BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RON KERSEY and LINN OSTER,
*Petitioners,*

vs.

LAKE COUNTY,
*Respondent,*

and

OUTBACK SOLAR, LLC,
SAGE RENEWABLES LLC and
LOST FOREST SOLAR LLC,
*Intervenors-Respondents.*

LUBA No. 2010-050

FINAL OPINION
AND ORDER

Appeal from Lake County.

Micheal M. Reeder, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Arnold, Gallagher, Percell, Roberts & Potter, PC.

No appearance by Lake County.

Jeffrey G. Condit and Kelly S. Hossaini, Portland, filed the response brief and Kelly S. Hossaini argued on behalf of intervenors-respondents. With them on the brief was Miller Nash LLP.

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

AFFIRMED 11/16/2010

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 a decision by the county planning commission determining that a condition of approval in each of three previously issued conditional use permits has been satisfied.

**FACTS**

Intervenors sought to install solar electrical generation facilities on land zoned Agriculture-2, an exclusive farm use zone. As part of the development, between May and September, 2009, intervenors submitted three separate conditional use permit applications for three separate properties located in the county.

The first permit application was submitted by Sage Renewables, LLC (Sage Permit) to site a solar electrical generation facility on a portion of an approximately 80 acre parcel. After a hearing on the application, the Sage Permit was approved by the county planning commission on June 16, 2009. Record 134. That approval included, among others, the following condition:

> "The approved development shall comply with all local, state, and federal regulations." Record 144.

The Sage Permit was not appealed.

The second permit application was submitted by Lost Forest Solar, LLC (Lost Forest Permit) for an approximately 60-acre property. The record indicates that petitioners submitted written testimony during the proceedings below regarding the application. Record 100-104. After a hearing on the application, the Lost Forest Permit was approved by the county planning commission on November 24, 2009, and included the same condition quoted above. Record 85. The planning commission's decision on the Lost Forest Permit adopted the staff report as findings. One of the attachments to the staff report, and referenced in the report, was a letter from the applicant to the planning director addressing OAR 660-033-

0130(22). The applicant's letter took the position that that rule does not apply to the Lost Forest application.[1] Record 97-98. The Lost Forest Permit decision was not appealed.

A third permit application was submitted by Outback Solar, LLC (Outback Permit) for an approximately 60-acre property, and was apparently processed concurrently with the Lost Forest application. The record indicates that petitioners submitted written testimony during the proceedings below regarding the Outback Permit application. Record 43-47. As with the Lost Forest Permit, the Outback Permit was approved by the county planning commission on November 24, 2009, and included the same condition as the Lost Forest Permit set out above in the text. Record 27. As with the Lost Forest Permit, the planning commission's decision adopted the staff report as findings, and one attachment to the staff report is the letter from the applicant to the planning director dated November 9, 2009 taking the position that the 12/20 Rule did not apply to the Outback application. Record 27, 38-39. *See* n 1. The Outback Permit decision was not appealed.

Sometime after all three permits were issued, intervenors' representative contacted the county planning department to request confirmation that Condition 1 had been satisfied and that the 12/20 Rule "has been met" with respect to all three permits. Record 1-2. At its January 19, 2010 regular meeting, the planning commission found that "the 12/20 rule has been met * * *." On May 24, 2010, petitioners appealed that planning commission determination to LUBA.

---

[1] OAR 660-033-0120 is a Land Conservation and Development Commission administrative rule that sets out uses that may be allowed on agricultural land without an exception to Goal 3. Among those permissible uses are "[c]ommercial utility facilities for the purpose of generating power." OAR 660-033-0130 sets out standards that apply to the uses listed in OAR 660-033-0120. OAR 660-033-0130(22) provides:

> "[A] power generation facility shall not preclude more than *20* acres from use as a commercial agricultural enterprise unless an exception is taken pursuant to ORS 197.732 and OAR chapter 660, division 4." (emphasis added.)

OAR 660-033-0130(17) is the counterpart rule to OAR 660-033-0130(22) that applies where high value farmland is involved and prohibits siting power generation facilities on more than *12* acres of high value farm land. The parties refer to both rules collectively as the "12/20 Rule" and we refer to the rules herein by the same term.

**JURISDICTION**

In their response brief, intervenors move to dismiss the appeal. They argue that the challenged decision is not a land use decision under ORS 197.015(10)(a)(A) because it does not concern the adoption, amendment, or application of any goals, comprehensive plan provisions, or new or existing land use regulations and is also not a "significant impacts" decision under *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982). According to intervenors, the planning commission decision simply confirmed a matter that the previously-issued permits had already determined: that the 12/20 Rule does not apply to the properties. As such, intervenors argue, the planning commission made no new determination regarding the 12/20 Rule.

The challenged decision appears to directly "concern" the application of a state agency (LCDC) rule that implements Statewide Planning Goal 3, and therefore falls within the definition of "land use decision" at ORS 197.015(10)(a)(A). Intervenors do not argue that the challenged decision falls within any of the statutory exceptions to that definition, at ORS 197.015(10)(b).

**STANDING**

Intervenors also move to dismiss the appeal on the basis that petitioners have failed to establish that they are "adversely affected" by the decision under ORS 197.830(3).[2]

---

[2] Petitioners' Notice of Intent to Appeal (NITA) asserts it is filed "pursuant to ORS 197.830(3)(b)." NITA 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:
>
> "(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." (Emphasis added.)

Petitioners' arguments in response to intervenors' motion are very confusing, and that confusion is compounded by the fact that petitioners changed their legal theory for why their NITA was timely filed, after the petition for review was filed. Petitioners ultimately rely almost entirely on their argument that the challenged decision is a "permit" as defined in ORS 215.402(4), in arguing that the deadline for filing their NITA did not commence until they received actual notice of the decision under ORS 197.830(4)(a), which does not include a requirement that the petitioners demonstrate that they were adversely affected.[3] Petitioners' argument that the challenged decision is a permit forms the basis for their first assignment of error. Because we reject that argument on the merits below and reject petitioners' other assignment of error on the merits, we elect not to try to sort out the parties' arguments regarding ORS 197.830(3).

**FIRST ASSIGNMENT OF ERROR**

In the first assignment of error, petitioners allege that in making its January 19, 2010 determination regarding Condition 1 and the 12/20 rule, the county erred in failing to follow the procedures set forth in ORS 215.416(11) that would apply to a county decision on a "permit" as defined in ORS 215.402(4).[4] According to petitioners, if the county had

---

[3] ORS 197.830(4) provides:

> "If a local government makes a land use decision without a hearing pursuant to ORS 215.416 (11) or 227.175 (10):
>
> "(a) A person who was not provided mailed notice of the decision as required under ORS 215.416 (11)(c) or 227.175 (10)(c) may appeal the decision to the board under this section within 21 days of receiving actual notice of the decision.
>
> "(b) A person who is not entitled to notice under ORS 215.416 (11)(c) or 227.175 (10)(c) but who is adversely affected or aggrieved by the decision may appeal the decision to the board under this section within 21 days after the expiration of the period for filing a local appeal of the decision established by the local government under ORS 215.416 (11)(a) or 227.175 (10)(a)."

[4] ORS 215.402(4) provides that a "permit" means in relevant part "discretionary approval of a proposed development of land under ORS 215.010 to 215.311, 215.317, 215.327 and 215.402 to 215.438 and 215.700 to 215.780 or county legislation or regulation adopted pursuant thereto."

processed intervenors' request as a permit application, the county would have been required to provide petitioners, or at least some petitioners, notice of the request and at least offer petitioners the opportunity to request a hearing.

Intervenors respond in relevant part that the challenged decision is not a "permit" as defined in ORS 215.402(4) because the decision did not constitute the "discretionary approval of a proposed development of land." As explained below in our discussion of the second assignment of error, in our view, the most accurate characterization of the planning commission's action is that the planning commission determined that the issue of compliance with the 12/20 rule had been resolved in the three prior permit proceedings. Such a determination may or may not have required the exercise of some discretion, but even if so it does not constitute the "discretionary *approval* of a proposed *development* of land" under applicable land use regulations. The three initial permit decisions were the discretionary approval of a proposed development of land. For that reason, the planning commission decision that at most identifies what was decided in the initial permit decisions was not itself a decision on a "permit," and the county did not commit procedural error by failing to process intervenors' request as a permit application.

The first assignment of error is denied.

**SECOND ASSIGNMENT OF ERROR**

In their second assignment of error, petitioners argue that the county erred in its conclusion that the 12/20 Rule "has been met" with respect to each of the permits. According to petitioners, the proposed solar facilities on the Sage, Lost Forest and Outback properties do not in fact qualify under the 12/20 rule as uses that may be permitted in the EFU zone without an exception to Statewide Planning Goal 3 (Agricultural Lands), and therefore the county can approve the proposed development only if it first justifies an exception to Goal 3.

Intervenors respond that the issue that is presented in the second assignment of error, *i.e.*, whether the proposed development may be allowed without an exception under the 12/20 Rule, is outside of LUBA's scope of review, because that issue could have been raised and resolved, or was raised and resolved, in the three prior permit proceedings. Petitioners respond by arguing that the decision before LUBA in this appeal had the effect of removing Condition 1 as a barrier to the development approved under the three permits, so that any issue that the county decided with respect to Condition 1, including whether the 12/20 Rule "has been met," may be challenged in this appeal of the planning commission's January 10, 2010 decision concerning Condition 1.

As noted above, the events that led to the challenged decision are confusing. The driving force behind intervenors' request that led to the challenged decision appears to be their misunderstanding that Condition 1 of each of the permits, quoted above, may have required intervenors to seek confirmation that the 12/20 Rule was met. The county may also have shared in that misunderstanding, because the decision includes language suggesting that the county believed that the effect of Condition 1 was to provide a mechanism for the county to revisit its prior final permit decisions to apply land use laws that should have been applied to the three permit applications when the planning commission was considering whether to approve those permits in the first place, but were not applied at that time.

If that is the case, both intervenors and the county misunderstand the legal effect of Condition 1. First, the language of the condition suggests that it is a general boilerplate condition that is meant to serve as notice that there may be other federal, state, or local *non-land use* regulations that the applicant will be required to comply with independent of the county's land use decision-making process. Second, even if the county intended Condition 1 to provide a general mechanism for revisiting its final permit decisions to apply land use standards that should have been applied prior to approval of those permits, that mechanism would not be effective. In making a decision on a land use application, a local government is

required to determine whether the application complies with all applicable land use approval criteria at the time it renders a decision on the application. A local government is not entitled to include a general condition that requires a successful applicant to come back to the county each time a land use regulation that was not considered is discovered after the original approval decision has become final. It is true that, under certain circumstances, a local government may find that it is feasible to comply with specified land use regulations and expressly defer a finding of compliance with those land use regulations to a later proceeding that has the same public participatory rights as in the initial proceeding. *See Gould v. Deschutes County*, 227 Or App 601, 609-13, 206 P3d 1106 (2009) (so stating). However, petitioners do not argue that Condition 1 was such a deferral of a decision regarding the 12/20 Rule. Even if it was intended to be such a deferral decision, we seriously question whether such a general condition that does not mention the 12/20 Rule or any other particular land use standard could have that legal effect.

Stated differently, the proper time and place to consider whether the facilities qualified under the 12/20 rule, and therefore did not require a Goal 3 exception, was during the land use proceedings on the initial permits. The issue of whether the facilities qualified under the 12/20 rule clearly could have been raised in those proceedings, as evidenced by the fact that the issue was clearly raised, and perhaps actually resolved, in two of the three permit proceedings.[5] That being the case, under the reasoning in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), once those three permit decisions became final, unappealed

[5] In the Outback and Lost Forest permits, the issue was not only raised during the proceedings but arguably resolved in the planning commission decision, which adopted as findings the staff report, which included an attached letter from the applicant taking the position that the 12/20 rule did not apply to those permit applications. Based on language in the staff report, it is arguable that staff incorporated the attached letter as staff's position on why the 12/20 rule did not apply. If so, the attached letter was incorporated as part of the planning commission findings, and therefore the issue of whether the 12/20 rule applied was actually raised and resolved with respect to those permits. However, because the issue clearly could have been raised in the initial permit decisions, we need not and do not consider that question further.

decisions, the issue of whether the facilities qualified under the 12/20 rule became a final, resolved issue.

Against this background, we understand the planning commission's response to intervenors' request to confirm that the 12/20 rule "has been met" with respect to the three permits to be most accurately characterized as a determination that the issue of whether the facilities qualified under the 12/20 rule is a final, resolved issue, one that was either raised and resolved or that could have been raised and resolved in the prior permit proceedings. The planning commission's decision is not accurately understood to determine, in the first instance, that the 12/20 rule applies to the three permits and is satisfied. Whether or not the facilities in fact qualify under the 12/20 rule, that issue was either raised and resolved or could have been raised and resolved in the three permit proceedings. In either case, the issue is a final, resolved issue.

In sum, the issue presented under the second assignment of error is not within our scope of review. The second assignment of error provides no basis for reversal or remand of the decision.

The county's decision is affirmed.