BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HOWARD GRABHORN and GRABHORN INC.,
Petitioners,

vs.

WASHINGTON COUNTY,
Respondent,

and

ART KAMP, JOHN FREDERICK,
DAVID VAN RIPER, ROBERT BURCHFIELD
and RICHARD PONZI,
Intervenors-Respondent.

LUBA Nos. 2004-065 and 2005-039

ART KAMP, JOHN FREDERICK,
DAVID VAN RIPER, ROBERT BURCHFIELD
and RICHARD PONZI,
Petitioners,

vs.

WASHINGTON COUNTY,
Respondent,

and

HOWARD GRABHORN and GRABHORN INC.,
Intervenors-Respondent.

LUBA No. 2004-125

HOWARD GRABHORN and GRABHORN INC.,
Petitioners,

vs.

WASHINGTON COUNTY,

Respondent.

LUBA No. 2005-055

FINAL OPINION
AND ORDER

Appeal from Washington County.

Wendie L. Kellington, Lake Oswego, filed petitions for review in LUBA Nos. 2004-065, 2005-039 and 2005-055, a response brief in LUBA No. 2004-125 and argued on behalf of petitioners/intervenors-respondent Grabhorn.

Christopher A. Gilmore, Assistant County Counsel, Hillsboro, filed response briefs and argued on behalf of respondent.

Arthur J. Kamp, John Frederick, David Van Riper, Robert Burchfield, Beaverton and Richard Ponzi, Newberg, filed a joint petition for review in LUBA No. 2004-125 and a joint response brief in LUBA Nos. 2004-065 and 2005-039. Arthur J. Kamp argued on his own behalf.

BASSHAM, Board Member; DAVIES, Board Chair; HOLSTUN, Board Member, participated in the decision.

REVERSED (LUBA No. 2004-065) 10/10/2005
DISMISSED (LUBA No. 2004-125)
REVERSED (LUBA No. 2005-039)
DISMISSED (LUBA No. 2005-055)

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

Opinion by Bassham.

NATURE OF THE DECISION

In LUBA Nos. 2004-065 and 2004-125 petitioners appeal a July 14, 2004 hearings officer's decision that verifies the nonconforming use status and scope of a landfill. LUBA Nos. 2005-039 and 2005-055 involve a subsequent county decision to re-issue the July 14, 2004 hearings officer's decision.

MOTION FOR REPLY BRIEF

Petitioners Howard Grabhorn and Grabhorn, Inc. (Grabhorn) move to file a reply brief in LUBA No. 2004-065, to address several new issues raised in the county's response brief. There is no opposition to the motion, and it is allowed.

MOTIONS TO STRIKE

Grabhorn moves to strike or disregard (1) some or all of the county's response brief in LUBA No. 2004-065, and (2) some or all of the brief of intervenors-respondent in LUBA No. 2004-065 (hereafter, Kamp). A principal theme of both motions is that the response briefs include appendices with documents that are not in the record, and the briefs include arguments based on these extra-record documents. Grabhorn also argues that the county's brief should be stricken because it raises a number of new issues and justifications for the decision, and that Kamp's brief should be stricken because it was mailed late to Grabhorn.

Our disposition of LUBA No. 2004-065 is based solely on Grabhorn's first assignment of error, and it is not necessary under that disposition for us to reach or consider any of the disputed appendices or the portions of the response briefs that rely on the appendices. Grabhorn's motions to strike on that basis are denied as moot. We reject without discussion the other asserted bases for striking the response briefs.

FACTS

Most of the pertinent facts have been summarized in two previous orders, *Grabhorn v. Washington County*, 48 Or LUBA 657 (2005) and *Grabhorn v. Washington County*, 49 Or

LUBA ___ (2005) (Order, May 31, 2005). We set out here only the facts most relevant to our disposition of these appeals.

The subject property is a 126-acre tract that is developed with a dwelling on which petitioner Grabhorn resides. Much of the remaining tract is occupied by a limited purpose landfill that accepts only construction and demolition waste. The property is zoned exclusive farm use, and includes high-value farm soils. In 1991, Grabhorn sought to renew permits from the Department of Environmental Quality (DEQ) under which Grabhorn had long operated the landfill. DEQ requested that the county supply a Land Use Compatibility Statement (LUCS) confirming that the landfill operation is consistent with the county comprehensive plan and land use regulations. Based on information submitted by Grabhorn, the county determined that the landfill is a lawful nonconforming use (NCU) and returned the LUCS to DEQ with the indication that the landfill is a permitted use.

In 2001, Grabhorn filed an application with the county for a lot-line adjustment between two of the parcels on the subject tract. The county informed Grabhorn that it must also submit an application to verify the nature and extent of the nonconforming use of the landfill. On March 6, 2001, Grabhorn submitted the requested NCU application, on condition that the application could be withdrawn if Grabhorn so elected. The county accepted the verification application as complete and provided notice to required persons. On February 5, 2002, after local opposition to the NCU application had arisen, Grabhorn requested in writing that both applications be withdrawn.

On February 6, 2002, the county responded to that request in a letter returning half of Grabhorn's application fees "for withdrawal" of the application. Combined Supplemental Record (CSR) 567. The letter is signed by a principal planner and a planning assistant. County staff apparently also wrote "Withdrawn" across the file folder for the applications.

On February 21, 2002, an attorney for one of the opposing parties wrote the county requesting that the planning director make a determination whether to allow withdrawal of the NCU application pursuant to Community Development Code (CDC) 203-1.2(B), which requires that

once the application is complete the applicant is entitled to withdraw it only if the planning director determines that "no existing violation" of the code "has been identified" on the property.[1] Record 7565. The letter cites allegations by neighbors that there are existing code violations on the property. The county scheduled a meeting between the county, Grabhorn and the opponents on April 10, 2002, in which the county requested that Grabhorn address a number of issues, including whether there are existing code violations and whether the county should initiate a nonconforming use verification application on its own. Finally, on June 11, 2002, the county issued a notice to interested parties inviting comments on whether the applications should be withdrawn under CDC 203-1.2. Record 7531. Grabhorn responded by filing a petition for alternative writ of mandamus and stay of proceedings in circuit court, to compel the county to allow withdrawal of the applications.

The circuit court ultimately determined that whether the county must allow withdrawal under its land use regulations is a land use decision, and therefore not subject to circuit court jurisdiction. Record 6999. The circuit court dismissed the writ on February 13, 2003, and the county resumed processing the applications. On October 3, 2003, the planning director issued a decision approving the NCU application, with conditions. The October 3, 2003 decision rejects Grabhorn's February 6, 2002 request to withdraw the NCU application, pursuant to CDC 203-1.2(B).

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[1] CDC 203-1.2 provides, in relevant part:

> "The Director may withdraw any application, petition for review or motion for reconsideration at the request of the applicant or petitioner. Once accepted as complete, however, the applicant or petitioners shall be entitled to withdraw by right only if the Director determines that:
>
> "A. Written consent to withdraw an application has been obtained from a majority of the owners * * *; and
>
> "B. No existing violation of this Code or the Comprehensive Plan, which might best be cured by further processing the application, [has] been identified on the subject property."

The opponents appealed the director's decision to the hearings officer pursuant to CDC 209-1. After conducting several hearings, the hearings officer issued a decision on March 30, 2004 approving the NCU application, with conditions. The hearings officer concluded that there was evidence of existing code violations and thus that allowing withdrawal of the NCU application was not appropriate under CDC 203-1.2. The hearings officer did allow Grabhorn to withdraw the lot line adjustment application.

Grabhorn appealed the March 30, 2004 decision to LUBA. The county withdrew the decision to clarify the language of a condition of approval, Condition 2. On July 14, 2004, the hearings officer issued the county's decision on reconsideration, modifying the language of Condition 2 and incorporating the March 30, 2004 decision, as modified. The July 14, 2004 decision refers to four exhibits. According to the July 14, 2004 decision, exhibit D consists of the March 30, 2004 decision with strike-throughs to indicate the modified language. Exhibit B consists of the modified Condition 2.

However, in issuing the July 14, 2004 decision county staff attached as Exhibit D a copy of a document dated March 29, 2004, rather than the March 30, 2004 decision referenced in the decision on reconsideration. The March 29, 2004 document is apparently an earlier version of the March 30, 2004 decision that was signed by the hearings officer, but never issued. There are minor textual differences between the March 29, 2004 document and the March 30, 2004 decision. In addition, county staff apparently modified the March 29, 2004 document to include strike-throughs of the language modified by the July 14, 2004 decision and to add editorial notes explaining that the deleted language was modified by the July 14, 2004 decision.

Grabhorn appealed the July 14, 2004 decision on reconsideration (LUBA No. 2004-065). Several parties who opposed the NCU application below also appealed the July 14, 2004 decision (LUBA No. 2005-125), and both appeals were consolidated for review.

The fact that Exhibit D to the July 14, 2004 decision was not the March 30, 2004 decision came to the parties' attention during the course of settling the record. The county filed a motion for

voluntary remand, requesting that the July 14, 2004 decision be remanded so that the county could attach the March 30, 2004 decision as Exhibit D and re-issue the decision, so corrected. Grabhorn objected to voluntary remand on that limited basis. The Board denied the county's motion, pursuant to our cases instructing that granting voluntary remand over the objections of the petitioner is appropriate only when the local government indicates that it will address all issues on remand. *Grabhorn v. Washington County*, 48 Or LUBA 657, 659 (2005).

Notwithstanding our order, on March 4, 2005, the county re-issued the July 14, 2004 decision with a copy of the March 30, 2004 decision attached as Exhibit D. Grabhorn appealed that March 4, 2005 decision in LUBA No. 2005-039, and also attempted to file a local appeal, which the county rejected. Grabhorn appealed the county's letter rejecting the local appeal of the March 4, 2005 decision (LUBA No. 2005-055), and both appeals were consolidated with each other and with LUBA Nos. 2004-065/125.

FIRST ASSIGNMENT OF ERROR (LUBA NO. 2004-065)

Grabhorn argues that the county erred in (1) requiring Grabhorn to apply for a nonconforming use verification as a condition of processing the requested lot line adjustment, (2) proceeding with the NCU verification once it had been withdrawn, and (3) refusing to allow withdrawal of the verification application as required by CDC 203-1.2.

Because we agree with Grabhorn's second argument under this assignment of error—that the NCU application was effectively withdrawn and the county therefore lost jurisdiction to proceed with it—we need not and do not consider the remaining arguments under this assignment of error.

Absent legal authority to the contrary, withdrawal of the application prior to reaching a final decision results in the local government losing jurisdiction over the application. *Witzel v. Harney County*, 34 Or LUBA 433 (1998); *Torgeson v. City of Canby*, 19 Or LUBA 214 (1990); *Lamb v. Lane County*, 14 Or LUBA 127 (1985); *Robert Randall Company v. City of Wilsonville*, 8 Or LUBA 185, 189 (1983); *Friends of Lincoln City v. City of Newport*, 5 Or LUBA 346 (1982). CDC 203-1.2 alters that general rule, by providing that once the application is deemed

complete the applicant may withdraw the application "by right" only if the director determines that "[n]o existing violation of this Code or the Comprehensive Plan, which might best be cured by further processing the application, [has] been identified on the subject property." *See* n 1.

As noted, Grabhorn submitted a written request to withdraw the NCU and lot line applications on February 5, 2002. A principal planner wrote "OK to refund 50%" on that letter, and signed and dated it on February 6, 2002. CSR 570. The same date the same planner sent a letter to Grabhorn enclosing a refund in the amount of $1,445 "for withdrawal" of the NCU and lot line adjustment applications. CSR 567.[2] The record also includes a printout dated February 6, 2002, of the county account for the application, showing a zero balance. CSR 568. At some point county staff wrote "Withdrawn" across the NCU application folder.[3] Thereafter, the record reflects no county action on the applications until April 2002, when the county scheduled a meeting with Grabhorn and opponents, followed by the June 11, 2002 notice seeking comments on whether the county should allow the withdrawal.[4]

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[2] The February 6, 2002 letter states, in relevant part:

> "Per the request of Associate Planner, Laurie Nicholson, enclosed is a refund check in the amount of $1,445.00 for withdrawal of Casefile 01-327-NC/PLA, Tax Map 2S2 12 100. Please note it is County policy to issue the refund to the party that paid for the application—Grabhorn, Inc.
>
> "If you have any questions or require additional information, feel free to contact Virginia Gamble at 503-846-8134."

The letter is signed by Virginia Gamble, planning assistant, and William Avery, Principal Planner.

[3] A copy of the first page of the folder, with the word "Withdrawn" written across it, is found at App 12-A to Grabhorn's petition for review in LUBA No. 2004-065. That document is not in the record, but apparently came to light during the parties' efforts to settle the record, and was first submitted to the Board when Grabhorn attached the document to its objection to the CSR dated December 4, 2004. No party objects to our consideration of that document.

[4] The June 11, 2002 notice states, in relevant part:

> "* * * [T]he above applicant has submitted a request to withdraw the application. [CDC] 203-1.2 permits a withdrawal if there are no existing violations of the CDC that might be best cured by continuing with the application.

Grabhorn argues that the February 6, 2002 letter was a final decision allowing withdrawal of the NCU application, and that no party attempted to file an appeal of that decision either at the local level or to LUBA. Grabhorn notes that CDC 211-4 provides that, for purposes of an appeal to LUBA, "a written decision of the Director or Hearings Officer becomes final on the date it is signed." Once the February 6, 2002 decision became final, Grabhorn argues, the county lost jurisdiction over the applications. We understand Grabhorn to argue that nothing in the CDC authorizes the county revive or reconsider an otherwise final decision, or to revive an application that has been withdrawn pursuant to a final decision.[5]

The county responds, simply, that the county denied the request to withdraw the applications in the director's October 3, 2003 decision, and again in the hearings officer's March 30, 2004 decision, and did not approve that request on February 6, 2002. We understand the county to argue that the February 6, 2002 letter refunding part of the Grabhorn's application fee does not constitute a decision allowing withdrawal of the NCU application under CDC 203-1.2.

However, it is not clear to us why the February 6, 2002 letter does not constitute an effective, and final, decision to allow withdrawal of the NCU application. There is no contention that the principal planner who signed the February 6, 2002 letter did not have authority to decide Grabhorn's request to withdrawal the application, as a designee of the director. The county's code does not prescribe any particular form for a decision to allow withdrawal of an application. On its face, the February 6, 2002 letter appears to reflect a final decision to allow the requested withdrawal. There is nothing in the letter, or indeed in any contemporaneous document or county action reflected in the record, suggesting that the county was still considering whether to allow the

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> "The county has received information in support of and in opposition to withdrawal of the application. At this time, the County is seeking final comments on whether this standard has been met. Once the County receives that evidence, it will determine whether or not to grant the withdrawal of the application because there is no violation that the application can cure." Record 7531.

[5] We find no indication in the record that this issue was raised below, at least in the form Grabhorn now advances. On the other hand, no party argues that this issue was waived under ORS 197.763(1) and 197.835(3).

requested withdrawal. On the contrary, the letter and the county's contemporaneous actions all evince a belief that the application had been withdrawn. Not until two months after the February 6, 2002 letter is there any indication in the record that the county believed that the application was still pending before it.

Although the county does not advance this argument, one could argue that the February 6, 2002 letter is insufficient to constitute a decision allowing withdrawal because it does not address CDC 203-1.2, particularly the requirement that the director determine that "no existing violation" of the code "has been identified" on the property. However, that argument confuses the question of whether the February 6, 2002 letter authorizes withdrawal of the application and whether it correctly authorized the withdrawal.[6] The principal planner who signed the February 6, 2002 letter may have erroneously believed that the application was incomplete and therefore that withdrawal was appropriate regardless of any allegations about existing violations. Or the planner may have believed, contrary to the interpretation later adopted by the planning director and hearings officer, that only actual citations or enforcement actions constitute "existing violations" under CDC 203-1.2, *i.e.*, that mere allegations were insufficient, and therefore allowed withdrawal because no such citations or enforcement actions had been identified. Or the planner may simply have failed to apply CDC 203-1.2. However, any error that the planner might have made in authorizing the withdrawal does not mean that the February 6, 2002 letter is not a decision allowing the withdrawal. Unless that decision is appealed or formally rescinded or reconsidered in some way that is authorized under applicable law, that decision would appear to be a final decision that deprives the county of jurisdiction to proceed on the NCU application.

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[6] That argument also presupposes that CDC 203-1.2 requires a determination from the director that no existing violation has been identified on the property, as a condition precedent to allowing withdrawal. Although we need not and do not interpret CDC 203-1.2, we note that that is not the only way to read the code. While CDC 203-1.2 states that the applicant has no "right" to withdrawal unless the director makes the finding of no existing violations, CDC 203-1.2 does not prohibit the director from allowing withdrawal as a matter of discretion, even in circumstances where existing violations have been identified.

As far as we can tell or the parties advise us, the February 6, 2002 decision authorizing withdrawal could have been appealed to the hearings officer, under CDC 209. If no local appeal was available, it is conceivable that a person dissatisfied with the decision could have appealed it to LUBA, under ORS 197.830(3) or ORS 197.830(9). No such appeals were filed. The county's code also provides a limited opportunity to seek reconsideration of certain decisions, under CDC 208, but the record does not reflect that a motion for reconsideration was ever filed or acted upon. Instead, at some undetermined point the county elected to proceed as if the February 6, 2002 letter did not exist.[7] We are aware of no code provisions that allow the county to informally rescind or ignore an otherwise final decision, or to unilaterally revive an application that the county has allowed to be withdrawn.[8]

In sum, the record reflects that the county adopted a written decision on February 6, 2002 that allows the NCU application to be withdrawn. Whether that decision was right or wrong, it was not appealed or otherwise timely challenged, and it would appear to be a final decision that

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[7] The only explanation we can find for the county's view of the February 6, 2002 letter is in the October 3, 2003 director's decision, which states, in relevant part:

> "The applicant requested to withdraw their application in February of 2002, and the County initiated withdrawal, but halted the action when an attorney retained by the neighbors asserted that [CDC] 203-1.2(B) requires the County to determine whether the application could cure a land use violation. * * *" Record 7302.

However, there is no support in the record for characterizing the February 6, 2002 letter as merely "initiat[ing] withdrawal." As a practical matter, refunding the applicant's fees would likely be the last step in allowing withdrawal, not the first. We doubt that it is the county's practice to initiate withdrawal by first refunding any fees that would be due *if* the application is allowed to be withdrawn, and then determining in a subsequent decision whether the county should in fact allow withdrawal. The county cites nothing in the CDC that authorizes proceeding in that manner. Indeed, CDC 203-1.4 suggests that fees will be refunded only after the application is "withdrawn." There is also no indication in the record that the county was in fact contemplating a separate decision whether or not to allow withdrawal and "halted" that action when the neighbors' attorney objected to withdrawal. On the contrary, all the contemporaneous documents cited to us indicate that the county considered the application to have been withdrawn effective February 6, 2002, at least up until February 21, 2002, when the opponents' attorney requested that the county deny the withdrawal under CDC 203-1.2(B).

[8] The county code allows the county under certain circumstances to initiate an application under CDC 203-1.1, and there is some suggestion in the record that in April 2002 the county was considering whether it should initiate a NCU application with respect to the Grabhorn landfill rather than proceed with the Grabhorn application. Record 7542.

withdraws the NCU application and hence deprives the county of jurisdiction over that application. At some point thereafter, the county decided to proceed as if it had not yet made a decision on Grabhorn's request to withdraw the application. However, the county cites no basis under the code or elsewhere that would authorize the county to proceed in that manner. Accordingly, we agree with Grabhorn that the county lacked jurisdiction to proceed with that application and to issue the decision challenged in LUBA No. 2004-065.

OAR 661-010-0071(1)(a) provides that LUBA shall reverse a land use decision when the "governing body exceeded its jurisdiction." However, we note that the disposition of *Witzel*, *Torgeson* and other cases cited above for the proposition that withdrawal of the application results in the local government losing jurisdiction over the application was in each case dismissal rather than reversal. That disposition was based on reasoning in two of the earlier cases that a decision on an application that has been withdrawn is a nullity and merely advisory, and therefore either the appeal is moot or the decision is not a "final" decision subject to LUBA's jurisdiction. *Randall Construction Company v. City of Wilsonville*, 8 Or LUBA at 189-90 (1983); *Friends of Lincoln City v. City of Newport*, 5 Or LUBA at 351-52 (1982). However, we now question whether dismissal under such circumstances is the appropriate disposition, rather than reversal under OAR 661-010-0071(1)(a). Both *Randall* and *Friends of Lincoln City* predate OAR 661-010-0071(1)(a), and our subsequent cases based on *Randall* and *Friends of Lincoln City* do not consider the rule. Even if the rule did not require reversal where the local government exceeds its jurisdiction, we question whether the reasoning in *Randall* and *Friends of Lincoln City* is correct. Simply because the local government adopts a decision that we ultimately determine the local government had no jurisdiction to adopt does not mean that the decision is not "final." There seems little doubt that if Grabhorn had not appealed the July 14, 2004 decision and obtained from us a determination that the county lacked jurisdiction to adopt it, that decision would be a binding and effective decision that the county could enforce against Grabhorn. Accordingly, to the extent our prior cases hold that dismissal of the appeal rather than reversal of the decision is the appropriate

disposition of an appeal of a decision on an application following withdrawal of that application, we now overrule those cases.

Because we reverse under the first assignment of error, we need not and do not address the remainder of the assignments of error in LUBA No. 2004-065.

LUBA NO. 2004-125

In this appeal, petitioners Kamp challenge the July 14, 2004 decision to approve the NCU application with conditions. Petitioners seek remand of that decision, arguing that the hearings officer erred in verifying the nature and extent of the landfill operation under ORS 215.130 and county regulations implementing the statute.

Our conclusion that the county lacked jurisdiction to adopt the July 14, 2004 decision requires that we reverse that decision. Consequently, any assignments of error directed at the merits of that decision are moot, and hence this appeal is moot. Therefore, we dismiss LUBA No. 2004-125.

LUBA NOS. 2005-039 AND 2005-055

As explained, on March 4, 2005, the county re-issued the July 14, 2004 decision with a copy of the March 30, 2004 decision attached as Exhibit D. Grabhorn appealed that March 4, 2005 decision in LUBA No. 2005-039, and then appealed the county's rejection of his local appeal of that March 3, 2005 decision, in LUBA No. 2005-055. Grabhorn advances a number of challenges to that March 4, 2005 decision, including an argument that the county's attempt to modify the July 14, 2004 decision while that decision was on appeal to LUBA is impermissible under the reasoning in *Standard Insurance v. Washington County*, 17 Or LUBA 647, *rev'd on other grounds* 97 Or App 687, 776 P2d 1315 (1989), which the Board recently reaffirmed in *Rose v. City of Corvallis*, 49 Or LUBA ___ (LUBA No. 2004-221/222, April 15, 2005).

For the same reasons the county lacked jurisdiction to issue the July 14, 2004 decision in the first place, the county lacked jurisdiction to re-issue the decision again on March 5, 2005, whether or not the March 5, 2005 decision is also inconsistent with *Standard Insurance* and *Rose*.

Accordingly, the county's decision in LUBA No. 2005-039 must be reversed. OAR 661-010-0071(1)(a). Reversal of that decision makes the appeal of the county's decision rejecting local appeal of the March 5, 2005 decision moot. Accordingly, LUBA No. 2005-055 is dismissed.

For the foregoing reasons, LUBA Nos. 2004-065 and 2005-039 are reversed. LUBA Nos. 2004-125 and 2005-055 are dismissed.