

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BEFORE THE LAND USE BOARD OF APPEALS
FOR THE STATE OF OREGON

ROGUE ADVOCATES and)
CHRISTINE HUDSON,)
)
 Petitioners,)
)
 vs.)
)
 JACKSON COUNTY,)
)
 Respondent,)
)
 and)
)
 PAUL MEYER and KRISTEN MEYER,)
)
 Intervenor-Respondents.)

LUBA NO.: 2014-015

**INTERVENOR-RESPONDENT'S
MOTION TO DISMISS AND MOTION
TO SUSPEND BRIEFING SCHEDULE**

I. Motion to Dismiss

Intervenor-Respondent (“Intervenor”) moves to dismiss the appeal. The challenged decision (“the Decision”) is not a land use decision and it is not subject to LUBA’s jurisdiction.

A. Summary of Facts

Intervenor accepts Petitioners’ Summary of Material Facts except as supplemented herein. A septic tank located within the designated floodway (“the septic tank”) was removed prior to the filing of the application for the floodplain permit at issue. *Record, 2.* The septic tank was removed pursuant to the *Stipulated Order with Findings of Fact and*

1 *Conclusions of Law* (“the Stipulated Order”). *Record*, 66-69. The Stipulated Order states, in
2 part, as follows:

3 7. That DEFENDANTS immediately cease and desist the use of any part of
4 the Premise, including improvements, fixture or real property not found to be
5 a lawful pre-existing no conforming use (sic) pursuant the Order (sic) of this
6 Hearings Officer in Case No. COD2013-00559. Specifically, DEFENDANTS
shall only be permitted to use the following improvements, fixtures or
portions of the real property on the Premise: See Exhibit A to this Stipulated
Order.

7 8. That Jackson County confirm that DEFENDANTS have removed any
8 improvement or fixture on the Premise not identified in paragraph 7, above, as
9 being an unlawful extension of a lawful preexisting nonconforming use from
the Premise no later than December 25, 2013. *Record*, 68.

10 As the Decision expressly states, the Septic Tank was removed pursuant to and in
11 conformance with the Stipulated Order. *Record*, 2, 5. Consequently, no development was
12 being proposed within the floodway in conjunction of the Application. *Record*, 19. No
13 appeal of the Stipulated Order was filed.

14 **B. The Challenged Decision is not a Land Use Decision**

15 The Decision involves development outside the floodway where base flood elevations
16 have been determined by the Federal Emergency Management Agency (FEMA). *Record*, 73,
17 90. Section 7.2.2(C)(1) states, in part, as follows:

18 A Floodplain Development Permit will be processed through the following
19 review procedures:

20 1) A Type 1 Floodplain Development Permit (administrative) is required for
the following development projects.

21 ****;

22 (b) Development outside of the floodway where base flood elevations have
23 been determined by FEMA. However, development requiring a cumulative
24 analysis or a no-rise certification requires a Type 2 Floodplain Development
Permit. LDO 7.2.2(C)(1)(b) (*See Also*, Appendix ___).

1 As set forth above, that Application does not propose any development within the designated
2 floodway.

3 Consequently, a Type 1 review procedure was the appropriate review procedure for
4 the Application. LDO 3.1.2, which governs Type 1 permits, states as follows:

5 **Type 1 Land Use Authorizations, Permits and Zoning Information Sheet**

6 Type 1 uses are authorized by right, requiring only non-discretionary staff
7 review to demonstrate compliance with the standards of this Ordinance. A
8 Zoning Information Sheet may be issued to document findings or to track
9 progress toward compliance. Type 1 authorizations are limited to situations
10 that do not require interpretation or the exercise of policy or legal judgment.
11 Type 1 authorizations are not land use decisions as defined by ORS 215.402.
12 LDO 3.1.1.¹

13 A “land use decision” does not include a decision “[t]hat is made under land use standards
14 that do not require interpretation or the exercise of policy or legal judgment.” ORS
15 197.015(10)(b)(A).

16 Petitioners do not allege that the applicable standards under LDO 7.2 require
17 interpretation or the exercise of policy or legal judgment. Instead, Petitioners argue that a
18 determination as to whether the development on the subject property was “lawfully
19 established” requires “a significant exercise of policy or legal judgment”. *Petition for*
20 *Review*, Pg. 16. However, the Application was not subject to any criteria or standard
21 requiring a finding that proposed development or use be “lawfully established”. Petitioners
22 further argue that the Decision required the exercise of legal judgment in finding that the
23 Applicant had complied with the Stipulated Order. *Petition for Review*, Pg. 17. However,
24 the Stipulated Order, specifically the development listed in Exhibit “A” of the Stipulated
Order, is concise requiring no interpretation or exercise of policy or legal judgment on the

¹ Intervenor acknowledges that ORS 215.402 does not directly define a “land use decision”.

1 part of Respondent. Consequently, the Decision is not a land use decision and the appeal
2 should be dismissed for lack of jurisdiction.

3 **II. Motion to Suspend Briefing Schedule.**

4 Intervenor moves to suspend the briefing schedule pending a determination on the
5 motion to dismiss pursuant to OAR 661-010-0067. Intervenor has consulted with counsel for
6 Respondent and he consents to this motion. Intervenor has also consulted with counsel for
7 Petitioners and Petitioners have no position on this motion.

8 Dated this 16th day of June, 2014.

9 HUYCKE O'CONNOR JARVIS, LLP

10 

11
12 Daniel B. O'Connor, OSB No. 950444
13 Of Attorneys for Intervenor-Respondents
14 Paul Meyer and Kristen Meyer

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF FILING

I hereby certify that I filed the original of the Intervenor-Respondent's Motion to Dismiss and Motion to Suspend Briefing Schedule, together with one (1) copy thereof, with the Land Use Board of Appeals, Department of State Lands Building, 775 Summer Street, NE, Suite 330, Salem, Oregon 97301-1283, on June 16, 2014, by first class mail, postage prepaid, to the Board at the above address.



Daniel B. O'Connor, OSB No. 950444
Of Attorneys for Intervenor-Respondents Paul Meyer
and Kristen Meyer

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2014, I served a true and correct copy of Intervenor-Respondent's Motion to Dismiss and Motion to Suspend Briefing Schedule on all persons listed below, by first class mail, postage prepaid.

Joel Benton
County Counsel
10 S. Oakdale, Room 214
Medford, Oregon 97501

Maura Fahey
Crag Law Center
917 SW Oak, Suite 417
Portland, Oregon 97205



Daniel B. O'Connor, OSB No. 950444
Of Attorneys for Intervenor-Respondents Paul Meyer
and Kristen Meyer