BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOAN ROSE,
*Petitioner*,

and

GERALD HEILMAN,
*Intervenor-Petitioner*,

vs.

CITY OF CORVALLIS,
*Respondent*.

LUBA No. 2004-221

NANCY STAUS,
*Petitioner*,

vs.

CITY OF CORVALLIS,
*Respondent*.

LUBA No. 2004-222

FINAL OPINION
AND ORDER

Appeal from City of Corvallis.

Daniel A. Terrell, Eugene, filed a petition for review on behalf of petitioner Rose. With him on the brief was Bill Kloos, PC. Bill Kloos, Eugene, argued on behalf of petitioner Rose.

Nancy Staus and Gerald Heilman, Corvallis, filed a joint petition for review.

James K. Brewer, City Attorney, Corvallis, filed a response brief and argued on behalf of respondent. With him on the brief was Fewel and Brewer.

Michael J. Lilly, Portland, filed a brief and argued on behalf of amicus Group Mackenzie.

BASSHAM, Board Member; HOLSTUN, Board Chair, participated in the decision. DAVIES, Board Member, did not participate in the decision.

REVERSED 04/15/2005

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**

Petitioners appeal a decision that approves a zone change, major planned development modification, detailed development plan, tentative subdivision plat and sign variance.

**MOTION TO INTERVENE**

Group Mackenzie, the applicant below, moves to intervene on the side of respondent in LUBA Nos. 2004-221 and 2004-222. Petitioner Rose (Rose) opposes intervention in LUBA No. 2004-221, as untimely. Petitioner Staus opposes intervention in LUBA No. 2004-222, for the same reason. Rose argues that under ORS 197.830(7) and OAR 661-010-0050(2), a motion to intervene must be filed within 21 days of the date the notice of intent to appeal is filed with LUBA.[1] A motion to intervene filed after that date must be denied. ORS 197.830(7)(c); *Slusser v. Polk County*, 37 Or LUBA 1062, 1063 (2000); *Wolverton v. Crook County*, 34 Or LUBA 515, 517 (1998).

According to Rose, the notice of intent to appeal in LUBA No. 2004-221 was filed with LUBA on December 31, 2004, by certified mail. A copy of the notice was contemporaneously served on Group Mackenzie, as required by OAR 661-010-0015(2). However, the motion to

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[1] ORS 197.830(7) provides:

> "(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.
>
> "(c) Failure to comply with the deadline set forth in paragraph (a) of this subsection shall result in denial of a motion to intervene."

intervene was not filed with LUBA until January 24, 2005, three days late. Therefore, Rose argues, the motion must be denied.

Group Mackenzie responds that Rose's objection is itself untimely under OAR 661-010-0065(2), which requires that objections to violations of the Board's rules must be filed within 10 days of the date the party becomes aware of the violation.[2] Rose failed to object to the motion to intervene until March 11, 2005, Group Mackenzie argues, more than 46 days after the motion was filed, and only after Group Mackenzie had prepared and filed its brief in response to the petition for review. According to Group Mackenzie, the three-day delay in filing the motion to intervene did not delay the appeal or prejudice the rights of any party to the appeal, while in contrast Rose's 46-day delay in objecting to the motion until after Group Mackenzie filed its response brief on the merits has prejudiced Group Mackenzie's substantial rights.

We agree with Group Mackenzie that Rose's untimely objection has prejudiced Group Mackenzie's substantial rights in this appeal. Under our rules, a response to a motion to intervene must be filed within 14 days of the date the motion is filed. OAR 661-010-0065(2). An objection based on a violation of LUBA's rules must be filed within 10 days of the date the objector knew of the violation. *Id.* In many cases, an untimely response or objection will not prejudice any party's substantial rights. Such "technical violations" of LUBA's rules do not affect LUBA's review. OAR 661-010-0005.[3] However, filing an objection to intervention long after the motion to

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[2] OAR 661-010-0065(2) provides:

> "Time of Filing: A party seeking to challenge the failure of an opposing party to comply with any of the requirements of statutes or Board rules shall make the challenge by motion filed with the Board and served on all parties within l0 days after the moving party obtains knowledge of such alleged failure. However, motions to dismiss for lack of jurisdiction may be filed at any time. An opposing party may, within 14 days from the date of service of a motion, file a response."

[3] OAR 661-010-0005 provides:

> "These rules are intended to promote the speediest practicable review of land use decisions and limited land use decisions, in accordance with ORS 197.805-197.855, while affording all interested persons reasonable notice and opportunity to intervene, reasonable time to prepare and submit their cases, and a full and fair hearing. The rules shall be interpreted to carry out

intervene is filed, and after the Group Mackenzie has invested considerable time and money in preparing and filing the response brief on the merits, and presumably in preparing for oral argument, manifestly prejudices Group Mackenzie's substantial rights. Rose was timely informed of the motion to intervene, by the Board's letter dated January 25, 2005, as well as by service of the motion, and Rose offers no reason for the delay in objecting or responding to that motion. As far as LUBA's rules are concerned, therefore, it is clear that the objection should be denied and the motion to intervene allowed.

As Rose points out, however, ORS 197.830(7)(c) states that failure to comply with the 21-day deadline to file the motion to intervene in ORS 197.830(7)(a) "shall result in denial of a motion to intervene." LUBA is not at liberty to apply its rules in a manner that contravenes a state statute. If ORS 197.830(7)(c) requires denial of the motion to intervene notwithstanding Rose's untimely objection and the resulting prejudice to Group Mackenzie's substantial rights, then the motion must be denied. We have previously held in at least one circumstance that ORS 197.830(7)(c) does not mandate denial of an untimely motion to intervene where the delay in filing the motion is attributable to the petitioner's violation of our rules. *Mountain West Investment Corp. v. City of Silverton*, 38 Or LUBA 932, 934 (2000) (LUBA will not deny the applicant's motion to intervene filed 53 days after the notice of intent to appeal is filed, where the petitioner failed to serve a copy of notice on the applicant as required under our rules). Here, while petitioner Rose's untimely objection to the motion to intervene has prejudiced Group Mackenzie's substantial rights in this appeal, that untimely objection did not cause the delay in filing the motion to intervene. Given the unequivocal language of ORS 197.830(7)(c), we do not believe that it would be consistent with the statute to allow the motion to intervene based on petitioner Rose's untimely objection.

Group Mackenzie's motion to intervene in LUBA Nos. 2004-221 and 2004-222 is denied.

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these objectives and to promote justice. Technical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or limited land use decision. Failure to comply with the time limit for filing a notice of intent to appeal under OAR 661-010-0015(1) or a petition for review under OAR 661-010-0030(1) is not a technical violation."

**MOTION TO APPEAR AS AMICUS**

Group Mackenzie moves to appear as amicus in these appeals pursuant to OAR 661-010-0052, in the event the motion to intervene is denied.[4] We understand Group Mackenzie to request that, if amicus participation is allowed, the Board should treat Group Mackenzie's response brief as an amicus brief. Petitioner Rose objects to Group Mackenzie's participation as amicus, arguing that Group Mackenzie has failed to show "why a review of the relevant issues would be significantly aided by participation of the amicus."

As noted, as far as LUBA's rules are concerned petitioner Rose is in no position to complain about Group Mackenzie's participation in these appeals. LUBA has significant discretion under OAR 661-010-0052 in determining when amicus participation will assist the Board. Under the unusual circumstances of this case, we do not see that is inconsistent with either OAR 661-010-0052 or ORS 197.830(7) to allow Group Mackenzie to participate in these appeals as an amicus. The motion to appear as amicus in LUBA Nos. 2004-221 and 2004-222 is allowed.

**FACTS**

The challenged decision is the city's decision on remand from LUBA. *Staus v. City of Corvallis*, 48 Or LUBA ___ (LUBA Nos. 2004-091/093, November 16, 2004). The decision challenged in *Staus* rezoned a portion of the subject property from PD(RTC) (Research Technology Center with Planned Development overlay) to PD(GI) (General Industrial with a Planned Development overlay). One of the issues in *Staus* was whether the comprehensive plan

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[4] OAR 661-010-0052 provides:

> "(1) A person or organization may appear as amicus only by permission of the Board on written motion. The motion shall set forth the interest of the movant and state reasons why a review of relevant issues would be significantly aided by participation of the amicus. A copy of the motion shall be served on all parties to the proceeding.
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> "(2) Appearance as amicus shall be by brief only, unless the Board specifically authorizes or requests oral argument. An amicus brief shall be subject to the same rules as those governing briefs of parties to the appeal, and shall be filed together with four copies within the time required for filing respondent's brief. No filing fee is required. An amicus brief shall have green front and back covers."

designation for the subject property is General Industrial with a Research Technology (RT) comprehensive plan *overlay* (as the city found) or simply RT as a *base* comprehensive plan designation (as the petitioners contended). Petitioners argued that if the base comprehensive plan designation for the property is RT, then the city cannot rezone the property to PD(GI). We ultimately affirmed the city council's interpretation that the RT plan designation is an overlay designation, not a base designation, and therefore that the city could rezone the property to PD(GI). However, we remanded the decision to the city to adopt more adequate findings addressing the Transportation Planning Rule (TPR) at OAR 660-012-0060.

Petitioner Rose appealed LUBA's decision to the Court of Appeals, challenging our disposition of the comprehensive plan issue. That appeal is presently pending before the court. In the meantime, the city scheduled remand proceedings to address the TPR issue. The city council held a meeting on December 20, 2004, at which it voted four to two to adopt additional findings on the TPR issue. The following day the city issued a new decision approving the requested zone change, major planned development modification, detailed development plan, tentative subdivision plat, and sign variance, with the additional findings addressing the TPR. This appeal followed.

**REPLY BRIEF**

Petitioner Rose moves to file a reply brief to respond to new issues raised in the response briefs. There is no opposition to the motion, and it is allowed.

**FIRST ASSIGNMENT OF ERROR (ROSE)**
**FIRST ASSIGNMENT OF ERROR (STAUS)**

Petitioners[5] argue that the city lacked jurisdiction to adopt the challenged decision on remand from *Staus*, because at the time the city adopted its decision the Court of Appeals had exclusive jurisdiction over the *Staus* decision. Therefore, petitioners contend, the city lacked

[5] Petitioner Rose filed a petition for review in LUBA No. 2004-221, and petitioner Staus and intervenor-petitioner Heilman filed a combined petition for review in LUBA Nos. 2004-221 and 2004-222. The first assignment of error in each petition raises essentially the same issue. We address those assignments of error together, and refer collectively to the petitioners and intervenor-petitioner as "petitioners."

authority to adopt the decision on remand. Petitioners cite to *Standard Insurance Co. v. Washington County (Standard IV)*, 17 Or LUBA 647, 660, *rev'd on other grounds* 97 Or App 687, 776 P2d 1315 (1989), in which we held:

> "Where jurisdiction is conferred upon an appellate review body, once appeal/judicial review is perfected, the lower decision making body loses its jurisdiction over the challenged decision unless the statute specifically provides otherwise. In this case, the statutes do not authorize the county to take further action on its decision while that decision is being reviewed by LUBA or the Court of Appeals. Therefore, the county was without jurisdiction to adopt the challenged decision." (Footnote omitted.)

Petitioners contend that the above-described principle in *Standard IV* remains good law. Because no statute or other law authorizes the city in the present case to exercise jurisdiction over the *Staus* decision or to respond to LUBA's remand in that case while LUBA's decision is before the court, the city simply lacks jurisdiction to adopt the challenged decision on remand.

Respondents[6] contend first that it is not yet clear whether the Court of Appeals has jurisdiction over the *Staus* appeal. Respondents explain that they have challenged petitioner Rose's standing to appeal *Staus* to the court, under the reasoning in *Utsey v. Coos County*, 176 Or App 524, 32 P3d 933 (2001), *rev dismissed* 335 Or 217, 65 P3d 1109 (2003). If the court ultimately determines that it lacks jurisdiction over the *Staus* appeal, then petitioners' premise that the court has exclusive jurisdiction over the appeal under *Standard IV* evaporates.

In any case, respondents argue, *Standard IV* is distinguishable or should be limited to its facts. If the principle described in *Standard IV* is potentially applicable in the present circumstances, respondents urge us to limit that principle to recognize that local governments may continue to exercise jurisdiction over land use decisions on appeal to LUBA or the court, as long as that exercise of jurisdiction does not interfere with LUBA's or the court's review.

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[6] We refer to the city and Group Mackenzie collectively as "respondents," unless separate reference is necessary.

**A. Court of Appeals' Jurisdiction**

In a reply brief, petitioner Rose argues that the Court of Appeals' jurisdiction commenced when petitioner filed the petition for review/notice of appeal and that jurisdiction ends only when the court issues its appellate judgment, pursuant to ORS 19.270(6). Even if the court ultimately concludes that Rose lacks standing to invoke the court's jurisdiction and thus that the appeal is "non-justiciable" under the reasoning in *Utsey*, petitioner contends that the court always has jurisdiction to determine whether it has jurisdiction, and that jurisdiction continues until the court issues its appellate judgment.

We agree with petitioners that the possibility that the court may ultimately determine that Rose lacks standing to appeal the *Staus* decision is irrelevant for purposes of determining whether the city can, consistent with *Standard IV*, modify or take action with respect to the *Staus* decision while an appeal of that decision is before the court.

**B. *Standard IV***

Respondents contend that *Standard IV* is distinguishable or should be limited to allow a local government to modify a decision that is under appellate review, as long as such modification involves a discrete issue that is not before the appellate review body. According to respondents, *Standard IV* involved circumstances where the local government's decision during the pendency of the court's review potentially interfered with appellate review. In the present case, respondents argue, the only substantive issue before the Court of Appeals is the question of the comprehensive plan designation for the subject property, which has nothing to do with the TPR issue that the city addressed in the challenged decision.

To the extent *Standard IV* applies beyond its facts, the city argues that LUBA should exercise its discretion under ORS 197.805 to limit the holding in *Standard IV* to allow a local government to modify a decision under review where, as here, that modification could not interfere

with appellate review.[7] The city contends that such a limitation is consistent with "sound principles of judicial review" and necessary to implement the state policy that "time is of the essence" in reaching finality with respect to land use decisions.

Group Mackenzie also argues that *Standard IV* is not controlling, but for a slightly different reason. Group Mackenzie notes that the holding in *Standard IV* is based on the absence of any statutes that authorized the county to take further action on its decision while that decision is being reviewed by LUBA or the Court of Appeals. 17 Or LUBA at 660. According to Group Mackenzie, ORS 227.180(1) now authorizes and indeed requires cities to take action on a remand from LUBA within 90 days of the effective date of the Board's final order.[8] Under ORS 227.180(1), Group Mackenzie argues, a city may take action on a remand from LUBA notwithstanding that the LUBA decision has been appealed to the Court of Appeals.

Turning to ORS 227.180(1) first, that statute does not, as Group Mackenzie suggests, authorize a city to take action on a LUBA remand notwithstanding that LUBA's decision has been appealed to the Court of Appeals. The second and third sentences of ORS 227.180(1) make it clear that the 90-day period begins to run only if no appeal to the court is filed or, if an appeal is filed, only after "final resolution of the judicial review," *i.e.*, when the court issues its appellate judgment.

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[7] ORS 197.805 provides:

> "It is the policy of the Legislative Assembly that time is of the essence in reaching final decisions in matters involving land use and that those decisions be made consistently with sound principles governing judicial review. It is the intent of the Legislative Assembly in enacting ORS 197.805 to 197.855 to accomplish these objectives."

[8] ORS 227.180(1) provides, in relevant part:

> "Pursuant to a final order of [LUBA] under ORS 197.830 remanding a decision to a city, the governing body of the city or its designee shall take final action on an application for a permit, limited land use decision or zone change within 90 days of the effective date of the final order issued by the board. For purposes of this subsection, the effective date of the final order is the last day for filing a petition for judicial review of a final order of the board under ORS 197.850(3). If judicial review of a final order of the board is sought under ORS 197.830, the 90-day period established under this subsection shall not begin until final resolution of the judicial review."

Turning to *Standard IV*, our conclusion in that case was based on a thorough analysis of the applicable statutes and case law. No changes in the statutory or judicial landscape over the intervening years brought to our attention calls our holding in *Standard IV* into question. We affirm its general holding that, absent statutory authority to the contrary, where jurisdiction over an appeal of a land use decision lies with an appellate court, the local government loses jurisdiction to modify that land use decision.

We appreciate the respondents' arguments that judicial efficiency and the policy set out in ORS 197.805 might be furthered by allowing local governments to modify decisions that are on appeal, where the modifications involve issues not before the court. We do not wish to foreclose the possibility that, at least in some circumstances, it might be appropriate to limit *Standard IV* to allow a local government to modify decisions that are on appeal. However, we disagree that the facts in the present case warrant considering such a limitation, for the following reasons.

First, as petitioners note, the challenged decision does not simply *modify* the city's previous decision; it *reissues* the entire decision appealed in *Staus*, with some additional findings. In other words, the challenged decision purports to re-adopt the same rezoning, development plans, tentative subdivision plat and sign variance adopted by the city's earlier decision. Arguably, the effect of the challenged decision is to *replace* the city's earlier decision—the decision that is before the Court of Appeals—with the challenged decision. While there may be circumstances where a local government can effectively moot an appeal before LUBA or the court by adopting a new decision that nullifies or withdraws the decision on appeal, we have never held that a local government can modify a decision on appeal and then readopt or reissue that decision. Whatever the effect of the challenged decision on the decision at issue in *Staus*, it is not accurate to say that the challenged decision simply *modifies* the city's earlier decision.

That problem aside, there is an additional reason why the present case is not an appropriate vehicle to revisit the breadth of *Standard IV*. Respondents' premise is that the city's action on remand involved only the TPR issue, which has nothing to do with the plan designation issue before

the court, and therefore the city's action cannot interfere with the court's review or otherwise affect judicial autonomy or efficiency. However, the validity of that premise is questionable. Resolution of the plan designation issue (*i.e.*, whether the base plan designation is GI or RT) will also effectively resolve the zoning issue (*i.e.*, whether the city can rezone the subject property to the PD(GI) zone, as the city contends, or whether it cannot, as petitioners contend). The challenged decision resolves the TPR issue based on the assumption that the subject property can be rezoned to PD(GI), to facilitate the more traffic-intensive retail use that Group Mackenzie proposes for the property. Although we need not go into a detailed discussion of the TPR or the city's TPR findings here, we note that OAR 660-012-0060 often requires a comparison of traffic impacts under the pre-amendment plan and zoning governing the subject property with traffic impacts under the post-amendment plan and zoning, and the city conducted such a comparison in the present case. To conduct that analysis, it would seem necessary for the city to know with some confidence what are the pre-amendment plan designation and zoning districts governing the property, and whether the post-amendment zoning district is consistent with the applicable plan designation. The city cannot know those matters with any confidence, because those are precisely the issues before the court.

In other words, the respondents are simply incorrect that there is no relationship between the TPR issue and the plan designation issue that is before the Court of Appeals. The issue of the correct plan designation is inextricably bound up with the question of the proper zoning for the subject property, which in turn is an essential element in applying the TPR. However we might view and apply *Standard IV* in circumstances where there is no possible relationship between the action on remand and the matters under the court's jurisdiction, the present case does not involve such circumstances.

Finally, with respect to judicial efficiency, as explained the city's TPR findings on remand necessarily presume that the city will prevail on the plan designation issue that is before the court. If the city is wrong on that point, then it will have wasted a great deal of time and resources (including

the parties' and the Board's time and resources) in adopting the challenged decision. We see little or no gain in judicial efficiency from allowing the city to gamble in that manner.

For the foregoing reasons, we agree with petitioners that the city lacked the authority or jurisdiction to adopt the challenged decision. Because the decision violates a provision of applicable law and is prohibited as a matter of law, we reverse. OAR 661-010-0071(1)(c).

The first assignment of error (Rose) and first assignment of error (Staus) are sustained.

The city's decision is reversed.[9]

[9] Our disposition of the first assignment of error makes it unnecessary and premature to address Rose's second assignment of error or Staus' second assignment or error, both of which challenge the findings the city adopted on remand to address the TPR.