

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

3
4 MOLLY JACOBSEN and DANA JACOBSEN,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF WINSTON,
10 *Respondent,*

11 and

12
13
14 DON JENKINS and JOELL JENKINS,
15 *Intervenors-Respondents.*

16
17 LUBA No. 2011-015

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from City of Winston.

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24 Molly Jacobsen and Dana Jacobsen, Winston, represented themselves.

25
26 Zack P. Mittge, Eugene, represented respondent.

27
28 Corinne C. Sherton, Salem, represented intervenors-respondents.

29
30 HOLSTUN, Board Member; RYAN, Board Chair; BASSHAM, Board Member,
31 participated in the decision.

32
33 DISMISSED

06/14/2011

34
35 You are entitled to judicial review of this Order. Judicial review is governed by the
36 provisions of ORS 197.850.

INTRODUCTION

This appeal is one of a number of related appeals. Those appeals have been described in detail in earlier orders in this appeal. *Jacobsen v. City of Winston*, ___ Or LUBA ___ (LUBA No. 2011-015, Order, May 9, 2011), *Jacobsen v. City of Winston*, ___ Or LUBA ___ (LUBA No. 2011-015, Order Correcting Previous Order, April 8, 2011), and *Jacobsen v. City of Winston*, ___ Or LUBA ___ (LUBA Nos. 2010-111 and 2011-015, Order, March 16, 2011). We limit our discussion here to the facts that are critical to the city’s motion to dismiss.

Petitioners filed a local appeal of a November 16, 2010 letter from the city administrator to intervenors’ attorney. In a subsequent January 24, 2011 letter, the city administrator took the position that certain actions on the part of petitioners had the legal effect of withdrawing petitioners’ local appeal of the November 16, 2010 letter. Petitioners appeal that January 24, 2011 letter to LUBA in this appeal (LUBA No. 2011-015).

At the same time petitioners filed this LUBA appeal, petitioners also filed a local appeal of the January 24, 2011 letter. On April 13, 2011, the city planning commission held a public hearing on petitioners’ local appeal of the January 24, 2011 letter. In an April 27, 2011 decision, the planning commission affirmed the city administrator’s January 24, 2011 letter decision. The planning commission’s April 27, 2011 decision is the city’s final decision that petitioners withdrew their local appeal of the November 16, 2010 letter. Petitioners did not appeal the planning commission’s April 27, 2011 decision to LUBA. We understand petitioners to seek review of the January 24, 2011 letter decision that is not the city’s final decision concerning whether petitioners withdrew their local appeal of the November 16, 2011 letter.

1 On April 11, 2011, the city moved to dismiss this appeal because it was filed before
2 petitioners had “exhausted all remedies available by right.” ORS 197.825(2)(a).¹ On the
3 date the city filed its motion to dismiss, the local remedy that the city was in the process of
4 providing to petitioners had not yet been exhausted, and there was still a possibility that the
5 planning commission might ultimately decide that petitioners had no right to a local remedy
6 to challenge the city administrator’s January 24, 2011 letter decision. As we have already
7 explained, the planning commission’s April 27, 2011 decision has now removed any doubt
8 on this point. Petitioners were given a right of local appeal and have now exhausted that
9 local appeal. But as already noted, petitioners did not file a LUBA appeal to challenge the
10 planning commission’s April 27, 2011 decision. In a May 11, 2011 motion, the city asks that
11 we take action to grant its motion to dismiss this appeal.

12 **JURISDICTION**

13 The ORS 197.825(2)(a) requirement that petitioners at LUBA first exhaust any
14 remedies available by right is imposed to increase the chances that land use disputes will be
15 finally resolved locally, and to avoid interrupting that local process while it is still in
16 progress. *Lyke v. Lane County*, 70 Or App 82, 87, 688 P2d 411 (1984). For the exhaustion
17 requirement to serve its intended purpose, it is the decision rendered at the end of the local
18 appeal process that must be appealed to LUBA, not the decision that led to the local appeal.
19 If we understand the city correctly, it is arguing that this appeal must be dismissed because
20 petitioners sought LUBA review of the city’s initial January 24, 2011 decision while local
21 remedies were available to challenge that decision and had not yet been exhausted. Now that
22 those local remedies have been exhausted and resulted in a final city decision that petitioners
23 elected not to appeal to LUBA, we understand the city to argue this appeal must be
24 dismissed. The city appears to be correct.

¹ ORS 197.825(2)(a) provides that LUBA’s jurisdiction “[i]s limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning [LUBA] for review[.]”

1 Petitioners filed a reply to the city’s motion to dismiss on April 25, 2011. We turn to
2 that reply to determine whether it offers any basis for denying the city’s motion to dismiss.

3 **A. Stay and Representation**

4 In the first two pages of their reply, petitioners set out a dispute regarding an earlier
5 stay of this appeal and whether petitioner Molly Jacobsen represents petitioner Dana
6 Jacobsen in this appeal. We are not sure we understand the dispute, but it clearly does not
7 have any bearing on whether we have jurisdiction over this appeal. We do not consider those
8 arguments further.

9 **B. Failure to Observe Local Appeal Deadline**

10 Under City of Winston Zoning Ordinance (WZO) 11.300(11), the planning
11 commission generally must act on an appeal within 30 days.² Petitioners complain that the
12 city did not complete their local appeal of the November 16, 2010 letter in 30 days and did
13 not complete their local appeal of the January 24, 2011 letter within 30 days. However, as
14 we pointed out in an earlier order, the city’s failure to complete the local appeal within 30
15 days may have been error, but that error has no bearing on whether there is a local remedy
16 that petitioners must exhaust.

17 **C. Inconsistent City Positions on Whether WZO 11.300(1) Extends a Local**
18 **Appeal Remedy for Decisions Like the Decision at Issue in this Appeal**

19 In this appeal, the city is relying on WZO 11.300(1) in arguing that petitioners have
20 an available remedy to exhaust.³ Petitioners contend that in earlier disputes with the city, the

² WZO 11.300(11) provides:

“The majority of the Planning Commission shall act upon [an] appeal within thirty (30) days of filing thereof, unless such time limitation be extended with the consent of the applicant; provided that, unless otherwise ordered by the Planning Commission, the City Administrator shall forward such appeals in the order in which they are filed.”

³ WZO 11.300(1) provides:

“Any action taken by the City Administrator in the interpretation, administration or enforcement of [the WZO] shall be subject to review by the Planning Commission.”

1 city took the position that under WZO 11.300(1) appeals to the planning commission were
2 only available to challenge “administrative actions,” and the letter decision at issue in this
3 appeal does not qualify as an administrative action.⁴ We understand petitioners to contend
4 that WZO 11.300(1) provides no right of local appeal to challenge the January 24, 2011
5 letter. We also understand petitioners to argue that LUBA should apply judicial estoppel
6 here to prevent the city from taking the position that petitioners have a remedy to exhaust
7 under WZO 11.300(1), because that position is inconsistent with the narrow reading of WZO
8 11.300(1) that the city formerly adopted.

9 **1. The City’s Interpretation of WZO 11.300(1)**

10 The city’s interpretation that the appeals authorized by WZO 11.300(1) are not
11 limited to “administrative actions” under WZO 11.075(2) is entirely consistent with the text
12 of WZO 11.300(1). WZO 11.300(1) makes no mention of administrative actions. WZO
13 11.300(1) expressly authorizes appeals of “[a]ny action taken by the City Administrator in
14 the interpretation, administration or enforcement of” the WZO. We reject petitioners’
15 contention that WZO 11.300(1) must be interpreted to limit local appeals to appeals of
16 administrative actions.

17 **2. Judicial Estoppel**

18 We described the principle of judicial estoppel in our decision in *Rutigliano v.*
19 *Jackson County*, 42 Or LUBA 565, 575-76 (2002):

20 “In *Hampton Tree Farms, Inc. v. Jewett*, 320 Or 599, 609-10, 892 P2d 683
21 (1995), the Supreme Court explained the principle of judicial estoppel as
22 follows:

23 “Judicial estoppel is a common law equitable principle that
24 has no single, uniform formulation in the several jurisdictions
25 in which it has been recognized. The purpose of judicial
26 estoppel is ‘to protect the judiciary, as an institution, from the

⁴ Under WZO 11.075(2), only three kinds of applications are processed as administrative actions: (1) conditional use permit, (2) variance, and (3) land partition.

1 perversion of judicial machinery.’ The doctrine may be
2 invoked under certain circumstances to preclude a party from
3 assuming a position in a judicial proceeding that is inconsistent
4 with the position that the same party has successfully asserted
5 in a different judicial proceeding. Some courts have stated that
6 judicial estoppel should apply when a litigant ‘is playing fast
7 and loose with the courts.’ Other courts have said that judicial
8 estoppel should be used only to preclude a party from taking an
9 inconsistent position in a later proceeding if that party has
10 ‘received a benefit from the previously taken position in the
11 form of judicial success.’ (citations and footnote omitted).

12 “The Supreme Court then reduced the relevant inquiry in a case where a party
13 asserts judicial estoppel to the following:

14 “* * * That inquiry involves three issues: benefit in the earlier
15 proceeding, different judicial proceedings, and inconsistent
16 positions. 320 Or at 611.”

17 We seriously question whether LUBA has authority to borrow a common law
18 equitable principle from judicial proceedings and apply that principle in LUBA’s
19 administrative proceedings. Even if the principle of judicial estoppel could apply in an
20 appropriate circumstance, it could not operate as broadly as petitioner suggests because that
21 would mean a local government would be powerless to correct an erroneous interpretation of
22 its land use legislation, since the correct interpretation would almost certainly be inconsistent
23 with the earlier incorrect interpretation. In any event, judicial estoppel does not apply here.
24 As was the case in *Rutigliano*, petitioners get no further than the first of the three required
25 inquiry issues. Petitioners make no attempt to identify the “benefit” the city obtained in the
26 earlier proceedings by interpreting WZO 11.300(1) more narrowly than it does now. It is
27 true the city might have avoided the trouble of providing local appeals in those cases, but by
28 allowing a local appeal to the planning commission in those cases the city might have
29 avoided the LUBA appeal. We see no discernable “benefit” that the city received from its
30 earlier, narrower interpretation of WZO 11.300(1).

1 **D. Conclusion**

2 Although petitioners have now exhausted their administrative remedies, they failed to
3 appeal the decision that was the product of that exhaustion of local remedies: the planning
4 commission's April 27, 2011 decision. Instead, they continue to seek review of the
5 intermediate decision that gave rise to the city's final decision. For the reasons explained
6 above, we lack jurisdiction to review that intermediate decision.

7 This appeal is dismissed.