

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

NATIONAL ADVERTISING COMPANY,)
)
Petitioner,)
)
vs.)
)
LOGAN RAMSEY, and MARGARETTA) LUBA Nos. 86-040 and 86-041
RAMSEY)
) FINAL OPINION
Intervenors-Petitioner,) AND
ORDER)
)
and)
)
CITY OF PORTLAND,)
)
Respondent.)

Appeal from City of Portland.

Rex Armstrong, Portland, represented petitioner.

Daniel H. Kearns, Portland, represented intervenors-petitioner.

Kathryn Beaumont Imperati, Portland, represented respondent.

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

DISMISSED 10/08/90

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 two City of Portland ordinances which (1) amend the Portland City Code to establish new sign regulations, and (2) authorize city officials to enter into a settlement agreement with Ackerley Communications of the Northwest, Inc. concerning maintenance, location and relocation of its outdoor advertising signs.

FACTS

The appealed ordinances were adopted by respondent City of Portland on May 22, 1986. On June 12, 1986, petitioner filed its notices of intent to appeal. On July 31, 1986, the Board received from respondent a consolidated record of the local proceedings. On August 7, 1986, intervenors-petitioner Logan and Margaretta Ramsey (intervenors) filed motions to intervene on the side of petitioner. A series of stipulated motions to extend the deadlines for filing the petition for review and response brief in this proceeding to "enable petitioner and respondent to continue their efforts to settle this matter" followed. On July 16, 1990, petitioner filed a motion to dismiss this appeal proceeding.

INTRODUCTION

The administrative rules governing this appeal proceeding are those filed by LUBA on October 3, 1983. Under OAR 661-10-050, a motion to intervene on the side of

petitioner is required (1) to be filed within the time for filing the petition for review; and (2) to contain intervenor's brief, which must conform to the specifications for a petition for review set out in OAR 661-10-030. OAR 661-10-030(3) requires petitions for review to set out the facts establishing petitioners' standing, and to contain a statement of the case, assignments of error and argument supporting each assignment of error. Intervenors' motions to intervene are generally in the form required by OAR 661-10-050 and 661-10-030(3), and include a statement of facts and legal argument contending that intervenors meet the applicable standing requirements for intervention found in ORS 197.830(5)(1985).

Respondent, in its argument in support of petitioner's motion to dismiss discussed infra, argues that it has the right to address, in its response brief, issues concerning the accuracy and adequacy of intervenors' allegations of standing. Respondent contends it is premature and unnecessary for this Board to resolve issues concerning intervenors' standing at this time. According to respondent, if the Board permits petitioner to withdraw its notices of intent to appeal, there is no basis for the Board to retain jurisdiction over this proceeding, regardless of whether intervenors have standing to intervene.

We agree with respondent that if we must dismiss this proceeding based on petitioner's motion to dismiss,

discussed infra, regardless of whether intervenors have standing to intervene, there is no point in deciding the potentially complex issues involved in determining whether intervenors have standing. Therefore, for the purpose of considering petitioner's motion to dismiss, we assume, without deciding, that intervenors have standing to intervene.

DECISION

Petitioner's Motion to Dismiss its Petitions for Review states, in its entirety:

"Based on the agreement between petitioner National Advertising Company and respondent City of Portland, National Advertising Company respectfully moves the Land Use Board of Appeals to dismiss the petitions for review that were filed by National Advertising Company in LUBA Nos. 86-040 and 86-041."

No petitions for review have been filed by petitioner National Advertising Company in this proceeding. However, petitioner subsequently advised the Board by letter that it wishes the Board to consider its motion to dismiss as a motion to withdraw its notices of intent to appeal in LUBA Nos. 86-040 and 86-041.

Intervenors contend that notwithstanding petitioner's motion to dismiss, LUBA retains jurisdiction over this appeal with regard to intervenors' claims. Intervenors argue that petitioner's motion merely seeks dismissal of the appeal, not withdrawal of petitioner's notices of intent to appeal. Intervenors argue that so long as a valid notice of

intent to appeal was timely filed and is not withdrawn, LUBA retains jurisdiction. Gross v. Washington County, ___ Or LUBA ___ (LUBA No. 88-115, April 14, 1989), slip op 7-8.¹

Intervenors further argue that even when an original petitioner's appeal is dismissed, LUBA has held it retains jurisdiction over the appeal based on claims asserted by intervenors-petitioner. See Todd v. Jackson County, 14 Or LUBA 233, 239 n 4 (1986) (LUBA retained jurisdiction over appeal although the original petitioner's petition for review was dismissed as untimely filed). According to intervenors, this holding was based on the legislative mandate of ORS 197.805 requiring LUBA to conduct expeditious appeal proceedings subject to sound principles of judicial review. Also in accord with this policy, intervenors argue, is LUBA's refusal to limit the issues raised by intervenors-petitioner to those framed by the petitioner. Stotter v. City of Eugene, ___ Or LUBA ___ (LUBA No. 89-037, October 10, 1989), slip op 10-11 (intervenors-petitioner may raise any issue which they could properly raise had they filed separate notices of intent to appeal and pursued

¹Intervenors concede that under our decision in Gross, if the original petitioner's notice of intent to appeal is withdrawn, LUBA does not have jurisdiction over the appeal, notwithstanding the timely filing of a cross-petition for review by an intervenor-respondent. Intervenors argue, however, that Gross is distinguishable from this case, because the intervenor seeking to continue the appeal after withdrawal of the notice of intent to appeal in Gross was an intervenor on the side of respondent. Therefore, according to intervenors, once the original petitioner withdrew, there was no longer a case or controversy.

separate appeals).

Intervenors argue that in accord with Todd and Gross, LUBA retains jurisdiction over this appeal even if National Advertising Company, the original petitioner, no longer wishes to participate in the appeal. According to intervenors, the mere fact that petitioner has reached a settlement with respondent and now wants to dismiss its claims should not prejudice intervenors' claims. Intervenors therefore conclude it may be permissible to dismiss this appeal with regard to petitioner's claims against respondent, but intervenors' claims "should remain as independent colorable claims against [respondent] and should not be dismissed." (Emphasis in original.) Intervenors' Opposition to Petitioner's Motion to Dismiss 10.

According to respondent, if petitioner is satisfied it is no longer necessary or desirable to pursue its appeals, petitioner should be permitted to withdraw its notices of intent to appeal. Respondent argues that forcing petitioner to continue an appeal it no longer wishes to pursue would not advance the purposes of ORS 197.805, nor achieve administrative efficiency or economy in LUBA's review proceeding, and would result in the issuance of an advisory opinion.

Respondent further argues that if petitioner's notices of intent to appeal are withdrawn, our opinion in Gross is

controlling with regard to the effect of such withdrawal on intervenors. According to respondent, in this appeal as in Gross, intervenors have no statutory or other right to proceed with this appeal if the only documents giving LUBA jurisdiction, the notices of intent to appeal, are withdrawn. Respondent argues intervenors did not file their own notices of intent to appeal, which prudent persons wishing to challenge a land use decision should do. Gross, supra, slip op at 10 n 6.

Respondent argues that the other decisions cited by intervenors are inapposite. According to respondent, in Stotter, the only issue was whether intervenors-petitioner could raise issues other than those raised by the petitioner. LUBA's jurisdiction over the appeal was not an issue, because timely notices of intent to appeal were filed and were not withdrawn. In Todd, the petitioner's petition for review was rejected because it was not timely filed. However, there remained a valid notice of intent to appeal which gave LUBA jurisdiction to consider intervenors-petitioner's petitions for review.

In Gross, based on reasoning in Ludwick v. Yamhill County, 71 Or App 34, 38, 691 P2d 515, vacated 298 Or 302 (1984) which we found to be unaffected by the Supreme Court remand of that decision, we concluded that the Court of Appeals would "dismiss a cross-appeal [of a LUBA decision] if the notice of appeal in the case were jurisdictionally

defective, were defective for other reasons which resulted in prejudice or unfairness to respondent, or were withdrawn." Gross, supra, slip op at 7. We also stated:

"There are no material differences between ORS 197.850(3) * * * and ORS 197.830(1), which conditions our jurisdiction upon 'filing a notice of intent to appeal.' In this proceeding we no longer have a notice of intent to appeal. Although timely filed, the notice of intent to appeal has been withdrawn. Whether the notice of intent to appeal is not timely filed or is timely filed and later withdrawn, dismissal is required. We have no statutory basis for jurisdiction in this matter. * * *" Id., slip op at 7-8.

We similarly conclude that the Court of Appeals would dismiss an appeal of a LUBA decision if the notice of appeal were withdrawn, and adhere to our reasoning in Gross. Therefore, we agree with respondent that if petitioner's notices of intent to appeal are withdrawn, we must dismiss this appeal.²

Thus, the remaining issue which must be resolved in this case is whether petitioner may withdraw its notices of intent to appeal.³ In Gross, we noted that nothing in our

²We also agree with respondent that our decision in Todd, supra, is distinguishable. In Todd, the petitioner's notice of intent to appeal was not withdrawn or found to be defective. The issue in Todd was whether, if the petitioner fails to file a timely petition for review, but intervenors-petitioner file their briefs in a timely manner, OAR 661-10-030(1)(1983) requires dismissal of the entire appeal proceeding. See Todd v. Jackson County, ___ Or LUBA ___ (LUBA No. 85-061, Order on Intervention and Motion to Dismiss, December 16, 1985).

³Although petitioner's motion requests us "to dismiss [petitioner's] petitions for review," petitioner's subsequent letter makes it clear that

administrative rules or the statutes governing our proceedings expressly allows petitioners to withdraw notices of intent to appeal once filed with LUBA. We also noted the Supreme Court has granted a petitioner's request to withdraw a petition for review of a Court of Appeals decision in an appeal from a LUBA decision, even though no statute or rule of the court expressly permits such withdrawal. Ackerley Communications, Inc. v. Mult. Co., 303 Or 165, 734 P2d 885 (1987). We concluded in Gross, supra, slip op at 3, that we may allow a petitioner's request to withdraw his notice of intent to appeal.

However, in Gross there was no objection by another party to the withdrawal. In this case, we must determine whether intervenors' objections prevent petitioner from withdrawing its notices of intent to appeal. Neither the statutes nor our rules specifically address whether intervenors, by becoming parties to an existing appeal proceeding, gain the right to prevent a petitioner from withdrawing its notice of intent to appeal, the document which gives us jurisdiction over the appeal.

ORS 197.805(1985) 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."

what petitioner is asking is that (1) it be allowed to withdraw its notices of intent to appeal, and (2) this appeal proceeding be dismissed.

Where a petitioner and respondent have settled the disagreement concerning a land use decision which led to the petitioner's filing of a notice of intent to appeal, it is consistent with the above policy favoring timely resolution of land use matters to allow the petitioner to withdraw its notice of intent to appeal. Furthermore, we believe this conclusion is also consistent with sound principles governing judicial review.

If someone has already filed a notice of intent to appeal a land use decision before LUBA, another person wishing to challenge that decision initially has a choice. Such a person may file a notice of intent to appeal, and challenge the decision as a petitioner,⁴ or may intervene in the appeal that has already been filed.⁵ If a person chooses to file a motion to intervene, rather than a notice of intent to appeal, there are certain advantages. The motion to intervene does not have to be filed within 21 days

⁴OAR 661-10-055 allows LUBA, at the request of a party or on its own motion, to consolidate appeal proceedings which "seek review of the same or closely related land use decision(s)."

⁵ORS 197.830(5)(1985) provides:

"Within a reasonable time after a petition for review has been filed with the board, any person may intervene in and be made a party to the review proceeding upon a showing of compliance with subsection (2) or (3) of this section."

ORS 197.830(2) and (3)(1985), referred to above, set out the standing requirements for appealing legislative and quasi-judicial land use decisions, respectively. Therefore, a person who has standing to intervene in an appeal before LUBA would also have standing to initiate an appeal before LUBA.

after the decision appealed from becomes final, as does the notice of intent to appeal, and an intervenor-petitioner does not have to pay a filing fee and deposit for costs, as does a petitioner. See ORS 197.830(7)(1985). On the other hand, there is at least one disadvantage, namely that the intervenor is dependent on the petitioner to timely file and maintain its notice of intent to appeal, so that LUBA has jurisdiction over the appeal. See Gross, supra, slip op at 10 n 6.

Petitioner's motion to withdraw its notices of intent to appeal is granted.

This appeal is dismissed.