

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

RICHARD N. MCDOUGAL,
Petitioner,

vs.

LANE COUNTY,
Respondent.

LUBA Nos. 2025-024/030

FINAL OPINION
AND ORDER

Appeal from Lane County.

Michael M. Reeder filed the petition for review and reply brief and argued on behalf of petitioner.

Anne C. Davies filed the respondent's brief and argued on behalf of respondent.

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

REMANDED

07/31/2025

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

NATURE OF THE DECISION

In these consolidated appeals, petitioner, the applicant below, challenges a county planning staff decision denying their Agricultural Building Self Certification application for two structures on the same lot on land zoned Nonimpacted Forest Lands (F-1) and Impacted Forest Lands (F-2) and a subsequent planning staff decision denying petitioner's local appeal of the denial decision.

MOTION TO TAKE OFFICIAL NOTICE

Our review is generally limited to the record. ORS 197.835(2)(a). However, we may take official notice of documents that (1) constitute officially cognizable law under ORS 40.090 and (2) have some relevance to the issues on appeal. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 688, 692 (2007); OAR 661-010-0046(1). A motion for official notice must explain "with particularity what the material sought to be noticed is intended to establish, how it is relevant to an issue on appeal, and the authority for notice under ORS 40.090." OAR 661-010-0046(2)(a).

Petitioner requests that we take official notice of the following three documents: (1) the Lane County Land Management Division handout "Agricultural Buildings for Farm or Forest Use & Equine Facilities" (handout); (2) the Land Management Division "TYPE I APPLICATION Zoning Determination Farm or Forest Operation Verification" form (form); and (3) the

1 case information printout from Lane County Circuit Court for case number
2 24CV20779 *Richard McDougal vs. Lane County* (circuit court case information).

3 Petitioner argues that the county committed procedural error in denying
4 petitioner's self-certification. Petitioner explains that the handout and form
5 establish that the county has alternative means, other than denial, for obtaining
6 additional evidence of a farm operation from an applicant. The county responds
7 that it does not object to petitioner's motion to take official notice of those two
8 documents and also moves us to take official notice of those two documents so
9 that the county may refer to them. The motion is allowed as to the handout and
10 form.

11 The county requests that we deny petitioner's motion to take official notice
12 of the circuit court case information because it post-dates the challenged self-
13 certification denial and is not "relevant law" for purposes of ORS 40.090.

14 Petitioner has not explained "with particularity" what the circuit court case
15 information is intended to establish or "how it is relevant to an issue on appeal."
16 OAR 661-010-0046(2)(a). The circuit court case information is not necessary to
17 establish petitioner's assertion that the circuit court case exists, which the county
18 does not dispute. Petitioner's motion to take official notice of the circuit court
19 case information is denied.

20 Petitioner's motion to take official notice is allowed in part and denied in
21 part.

1 **MOTION TO DISMISS**

2 LUBA has exclusive jurisdiction to review “land use decisions” as defined
3 in ORS 197.015(10). As relevant here, a land use decision includes “[a] final
4 decision or determination made by a local government or special district that
5 concerns the adoption, amendment or application of * * * [a] land use
6 regulation.” ORS 197.015(10)(a)(A)(iii). A “land use decision” does not include
7 “a decision of a local government * * * [t]hat is made under land use standards
8 that do not require interpretation or the exercise of policy or legal judgment[.]”
9 ORS 197.015(10)(b)(A). As the party seeking LUBA review, petitioners bear the
10 burden of establishing that LUBA has jurisdiction to review the challenged
11 decision. *Billington v. Polk County*, 299 Or 471, 475, 703 P2d 232 (1985);
12 *Emerald Cove LLC v. City of Lincoln City*, 73 Or LUBA 72, 76 (2016).

13 The county moves to dismiss this appeal for lack of jurisdiction arguing
14 that the Agricultural Building Self Certification denial (self-certification denial)
15 does not concern the application of a land use regulation and, even if it does, the
16 denial decision is made under land use standards that do not require interpretation
17 or the exercise of policy or legal judgment. The county argues that the county’s
18 denial of a local land use appeal cannot be within LUBA’s jurisdiction because
19 the self-certification denial is not a land use decision.

20 Petitioner responds that the self-certification denial concerns the
21 application of a land use regulation and involved interpretation and exercise of
22 legal judgment. For the reasons explained immediately below, we conclude that

1 we have jurisdiction to review both challenged decisions and we deny the
2 county's motion to dismiss these consolidated appeals.

3 ORS chapter 455 governs construction-related development activities. The
4 legislature authorized the Department of Consumer and Business Services to
5 develop, implement, administer, and enforce state building and specialty codes.
6 ORS 455.020; OAR 918-460-0000 to 918-460-0500. The county issues building
7 permits under the state building and specialty codes. ORS 455.315 exempts
8 agricultural buildings from the application of the state building and specialty
9 codes, which means that agricultural buildings do not require a building permit
10 from the county. However, the county requires a land use placement permit for
11 agricultural buildings.

12 The county handout for agricultural buildings for farm or forest use
13 explains:

14 “Structures that meet the definition of ‘agricultural building’ or
15 ‘equine facility’ are exempt from the Oregon Structural Specialty
16 Code and do not need a building permit. However, a land use
17 placement permit is required. The land use permit is issued over the
18 counter by the Planner on Duty (POD) through a self-certification
19 process. The Planner on Duty will check that the owner has certified
20 that the land use requirements have been met. Such requirements
21 include, but are not limited to, road and property line setbacks,
22 floodplain restrictions (see page 3), riparian setbacks, and
23 appropriate sanitation setbacks.” Petition for Review App 22
24 (underscoring in original).

25 ORS 455.315(2)(a)(A) provides, in part:

26 “‘Agricultural building’ means a structure located on a farm or

1 forest operation and used for:

2 “(i) Storage, maintenance or repair of farm or forestry machinery
3 and equipment;

4 “* * * * *

5 “(iii) The feeding, breeding, management and sale of, or the
6 produce of, livestock, poultry, fur-bearing animals or
7 honeybees[.]”

8 The parties agree that ORS 455.315 is not a land use regulation.

9 Lane Code (LC) chapter 16 is the county’s land use and development code.

10 LC 16.090(7) provides a definition of “agricultural building” that is identical to
11 the definition in ORS 455.315(2)(a)(A). In the F-1 and F-2 zones, an agricultural
12 building is an allowed use, subject to a Type 1 county administrative review for
13 compliance with setback and fuel-break standards.¹ LC Table 16.210-1 (Use
14 Table for Nonimpacted Forest Zones); LC 16.210(5)(b) (setback standards); LC
15 16.210(6)(c) (fuel-break standards); LC Table 16.211-1 (Use Table for Impacted
16 Forest Zones); LC 16.211(5)(b) (setback standards); LC 16.211(6)(c) (fuel-break
17 standards).

¹ As explained further below, the Type I review process applies to development and uses that are permitted outright in the zone under standards and criteria that do not require interpretation or exercise of policy or legal judgement. A Type I decision is made without public notice or hearing and may not be appealed at the county level. LC 14.030(1)(a)(i).

1 The self-certification application is made on a county form titled
2 “Agricultural Building or Equine Facility Self-Certification.” The introductory
3 paragraph on that form provides:

4 “This form is intended to facilitate self-certification of compliance
5 with ORS 455.315 *as well as local land use regulations*. This form
6 is not a substitute for the specific language of local or state
7 regulations. Development is required to comply with all applicable
8 *land use*, building, and sanitation requirements.” Record 9
9 (emphases added).

10 The form consists of a list of check-the-box and fill-in-the-blank items,
11 including the zoning of the subject property and the proposed uses of the building.
12 The form includes a self-certification of “verification of compatible zoning” and
13 “verification that proposed structure will not require additional land use review.”
14 Record 11-12. The potential “additional land use review” items include wetland,
15 riparian, floodplain, Willamette River Greenway, archeological overlay, and
16 coastal resource overlay. Record 12-13. An applicant must certify that the
17 structure is not subject to those land use standards by checking a “no” box next
18 to each section. *Id.* Finally, an applicant must indicate that they have applied for
19 a firebreak verification for structures on a property zoned F-1 or F-2. *Id.*

20 The county argues that the self-certification denial is merely a
21 determination that the subject structure is not an “agricultural building” as
22 defined in ORS 455.315 for purposes of the building and specialty code
23 exemptions, and so the denial does not “concern the application of a land use
24 regulation.” ORS 197.015(10)(a)(A). We reject that argument. The self-

1 certification review includes a county determination whether the building is
2 exempt under ORS 455.315. The self-certification *also* includes a certification
3 by the applicant and a determination by the county whether the building is or will
4 be developed in a zone that allows those structures (*i.e.*, resource and rural
5 residential zones), that the building will be located on a farm or forest operation,
6 and that no additional land use reviews are required. All those determinations
7 concern the application of land use regulations.

8 The county argues that “[t]o the extent the self-certification was meant to
9 facilitate compliance with local land use regulations, [r]espondent’s denial of the
10 self-certification did not address those regulations.” Motion to Dismiss 4. The
11 county argues that the planning staff only determined that the structures do not
12 meet the definition of “agricultural building” in ORS 455.315, so the decision
13 does not concern the application of a land use regulation. The county further
14 argues that “the self-certification form is not designed to elicit a land use decision
15 from [r]espondent.” Motion to Dismiss 5. We reject those characterizations of
16 the decision. The self-certification form is intended to allow an applicant to
17 demonstrate that (1) the subject building and uses of the building are allowed in
18 the zone, (2) the building is not subject to additional land use reviews, and (3) the
19 building is sited in a location that meets setback and firebreak standards in the F-
20 1 and F-2 zones. Those determinations *concern* land use standards, even if self-
21 certification and review demonstrate that potentially applicable land use
22 standards do not apply.

1 We reject the county's argument that the determination that the buildings
2 are not "agricultural buildings" because petitioner failed to demonstrate that the
3 buildings are "located on a farm or forest operation" is *only* a determination that
4 the ORS 455.315 building code exemption does not apply. The self-certification
5 denial contains a parallel determination that the subject buildings are not
6 "agricultural buildings" as defined in LC 16.090(7) and, therefore, the buildings
7 are not allowed outright on the property. The denial decision explains:
8 "Unfortunately, there was insufficient evidence that there is a commercial, for-
9 profit farm operation pursuant to [LC] 16.090(83) on this property and, therefore
10 your Ag[ricultural] Building request has been denied." Record 98. LC 16.090(83)
11 is the county land use and development code definition of "farm use," which
12 adopts the ORS 215.203(2)(a) definition of "farm use" for purposes of exclusive
13 farm use zones. In the self-certification denial, the county applied the land use
14 regulation definitions of "agricultural building" and "farm use." The denial
15 concludes that the two buildings are not exempt from building permit
16 requirements and that they are not "agricultural buildings" authorized under the
17 land use code as outright permitted uses on the subject property.

18 The county attempts to divorce the ORS 455.315 definitional
19 determination from the concurrent LC definitional determination. The self-
20 certification form introductory paragraph and the substance demonstrate that the
21 self-certification process is a means for the county to decide whether a building
22 is exempt from building permit requirements *and* whether a building is allowed

1 without additional land use review.² Thus, the decision that the building is not an
2 agricultural building under ORS 455.315 is *also* a decision that it is not an
3 agricultural building allowed under the land use code. The county urges an
4 artificial distinction, characterizing the self-certification as a sequential, two-step
5 decision when it is in fact a unified decision. The self-certification denial meets
6 the definition of “land use decision” in ORS 197.830(10)(a)(A).

7 The question then becomes whether the decision is not a land use decision
8 because it is a so-called “ministerial decision” that “is made under land use
9 standards that do not require interpretation or the exercise of policy or legal
10 judgment.” ORS 197.015(10)(b)(A). The county argues that the setback and
11 firebreak standards “are clear and objective and determination of compliance
12 with them requires no exercise of discretion.” Motion to Dismiss 6. We agree that
13 those criteria appear to be clear and objective and do not require the exercise of
14 policy or legal judgment. However, the county does not argue, let alone
15 demonstrate, that the planning staff determination whether the buildings are
16 “located on a farm or forest operation” for purpose of the LC 16.090(7) definition
17 of “agricultural building” does “not require interpretation or the exercise of
18 policy or legal judgment.” ORS 197.015(10)(b)(A). Importantly, whether the
19 structures are “agricultural buildings” under LC 16.090(7) determines whether

² If the county approves a self-certification application, then the county will issue an Agricultural Building Placement Authorization that authorizes installation of an agricultural building as shown on the site plan. Record 96.

1 the buildings are allowed in the zone. LC Table 16.210-1 (Use Table for
2 Nonimpacted Forest Zones); LC Table 16.211-1 (Use Table for Impacted Forest
3 Zones).

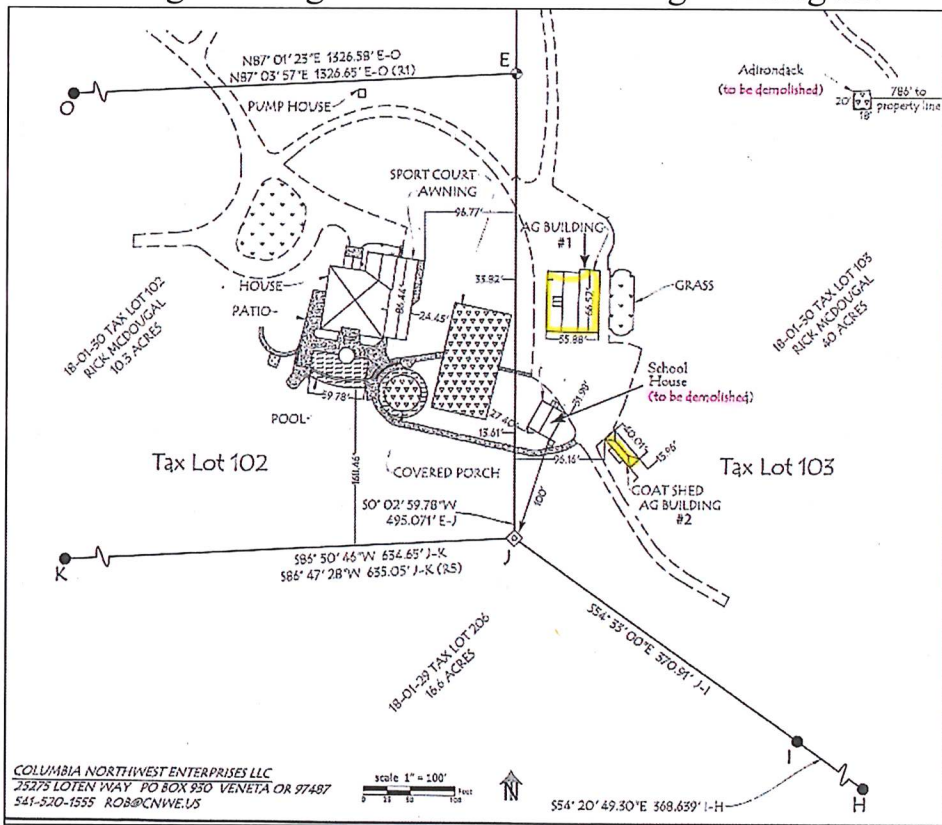
4 Petitioner argues, and we agree, that while the agricultural building self-
5 certification application process is intended to be a ministerial decision that is
6 exempted from LUBA's jurisdiction, planning staff interpreted and exercised
7 legal judgment in denying the self-certification. Again, the denial decision
8 explains: "Unfortunately, there was insufficient evidence that there is a
9 commercial, for-profit farm operation pursuant to Lane County Code LC
10 16.090(83) on this property and, therefore your Ag[ricultural] Building request
11 has been denied." Record 98. LC 16.090(83) is the county land use and
12 development code definition of "farm use," which mirrors the ORS 215.203(2)(a)
13 definition of "farm use." Petitioner argues, and we agree that the self-certification
14 denial includes an interpretation of "farm operation" that considers both whether
15 there is a "farm use" on the property and whether the farm use is "commercial,
16 for-profit." Planning staff thereby interpreted "farm operation" to require
17 evidence of commercial, and for-profit farm activities. That determination
18 constitutes an interpretation and application of that interpretation required
19 exercise of legal judgment. Thus, the exclusion at ORS 197.015(10)(b)(A) does
20 not apply and the self-certification denial is a land use decision subject to our
21 review.

The county argues that we lack jurisdiction to review the county's decision denying petitioner's local appeal of the self-certification denial. The county's argument relies on its argument that the self-certification denial is not a land use decision. We reject that argument and thus, also reject the county's argument that we lack jurisdiction to review the local appeal denial.

The county's motion to dismiss is denied.

FACTS

The subject property consists of 50.3 acres of land zoned F-1 and F-2. Petitioner sought to self-certify as agricultural buildings and obtain from the county placement permits for the two structures depicted in the image below labeled "Ag Building #1" and "Goat Shed Ag Building #2."



Record 109.

1 Petitioner submitted documents with the self-certification, which
2 petitioner argues evidence a historic and ongoing livestock farm operation on the
3 subject property. Petitioner asserts that the farm operation on the subject property
4 is the same farm operation “run by McDougal family members” on multiple
5 properties. Petition for Review 6. The county approved an agricultural building
6 self-certification for a Norman McDougal on an adjacent property and petitioner
7 explains that “the application forms and evidence regarding the farm operation
8 are significantly duplicative.” *Id.* (citing Record 99-104 (application in this
9 proceeding); Record 70-75 (PA24-05178 application); Record 124-76 (farm
10 operation evidence for this proceeding); Record 84-95 (PA24-05178 application
11 farm operation evidence)). That evidence includes documents showing purchase
12 of livestock, hay, alfalfa, and corn. As explained above, on March 3, 2025,
13 planning staff denied the self-certification request.

14 On March 14, 2025, petitioner filed a local appeal of the self-certification
15 denial. On March 18, 2025, planning staff denied the local appeal. On March 21,
16 2025, petitioner appealed the self-certification denial in LUBA No. 2025-024.
17 On April 8, 2025, petitioner appealed the local appeal denial in LUBA No. 2025-
18 030. On April 17, 2025, we issued an order granting the county’s motion to
19 consolidate these appeals.

20 **SECOND ASSIGNMENT OF ERROR**

21 In the second, contingent assignment of error, petitioner argues that the
22 director misconstrued applicable law by failing to conclude that the self-

1 certification denial is a land use decision and, therefore, the director erred in
2 denying petitioner's local appeal.³

3 Generally, Type I decisions are not subject to local appeal. LC
4 14.080(1)(a)(i) provides:

5 "Type I determinations may not be appealed at the County level
6 except as otherwise provided in Lane Code, or if found to constitute
7 a permit and authorized by the Director. *Where found to constitute*
8 *a land use decision*, the appeal will be processed in the same manner
9 as an appeal of a Type II decision." (Emphasis added.)

10 A senior planner rejected petitioner's local appeal because "the appeal
11 does not involve an application made pursuant to Type II or Type III procedures
12 and is not authorized by the Director under LC 14.080(1)(a)(i)." Record 2. The
13 senior planner determined that the self-certification denial decision "was not a
14 discretionary determination" and explained that, in their view, the self-
15 certification denial "was based on the absence of documentation clearly showing
16 that the alleged farm activities and operation are existing and occurring on the
17 subject property." *Id.* The senior planner encouraged petitioner to submit a Type
18 II application if petitioner believed that the approval or denial of the self-
19 certification "require[d] a discretionary determination with respect to farm use."
20 *Id.*

³ The two decisions challenged in this appeal were issued by planning staff under the delegated authority of the planning director.

1 Petitioner acknowledges that the director did not authorize the local appeal.
2 Thus, we need not and do not consider or resolve whether the self-certification
3 denial is a “permit.”

4 Petitioner argues that the director misconstrued applicable law by failing
5 to conclude that the self-certification denial is a land use decision because the
6 decision involved an interpretation of the code. Petitioner argues that if we find
7 that the self-certification denial is a land use decision, then we should also find
8 that petitioner is entitled to a local appeal under LC 14.080(1)(a)(i). Petitioner
9 argues that the fact that alternative routes to a Type II review exist does not
10 relieve the director from the obligation to correctly decide whether a local appeal
11 is allowed.

12 The county responds that this issue is waived because petitioner knew or
13 should have known that the director would deny their local appeal and
14 petitioner’s local appeal statement did not provide any support for a right to a
15 local appeal of the self-certification denial. Petitioner replies, and we agree, that
16 petitioner’s local appeal statement alleges that staff exercised discretion in
17 denying the self-certification. The fact that petitioner applied for a local appeal
18 evidences petitioner’s assertion of the right to a local appeal sufficiently to
19 preserve the issues raised in the second assignment of error.

20 On the merits, we agree that the director erred in denying petitioner’s local
21 appeal because the self-certification denial is a land use decision. LC
22 14.080(1)(a)(i) provides, in relevant part that, “[w]here found to constitute a land

1 use decision,” an appeal of a Type I decision “will be processed in the same
2 manner as an appeal of a Type II decision.” The county argues only that the self-
3 certification denial is not a land use decision. The county does not argue in the
4 alternative that, even if we conclude that the self-certification denial is a land use
5 decision for purposes of ORS 197.015(10), the county still not did err in denying
6 the local appeal under LC 14.080(1)(a)(i). In the absence of any argument for a
7 different construction of LC 14.080(1)(a)(i), we agree with petitioner that,
8 because we conclude that the self-certification denial is a land use decision, the
9 director erred in concluding that the self-certification denial is not a land use
10 decision and therefore denying the local appeal. Accordingly, petitioner is
11 entitled to a local appeal.

12 The second assignment of error is sustained.

13 **FIRST ASSIGNMENT OF ERROR**

14 Petitioner argues that, in denying the self-certification, the director failed
15 to follow applicable procedures in a manner that prejudiced petitioner’s
16 substantial rights and made a decision that exceeded their jurisdiction. Petitioner
17 further argues that the self-certification denial improperly construes the
18 applicable law and is not supported by substantial evidence in the whole record.

19 For the reasons explained in our denial of the county’s motion to dismiss,
20 we agree with petitioner that the self-certification denial is a land use decision.
21 In resolving the second assignment of error we conclude that petitioner is entitled
22 to a local appeal of the self-certification denial. Therefore, petitioner is entitled

1 to further local process in which petitioner may challenge the self-certification
2 denial for all the same reasons that petitioner asserts under the first assignment
3 of error. Petitioner frames their second assignment of error as “contingent” and
4 argues that petitioner is entitled to reversal with an order to approve the self-
5 certification application. However, it would be premature for us to address the
6 merits of petitioner’s procedural and substantive challenges to the self-
7 certification denial where we have concluded that petitioner is entitled to further
8 local process to advance issues that should be decided in the first instance by the
9 county.

10 On remand, the county will issue a new decision, which would make our
11 resolution of the issues in the first assignment of error advisory. We generally do
12 not issue advisory opinions, consistent with the statutory mandate that our review
13 be conducted pursuant to sound principles of judicial review. ORS 197.805; *Botts*
14 *Marsh, LLC v. City of Wheeler*, LUBA Nos 2022-063/064 (Nov 9, 2022) (slip op
15 at 13). We do not reach or resolve the first assignment of error.

16 The county’s decision is remanded.