BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CATHERINE KEITH,
Petitioner,

vs.

WASHINGTON COUNTY,
Respondent,

and

STUART WILSON,
Intervenor-Respondent.

LUBA No. 2011-104

FINAL OPINION
AND ORDER

Appeal from Washington County.

Jeffrey L. Kleinman, Portland, filed the petition for review and argued on behalf of petitioner.

Jacquilyn Saito-Moore, Washington County Counsel, Hillsboro, filed the response brief and argued on behalf of respondent. With her on the brief was Alan R. Rappleyea.

Stuart Wilson, Hillsboro, filed a response brief and argued on his own behalf.

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

REMANDED 08/08/2012

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

Petitioner appeals a decision by the county approving a building permit application to change the use of an existing structure on a parcel zoned exclusive farm use (EFU) to a farm stand.

MOTION TO INTERVENE

Stuart Wilson, the applicant below, moves to intervene on the side of the county. The motion is granted.

REPLY BRIEF/MOTIONS TO STRIKE

Petitioner moves for permission to file a reply brief to respond to intervenor's response brief. The reply brief is allowed.

Petitioner alleges that Appendix 1 to the county's response brief is not a part of the record and moves to strike it from the county's response brief. Appendix 1 is a blank version of the completed building permit stamp that appears on a site plan in the building permit decision that is at issue in this appeal. Record 6; Petition for Review App. 4. We understand the county to have provided the blank stamp as more readable version of the smaller completed stamp that appears at Record 6 and Petition for Review App. 4 and the blank stamp includes no additional information. The motion to strike is denied.

Petitioner moves to strike an attachment to intervenor's response brief that petitioner contends is not part of the record. The attachment is a blank, yellow notice form marked "SAMPLE." We agree with petitioner that as far as we can tell the attachment is not part of the record. The attachment is stricken and the Board will not consider it.

Petitioner's remaining motions to strike are denied.

FACTS

The subject property is the same property that we described in *Wilson v. Washington County*, 63 Or LUBA 314 (2011). As we explained in *Wilson*, intervenor's property is

comprised of two parcels totaling approximately 70 acres. An approximately 40-acre portion of intervenor's property is zoned Exclusive Farm Use (EFU), and the sole access to the EFU parcel from the public right of way is over a driveway located entirely on the approximately 30-acre parcel that is zoned Exclusive Forest Conservation (EFC). *Id*. at 316-17.

On July 8, 2011, intervenor submitted an application to the county building department to convert the use of an existing structure located on the EFU parcel to a farm stand.[1] The county approved the application on the same day. The county did not provide notice of the decision to any party, and petitioner filed a notice of intent to appeal the decision on November 8, 2011.

JURISDICTION

A. Introduction

The county and intervenor move to dismiss this appeal, arguing that the appealed building permit is not a "land use decision" as defined by ORS 197.015(10)(a) subject to LUBA's jurisdiction. In addition, intervenor argues that petitioner lacks standing to appeal the challenged decision.

Understanding the parties' jurisdictional arguments requires a brief explanation of our decision in *Wilson*, the parties' positions regarding the effect of *Wilson*, and some of the applicable sections of the Washington County Community Development Code (CDC). In *Wilson*, we held that a proposed winery on intervenor's EFU-zoned parcel included the driveway located on intervenor's EFC-zoned parcel that was necessary to connect the winery to the nearest public right of way.[2] Petitioner argues in the petition for review that, as was

[1] At oral argument, intervenor described the existing structure as a gazebo and the framing plans included in the record depict a structure that resembles a gazebo. Record 11.

[2] We held that the hearings officer correctly concluded that a proposed winery on the EFU parcel could not be allowed where the driveway to the proposed winery was located on the EFC parcel, and wineries are not permitted uses in the EFC zone.

the case in *Wilson*, the proposed farm stand on intervenor's EFU-zoned property includes the driveway located on the EFC-zoned parcel and therefore the farm stand must be a permitted use on the EFC parcel in order to allow it on the EFU-zoned parcel. We understand the county to take the position that *Wilson* is inapposite because "farm stands" are uses allowed outright on EFC-zoned land.

The parties' argument on the merits in this appeal appears to turn on how an arguable conflict between a number of sections of the CDC is resolved. Those sections are CDC 342-2 through 4, CDC 342-6.1 and 201-2.20. CDC 342-2 through 342-4 list the allowed uses in the EFC zone.[3] CDC 342-6.1 prohibits in the EFC zone "[s]tructures or uses of land not specifically authorized by Section 342." Petitioner argues that because farm stands are not listed as allowed uses in CDC Chapter 342, farm stands are prohibited in the EFC zone by CDC 342-6.1.

CDC 201-1 requires that "* * * no person shall engage in or cause a development to occur, as defined in Section 106-57, without first obtaining a Development Permit through the procedures set forth in this Code."[4] CDC 201-2 provides in part:

> "201-2 Exclusions from Permit Requirement
>
> "*The following activities are permitted in each district* but are excluded from the requirement of obtaining a Development Permit. * * *.
>
> "* * * * *

[3] CDC 342-2 through 342-4 separately list the uses that are permitted in the EFC zone under the county's Type I, Type II, and Type III procedures.

[4] CDC 106-58 defines "development permit" as

> "The Director's or Hearings Officer's written approval shall be the Development Permit for any Type I, Type II, or Type III decisions. A 'permit' issued by the building official authorizing performance of a specified activity is a Type I development permit."

"201-2.20 "Farm stands in the AF-5, AF-10, EFU, AF-20, and EFC Districts if:

"A. The structures are designed and used for the sale of farm crops or livestock grown on the farm operation, or grown on the farm operation and other farm operations in the local agricultural area, including the sale of retail incidental items and fee-based activity to promote the sale of farm crops or livestock sold at the farm stand if the annual sales of the incidental items and fees from promotional activity do not make up more than twenty-five (25) percent of the total annual sales of the farm stand; and

"B. The farm stand does not include structures designed for occupancy as a residence or for activity other than the sale of farm crops and livestock and does not include structures for banquets, public gatherings or public entertainment."

"* * * * *. (Emphasis added)[5]

We understand the county to rely on the CDC 201-2 language emphasized above to conclude that CDC 201-2.20 authorizes farm stands in the county's EFC zone, notwithstanding that farm stands are not listed as permitted uses in CDC Chapter 342.[6] We understand the county to contend that the arguable conflict between (1) the emphasized language in 201-2 and CDC 201-2.20 and (2) CDC 342-6.1 is resolved in favor of the emphasized language in 201-2 and CDC 201-2.20.

B. Land Use Decision

ORS 197.015(10)(a) defines "land use decision" in relevant part as a "final decision or determination made by a local government" that "concerns" the application of a

[5] ORS 215.213(1)(r) allows "farm stands" as outright permitted uses on exclusive farm use zoned parcels as provided in the statute. The language of CDC 201-2.20 is identical to the language in ORS 215.213(1)(r).

[6] CDC Chapter 340-3 through 340-5 lists the uses that are permitted in the EFU zone and CDC 340-6.1 prohibits in the zone "structures or uses of land not specifically authorized by Chapter 340." Similar to CDC Chapter 342, Chapter 340 does not list farm stands as permitted uses.

comprehensive plan provision or land use regulation. Generally, a local government decision "concerns" the application of a comprehensive plan provision or land use regulation if the plan provision or land use regulation is actually applied in making the decision, or should have been applied in making the decision. *Jaqua v. City of Springfield*, 46 Or LUBA 566, 574 (2004).

ORS 197.015(10)(b)(A) excludes from the scope of "land use decision" a decision of a local government "[t]hat is made under land use standards that do not require interpretation or the exercise of policy or legal judgment." Similarly, ORS 197.015(10)(b)(B) excludes any decision "[t]hat approves or denies a building permit issued under clear and objective land use standards [.]"[7] In their response briefs, the county and intervenor and challenge LUBA's jurisdiction. In its response brief, the county first argues that LUBA does not have jurisdiction over the appeal because the county was not required to apply its comprehensive plan or a land use regulation in making the decision. Second, the county argues, even if the challenged decision is a land use decision under ORS 197.015(10)(a)(A), it falls within the exclusion from the definition under ORS 197.015(10)(b)(A) or (B) because any land use standards the county may have applied here did "not require interpretation or the exercise of policy or legal judgment" or the "building permit [was] exercised under clear and objective land use standards." Third, citing *Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995), the county argues that because "farm stands" are uses that are allowed in the

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

> "(A) That is made under land use standards that do not require interpretation or the exercise of policy or legal judgment;
>
> "(B) That approves or denies a building permit issued under clear and objective land use standards[.]"

exclusive farm use zone pursuant to ORS 215.213(1)(r) and under *Brentmar* the county may not subject those uses to additional regulation under its local code, a decision to allow a use that is allowed under subsection (1) of ORS 215.213 is not a land use decision.

First, we disagree with the county that the challenged decision falls within the exception to our jurisdiction at ORS 197.015(10)(b)(A) or (B). *See* n 7. As we have already explained, one of petitioner's principal arguments on the merits is that the proposed farm stand is not a permitted use on the EFU-zoned parcel because the sole access to the farm stand is over the EFC-zoned parcel, and farm stands are not permitted in the EFC zone at all under CDC 3.42-2 through 3.42-4 and 342-6.1. In its response brief, the county appears to argue that CDC 201-2.20 authorizes farm stands on EFU and EFC-zoned lands, notwithstanding that farm stands are not listed as uses that are permitted in the county's EFU or EFC zones. Respondent's Brief 7, lines 8-10. *See* n 6. That interpretation is not included in the challenged decision. If that is in fact the way the county interprets CDC 201-2.20 and 342-6.1, at a minimum, the county is required to interpret its land use regulations to resolve an apparent ambiguity in the text of the CDC that is presented by the arguable conflict between CDC 201-2.20 and 342-6.1.

Moreover, petitioner also argues that the county was required to interpret CDC 201.2-20(A) and (B) and exercise policy or legal judgment in determining whether the proposed structure is in fact a "farm stand" that meets the requirements of those CDC sections. The challenged decision does not explain or indicate why the county believed that the farm stand is an allowed use on the property or why the proposed farm stand will have the characteristics listed in CDC 201.2-20. We agree with petitioner that interpreting the applicable provisions of the CDC to determine whether farm stands are permitted uses in the applicable zones, and determining whether the farm stand qualifies under CDC 201.2-20 requires the exercise of legal judgment. Further, we disagree with respondents that the

applicable farm stand criteria at CDC 201.2-10, which mirror the statutory standards at ORS 215.213(1)(r), are clear or objective.

Finally, to the extent the county argues that local government decisions on applications for uses that are allowed under ORS 215.213(1) or ORS 215.283(1) are not land use decisions because those uses may not be subjected to additional local regulations under *Brentmar*, we reject that argument. Decisions regarding applications for uses that are listed in subsection 1 of the statutes may not be subject to additional *county* regulations but they are subject to *statutory* standards, and may also be subject to rules adopted by the Land Conservation and Development Commission (LCDC). *Lane County v. LCDC*, 325 Or 569, 583, 942 P2d 278 (1997). Many of the statutory criteria for uses allowed under ORS 215.213(1) and 215.283(1) are not clear and objective. That subsection (1) uses may not be subjected to additional local regulations does not necessarily mean that a decision approving such uses cannot be a land use decision.

For the reasons set out above, the challenged decision is a land use decision as defined in ORS 197.015(10)(a) and we have jurisdiction.

C. Standing

Intervenor challenges petitioner's standing to appeal the decision. As explained above, the county did not provide notice of the decision to any party. ORS 197.830(3) provides, in relevant part:

> "If a local government makes a land use decision without providing a hearing, a person adversely affected by the decision may appeal the decision to [LUBA] 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."

In his response brief and in a response to petitioner's reply brief, we understand intervenor to argue first that petitioner is not "adversely affected by the decision" under ORS 197.830.

Petitioner responds with an affidavit that states in relevant part that her property is adjacent to intervenor's property at her property's northern boundary and that "the noise (especially music) generated by the events conducted by [intervenor] * * * [are] audible from my farm." Petitioner's Affidavit 2. A person whose property is within sight or sound of the subject property is presumed to be "adversely affected" by a decision within the meaning of ORS 197.830(3). *Frymark v. Tillamook County*, 45 Or LUBA 685, 690 (2003). We disagree with intervenor that petitioner is not "adversely affected" by the decision.

We also understand intervenor to argue that petitioner failed to file her Notice of Intent To Appeal (NITA) within 21 days of the date petitioner "knew or should have known of the decision" for purposes of ORS 190.830(3)(b). We understand intervenor to argue (1) a sign that contained a building permit notice was posted on his property for approximately one month after the county issued the decision, and (2) a meeting occurred on September 7, 2011 between the county and some neighbors regarding intervenor's activities on the property.

As we explain below, we agree with petitioner that the challenged decision is a decision to issue a "permit" as defined in ORS 215.402(4). The county did not provide the notice and opportunity for a hearing required for the permit decision under ORS 215.416(11), and did not adopt adequate findings as required by ORS 215.416(9). We have held that where a local government has rendered a permit decision without recognizing that its decision was a permit decision and without providing notice of that decision as required by ORS 215.416(11), ORS 197.830(3)(a) applies, and the "actual notice" that the statute requires is provided only when the local government provides the written notice of the decision that is required by law or a copy of the decision itself. *Frymark*, 45 Or LUBA at 696 (2003). Intervenor does not argue that petitioner was not entitled to notice of the decision as an adjoining landowner under ORS 215.416(11) or the applicable procedures of the CDC. For those reasons, intervenor's arguments do not assist him. Petitioner filed the NITA within the time set forth in ORS 197.830(3)(a) and the appeal is timely.

FIRST AND SECOND ASSIGNMENTS OF ERROR

A. Statutory Permit

ORS 215.402(4) defines "permit" in relevant part as the "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." CDC 106-57 defines "development" to include the "* * * change in use of a building or structure * * *." As explained above, intervenor applied to change the use of an existing structure on his property that intervenor describes as a gazebo to a farm stand. *See* n 1.

In a portion of the first assignment of error and in a portion of the second assignment of error, petitioner argues that the county exercised discretion in approving the proposed farm stand and for that reason the decision is a "permit" as defined in ORS 215.402(4). According to petitioner, the type of discretion exercised by the county in deciding whether to approve the application requires the county to interpret various ambiguous provisions of the CDC to determine whether the proposed farm stand is allowed at all on the property. Petitioner argues that the discretion the county is required to exercise in considering whether to approve the application does not involve merely interpreting an ambiguous term in a land use regulation that applies to a use that is unquestionably permitted in the zone, but involves resolving fundamental questions as to whether the use is allowed at all in the applicable zones. *Frymark v. Tillamook County*, 45 Or LUBA 486, 493 (2003). Finally, petitioner argues that the county failed to accompany its approval of the application with "a brief statement that explains the criteria and standards considered relevant to the decision, states

the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth" as required by ORS 215.416(9).[8]

The county responds that the challenged decision was issued under standards that do not require the exercise of discretion and therefore the decision is not a "permit" as defined in ORS 215.402(4). The county cites *Tirumali v. City of Portland*, 41 Or LUBA 231, 240 (2001), *aff'd* 180 Or App 613, 45 P3d 519 (2002) and argues that the county's decision to approve the farm stand is similar to the city's building permit decision in *Tirumali* because, according to the county, "there is no question [that] applicant's use of a farm stand was allowed as a permitted use." Response Brief 10. According to the county, there was no exercise of discretion in approving the application because county staff who processed the application merely filled in the blanks on a grid that requests information about setbacks, the applicable zoning district, and the proposed use.

We disagree with the county that the decision at issue is like the challenged decision in *Tirumali*. The residential building permit at issue in *Tirumali* was issued for a use that was indisputably permitted outright in the zone, and the city's interpretational exercise involved an interpretation of whether the term "finished surface" in the city code definition of the term "grade" was limited to a paved surface or also included nonpaved surfaces where fill had been placed. We held that the building permit in that case was a land use decision, because it did not fall within the exclusion at ORS 197.015(10)(b)(B), but we rejected the petitioner's argument that the city's interpretation of ambiguous code language governing an outright permitted use constituted the "discretionary" approval of the development of land. Here, the county is required to make a fundamental determination regarding the nature of the proposed

[8] ORS 215.416(9) provides that "[a]pproval or denial of a permit or expedited land division shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

use and whether that proposed use is allowed in the EFU and EFC zones at all because, as noted above, CDC 342-6.1 on its face prohibits farm stands in the EFC zone if they are not "specifically authorized by Section 342."

More importantly, the statutory-based criteria governing farm standards require the exercise of discretion. Determining whether a proposed use is a "farm stand," *i.e.* a structure designed and used for the sale of agricultural products grown on the farm operation, including the sale of retail incidental items and "fee-based activities" to promote the sale of agricultural products sold at the stand, necessarily requires the exercise of discretion. CDC 201.2-20(A) and ORS 215.213(1)(r)(A). Further, determining whether the proposed use does not include structures designed for activity other than the sale of agricultural products almost certainly will require discretion. CDC 201.2-20(B) and ORS 215.213(1)(r)(B).

For the reasons explained above, we agree with petitioner that the challenged decision is a "permit" as defined in ORS 215.402(4). It follows that the county erred in failing to provide the notice and opportunity for a hearing required for permit decisions, and in failing to adopt a decision supported by findings as required by ORS 215.416(9).

B. Applicable Procedures under the CDC

In a portion of her second assignment of error, petitioner argues that the county failed to follow any of the procedures for Type I, II or III land use actions, and further argues that the county was required to apply its process that applies to "Type III" actions as described in CDC 202-3. The county does not respond to petitioner's argument.

We need not resolve the issue. Following the remand required by our decision, the county must provide the notice and an opportunity for a hearing required under ORS 215.416 and process the application according to the procedures it has adopted in the CDC to comply with ORS 215.416, and we leave it to the county to do so on remand.

C. Remaining Argument

The remaining argument in petitioner's first assignment of error asserts that the county erred in approving the application because the farm stand is not a use that is permitted in the EFC zone. It would be premature under these circumstances for the Board to resolve that portion of petitioner's assignment of error. If the applicant wishes to proceed with this matter following our remand, the county will be required to address those arguments on remand. We express no view on the merits of the parties' positions about how the apparent conflict between CDC 201-2.20 and 342-6.1 should be resolved.

The first and second assignments of error are sustained, in part.

The county's decision is remanded.