BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JEANNE BIGGERSTAFF and CARR BIGGERSTAFF,
Petitioners,

vs.

YAMHILL COUNTY,
Respondent,

and

RANDY HOPP,
Intervenor-Respondent.

LUBA Nos. 2008-109, 2008-110, 2008-111 and 2008-112

ORDER

MOTION TO INTERVENE

Randy Hopp (intervenor) moves to intervene on the side of the respondent in these appeals. Petitioners object to the motion to intervene on the basis that intervenor did not appear below. These consolidated appeals involve challenges to replacement dwelling building permits issued by the county on November 21, 2007. The replacement dwelling permits were issued to Ralph Johnson. Ralph Johnson sold the subject property to Allan Hopp and Norma Johnson on November 26, 2007. Allan Hopp and Norma Johnson subsequently sold the property to intervenor in May 2008 and the deed was recorded on June 13, 2008. The notices of intent to appeal (NITAs) were filed on July 8, 2008.

The county building inspector issued the replacement dwelling permits without notice, or opportunity for comment or a hearing. The owner at the time, Ralph Johnson applied for the permits, and were he still the owner there would be no doubt that he could intervene as the applicant who initiated the action.[1] Even though intervenor himself did not

[1] ORS 197.830(7) provides:

appear below and was not the applicant at the time the replacement dwellings permits were issued, he is the successor in interest to the original applicant. As the original applicant would be allowed to intervene in this appeal, so too may the applicant's successor in interest. The motion to intervene is granted.

MOTION TO DISMISS

The county and intervenor move to dismiss these appeals on the basis that it was not timely filed. ORS 197.830(3) provides:

> "If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416 (11) or 227.175 (10), * * * a person adversely affected by the decision may appeal the decision to the board under this section:
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> "(a) Within 21 days of actual notice where notice is required; or
>
> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

The challenged decisions were issued without providing a hearing and petitioners do not argue that they were entitled to notice. Therefore, under ORS 197.830(3)(b) petitioners were required to file their NITA s within 21 days of the date they knew or should have

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> "(a) Within 21 days after a notice of intent to appeal has been filed with the board under subsection (1) of this section, any person may intervene in and be made a party to the review proceeding upon a showing of compliance with subsection (2) of this section.
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> "(b) Notwithstanding the provisions of paragraph (a) of this subsection, persons who may intervene in and be made a party to the review proceedings, as set forth in subsection (1) of this section, are:
>
> "(A) The applicant who initiated the action before the local government, special district or state agency; or
>
> "(B) Persons who appeared before the local government, special district or state agency, orally or in writing.
>
> "(c) Failure to comply with the deadline set forth in paragraph (a) of this subsection shall result in denial of a motion to intervene."

known of the decisions. Intervenor argues that petitioners knew of the challenged decisions no later than January 2008, when during a contested Ballot Measure 37 (2004) hearing before the Yamhill County Circuit Court the existence of replacement dwelling permits was noted. According to intervenor, because petitioners knew or should have known that replacement dwelling permits had been issued in January 2008 and they did not file their NITAs within 21 days of that knowledge, the NITAs were untimely.

In situations where a petitioner does not have actual notice of the decision "but observes activity or otherwise obtains information reasonably suggesting" that a land use decision has been issued, the petitioner is "placed on inquiry notice." *Rogers v. City of Eagle Point*, 42 Or LUBA 607, 616 (2002). When a petitioner is placed on inquiry notice and the petitioner makes timely inquiries and discovers the decision, the 21-day appeal period begins to run on the date the decision is discovered. If the petitioner does not make timely inquiries, the 21-day appeal period begins to run on the date the petitioner is placed on inquiry notice. *Id*.

Petitioner Carr Biggerstaff's uncontested affidavit states that he requested from the county all documentation of any development permits for the subject property on November 29, 2007. Even though the replacement dwelling permits had been issued several days earlier, the county did not provide copies of the replacement dwelling permits. Petitioner's affidavit also states that in January 2008, during the Measure 37 proceeding before the circuit court, he read an assertion by the owners of the property that replacement dwelling permits had been issued for several residences of the original proposed 40-lot subdivision. After reading the assertion, petitioner again requested from the county any documentation of replacement dwelling permits for the subject property. Planning staff again informed petitioner that they had no record of any replacement dwelling permits. On June 6, 2008, petitioner received an electronic mail message from the original owners' attorneys that activities would be occurring on the subject property, and on June 16, 2008, petitioner

observed one of the original dwellings being removed. Petitioner again requested any information regarding dwelling permits for the property, and finally, on June 20, 2008, the county informed petitioners that replacement dwelling permits had been issued for the subject property. Petitioners filed their NITAs 18 days later.

Neither intervenor nor the county has challenged the allegations in petitioner's affidavit, and we therefore accept the facts set forth in the affidavit as true. Petitioners were placed on inquiry notice when they observed the original dwellings being removed on June 20, 2008. As the NITAs were filed 18 days later, the NITAs were timely filed. Even if petitioners were placed on inquiry notice in January 2008, they made the proper inquiries to the county. Petitioners cannot be faulted for not learning of the replacement dwelling permits when the county effectively took the position that no such permits existed. Once petitioners discovered the challenged decisions, the NITAs were filed within 21 days. The NITAs were filed timely.

The county also moves to dismiss the appeal on the basis that the challenged decisions are not land use decisions under the exception for building permits issued under clear and objective standards.[2] The county argues that the building inspector only considered four clear and objective criteria in determining whether to issue the replacement dwelling permits: whether the existing dwelling had intact walls and a roof, indoor plumbing, interior wiring, and a heating system. According to the county, the building inspector merely checked the four boxes and did not consider any land use regulations.

The subject property is zoned for exclusive farm use (EFU). On EFU-zoned land, replacement dwellings are permitted uses. Yamhill County Zoning Ordinance (YCZO) 402.02(M) is identical to ORS 215.283(1), which provides:

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[2] ORS 197.015(10)(b)(B) provides that a land use decision does not include a local government decision:

"That approves or denies a building permit issued under clear and objective land use standards[.]"

"Alteration, restoration or replacement of a *lawfully established dwelling* that:

"(A) Has intact exterior walls and roof structure;

"(B) Has indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system;

"(C) Has interior wiring for interior lights;

"(D) Has a heating system[.]" (Emphasis added.)

The county may be correct that the building permit criteria at ORS 215.283(1)(s)(A-D) are clear and objective, and merely call for checking the four boxes regarding walls and a roof, indoor plumbing, interior wiring, and heating system to indicate they are present. However, the county does not acknowledge the requirement that the dwelling that is being replaced must be a "lawfully established dwelling." In the present case, petitioners dispute that the exiting dwellings were lawfully established. The dwellings were established pursuant to a Measure 37 waiver. Petitioners are apparently contesting those Measure 37 waivers in Yamhill County Circuit Court. Furthermore, it is unclear if or how the passage and adoption of Measure 49 may affect the disputed dwellings. Even if intervenor and the county are correct that the original dwellings were legally established, there is no doubt that making that determination requires interpretation or the exercise of factual, policy, or legal judgment and the criterion therefore is not clear and objective. *See Heceta Water District v. Lane County*, 24 Or LUBA 402, 408 (1993) (determining a replacement dwelling is authorized requires interpretation or the exercise of factual, policy, or legal judgment and does not fall under the clear and objective building permit standards exception to land use decisions). While the county may not have believed it was making a land use decision in approving the replacement dwelling permits, the county nonetheless made land use decisions. *See Tirumali v. City of Portland*, 169 Or App 241, 244, 7 P3d 761 (2000) (building permits can be land use decisions).

Finally, the county also states that the challenged decision is not a land use decision because the building inspector does not have the authority to issue land use decisions. The building inspector applied YCZO 402.02(M) and either made a determination whether the existing dwellings were "lawfully established," or should have made such a determination. The fact that the building inspector had no authority to apply YCZO 402.02(M) to make a decision concerning the requested replacement dwelling permits, if that is a fact, might provide a basis for reversal or remand. It does not mean his decisions to issue those permits are not land use decisions.

The motion to dismiss is denied.

RECORD

The record in this appeal has not yet been filed. The county will file the record within 21 days from the date of this order.

Dated this 2nd day of December, 2008

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Michael A. Holstun
Board Member