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 No. 2010-097

FINAL OPINION
AND ORDER

Appeal from Jackson County.

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

No appearance by Jackson County.

Rosalind Schrodt and Gary Schrodt, Ashland, filed the response brief. Mark S. Bartholomew, Medford, argued on behalf of intervenors-respondents.

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

DISMISSED 07/01/2011

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

Petitioner appeals a zoning information sheet concerning a change in use of intervenors' commercial/industrial building.

FACTS

Petitioner has filed a number of appeals of decisions affecting intervenors' 2.39-acre Rural Residential (RR-5)-zoned property. We set out the history of those appeals in some detail in our November 16, 2010 final opinion in one of petitioner's prior appeals. *Hardesty v. Jackson County*, ___ Or LUBA ___ (LUBA Nos. 2010-028 and 2010-048, November 16, 2010). We set out a more limited discussion of that history here. The property is improved with a historic slaughterhouse building. Pursuant to conditional use permits that were issued by the county in the 1990s, the slaughterhouse was remodeled for commercial use and a 21,000 square foot industrial building was constructed on the property.

In 2003, the county adopted significant amendments to the Jackson County Land Development Ordinance (LDO). After those amendments were adopted, the county apparently took the position that the addition of new uses to the buildings on intervenors property constituted alterations of a nonconforming use that required discretionary review and approval through a public review process. Intervenors took the position that uses that fell within the use categories authorized by the earlier conditional use approval decisions could be approved by the county via a ministerial review, without notice to adjoining property owners and without any public hearing or opportunity for a local appeal.

In 2006 intervenors sought what the parties refer to as a "Planning Director's Interpretation." That Planning Director's Interpretation concluded that the county could ministerially approve eleven types of businesses. The Planning Director's Interpretation also concluded that changes to allow any other kinds of uses would require approval as an alteration of a nonconforming use. Petitioner filed a local appeal of the 2006 Planning

Director's Interpretation. A county hearings officer ruled that the planning department should have sent petitioner's appeal to the board of county commissioners, not the hearings officer. The hearings officer returned the appeal to the planning department so that it could be forwarded to the board of county commissioners. At the time we issued our November 16, 2010 decision regarding two of petitioner's prior appeals, the county had taken no further action on the Planning Director's Interpretation.

In our November 16, 2010 decision, we concluded that in one of the change-in-use decisions that were before us on appeal, the county relied on the 2006 Planning Director's Interpretation to issue that decision ministerially. We also concluded that because the 2006 Planning Director's Interpretation had been appealed and that local appeal had never been finally resolved, it was error for the county to rely on the 2006 Planning Director's Interpretation to approve the change in use ministerially, and we remanded the decision. We are informed by the parties that subsequent to our November 16, 2010 decision, petitioner's local appeal of the 2006 Planning Director Interpretation was sent to the board of county commissioners for a final decision. We are also informed by the parties that intervenors have now filed a petition for writ of mandamus in Jackson County Circuit Court, pursuant to ORS 215.429.[1] Intervenors apparently seek to have the circuit court take action to make the Planning Director's Interpretation the county's final decision. We were informed at oral argument on June 23, 2011 that a hearing before the circuit court on the petition for writ of mandamus was held recently, but as far as we are informed as of this date, the circuit court has not issued a peremptory writ.

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[1] Under ORS 215.427, a county is required to make a final decision on an application for a permit or zone change application within 120 days, if the property is inside an urban growth boundary, or 150 days, if the property is outside an urban growth boundary. If a county fails to take timely final action on an application for a permit or zone change, ORS 215.429 authorizes the applicant to file a petition for writ of mandamus to compel the county to approve the application, unless the governing body or an intervenor can establish that approving the application would violate a "substantive provision of the county comprehensive plan or land use regulations * * *."

The decision before us in this appeal is a "zoning information sheet" that concerns intervenors' proposal to use one of the buildings on the subject property for a recreational/sports club and dance studio. We describe the challenged decision and the events surrounding it more fully below.

JURISDICTION

Intervenors argue that LUBA lacks jurisdiction over the challenged decision because it is not a final decision. LUBA has exclusive jurisdiction to review land use decisions. ORS 197.825(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). Turning first to the requirement that a land use decision must be a final decision, it does not appear to us that the "decision" that petitioner identifies in his notice of intent to appeal is a decision at all. The record is made up of seven pages. Record 2-7 appear to be intervenors' application for a ministerial Type 1 approval for a change in use. In a blank space on the form the applicant is to "Describe your proposal." In that space intervenors have entered the following: "We have a finished building. We are going to start using the upstairs for a Recreational/Sports Club + Dance Studios." Record 3. The application also includes two pages from the 2006 Planning Director's Interpretation. One of those pages lists "Recreation/sports club, private" as one of the type of businesses that the planning director determined the county can approve ministerially.

Page one of the record appears to be a webpage printout. At the top of that page, the "Application Type" is identified as a "Zoning Information Sheet." We set out relevant entries from the top of the Zoning Information Sheet below:

"CASE STATUS: **Received**"

"PROCESS: **Type 1**"

"DECISION:"

"MASTER NO: **ZON2006-00049**"

"RECEIVED DATE: **09/28/2010**"

"ATTACHED DOCUMENTS:

"Document: SCHRODT-HARDESTY NOTICE OF INTENT [TO APPEAL]
Description: Recvd from Chris Hearn, agent for H. Hardesty 10/20/10"

From the above, it appears that intervenors filed their Type 1 application on September 28, 2010, approximately six weeks before our November 16, 2010 decision. The Zoning Information Sheet calls for a Type 1 process. The reference to ZON2006-00049 is a reference to the 2006 Planning Director's Interpretation. There is no entry after "Decision" and there is nothing else on the Zoning Information Sheet that indicates the county has done anything other than enter data from the application into the county's automated permit application tracking system. The attached document referenced in the Zoning Information Sheet is the notice of intent to appeal that petitioner filed with LUBA to challenge the Zoning Information Sheet. That notice of intent to appeal is not included in the record that the county transmitted to LUBA in this appeal.

In an October 19, 2010 e-mail communication with county counsel, with the Zoning Information Sheet and application attached, petitioner's attorney asked county counsel to confirm whether the Zoning Information Sheet was a final decision. In an e-mail response the next day, county counsel declined to take a position, one way or the other. The next day, October 21, 2010, petitioner filed his notice of intent to appeal with LUBA.

If the county had adopted a final decision to authorize or approve a Recreational/Sports Club + Dance Studios on intervenors' property, and in doing so relied on the 2006 Planning Director Interpretation to grant the approval through a Type 1 ministerial process, that decision would be materially identical to the county decision we remanded on November 16, 2010. We would almost certainly have to remand this decision as well, for the

same reasons we set out in our November 16, 2010 decision. Intervenors suggest the Zoning Information Sheet does not rely on the Planning Director Interpretation and instead relies on a 1999 conditional use permit that intervenors argue is sufficient to authorize the proposed uses. However, there is absolutely nothing in the application or the zoning information sheet that suggests the county believes that the 1999 conditional use permit constitutes a basis to approve changes in use on the subject property. In any case, from the above, we conclude that what petitioner has appealed is only an incomplete zoning information sheet reflecting receipt of an application that the county had not taken any action on at the time of appeal and, as far as we have been informed, has yet to act on.

Because the document that is the subject of this appeal is neither a "decision" nor "final" it is not a land use decision, as defined by ORS 197.015(10). Accordingly, this appeal is dismissed.