

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 MICHAEL J. EARLY JR. and MICHAEL J. EARLY SR.,
5 *Petitioners,*

6
7 vs.

8
9 JACKSON COUNTY,
10 *Respondent.*

11
12 LUBA No. 2014-019

13
14 FINAL OPINION
15 AND ORDER

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17 Appeal from Jackson County.

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19 Michael J. Early Jr and Michael J. Early Sr, Ashland, filed a petition for
20 review on their own behalf.

21
22 Daniel O'Connor, Medford, represented respondent.

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

26
27 DISMISSED 10/20/2014

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29 You are entitled to judicial review of this Order. Judicial review is
30 governed by the provisions of ORS 197.850.

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NATURE OF THE DECISION

Petitioners appeal a county hearings officer decision in which he concludes that petitioners are using their property in a manner that is not permitted by the Jackson County Land Development Ordinance, orders petitioners to cease such use, and imposes a fine.

FACTS

Petitioners own property located on the south side of Crowson Road, adjacent to, but outside, the City of Ashland’s city limits. The property is zoned Rural Residential – 5 (RR-5) by Jackson County. Petitioners own and operate Ashland Towing Company, which is located a short distance north of the subject property, within the City of Ashland. The challenged decision finds that petitioners have been storing and parking commercial vehicles from its nearby towing company business on the RR-5 zoned property and stowing and parking towed vehicles on the RR-5 zoned property. The challenged decision orders petitioners to “cease using the Property for the parking, storage or occupancy of vehicles associated with the Ashland Towing Company or any other commercial activity not allowed in the Rural Residential zone[.]” Record 5. The challenged decision also imposes a fine of \$1,200.

JURISDICTION

As relevant here, LUBA’s review jurisdiction is limited to “land use decision[s].” ORS 197.825(1).¹ As defined by ORS 197.015(10)(a), land use

¹ ORS 197.825(1) provides:

“Except as provided in ORS 197.320 and subsections (2) and (3) of this section, the Land Use Board of Appeals shall have

1 decisions include, among other things, “[a] final decision” “by a local
2 government” “that concerns the * * * application of” “[a] land use regulation.”²
3 As the appealing parties, petitioners have the burden of establishing that LUBA
4 has jurisdiction to review the challenged decision. *Billington v. Polk County*,
5 299 Or 471, 475, 703 P2d 232 (1985).

6 Petitioners’ “Statement of Jurisdiction” in the petition for review is set
7 out below:

8 “The decision[s] of Jackson County set forth in this appeal are
9 land use decisions and ancillary process to land use decisions and
10 as such [LUBA] has proper jurisdiction pursuant to ORS
11 197.825(1); ORS 197.320; ORS 34.102(3).” Petition for Review
12 9.

exclusive jurisdiction to review any land use decision or limited
land use decision of a local government, special district or a state
agency in the manner provided in ORS 197.830 to 197.845.”

² ORS 197.015(10)(a) provides, in part:

“Land use decision”:

“(a) Includes:

“(A) *A final decision* or determination made by a local
government or special district *that concerns the*
adoption, amendment or *application of*:

“(i) The goals;

“(ii) A comprehensive plan provision;

“(iii) *A land use regulation*; or

“(iv) A new land use regulation[.]” (Emphases
added.)

1 Petitioners must do more than simply assert that the challenged decision is a
2 land use decision subject to LUBA review. Petitioners’ undeveloped assertion
3 in the petition for review that the challenged decision is a land use decision is
4 insufficient to establish that such is the case.

5 Petitioners’ statutory references also do not assist us in determining if we
6 have jurisdiction over the hearings officer’s decision. ORS 197.825(1), *see n*
7 1, merely states that LUBA has jurisdiction over land use decisions; the
8 relevant jurisdictional question is whether the hearings officer’s decision
9 qualifies as a land use decision. That issue is governed by ORS 197.015(10), a
10 statute that petitioners neither cite nor address. Petitioners cite two other
11 statutes. ORS 197.320 grants certain authority to the Land Conservation and
12 Development Commission, and ORS 34.102(3) authorizes circuit courts to
13 transfer writ of review proceedings to LUBA, in the event the writ of review
14 proceedings seek review of a land use decision. Neither of those undeveloped
15 statutory references assist us in determining if the hearings officer’s decision is
16 a land use decision.

17 We have reviewed petitioners’ 43-page petition for review. That petition
18 for review asserts a large number of arguments on the merits, under three
19 assignments of error. None of those arguments establish that the hearings
20 officer’s decision that is the subject of this appeal qualifies as a land use
21 decision.

22 Since Jackson County is a local government and the challenged decision
23 is a final decision that concerns the application of Jackson County Land
24 Development Ordinance (LDO), which is a land use regulation, we understand
25 the county to concede that the hearings officer’s decision falls within the ORS
26 197.015(10)(a) definition of “land use decision.” *See n* 2. But ORS

1 197.015(10)(b) sets out a number of exceptions to the ORS 197.015(10)(a)
2 definition of “land use decision,” which make certain decisions that might
3 otherwise qualify as a “land use decision,” exempt from the ORS
4 197.015(10)(a) definition of “land use decision.” One of those exceptions is a
5 local government decision “[t]hat is made under land use standards that do not
6 require interpretation or the exercise of policy or legal judgment[.]” ORS
7 197.015(10)(b)(A). After the petition for review was filed, the county moved
8 to dismiss the appeal, contending that the hearings officer’s decision in this
9 matter required no “exercise of policy or legal judgment,” and therefore is
10 exempt from the ORS 197.015(10)(a) definition of “land use decision,” under
11 ORS 197.015(10)(b)(A).

12 In arguing that the hearings officer’s decision is exempt under ORS
13 197.015(10)(b)(A), the county contends that the hearings officer simply
14 consulted the LDO to determine whether petitioner’s parking and storage of
15 commercial and towed vehicles on the RR-5 zoned property is permitted under
16 the LDO. We understand the county to argue that it required no “exercise of
17 policy or legal judgment” to determine that parking and storage of commercial
18 and towed vehicles is not among the uses authorized by the LDO in the RR-5
19 zone. The county contends that other county zones permit an “impound
20 facility” and “equipment storage,” but the RR-5 zone does not.

21 Petitioners offer no response that we can understand to the county’s
22 contention that the hearings officer’s decision qualifies for the ORS
23 197.015(10)(b)(A) exception to the ORS 197.015(10)(a) definition of “land use
24 decision.” Petitioners’ first response argues the hearings officer committed
25 procedural errors and rendered an unconstitutional decision that is not
26 supported by substantial evidence. Petitioners’ first response does not address

1 the county’s jurisdictional challenge. Petitioners’ amended response merely
2 adds a reference to their jurisdictional statement in the petition for review,
3 which we have already determined is not sufficient to establish that we have
4 jurisdiction in this matter. Petitioners’ amended response also refers generally
5 to their arguments in their petition for review, which was filed before, and is
6 simply not responsive to, the argument presented in respondent’s motion to
7 dismiss. We therefore agree with the county that petitioners have failed to
8 establish that LUBA has jurisdiction to proceed with a decision on the merits in
9 this appeal.

10 Under OAR 661-010-0075(11)(b), petitioners had 14 days from the date
11 the county’s motion to dismiss was filed to file a conditional motion to transfer
12 this appeal to circuit court, in the event LUBA sustained the jurisdictional
13 challenge. Petitioners did not file a motion to transfer.³ Therefore, this appeal
14 is dismissed. *Miller v. City of Dayton*, 22 Or LUBA 661, 666, *aff’d* 113 Or
15 App 300, 833 P2d 299, *rev den* 314 Or 573, 840 P2d 1295 (1992).

³ In their petition for review, petitioners contend:

“* * * The Petitioners appeared in the County Quasi Judicial hearing and are appealing the decision with LUBA and concurrently with Circuit Court in accordance with Jackson County Code section 294.21 and By Writ of Review ORS 34.010 to 34.100 * * *.” Petition for Review 4.

It may be that petitioners did file a petition for writ of review with the Jackson County Circuit Court, although no party has advised LUBA of the status of any such circuit court writ of review. Respondent advised LUBA in its July 8, 2014 motion to dismiss that, as of the date of the filing of the motion to dismiss, the county had not been served with a petition for writ of review.