



1 Holstun, Chief Referee.

2 MOTION TO INTERVENE

3 Baker Rock Crushing Company (Baker Rock) moves to intervne  
4 on the side of respondent in this proceeding. There is no  
5 opposition to the motion, and it is allowed.

6 INTRODUCTION

7 On December 15, 1988, petitioner filed a timely notice of  
8 intent to appeal challenging respondent county's decision  
9 granting Baker Rock an operating permit for an existing batch  
10 plant. On January 16, 1989, Baker Rock moved to intervene on  
11 the side of respondent. Although Baker Rock intervened on the  
12 side of respondent, on January 26, 1989, Baker Rock filed a  
13 document entitled "Intervenor Baker Rock's Petition for Review"  
14 in which it challenged the constitutionality of one of  
15 respondent's conditions of approval.

16 PETITIONER'S WITHDRAWAL OF APPEAL

17 On January 30, 1988, the last day under OAR 661-10-030(1)  
18 for filing a petition for review in this proceeding, petitioner  
19 advised the Board in writing that he was withdrawing his appeal.

20 " \* \* \* Petitioner in the above-captioned proceeding,  
21 hereby withdraws his Notice of Intent to Appeal.  
22 \* \* \*." Withdrawal of Appeal 1.

23 Our jurisdiction to review land use decisions is invoked  
24 when a petitioner files a notice of intent to appeal.  
25 ORS 197.830(1); OAR 661-10-015(1). Where a notice of intent to  
26 appeal is not followed by a timely petition for review, the  
27 appeal is dismissed and the filing fee and deposit for costs is

1 awarded to the respondent. ORS 197.830(7);

2 OAR 661-10-030(1).<sup>1</sup>

3 In this case, petitioner failed to file a petition for  
4 review. Instead, petitioner filed a "Withdrawal of  
5 Appeal."<sup>2</sup> Nothing in our rules or the statutes governing our  
6 proceedings expressly allows petitioners to withdraw notices of  
7 intent to appeal once filed with the Board.

8 In Ackerly Communications, Inc. v. Mult. Co., 303 Or 165,  
9 734 P2d 885 (1987), the Oregon Supreme Court granted a  
10 petitioner's request to withdraw a petition for review after  
11 briefing and oral argument had been completed. In Ackerly  
12 Communications, no statute or rule expressly permitting  
13 withdrawal of the petition for review was cited by the court.  
14 Although Ackerly Communications involved withdrawal of a  
15 petition for review, see ORAP 10.05, and this proceeding  
16 concerns withdrawal of a notice of intent to appeal filed under  
17 ORS 197.830(1) and OAR 661-10-015(1), we do not believe the  
18 difference is important.<sup>3</sup>

19 Neither respondent nor intervenor objected to petitioner's  
20 request that his notice of intent to appeal be withdrawn. We  
21 see no reason to deny petitioner's request, and petitioner's  
22 request to withdraw his notice of intent to appeal is allowed.

23 MOTION TO DISMISS

24 Respondent county moves to dismiss. Respondent argues:

25 "The Board has jurisdiction to hear an appeal of a  
26 local land use decision only if Notice of Intent to  
Appeal is timely filed, ORS 197.830(7) and

1 OAR 661-10-015. The only exception to this is  
2 provided not in statute, but Board rules, which state  
3 that 'any respondent who desires to file a petition  
4 for review may do so by filing a cross petition for  
5 review' which 'must comply in all respects with the  
6 requirements of this rule governing the petition for  
7 review, [except that a notice of intent to appeal need  
8 not have been filed by such party].'

9 OAR 661-10-075(3). The Board does not have  
10 jurisdiction to continue when there has been no filing  
11 of a notice of intent to appeal or a cross petition in  
12 the time and manner provided by law." Memorandum in  
13 Support of Motion to Dismiss 1.

14 Respondent goes on to point out that Baker Rock intervened  
15 as a respondent, not as a petitioner. Although respondent  
16 acknowledges that our rules provide for cross petitions,  
17 respondent argues Baker Rock filed a petition for review rather  
18 than a cross petition for review. Respondent argues Baker Rock  
19 may not file a petition for review, unless it also filed a  
20 notice of intent to appeal together with the required filing  
21 fee and deposit for costs. Respondent further notes that  
22 petitions for review and cross petitions for review are  
23 required to conform to the requirements of OAR 661-10-030(2)  
24 and respondent argues the petition for review filed by Baker  
25 Rock

26 "lacks a table of contents; has no cover page; omits  
facts to establish standing; fails to present a  
statement of the case, including the nature of the  
decision, summaries of arguments and material facts,  
and statement of Board jurisdiction; fails to set  
forth assignments of error; and fails to contain a  
copy of the challenged decision or local law  
provisions." Memorandum in Support of Motion to  
Dismiss 3.

Baker Rock argues that although the document it submitted  
is captioned a "Petition for Review" rather than a "Cross

1 Petition for Review" it was timely filed and

2 "to the extent that the cross petition is not in the  
3 precise form required for petitions for review,  
4 intervenor-respondent moves the Board pursuant to  
5 OAR 661-10-030(4) for leave to amend it." Intervenor  
6 Baker Rock's Memorandum in Opposition to Motion 2.

7 We agree with Baker Rock that its failure to caption its  
8 cross petition for review as such and its failure to comply in  
9 all respects with OAR 661-10-030(2) does not, in this case,  
10 provide a basis for dismissing the appeal. However, we  
11 disagree with the understanding apparently shared by Baker Rock  
12 and respondent that a cross-petition for review provides a  
13 basis for our continued jurisdiction to consider an appeal,  
14 where the petitioner withdraws its notice of intent to appeal  
15 and fails to file a petition for review.

16 In Ludwick v. Yamhill County, 71 Or App 34, 691 P2d 515,  
17 vacated 298 Or 302 (1984), the Court of Appeals dismissed an  
18 appeal from this Board in circumstances analogous to those  
19 presented in this proceeding. In Ludwick, petitioner filed a  
20 timely petition for judicial review as required by ORAP 5.65,  
21 but did not file the notice of intent to appeal required by  
22 ORS 197.850(3)<sup>4</sup>. Intervenor in that appeal filed a timely  
23 cross-petition for review.<sup>5</sup> The Court of Appeals dismissed  
24 petitioner's appeal, based on petitioner's failure to file the  
25 required notice of intent to appeal. In rejecting the  
26 intervenor's argument that the Court of Appeals should proceed  
with the appeal based on the timely cross-petition for review,  
the Court of Appeals explained:

1       \*\* \* \* ORS 197.850(6) gives this court the authority  
2       to set time limits for the filing of petitions and  
3       briefs. Our rules require the appellant's petition to  
4       be filed at the same time as his or her notice of  
5       intent to appeal, ORAP 5.65, and that any  
6       cross-petition be filed within seven days after the  
7       filing of the appellant's petition. ORAP 5.77(1).  
8       Axiomatically, we do not have authority to assume any  
9       jurisdiction--through our rules or otherwise--that the  
10      legislature has not conferred. ORS 197.850(3)  
11      expressly makes the filing of a notice of intent to  
12      appeal--by someone, within the prescribed time--the  
13      event that invokes our jurisdiction. No notice of  
14      intent to appeal was filed by anyone in this case.  
15      Consequently, we do not have jurisdiction.

16      "We do not suggest any view about whether the same  
17      answer would be made in a civil appeal where a notice  
18      of cross-appeal is filed more than 30 days after the  
19      entry of judgment but within 10 days from the filing  
20      of jurisdictionally infirm notice of appeal. See  
21      Annot., 32 ALR 3rd 1290 (1970). We do note, however,  
22      that the answer is clearer under the land use statutes  
23      than under the general appeal provisions of ORS  
24      chapter 19. ORS 19.026(3) makes the filing of a  
25      notice of cross-appeal a separate statutory event.  
26      The only authority for the filing of a cross-petition  
27      from a LUBA order is ORAP 5.77. That rule can have no  
28      application to an appeal over which we do not have  
29      jurisdiction; moreover, the rule does not purport to  
30      suggest that the filing of a petition or  
31      cross-petition is adequate to establish jurisdiction  
32      if no notice of intent to appeal has been filed."  
33      (Emphasis in original). 71 Or App at 38.

34      The Supreme Court vacated the Court of Appeals' denial of  
35      petitioner's appeal and remanded with instructions "to  
36      reinstate the appeal unless the Court determines that the  
37      failure to file a document entitled "Notice of Intent to  
38      Appeal" was prejudicial and proceeding upon the petition for  
39      judicial review would be unfair to respondents. Ludwick v.  
40      Yamhill County, 298 Or 302, 306 (1984). The Court of Appeals  
41      ultimately concluded there was no prejudice or unfairness and

1 "reinstated judicial review as to both respondents." Ludwick  
2 v. Yamhill County, 72 Or App 224, 226 n 2, 696 P2d 536 (1985).

3 In remanding the Court of Appeals' decision, the Supreme  
4 Court simply held that failure to file a document entitled  
5 "Notice of Intent to Appeal," was not a jurisdictional defect  
6 in the unusual circumstance presented in that case where the  
7 petition for judicial review and the notice of intent to appeal  
8 required the same information and a petition for judicial  
9 review was filed within the time required for filing the notice  
10 of intent to appeal. We find nothing in the Supreme Court's  
11 decision or the Court of Appeals' decision on remand that would  
12 affect the Court of Appeals' reasoning in its initial decision,  
13 quoted above, dismissing the cross appeal. Based on that  
14 reasoning, we conclude the Court of Appeals would dismiss a  
15 cross-appeal if the notice of appeal in a case were  
16 jurisdictionally defective, were defective for other reasons  
17 which resulted in prejudice or unfairness to respondent, or  
18 were withdrawn.

19 There are no material differences between ORS 197.850(3)  
20 quoted supra at n 4 and ORS 197.830(1), which conditions our  
21 jurisdiction upon "filing a notice of intent to appeal." In  
22 this proceeding we no longer have a notice of intent to  
23 appeal. Although timely filed, the notice of intent to appeal  
24 has been withdrawn. Whether the notice of intent to appeal is  
25 not timely filed or is timely filed and later withdrawn,  
26 dismissal is required. We have no statutory basis for

1 jurisdiction in this matter. Intervenor has no separate  
2 statutory right to file a cross-petition for review, and his  
3 timely filing of a cross-petition for review under our  
4 administrative rules provides no basis for our continued  
5 jurisdiction.<sup>6</sup>

6 The respondent's motion to dismiss is granted.

7 This appeal is dismissed.

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FOOTNOTES

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ORS 197.830(9) requires the "petition for review of the land use decision and the supporting brief" to be filed within the times specified in LUBA's rules. Under our rules, the petition for review and supporting brief are a single document which must be filed within 21 days after the date the record is received or, if an objection is filed, after the date the record is settled. OAR 661-10-030.

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We treat petitioner's "Withdrawal of Appeal" as a motion to withdraw its notice of intent to appeal. OAR 661-10-065(1) ("\* \* \* a request for an order or relief shall be made by filing a motion in writing for such order or relief \* \* \*"). Under our rules, parties have 10 days from the date they receive a motion to file an answer. OAR 661-10-065(2).

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Under ORS 197.830(1), it is the notice of intent to appeal that invokes LUBA's review jurisdiction. Under ORAP 10.05 and 10.15 it is the filing and acceptance of the petition for review that invokes the Supreme Court's review jurisdiction in appeals from decisions of the Court of Appeals. For purposes of this appeal, it is the similar jurisdictional nature of the notice of intent to appeal filed with LUBA and the petition for review filed with the Supreme Court that is important.

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ORS 197.850 provides in part:

\* \* \* \* \*

"(2) Notwithstanding the provisions of ORS 183.480 to 183.550, judicial review of orders issued under ORS 197.830 to 197.845 shall be solely as provided in this section.

"(3) Jurisdiction for judicial review of proceedings under ORS 197.830 to 197.845 is conferred upon the Court of Appeals. Proceedings for review shall be instituted by filing a notice of intent to appeal in the Court of Appeals. The notice shall be filed within 21 days following the date the board delivered or mailed the order upon which the notice is based.

1           "\* \* \* \* \*

2           "(6) Petitions and briefs shall be filed within time  
3 periods and in a manner established by the Court of  
4 Appeals by rule."

5           ORAP 5.65 provides:

6           "A petition for judicial review shall be filed at the  
7 same time that the notice of intent to appeal is  
8 filed. Insofar as practicable, the form, content and  
9 service of the petition shall be as described in Rule  
10 5.10."

11           The information required by ORS 197.850(3) to be  
12 included in the notice of intent to appeal, is also  
13 required to be included in the petition for judicial  
14 review required by ORAP 5.65. See ORAP 5.10.

15 \_\_\_\_\_  
16 5

17           ORAP 5.77 permits a cross-petition for review to be  
18 filed within 7 days after the petition for review is  
19 filed. Cross petitioner's brief and abstract of record is  
20 due 14 days after the petitioner's opening brief is filed  
21 and may be combined with the respondent's brief.

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23 6

24           The effect of our decision may be that potential  
25 intervenors wishing to avoid the uncertainty of relying on  
26 a petitioner to timely file and maintain a notice of  
27 intent to appeal must file their own notices of intent to  
28 appeal within the deadline established in ORS 197.830(9)  
29 and OAR 661-10-030.