

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 ROGUE ADVOCATES, JEFF GILMORE,
4 JEANNIE GILMORE and ELIZABETH COKER,
5 *Petitioners,*

6
7 vs.

8
9 JACKSON COUNTY,
10 *Respondent,*

11
12 and

13
14 DONALD E. ROWLETT and JEAN ROWLETT,
15 *Intervenors-Respondents.*

16
17 LUBA No. 2015-097

18
19 ORDER

20 **MOTION TO INTERVENE**

21 Donald E. Rowlett and Jean Rowlett (intervenors), the applicants below,
22 move to intervene on the side of the county. There is no opposition to the
23 motion and it is allowed.

24 **MOTION TO DISMISS**

25 Petitioners appeal a stipulation between the county and intervenors that
26 modifies development allowed in a campground that is a nonconforming use.
27 Intervenors move to dismiss this appeal, arguing that the challenged decision is
28 not a land use decision subject to LUBA’s jurisdiction.

1 In 1975, intervenors and another individual sought declaratory relief in
2 Jackson County Circuit Court to establish a vested right to develop the subject
3 property as a campground. On April 20, 1976, the circuit court conducted a
4 trial and, on May 17, 1976, entered a decree entitled “Findings of Fact,
5 Conclusions of Law and Decree” (Original Decree). The Original Decree
6 allowed intervenors to complete development of (1) a 60-unit campground, (2)
7 a general store, chapel and lodge with bunkhouse, (3) a replica of a frontier
8 village, and (4) six log guesthouses and other miscellaneous structures.

9 On August 13, 1987, intervenors and county council signed a stipulated
10 amendment to the Original Decree (First Stipulation). The First Stipulation
11 refined use of the development allowed under the Original Decree, and
12 authorized additional structures and uses. The First Stipulation also provided
13 that the right to future developments allowed under the Decree shall expire
14 January 1, 2007, and that further development after that time would conform to
15 current zoning standards.

16 The decision before us in this appeal is entitled “Second Stipulated
17 Amended General Judgment,” entered on December 20, 2013. We refer to it as
18 the Second Stipulation. The Second Stipulation is signed by the county
19 administrator, the county attorney, intervenors, and a circuit court judge. The
20 Second Stipulation sets forth the allowed development that has been completed
21 on the property, identifies the remaining future development allowed pursuant
22 to the Decree, approves a modified boundary for future development, and

1 adopts a site plan depicting existing and future development. The Second
2 Stipulation also provides that no development authorized under the Decree or
3 the First Stipulation is subject to the expiration period set out in the First
4 Stipulation. In addition, the Second Stipulation provides that the county shall
5 allow future development of the property consistent with the Second
6 Stipulation as non-conforming uses, despite any contrary land use regulations.

7 On December 7, 2015, petitioners appealed the Second Stipulation to
8 LUBA. Intervenors now move to dismiss this appeal, for two reasons.

9 **A. Land Use Decision**

10 Intervenors first argue that the Second Stipulation is not a “land use
11 decision” subject to LUBA’s jurisdiction. ORS 197.015(10)(a) defines “land
12 use decision” in relevant part as a final local government decision that concerns
13 the application of comprehensive plan provisions or land use regulations.¹

¹ ORS 197.015(10)(a)(A) defines “land use decision” to include:

“A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

“(i) The goals;

“(ii) A comprehensive plan provision;

“(iii) A land use regulation; or

“(iv) A new land use regulation[.]”

1 According to intervenors, the Second Stipulation does not concern the
2 application of any county comprehensive plan provision or land use regulation,
3 and therefore is not a land use decision subject to LUBA’s jurisdiction for that
4 reason alone.

5 Petitioners argue, and we agree, that the Second Stipulation concerns the
6 application of at least some county land use regulations, and therefore falls
7 within the definition of “land use decision” at ORS 197.015(10)(a). In the
8 Second Stipulation, the county and intervenors effectively stipulated to alter
9 the scope of the nonconforming uses that are authorized on the property as part
10 of the vested right and as nonconforming uses. The First Stipulation had
11 required all future development to occur within the frontier village. The
12 Second Stipulation approves location of future development within new
13 boundaries delineated on a site plan. Record 3. Such an alteration appears to
14 be, in all but name, an alteration of a nonconforming use for purposes of ORS
15 215.130 and county regulations that govern vested rights and nonconforming
16 uses.²

² A vested right is essentially the right to construct what will become a nonconforming use. *Fountain Village Development Co. v. Multnomah Cty.*, 176 Or App 213, 223, 31 P3d 458 (2001). Generally, the same principles that govern nonconforming uses govern vested rights. *Id.* ORS 215.130 is the statute that governs nonconforming uses within county jurisdiction, including provisions for alterations of nonconforming uses. The county implementation is at Jackson County Land Development Ordinance (LDO) chapter 11.2.

1 Further, the First Stipulation had provided that the right to future
2 development expired on January 1, 2007, and development thereafter must
3 conform to current zoning requirements. The Second Stipulation includes the
4 agreement of the county and intervenors that intervenors have initiated
5 development on the property in accordance with the Decree, “to the extent that
6 no expiration of the development rights” as provided in the First Stipulation “is
7 warranted.” Record 4. That modification arguably represents the verification
8 or alteration of a nonconforming use.

9 Finally, the Second Stipulation provides that the county shall allow
10 future development of the property consistent with the Second Stipulation “as
11 non-conforming uses, despite” any contrary county comprehensive plan
12 provisions or land use regulations. Record 7. Again, that provision arguably
13 represents the verification or alteration of a nonconforming use, and as such it
14 concerns the application of at least some land use regulations.

15 For the above reasons, the Second Stipulation concerns the application
16 of at least some land use regulations, and it is therefore a “land use decision” as
17 defined at ORS 197.015(10)(a), unless some statutory exception applies. No
18 party argues that any statutory exception applies.

19 **B. Circuit Court Jurisdiction**

20 Intervenors acknowledge that local government decisions regarding
21 vested rights and nonconforming uses are land use decisions subject to
22 LUBA’s exclusive jurisdiction. However, intervenors argue that the present

1 case is unique, in that the challenged decision amends a decree originally
2 issued by the circuit court in 1976, prior to the creation of LUBA, in 1979. In
3 1976, intervenors argue, the circuit court had jurisdiction to declare
4 intervenors' rights to develop the campground as a vested right. Although the
5 jurisdictional landscape (and much else) has changed since then, intervenors
6 argue that the circuit court retains inherent jurisdiction to approve amendments
7 to its original 1976 decree, notwithstanding that since 1979 a local
8 government's decision to approve modifications to a vested right or
9 nonconforming use would be a land use decision subject to LUBA's exclusive
10 review.

11 For the following reasons, we disagree with intervenor that the circuit
12 court's involvement in the Second Stipulation means that the stipulation is
13 excluded from LUBA's jurisdiction.

14 A stipulated agreement between a local government and a landowner to
15 resolve a land use dispute can constitute a land use decision, even in
16 circumstances where the stipulation is the basis to resolve an action in circuit
17 court. *See Murphy Citizens Advisory Committee v. Josephine County*, 319 Or
18 477, 878 P2d 414 (1994) (a stipulation between the applicant and county to
19 issue a permit is a land use decision, notwithstanding that the stipulation was
20 used to moot and dismiss a pending mandamus action); *DLCD v. Benton*
21 *County*, 27 Or LUBA 49, 58 (1994) (a stipulation between the applicant and
22 the county that the applicant has a vested right to develop property is a land use

1 decision, notwithstanding that the stipulation ended the applicant's declaratory
2 ruling action in circuit court).

3 The circumstances in *DLCD v. Benton County* are very similar to the
4 present case. The applicant filed a declaratory ruling in circuit court seeking a
5 declaration that he had the right to develop property, as a vested right among
6 other theories. The applicant and the county entered into a stipulation that
7 would allow the applicant to develop the property. Based on the stipulation,
8 the circuit court entered judgment in favor of the applicant. Some years later,
9 the petitioner, who was not a party to the stipulation or the circuit court action,
10 appealed the stipulation to LUBA. LUBA ultimately concluded that the
11 stipulation resolved a claim of vested rights and therefore was a land use
12 decision subject to LUBA's jurisdiction. Further, LUBA concluded that the
13 circuit court's entry of judgment based on the stipulation did not affect the
14 Board's jurisdiction.

15 We see no legally significant difference between the circumstances in the
16 present case and those in *DLCD v. Benton County*. In both cases, the applicant
17 and the county entered into a stipulation regarding a vested right to construct a
18 nonconforming development. In both cases, the stipulation met the definition
19 of land use decision at ORS 197.015(10)(a). In both cases, the stipulation was
20 the basis for a circuit court judgment that stemmed from an action filed for a
21 declaratory ruling regarding the vested right. The only real difference we see is
22 that in the present case the circuit court judgment based on the stipulation

1 amends an earlier circuit court decree, while in *DLCD v. Benton County* the
2 circuit court judgment based on the stipulation was the original, and only,
3 judgment. But intervenor has not explained why that factual difference should
4 result in a different conclusion regarding LUBA's jurisdiction.

5 It is important to observe that, under ORS 197.825(1), LUBA has
6 exclusive jurisdiction "to review any land use decision." LUBA's function is
7 to review appeals of land use decisions, in order to resolve the parties'
8 arguments regarding whether that decision complies with applicable land use
9 standards. The circuit court, in accepting the stipulation of the county and
10 intervenor, and entering judgment based on that stipulation, did not engage in
11 any kind of *review* of the stipulation against land use standards. To the extent
12 the circuit court actually reviewed such a stipulation against land use standards,
13 it would likely exceed its jurisdiction. *See Grabhorn, Inc. v. Washington*
14 *County*, 255 Or App 369, 297 P3d 524 (2013) (affirming dismissal of a
15 declaratory ruling action in which the applicant sought either (1) review of a
16 county letter regarding the nonconforming use status of a landfill, or (2) a
17 circuit court ruling on the nonconforming use status of the landfill).

18 Stated differently, if the county and intervenor wish to amend the
19 Original Decree to reflect their stipulation, they obviously must obtain the
20 circuit court's approval and signature to do so. Only the circuit court has
21 authority to modify a circuit court decree. But that does not mean that the

1 stipulation itself is not potentially a land use decision subject to appeal to
2 LUBA.

3 In sum, the challenged stipulation between the county and intervenor is a
4 land use decision subject to LUBA's jurisdiction. The motion to dismiss is
5 denied.

6 **RECORD OBJECTIONS**

7 On January 13, 2016, petitioners filed objections to the record, advising
8 that they are working with the county to resolve the objections. Pursuant to
9 OAR 661-010-0026(4), the county shall advise LUBA of the status of efforts to
10 resolve the objections.

11 Dated this 28th day of January, 2016.

12
13
14
15
16

Tod A. Bassham
Board Chair