

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 DAVID SETNIKER, JOAN SETNIKER
5 and ACMPC 2, LLC,
6 *Petitioners,*

7
8 and

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10 RICKREALL COMMUNITY
11 WATER ASSOCIATION,
12 *Intervenor-Petitioner,*

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14 vs.

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16 POLK COUNTY,
17 *Respondent,*

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19 and

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21 CPM DEVELOPMENT CORPORATION,
22 *Intervenor-Respondent.*

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24 LUBA No. 2016-068

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26 FINAL OPINION
27 AND ORDER

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29 Appeal from Polk County.

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31 William H. Sherlock, Eugene, represented petitioners.

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33 David C. Noren, Hillsboro, represented intervenor-petitioner.

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35 Morgan B. Smith, County Counsel, Dallas, represented respondent.

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37 Wallace W. Lien, Salem, represented intervenor-respondent.

1 BASSHAM, Board Member; HOLSTUN, Board Chair; RYAN, Board
2 Member, participated in the decision.

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4 DISMISSED 08/03/2016

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

NATURE OF THE DECISION

Petitioners appeal a hearings officer’s decision on remand from LUBA that approves comprehensive plan text and map amendments, and related zoning map amendments, to authorize an aggregate operation.

MOTIONS TO INTERVENE

CPM Development Corporation (intervenor), the applicant below, moves to intervene on the side of the county. There is no opposition to the motion, and it is allowed.

The Rickreall Community Water Association (RCWA) moves to intervene on the side of petitioners. There is no opposition to the motion, and it is allowed.

MOTIONS TO DISMISS

LUBA No. 2016-068 challenges a June 15, 2015 hearings officer’s decision on remand from LUBA. This appeal of the June 15, 2015 decision is closely related to a separate appeal, LUBA No. 2016-072, an appeal of a board of commissioners’ decision dated exactly one year later, on June 15, 2016, that ratifies and adopts the hearings officer’s June 15, 2015 decision.

Petitioners and intervenor-petitioner suggest that the two appeals be consolidated for review. The county and intervenor (collectively, respondents) move to dismiss LUBA No. 2016-068, on the grounds that the hearings officer’s June 15, 2015 decision is a non-final, or interlocutory, decision, and

1 that the commissioners' June 15, 2016 decision at issue in LUBA No. 2016-
2 072 is the county's final decision, for purposes of appeal to LUBA.¹ For the
3 following reasons, we agree with respondents, decline to consolidate these two
4 appeals, and instead dismiss LUBA No. 2016-068.

5 Polk County Zoning Ordinance (PCZO) 111.280 provides, rather
6 confusingly, that a hearings officer's decision on remand shall constitute the
7 county's "final" decision, but the county board of commissioners must
8 nonetheless "ratify" the hearings officer's decision.² Under PCZO 111.280, the

¹ In relevant part, ORS 197.015(10)(a) defines a "land use decision" subject to LUBA's jurisdiction as the "final" decision of a local government that amends or applies comprehensive plan provisions or land use regulations.

² Polk County Zoning Ordinance (PCZO) 111.280 provides, in relevant part:

“(C) Upon receipt of an appeal filed with the Community Development Department of a decision by the Planning Director or request by the applicant for reconsideration of a land use application on remand from the Land Use Board of Appeals, the Board of Commissioners shall review the matter and thereafter set the matter for a public hearing and cause notice of the time and place of the hearing to be given as provided under Section 111.340. The public hearing, as determined by the Board of Commissioners, will be conducted by either the Hearings Officer or the Board. *The decision resulting from this public hearing shall constitute the final county decision. Decisions of the Hearings Officer shall thereafter be ratified by the Board of Commissioners as part of the Board's Consent agenda.*

“(D) Upon receipt of an appeal filed with the Community Development Department of a decision by the Hearings Officer after a first evidentiary hearing, the Board of

1 identity of the county’s final decision on remand is somewhat in doubt. The
2 penultimate sentence of PCZO 111.280(C) states that the “decision resulting
3 from [the remand hearing] shall constitute the final county decision.”
4 However, the last sentence of PCZO 111.280(C) states that the board of
5 commissioners must nonetheless “ratify” the decision. Arguably, in adopting
6 PCZO 111.280(C), the board of commissioners has chosen to give up its
7 authority to modify the hearings officer’s decision or to adopt a different
8 decision, and has assumed a merely executive role in issuing the county’s final
9 decision. However, even if so, that does not necessarily mean that the board of
10 commissioners intended that its decision ratifying and adopting the hearings
11 officer’s decision would not be the county’s final decision *for purposes of*
12 *appeal to LUBA.*

13 In the present case, both the county and intervenor take the position that
14 the board of commissioners’ June 15, 2016 decision ratifying and adopting the
15 hearings officer’s decision is the county’s “final” decision for purposes of
16 appeal to LUBA. That is consistent with the notice of decision that the county

Commissioners shall review the matter and thereafter either ratify the Hearings Officer’s decision or set the matter for a public hearing and cause notice of the time and place of the hearing to be given as provided under Section 111.340. The public hearing will be conducted by the Board of Commissioners. *The Board’s ratification of the Hearings Officer’s decision or the Board’s decision after holding a public hearing shall constitute the final county decision.*” (Emphases added.)

1 issued on June 17, 2016, following the board of commissioners' June 15, 2016
2 decision. The June 17, 2016 notice, which was also sent to the Department of
3 Land Conservation and Development as required by ORS 197.615, states that
4 the county's "final local decision" may be appealed to LUBA within 21 days of
5 the mailing of the notice, consistent with the second sentence of ORS
6 197.830(9).³

7 Given the ambiguous and contradictory language in PCZO 111.280, we
8 cannot fault petitioners for filing a precautionary direct appeal of the hearings
9 officer's June 15, 2015 decision, in case the county or intervenor took the
10 position that the hearings officer's decision is the county's final decision for
11 purposes of appeal to LUBA, which PCZO 111.280(C) can be read to suggest.
12 However, respondents agree that the board of commissioners' June 15, 2016
13 decision adopting and ratifying the hearings officer's decision is the county's
14 final land use decision on remand for purposes of appeal to LUBA, and it is

³ ORS 197.830(9) provides, in relevant part:

*"A notice of intent to appeal a land use decision or limited land use decision shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final. A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed not later than 21 days after notice of the decision sought to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS 197.615. * * *"* (Emphasis added.)

1 reasonably clear to us that the hearings officer's June 15, 2015 decision is best
2 viewed as an interlocutory decision that is not directly appealable to LUBA.

3 Accordingly, we agree with respondents that LUBA lacks jurisdiction
4 over the direct appeal of the hearings officer's June 15, 2016 decision. LUBA
5 No. 2016-068 is dismissed.⁴

⁴ On July 22, 2016, petitioners filed objections to the record in this appeal. The objections are denied, as moot.