

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 THOMAS M. BURKE, TERRY DORVINEN,
5 DWAIN C. LUNDY, WILSON CULWELL and
6 LAURIE J. MONICAL,
7 *Petitioners,*
8

9 vs.

10 CROOK COUNTY,
11 *Respondent,*
12

13 and

14 EAGLE CREST, INC.,
15 *Intervenor-Respondent.*
16

17 LUBA No. 2003-100
18

19 FINAL OPINION
20 AND ORDER
21

22 Appeal from Crook County.
23

24 Max M. Miller, Portland, represented petitioner.
25

26 Jeff M. Wilson, County Counsel, Prineville, represented respondent.
27

28 Kristin L. Udvari, Portland, represented intervenor-respondent.
29

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

33 DISMISSED
34

10/16/2003
35

36 You are entitled to judicial review of this Order. Judicial review is governed by the
37 provisions of ORS 197.850.
38

1 Holstun, Board Member.

2 **DECISION**

3 **A. Introduction**

4 The notice of intent to appeal in this appeal was filed with LUBA on June 25, 2003.
5 In this appeal, petitioners seek LUBA review of a June 4, 2003 planning commission
6 decision that grants conditional use approval for a destination resort.

7 Petitioners also attempted to appeal the same planning commission decision to the
8 county court. The county court dismissed that attempted appeal on June 18, 2003. In a
9 second appeal (LUBA No. 2003-104), which was filed with LUBA on July 9, 2003,
10 petitioners seek LUBA review of the county court's June 18, 2003 decision. That appeal is
11 pending before LUBA and has not been consolidated with this appeal. We issue an order this
12 date establishing a briefing schedule in LUBA No. 2003-104.

13 **B. Motion to Dismiss**

14 Intervenor moves to dismiss this appeal (LUBA No. 2003-100), alleging that
15 petitioners failed to exhaust local administrative remedies as required by ORS 197.825(2)(a).
16 For the reasons explained below, it is inappropriate to reach any final decision in this appeal
17 concerning whether petitioners failed to exhaust available administrative remedies.
18 However, we agree with intervenor that this appeal must be dismissed in any event.

19 There is no dispute that under the Crook County Zoning Ordinance (CCZO) planning
20 commission final decisions on Destination Resort Development proposals may be appealed
21 to the Crook County Court. CCZO 9.110(8)(B); 12.090(C).¹ The county court dismissed

¹ In its motion to dismiss, intervenor does not quote CCZO 9.110(8)(B) or attach a copy of that subsection of the CCZO. According to our copy of the CCZO, CCZO 9.110 governs local appeals of county land use decisions, and CCZO 9.110(8)(B) provides:

“The appellate body for appeals from final decisions of the [Planning] Commission shall be the County Court.”

1 petitioners' local appeal without considering the merits of the planning commission's June 4,
2 2003 decision. In dismissing petitioners' attempted local appeal, the county court concluded
3 that certain local appellants failed to demonstrate that they had standing to seek the local
4 appeal and that other local appellants inadequately specified their grounds for the local
5 appeal. *Burke v. Crook County*, ___ Or LUBA ___ (LUBA No. 2003-104, Order, October
6 16, 2003).

7 As we have already noted, no party disputes that CCZO 9.110(8)(B) and 12.090(C)
8 provide a right of local appeal to challenge the June 4, 2003 planning commission decision.
9 If LUBA ultimately sustains the county court's decision in LUBA No. 2003-104, that will
10 mean that petitioners in this appeal, who were also the local appellants, failed to perfect the
11 available local appeal that they (1) were entitled to under the CCZO and (2) were obligated
12 to seek and pursue to finality under ORS 197.825(2)(a) before appealing to LUBA. In that
13 event, the planning commission's decision will be the county's final decision in this matter,
14 and this appeal would have to be dismissed because petitioners failed to exhaust local
15 remedies, as ORS 197.825(2)(a) requires. *Ramsey v. City of Portland*, 28 Or LUBA 763, 768
16 (1994).

17 On the other hand, if LUBA concludes in LUBA No. 2003-104 that the county court
18 erred in dismissing petitioners' local appeal, the appropriate remedy would be to remand the
19 county court's June 18, 2003 decision so that the county court can provide the right to a local

Similarly, intervenor cites CCZO 12.090(C), but does not quote that subsection of the CCZO or attach a copy of CCZO 12.090(C) to its motion to dismiss. Chapter 12 of the copy of the CCZO in LUBA's library has CCZO Sections 12.080 and 12.100 but does not have a CCZO Section 12.090. However, CCZO 12.080 has two subsections CCZO 12.080(C). The second CCZO 12.080(C) provides:

"The Planning Commission shall issue a final order of its decision on [a Destination Resort] Development] Plan. The Planning Commission's decision may be appealed to the County Court."

We do not understand petitioners to dispute that the CCZO grants a right to appeal decisions such as the June 4, 2003 planning commission decision to the county court. Rather, petitioners' dispute with the county is whether the local appeal of the June 4, 2003 planning commission decision that petitioners admittedly filed was properly dismissed by the county court. That dispute appears to be at the heart of LUBA No. 2003-104.

1 appeal that is granted by CCZO 9.110(8)(B) and 12.090(C) and thereafter issue a decision on
2 the merits of the local appeal. *Id.*; *Forest Park Neigh. Assoc. v. City of Portland*, 26 Or
3 LUBA 636, 640 (1994). In that event, this appeal of the planning commission’s June 14,
4 2003 decision would have to be dismissed because the county court’s decision following our
5 remand will be the county’s final decision in this matter, not the planning commission’s June
6 14, 2003 decision.

7 Under either of the above-described scenarios, petitioners’ appeal of the planning
8 commission’s June 4, 2003 decision in this appeal must be dismissed. In resisting the motion
9 to dismiss, petitioners cite *Franklin v. Deschutes County*, 139 Or App 1, 911 P2d 339 (1996)
10 and *Komning v. Grant County*, 20 Or LUBA 481 (1990). Neither of those cases support a
11 finding that we have jurisdiction in this appeal of the planning commission’s decision.

12 **1. *Franklin v. Deschutes County***

13 In *Franklin*, the petitioners sought a local appeal of a planning director decision.
14 That requested local appeal was dismissed by the county hearings officer, without reviewing
15 the planning director’s decision on the merits, based on the hearings officer’s finding that she
16 lacked jurisdiction to review the disputed planning director decision. The county
17 commissioners declined to review the hearings officer’s decision. Both the planning
18 director’s decision and the hearings officer’s decision were appealed to LUBA. LUBA
19 consolidated those appeals and ultimately remanded the county’s decision, concluding that
20 the planning director’s decision was a “land use action” that the planning director rendered
21 without following required local procedures.

22 In *Franklin*, as here, the local appellate bodies rejected the attempted local appeal
23 without reaching the merits. However, any similarity between the decisions in *Franklin* and
24 the appeal now before us ends there. In *Franklin*, the hearings officer concluded that *there*
25 *was no right of local appeal* under the county zoning ordinance and the county
26 commissioners declined to disturb that conclusion. It was that conclusion that led the Court

1 of Appeals to hold that LUBA had jurisdiction to review petitioners’ appeal of the planning
2 director’s decision to LUBA. 139 Or App at 7. Again, in the present appeal, there is no
3 dispute that there is a right of local appeal under the CCZO. The dismissal of the local
4 appeal that led to the appeals in LUBA Nos. 2003-100 and 2003-104 was based on the
5 county court’s conclusion that some of the local appellants lack standing to seek that local
6 appeal and that other local appellants inadequately specified their grounds for local appeal.
7 This difference in the factual and legal basis for the dismissal of the local appeal in LUBA
8 Nos. 2003-100 and 2003-104 renders *Franklin* inapposite.

9 In summary, the Court of Appeals concluded in *Franklin* that the planning director’s
10 decision was properly before LUBA because there was no administrative remedy to exhaust
11 before appealing that decision to LUBA. In this case there is no dispute that petitioners had
12 an administrative remedy (a right of appeal to the county court) that ORS 197.825(2)(a)
13 requires them to exhaust. The issue here is whether the county correctly concluded that
14 petitioners failed to properly perfect the available local appeal. That issue will be resolved in
15 LUBA No. 2003-104.

16 2. *Komning v. Grant County*

17 In opposing the motion to dismiss this appeal of the planning commission’s June 4,
18 2003 decision, petitioners also rely on LUBA’s decision in *Komning* and make the following
19 argument:

20 “Although [intervenor] suggests that if a local governing body dismisses a
21 request for review the [local appellant] may not appeal the underlying
22 decision to LUBA, [intervenor] cites no authority for that proposition. This
23 failure is likely due to the fact that applicable precedent states otherwise[.]”
24 Petitioners Response in Opposition to Motion to Dismiss 2.

25 “In sum, under the circumstances of this case, LUBA has jurisdiction to
26 decide the merits of the County Court’s dismissal of Petitioners’ appeal and
27 the merits of the Planning Commission’s decision which became the final
28 action of the County upon the County Court’s erroneous dismissal of
29 Petitioners’ appeal.” *Id.*

1 In support of the above argument, petitioners set out the following text from our decision in

2 *Komning*:

3 “Both the county court’s decision (not to hear the appeal) and the planning
4 commission’s decision on the merits are before [LUBA], and these decisions
5 constitute the county’s final decision[.]” 20 Or LUBA at 487.

6 “It does not matter, for purposes of determining whether [LUBA] has
7 jurisdiction over the appealed decision, that the county court may have
8 erroneously decided not to conduct any further review of petitioners’ county
9 [court] appeal.” *Id.* at 486.

10 *Komning* involved an attempt to appeal a planning commission decision to LUBA,
11 after the petitioners’ local appeal was rejected by the county court. In *Komning*, there was a
12 dispute whether the petitioners were entitled under the county zoning ordinance to appeal the
13 planning commission decision to the county court. LUBA ultimately concluded that
14 petitioners had such a right. However, as was the case with *Franklin*, any similarity between
15 *Komning* and LUBA No. 2003-100 ends there.

16 Although the local appellant’s appeal in *Komning* was also rejected by the county
17 court without reaching the merits of that local appeal, it was not rejected based on a county
18 finding that petitioners lacked standing or failed to perfect an available local appeal.² This
19 conclusion on the part of the county court ended any further obligation on the part of
20 petitioners to *exhaust local remedies* before appealing the planning commission decision to
21 LUBA. As LUBA noted in *Komning*, no party identified any local remedy whereby the
22 petitioners in that appeal could have challenged the county court’s decision that its members
23 had conflicts that precluded them from considering the appeal.³ Having exhausted their local

² In *Komning*, all members of the county court disqualified themselves from hearing the appeal. The county attorney notified the local appellants that “no county court hearing would be held concerning the appeal.” 20 Or LUBA at 484. The county attorney’s letter advised the local appellants that the county court’s decision “causes the decision of the Planning Commission to become final insofar as Grant County is concerned.” *Id.*

³ LUBA also reached the unremarkable conclusion that the ORS 197.825(2)(a) exhaustion requirement does not require that local appellants file a circuit court mandamus proceeding to force a county governing

1 remedies, petitioners' appeal of the planning commission decision in *Komning* was not
2 barred by the ORS 197.825(2)(a) exhaustion requirement.

3 The language that petitioners quote from LUBA's opinion in *Komning* can be read to
4 say that LUBA believed that the petitioners in that appeal were not only free to challenge the
5 planning commission decision, they were also free to challenge the county court's decision
6 not to provide the required local appeal. LUBA's reasons for that suggestion are not entirely
7 clear in the opinion, since the opinion seems to say that petitioners' notice of intent to appeal
8 only identified the planning commission decision and there was no separate appeal of the
9 county court's decision to reject the attempted local appeal.⁴ Whatever the reasons behind
10 LUBA's suggestion regarding the possible reviewability in *Komning* of a challenge to the
11 county court's decision, we reject the broad principle that petitioners apparently read into
12 that language in *Komning*. Specifically, we reject petitioners' suggestion that the cited
13 language from our opinion in *Komning* stands for a broad principle that upon rejection of a
14 local appeal of a planning commission decision, the rejected local appellant necessarily
15 obtains a right by virtue of that rejection to pursue a direct appeal of that planning
16 commission decision to LUBA.

17 A key factual difference, with a significant legal consequence, lies in the very
18 different reason the county court gave for rejecting the local appeal in *Komning* and the
19 reason the Crook County Court gave for rejecting the local appeal in the present appeal. In
20 *Komning* the county court did not identify any appealable error on petitioners' part as the

body to accept their local appeal, notwithstanding the county court members' conclusions that they had conflicts that they believed precluded the county court from doing so. 20 Or LUBA at 486-87 n 6; *see Hiebenthal v. Polk County*, 41 Or LUBA 316, 321-24 (2002) (hearings officer decision granting conditional use approval is county's final decision where board of county commissioners declares bias and refuses to hear appeal of hearings officer's decision).

⁴ We note that the above-quoted language is included in LUBA's order that dismissed the applicant's jurisdictional challenge in *Komning*. Whatever LUBA may have meant by that language in its order denying the motion to dismiss, it is clear from LUBA's subsequent final opinion in the appeal that the only two assignments of error in that appeal were directed exclusively at the planning commission's decision. *Komning v. Grant County*, 20 Or LUBA 355 (1990).

1 basis for rejecting the local appeal. The county court's failure to identify any appealable
2 error on petitioners' part as the basis for rejecting petitioners' attempted local appeal in
3 *Komning* meant: (1) petitioners in *Komning* were not obligated to seek LUBA review of the
4 county court's decision; (2) petitioners in *Komning* exhausted local remedies that were
5 available to challenge the planning commission's decision; and (3) the planning
6 commission's decision became the county's final decision, which petitioners were entitled to
7 appeal to LUBA.

8 The Crook County Court's reason for rejecting petitioners' attempted local appeal in
9 this appeal is quite different. The county rejected petitioners' attempted local appeal in this
10 appeal based on the county court's finding that petitioners lack standing and failed to
11 properly perfect their local appeal. If the county is right about that, petitioners may not seek
12 review of the planning commission decision this appeal because petitioners failed to exhaust
13 administrative remedies. If petitioners are correct that they have standing and properly
14 perfected their appeal, and that the county therefore erroneously denied them the local appeal
15 that the CCZO grants them, they are entitled to a remand of the county court's decision in
16 LUBA No. 2003-104. In that event, petitioners will be given their local appeal on remand
17 and the county court will render the county court will render the final decision in this matter,
18 which will be subject to appeal to LUBA. In either case, the county court's decision which is
19 challenged in LUBA No. 2003-104 is the only potential target of a LUBA appeal at this
20 point. However petitioners' challenge to the county court's decision is resolved in LUBA
21 No. 2003-104, petitioners may not directly appeal the planning commission's decision to
22 LUBA. Neither *Franklin* nor *Komning* support a contrary conclusion. .

23 This appeal is dismissed.