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

ROGUE ADVOCATES, and)	
CHRISTINE HUDSON,)	LUBA No. 2014-015
Petitioners,)	
)	
v.)	PETITIONERS' RESPONSE TO
)	INTERVENOR-RESPONDENT'S
JACKSON COUNTY,)	MOTION TO DISMISS AND
Respondent, and)	MOTION TO SUSPEND
)	BRIEFING SCHEDULE
PAUL MEYER and KRISTEN MEYER,)	
Intervenor-Respondents.)	
_____)	

Petitioners respond to the Motion to Dismiss and Motion to Suspend the Briefing Schedule (“Motion”) filed by Intervenor-Respondent (“Intervenor”) as follows:

I. Motion to Dismiss

Petitioners oppose the Motion to Dismiss on several grounds. First, for the reasons stated in Petitioners’ Petition for Review (“Petition”) LUBA has

1 jurisdiction over this appeal because the permit decision at issue is a land use
2 decision that required the exercise of policy or legal judgment. *See* Petition at 13-
3 18. As Petitioners explained in the Petition for Review, the floodplain
4 development permit application proposed development that required the permit to
5 be processed under the Type 2 Review process, a process expressly involving
6 discretionary review. *Id.* at 13-15.

7 Intervenor does not address Petitioners’ argument that the required no-rise
8 certification for the septic tank removal mandated that the permit be processed
9 under the Type 2 review procedures. Intervenor instead contends that the septic
10 tank was removed pursuant to the stipulated order *prior* to the filing of the
11 floodplain permit application. There is no evidence in the record to support this
12 assertion.¹ Intervenor points to the stipulated order requirement that the septic tank
13 be removed no later than December 25, 2013 to support its claim. Motion at 2.
14 However, the floodplain permit application was filed October 25, 2013 and
15 expressly states that the “Applicant *proposes*, and the applicant’s engineer
16 confirms feasibility, to remove the existing septic tank....” Rec. 87 (emphasis
17 added). It is clear from this statement that the floodplain permit application sought
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¹ Intervenor sites to Rec. 2 to support its claim, however, that citation is to the floodplain permit staff report, not the floodplain permit application. Additionally, although the staff report states that the “septic tank has been removed pursuant to the stipulated order[,]” it does not specify when that removal was completed.

1 approval for “development” within the floodplain as it is defined in the LDO² and
2 that the proposed development required a no-rise certification. Additionally,
3 Intervenor does not assert, and the application decision does not provide, that the
4 fill placed in the floodways associated with the septic tank removal was completed
5 prior to the floodplain permit application. *See* Rec. 6. The proposed development
6 required Respondent to review the floodplain permit under the Type 2 review
7 procedures; this failure alone provides sufficient basis for LUBA’s jurisdiction.

8 Aside from the clear requirement for Type 2 review, Petitioners respond to
9 Intervenor’s argument that the decision did not require the exercise of policy or
10 legal judgment by referring the Board to their second assignment of error. Petition
11 at 13-20. As fully addressed in the Petition, Respondent was required to exercise
12 significant policy or legal judgment when deciding to rely on the non-conforming
13 use determination, the code enforcement orders, and the stipulated order to
14 determine the extent of development that is the subject of the floodplain
15 development permit at issue. *Id.*

16 Moreover, based on Intervenor’s Motion, it is apparent that the relationship
17 between the prior land use decisions, the code enforcement orders, the stipulated
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² Development is defined as “[a]ny man made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, *filling*, grading, paving, excavation or drilling operations or storage of equipment or materials.” LDO 13.3(65).

1 order and the floodplain permit decision currently at issue is a point of dispute.
2 LUBA should deny the Motion and defer a ruling on jurisdiction until after the
3 nature and relationship of the proceedings below has been fully briefed and oral
4 argument has been heard. *Columbia Hills Development Co. v. Columbia County*,
5 35 Or LUBA 737, 740 (1998).

6 Finally, the issues raised by the Motion are a primary basis of Petitioners’
7 appeal and are more properly addressed in Intervenor’s response brief.
8 Intervenor’s Motion is essentially a condensed response to Petitioners’ second
9 assignment of error. The issues presented by the Motion are more appropriately
10 resolved through complete briefing and oral argument. The Board should deny this
11 Motion and require Intervenor to fully respond to the arguments as set out in the
12 Petition.

13 Alternatively, because denial of the Motion would essentially amount to a
14 granting of Petitioners’ second assignment of error, Petitioners request that if the
15 Board rules to deny this Motion, that it treats the Motion as dispositive of the
16 appeal and order reversal or remand of the floodplain permit decision on that basis.
17 The Board should not afford Intervenor-Respondent “unlimited bites at the
18 jurisdictional apple.” *Comrie v. City of Pendleton*, 46 Or LUBA 19, 22 (2003).

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CERTIFICATE OF FILING

I hereby certify that, on June 17, 2014, I filed the original and one copy of **Petitioners' Response to Intervenor-Respondent's Motion to Dismiss and Motion to Suspend Briefing Schedule** with the Land Use Board of Appeals, at DSL Building, 77s Summer Street NE, Suite 330, Salem, Oregon 97301, by first class mail.

DATED: This 17th day of June, 2014

By: _____
Maura C. Fahey
Crag Law Center

CERTIFICATE OF SERVICE

I further certify that, on June 17, 2014, I served a true and correct copy of **Petitioners' Response to Intervenor-Respondent's Motion to Dismiss and Motion to Suspend Briefing Schedule** on the other parties to this appeal, by first class mail as follows:

Joel Benton
Jackson County Counsel
10 S Oakdale, Room 214
Medford, OR 97501

Daniel O'Connor
Huycke O'Connor Jarvis LLP
823 Alder Creek Drive
Medford, OR 97504

DATED: This 17th day of June, 2014

By: _____
Maura C. Fahey
Crag Law Center