[3] In this circumstance, we believe it is not appropriate to dismiss petitioner's appeal for failure to comply with OAR 661-010-0030(4)(c).

On the merits of petitioner's jurisdictional arguments, the enclosure decision expressly states it is based on review of, among other things, the "Jackson County Land Development Ordinance." First Record 2. Therefore the jurisdictional question in LUBA

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[2] Under ORS 197.015(10)(a)(A)(iii) a decision is a land use decision if it is "[a] final decision * * * made by a local government * * * that concerns the * * * application of * * * [a] land use regulation[.]"

[3] Under ORS 197.015(10)(b)(A), a decision that would otherwise qualify as a land use decision under ORS 197.015(10)(a) is not a land use decision if it is a local government decision "[t]hat is made under land use standards that do not require interpretation or the exercise of policy or legal judgment."

No. 2010-028 turns on whether in rendering the enclosure decision, the county was required to exercise "policy or legal judgment." We conclude petitioner has failed to show that the county was required to exercise "policy or legal judgment" is making the enclosure decision.

In our discussion of the small engine use decision below, we conclude that the county was required to exercise considerable legal judgment to conclude that the county could rely on the 2006 Planning Department Decision to authorize approval of the small engine use through the county's Type I review procedure. However, unlike the small engine use decision, the enclosure decision expressly does not rely on the 2006 Planning Department Decision and expressly states that the enclosure decision does not authorize a new use.[4] As far as we can tell, the enclosure decision simply authorizes construction of two walls to enclose an unenclosed portion of the Warehouse, without authorizing any additional or modified use. The enclosure decision therefore appears to be quite similar to the electrical permit decision that we concluded in an earlier appeal was not a land use decision, because it did not authorize any additional use of the Warehouse. *Hardesty v. Jackson County*, 58 Or LUBA 162, 169 (2009). It is petitioner's burden to establish that LUBA has jurisdiction to consider his appeal of the enclosure decision. *Billington v. Polk County*, 299 Or 471, 475, 703 P2d 232 (1985). Petitioner makes no attempt to explain why the enclosure decision should be viewed differently from the electrical permit decision. As far as we can tell, the county simply authorized construction of some walls for uses and a structure that were granted land use approval by other prior land use decisions. Petitioner failed to carry the burden to demonstrate that in doing so county was required to exercise "policy or legal judgment." We conclude that the exception to the statutory definition of "land use decision"

[4] The enclosure decision includes the following finding:

> "[The 2006 Planning Department Decision] acts as a vehicle to allow new occupancies/use in the structure. Staff found this is not a new occupancy/use and is therefore not subject to that approval." First Record 1.

set out at ORS 197.015(10)(b)(A) applies in petitioner's appeal of the enclosure decision. *See* n 3.

LUBA No. 2010-028 is dismissed.

B. The Small Engine Use

Unlike the county's enclosure decision, the small engine use decision authorizes a new use, and the county's decision expressly relies on the 2006 Planning Department Decision:

> "[The small engine use] proposal is for a new use under [the 2006 Planning Department Decision] where conditions were established for new uses proposed in the warehouse structure. * * *
>
> "The Proposal is for low impact manufacturing as defined by [LDO 13.3(156)]. The operation entails making after market alterations to small engines like generators to significantly increase the fuel efficiency. Most of the Work at this time will be proto-typing."
>
> "* * * * *
>
> "On-Going conditions of approval imposed through [the 2006 Planning Department Decision] remain in effect.
>
> "* * * **." Second Record 2.

We understand the above findings to conclude that the 2006 Planning Department Decision expressly authorized the county to approve "low impact" "manufacturing" uses through a Type I review and that the county relied on that 2006 Planning Department Decision to approve the small engine use as a low impact manufacturing use.

If the 2006 Planning Department Decision had not been appealed, petitioner's challenge of the county's small engine use decision would almost certainly have to be rejected.[5] *See J.P. Finley v. Washington County*, 19 Or LUBA 263 (1990) (where a

[5] We do not understand petitioner to dispute that the small engine use qualifies as low impact manufacturing, as defined by LDO 13.3(156). Petitioner's argument is that in approving the small engine use the county may not rely on the 2006 Planning Department Decision (which has never become final) and instead must review the request as a proposal to alter a nonconforming use through a Type II review.

condition in an unappealed conditional use permit dictated a ministerial review procedure for a subsequent site plan review). However, as we have already explained, petitioner did appeal the 2006 Planning Department Decision, and the hearings officer returned the 2006 Planning Department Decision to the planning department for referral to the board of county commissioners. But the 2006 Planning Department Decision has never been referred to the board of county commissioners.

As we have already noted, the county is not a party to this appeal and nothing in the small engine use decision itself explains why the county believes it can rely on the 2006 Planning Department Decision to approve the small engine use through a Type I review.

Under LDO 2.7.5(A), a planning staff decision rendered without a hearing becomes final on the 13th day after notice of the right to appeal is given if no appeal is filed within 12 days after notice.[6] Consistent with LDO 2.7.5(A), LDO 2.7.5(D)(3) provides that "[i]f an appeal is timely filed and is accompanied by the required fee, *the decision will not be final*." (Emphasis added.) As we have already noted, the 2006 Planning Department Decision itself stated the decision would not become final if a timely appeal was filed within 12 days. It appears to be undisputed that petitioner's appeal was filed within 12 days, along with the required appeal fee. As relevant here, LDO 2.7.5(D)(2) requires that such an appeal be "in writing" and "[i]dentify the decision that is being appealed and the date of the decision." LDO 2.7.5(D)(2)(a) and (b). Importantly, LDO 2.7.5(D) does not require the appellant to identify the appropriate review body. That task apparently falls to the planning department. LDO 2.7.5(D)(4) provides that if an appeal is withdrawn after it is filed, "the appealed decision will become final on the date the appeal was withdrawn." However, as far as we

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[6] LDO 2.7.5(A) provides:

> "A Notice of Decision by the Planning Staff will be sent for all Type 2 or 3 reviews, unless referred directly to hearing * * *. When no appeal of the staff decision is received, or one is received that does not meet the requirements of this Ordinance, the decision will be final on the 13th day after the Notice of Decision is mailed."

can tell, in a case like this one where the appeal is timely filed with the required fee, the county's final decision is its final decision on the local appeal, not the planning staff decision that is the subject of the local appeal.

Because the county has not appeared in this appeal we may be missing something that would support intervenors' position that that the 2006 Planning Department Decision is now final and may be relied on to determine which new or altered uses may be approved through a Type I review and which new or altered uses require Type II review. However, intervenors cite no authority for their position that petitioners were obligated to take further action to refer their appeal of the 2006 Planning Department Decision to the board of county commissioners. As far as we can tell, the LDO assigned the planning department the responsibility of identifying the appropriate review body following petitioner's appeal of the 2006 Planning Department Decision. The hearings officer concluded that the planning department erred in referring that appeal to the hearings officer and returned the appeal to the planning department for referral to the board of county commissioners. As far as we can tell, under the LDO the 2006 Planning Department Decision is not final and there will be no final decision concerning the 2006 Planning Department Decision until the appeal is referred to the board of county commissioners.

At the very least, the county was required to exercise significant "legal judgment" in deciding to rely on the 2006 Planning Department Decision, making the ORS 197.015(10)(b)(A) exception to the statutory definition of land use decision inapplicable. Because the small engine use decision applies the LDO and does not qualify for the ORS 197.015(10)(b)(A) exception, petitioner has adequately established that we have jurisdiction to review the small engine decision. As far as we can tell, the planning department relied on the 2006 Planning Department Decision to approve the small engine use through a Type I review. However, in doing so the county offers no explanation for why it believes it can rely on that 2006 Planning Department Decision before petitioner's appeal is complete. It

appears quite likely to us under the LDO provisions cited and discussed above that the county may not rely on the 2006 Planning Department Decision, although we do not foreclose the possibility that there are other LUD provisions that have not been cited to us that might permit the county to do so. However, based on the county's failure to explain how the 2006 Planning Department Decision may be relied on to allow the small engine use through a Type I review, the county's decision must be remanded.

The county's small engine use decision in LUBA No. 2010-048 is remanded.[7]

[7] There are some suggestions in intervenors' brief that petitioner may have unsuccessfully sought a writ of mandamus to require that the city proceed with its appeal of the 2006 Planning Department Decision. If so, no party has given us a copy of any circuit court decision on such a mandamus proceeding, and that mandamus proceeding, if there was one, has played no role in this decision.