BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FLYING J. INC.,
Petitioner,

vs.

MARION COUNTY,
Respondent,

and

TRAVELCENTERS OF AMERICA
and LEATHERS FUELS,
Intervenors-Respondent.

LUBA No. 2003-192

ORDER ON MOTION TO DISMISS
AND MOTION TO STRIKE

This motion, filed by Intervenors-respondent (intervenors), is the second of two motions to dismiss in this case. The first, filed by the county, was denied by previous order. *Flying J. Inc. v. Marion County*, ___ Or LUBA ___ (LUBA No. 2003-192, Order, March 19, 2004). The facts were set forth in detail in that order, and we will not restate all of them here. Briefly, the parties have been engaged in a lengthy legal battle involving the proper zoning of two acres of a 29-acre parcel west of the Fargo Interchange on I-5. Petitioner contends that two of the 29 acres are zoned Interchange Development (ID), while the county and intervenors contend the entire 29-acre parcel is zoned Interchange Development/Limited Use (ID-LU).[1]

As part of periodic review, the county adopted Ordinance 1132, which adopted a community plan for the area and land use regulations to conform with administrative rules pertaining

[1] The ID-LU zoning designation provides fewer outright permitted uses than does the ID zone and requires notice and an opportunity for interested parties to object to allowed uses not permitted outright.

to rural communities. That 2001 ordinance included as an exhibit a map that shows the entire 29 acres within the ID-LU zoning designation. However, the text of the ordinance states: "the Limited Use Overlay Zone and restrictions applied to the Flying J property within the Fargo Interchange Community Plan area through prior land use actions shall remain in effect for the property." Apparently, none of those prior land use actions zoned the 2 acres ID-LU.

In the subsequent Land Conservation and Development Commission (LCDC) periodic review of Ordinance 1132, petitioner filed an objection, arguing that the two acres were not zoned ID-LU, but it withdrew that objection before LCDC issued its final order. LCDC adopted an order on June 21, 2002 that included the following finding:

> "Marion County's submittal indicates that a Limited Use Overlay Zone was applied by the county to include the entire 29 acre Flying J property, including the 2 acres. This is a local land use decision, and according to Marion County is required because the development proposed as part of the 'reasons' exception included the entire 29 acres as a single development. The county's decision to apply the limited use overlay zone to the 2 acres is consistent with the statewide planning goals. There is no basis to support this claim by Flying J. This exception is not sustained." Intervenor's Motion to Dismiss, Exh. 3.

More than a year later, intervenor initiated a mandamus proceeding in an attempt to require respondent to provide notice and hearings prior to issuing building permits to petitioner for a service station on the 2-acre parcel. On October 29, 2003, county counsel filed a factual stipulation in a circuit court mandamus proceeding. That stipulation, which led to dismissal of the circuit court mandamus action, is the subject of this appeal. It states, in pertinent part:

> "1. [T]he Marion County official zoning map was amended through [Ordinance 1132] and, as a result, the official zoning map now reflects that the county's Interchange District-Limited Use Overlay Zone ('ID-LU') applies to the entire 29-acre Flying J property, including the [two] acres that had previously been zoned [Interchange District (ID)].
>
> "2. In accordance with ORS 197.763, or as otherwise provided by law, the county will provide notice and an opportunity for hearing prior to approval of any permits for development on any portion of the Flying J property

located within the ID-LU zone." Stipulation by Defendant Marion County, 1-2.

MOTION TO STRIKE

Petitioner has moved to strike 10 of the 19 exhibits submitted by intervenors in support of its motion to dismiss, because those exhibits are not part of the record. Intervenors respond by citing to cases decided by this Board where we have considered evidence outside the record, without an evidentiary hearing, where the evidence is relevant to the determination of our jurisdiction. *Leonard v. Union County*, 24 Or LUBA 362, 377 (1992); *Hemstreet v. Seaside Improvement Comm.*, 16 Or LUBA 630, 631-32 (1988). Petitioner has not argued that any of the challenged exhibits are not relevant to the jurisdictional question presented in intervenors' motion to dismiss, and petitioner's motion to strike is denied.

MOTION TO DISMISS

The county argued in its motion to dismiss that we did not have jurisdiction to review the challenged stipulation because it was excepted from the statutory definition of "land use decision" by ORS 197.015(10)(b)(A).[2] Ordinance 1132 is the relevant land use decision, the county argued, and the stipulation merely reflected that previous decision. The county did not cite or discuss the LCDC order as a basis for concluding that the challenged decision fell within that exception. We rejected the ORS 197.015(10)(b)(A) argument, concluding that the stipulation was not ministerial and that LUBA had jurisdiction to review it. Intervenors assert in their motion to dismiss that the stipulation reflects the LCDC order and, therefore, did not require interpretation or the exercise of policy or legal judgment. In our previous order, we specifically noted that the county had failed to argue that the stipulation was not "[a] final decision or determination made by a local government * * * that concerns the * * * application of * * * [a] land use regulation," under ORS

[2] ORS 197.015(10)(a) defines a "land use decision" as a "final decision or determination made by a local government * * * that concerns the adoption, amendment or application of * * * [a] comprehensive plan provision * * * [or] land use regulation." ORS 197.015(10)(b)(A) provides that a "land use decision" does not include a decision of a local government "* * * made under land use standards which do not require interpretation or the exercise of policy or legal judgment[.]"

197.015(10)(a). Intervenors' motion adds that argument.

A. Ministerial Exception

We do not disturb our previous conclusion based on Ordinance 1132, but revisit this statutory exception only to address intervenors' argument regarding the effect of the LCDC order.

Intervenors argue that the LCDC order conclusively determined that the ID-LU zone applied to the entire 29-acre parcel, including the two-acre site. The county counsel's stipulation in the mandamus action, they assert, was merely a restatement of the LCDC order, notwithstanding that the stipulation did not cite to the LCDC order. Therefore, intervenors argue, the stipulation was made under land use standards that did not require interpretation or the exercise of policy or legal judgment under ORS 197.015(10)(b)(A). We agree with petitioner that even if the county counsel was relying on or restating the LCDC order, the stipulation does not fall within the ministerial exception.

Following the adoption of Ordinance 1132, the periodic review work task of which it was a part was submitted to LCDC for review. Petitioner filed an objection to that work task to clarify the proper zoning of the two-acre parcel. The Department of Land Conservation and Development (DLCD) prepared a report which was forwarded as a recommendation to LCDC for review and action. *See* OAR 660-025-0150(1)(c). The report included the previously quoted response to petitioner's written objection. As previously noted, petitioner withdrew its objection prior to the issuance of LCDC's order. Despite the withdrawal, LCDC incorporated the language from the DLCD report into its own findings of fact in support of its order. The language of the order itself, found under the caption "THEREFORE, IT IS ORDERED THAT," provides:

> "In order to comply with Goal 2, Marion County on remand shall, pursuant to OAR 660-004-0015 and 660-004-0018(4)(a) and (b), apply the following land use limitation to the property described as Tax Lots 403334-002 and 403336-000, otherwise known as the 'Flying J property':
>
> "Adopt a Limited Use (LU) Overlay zone for the Flying J property to specify those uses and activities allowed, limited or conditioned under the acknowledged 'reasons' exception and limit those uses and activities pursuant to OAR 660-004-

> 0018(4)(b). Include a provision in the LU Overlay Zone to no longer allow motels or hotels (OAR 660-022-0030(5)(b)). Specify in the LU Overlay Zone that any change in the type or intensity of uses, approved within the acknowledged 'reasons' exception, requires a new 'reasons' exception (OAR 660-004-0018(4)(b)). The uses on this property shall be limited to exclusive farm use and uses allowed by Marion County Ordinances 777, 784 and 826, as interpreted by the Land Use Board of Appeals in *Leathers v. Marion County*, 31 Or LUBA 220, *aff'd* 144 Or App 123, 925 P2d 148 (1996) and *Flying J. Inc. v. Marion County*, 38 Or LUBA 149, *aff'd* 170 Or App 568, 13 P3d 516 (2000)." Intervenor's Motion to Dismiss, Exh. 3.

This language can be read to suggest that LCDC believed the county had not yet applied the ID-LU zoning to the two-acre parcel, that LCDC was not purporting to determine the zoning in its order, and that a future act by the county was required to rezone the property.

Petitioner argues that the LCDC determination on the zoning was not binding because petitioner had withdrawn its exception regarding the proper zoning before LCDC adopted its order. Petitioner also questions LCDC's authority to determine the proper zoning of the 2-acre parcel. We need not resolve these issues here. The effect of petitioner's withdrawal of its exception in the acknowledgment proceeding, the authority of LCDC to rule on the zoning of a particular property, the effect of a purported determination on zoning in the findings, and the ambiguity between those findings and the order merely support petitioner's contention that the order itself, and the legal effect of the order, require legal interpretation or judgment. County counsel was therefore required to exercise policy or legal judgment in filing the stipulation, even if we assume she was relying on the LCDC order. The issues intervenors raise may have a bearing on our resolution of the merits of this appeal, but they do not preclude LUBA's review based on ORS 197.015(10)(b)(A).

B. Final Decision or Determination

Intervenors argue that the stipulation does not qualify as a "decision or determination" and, therefore, is not a "land use decision". ORS 197.015(10)(a). *See* n 2. They also argue that the stipulation was not a "final" land use decision. *Id*. Intervenors contend that Ordinance 1132 was the final land use decision that determined the zoning of the Flying J property, and that the proper time for appealing that decision was in 2001, when it was initially adopted.

The Oregon Supreme Court has held that a stipulation in a mandamus action to compel issuance of a permit under ORS 215.429(1) can qualify as a land use decision. *Murphy Citizens Advisory Com. v. Josephine County*, 319 Or 477, 482, 878 P2d 414 (1994).[3] In *Murphy Citizens Advisory Com.*, the stipulation at issue was in the form of an agreement between the parties in which the local government agreed to approve the applicant's development permit. The Supreme Court dismissed the developer's contention that the stipulation was not a land use decision because it was not made as part of a land use proceeding. The Court held that a local government cannot avoid the statutory procedural safeguards, make a land use decision outside the regular land use setting, and then argue that the determination is not appealable as a land use decision. *Id.* at 481-82. The stipulation in *Murphy Citizens Advisory Com*. concerned the application of the county's goals, comprehensive plan, and land use regulations, and the court held that it was a land use decision under ORS 197.015(10)(a). *Id*. at 482.

Intervenors offer policy reasons against treating the stipulation in this case as a land use decision.[4] However, they make no attempt to distinguish the stipulation in *Murphy Citizens Advisory Com*. from the stipulation in this case. While the stipulations differ from each other in some respects, we do not see that those differences are material or require a different result.

Finally, intervenors argue that the stipulation is not a "final" decision or determination as required by the definition of "land use decision" in ORS 197.015(10)(a). They contend that the final appealable land use decision occurred in 2001 when Ordinance 1132 was adopted. There is

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[3] *Murphy Citizens Advisory Com.* was decided prior to legislative changes to ORS 215.429 in 1999. Under that legislation, it is doubtful that the stipulation in *Murphy Citizens Advisory Com.* would be reviewable by LUBA. The stipulation in this case, however, was not issued in an ORS 215.429 mandamus proceeding, and the court's analysis and conclusion in *Murphy Citizens Advisory Com.* appears to be equally applicable to the stipulation at issue in this appeal.

[4] First, intervenors argue that a ruling that a stipulation by a local government lawyer during a circuit court action is a land use decision will create a chilling effect on local government counsel. Counsel cannot be required to send out notice and hold a hearing before signing a stipulation. Second, intervenors contend that a party should not be able to collaterally attack a circuit court pleading through a direct appeal to LUBA. Allowing jurisdiction in this case, according to intervenors, would create a two-track system for reviewing circuit court pleadings; one to LUBA and the other an appeal of the circuit court action.

no question that the county's adoption of Ordinance 1132 was a final land use decision that could have been appealed to LUBA at that time. However, that does not necessarily mean that a stipulation that interprets and applies Ordinance 1132 is not also a final land use decision subject to our jurisdiction.

If Ordinance 1132 were unambiguous, and the stipulation were merely a recitation or restatement of the clear terms of that ordinance, then we agree that the stipulation would be ministerial and would not qualify as a land use decision. *See* n 2. We concluded in our previous order on the county's motion to dismiss, however, that Ordinance 1132 was sufficiently ambiguous to require the interpretation or the exercise of policy or legal judgment. For the same reason, we conclude that the LCDC order could not render the stipulation ministerial.

The stipulation is presumably binding on the county. It is similar to a declaratory ruling by the county on the question of the zoning for the two-acre parcel. This Board has held that a local determination in the nature of a declaratory ruling is a land use decision where it results in the last local determination concerning land use standards applicable to a pending application. *Townsend v. City of Newport*, 21 Or LUBA 286, 289-90 (1991). While the determination at issue here did not directly concern local standards applicable to a pending permit application, it is a final determination interpreting Ordinance 1132 concerning the zoning of the two acres. The stipulation, though not adopted pursuant to local declaratory ruling procedures, is in essence a declaratory ruling and satisfies the finality requirement in ORS 197.015(10)(a).

Intervenors' motion to dismiss is denied. The county has yet to file the record in this appeal. The county shall have 14 days from the date of this order to file the record.

Dated this 19th day of July, 2004.

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Anne C. Davies

1 Board Member