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

RONALD G. SCHOFIELD and
ERIKA E. SCHOFIELD,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent,

and

SHELLEY WETHERELL,
Intervenor-Respondent.

LUBA No. 2019-116

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Stephen Mountainspring, Roseburg, represented petitioners.

Paul E. Meyer, Roseburg, represented respondent.

Andrew Mulkey, Portland, represented intervenor-respondent.

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

TRANSFERRED 02/14/2020

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

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioners appeal a letter from county counsel to petitioners confirming that a nonfarm dwelling approval issued in 2015 had expired.

MOTION TO INTERVENE

Shelley Wetherell (intervenor) moves to intervene on the side of the respondent in this appeal. No party opposes the motion and it is granted.[1]

BACKGROUND

This is the fourth time that a county action concerning the subject property, which is owned by petitioners, has come before LUBA. We reiterate the pertinent background from our prior cases.

The subject property is comprised of approximately three acres and is zoned Farm Forest, which is an exclusive farm use (EFU) zone. Oregon law preserves land for agricultural uses by restricting uses allowed in EFU zones to farm uses and enumerated nonfarm uses. *See* ORS 215.203(2)(a) (defining "farm use"); ORS 215.283 (providing nonfarm uses permitted in EFU zones in nonmarginal lands counties). Outside the Willamette Valley, a nonfarm dwelling may be allowed in the EFU zone if "[t]he dwelling is situated upon a lot or parcel or portion of a lot or parcel that is generally unsuitable land for the production of farm crops and livestock or merchantable tree species, considering the terrain,

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[1] Because we grant the motion to intervene, we do not address intervenor's alternative motion to participate as *amicus*.

adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract." ORS 215.284(2)(b).

In 2005, the prior property owner, Umpqua Pacific Resources Company, Inc. (Umpqua) obtained county approval for a nonfarm dwelling on a portion of the subject property that the county determined is generally unsuitable for farm use. In *Wetherell v. Douglas County*, 51 Or LUBA 699, *aff'd*, 209 Or App 1, 146 P3d 343 (2006) (*Wetherell I*), we remanded the county's decision. Among other things, we concluded that, in addition to the nonfarm dwelling, improvements serving the nonfarm dwelling—such as driveways, wells, septic systems, and drain fields—must also be located on land that is generally unsuitable for farm use under ORS 215.284(2)(b). We remanded the county's approval and instructed the county to adopt findings explaining whether that regulation was satisfied. *Wetherell I*, 51 Or LUBA at 716. The Court of Appeals affirmed our decision that substantial evidence failed to support the county's conclusion that the land at issue was unsuitable for farm use. 209 Or App at 5–6. The court did not address whether improvements serving the nonfarm dwelling must also be located on land that is generally unsuitable for farm use.

On remand, the county did not require that the well, septic system, and driveway serving the dwelling be located on the generally unsuitable portion of the subject property. Wetherell, the intervenor in this appeal, appealed that decision to LUBA. *Wetherell v. Douglas County*, 56 Or LUBA 120 (2008) (*Wetherell II*). We concluded that we erred in *Wetherell I* regarding the driveway,

and that the driveway did not need to be located on the generally unsuitable portion of the property. However, we again remanded for the county to adopt findings explaining how the well and septic system would be located on the generally unsuitable portion of the subject property. *Id.* at 136–37.

On remand for the second time, intervenor offered evidence that in 2006 Umpqua had developed a well, septic tank, and drain field on a portion of the subject property that is suitable for farm use, and intended to connect the proposed nonfarm dwelling to those improvements. The county declined to reopen the record to receive that evidence and again approved the nonfarm dwelling. That decision included the following condition of approval:

> "The dwelling and essential or accessory improvements or structures to be built or installed in conjunction with the dwelling (except for a driveway providing access to the dwelling), including the service lines connecting the dwelling to the water system and the septic system, will be located on the unsuitable portion of the property."

Intervenor appealed that decision to LUBA, arguing, among other things, that the above-quoted condition was insufficient to ensure that the well and septic system serving the nonfarm dwelling would be situated on generally unsuitable land. We agreed with intervenor that remand was necessary for the county to eliminate ambiguity in that condition. *Wetherell v. Douglas County*, 57 Or LUBA 434, 441–42 (2008) (*Wetherell III*), *aff'd*, 26 Or App 320, 203 P3d 300 (2009).

In *Wetherell III*, intervenor argued that the county erred by denying her request to reopen the record. We denied that assignment of error and again

explained that the septic system and water system that serve the nonfarm dwelling must be located on the generally unsuitable portion of the property. "So long as the challenged decision clearly imposes that requirement, it does not matter whether the applicant has taken actions while this matter has been pending that may be inconsistent with that limitation. Such actions, if they have occurred or if they do occur in the future, may provide a basis for an appropriate enforcement action[.]" *Wetherell III*, 57 Or LUBA at 440. We concluded:

> "In hopes of finally putting this matter to rest, we now hold for the third time that the water system and the septic system that will be needed to serve the disputed nonfarm dwelling must be located entirely on the .3-acre generally unsuitable portion of the property. No portion of those systems can be located on the suitable portion of the property. If intervenor chose to proceed with construction of portions of a septic system and a well and water lines while this matter has been pending before the county and LUBA, those septic and water facilities can only be used by the nonfarm dwelling if the entire water system and septic system that ultimately serve the nonfarm dwelling are located on the generally unsuitable portion of the property. If they are not located entirely on the .3-acre generally unsuitable portion of the property, the disputed nonfarm dwelling may not be connected to those systems. Because the challenged nonfarm dwelling decision does not make that limitation clear, and in fact seems to have been drafted to make that limitation ambiguous, another remand is required so that the county can eliminate the ambiguity." *Id.* at 442.

Meanwhile, in 2008, while *Wetherell III* was pending, petitioners obtained a building permit and constructed the nonfarm dwelling. Petitioners executed and recorded in the county official records a "Disclaimer Covenant for Issuance of a Planning Authorization and Building Permit" acknowledging that the nonfarm

dwelling approval was subject to a pending LUBA appeal and that future decisions may require them to remove the dwelling. NITA, Exhibit, page 3.[2] Petitioners apparently connected the nonfarm dwelling to the well, septic tank, and drain field that were constructed prior to the nonfarm dwelling and are situated on a portion of the subject property that is suitable for farm use. MTD, Exhibit 1, pages 4–5.

In May 2015, on remand from our decision in *Wetherell III*, the board of county commissioners again approved the nonfarm dwelling, amending the condition of approval to comply with LUBA's remand. Amended Condition 1 (Condition 1) provides:

> "The dwelling, and essential or accessory improvements or structures (except for a driveway providing access to the dwelling), including the entire water system and the entire septic system serving the dwelling, will be located on the generally unsuitable portion of the property." NITA, Exhibit, page 7.

On April 12, 2019, a county planner sent petitioners a letter, explaining that the nonfarm dwelling "approval required that certain conditions be met prior to the expiration of the approval period. Our records indicate that the conditions have not yet been met. The approval period will expire on May 20, 2019." MTD, Exhibit 1, page 1 (boldface omitted). The county planner invited petitioners to

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[2] We issue this decision prior to settling the record. We refer to the documents attached to the parties' pleadings and abbreviate notice of intent to appeal (NITA) and motion to dismiss (MTD).

submit a written extension request and enclosed a one-page extension request form. *Id.*

In a letter dated April 19, 2019, petitioners responded to the county planner contending that they had satisfied all conditions of approval and that Condition 1 did not require any specific action, including construction or relocation of a water and septic system on the unsuitable portion of land. Petitioners contended that there was no need for petitioners to request an extension of the May 2015 nonfarm dwelling approval. *Id.* at 3–4. Petitioners argued that the water and septic systems that serve the nonfarm dwelling are "lawfully authorized by the County and were installed under a completely separate land use action that was never appealed, and thus is unrelated to the subject nonfarm dwelling." *Id.* at 4.

It is not clear from the documents before us what, if anything, transpired between petitioners and the county planning department between April and October 2019. On October 14, 2019, county counsel sent a letter to petitioners (county counsel letter) explaining that the file had been referred to county counsel and that the county's May 2015 decision "made it clear" that "water and septic systems must be located entirely on the .3-acre generally unsuitable portion of the property." NITA, Exhibit, page 1. County counsel concluded that, because the nonfarm dwelling is connected to water and septic systems that are situated outside the generally unsuitable portion of the property, petitioners had not

satisfied Condition 1 and, thus, the May 2015 approval had expired.[3] Petitioners filed a NITA appealing the county counsel letter, describing the county counsel letter as a final county decision involving "revocation of a dwelling permit, or in the alternate, an interpretation of an existing approval." NITA 1.

JURISDICTION

As the party seeking review by LUBA, petitioners have the burden of establishing that LUBA has jurisdiction. *Billington v. Polk County*, 299 Or 471, 475, 703 P2d 232 (1985). As relevant here, LUBA has statutory authority to review "land use decisions." ORS 197.825(1). A "land use decision" is:

> "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;
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> "(ii) A comprehensive plan provision;
>
> "(iii) A land use regulation; or
>
> "(iv) A new land use regulation[.]" ORS 197.015(10)(a)(A).

Intervenor moves to dismiss the appeal and argues that the county counsel letter is not a "land use decision" as that term is defined in ORS 197.015(10)(a).[4]

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[3] County counsel further opined that the county counsel letter constitutes a land use decision that could be appealed to LUBA. NITA, Exhibit, page 2.

[4] Intervenor also argues that the April 12, 2019 county planner's letter is not a land use decision, and that, even if the April 12 letter is a land use decision, petitioners' appeal was untimely filed. We do not understand petitioners to

Intervenor argues that the county counsel letter does not apply any goal, plan, or land use regulation and does not approve or deny any land use activity. Rather, the letter merely reiterated the same information that the planning department provided in its April 12, 2019 letter—namely that petitioners had failed to satisfy Condition 1, and that the deadline to satisfy the condition expired in May 2019. MTD 10. For the reasons explained below, we agree with intervenor that the county counsel letter is not a land use decision and LUBA lacks jurisdiction over this appeal.

The May 2015 decision is the operative county decision that approved the nonfarm dwelling, imposed Condition 1, and commenced a four-year approval expiration period. The county counsel letter communicated to petitioners that, because Condition 1 had not been timely satisfied, the approval expired and was no longer valid. The county counsel letter addressed petitioners' contention that they were not required to satisfy Condition 1 within the approval period. "A decision that simply concludes that a condition of permit approval is satisfied or not satisfied, is violated or not violated, is not a land use decision as defined by ORS 197.015(10)(a), because it concerns only the application or interpretation of a permit condition of approval, not the application or interpretation of a land use regulation." *Noordhoff v. City of North Bend*, 65 Or LUBA 420, 422–23 (2012) (citing *Mar-Dene Corp. v. City of Woodburn*, 149 Or App 509, 515, 944 P2d 976

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challenge the April 12 letter in this appeal. We therefore do not further address the April 12 letter.

(1997)); *see also Leyden v. City of Eugene*, ___ Or LUBA ___ (LUBA 2019-009/010/012/013/016/017, July 23, 2019) (slip op at 25), *aff'd*, 300 Or App 403, 450 P3d 1050 ("a dispute over whether a prior condition of approval is satisfied does not give LUBA jurisdiction over a decision that is not otherwise a land use decision").

We have jurisdiction to consider an interpretation of a condition of approval only if the challenged interpretation necessarily concerns the application of land use regulations. *Mar-Dene Corp. v. City of Woodburn*, 33 Or LUBA 245, 251, *aff'd*, 149 Or App 509, 515, 944 P2d 976 (1997). Petitioners have the burden to establish LUBA jurisdiction and demonstrate that the challenged decision applied or should have applied any land use regulations. *Lindsey v. City of Eugene*, 37 Or LUBA 695, 699–700 (2000). Petitioners do not assert that the county counsel letter involves the application of land use regulations or identify any land use regulation that county counsel applied or should have applied. We conclude that the county counsel letter does not apply or concern the application of any land use regulation.[5]

Petitioners also argue that the county counsel letter does not fall within the so-called "ministerial exception" in ORS 197.015(10)(b)(A), which excepts from

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[5] The only land use regulation that the county counsel letter arguably may "concern" is a four-year approval validity regulation. No party cites any such regulation to us. There does not appear to be any dispute that the approval period is four years, or that the approval expires if conditions of approval are not satisfied during the approval period.

LUBA's review, decisions "made under land use standards that do not require interpretation or the exercise of policy or legal judgment." That argument, however, puts the cart before the horse because petitioners have not established that the county counsel letter concerns the application of any land use regulation and that therefore that the county counsel letter is a land use decision as defined in ORS 197.015(10)(a)(A). The ministerial exception can divest LUBA of jurisdiction over a decision that is otherwise a land use decision as defined in ORS 197.015(10)(a)(A). The ministerial exception does not generally establish whether a challenged decision concerned the application of a land use regulation. Therefore, petitioners' arguments regarding the ministerial exception do not assist them in establishing that the challenged decision is a land use decision.

The county counsel letter is not a land use decision. Thus, LUBA lacks jurisdiction to review it.

MOTION TO TRANSFER

Petitioners move to transfer the dispute to circuit court pursuant to ORS 34.102(4), which provides:

> "A notice of intent to appeal filed with the Land Use Board of Appeals pursuant to ORS 197.830 and requesting review of a decision of a municipal corporation made in the transaction of municipal corporation business that is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015 shall be transferred to the circuit court and treated as a petition for writ of review. If the notice was not filed with the board within the time allowed for filing a petition for writ of review pursuant to ORS 34.010 to 34.100, the court shall dismiss the petition."

Intervenor opposes the motion to transfer. Intervenor argues that dismissal, and not transfer, is the correct disposition of nonfinal decisions or moot proceedings, citing *Grabhorn v. Washington County*, 46 Or LUBA 672, 678 (2004). We conclude above that the challenged county counsel letter is not a land use decision because it does not concern the application of any land use regulation. In so concluding, we do not decide whether the county counsel letter is a final decision.

It is not clear to us that the issues raised in this appeal are moot. The apparent and ongoing dispute between petitioners and the county regarding petitioners' obligations under Condition 1 may have a practical effect. For example, the county or intervenor may commence an enforcement action requiring petitioners to remove the nonfarm dwelling and related improvements. Such an action may involve the county's interpretation of Condition 1. Accordingly, transfer to the circuit court is the appropriate disposition. *See Mar-Dene Corp.*, 33 Or LUBA at 252 (transferring appeal where decision did not involve the application of land use regulations, but LUBA observed that the parties' arguments could be relevant to enforcement proceedings).

The appeal is transferred.