BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

EDWARD L. REED,
Petitioner,

06/26/18 PM 2:12 LUBA

vs.

JACKSON COUNTY,
Respondent,

and

ROBERT E. WAGNER,
Intervenor-Respondent.

LUBA No. 2018-015

FINAL OPINION
AND ORDER

Appeal from Jackson County.

H. M. Zamudio, Medford, filed the petition for review. William Hugh Sherlock, Eugene, argued on behalf of petitioner.

Joel C. Benton, Jackson County Counsel, Medford, filed a response brief and argued on behalf of respondent.

Christian E. Hearn, Ashland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Davis Hearn Anderson & Turner, P.C.

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

REMANDED 06/26/2018

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 an application for outdoor marijuana production on land zoned Woodland Resource.

FACTS

Intervenor-respondent (intervenor) applied for authorization for a 10,000-square foot outdoor area for marijuana production, and placement of a two-square-yard waste receptacle. The property that is the subject of the application is a 13.85-acre parcel zoned Woodland Resource (WR), located southeast of the city of Ashland on Old Siskiyou Highway. Petitioner owns property adjacent to the subject property.

The county has adopted special regulations governing marijuana production in the Forest zone, including the WR zone. Jackson County Land Development Ordinance (LDO) 3.13. We discuss some of those regulations later in this opinion. County planning staff approved the application with conditions, and this appeal followed.

FIRST ASSIGNMENT OF ERROR

In his first assignment of error, petitioner argues that the county committed a procedural error by processing the application according to a Type 1 process at LDO 3.1.2, which does not require notice to nearby property owners, instead of processing the application under the Type 2 process at LDO 3.1.3, which requires notice of the decision and the opportunity for a hearing.

Petitioner argues that his substantial rights were prejudiced because he was entitled to notice of the decision as an adjacent property owner, and the opportunity to request a hearing. ORS 197.835(9)(a)(B).

LDO 3.13.2(A) provides that "[a]ll marijuana production shall be permitted through a Type 1 land use authorization per LDO Section 3.1.2." LDO 3.1.2 describes the Type 1 process:

> "Type 1 uses are authorized by right, requiring only non-discretionary staff review to demonstrate compliance with the standards of this Ordinance. A Zoning Information Sheet may be issued to document findings or to track progress toward compliance. Type 1 authorizations are limited to situations that do not require interpretation or the exercise of policy or legal judgment. Type 1 authorizations are not land use decisions as defined by ORS 215.402."[1]

LDO 3.1.3 describes the Type 2 process:

> "Type 2 uses are subject to administrative review. These decisions are discretionary and therefore require notice of decision and opportunity for hearing."

Intervenor and the county respond that the decision to approve the application did not involve land use standards that "require interpretation or the

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[1] As we noted in *Del Rio Vineyards, LLC v. Jackson County*, 68 Or LUBA 553, 554 *n* 1 (2013), notwithstanding the reference to ORS 215.402 in LDO 3.1.2, ORS 215.402 does not contain a definition for "land use decision." ORS 215.402(4) does contain a definition for "permit," as relevant here:

> "'Permit' means 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[.]"

exercise of policy or legal judgment." Accordingly, intervenor argues, under ORS 197.015(10)(b)(A), LUBA does not have jurisdiction over the decision. ORS 197.015(10)(b)(A) is commonly referred to as the "ministerial decision" exception to LUBA's jurisdiction.[2]

LDO 3.1.2 is inartfully worded. The third sentence of LDO 3.1.2 uses language that is almost identical to the language in ORS 197.015(10)(b)(A) to define Type 1 decisions as including decisions that do not "require interpretation or the exercise of policy or legal judgment." However, the first sentence of LDO 3.1.2 appears to specify that Type 1 decisions also include decisions that do not require the exercise of discretion ("requiring only non-discretionary staff review"). And still, the final sentence of LDO 3.1.2 includes a pronouncement that Type 1 decisions are not "land use decisions as defined in ORS 215.402," a statute which, as we explain in the margin, does not actually include a definition for "land use decisions" but does include a definition for "permit." *See* n 1. While all "permit" decisions as defined at ORS 215.402 are land use decisions, not all land use decisions as defined at ORS 197.015(10)(a)(A) are "permits." *See Tirumali v. City of Portland*, 41 Or LUBA 231, 239-42 (2001), *aff'd* 180 Or App 613, 45 P3d 519, *rev den* 334 Or

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[2] ORS 197.015(10)(b)(A) provides that a "land use decision" does not include a decision:

> "That is made under land use standards that do not require interpretation or the exercise of policy or legal judgment[.]"

632 (2002) (a building permit issued under ambiguous land standards is a "land use decision" as defined at ORS 197.015(10)(a) because it is issued under standards that require interpretation, but the building permit is not necessarily a "permit" as defined at ORS 227.160(2), the cognate to ORS 215.402(4)).

Conversely, LDO 3.1.3 fairly clearly implements the statutory permit requirements at ORS 215.416. LDO 3.1.3 requires "discretionary" decisions to be subject to notice and an opportunity for a hearing.

We interpret LDO 3.1.2 in context with LDO 3.1.3 to mean that the county's Type 1 process is designated as the appropriate process for all non-discretionary decisions (*i.e.,* decisions that are not "permits" as defined in ORS 215.402(4)). The county's Type 1 process is also *intended* to encompass decisions subject to standards that do not require interpretation or the exercise of policy or legal judgment, *i.e.*, do not result in decisions that are "land use decisions" subject to LUBA's jurisdiction. However, it is extremely difficult to write land use standards that, as applied to all possible circumstances, will *never* require interpretation or the exercise of legal judgment. Where particular circumstances arise that reveal an ambiguity in an applicable land use approval standard, or reveal the need to exercise legal judgment, one consequence is that the resulting decision is not subject to the "ministerial" exception at ORS 197.015(10)(b)(A) or (B), and is therefore a "land use decision" that can be appealed to LUBA for review. 41 Or LUBA at 241. But it does not necessarily follow in such circumstances that the county is required to process such

decisions under the Type 2 procedures at LDO 3.1.3. As noted, the Type 2 procedures at LDO 3.1.3 are intended for applications for discretionary approval of "permit" decisions. It is not a process that is appropriate, or required, for non-discretionary, non-permit decisions on uses allowed by right under the code. Further, where a non-permit decision is subject to standards that, as applied to particular circumstances, require interpretation or the exercise of legal judgment, the ambiguity or need to exercise legal judgment will typically not arise or be recognized until late in the process, perhaps only in the final decision, when the standards are first applied to the particular circumstances. We do not interpret LDO 3.1.2 to require the county, in such circumstances, to halt the Type 1 process, and go back and reprocess the application under the (inapplicable) Type 2 process.

Turning to the present case, for the reasons explained below, we conclude that the county's decision required interpretation and the exercise of legal judgment, and accordingly, it is not subject to the exception to LUBA's jurisdiction at ORS 197.015(10)(b)(A). We therefore reject intervenor's argument that LUBA lacks jurisdiction over this appeal. However, as we explain below, we also conclude that petitioner has not established that the application required the county to exercise discretion in the sense that the term is used in ORS 215.402 and LDO 3.1.3, and for that reason, the county properly relied on the Type 1 process at LDO 3.1.2, and was not required to

process the decision according to the Type 2 process in LDO 3.1.3 for decisions that are discretionary.

One section of the decision includes a "check the box" finding that "[t]he General Review Standards of Chapter 9 have been reviewed and have been found Met." Record 4. A box is also checked next to the phrase "Key Issue." *Id.* The decision then finds that:

> "**Key Issue**: The subject property has an existing access easement that crosses Tax Lots 200, 201, 202, 203, 900, 1102, and 1301. Evidence of the legal access is located in the record of File ZON2012-01535(FC). The submitted site plan does not indicate a designated parking area. The Jackson County 2016 air photo indicates that there is adequate area on the property, west of the approved dwelling site to accommodate any necessary off-street parking." Record 5 (emphasis in original).

The decision concludes that the application met LDO "Section [] * * * 9.4." *Id.* LDO 9.4 is a section of the LDO entitled "Off-Street Parking and Loading" and it includes eleven subsections. LDO 9.4.2 and Table 9.4-1 provide minimum and maximum off street parking spaces for different use categories, including, as relevant here "Agriculture, Commercial Use." Table 9.4-1 is ambiguous, because the comma in the table means that the county could intend to require off-street parking for all agriculture, including agriculture that is also a commercial use, or it could intend to require off-street parking for only agriculture that is also a commercial use. In determining that the specific standards at LDO 9.4.2 and Table 9.4-1 were met, the county engaged in interpretation of Table 9.4-1 and exercised legal judgment.

However, we disagree with petitioner that the county's exercise of legal judgment in the circumstances presented by this application necessarily means that the county exercised discretion and was therefore required to use the Type 2 process at LDO 3.1.3. Petitioner has not identified any LDO provisions that the county applied or should have applied that require the county to exercise discretion as that term is used in ORS 215.402 or LDO 3.1.3. As explained above, our conclusion — that application of the LDO standards in the present case required the exercise of legal judgment for purposes of ORS 197.015(10)(b)(A) — means only that the county's decision is not excluded from the definition of "land use decision" and hence LUBA's review jurisdiction. That conclusion does not compel the conclusion that the county's decision is also a statutory "permit" as defined at ORS 215.402(4) and thus the type of decision for which there is a statutory obligation to provide notice and an opportunity to request a hearing under ORS 215.416 or the county's implementation of that statute at LDO 3.1.3.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

LDO 9.5.5 is a section of the LDO that contains "mandatory standards for access to all new and existing structures located on existing lawfully established units of land except as exempted through Section 9.5.5(B)." The county found that "[t]he subject property has an existing access easement * * * [and] [e]vidence of the legal access is located in the record of File ZON2012-

01535(FC)," and concluded that LDO 9.5.5 was met. Record 5. In his second assignment of error, petitioner argues that the county erred in relying on the access easement because the access easement is not a part of the record, was not included in the application or the county's files for the subject application, but rather was included in a planning file for a different decision. Accordingly, petitioner argues, the county's decision that LDO 9.5.5 is met is not supported by substantial evidence in the record.

The county responds that the decision makes clear that the access easement was reviewed by the decision maker, the county planner, prior to issuing the decision.[3] However, the county does not appear to dispute that the record that was transmitted to LUBA and the parties does not include a copy of the easement. Accordingly, we agree with petitioner that the county's decision that LDO 9.5.5 is met based on the easement is not supported by substantial evidence in the record.

The second assignment of error is sustained.

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[3] In a section of the response brief that responds to petitioner's third assignment of error, the county takes the alternative position that LDO 9.5.5 does not apply to the application because there are no new or existing structures that are proposed or approved by the decision. Respondent's Response Brief 9. However, the problem with that response is that the decision found that LDO 9.5.5 was met, which assumes that LDO 9.5.5 applies to the application. That assumption may be incorrect, but nothing in the decision or record provides a basis for LUBA, on appeal, to resolve the county's alternative argument that LDO 9.5.5 does not apply.

THIRD AND FOURTH ASSIGNMENTS OF ERROR

As explained above, LDO 9.4 is a section of the LDO entitled "Off-Street Parking and Loading" and it includes eleven subsections. The county found that LDO 9.4 was met. Record 5. In his third and fourth assignments of error, petitioner argues that the county's decision that the application complies with LDO Section 9.4 is not supported by substantial evidence in the record, and that the findings are inadequate to explain the county's conclusion. According to petitioner, LDO 9.4.1(A) required intervenor to submit a parking and grading plan for approval; LDO 9.4.2(C) required the county to determine minimum off-street parking standards for the proposed agricultural production; and LDO 9.4.4(A) required the county to determine the total minimum off-street parking required for all uses on the property.[4] Petitioner also argues that LDO 9.4.8 requires off-street loading spaces because the agricultural use will require regular deliveries by trucks exceeding 10 tons gross vehicle weight.[5] Petitioner points out that the application proposed and the county approved three water tanks, with water to be delivered by a water service, and argues that

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[4] LDO 9.4.2 and Table 9.4-1 provide minimum and maximum off street parking spaces for different use categories, including, as relevant here "Agriculture, Commercial Use."

[5] LDO 9.4.8 provides in relevant part that "[o]ff-street loading spaces will be provided as required by Off-Street Parking Schedule 'A' when the use will require deliveries by trucks exceeding 10 tons gross vehicle weight. Where off-street loading is required, it will comply with the standards of this Section."

the county was required to adopt findings regarding the dimensions and location of off-street loading areas.

The county responds that the LDO does not require any off-street parking, because LDO 9.4.2(A) - Table 9.4-1 requires off-street parking only if "Agriculture" is also a "Commercial Use." The county cites the definition of "Commercial Use" in LDO 13.3(49), which is defined as "[t]he retail sale of products or services, including offices." The application proposes only the outdoor growing of marijuana, and thus, the county maintains, because the proposed agriculture is marijuana production and not "retail sale of products or services," no off-street parking is required. In a similar vein, the county argues that because no off-street parking spaces are required, no off-street loading spaces are required and LDO 9.4.8 does not apply.

The problem with the county's response is that the county's interpretation in its response brief of LDO 9.4.2(A) and Table 9.4-1 is not part of the findings, and the county's decision takes the position that there is "adequate area * * * to accommodate any necessary off-street parking." Record 5. That conclusion seems to assume that some off-street parking may be necessary. The decision also concludes that at least some requirements of LDO 9.4 apply to the application. The decision found in relevant part:

> "The submitted site plan does not indicate a designated parking area. The Jackson County 2016 air photo indicates that *there is adequate area on the property, west of the approved dwelling site to accommodate any necessary off-street parking.*" *Id.* (emphasis added).

The decision then concludes that "the proposed farm use (Marijuana Production) [complies] with the standards of [LDO] 9.4[.]" *Id.* On remand, the county should address whether the parking standards in LDO Table 9.4-1, Schedule C apply and if they apply, the minimum parking spaces required and whether these standards are met.

We also agree with petitioner that the loading standards at LDO 9.4.8 potentially apply to intervenor's application, depending on whether LDO Table 9.4-1, Schedule C applies, given the evidence that the water for the water tanks will be supplied by delivery trucks. On remand, the county should address the issue of whether LDO 9.4.8 applies, and if it does, whether it is met.

The third and fourth assignments of error are sustained.

The county's decision is remanded.