BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DONALD G. CAMPBELL
and DAWN BURROW,
Petitioners,

vs.

COLUMBIA COUNTY,
Respondent,

and

DEER POINTE MEADOWS, LLC,
Intervenor-Respondent.

LUBA No. 2018-107

FINAL OPINION
AND ORDER

Appeal from Columbia County.

Andrew H. Stamp, Lake Oswego, represented petitioners.

Robin Rojas McIntyre, Assistant County Counsel, St. Helens, represented respondent.

Timothy V. Ramis, Lake Oswego, represented intervenor-respondent.

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

TRANSFERRED 01/17/2019

You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal an email message from the county to a property owner lifting a previously imposed suspension of new mobile home placements and occupancy of vacant mobile homes in a mobile home park.

MOTION TO INTERVENE

Deer Pointe Meadows, LLC (intervenor) moves to intervene on the side of the respondent. No party opposes the motion and it is allowed.

FACTS

The subject property is a 46-space mobile home park that is a lawful, verified nonconforming use in the county's Rural Residential – 5 acre minimum (RR-5) zone. The mobile home park is the same park that was at issue in our January 2013 decision in *Campbell v. Columbia County*, 67 Or LUBA 53 (2013). That decision affirmed the county's issuance of a land use compatibility statement (LUCS), which concluded that approval of new septic improvements in the mobile home park is consistent with the Columbia County Zoning Ordinance (CCZO), and also approved the septic improvements as an alteration of a nonconforming use.

In August 2016, the existing, improved septic system, which is a Water Pollution Control Facility (WPCF) approved under an existing permit issued by the Oregon Department of Environmental Quality (DEQ), failed in part. The

failure was reported by the property owner's consultant to DEQ in November 2016.

In January 2017, DEQ issued the property owner a "Warning Letter with Opportunity to Correct." It gave the owner three solutions and instructed him to pick and implement one of those solutions and complete all construction by September 30, 2017.[1]

On February 22, 2017, based on the DEQ warning letter, the county issued to the owner a "Temporary Suspension of Mobile Home/Recreational Vehicle Placements, Replacements, New Occupancy in Deer Pointe Meadows Mobile Home Park." Record 24-25. That letter suspended authorization of the following:

> "1. Siting permits for the placement of mobile homes on vacant spaces within the mobile home park.
>
> "2. Siting permits for the replacement of existing mobile homes with larger mobile homes which may be expected to increase sewage flow above current levels.
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> "3. Authorization for the occupancy of existing sited mobile homes which are leased by you and are currently vacant.
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> "4. Authorization for the occupancy of existing RV spaces which are leased by you and are currently vacant." *Id.*

The letter further states:

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[1] On November 1, 2017, DEQ granted a previously requested 11-month extension of the deadline to complete the septic improvements from September 30, 2017 to August 31, 2018. Record 5-7.

"The withholding of authorization of the above listed actions in [the mobile home park] is based on [OAR] Chapter 340, Division, 71, Section 130(9), which reads as follows:

"'(9) Plumbing fixtures connected. All plumbing fixtures in dwellings, commercial facilities, and other structures from which sewage is or may be discharged must be connected to and discharge[d] into an approved area-wide sewage system or **an approved onsite system that is not failing**. (emphasis added).'

"Authorization for these actions is suspended until DEQ provides written verification to Columbia County that one or more of the three corrective actions in their above referenced 1/30/17 letter have been completed * * *." *Id.*

Construction of the septic improvements commenced and continued, and on July 23, 2018, DEQ issued a letter to the property owner notifying him that the corrective actions specified in DEQ's January 2018 letter had been completed.[2] The July 23, 2018, letter was copied to the county's Department of Land Development Services.

On August 13, 2018, the county's Land Development Services Director sent an email to the property owner stating that, based on the July 23, 2018, DEQ letter, "I am lifting the February 22, 2017 'Temporary Suspension of Mobile

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[2] In June 2017, the county issued a LUCS decision to DEQ, confirming that the proposed septic improvements are permitted lawful uses as part of a proposed modification of the owner's WPCF permit. Petitioners appealed that LUCS decision to the board of county commissioners. The board of county commissioners held a hearing in August 2017 and in November 2017, issued a decision upholding issuance of the LUCS. Petitioners did not appeal that LUCS decision further.

Home/Recreational Vehicle Placements, Replacements, New Occupancy in Deer Pointe Meadows Mobile Home Park'* * * effective on August 14, 2018." Record 2. Petitioners subsequently filed this appeal of the August 13, 2018, email.[3]

MOTION TO TAKE EVIDENCE

After the record was received, petitioners filed a motion to take evidence not in the record, to address jurisdictional issues that petitioners anticipated the county would subsequently raise, including whether petitioners timely filed their appeal under ORS 197.830(3). The county and intervenor (respondents) subsequently moved to dismiss the appeal, arguing that the challenged decision is not a "land use decision" as defined in ORS 197.015(10)(a), and that even if the decision qualifies as a land use decision, LUBA lacks jurisdiction over the decision for a number of other reasons.

Respondents object to the motion to take evidence on the basis that LUBA lacks jurisdiction over the appeal. In one portion of the motion to take evidence, petitioners take the position that the motion is submitted in order to establish petitioners' standing to appeal the challenged decision. Motion to Take Evidence 17-20. Although the bulk of petitioners' motion to take evidence includes many facts and legal arguments that petitioners have failed to establish are the proper

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[3] Petitioners are adjacent land owners. On August 14, 2018, one of the petitioners observed an RV trailer driving past his house into the mobile home park, and subsequently obtained a copy of the August 13, 2018, email that is the subject of this appeal. Petitioners filed their appeal of the email within 21 days of August 14, 2018. Timeliness of the appeal is not challenged by respondents.

subject of a motion to take evidence, and are not related to petitioners' standing, those facts and legal arguments assist us in resolving the jurisdictional issue presented in respondents' motion to dismiss. *Murray v. Multnomah County*, 56 Or LUBA 370 (2008) (LUBA may consider documents that are not in the record, even without a motion to take evidence under OAR 661-010-0045, if a party offers such documents for the limited purpose of determining whether LUBA has jurisdiction over the challenged decision). Accordingly, the motion to take evidence is allowed.

However, for the reasons set forth below, we conclude that the August 13, 2018, email is not a "land use decision" as defined in ORS 197.015(10)(a)(A).

JURISDICTION

ORS 197.015(10)(a)(A) defines "land use decision" as:

> "A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
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> "(i) The goals;
>
> "(ii) A comprehensive plan provision;
>
> "(iii) A land use regulation; or
>
> "(iv) A new land use regulation[.]"

LUBA has held that a decision qualifies as a "land use decision" under ORS 197.015(10)(a)(A) if it either applies, or should have applied, one of the four bodies of land use legislation listed in the statute, *i.e.*, the statewide planning goals, a comprehensive plan provision, or an existing or new land use regulation.

Jaqua v. City of Springfield, 46 Or LUBA 566, 574 (2004). ORS 197.015(11) defines "land use regulation" to mean "any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan."

Petitioners argue that the county land development services director should have applied the provisions of CCZO 1506.4, which implement ORS 215.130(7), to its decision to lift the suspension of authorizing siting permits for vacant spaces.[4] Petitioners argue that the provisions of CCZO 1506.4 apply to all nonconforming uses that operate in the county. Accordingly, petitioners argue, in lifting the previous suspension, the county was required to determine whether a lawful nonconforming use, the mobile home park, has been discontinued for more than one year when new placements and use of existing vacant mobile homes were suspended for 19 months, from February 2017 to August 2018.[5] Petitioners also argue that the August 13 email approved "development" in

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[4] CCZO 1506.4 provides in relevant part:

> "Reinstatement of a Discontinued Use: A Non-Conforming Use may be resumed if the discontinuation is for a period less than 1 year. If the discontinuance is for a period greater than 1 year, the building or land shall thereafter be occupied and used only for a conforming use."

[5] Petitioners argue that when the previously imposed suspension of placements of new mobile homes and use of vacant mobile homes had been in place for more than one year, CCZO 1506.4 automatically applied to the county's decision to allow further occupancy of vacant spaces.

authorizing the reoccupancy of previously vacant spaces, and therefore the county should have required intervenor "to submit an application to re-verify the non-conforming use in light of the discontinuance." Motion to Take Evidence 20.

Respondents argue that the email lifting the suspension of the placement of mobile homes is not a "land use decision," and did not approve development of any kind. Respondents argue that, like the initial February 22, 2017, suspension order, the August 13 email relies on OAR 340-071-0130(9), the DEQ rule that requires that a plumbing fixture be attached to a septic system "that is not failing." Respondents point out, correctly, that the DEQ rule is not a land use regulation. Respondents take the position that the challenged email is not a land use decision because it merely indicates the county's recognition of DEQ's conclusion that all corrective actions had been taken and that the need for suspension of authorization of future placements in vacant spaces no longer existed because such mobile homes would be connected to a septic system that was not failing.

We agree with respondents. First, we reject petitioners' argument that the county was required to apply CCZO 1506.4 when it notified the property owner that the county had received DEQ's notice that corrective action on the septic system had been completed, and based on receipt of that notice lifted the previously-imposed suspension of future authorization of siting permits for mobile homes. The nonconforming use provisions of the CCZO apply in the context of an application for development of a nonconforming use under the

CCZO, in the context of a code enforcement proceeding initiated under the Columbia County Code Enforcement Ordinance (CCCEO), or in the context of other proceeding initiated pursuant to ORS 215.185. However, absent any development application, enforcement or other proceeding under the CCZO or the CCCEO, or under ORS 215.185, the county was not required to determine *sua sponte* whether intervenor's nonconforming use had been discontinued under CCZO 1506.4 when it lifted the suspension order it had imposed pursuant to OAR 340-071-0130(9). The initial February 2017 suspension letter cites the DEQ rule at OAR 340-071-0130(9)as authority for the county's action, and it is reasonably clear that the county relied on the same DEQ rule, and nothing else, to lift the suspension. In so doing, the county was not required to consider whether the non-conforming use provisions of the CCZO were implicated.

Further, we reject petitioners' argument that the August 13 email authorized "development." As respondents point out, and petitioners do not dispute, placement of a mobile home requires an approved building permit application, which may or may not be a land use decision, a point on which we express no opinion here. The email merely lifted the county's previous suspension of processing an application for a building permit based on the property's lack of compliance with OAR 340-071-0130(9).

In summary, in notifying the property owner that the county had lifted the suspension order it had previously imposed under OAR 340-071-0130(9), the county was not required to apply the nonconforming use provisions in CCZO

1506.4, and therefore the challenged decision is not a land use decision. Accordingly, LUBA lacks jurisdiction over the challenged decision.

MOTION TO TRANSFER

Petitioners filed a conditional motion to transfer the appeal to circuit court in the event LUBA determines that it lacks jurisdiction over the challenged decision because it is not a land use decision. Respondents do not oppose the motion and it is granted. ORS 34.102(4); OAR 661-010-0075(11)(a).

The appeal is transferred to Columbia County Circuit Court.