BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAVID BRATTON and MARK LOHRER,
Petitioners,

vs.

WASHINGTON COUNTY,
Respondent,

and

MICHAEL APPLEBEE and JENNIE APPLEBEE,
Intervenors-Respondents.

LUBA Nos. 2011-094, 2011-095 and 2011-096

ORDER ON MOTION TO DISMISS

In these consolidated appeals, petitioners appeal three decisions concerning intervenors-respondents' (intervenors') property: (1) a letter from a county planner that accepts a floodplain delineation submitted by intervenors to resolve a code enforcement action against intervenors, and (2) two placement permits authorizing construction of agricultural buildings. The county and intervenors move to dismiss all three appeals, arguing that none of the three challenged decisions are "land use decisions" as defined at ORS 197.015(10)(a). In addition, intervenors argue that LUBA No. 2011-094, challenging the April 12, 2011 letter, was untimely filed, contending that at least petitioner David Bratton knew or should have known of the April 12, 2011 letter more than 21 days prior to filing that appeal. For the following reasons, we disagree with respondents and deny the motion to dismiss these appeals.

FACTS

The subject property is known as the Apple Valley Airport, developed with a private use airport established in 1989. The property is currently developed with a residence, a grass

airstrip, and a large pole barn used as an airplane hangar. The property is zoned Agriculture/Forestry (AF-20), an exclusive farm use (EFU) zone. A large portion of the property is subject to the county's Private Use Airport Overlay District. The airport is used, in part, to base airplanes used for commercial agricultural aviation activities, e.g., crop-dusting. A personal use airport is allowed as a conditional use in the EFU zone under ORS 215.213(2)(h), and can include commercial aviation activities in connection with agricultural operations.[1]

The county's official floodplain maps identify the subject property as being located entirely below a base flood elevation of 257 feet above sea level, and thus within the 100-year floodplain of nearby creeks. In 2006, the county authorized a limited expansion of the private use airport, with conditions of approval, including Condition IV, which prohibited overnight storage of chemicals on the site, including aircraft fuel stored in trucks. Condition IV implemented Community Development Code (CDC) 421-14.2, which prohibits storage of chemicals, including petroleum products, within the 100-year floodplain. The applicants, intervenors in the present appeal, appealed that 2006 decision to LUBA, and included a challenge to Condition IV's prohibition on storing fuel trucks at the airport. LUBA rejected that particular challenge, but remanded the 2006 decision on other grounds. *Applebee v. Washington County*, 54 Or LUBA 364, 408 (2007).

In August 2010, the county commenced an enforcement action against intervenors that in relevant part identified a violation of Condition IV's prohibition on storing fuel

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[1] Washington County is a "marginal lands" county and the applicable EFU zoning statute is therefore ORS 215.213 rather than the similar provisions of ORS 215.283. ORS 215.213(2)(h) allows in the EFU zone of marginal lands counties:

> "Personal-use airports for airplanes and helicopter pads, including associated hangar, maintenance and service facilities. A personal-use airport as used in this section means an airstrip restricted, except for aircraft emergencies, to use by the owner, and, on an infrequent and occasional basis, by invited guests, and by commercial aviation activities in connection with agricultural operations. * * *"

vehicles at the airport. In response, intervenors' engineer submitted to the county a floodplain delineation concluding that the base flood elevation is actually 245.83 feet above sea level, with the result that five portions of the subject property were deemed upland areas outside the 100-year floodplain, and therefore not subject to Condition IV. Intervenors' floodplain delineation was reviewed by Rick Raetz, the county's engineer and designated floodplain manager. On April 8, 2011, Raetz sent an e-mail to intervenors' engineer and Tom Harry, the county planner conducting the code enforcement action, stating that the floodplain delineation is "adequate and acceptable," and "consistent with standard engineering practice." Record 27.

On April 12, 2011, Harry sent a letter to intervenors, with the Raetz e-mail attached, noting that Raetz had found the floodplain delineation acceptable, and ordering intervenors to either remove the fuel vehicles from the site or "move them to a location on the property that was both inside the airport overlay and outside the 100-year floodplain." Record 26. The April 12, 2011 letter apparently concluded the county's enforcement action against intervenors, as far as the alleged violation of Condition IV was concerned.

Approximately five months later, on September 14, 2011, intervenors filed building permit applications to construct two "accessory buildings" for the "storage, maintenance or repair of farm machinery and equipment." Record 7, 18. Submitted with the applications were site plans showing that the two buildings would be constructed on portions of the property outside the 100-year floodplain, as delineated on the site plans, and within the Airport Overlay zone. On September 15, 2011, county staff approved the two applications. Each approval consists of a county-printed checklist for "Exempt Agricultural Building" that is signed by the county building services representative and the county land development

services representative.[2] Record 9, 20. One checklist item is "Building is in a FLOODPLAIN[,]" for which county staff checked the blank for "NA" or not applicable.

On October 11, 2011, petitioners Bratton and Lohrer observed construction activities on the subject property. On October 20, 2011, petitioners filed three appeals with LUBA, challenging the April 12, 2011 letter (LUBA No. 2011-094) and the two construction approvals (LUBA Nos. 2011-095 and 2011-096). LUBA consolidated all three appeals for review.

JURISDICTION

LUBA has exclusive jurisdiction to review "land use decisions." ORS 197.825(1). ORS 197.015(10)(a) defines "land use decision" in relevant part as a "final decision or determination made by a local government" that "concerns" the application of a comprehensive plan provision or land use regulation. Generally, a local government decision "concerns" the application of a comprehensive plan provision or land use regulation if the plan provision or land use regulation is actually applied in making the decision, or should have been applied in making the decision. *Jaqua v. City of Springfield*, 46 Or LUBA 566, 574 (2004).

ORS 197.015(10)(b)(A) excludes from the scope of "land use decision" a decision of a local government "[t]hat is made under land use standards that do not require interpretation or the exercise of policy or legal judgment." Similarly, ORS 197.015(10)(b)(B) excludes any decision "[t]hat approves or denies a building permit issued under clear and objective land use standards[.]" As the party seeking review by LUBA, petitioner has the burden of establishing that LUBA has jurisdiction. *Billington v. Polk County*, 299 Or 471, 475, 703 P2d 232 (1985).

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[2] Under ORS 445.315, quoted at n 6, agricultural buildings on EFU-zoned land are exempt from the structural building code and do not require a structural building permit, hence the term "exempt" agricultural building.

A. April 12, 2011 Letter

1. Land Use Decision

As noted, the April 12, 2011 letter challenged in LUBA No. 2011-094 concerns a code enforcement action regarding the location of fuel vehicles within the floodplain, in alleged violation of Condition IV imposed in a 2006 land use decision. The April 12, 2011 letter appears to resolve that enforcement action, relying upon the new 100-year floodplain delineation that the county floodplain manager had found to be acceptable. Petitioners apparently understand the April 12, 2011 letter to embody the county's final decision to accept the floodplain delineation, and seek to challenge the floodplain delineation or the county's decision to accept it. Initially, we note that it is arguable that it was the floodplain manager's April 8, 2011 determination that the floodplain delineation is "adequate and acceptable," which constituted the county's final action to "accept" the floodplain delineation, and not the April 12, 2011 code enforcement letter. However, that is not entirely clear, and for purposes of this order we will assume that the April 12, 2011 letter embodies the county's final decision to accept the floodplain delineation, at least for purposes of resolving the code enforcement action.

The county and intervenors both argue that the April 12, 2011 letter does not "concern" the application of any comprehensive plan provision or land use regulation, and for that reason does not qualify as a land use decision as defined at ORS 197.015(10)(a). Respondents note that the April 12, 2011 letter does not cite or expressly apply any plan provision or land use regulation, and argue that no plan provision or land use regulation in fact applies to a code enforcement action that relies upon a floodplain delineation to resolve an alleged violation of a permit condition of approval.

Petitioners respond first by noting that Policy 8 of the Natural Hazards section of the county comprehensive plan provides that the county will implement regulations that "shall discourage new development in flood plains and alterations of existing identified

floodplains." Pursuant to Policy 8, petitioners argue, the county promulgated Community Development Code (CDC) Section 421, which identifies floodplains and drainage hazard areas and provides standards for development within such areas. Petitioners contend that the county should have applied at least some provisions of CDC 421 in accepting the floodplain delineation.

CDC 421-1.1 adopts a series of maps as "setting forth the flood plain, floodway and drainage hazard areas of Washington County." [3] In recognition that the scale of the adopted maps "may be such that a true and accurate flood plain or drainage hazard area cannot be determined" from those adopted maps, CDC 421-1.2 requires that all persons seeking a "Development Permit" for lands inside or within 250 feet of a floodplain boundary identified on the maps adopted in CDC 421-1.2 must submit a "delineation of the flood plain" prepared by a registered engineer.[4]

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[3] CDC 421-1.1 provides:

> "The maps entitled 'Flood Plain Series, Washington County, Oregon' Revision 5/01/74, 1/03/78, 1/81 and 5/25/83 and 12/12/83 based upon data from the U.S. Army Corps of Engineers; U.S.G.S.; U.S.B.; S.C.S.; and Washington County, together with the Flood Insurance Rate Maps and the 'Flood Insurance Study for Washington County' maps, as may be amended from time to time, including the Flood Boundary and Floodway Map, as provided for in the regulations of the Federal Emergency Management Agency (FEMA) (44 CFR part 59-60) hereby are adopted by reference as setting forth the flood plain, floodway and drainage hazard areas of Washington County. But where the maps are not available, the Director may use any base flood elevation and floodway data available from a federal or state source, or any other authoritative source, to determine the boundaries of the flood plain, floodway and drainage hazard areas of Washington County."

[4] CDC 421-1.2 provides in relevant part:

> "Recognizing that the scale may be such that the true and accurate flood plain or drainage hazard area cannot be determined from the maps references in Section 421-1.1 alone, all persons seeking a Development Permit for lands within said areas and two-hundred-fifty (250) feet of the map boundary of a flood plain or drainage hazard area identified in Section 421-1.1 except as noted below for land divisions and property line adjustments, shall submit with the Development permit application:
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> "A. A delineation of the flood plain and the floodway boundaries, established by a registered engineer or a registered surveyor from the surface elevations prepared by the County for the flood plain based upon maps referenced in Section 421-1.1, and

Petitioners argue that the April 12, 2011 letter concerned the "application" of CDC 421-1.1 and CDC 421-1.2, because the county either applied or should have applied one or both provisions in accepting the floodplain delineation. According to petitioners, CDC 421-1.2 provides the exclusive vehicle under the county's code to seek county approval to delineate floodplain boundaries differently from the boundaries shown on the official county flood maps adopted in CDC 421-1.1. Petitioners contend that CDC 421 authorizes the county to accept and rely upon a new floodplain delineation to locate the floodplain boundary *instead of* the official floodplain maps only when that new delineation is submitted and processed with an application for a Development Permit pursuant to CDC 421-1.2. In all other circumstances, we understand petitioners to argue, the official floodplain maps adopted in CDC 421-1.1 control the location of floodplain boundaries.

Respondents argue that CDC 421-1.2 is limited by its terms to circumstances where a landowner is seeking a development permit for property within or near a floodplain area, and in that circumstance the CDC requires that the development permit application be accompanied by a floodplain delineation. According to respondents, CDC 421-1.2 does not govern or apply to a floodplain delineation that is submitted for county approval outside the context of a development permit application, and therefore does not apply to a county

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> upon any other available authoritative flood data approved by the Director, including but not limited to high water marks, photographs of past flooding or historical flood data; and
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> "B. A delineation of the drainage hazard area and drainageway by a registered surveyor or a registered engineer from surface elevations prepared by a registered engineer. Such delineation shall be based on mean sea level datum and be field located from recognized landmarks.
>
> "* * * * *
>
> "For each of the above, submitted plans shall be accurately drawn and at an appropriate scale that will enable ready identification and understanding of the submitted information. The plans shall include the locations of any existing or proposed property lines, buildings, structures, parking areas, streets, accessways, or other relevant information on the subject property, and within fifty (50) feet of the delineation."

decision resolving alleged violations of a permit condition of approval.[5] Respondents contend that nothing in the CDC prohibits relying on a site-specific floodplain delineation to resolve a code enforcement action. Because neither CDC 421-1.2 nor any other land use regulation was applied or should apply in accepting the floodplain delineation to resolve the code enforcement action, respondents argue, the April 12, 2011 letter is not a land use decision as defined in ORS 197.015(10)(a).

A curious feature of CDC 421-1.2, where it applies, is that it apparently allows the county to approve a development permit based on a site-specific, larger-scale floodplain delineation that may locate the floodplain boundary *differently* than the location depicted on the smaller-scale official maps adopted in CDC 421-1.1. In the present case, for example, intervenors' floodplain delineation determines that the base flood elevation level is 10 feet lower than the level used to develop the official adopted floodplain maps, with potentially significant consequences to the location of the floodplain boundaries. The practical difference is also significant: additional land use standards in CDC 421 will apply to development within the floodplain, and some development and uses otherwise allowed in the EFU zone may be proscribed altogether. Although CDC 421-1.1 notes that at least some of the adopted maps "may be amended from time to time," nothing in CDC 421 appears to require an actual amendment to an adopted floodplain map in the course of approving a

[5] As an additional support for their argument that CDC 421-1.2 applies to the code enforcement proceedings culminating in the April 12, 2011 letter, petitioners argue that the April 12, 2011 letter approves "development" as that term is defined at CDC 106.57 and therefore constitutes issuance of a "development permit" as defined at CDC 106.58, for purposes of CDC 421-1.2. Petitioners note that CDC 106.57 defines "development" as "man-made change" to land, including "storage on the land," and argues that the April 12, 2011 letter effectively authorizes intervenors to store aviation fuel on upland portions of the airport outside the delineated floodplain. Thus, petitioners argue, the April 12, 2011 letter concerns both a floodplain delineation AND an application for a "development permit," and therefore concerns the application of CDC 421-1.2. Respondents dispute that the code enforcement action resolved in the April 12, 2011 letter involved an application for a "development permit" for purposes of CDC 421-1.2. We agree with respondents. The April 12, 2011 letter resolved a code enforcement action, and at best concluded that parking fuel vehicles on portions of the property outside the floodplain would not violate Condition IV of the 2006 decision. The April 12, 2011 letter did not purport to authorize parking or storage of fuel vehicles under any CDC provision.

development permit. As CDC 421-1.2 is written, it apparently allows the county to rely upon a site-specific floodplain delineation to locate the relevant floodplain boundary for purposes of approving a concurrently submitted development permit, rather than rely upon the official floodplain map to locate the floodplain boundary.

The April 12, 2011 letter accepts and relies upon a new floodplain delineation to resolve a code enforcement matter involving storage of fuel in the floodplain, rather than the official floodplain maps adopted in CDC 421-1.1. If the county is correct that CDC 421-1.2 was not applied and should not have been applied in making the April 12, 2011 decision, because no development permit was sought, it seems to us an inescapable conclusion that the *adopted floodplain maps* applied or should have been applied in making that decision. The county identifies nothing in the CDC or elsewhere that authorizes the county to accept and rely upon a floodplain delineation instead of the adopted floodplain maps in making the type of code enforcement decision at issue here. Unless some code provision provides otherwise, under the terms of CDC 421-1.1 the floodplain maps adopted therein "set[] forth the flood plain, floodway and drainage hazard areas of Washington County." CDC 421-1.2 in effect provides an express exception to the general rule embodied in CDC 421-1.1 that adopted floodplain maps identify the county's floodplain areas. Other than CDC 421-1.2, nothing cited to us in the CDC authorizes the county to accept and apply a new floodplain delineation to determine the location of the floodplain boundaries, and thus where the provisions of CDC 421 will control, instead of applying the official adopted floodplain maps.

The parties do not discuss the point, but we see no possible dispute that the floodplain maps adopted by reference by (and into) CDC 421-1.1 qualify as "land use regulations" as defined in ORS 197.015(11). If CDC 421-1.2 or some other code provision does not operate to provide an exception, then the official floodplain maps incorporated by reference into CDC 421-1.1 apply to, and control, the county's determination of where the floodplain boundaries are located. For that reason, the April 12, 2011 letter concerns the application of

CDC 421-1.1, or more precisely the official floodplain maps incorporated therein, and therefore crosses the initial threshold of the definition of "land use decision" at ORS 197.015(10)(a).

As noted, ORS 197.015(10)(b) lists a number of exclusions to the definition of "land use decision" at ORS 197.015(10)(a), including an exclusion for decisions made under land use standards that "do not require interpretation or the exercise of policy or legal judgment." ORS 197.015(10)(b)(A). Respondents do not argue that the April 12, 2011 letter is excluded from the definition of land use decision under any provision of ORS 197.015(10)(b). However, the county does generally argue that a county decision to rely upon a new floodplain delineation, whether under CDC 421-1.2 or otherwise, does not involve the exercise of "discretion" or require interpretation: either certain property is or is not located within the floodplain as shown on the appropriate map or delineation. Motion to Dismiss 2. That argument may be intended to invoke the ORS 197.015(10)(b)(A) exclusion for decisions made under land use standards that "do not require interpretation or the exercise of policy or legal judgment." If so, we disagree that the April 12, 2011 letter falls within the exclusion.

As explained above, the CDC is ambiguous regarding the source of authority used to identify the location of a floodplain boundary on a specific property, for purposes such as resolving a code enforcement action. Under the county's apparent understanding and practice, a new floodplain delineation submitted outside the context of CDC 421-1.2 can supply that authority, even if the new delineation locates the floodplain boundary differently than the floodplain maps adopted under CDC 421-1.1. Because the relevant provisions of CDC 421 are less than clear on this point, the county's understanding represents a permissible interpretation of those provisions. However, as explained above, we disagree with that interpretation. As we understand the relationship between CDC 421-1.1 and 421-1.2, the floodplain maps adopted under CDC 421-1.1 control the county's determination of

floodplain boundaries, absent some other provision, such as CDC 421-1.2 that provides for a different source of authority. It is clear that CDC 421-1.1 and 421-1.2 "require interpretation" in the present circumstances, to determine what source of authority the county may use to locate the floodplain boundaries on the subject property, for purposes of resolving the code enforcement action. For that reason alone, the April 12, 2011 letter does not fall within the ORS 197.015(10)(b)(A) exclusion to the definition of land use decision.

2. Timely Filed under ORS 197.830(3).

We turn next to intervenors' alternative argument that petitioners' appeal of the April 12, 2011 letter was untimely filed.

ORS 197.830(3) provides that a person adversely affected by a land use decision made without a hearing may appeal the decision to LUBA "[w]ithin 21 days of the date a person knew or should have known of the decision where no notice is required." Intervenors argue that petitioner David Bratton was copied on a county letter to intervenors, dated February 10, 2011, that discusses the submission of the floodplain delineation. Intervenors argue that at least petitioner Bratton was thereby placed on inquiry notice that the county was reviewing intervenors' floodplain delineation and that Bratton had an obligation to follow up with the county to discover the status of that review, and its ultimate outcome, the April 12, 2011 letter. With respect to petitioner Mark Lohror, who owns property adjacent to the airport, intervenors argue that it is likely there were communications among the nearby neighbors opposed to the airport expansion and that such communications also sufficed to place Lohror on inquiry notice.

Lohror submitted an affidavit stating that he learned of the April 2011 floodplain delineation in a telephone conversation with petitioner Bratton on October 19, 2011. Intervenors offer only speculation that petitioner Lohror "knew or should have known" of the April 12, 2011 letter prior to October 19, 2011, which is well within the 21 day deadline supplied by ORS 197.830(3)(b). Intervenors offer only speculation to controvert Lohror's

affidavit. Accordingly, we conclude that Lohror's appeal, filed on October 20, 2011, was timely filed under ORS 197.830(3)(b).

Because at least one petitioner filed a timely appeal under ORS 197.830(3)(b), we need not resolve whether petitioner Bratton "knew or should have known" of the April 12, 2011 letter more than 21 days prior to October 20, 2011. However, we observe that ORS 197.830(3)(b) requires that the petitioner "knew or should have known *of the decision* * * *." We have held that a petitioner who observes construction activity or other indications that a land use decision has been made is thereby placed on inquiry notice, and to preserve the right to appeal under ORS 197.830(3)(b) must thereafter make timely inquiries with the local government to discover the decision. *Abadi v. Washington County*, 35 Or LUBA 67 (1998). However, we have also held that mere knowledge regarding a pending application for development is insufficient to place the petitioners on inquiry notice prior to the decision approving development. *Rogers v. City of Eagle Point*, 42 Or LUBA 607, 616 (2002). Therefore, that Bratton knew or should have known in February 2011 that intervenors had submitted a floodplain delineation for the county's review was insufficient, in itself, to place Bratton on inquiry notice of the April 12, 2011 letter, for purposes of ORS 197.830(3)(b).

For the reasons above, the motion to dismiss LUBA No. 2011-094 is denied.

B. September 15, 2011 Building Permits

As explained above, on September 14, 2011, intervenors filed applications with the county seeking approval to construct two "accessory buildings," specifically two pole barns or "exempt agricultural buildings," on portions of the subject property that, according to site plans submitted with the applications, are located outside the floodplain. Record 2-7, 13-19. The floodplain boundaries as depicted on the two site plans are apparently derived from the floodplain delineation that the county floodplain manager found to be "acceptable" in his April 8, 2011 e-mail, and that the county planner used to resolve the code enforcement action in the April 12, 2011 letter discussed above. The applications state that the buildings are

intended for "storage, maintenance or repair of farm machinery and equipment." Record 7, 18. County staff issued approvals the next day, September 15, 2011, authorizing construction of the two buildings.

Respondents move to dismiss LUBA Nos. 2011-095 and 2011-096, arguing that the challenged construction approvals are excluded from the ORS 197.015(10)(a) definition of "land use decision" pursuant to ORS 197.015(10)(b)(B), which excludes from LUBA's review "building permit[s] issued under clear and objective land use standards."

Pursuant to ORS 455.315, agricultural buildings located on a farm and used in the operation of the farm are exempt from the State of Oregon Structural Specialty Code requirements.[6] More to the point, ORS 215.213(1)(e) authorizes a county to approve in the EFU zone "[n]onresidential buildings customarily provided in conjunction with farm use." In the AF-20 zone, ORS 215.213(1)(e) is implemented by CDC 344-3.1, which allows as a permitted use under the county's Type I procedures "accessory uses and structures" pursuant to CDC 430-1. CDC 430-1 defines accessory uses and structures to include "buildings and structures customarily incidental to a permitted use located on the same lot." Specifically with respect to agricultural accessory buildings, CDC 430-1.5 provides that:

> "Agriculture and forestry accessory buildings and structures are located on a farm or tract used for the propagation or harvesting of a forest product and used in the operation of said farm or forest operation for such things as housing of farm animals, forest products or supplies, and storage, maintenance

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[6] ORS 455.315 provides in relevant part:

> "(1) Nothing in this chapter is intended to authorize the application of a state structural specialty code to any agricultural building, agricultural grading or equine facility.
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> "(2) As used in this section:
>
> "(a) 'Agricultural building' means a structure located on a farm and used in the operation of the farm for:
>
> "(A) Storage, maintenance or repair of farm machinery and equipment[.]"

> or repair of farm or forest machinery or equipment. Barns, sheds, commercial greenhouses and other farm or forest related accessory structures provided in conjunction with farm or forest uses are allowed [subject to setbacks and other standards]."

Respondents do not dispute, and there seems no possible dispute, that the two construction permit applications for accessory buildings "concerned" the application of one or more land use regulations, and to that extent meet the definition of "land use decision" at ORS 197.015(10)(a). As noted, at least CDC 344-3.1 and CDC 430-1.5 seem to apply to such permit approvals. In addition, although petitioners do not argue this point in connection with the two construction permits, it seems likely that CDC 421-1.2 applied or should have been applied. As explained, CDC 421-1.2 applies when an application for a "Development Permit" is submitted for a site within a mapped floodplain or within 250 feet of a mapped floodplain, and allows the permit to be granted based on a concurrently submitted floodplain delineation rather than the adopted floodplain maps. The location of the two proposed buildings are within the mapped floodplain or, even if the new floodplain delineation controls, within 250 feet of a floodplain.

We understand the county to dispute that the two construction permit applications constitute applications for "Development Permits." However, the applications clearly call for "development" as that term is defined at CDC 106.57. CDC 106-58 rather unhelpfully defines "Development Permit" as "[t]he Director's or Hearings Officer's written approval shall be the Development Permit for any Type I, Type II, or Type III decisions." As noted above, the county's AF-20 zone, at CDC 344-3.1, allows "accessory uses and structures" as a permitted use under the county's Type I procedures, and subject to CDC 430-1.5. In addition, as petitioners note, if the building location is within a floodplain, CDC 421-5.4 specifies that an "[a]ccessory structure customarily provided in conjunction with the use set forth in the applicable primary District" is approved through a Type II procedure. In either case, a decision approving an agricultural accessory building in the AF-20 zone is, or should

be, processed as a Type I or II decision and therefore meets the CDC 106-58 definition of "Development Permit."

The county's position that an application for an accessory agricultural building in the AF-20 zone is not an application for a "Development Permit" is apparently based on CDC 201-2.4, which exempts "farm use" from the requirement to obtain a Development Permit.[7] However, we do not understand the county's apparent position that an accessory agricultural building intended to store farm equipment is in itself a "farm use." CDC 106.79 defines "farm use" with reference to the Oregon Revised Statutes. ORS 215.203(2)(a) defines "farm use" to mean, in relevant part:

> "the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof."

The county cites nothing in the CDC or ORS 215.203(2)(a) that suggests an agricultural accessory building constitutes "farm use." We note that ORS 215.203(2)(a) goes on to include within the category of "farm use" the "on-site construction and maintenance of equipment and facilities used for the activities described in this subsection." It is not clear to us what is the dividing line between a "facility" used for the farm activities described in ORS 215.203(2)(a), that is itself part of "farm use," and the "buildings customarily provided in conjunction with farm use" separately allowed in the EFU zone under ORS 215.213(1)(e). The "buildings" referred to in ORS 215.213(1)(e) are clearly *accessory* to farm use, and do not themselves constitute farm uses. *See* OAR 660-033-0120, Table 1 (setting out separate categories for "farm use" and "other buildings customarily provided in conjunction with farm

[7] CDC 201-2 lists all the uses in the county that do not require Development Permit approval, including "farm use." However, nothing in CDC 201-2 mentions accessory buildings in EFU zones or any other zone or excludes such buildings from the requirement to obtain a Development Permit.

use"). However, we need not inquire further, because it is clear that the CDC categorizes the buildings applied for in the present case, to be used for "storage, maintenance or repair of farm or forest machinery or equipment," as accessory buildings allowed in the EFU under CDC 344-3.1 and 430-1.5, which implement ORS 215.213(1)(e) and which allow accessory agricultural buildings in the AF-20 zone under a Type I procedure. The CDC does not categorize the proposed buildings as farm use.

The other apparent source for the county's position that a permit application for an accessory agricultural building is not a "Development Permit" is ORS 455.315, which as noted above exempts "agricultural buildings" from compliance with the structural code. *See* n 6. However, nothing cited to us in ORS 455.315 or elsewhere exempts "agricultural buildings," however defined, from application of the statutory EFU zone requirements or the county's AF-20 zone. That the structural building code does not apply does not mean that the proposed buildings are not accessory buildings subject to CDC 344-3.1, CDC 430-1.5, and, potentially, CDC 421-5.4. For these reasons, we reject the county's position that the construction permits are not "Development Permits" for purposes of CDC 421-1.2.

In sum, the two construction permit approvals concern the application of one or more land use regulations and are therefore "land use decisions" as defined at ORS 197.015(10)(a), unless excluded under one of the provisions of ORS 197.0150(10)(b). As noted, respondents argue that the two approvals fall within the exclusion at ORS 197.015(10)(b)(B) for "building permit[s] issued under clear and objective land use standards."[8] We therefore turn to that question.

[8] Technically, the two permits may not be "building" permits, because they are exempt from the structural specialty code. Nonetheless, they seem to be the exact type of direct construction approval that the ORS 197.015(b)(B) exclusion potentially applies to, and we follow the parties in analyzing the ORS 197.015(b)(B) exclusion rather than the more general ORS 197.015(b)(A) exclusion.

Respondents argue that all of the land use standards that apply to a construction permit for an accessory agricultural building in the AF-20 zone are clear and objective standards. Petitioners offer a number of responses, but the most persuasive is an argument that the challenged decisions are not subject to clear and objective land use standards for the reasons stated in *Doughton v. Douglas County*, 82 Or App 444, 728 P2d 887 (1986). *Doughton* involved a building permit for a farm dwelling on EFU land, which the EFU statutes then and now authorized if the dwelling is "customarily provided in conjunction with farm use[.]" *See* ORS 215.213(1)(f) and ORS 215.283(1)(e). LUBA dismissed the appeal, concluding that the county's approval fell within the exclusion at ORS 197.015(10)(b) (1985) for ministerial decisions made under "clear and objective" standards.[9] The Court of Appeals reversed, concluding that the question of whether a dwelling is "customarily provided in conjunction with farm use" is "inherently not susceptible to a clear and objective ministerial resolution." *Id.* at 449.[10] The Court concluded that for a dwelling on EFU land to be "a

[9] The current version of the ORS 197.015(10)(b)(B) clear and objective exclusion is worded differently than the clear and objective exclusion at issue in *Doughton*, which excluded from LUBA's jurisdiction a "ministerial decision * * * made under clear and objective standards contained in an acknowledged comprehensive plan or land use regulation and for which no right to a hearing is provided by the local government." However, the operative "clear and objective" language is the same, and we see nothing in the wording differences that would suggest a different outcome had the *Doughton* court interpreted the current exclusion.

[10] The Court explained in *Doughton*:

> "* * * More fundamentally, the question is inherently not susceptible to a clear and objective ministerial resolution. LUBA's *Matteo* decisions, discussed in LUBA's opinion, *supra*, make clear that, for a dwelling on EFU land to be a customary conjunct of farm use, there must be a factual demonstration that the land is used as well as zoned for farm purposes, and there must be a showing that the 'type of farm use is customarily combined with a residence.'
>
> "The purpose of ORS 197.015(10)(b) is to make certain local government actions unreviewable as land use decisions, because they are really nondiscretionary or minimally discretionary applications of established criteria rather than decisions over which any significant factual or legal judgment may be exercised. If particular decisions can automatically follow from the existence of general standards which are unaffected by factual variables, the decisions are within the statute's scope. For example, the statute would apply here *if all* proposed dwellings on EFU parcels where no existing dwellings are located were *necessarily or categorically* ones which are customarily provided in conjunction with farm

customary conjunct of farm use, there must be a factual demonstration that the land is used as well as zoned for farm purposes," and further there must be a showing that the "type of farm use is customarily combined with a residence." *Id.* (quoting *Matteo v. Polk County*, 11 Or LUBA 259, *aff'd Polk County v. Matteo*, 70 Or App 179, 687 P2d 820 (1984)). According to the Court, the "clear and objective" exclusion applies only if "particular decisions can automatically follow from the existence of general standards which are unaffected by factual variables[.]" 82 Or App at 449. However, the Court held, the clear and objective exclusion does not apply to a permit for a dwelling "customarily provided in conjunction with farm use" because the "permissibility of any dwelling for which [such] a permit is sought depends on facts which are peculiar to itself and which are not determinable by simple reference to general provisions of the ordinance." *Id* at 450.

In our view, the same operative qualification at issue in *Doughton* applies to the ORS 215.213(1)(e) category of nonresidential buildings "customarily provided in conjunction with farm use." For the reasons stated in *Doughton*, determining whether a building is customarily provided in conjunction with farm use is not a clear and objective determination, and the answer will depend upon several factual variables. The county cannot simply determine that the land is zoned for farm use. As in *Doughton*, the county must also determine that the land is currently employed for farm use, and that the proposed building is of the type that is customarily combined with the farm use in question. Because those inquiries are not clear and objective in all cases, the exclusion at ORS 197.015(10)(b)(B) does not apply.[11]

> use. However, for the reasons we have discussed, that is not the case. The permissibility of any dwelling for which a permit is sought depends on facts which are peculiar to itself and which are not determinable by simple reference to general provisions of the ordinance. We hold that ORS 197.015(10)(b) does not apply to the county's decision and does not divest LUBA of jurisdiction over petitioner's appeal." 82 Or App at 449-50 (footnote omitted)

[11] It is important to observe here that the fact that the decision does not fall within the exclusion at ORS 197.015(10)(b)(B) and is therefore a "land use decision" does not *necessarily* mean that the decision is also a

In the present case, there are additional factual variables in play. As petitioners note, the primary use of the subject property is a private use airport, a conditional use in the EFU zone, and an allowed use in the airport overlay zone that covers most of the property. No party cites anything in the record describing a farm use on the property, or explains what "farm equipment" intervenors propose to store, repair and maintain within the two proposed buildings, or how such equipment relates to any farm use of the property. Petitioners note that the proposed buildings will be located within the airport overlay zone and adjacent to the runway, on portions of the subject property found to be above the floodplain under the new floodplain delineation the county accepted, for code enforcement purposes, in the April 12, 2011 letter described above. Petitioners argue that there is every reason to believe intervenors intend the buildings to store the fuel trucks and chemicals that the April 12, 2011 letter required intervenors to remove from the floodplain, and not farm equipment. Petitioners also argue that the buildings may be used to store airplanes and aviation related equipment, and function at least in part as hangars accessory to the airport use rather than buildings accessory to any farm use of the property.

At one level petitioners' concern that the buildings will not in fact be used to store, maintain and repair farm equipment is a simple enforcement matter. If a building is properly approved as an accessory building to farm use of the property, but after construction the building is in fact used for purposes that are either prohibited in the EFU zone or require a separate permit approval, the county has the authority to institute enforcement proceedings to enjoin the use or require a new approval. However, we generally agree with petitioners that

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statutory "permit" as defined at ORS 215.402(4). *Tirumali v. City of Portland*, 41 Or LUBA 231, *aff'd* 180 Or App 613, 45 P3d 519 (2002). ORS 215.402(4) defines "permit" for purposes of ORS 215.402 to 215.438 as the "discretionary approval of a proposed development of land" under ORS 215.010 to 215.311, among other statutes. If the county's decision is a land use decision, but not a "permit" as defined at ORS 215.402(4), then the procedural requirements of ORS 215.402 to 215.438, such as the requirement to provide notice and opportunity to request a hearing, do not apply. Contrary to popular belief, not all land use decisions are subject to procedures requiring notice and a hearing.

in the course of determining whether a proposed accessory building is "customarily provided in conjunction with farm use," one variable the county should consider when a non-farm use such as a private use airport has been authorized on the property, on which commercial aviation operations are conducted pursuant to an airport overlay zone, is the possibility that the proposed building located within the overlay zone is intended to be used as an accessory building to the airport use (subject to ORS 215.213(2)(h)), rather than as an accessory building to farm use of the property under ORS 215.213(1)(e). That is particularly the case where, as here, it is not clear that any farm use occurs on the subject property.

In sum, we disagree with respondents that approval of the proposed accessory buildings is governed entirely by clear and objective land use standards, and therefore the challenged decisions do not fall within the ORS 197.015(10)(b)(B) exclusion to the definition of "land use decision." The motions to dismiss LUBA Nos. 2011-095 and 2011-096 are denied.

C. Review Schedule

The Board earlier granted the county's motion to hold resolution of petitioners' and intervenors' record objections in abeyance, pending resolution of the motions to dismiss. We understand that the parties have resolved a number of objections but that there are several outstanding objections that remain. Within 14 days from the date of this order, the county shall advise the Board on the status of the parties' negotiations, and either submit the record for settlement or for the Board's resolution of any outstanding objections, or request time for additional negotiations among the parties.

Dated this 17th day of April, 2012.

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Tod A. Bassham
Board Member