BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HOWARD GRABHORN,
Petitioner,

vs.

WASHINGTON COUNTY,
Respondent.

LUBA Nos. 2004-028 and 2004-045

FINAL OPINION
AND ORDER

Appeal from Washington County.

Wendie L. Kellington, Lake Oswego, represented petitioner.

Christopher A. Gilmore, County Counsel, Hillsboro, represented respondent.

Christen C. White, Portland, represented intervenor-respondent.

BASSHAM, Board Member; HOLSTUN, Board Chair; BRIGGS, Board Member, participated in the decision.

DISMISSED 04/01/2004

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

In these consolidated appeals, petitioner appeals (1) a January 29, 2004 letter from the county determining that a berm on petitioner's landfill was constructed without necessary permits and requiring that petitioner bring the berm into compliance with the county's code; and (2) a February 25, 2004 letter that suspends the enforcement action initiated by the January 29, 2004 letter, pending a future county decision to affirm, modify, or reverse the county's position with respect to the alleged code violation.

MOTION TO INTERVENE

Art Kamp, John Frederick, and Richard Ponzi move to intervene on the side of respondent. Petitioner objects to the motion, on the grounds that the motion fails to establish that any of the moving parties is entitled to intervene under ORS 197.830(7).[1] The moving parties have not responded to petitioner's objection. We agree with petitioners that the motion to intervene does not establish that the moving parties are entitled to intervene. The motion to intervene is denied.

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[1] ORS 197.830(7) provides, in relevant part:

> "(a) Within 21 days after a notice of intent to appeal has been filed with the board under subsection (1) of this section, any person may intervene in and be made a party to the review proceeding upon a showing of compliance with subsection (2) of this section.
>
> "(b) Notwithstanding the provisions of paragraph (a) of this subsection, persons who may intervene in and be made a party to the review proceedings, as set forth in subsection (1) of this section, are:
>
> "(A) The applicant who initiated the action before the local government, special district or state agency; or
>
> "(B) Persons who appeared before the local government, special district or state agency, orally or in writing."

JURISDICTION

The county moves to dismiss both LUBA No. 2004-028 and 2004-045, arguing that one or both decisions are moot, are not final, or are not "land use decisions" as that term is defined at ORS 197.015(10)(a), and therefore are not subject to LUBA's jurisdiction.

A. Background

We take the following facts from the parties' pleadings. Petitioner operates a landfill on the subject property as a nonconforming use. In 1991, petitioner sought permits from the Oregon Department of Environmental Quality (DEQ) to continue operation of the landfill. DEQ requested a land use compatibility statement (LUCS) from the county, inquiring whether the landfill operation required county land use approvals. The county responded that the landfill was a nonconforming use and thus required no approvals. DEQ subsequently issued permits to operate the landfill.

In 2002, petitioner sought county approval for a lot line adjustment, apparently to facilitate desired improvements to the landfill. The county responded that approval of the requested lot line adjustment required a nonconconforming use verification to determine whether the landfill qualified as a nonconforming use and to determine the nature and scope of the landfill operation on the date it became nonconforming. Although petitioner believed that the 1991 LUCS constituted a sufficient nonconforming use verification, petitioner agreed to file an application for a nonconforming use verification. Sometime thereafter, petitioner sought to withdraw the application for nonconforming use verification. The county refused to allow the application to be withdrawn, citing a local code provision that authorizes the county to continue processing such applications if the planning director believes there is an ongoing code violation on the property. Petitioner then filed for a writ of mandamus in circuit court, to force the county to allow him to withdraw the application. The circuit court ultimately agreed with the county that it could refuse to allow withdrawal of the application. The county then continued with the nonconforming use verification process, which is apparently still pending.

In December 2003, petitioner constructed a large berm on the subject property. After a complaint was filed with the county regarding the berm, a county engineering assistant sent a letter to petitioner dated January 29, 2004. The January 29, 2004 letter is the subject of LUBA No. 2004-028, and it states in relevant part:

> "We have recently received a complaint from one of your neighbors with regard to the berm on the northwest corner of the above-mentioned property. As part of our investigation of the complaint, our office contacted DEQ, acknowledging that the landfill activity on this parcel falls under DEQ's jurisdiction. In their response, DEQ concluded that the berm is not considered part of the landfill operation. Thus, the grading associated with the berm falls within the jurisdiction of Washington County. Because the berm was constructed without a permit from Washington County Building Services contrary to the Uniform Building Code (UBC) Chapter 33 and the Community Development Code (CDC) Section 410-1.3 you will need to bring your property into compliance with regards to this issue. * * *"

On February 10, 2004, DEQ wrote a letter to the county stating that, after further review, DEQ believes that the disputed berm is within the scope of the DEQ permits issued to petitioner and thus within DEQ's jurisdiction. On February 25, 2004, the county sent the following letter to petitioner's attorney:

> "As we discussed, the County will forego taking any further action on the enforcement letter * * * dated January 29, 2004, until such time as a final decision is issued by the hearings officer * * * regarding the nature and scope of the nonconforming use on the property. [The hearings officer's] decision will likely be of some value, given that the issue of whether the berm is a violation was specifically raised in that proceeding.
>
> "Based on that decision, the County will consider whether to affirm, modify, or reverse its position with regard to any violation on the property.
>
> "Because this letter is specifically provided for purposes of modifying the prior letter referenced above, the County asks that you voluntarily dismiss the pending appeal [of the January 29, 2004 letter] on or before March 5, 2004."

Petitioner promptly appealed the February 25, 2004 letter to LUBA, and that letter is the subject of LUBA No. 2004-045. On March 17, 2004, we consolidated these appeals for review.

B. Motions to Dismiss

Although the parties disagree about nearly everything else, the parties appear to agree that the intent and effect of the February 25, 2004 letter appealed in LUBA No. 2004-045 is to suspend the enforcement action initiated by the January 29, 2004 letter appealed in LUBA No. 2004-028. That suspension is to remain in effect until the county renders a decision whether to "affirm, modify, or reverse [the county's] position with regard to any violation on the property," following the conclusion of the nonconforming use verification proceedings. The county argues first that the February 25, 2004 letter renders the January 29, 2004 letter without effect and the appeal of that letter moot. Alternatively, the county argues that in suspending the January 29, 2004 letter pending a subsequent decision, the February 25, 2004 letter effectively renders the January 29, 2004 letter a tentative rather than "final" decision. As relevant here, LUBA's jurisdiction is limited to *final* decisions. *E & R Farm Partnership v. City of Gervais*, 37 Or LUBA 702, 705 (2000); *CBH Company v. City of Tualatin*, 16 Or LUBA 399, 405 n 7 (1988).

Petitioner disputes that the February 25, 2004 letter moots the appeal of the January 29, 2004 letter, arguing that absent an express revocation or rescission of the January 29, 2004 letter, the county's determination in that decision that a violation exists is still in effect and the county's enforcement action initiated by the January 29, 2004 letter could be reinstated at any time. As to finality, petitioner argues that the January 29, 2004 letter is final on its face, and there is no dispute that no local appeal is available from that decision. According to petitioner, the February 25, 2004 letter cannot render an earlier final decision a non-final or tentative decision.

As the parties recognize, the present facts are unusual and no precedent cited to us is particularly on point. However, we agree with the county that the January 29, 2004 letter is not within our jurisdiction. In our view, the February 25, 2004 letter is accurately characterized as announcing that, based on petitioner's remonstrance, the county (1) has *reconsidered* the January 29, 2004 letter and (2) will issue a subsequent decision that will declare whether the county adheres to, modifies, or rejects the January 29, 2004 letter. Although we find no authority directly on point,

it seems logical that a decision to reconsider what might otherwise be a final, appealable decision effectively renders that previous decision, at most, a tentative, non-final and non-appealable decision. Further, the February 25, 2004 letter effectively identifies the ultimate decision on reconsideration that the county will adopt as the final, appealable decision.

Moreover, the February 25, 2004 letter could also be accurately characterized as effectively withdrawing or repealing the county's earlier determination that the disputed berm requires a county permit, and reserving final judgment on that issue to a subsequent decision. If so, the February 25, 2004 letter would appear to moot the appeal of the January 29, 2004 letter. Because the February 25, 2004 letter declares in essence that the county will reconsider the January 29, 2004 letter, the January 29, 2004 letter is either no longer a final decision or it is rendered without legal effect. In either case, we agree with the county that petitioner's appeal of the January 29, 2004 letter is not within our jurisdiction.

We also agree with the county that the February 25, 2004 letter is not a final land use decision within our jurisdiction. First, the February 25, 2004 letter does not apply a land use regulation or otherwise fall within the definition of "land use decision" at ORS 197.015(10)(a), and petitioner does not argue that any comprehensive plan provision or land use regulation applies to the February 25, 2004 decision. As noted, the only thing the February 25, 2004 letter does is agree to reconsider the county's earlier determination that the disputed berm requires a county permit, and to reserve judgment on that issue for a subsequent decision. If there is any county land use regulation that governs such a decision to reconsider, no party has cited it to us. Second, the terms and the limited effect of the February 25, 2004 letter suggests that it is in the nature of an interlocutory determination, intermediate to reaching a final decision, rather than a *final* determination on any issue. Thus, even if the February 25, 2004 letter can be said to apply or concern the application of a land use regulation for purposes of ORS 197.015(10)(a), it is not a *final* decision of any kind.

In sum, the decisions appealed in LUBA No. 2004-028 and 2004-045 are not final land use decisions subject to our jurisdiction. In addition, LUBA No. 2004-028 is moot.

MOTION TO TAKE EVIDENCE

Our conclusion that we lack jurisdiction over the challenged decisions makes it unnecessary to resolve petitioner's motion to take evidence. As far as we can tell, the alleged facts that petitioner seeks to establish in that motion do not pertain to the jurisdictional question, but rather to the merits of whether the disputed berm requires a county permit. The motion to take evidence is moot.

MOTION TO TRANSFER TO CIRCUIT COURT

Petitioner moves to transfer the challenged decisions to circuit court, in the event LUBA determines that it lacks jurisdiction to review those decisions. It is not clear to us that transfer to circuit court under ORS 34.102 and OAR 661-010-0075(11), as opposed to dismissal, is the appropriate disposition where our resolution of the jurisdictional question is based on our determination that an appeal is moot or the challenged decision is not a "final" decision.[2]

Because ORS 34.102(4) provides that a transferred appeal is to be "treated as a petition for writ of review," it is unlikely that the legislature intended that LUBA transfer appeals of non-final decisions or land use decisions that have become moot, since the circuit court presumably will dismiss the appeal without reaching the merits if such an appeal were transferred. *See Frederick v. City of Portland*, 178 Or App 571, 38 P3d 288 (2002) (directing vacation of a judgment in a writ of review proceeding where the matter became moot before entering judgment); *Bienz v. City of Dayton*, 29 Or App 761, 767, 566 P2d 904, *rev den* 280 Or 171 (1977) (pre-LUBA case holding that tentative subdivision approvals are "final decisions" reviewable under a writ of review). In the circumstances presented in these appeals, we can envision no useful purpose that would be

[2] ORS 34.102(4) provides:

> "A notice of intent to appeal filed with [LUBA] pursuant to ORS 197.830 and requesting review of a decision of a municipal corporation made in the transaction of municipal corporation business that is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015 shall be transferred to the circuit court and treated as a petition for writ of review. If the notice was not filed with the board within the time allowed for filing a petition for writ of review pursuant to ORS 34.010 to 34.100, the court shall dismiss the petition."

served in transferring these appeals to the circuit court so that the county could file additional motions to dismiss and the circuit court could enter judgments dismissing the appeals. If we are correct about the challenged decisions not being final and the appeal in LUBA No. 2004-028 being moot, transferring these appeals to the circuit court would serve no purpose. On the other hand, if we have decided the jurisdictional question incorrectly, an immediate appeal of our decision to the Court of Appeals would provide the speediest route for petitioner to seek correction of our error. We therefore dismiss these appeals.

LUBA Nos. 2004-028 and 2004-045 are dismissed.