

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 MOLLY JACOBSEN and DANA JACOBSEN,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF WINSTON,
10 *Respondent,*

11
12 and

13
14 DON JENKINS and JOELL JENKINS,
15 *Intervenors-Respondents.*

16
17 LUBA Nos. 2010-111 and 2011-015

18 ORDER

19 **MOTIONS TO INTERVENE**

20 Before these appeals were consolidated, Don Jenkins and Joell Jenkins moved to
21 intervene on the side of respondent in LUBA Nos. 2010-111 and 2011-015. There is no
22 opposition to the motions, and they are allowed.

23 **INTRODUCTION**

24 Petitioners, intervenors-respondents (intervenors) and the city have been engaged in a
25 dispute concerning intervenors' RV park for nearly five years. Over that time there have
26 been a number of LUBA appeals and there appears to be no dispute that the RV park has
27 now been completed and is operating. Some understanding of the parties' underlying dispute
28 is helpful in resolving the city's motion to dismiss one of the appeals that is before us in this
29 consolidated appeal and how the other remaining appeal is likely to be resolved. However,

1 the parties' larger dispute is complicated and likely involves nuances that we do not
2 appreciate.¹

3 The current consolidated appeals concern two decisions. The first decision is a
4 November 16, 2010 letter from the City Administrator to intervenors that acknowledges
5 intervenors' withdrawal of their application for site plan approval for the RV park.
6 Petitioners challenge that decision in LUBA No. 2010-111. The second decision is a January
7 24, 2011 letter from the City Administrator, in which the City Administrator takes the
8 position that petitioners took actions that have the legal effect of terminating their separate
9 local appeal of the city's November 16, 2010 letter. For the reasons explained below, we
10 conclude that LUBA does not have jurisdiction to review the November 16, 2010 letter and
11 that for similar reasons LUBA likely lacks jurisdiction to review the city's January 24, 2011
12 letter.

13 **FACTS**

14 **A. The RV Park Comprehensive Plan and Zoning Map amendments and** 15 **Conditional Use Permit**

16 In 2005, intervenors submitted an application for a comprehensive plan and zoning
17 map amendments and a conditional use permit for an RV park on their property. The city
18 approved the application and petitioners appealed that approval to LUBA. In an April 19,
19 2006 decision, LUBA remanded the city's decision on the conditional use permit and map
20 amendments. *Jacobsen v. City of Winston*, 51 Or LUBA 602 (2006). As far as we are

¹ The city's motion to dismiss is half a page long. Petitioners' response to that motion is 12 single spaced pages with type that is something less than 12 point font. The city's reply to petitioners' response is also 12 pages long. While most of the city's reply is double spaced, some of it is also single spaced. In the future, except for footnotes, LUBA will strike on its own motion any pleadings in this appeal that are not double spaced and in at least 12 point font.

Petitioners' response to the motion to dismiss and to a lesser degree the city's response address other aspects of their dispute that need not be resolved to decide the pending motion to dismiss. Petitioners in several places ask LUBA to weigh in on those other disputes. With one exception, we decline to do so, and decide only those issues that must be resolved to decide the pending motion to dismiss. The exception is that we do briefly discuss the similar jurisdictional question that is likely to arise in LUBA No. 2011-015.

1 informed, the city has not taken additional action on the plan and zoning map amendments
2 and conditional use permit following LUBA's April 19, 2006 remand.

3 **B. The RV Park Site Plan Approval**

4 On March 1, 2006, while the LUBA appeal concerning the comprehensive plan and
5 zoning map amendment and conditional use permit was pending before LUBA, intervenors
6 filed an application for site plan review for the RV park. On March 20, 2006, the city
7 approved the site plan. In April 2006, petitioners appealed the city's March 20, 2006 site
8 plan decision to LUBA. After a protracted dispute concerning objections to the record,
9 petitioners' appeal of the site plan was suspended. In 2010, the appeal was reactivated, and
10 the city moved for a voluntary remand of the site plan decision. LUBA granted the city's
11 motion over petitioners' objections, based on the city's representation that "[i]f respondent
12 readopts the challenged decision it will address all allegations of error regarding the
13 challenged decision that Petitioners would have included in the petition for review."
14 *Jacobsen v. City of Winston*, ___ Or LUBA ___ (LUBA No. 2006-060, August 12, 2010).

15 **C. The November 16, 2010 Letter and Petitioners' LUBA and Local Appeal**
16 **of that Letter**

17 Following LUBA's remand, the city did not readopt the challenged decision. Instead,
18 in a September 10, 2010 letter, intervenors advised the city that they wished to withdraw
19 their application for site plan approval. In a November 16, 2010 letter, the City
20 Administrator acknowledged intervenors' September 10, 2010 letter and stated that the city
21 "had closed its file on this application." On December 5, 2010, petitioners appealed that
22 November 16, 2010 letter to LUBA in LUBA No. 2010-111.²

² This is probably a critical juncture in this dispute. We understand petitioners to contend that the site plan could not have been approved without the comprehensive plan and zoning map amendments and conditional use permit that were remanded by LUBA in April, 2006. We also understand petitioners to contend that the city's land use regulations do not authorize withdrawal of an application for site plan review, when site plan approval is required for the RV park that has already been constructed. The city's and intervenors' legal theory for how the RV park can be allowed to remain built and operating without the comprehensive plan and zoning map amendments, the conditional use permit and the site plan approval is not apparent to us. One way to

1 Before petitioners appealed the November 16, 2010 letter to LUBA, they attempted to
2 determine if a local appeal was available, and on November 23, 2010, petitioners filed a local
3 appeal to challenge the November 16, 2010 letter. After filing that local appeal, petitioners
4 made a number of requests for confirmation from the city that their local appeal had been
5 accepted. According to petitioners, the city did not respond to those requests until January
6 21, 2011, when the city moved to dismiss LUBA No. 2010-111, alleging that petitioners had
7 not exhausted their local appeal of the November 16, 2010 letter. On January 21, 2011,
8 petitioners also received notice of a February 9, 2011 hearing before the planning
9 commission on their local appeal of the November 16, 2010 letter.

10 **D. The January 24, 2011 Letter and Petitioners' LUBA and Local Appeal of**
11 **that Letter**

12 When petitioners received the city's notice of the February 9, 2011 planning
13 commission hearing and the city's motion to dismiss LUBA No. 2010-111, petitioners went
14 to the planning department on January 21, 2011. The parties dispute precisely what
15 happened during that January 21, 2011 visit to the planning department, but petitioners
16 contend, among other things, that they sought a receipt from the city for their appeal of the
17 November 16, 2010 letter and learned that their appeal documents had been placed in a city
18 vault and the \$250 check for the appeal fee had never been cashed. The city takes the
19 position that petitioners sought to recover their local appeal documents and appeal fee and
20 that the documents and appeal fee were both returned to petitioners. Petitioners contend that
21 although they accepted the appeal documents and the uncashed check when the city offered
22 to return them, petitioners never sought to recover their appeal documents or appeal fee and
23 never sought to abandon their local appeal.

proceed following intervenors' decision to withdraw the application for site plan review would have been to initiate an enforcement action in circuit court under ORS 197.825(3)(a) and attempt to establish in circuit court that the existing RV park is in violation of city land use laws. Petitioners apparently have not elected to pursue that course.

1 In a January 24, 2011 letter from the City Administrator to petitioners, the city takes
2 the position that petitioners requested that the city return their appeal documents and appeal
3 fee during their January 21, 2011 visit to the planning department, and that return of that
4 appeal documents and appeal fee had the legal effect of withdrawing their local appeal of the
5 November 16, 2010 letter. The January 24, 2011 letter also advised petitioners that the city
6 would be cancelling the February 9, 2011 planning commission hearing on their local appeal.

7 In a January 25, 2011 letter to the city, petitioners disputed the city's version of the
8 events at the planning department on January 21, 2011, and petitioners returned the
9 unprocessed appeal documents and uncashed check. In a January 26, 2011 letter from the
10 City Administrator to petitioners, the city reasserted its position that petitioners had
11 requested return of the check and appeal documents and rejected petitioners' attempt to
12 return the returned check and appeal documents. In a January 27, 2011 letter, petitioners
13 continued their dispute with the city regarding the events during petitioners' visit to the
14 planning department on January 21, 2011.

15 On January 27, 2011 petitioners filed another local appeal to the planning
16 commission challenging the city administrator's January 24, 2011 letter to petitioners. In a
17 January 28, 2011 letter, the city sought clarification regarding petitioners' January 27, 2011
18 appeal, and in a February 1, 2011 letter petitioners provided clarification. We are informed
19 that the city held a public hearing on petitioners' local appeal of the City Administrator's
20 January 24, 2011 letter on March 14, 2011.

21 **MOTION TO DISMISS LUBA NO. 2010-111**

22 Exhaustion of any available local remedies is a mandatory prerequisite for LUBA's
23 jurisdiction to review a land use decision. ORS 197.825(2)(a).³ The city moves to dismiss
24 LUBA No. 2010-111, arguing that petitioners failed to exhaust their local appeal of the City

³ ORS 197.825(2)(a) provides that LUBA's jurisdiction "[i]s limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review[.]"

1 Administrator's November 16, 2010 letter before filing their appeal in LUBA No. 2010-111.
2 Applying ORS 197.825(2)(a) to the facts of this case is quite simple, and it is clear that
3 LUBA lacks jurisdiction in LUBA No. 2010-111 to review the November 16, 2010 letter to
4 intervenors.⁴

5 Petitioners contend the city did not timely process their local appeal of the November
6 16, 2010 letter and failed to make a timely decision on that appeal. Although the city may
7 have failed to adopt a timely decision in this matter, the city argues that petitioners clearly
8 have a right to a local appeal of the November 16, 2010 letter under City of Winston Zoning
9 Ordinance (WZO) 11.300(1).⁵ We do not understand petitioners to dispute that they have a
10 right to appeal under WZO 11.300(1). It is difficult to understand why the city left
11 petitioners in the dark for almost two months after their local appeal was filed on November
12 23, 2010, which was no doubt a contributing factor to petitioners' decision to file their
13 LUBA appeal in LUBA No. 2010-111.⁶ But there can be no dispute that the city accepted
14 that local appeal by January 19, 2011, when it gave notice of the February 9, 2011 public
15 hearing on the appeal.

16 After petitioners' November 23, 2010 local appeal was filed and accepted by the city,
17 one of two things happened. The first possibility is that petitioner withdrew its appeal
18 prematurely and thereby failed to exhaust an available remedy. If that is what happened, this
19 appeal must be dismissed. *Lyke v. Lane County*, 11 Or LUBA 117, 123, *aff'd* 70 Or App 82,
20 688 P2d 411 (1984). The second possibility is that the city erroneously concluded that

⁴ As explained below, we cannot yet tell for certain whether we have jurisdiction to review the city's January 24, 2011 letter, which petitioners challenge in LUBA No. 2011-015.

⁵ WZO 11.300(1) provides "[a]ny action taken by the City Administrator in the interpretation, administration or enforcement of this ordinance shall be subject to review by the Planning Commission."

⁶ The city does point out that Thanksgiving and Christmas holidays fell during this two month period and states that the planning commission did not meet during the months of November and December. Respondent's Combined Reply and Responses 4 n 3.

1 petitioners withdrew their local appeal of the November 16, 2010 letter. If that is what
2 happened, the city will be required to provide that local appeal so that petitioners may argue
3 to the planning commission that the November 16, 2010 letter is legally defective in some
4 way. If that is what has happened, petitioners' appeal in LUBA 2010-111 was filed
5 prematurely, before petitioners exhausted available administrative remedies, and LUBA
6 2010-111 still must be dismissed. *Doyle v. Coos County*, 49 Or LUBA 397, 400 (2005).

7 As explained above, petitioners have either failed to exhaust available local remedies
8 before appealing the city's November 16, 2010 letter to LUBA in LUBA No. 2010-111, or
9 petitioners have not yet exhausted available local remedies to challenge that decision. We
10 need not resolve here which of those things has happened. In either event, petitioners'
11 appeal of LUBA No. 2010-111 must be dismissed.

12 **LUBA NO. 2011-015**

13 For reasons similar to those set out in our discussion of LUBA No. 2010-111, it
14 seems highly likely that LUBA lacks jurisdiction in LUBA No. 2011-015 to review the city's
15 January 24, 2011 letter. As we have already explained, petitioners have appealed that
16 January 24, 2011 letter to the planning commission, and we understand that the city has
17 accepted that appeal, and the planning commission held a hearing on that appeal on March
18 14, 2011. The planning commission may rule in petitioners' favor in that appeal. If it does,
19 petitioners will presumably then be given an opportunity to challenge the November 16,
20 2010 letter before the planning commission, and must exhaust that remedy before seeking
21 review at LUBA. If the planning commission does not rule in petitioners' favor in the
22 pending appeal of the January 24, 2011 letter, then petitioners may have a remedy at LUBA
23 to challenge the planning commission's decision in that local appeal. But any such challenge
24 must proceed by way of an appeal to LUBA of the planning commission's final decision in
25 petitioners' pending local appeal; petitioners' appeal of the City Administrator's January 24,

1 2011 letter was filed prematurely, because it was filed before petitioners had exhausted all
2 available local remedies to challenge that January 24, 2011 letter.

3 In a separate order and final opinion issued this date we bifurcate these appeals and
4 dismiss LUBA No. 2010-111. Because the city has not yet moved to dismiss LUBA No.
5 2011-015, we take no action on LUBA No. 2011-015 at this time. If the city has already
6 acted or takes action on petitioners' pending appeal of the January 24, 2011 letter in the
7 future, we will leave it to the parties to request that LUBA take appropriate action.

8 Dated this 15th day of March, 2011.
9
10
11
12
13
14

15 _____
16 Michael A. Holstun
Board Chair