BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

STANDARD INSURANCE COMPANY, an Oregon corporation, Petitioner, vs. WASHINGTON COUNTY, Respondent, and LLOYD POWELL AND ASSOCIATES, Intervenor-Respondent.	LUBA No. 88-109 ORDER ON REMAND FROM COURT OF APPEALS

On remand from the Court of Appeals.

SHERTON, Referee; HOLSTUN, Chief Referee; KELLINGTON, Referee, participated in the decision.

DISMISSED 09/20/89

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

Opinion by Sherton.

Our final opinion and order reversing the county decision appealed in this case, Standard Insurance Co. v. Washington County, ___ Or LUBA ___ (LUBA No. 88-109, April 26, 1989), was appealed to the Court of Appeals. The Court of Appeals reversed and remanded our decision, with instructions to dismiss the appeal proceeding. Standard Ins. Co. v. Washington County, 97 Or App 687, ___ P2d ___ (1989).

Accordingly, this appeal is dismissed.

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

STANDARD INSURANCE COMPANY, an Oregon corporation, Petitioner, vs. WASHINGTON COUNTY, Respondent, and LLOYD POWELL & ASSOCIATES, Intervenor-Respondent.	LUBA No. 88-109 FINAL OPINION AND ORDER

Appeal from Washington County.

Jack L. Orchard, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Ball, Janik & Novack.

John M. Junkin and Cheyenne Chapman, Hillsboro, filed a response brief on behalf of respondent Washington County.

Lawrence R. Derr, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Weiss, DesCamp & Botteri.

SHERTON, Referee, HOLSTUN, Chief Referee, participated in the decision.

REVERSED 04/26/89

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioner appeals Washington County Resolution and Order No. 88-196, which approves a comprehensive plan map amendment from Industrial (IND) to Neighborhood Commercial (NC) for a ten acre tract at the intersection of Walker Road and 185th Avenue.

MOTION TO INTERVENE

Lloyd Powell & Associates moves to intervene on the side of respondent in this proceeding. There is no opposition to the motion, and it is allowed.

FACTS

This is the third time a plan map amendment from IND to NC for the subject property has been appealed to LUBA. Our first two reviews resulted in decisions remanding the amendment. Standard Insurance Company v. Washington County, ___ Or LUBA ___ (LUBA No. 87-020, September 1, 1987) (Standard I); Standard Insurance Company v. Washington County, ___ Or LUBA ___ (LUBA No. 88-005, June 7, 1988) (Standard II).[1]

Our decision in Standard II was appealed to the Court of Appeals, which issued an opinion affirming our decision on October 5, 1988. Standard Insurance Company v. Washington County, 93 Or App 276, 761 P2d 1348 (1988). A petition for review of the Court of Appeals decision was filed with the Oregon Supreme Court. The Supreme Court issued an order acknowledging withdrawal of the petition for review on January 10, 1989. The Court of Appeals issued its mandate in

Standard II on February 3, 1989.

On November 8, 1988, the Washington County Board of Commissioners (board of commissioners) adopted a resolution and order approving the plan map change from IND to NC for the subject property. Petitions for reconsideration of that decision were filed on November 8 and 9, 1988. Under the Washington County Community Development Code (CDC), if a petition for reconsideration of a decision of the board of commissioners is timely filed, that decision does not become final until notice is given that either reconsideration is denied or a reconsidered decision is adopted.[2] On November 9, 1988, the subject property was annexed by the City of Hillsboro. On November 15, 1988, the board of commissioners denied the petitions for reconsideration.[3] Notice of the denial of reconsideration was mailed on November 23, 1989.

MOTION TO DISMISS

On January 16, 1989, intervenor-respondent (intervenor) filed a motion to dismiss on the ground that the county did not make a final land use decision because it had no authority to act on the pending requests for reconsideration after the subject property was annexed by the City of Hillsboro.

Intervenor's motion to dismiss is based on the same premise as petitioner's second assignment of error. The only disagreement between the parties is with regard to the legal consequence of the county's lack of jurisdiction over the subject property when it denied the requests for

reconsideration. Intervenor argues this appeal should be dismissed, whereas petitioner argues the county's decision should be reversed. We consider intervenor's motion to dismiss together with petitioner's second assignment of error, infra.

FIRST ASSIGNMENT OF ERROR

> "Washington County lacked jurisdiction to hear and approve the Applicant's comprehensive plan amendment because the matter was pending before the Oregon Court of Appeals at all times relevant to the County's purported actions relating to the approval."

Petitioner argues the county acted prematurely and without jurisdiction in the matter of the appealed plan map amendment. According to petitioner, once the appellate process is invoked, the county does not have jurisdiction to take action on the appealed decision until the appellate process is concluded. In this case, although the county chose to treat the decision as "remanded" to it based on the Court of Appeals September 14, 1988 opinion in Standard II, petitioner points out the Court of Appeals did not enter its appellate judgment until February 3, 1989. Petitioner argues that under ORAP 11.03(2)(b), the Court of Appeals decision is not effective until the court administrator sends a copy of the appellate judgment to LUBA.[4] Therefore, petitioner contends the county lacked jurisdiction at the time the county made the modified decision appealed in this case because no remand of the decision to the county had occurred at that time.

Petitioner argues that Oregon courts have held that appellate court jurisdiction, once invoked by the filing of a

notice of appeal, "is exclusive and plenary, until such time as the appellate courts have made disposition of the appeal," citing Murray Well-Drilling v. Deisch, 75 Or App 1, 9, 704 P2d 1159 (1985). Petition for Review 13. Petitioner also points out that the Supreme Court has stated

> "[i]t is a well-settled rule that after jurisdiction has been vested in an appellate court by the taking of an appeal the lower court cannot proceed in any manner so as to affect the jurisdiction acquired by the appellate court or defeat the right of the appellants to prosecute the appeal with effect." State v. Jackson, 228 Or 371, 382, 365 P2d 294 (1961).

According to petitioner, any lower tribunal proceedings undertaken to modify a decision while an appeal of the same decision is pending are void.

Petitioner also argues that although the county has been delegated authority over land use matters by ORS ch 215, the county has no "retained jurisdiction" to rehear and act further upon a land use decision while an appeal of its decision is pending before LUBA or the appellate courts. Petition for Review 14. Petitioner contends there is no statutory basis for such an exception to accepted principles of appellate jurisdiction.

Petitioner points out that ORS 197.825 states that LUBA "shall have exclusive jurisdiction to review any land use decision of a local government * * * ." (Emphasis added.) ORS 197.850(3) in turn confers exclusive jurisdiction for review of LUBA decisions on the Court of Appeals. Petitioner further argues that because ORS 197.850(2) provides that

judicial review of LUBA orders shall be solely as provided in that section, and that section does not provide for LUBA retention of any jurisdiction over a matter once its final order has been appealed to the Court of Appeals, LUBA loses all jurisdiction over a matter after it is appealed to the Court of Appeals. Petitioner cites Cascade Aggregates v. Scappoose Drainage Dist., 53 Or App 954, 633 P2d 854 (1981), in which the court held that LUBA does not have the authority to withdraw its final orders for reconsideration once an appeal is filed with the Court of Appeals.[5]

Petitioner argues that the state's land use decision making system is based on the principle that LUBA and the appellate courts have exclusive jurisdiction to make legally controling decisions on decisions on appeal before them. According to petitioner, if the concept of county "retained jurisdiction" over a specific decision were endorsed, a county could negate the appellate bodies' authority to make final, binding rulings at any time, simply by taking further action on a decision while it is on appeal.

The county argues that what is critical to resolving this assignment of error is the relationship between the county's jurisdiction and that of LUBA and the appellate courts and, therefore, much of petitioner's argument is irrelevant. The county argues that Murray Well-Drilling v. Deisch, supra, and State v. Jackson, supra, cited by petitioner, are inapposite because they construe statutes concerning jurisdiction of

appellate courts in appeals from trial courts, and do not consider the jurisdiction of a local government when its decision is appealed to LUBA. The county also argues that Cascade Aggregates v. Scappoose Drainage Dist., supra, is inapposite because it construes statutes concerning appellate court review of LUBA and other state agency decisions. The county maintains the situation presented by this case is different, because there are no statutory provisions in ORS ch 183, 197 or 215 which concern the jurisdiction of local government to act on a decision which is the subject of a pending LUBA or appellate court review proceeding.

Intervenor argues that this case is not analogous to Murray Well-Drilling v. Deisch or State v. Jackson because this case involves judicial review, rather than appeal, of a land use decision. Intervenor argues that an appeal removes a case entirely from the decision making tribunal, and the decision making tribunal is not a party to the appeal. With regard to review, intervenor states "a writ of error which is a form of review removes only the law for reexamination," and the original decision making tribunal is a party to the review conducted on that tribunal's record. Intervenor derives this distinction from the definition of "appeal" in Black's Law Dictionary. (See n 12, infra.)

According to intervenor, an appeal is initiated when an aggrieved party files a notice of appeal as provided in ORS ch 19. Intervenor recognizes that under ORS 19.033(1), when a

notice of appeal is filed, jurisdiction over the case transfers from the trial court to the appellate court. Intervenor contends, however, that ORS 197.825 only grants LUBA the right to review a local government's land use decision for legal error.

Intervenor argues the policy expressed by ORS 19.033(1), Murray Well-Drilling v. Deisch, supra, and State v. Jackson, supra, that the trial court cannot act on a case while it is on appeal to the appellate court is based on the fact that both courts involved are independent bodies. Intervenor contends it would create confusion if both were able to take action at the same time, on the same matter, with potentially inconsistent results. Intervenor argues, however, that this policy does not apply to judicial review. According to intervenor, in judicial review the lower decision making body (in this case, the county) is a party to the review. If that lower body takes further action in the matter pending before the reviewing tribunal which another party to the review proceeding believes improper, intervenor contends the other party would have recourse in the pending review proceeding.[6]

Intervenor also argues that ORS ch 215 clearly delegates land use decision making authority to the county. Furthermore, intervenor contends ORS 197.005(3) expresses a legislative policy that counties should retain authority to manage land conservation and development. Intervenor claims petitioner cites no statute or case supporting its contention that the

county is divested of this authority to act on a land use decision while judicial review of its decision is pending.

Both intervenor and the county argue our decision in DeWolfe v. Clackamas County, 6 Or LUBA 56 (1982), supports the position that a local government has jurisdiction to take further action on a decision while that decision is being reviewed by LUBA. In that case, the county reconsidered its decision and made a new decision in the same matter after a notice of intent to appeal the earlier decision was filed with LUBA. According to respondents, the parties and LUBA apparently assumed that the county had jurisdiction to take such action, and LUBA dismissed the appeal of the earlier decision as moot, without discussing the jurisdictional issue.

The county also argues that the courts have consistently recognized that local governments "retain jurisdiction" or authority over property within their boundaries even during the pendancy of an appeal of a land use decision involving that property, citing Warren v. Lane County, 297 Or 290, 686 P2d 316 (1984); Carmel Estates, Inc. v. LCDC, 51 Or App 435, 625 P2d 1367, rev den 291 Or 309 (1981); Citadel Corporation v. Tillamook County, 66 Or App 965, 675 P2d 1114 (1984). The county argues that its reliance on this line of authority is reasonable and should be upheld.

Finally, the county argues that in the absence of a specific statutory prohibition against its taking action based on a Court of Appeals opinion, as opposed to an appellate

judgment, it should be allowed to do so. The county maintains that in this case it was clear, upon issuance of the court's opinion, what was required of LUBA and the county, as the opinion specified that it "leads to the same disposition [remand] as LUBA's but requires different considerations and actions by the county on remand." Standard II, 93 Or App at 85, n 3.

The county argues there is only minimal risk if it proceeds to reconsider its decision prior to entry of the appellate court judgment. If the Court of Appeals reconsidered its decision, or the Supreme Court agreed to review the decision, "LUBA and the county would have to review any actions taken in the interim and determine if they needed to be done again or done differently." Respondent's Brief 6. On the other hand, according to the county, if the county lacks authority to act based on a Court of Appeals opinion, "weeks or months could be added to the timeline for any land use decision simply by [parties] filing motions of reconsideration and requests for review." Id.

We agree with the county that the issue critical to this assignment of error is the relationship between the county's jurisdiction over a land use decision, and that of LUBA and the appellate courts, when that decision has been appealed. However, the county's argument that it retains jurisdiction over property within its boundaries, during pendancy of an appeal of a land use decision concerning that property, is not

relevant to this issue. There is no disagreement that a county continues to have jurisdiction over the property that is the subject of a decision on appeal and, therefore, has jurisdiction to adopt a new quasi-judicial or legislative decision concerning the same property, based on a separate proceeding. That is the principle implicitly recognized by the courts in the cases cited by the county, Warren v. Lane County, supra (adoption of new comprehensive plan while appeal of amendment to prior plan pending); Carmel Estates, Inc. v. LCDC, supra (new ordinance amending comprehensive plan and zoning designations for subject property adopted, based on new proceeding, while appeal of prior amendment pending); Citadel Corporation v. Tillamook County, supra (new ordinance amending zoning of subject and other properties adopted while appeal of decision denying zone change pending).

Respondents are correct that in DeWolfe v. Clackamas County, supra, we dismissed the appeal as moot because a modified decision was made by the county while the appeal of its original decision was pending. Respondents are also correct in contending we should not have dismissed that appeal as moot if the county had no jurisdiction to adopt a modified decision while the appeal of the original decision was pending. However, our opinion in DeWolfe v. Clackamas County shows that this issue was not raised or considered by the parties or LUBA.[7] In deciding whether a county has jurisdiction to act further on a land use decision while its

earlier decision is on appeal to LUBA or to the appellate courts, we do not consider ourselves bound by a case where the issue was never raised or discussed in the opinion.

Thus, we must construe the statutes which grant land use decision making authority to the county, and those which create the process for review of such decisions, without benefit of previous LUBA or appellate court opinions on point.

ORS ch 215 generally establishes county authority for planning and zoning. ORS 215.050 grants county governing bodies authority to adopt and revise comprehensive plans, and ORS 215.060 sets out procedural requirements for such actions. ORS 215.431 allows county governing bodies, in certain instances, to authorize planning commissions or hearings officers to make final decisions on comprehensive plan amendments. However, we find no provisions in ORS ch 215 which address a county's jurisdiction over a comprehensive plan amendment decision, or any other type of land use decision, while that decision is on appeal to LUBA or to the appellate courts.

Statutes codified at ORS ch 197 generally establish the state-wide comprehensive land use planning system, including the Land Conservation and Development Commission (LCDC) and the Land Use Board of Appeals. The legislative findings in ORS 197.005 state as follows with regard to local government decision making authority:

" * * * * *

> "(3) Except as otherwise provided in subsection (4) of this section, cities and counties should remain as the agencies to consider, promote and manage the local aspects of land conservation and development for the best interests of the people within their jurisdictions.
>
> "(4) The promotion of coordinated state-wide land conservation and development requires the creation of a state-wide planning agency to prescribe planning goals and objectives to be applied by * * * cities, counties and special districts throughout the state."

The above-quoted findings were enacted prior to the creation of LUBA, and explain that while LCDC is to adopt state-wide goals and objectives for comprehensive planning, these goals and objectives are to be implemented locally by local governments through their comprehensive plans and land use decisions. We believe these findings address the legislature's intent as to the allocation of land use decision making authority between local governments and LCDC and not, as intervenor suggests, the jurisdiction of local governments to act on land use decisions while those decisions are being reviewed by LUBA or the appellate courts.

There are, however, two provisions in ORS ch 197 which deal directly with jurisdiction over review of local government land use decisions. One of these is ORS 197.825(1), which states:

> "Except as provided in subsections (2) and (3) of this section, [LUBA] shall have <u>exclusive</u> jurisdiction to review any land use decision of a local government * * * in the manner provided in ORS 197.830 to 197.845." (Emphasis added.)

The "exceptions" in ORS 197.825(2) and (3) to LUBA's exclusive review jurisdiction, mentioned in ORS 197.825(1) above, refer

to specific instances where the court of appeals or LCDC has jurisdiction to review decisions by local governments, or to instances where LUBA does not have jurisdiction to review a local government decision because petitioner failed to exhaust all available remedies below.[8] The "exceptions" do not describe any instances in which a local government is authorized to review, reconsider, or modify its own land use decision while review of such decision is pending before LUBA.

The second provision in ORS ch 197 which deals directly with jurisdiction over review of local government land use decisions is ORS 197.850(3), which provides:

> "Jurisdiction for judicial review of [LUBA] proceedings under ORS 197.830 to 197.845 is conferred upon the Court of Appeals. * * * "

Furthermore, ORS 197.850(2) provides:

> "Notwithstanding the provisions of ORS 183.480 to 183.550 [governing judicial review of administrative agency orders], judicial review of orders issued [by LUBA] under ORS 197.830 to 197.845 shall be solely as provided in this section."

Nowhere in that section is there any authorization for LUBA or local governments, to take any action with regard to their decisions while judicial review of those decisions is pending before the appellate courts. In Cascade Aggregates v. Scappoose Drainage Dist., supra, the Court of Appeals ruled that LUBA's jurisdiction while appellate court review is pending is governed solely by ORS 197.850.[9]

Statutes governing jurisdiction in other appellate review proceedings are also instructive. As previously mentioned,

with regard to appeals from trial court judgments in civil cases, ORS 19.033 provides once an appeal has been perfected, the Court of Appeals or Supreme Court has jurisdiction over the case, but sets out certain instances in which the trial court retains jurisdiction to take specific actions with regard to the case.[10] Furthermore, the appellate court decisions cited by petitioner, Murray Well-Drilling v. Deisch, supra, and State v. Jackson, supra, make it clear that a trial court does not generally retain jurisdiction to act on a case while appellate review is pending.

Statutes concerning judicial review of administrative agency contested cases confer jurisdiction on the Court of Appeals. ORS 183.482(1). Jurisdiction for review of orders in other than contested cases is conferred on circuit courts. ORS 183.484(1). The statutes grant administrative agencies no authority to take further action on orders in other than contested cases while appellate review is pending. However, ORS 183.482(5) and (6) do grant administrative agencies authority, in certain instances, to modify or withdraw their orders in contested cases while appellate review of those orders is pending.[11] The clear inference is that administrative agencies lack authority to act upon an order while appellate review of that order is pending, unless such authority is specifically provided for by statute, as it is in ORS 183.482(5) and (6).[12]

We find there is a clear pattern to these statutory

provisions for appellate review. 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 by the Court of Appeals.[13] Therefore, the county was without jurisdiction to adopt the challenged decision. This requires us to reverse the county's decision. OAR 661-10-071(1)(a).

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR/ MOTION TO DISMISS

Petitioner's second assignment of error states:

> "The county lacked jurisdiction to enter a final order in this case because the subject property was annexed to the City of Hillsboro prior to the time a final order was entered."

The parties agree the county lacked authority to act on the pending requests for reconsideration after the subject property was annexed by the City of Hillsboro on November 9, 1989. Petitioner argues that because the county lacked jurisdiction to adopt a plan designation amendment for the subject property after the annexation occurred, the final order which resulted from the board of commissioners' November 15, 1988 action denying the petitions for reconsideration should be reversed.

Intervenor moves to dismiss this appeal, arguing that when the notice of intent to appeal in this case was filed on

November 23, 1989, no final land use decision had been made by the county, because the county lacked authority to act upon the requests for reconsideration.[14] Intervenor contends LUBA has no jurisdiction to act on the merits of an appeal of a decision that is not a final land use decision. Intervenor terms this appeal a "premature filing," and argues it should be dismissed for lack of jurisdiction, citing Bettis v. City of Roseburg, 1 Or LUBA 174 (1980) and Beem v. Union County, 4 Or LUBA 140 (1981). Memorandum in Support of Motion to Dismiss 2.

Under CDC 211-2.2, quoted at n 2, supra, if a petition for reconsideration is timely filed and denied, a county decision on an application for a plan map amendment becomes final on the date notice of the denial of reconsideration is provided to the parties. In this case, there is no dispute a timely petition for reconsideration was filed. On November 23, 1988, a written "Notice of Decision" that the petitions for reconsideration had been denied was mailed to the parties. Record 1-2. Thus, under the CDC, the "Notice of Decision" document purports to be a final decision in the matter of the requested plan map amendment.[15] There is also no dispute that the county lacked jurisdiction to make such a decision after the subject property was annexed to the City of Hillsboro. The appealed decision, therefore, exceeded the county's jurisdiction and must be reversed.[16] ORS 197.835(8)(a)(A); OAR 661-10-071(1)(a).

The second assignment of error is sustained. Intervenor's motion to dismiss is denied.

THIRD THROUGH EIGHTH ASSIGNMENTS OF ERROR

The third through eighth assignments of error attack the merits of the county's decision to approve a plan map amendment for the subject property. With regard to these assignments, petitioner states "[t]he following assignments of error apply, only if LUBA determines the County had jurisdiction to approve the plan amendment." Petition for Review 22.

Under both the first and second assignments of error, supra, we determined that the county's decision exceeded its jurisdiction. Thus, our determination on either of these assignments would require that we reverse the county's decision. We are aware that ORS 197.835(10)(a) generally requires us, when reversing or remanding a land use decision, to decide all issues presented to us.[17] However, we believe the purpose of this provision is to provide needed guidance to the local government making the decision, so that it may, if possible, correct all deficiencies in its decision without the need for repeated appeals to this Board. We do not believe that addressing all issues raised by petitioner with regard to the merits of the county's decision would serve a useful purpose in this case. The county could not correct any deficiencies in its decision because it does not have jurisdiction to adopt a plan map amendment for the annexed property. We, therefore, decline to address the third through eighth assignments of error.

The county's decision is reversed.

FOOTNOTES

1

In addition, development review approval for a supermarket on the subject property was appealed to us in Standard Insurance Company v. Washington County, LUBA No. 88-015 (Standard III). On July 7, 1988, we issued an order reversing that approval. However, our decision was appealed to the Court of Appeals, and in Standard Insurance Company v. Washington County, 93 Or App 276, ___ P2d ___ (1988), the court directed that we change our disposition of the case to a remand. See Standard III, ___ Or LUBA ___ (LUBA No. 88-015, Order on Remand from Court of Appeals, January 13, 1989).

2

Washington County Community Development Code (CDC) 211-2 provides:

"Decisions of the Board on an application shall be deemed final as follows:

"211-2.1 If no petition for reconsideration is timely filed, the decision shall be deemed final on the date notice of the decision was provided to the parties;

"211-2.2 If a petition for reconsideration is filed and denied, the decision shall be deemed final on the date notice of the denial of reconsideration is provided to the parties;

"211-2.3 If a petition is filed and reconsideration granted, the decision shall be deemed final on the date notice of decision on the development, as reconsidered, is provided."

3

On December 20, 1988, the Hillsboro City Council denied the same petitions for reconsideration. That decision is on appeal in Standard Insurance Company v. City of Hillsboro, LUBA No. 88-120 (Standard V). A separate final opinion and order in that appeal is issued this date.

4

ORAP 11.03 provides in relevant part:

"(1) As used in this rule,

"(a) 'Appellate judgment' means a decision of the Court of Appeals or Supreme Court together with a final order and the seal of the court. * * *

" * * * * *

"(2) The decision of the Supreme Court or Court of Appeals is effective:

" * * * * *

"(b) With respect to judicial review of administrative agency proceedings, on the date that the Administrator sends a copy of the appellate judgment to the administrative agency, unless the court orders otherwise.

" * * * * * "

Petitioner argues ORAP 11.03 is applicable in this case because ORAP 5.55 states that, unless otherwise provided by statute or the ORAP, the procedure for judicial review of LUBA decisions shall be the same as for judicial review of administrative agency proceedings.

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[5] We note that the court's ruling in Cascade Aggregates v. Scappoose Drainage Dist., supra, was based on the following provision in Oregon Laws 1979, chapter 772, section 6a:

" * * * judicial review of [LUBA] orders issued under sections 4 to 6 of this 1979 Act shall be solely as provided in this section."

This initial statutory provision for judicial review of LUBA decisions is identical in substance to current ORS 197.850(2), which replaced it in 1983. Oregon Laws 1983, ch 827, sec 35.

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[6] We note, however, intervenor does not cite any statutory authority supporting this contention with regard to the authority of LUBA or the appellate courts, while review of a local government land use decision is pending, to consider or act upon subsequent actions of a local government concerning its decision. Compare ORS 183/482(6), quoted infra at n 11.

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[7] This issue likewise was not raised or considered by the

parties or LUBA in our decision in a separate appeal affirming the county's second decision in the matter. DeWolfe v. Clackamas County, 6 Or LUBA 249 (1982). Furthermore, our decisions in both DeWolfe v. Clackamas County appeals were affirmed per curiam by the Court of Appeals in a consolidated appeal, DeWolfe v. Clackamas County Bd. Comm., 66 Or App 580, 674 P2d 1191 (1984). However, the court's opinion also discloses no consideration of this jurisdictional issue.

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[8] ORS 197.825(2) and (3) provide in relevant part:

"(2) The jurisdiction of the board:

"(a) Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review;

"(b) Is subject to the provisions of ORS 197.850 relating to judicial review by the Court of Appeals;

"(c) Does not include those matters over which the department has review authority under ORS 197.430 to 197.455 and 197.640 to 197.650;

" * * * * *

"(3) The provisions of paragraph (a) of subsection (2) of this section do not affect the authority of the board to decide issues not raised in the local government proceedings."

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[9] See n 5, supra.

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[10] ORS 19.033 provides, in relevant part:

"(1) When the notice of appeal has been served and filed as provided in ORS 19.023, 19.026 and 19.029, the Supreme Court or Court of Appeals shall have jurisdiction of the cause, pursuant to rules of the court, but the trial court shall have such powers in connection with the appeal as are conferred upon it by law and shall retain

jurisdiction for the purpose of allowance and taxation of attorney fees, costs and disbursements or expenses pursuant to rule or statute. * * *

" * * * * *

"(4) Notwithstanding the filing of a notice of appeal, the trial court shall have jurisdiction, with leave of the appellate court, to enter an appealable judgment if the appellate court [makes certain determinations].

" * * * * *

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[11] ORS 183.482(5) and (6) provide, as relevant:

"(5) If, on review of a contested case, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good and substantial reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency under such conditions as the court deems proper. The agency may modify its findings and order by reason of the additional evidence and shall, within a time to be fixed by the court, file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or orders * * *.

"(6) At any time subsequent to the filing of the petition for review and prior to the date set for hearing the agency may withdraw its order for purposes of reconsideration. If an agency withdraws an order for purposes of reconsideration, it shall, within such time as the court may allow, affirm, modify or reverse its order. If the petitioner is dissatisfied with the agency action after withdrawal for purposes of reconsideration, the petitioner may file an amended petition for review and the review shall proceed upon the revised order. * * *."

[12] We disagree with intervenor's contention that there is a significant difference between appellate review processes statutorily termed appeals and those statutorily termed judicial review, with regard to the retention of jurisdiction by original decision making bodies. We note that review of state agency decisions is statutorily termed judicial review, and fits intervenor's description of judicial review in that the agency is a party to such review. However, it is clear from ORS 183.482 that a state agency only has jurisdiction to take further action upon its appealed orders where such jurisdiction is specifically conferred upon the agency by that section.

We further note that the definition of "appeal" in Black's Law Dictionary, Fifth Edition, 1979, cited by intervenor, is "[r]esort to a superior (i.e. appellate) court to review the decision of an inferior (i.e. trial) court or administrative agency." (Emphasis added.) Black's Law Dictionary also defines "judicial review" as a "form of appeal from an administrative body to the courts for review of either findings of fact, or of law, or of both. See also Appeal." (Emphasis added.)

[13] We do not agree with respondents' view that such an interpretation of the statutes poses dire consequences for local governments. While it is true that this interpretation means that a county cannot act further on a specific land use decision until all appeals of its decision are concluded, we agree with the parties that a county still has jurisdiction over the subject property. Thus, a county could supersede its earlier decision while review is pending, with a new decision concerning the property made as a result of a separate land use proceeding. Furthermore, we note that a county's land use decisions are effective while review by LUBA and the appellate courts is pending, unless a stay is specifically granted by LUBA pursuant to ORS 197.845.

[14] The notice of intent to appeal in this case mistakenly identified the date the appealed decision became final as November 15, 1988, the date the board of commissioners voted to deny the petitions for reconsideration, rather than November 23, 1988, the date notice of the board of commissioners' decision was mailed to the parties. Record 1-2; see CDC 211-2.2, quoted at n 2, supra. At oral argument, intervenor claimed the citation of November 15, 1988 in the

notice of intent to appeal means petitioner did not appeal from a final decision and, therefore, the appeal should be dismissed. However, we note that on November 23, 1988, the date the notice of intent to appeal was filed, a final decision in the matter had been made by the county. The notice of intent to appeal clearly described the decision challenged, and apparently neither intervenor nor respondent were confused as to the identity of the decision appealed by petitioner. In such circumstances, we regard the error in petitioner's notice of intent to appeal concerning the date the decision became final as technical, harmless and not a basis for dismissing the appeal. See Atwood v. City of Portland, 4 Or LUBA 177, 179 (1981), aff'd without opinion 56 Or App 396 (1982).

15

We note that intervenor's characterization of the situation presented in this appeal would probably be correct if, after annexation of the subject property by the city, the county had issued a decision that it did not have jurisdiction to act on the petitions for reconsideration. According to the CDC, such a decision by the county would not result in the county's November 8, 1988 decision approving the plan amendment becoming a final decision. Therefore, there would arguably be no county final decision for LUBA to review.

16

We note the circumstances in this case differ significantly from those in Bettis v. City of Roseburg, supra (appeal from minutes of city council meeting dismissed where city argued it intended eventually to issue written resolution and findings in matter appealed), and Beem v. Union County, supra (appeal from county order dismissed where another appeal was filed from subsequently adopted county ordinance in same matter).

17

ORS 197.835(10)(a) provides:

> "Whenever the findings, order and record are sufficient to allow review, and to the extent possible consistent with the time requirements of ORS 197.830(12), the board shall decide all issues presented to it when reversing or remanding a land use decision described in subsections (2) through (8) of this section."