

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

3  
4                                   TOM BUTORI,  
5                                   *Petitioner,*

6  
7                                   vs.

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9                                   CLATSOP COUNTY,  
10                                  *Respondent.*

11  
12                                  LUBA No. 2003-064

13                                  ORDER ON MOTION TO DISMISS

14                   This appeal concerns a decision by the Clatsop County Director of Community  
15 Development (Director) that grants a one-year extension for a conditional use permit to  
16 construct a dwelling in a county forest zone.<sup>1</sup> Petitioner appealed that decision to LUBA.  
17 The county moves to dismiss the appeal, arguing that the Director’s decision is not a land use  
18 decision subject to LUBA review. Petitioner moves to transfer this appeal to circuit court, in  
19 the event LUBA determines the challenged decision is not a land use decision. ORS  
20 34.102(4); OAR 661-010-0075(11). We conclude that the challenged decision is a land use  
21 decision and, therefore, we deny both motions.

22                   The disputed one-year extension is granted pursuant to Clatsop County Zoning  
23 Ordinance (CCZO) 5.030, which provides:

24                   “Time Limit on Permit for Conditional Use. Authorization of a conditional  
25 use shall be void after two years unless substantial construction or action  
26 pursuant thereto has taken place (as per Section S2.011). However, the  
27 County may, at the discretion of the Planning Director, extend authorization  
28 for an additional one year upon request, provided such request is submitted in  
29 writing at least 10 days and not more than 30 days prior to expiration of the  
30 permit. \* \* \*”

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<sup>1</sup> The parties apparently agree that the original conditional use permit authorized construction of a forest template dwelling under ORS 215.750 or county legislation that implements that statute. The record has not been filed and we cannot independently confirm that this is the case. However, for purposes of this order, we assume that the parties are correct.

1 The reference to “S2.011” is apparently a reference to the Clatsop County Development  
2 Standards (CCDS). We do not have a copy of the CCDS. The challenged decision sets out  
3 the text of CCDS S2.011 as follows:

4 “Substantial construction shall be defined to have occurred for construction  
5 when any of the following has been met prior to the expiration the specific  
6 development permit:

7 “a. Building, development and septic permits have been obtained and a  
8 foundation completed for a conventionally built dwelling; or

9 “b. Substantial construction (as defined in [CCZO] 1.030)<sup>[2]</sup> has been  
10 completed at a cost in excess of 10% of the construction value of the  
11 proposed structure as determined by Uniformed Building Code  
12 calculations. Documentation of the cost of improvements for the  
13 dwelling shall be in writing (i.e. receipts, canceled checks, etc.) and  
14 shall be submitted to the Planning Department with a time schedule of  
15 the activities/expenditures.”

16 After setting out CCZO 5.030 and CCDS S2.011, the challenged decision concludes:

17 “You have submitted an extension request to your Conditional Use Permit and  
18 documentation for the ‘substantial construction.’ Based on this information,  
19 your request has been approved. You now have until March 13, 2004 to  
20 finalize your Conditional Use Permit. **It is important to state at this time,**  
21 **that no further extensions can be requested and should you not complete**  
22 **the Conditional Use Permit by the date mentioned above you will need to**  
23 **reapply (including the fee) and receive approval of the Conditional Use**  
24 **Permit.”** Motion to Dismiss, Exhibit B, page 2 (bold type and underlining in  
25 original).

26 The Land Conservation and Development Commission (LCDC) has established time  
27 limits for certain discretionary permits on farm and forest lands and authorizes extensions of  
28 those time limits in certain circumstances. OAR 660-033-0140. Several sections of OAR

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<sup>2</sup> CCZO 1.030 defines “Substantial Construction” as follows:

“Any development-related activity (site preparation or construction activities), including any combination of development, building, or septic permits, septic construction, clearing, grading, excavation or other earthwork, road construction, utility placement, surveying, engineering and architectural design, that has been met prior to the expiration of the specific development permit as outlined in S2.011.

1 660-033-0140 are relevant here.<sup>3</sup> Citing OAR 660-033-0140(3), the county moves to dismiss  
2 this appeal.

3 We reject the argument. OAR 660-033-1040(5), imposes a four-year limit on  
4 conditional use permits for forest template dwellings authorized by ORS 215.750. As far as  
5 we can tell, that four-year time limit has not expired.

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<sup>3</sup> OAR 660-033-0140 provides:

- “(1) Except as provided for in subsection (5) of this rule, a discretionary decision, except for a land division, made after the effective date of this division approving a proposed development on agricultural or forest land outside an urban growth boundary under ORS 215.010 to 215.293 and 215.317 to 215.438 or under county legislation or regulation adopted pursuant thereto is void two years from the date of the final decision if the development action is not initiated in that period.
- “(2) A county may grant one extension period of up to 12 months if:
  - “(a) An applicant makes a written request for an extension of the development approval period;
  - “(b) The request is submitted to the county prior to the expiration of the approval period;
  - “(c) The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period; and
  - “(d) The county determines that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible.
- “(3) Approval of an extension granted under this rule is an administrative decision, is not a land use decision as described in ORS 197.015 and is not subject to appeal as a land use decision.
- “(4) Additional one year extensions may be authorized where applicable criteria for the decision have not changed.
- “(5)(a) If a permit is approved for a proposed residential development on agricultural or forest land outside of an urban growth boundary, the permit shall be valid for four years.
  - “(b) An extension of a permit described in subsection (5)(a) of this rule shall be valid for two years.
- “(6) For the purposes of subsection (5) of this rule, ‘residential development’ only includes the dwellings provided for under ORS 215.213(1)(t), (3) and (4), 215.283(1)(s), 215.284, 215.705(1) to (3), 215.720, 215.740, 215.750 and 215.755(1) and (3).”

1 The challenged decision applies the “substantial construction or action” standard set  
2 out in CCZO 5.030.<sup>4</sup> The challenged decision does not apply the “unable to begin or  
3 continue” standard set out at OAR 660-033-0140(2) or (5)(a) to extend the conditional use  
4 permit.<sup>5</sup> Thus, the challenged permit extension decision was not issued pursuant to OAR  
5 660-033-0140. Therefore, even if we assume that LCDC has authority to decide in OAR  
6 660-033-0140(3) that extensions of conditional use permits under OAR 660-033-0140(2) are  
7 not land use decisions that are subject to LUBA review, a question we need not and do not  
8 decide here, OAR 660-033-0140(3) has no bearing on whether we have jurisdiction over the  
9 county decision that is challenged in this appeal.

10 As noted, the challenged decision applies CCZO 5.030, which is a county land use  
11 regulation. Under ORS 197.015(10)(a)(A)(iii) final county decisions that apply “[a] land use  
12 regulation” are land use decisions subject to LUBA review. The county does not argue that  
13 the challenged decision qualifies for the exception to our jurisdiction for decisions that are  
14 “made under land use standards which do not require interpretation or the exercise of policy  
15 or legal judgment.” ORS 197.015(10)(b)(A). Even if it had, the county applied CCZO 5.030  
16 and determined that the applicant has completed “substantial construction,” as that term is  
17 defined by CCZO 1.030 and CCDS S2.011. That determination would appear to require the  
18 exercise of discretion and the exercise of legal judgment.

19 The county’s motion to dismiss is denied. Petitioner’s motion to transfer is denied

20 The record shall be due 21 days from the date of this order.

21 Dated this 14<sup>th</sup> day of July, 2003.

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<sup>4</sup> It is not clear to us why the county applied the “substantial construction or action” standard in CCZO 5.030 to grant a one-year extension. The authority to grant a one-year extension appears to be wholly within the discretion of the Director, if a timely request for an extension is filed. Literally read, the CCZO 5.030 two-year time limit is satisfied by “substantial construction or action” and, if there has been “substantial construction or action,” as the county apparently found, a one-year extension would appear to be unnecessary. However, we will await the briefs on the merits before considering this issue any further.

<sup>5</sup> Actually, it is not clear to us that OAR 660-033-0140(5)(b) imposes any standard for granting the two-year extension that is authorized by that subsection of the rule.

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Michael A. Holstun  
Board Member