

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 LOIS THOMPSON HOUSING PROJECT
5 and GEOFF THOMPSON,
6 *Petitioners,*

7
8 vs.

9
10 MULTNOMAH COUNTY,
11 *Respondent,*

12
13 and

14
15 FRIENDS OF THE COLUMBIA GORGE,
16 *Intervenor-Respondent.*

17
18 LUBA No. 99-112

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Multnomah County.

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25 William C. Cox, Portland, represented petitioners.

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27 Sandra N. Duffy, Portland, represented respondent.

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29 Gary K. Kahn, Portland, represented intervenor-respondent.

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

33
34 DISMISSED

01/27/2000

35
36 You are entitled to judicial review of this Order. Judicial review is governed by the
37 provisions of ORS 197.850.

38

NATURE OF THE DECISION

Petitioners challenge a determination by the county planning director that petitioners are in violation of their land use permit and additional provisions of the county code.

MOTION TO INTERVENE

Friends of the Columbia Gorge moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

MOTION TO DISMISS

In 1997, the county issued petitioners a land use permit under the standards provided in the county’s Columbia River Gorge National Scenic Area Land Use Ordinance. On April 5, 1999, the county issued petitioners a notice of noncompliance with their land use permit, county zoning ordinances and the Columbia River Gorge National Scenic Area Act. On June 25, 1999, the county planning director upheld the county’s notice of violation. Petitioners timely filed a notice of intent to appeal with this Board. The county moves to dismiss this appeal on jurisdictional grounds.

ORS 196.110(1) provides that counties may take action under the Columbia River Gorge National Scenic Area Act (Scenic Area Act). The statute specifies the means to appeal any such county action:

"Any action of a county taken pursuant to this subsection shall be appealed to the Columbia River Gorge Commission as provided in section 15(a)(2) of the Columbia River Gorge National Scenic Area Act, P.L. 99-663." ORS 196.110(1).

As referenced in ORS 196.110(1), the Scenic Area Act provides for appeals to the Columbia River Gorge Commission. 16 USC §544m(a)(2) provides:

“Any person or entity adversely affected by any final action or order of a county relating to the implementation of sections 544 to 544p of this title may appeal such action or order to the Commission by filing with the Commission within thirty days of such action or order, a written petition requesting that such action or order be modified, terminated, or set aside.”

1 Thus, enforcement actions taken under the Scenic Area Act must be appealed to the
2 Columbia River Gorge Commission. 16 USC §544m(a)(2), ORS 196.110(1).

3 ORS 197.825(2)(f) provides that jurisdiction of this Board:

4 “Is subject to ORS 196.115 for any county land use decision that may be
5 reviewed by the Columbia River Gorge Commission pursuant to sections
6 10(c) or 15(a)(2) of the Columbia River Gorge National Scenic Area Act, P.L.
7 99-663[.]”

8 ORS 196.115 governs appeals and judicial review of a decision by a county or the Columbia
9 River Gorge Commission under the Scenic Area Act. The statute provides three avenues of
10 appeal. First, a final action or order of the Columbia River Gorge Commission regarding any
11 action of a county pursuant to the Scenic Area Act may be appealed to the Court of Appeals.
12 ORS 196.115(2)(a).¹ In that circumstance, the Court of Appeals reviews the Columbia River
13 Gorge Commission decision generally as provided in the Administrative Procedures Act for
14 contested case orders. ORS 196.115(3)(a).²

15 Second, a party that petitions the Court of Appeals for judicial review of a Columbia
16 River Gorge Commission decision reviewing a county action may also request that the court
17 review the underlying county action. ORS 196.115(2)(b).³ In this circumstance, the court

¹ ORS 196.115(2)(a) provides:

“A final action or order by the commission in a review or appeal of any action of the commission pursuant to section 10(c) or 15(b)(4) of the Columbia River Gorge National Scenic Area Act, or a final action or order by the commission in a review or appeal of any action of a county pursuant to section 15(a)(2) or 15(b)(4) of the Columbia River Gorge National Scenic Area Act, shall be reviewed by the Court of Appeals on a petition for judicial review filed and served as provided in subsections (3) and (4) of this section and ORS 183.482.”

² ORS 196.115(3)(a) provides:

“If a petition for judicial review of a commission order is filed pursuant to subsection (2)(a) of this section, the procedures to be followed by the parties, the commission and the court, and the court’s review, shall be in accordance with ORS 183.480, 183.482 (1) to (7), 183.485, 183.486, 183.490 and 183.497, except as this section or the Columbia River Gorge National Scenic Area Act, P.L. 99-663, otherwise provides.”

³ ORS 196.115(2)(b) provides:

1 reviews the Columbia River Gorge Commission decision as an order in a contested case.
2 ORS 196.115(3)(a). The court reviews the county action in the same manner provided for
3 review by LUBA of county land use decisions. ORS 196.115(4)(a).⁴

4 Finally, in lieu of judicial review by the Court of Appeals, ORS 196.115(2)(d)
5 provides that a “county” action may be appealed to LUBA. The appeal to LUBA must be
6 filed within 21 days of the date the *Columbia River Gorge Commission order* becomes final,
7 not 21 days from the date the county decision becomes final. ORS 196.115(2)(d).⁵ In such an
8 appeal, ORS 196.115(2)(e) provides that this Board’s review “shall not include any issue
9 related to interpretation or implementation of the [Scenic Area Act].” Furthermore, any issue
10 related to such interpretation or implementation of the Scenic Area Act is waived by the
11 filing of an appeal to LUBA under ORS 196.115(2)(d). ORS 196.115(2)(e).⁶

“On a petition for judicial review under paragraph (a) of this subsection the Court of Appeals also shall review the action of the county that is the subject of the commission’s order, if requested in the petition.”

⁴ ORS 196.115(4)(a) provides:

“Except as otherwise provided by this section or the [Scenic Area Act], if review of a county action is sought pursuant to subsection (2)(b) of this section, the procedures to be followed by the parties, the county and the court, and the court’s review, shall be in accordance with those provisions governing review of county land use decisions by the Land Use Board of Appeals set forth in ORS 197.830(2) to (7), (9), (14) and (15) and 197.835(2) to (10), (12) and (13). As used in this section, ‘board’ as used in the enumerated provisions shall mean ‘court’ and the term ‘notice of intent to appeal’ in ORS 197.830 (9) shall refer to the petition described in subsection (2) of this section.”

⁵ ORS 196.115(2)(d) provides:

“In lieu of judicial review under paragraphs (a) and (b) of this subsection, a county action may be appealed to the Land Use Board of Appeals under ORS 197.805 to 197.855. A notice of intent to appeal the county’s action shall be filed not later than 21 days after the commission’s order on the county action becomes final.”

⁶ ORS 196.115(2)(e) provides:

“Notwithstanding ORS 197.835, the scope of review in an appeal pursuant to paragraph (d) of this subsection shall not include any issue relating to interpretation or implementation of the [Scenic Area Act], and any issue related to such interpretation or implementation shall be waived by the filing of an appeal under paragraph (d) of this subsection.”

1 Based on the above, we conclude that jurisdiction to review the county’s decision in
2 the first instance lies with the Columbia River Gorge Commission, under ORS 196.110(1).
3 The reference in ORS 197.825(2)(f) makes it clear that LUBA does not have jurisdiction to
4 review the county’s decision until the Columbia River Gorge Commission has done so.
5 Moreover, LUBA will not have jurisdiction to review the challenged decision after the
6 Columbia River Gorge Commission has done so, if petitioners elect to seek judicial review of
7 the Columbia River Gorge Commission’s decision under ORS 196.115(2)(a) or seek judicial
8 review of both the Columbia River Gorge Commission’s decision and the county’s decision
9 under ORS 196.115(2)(a) and (b). LUBA could only have jurisdiction to review the county’s
10 decision if petitioners elect to seek LUBA review of the county’s decision under ORS
11 196.115(2)(d), within 21 days after the Columbia River Gorge Commission has rendered its
12 decision in this matter. However, even if petitioners should elect that route of appeal in the
13 future, the current appeal is premature and must be dismissed.

14 Respondent’s motion to dismiss is sustained.

15 **MOTION TO TRANSFER TO CIRCUIT COURT**

16 Pursuant to OAR 661-010-0075(11) and ORS 19.230, petitioners move that the Board
17 transfer this appeal to the Multnomah County Circuit Court as a writ of review, in the event
18 that the Board determines that the appealed decision is not reviewable as a land use decision.
19 However, as discussed above, jurisdiction over this matter lies with the Columbia River
20 Gorge Commission. No purpose would be served by transferring this appeal to the circuit
21 court under these circumstances.⁷

22 Petitioners’ motion to transfer to Multnomah County Circuit Court is denied.

⁷ Petitioners acknowledge that this case is a “precautionary appeal if it is determined that acts of respondent were taken outside the [Scenic Area Act] granted authority and those acts are considered to be Land Use Decisions.” Notice of Intent to Appeal 2. We note that the county has filed a complaint for mandatory injunction in the Multnomah County Circuit Court, Civil No. 9907 07733. The circuit court thus has a pending case in this matter.

1 **MOTION FOR ATTORNEY FEES**

2 The county moves for an order awarding its attorney fees pursuant to
3 OAR 661-010-0075(1)(e)(A) and ORS 197.830(14)(b), which provides:

4 “[t]he board shall also award reasonable attorney fees and expenses to the
5 prevailing party against any other party who the board finds presented a
6 position without probable cause to believe the position was well-founded in
7 law or on factually supported information.”

8 The county argues that petitioners’ appeal has no basis in law or factually supported
9 information, because ORS 197.825(2)(f) and 16 USC §544m(a)(2) are “clear and
10 unambiguous statements that this Board has no jurisdiction to review a decision of a County
11 relating to the implementation of the Scenic Area Act.” Motion for Attorney Fees 5.

12 Petitioners respond that the county’s motion is premature because no final order has
13 been issued in this case. Petitioners also argue that petitioners made no argument and
14 presented no “position” as that term is used in ORS 197.830(14)(b). We agree with
15 petitioners that merely filing a notice of intent to appeal with the Board does not present a
16 position for purposes of ORS 197.830(14)(b). *Dorman v. Yamhill County*, 35 Or LUBA 786,
17 788 (1998).

18 Respondent’s motion for attorney fees is denied.

19 This appeal is dismissed.