BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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. 2005-157

JAMES YANZICK,
Petitioner,

vs.

WASHINGTON COUNTY,
Respondent,

and

HOWARD GRABHORN and GRABHORN, INC.,
Intervenors-Respondent.

LUBA No. 2005-180

FINAL OPINION
AND ORDER

Appeal from Washington County.

Art Kamp, John Frederick, David Van Riper, Robert Burchfield, Beaverton, and Richard Ponzi, Newberg, represented themselves.

James Yanzick, Beaverton, represented himself.

Christopher A. Gilmore, County Counsel, Hillsboro, represented respondent.

Wendie L. Kellington, Lake Oswego, represented intervenors-respondent.

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

DISMISSED 05/02/2006

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

Petitioners appeal a county letter that allows withdrawal of an application to verify the nonconforming use status of an existing landfill.

MOTION TO INTERVENE

Howard Grabhorn and Grabhorn, Inc. (Grabhorn) move to intervene on the side of respondent in LUBA No. 2005-180. There is no opposition to the motion, and it is allowed.[1]

FACTS

The challenged decision is a letter dated February 6, 2002, from a county planner to Grabhorn. As described in a related appeal, the letter refunds Grabhorn's application fees and, we ultimately determined, effectively allowed withdrawal of Grabhorn's application for a nonconforming use (NCU) verification with respect to an existing landfill operation. *Grabhorn v. Washington County*, 50 Or LUBA 344 (2005), *aff'd* 203 Or App 639, ___ P3d ___ (2006). We repeat the relevant facts from our opinion in that case:

> "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 On March 6, 2001, Grabhorn submitted the requested NCU application, on condition that the application could be withdrawn if Grabhorn so elected.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.
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> "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. 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.

[1] The Board previously allowed Grabhorn's motion to intervene on the side of the respondent in LUBA No. 2005-157.

> "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. 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. 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.
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> "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. 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)." *Id.* at 347-49 (footnote and record citations omitted).

After further local proceedings, the county hearings officer issued a final decision on the NCU application in July 2004, again declining to allow withdrawal of the NCU application. On appeal to LUBA, Grabhorn argued in relevant part that the county had no jurisdiction to issue a decision on the merits of the NCU application, because it had made a final decision on February 6, 2002, to allow the application to be withdrawn. The county responded that the February 6, 2002 letter could not and did not operate to allow withdrawal of the application, because it did not comply with the requirements of CDC 203-1.2.[2] We

[2] CDC 203-1.2 provides:

> "The [Planning] Director may withdraw any application, petition for review or motion for reconsideration at the request of the applicant or petitioner. Once accepted as complete,

ultimately agreed with Grabhorn that the February 6, 2002 letter had the effect of allowing withdrawal of the application, notwithstanding any lack of compliance with the requirements of CDC 203-1.2. We noted that no party had appealed the February 6, 2002 letter to either the county or LUBA, and that on its face the letter appeared to be a final decision allowing withdrawal of the application.

Accordingly, we concluded that the county lost jurisdiction to issue a decision on Grabhorn's NCU application, and therefore we reversed or dismissed the four consolidated appeals of the hearings officer's July 2004 decision approving the application with conditions.

Our opinion in *Grabhorn* was issued on October 10, 2005. On October 31, 2005, the petitioners in LUBA No. 2005-157 (Art Kamp, John Frederick, David Van Riper, Robert Burchfield and Richard Ponzi) filed a notice of intent to appeal the February 6, 2002 letter. The petitioners in LUBA No. 2005-157 participated in the proceedings before the county on

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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 or contract purchasers or the majority interest holders in the property, or all signers of the petition for review; and

"B. No existing violation of this Code or the Comprehensive Plan, which might best be cured by further processing the application, have been identified on the subject property.

In addition, CDC 203-1.3 provides:

"If an application, petition for review or motion for reconsideration is withdrawn after public notice has been provided and the Review Authority has not rendered a decision, the Director shall provide written notification to all persons that were entitled to be mailed a public notice of pending review of the Type II or Type III action and all parties of record stating the application has been withdrawn."

Finally, CDC 203-1.4 states:

"Fees for applications and petitions for review withdrawn at the request of the applicant shall be refunded, less the actual costs incurred by the County."

the NCU application, and were parties to the proceedings before LUBA resulting in *Grabhorn*.

On December 20, 2005, the petitioner in LUBA No. 2005-180 (James Yanzick) filed a notice of intent to appeal the February 6, 2002 letter. Unlike the petitioners in LUBA No. 2005-157, Yanzick was not a party to the *Grabhorn* appeal. Yanzick alleges that he owns property within 1000 feet of the subject property.

MOTION TO FILE REPLY AND MOTION FOR ADDITIONAL TIME TO FILE A RESPONSE

As explained below, Grabhorn moved to dismiss this appeal. There have been a number of responses to that motion to dismiss and a second motion to dismiss. On April 17, 2006, Grabhorn filed a motion requesting leave to file a reply to petitioners' April 13, 2006 response to Grabhorn's second motion to dismiss, accompanied by the proposed response. On April 27, 2006, petitioner Art Kamp mailed a letter to the Board requesting that LUBA's review of the pending motions in these appeals be suspended until June 1, 2006, to allow petitioner Kamp time to file a response to Grabhorn's April 17, 2006 reply. Kamp explains that he is getting married April 30, 2006, followed by an extended honeymoon, and argues that Grabhorn's April 17, 2006 reply raises new issues that warrant an additional response. On May 1, 2006, Grabhorn mailed a letter to the Board objecting to Kamp's request.

While our rules do not specifically allow for replies involving motions (much less responses to replies), our practice is to allow replies where they are limited to new issues raised in a response. *Frevach Land Company v. Multnomah County*, 38 Or LUBA 729, 732 (2000). Under most circumstances, we would allow Grabhorn's motion to file a reply to petitioners' April 13, 2006 response, which Grabhorn alleges raises new issues. We might also grant petitioner Kamp's request for additional time to file a response to Grabhorn's April 17, 2006 reply, given his circumstances and the fact no party argues that an additional delay would prejudice any party's substantial rights. However, Grabhorn's proposed April 17, 2006 reply is almost entirely concerned with issues that are relevant only to whether

petitioners' appeals were timely filed under ORS 197.830(3). For the reasons explained below, we dismiss this appeal for reasons unrelated to ORS 197.830(3). Accordingly, we see no need either to accept Grabhorn's proposed April 17, 2006 reply to petitioners' response, or to allow petitioner Kamp additional time to file a response to that reply. Grabhorn's motion to file a reply to petitioners' response to the second motion to dismiss is denied; Kamp's motion for additional time to file a response to that reply is also denied.

JURISDICTION

Grabhorn moves to dismiss these consolidated appeals, arguing that (1) both appeals were filed more than 21 days after the petitioners had "actual notice" of the February 6, 2002 decision and hence the appeals are untimely under ORS 197.830(3)(a); and (2) both appeals were filed more than three years after the date of the decision, and thus are barred by the three-year statute of ultimate repose at ORS 197.830(6)(a).

We need not decide whether petitioners' appeals were timely filed under ORS 197.830(3)(a). Even if both appeals were timely filed under that statute, for the reasons set out below we agree with Grabhorn that the three-year statute of ultimate repose under ORS 197.830(6)(a) bars any appeal of the February 6, 2002 decision.[3]

ORS 197.830(6) provides:

> "(a) Except as provided in paragraph (b) of this subsection, the appeal periods described in [ORS 197.830(3), (4) and (5)] shall not exceed three years after the date of the decision.
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> "(b) If notice of a hearing or an administrative decision made pursuant to ORS 197.195 or 197.763 is required but has not been provided, the provisions of paragraph (a) of this subsection do not apply."

[3] On March 31, 2006, Grabhorn filed a Motion for Depositions and Evidentiary Hearing pursuant to OAR 661-010-0045, to elicit evidence pertinent to ORS 197.830(3) regarding when petitioners had "actual notice" of the challenged decision, among other matters. Given our disposition of this appeal under ORS 197.830(6), Grabhorn's motion to take evidence under OAR 661-010-0045 is denied as moot.

Because these consolidated appeals were filed more than three years after the date of the challenged decision, ORS 197.830(6)(a) clearly prohibits appeal to this Board under ORS 197.830(3), unless the exception set out in ORS 197.830(6)(b) applies.

The exception in ORS 197.830(6)(b) is limited to circumstances where the local government fails to provide either (1) "notice of a hearing" or (2) notice of an "administrative decision." The intended scope of those terms is obscured somewhat by the phrase "made pursuant to ORS 197.195 or 197.763," which follows and appears to modify the term "administrative decision." ORS 197.195 sets out the notice and other procedural requirements for making limited land use decisions. Under the statute, limited land use decisions are made without a hearing, with notice of the decision mailed to the applicant and any person who submits comments on the application. ORS 197.195(3)(c)(H). Pursuant to ORS 197.195(2), limited land use decisions are not subject to the requirements of ORS 197.763. We presume, therefore, that when ORS 197.830(6)(b) refers to notice of an "administrative decision made pursuant to ORS 197.195," it refers to the notice of decision required by ORS 197.195(3)(c)(H).

ORS 197.763, on the other hand, sets out the notice and other requirements for conducting a quasi-judicial hearing. ORS 197.763 includes no provisions for making administrative decisions, *i.e.*, decisions without a hearing. An "administrative decision" made pursuant to ORS 197.195 certainly makes sense, because decisions that are rendered pursuant to ORS 197.195 do not require a hearing. But it makes no sense at all to speak of an "administrative decision" made pursuant to ORS 197.763, because ORS 197.763 only establishes hearing requirements. We therefore do not understand the reference to ORS 197.763 to modify the term "administrative decision." Instead, we understand the reference to ORS 197.763 to relate to the term "notice of a hearing," which is the only other possible referent and the only reading that is consistent with the applicable statutes. Thus, we read ORS 197.830(6)(b) to apply to circumstances where the local government fails to

provide either (1) a "notice of a hearing" required by ORS 197.763 or (2) notice of an "administrative decision" required by ORS 197.195. Failure to provide notices required by other statutes, or by local codes, do not provide an exception to the three-year statute of ultimate repose.

It is worth noting in this respect that prior to 1999 ORS 197.830(6)(b)—then codified as ORS 197.830(5)(b)—referred to notices required by two additional statutes.[4] ORS 197.830(5)(b) (1997) referenced ORS 215.416(11) and ORS 227.175(10), two statutes that allow counties and cities, respectively, to make permit decisions without a hearing, as long as notice of the decision and an opportunity for appealing the decision to a *de novo* hearing is provided. In other words, prior to 1999 the three-year statute of ultimate repose did not apply when a local government failed to provide notice of a decision as required under ORS 215.416(11) and ORS 227.175(10). However, in 1999, the legislature amended ORS 197.830(6)(a) and (b) to delete the references to ORS 215.416(11) and ORS 227.175(10), as part of a larger package of amendments. The apparent effect and intent of that amendment was to strictly apply the three-year statute of ultimate repose to circumstances where the local government fails to provide notice of the decision as required by ORS 215.416(11) and ORS 227.175(10), without exception.[5]

Turning to the present case, it seems clear that the notice of withdrawal of the application required by CDC 203-1.3 is not a "notice of a hearing" required by ORS 197.763,

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[4] ORS 197.830(5)(b) (1997) provided as follows:

> "If notice of a hearing or an administrative decision made pursuant to ORS 197.195, 197.763, 215.416(11) or 227.175(10) is required but has not been provided, the provisions of paragraph (a) of this subsection do not apply."

[5] It is not clear to us why the legislature would want to treat a failure to provide the notice of decision required by ORS 197.195 differently from a failure to provide the notice of decision required by ORS 215.416(11) and ORS 227.175(10) with respect to the statute of ultimate repose. Yet that is clearly the effect of the 1999 amendment, and presumably the legislature intended that result.

or indeed notice of a hearing under any statute. On its face, notice of withdrawal of the application is not notice of a *hearing*, and petitioners do not argue that it is.

Petitioners instead appear to argue that notice of withdrawal required by CDC 203-1.3 is the notice required by ORS 197.195, applicable to limited land use decisions. While the comment/administrative decision process the county was following in processing Grabhorn's NCU application resembles the process that applies to limited land use decision under ORS 197.195, it is clear that a decision with respect to the NCU application would not be a limited land use decision.[6] ORS 197.015(12) defines "limited land use decision" in relevant part as a "final decision or determination made by a local government pertaining to a site within an urban growth boundary[.]" There is no dispute that the subject property is not within an urban growth boundary. The county's failure to provide notice of withdrawal of the application in the present case as required by CDC 203-1.3 is not a failure to provide the notice of decision required by ORS 197.195.

CONCLUSION

For the foregoing reasons, the notices of intent to appeal in LUBA Nos. 2005-157 and 2005-180 are subject to the three-year statute of ultimate repose. Because the present

[6] As we understand the county's procedures, at the time the county issued the February 6, 2002 letter it was conducting an administrative review of the NCU application under its "Type II" review procedures. Those procedures require that the county provide notice of the application to landowners within 1000 feet of the subject property and an opportunity to comment. CDC 202-2.3. The planning director then issues a decision on the application, and provides notice of that decision to those who commented or who were entitled to notice of the application. *Id.* The notice of decision must include the information required by CDC 204-3.4. The planning director's decision on the application may be appealed to the county hearings officer, who then conducts a *de novo* public hearing on the application. CDC 209-2.2, 209-5. The county's Type II and appeal procedures appear to implement the statutory procedures for making a permit decision without a hearing under ORS 215.416(11). One could argue that a decision allowing withdrawal of a permit application being processed under ORS 215.416(11), subject to standards such as those at CDC 203-1.3, is itself a "decision without a hearing" under that statute, and therefore the statute (and not simply the county's code) required the county to provide notice of the withdrawal. However, even if that argument is tenable, as noted above, in 1999 the legislature deleted from ORS 197.830(6)(b) the reference to notices required by ORS 215.416(11). It seems clear under the present statute that failure to provide notice of the decision as required by ORS 215.416(11) is no longer a basis to avoid application of the three-year statute of ultimate repose at ORS 197.830(6)(a).

appeals were filed more than three years after the date of the challenged decision, these appeals must be dismissed.[7]

[7] On March 31, 2006, Grabhorn filed a precautionary objection to the combined record, objecting to the omission of three items. Our dismissal of these appeals makes it unnecessary to resolve these record objections.