BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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

vs.

WASHINGTON COUNTY,
Respondent,

and

HOWARD GRABHORN and GRABHORN INC.,
Intervenors-Respondent.

LUBA No. 2005-157

ORDER

MOTION TO INTERVENE

Howard Grabhorn and Grabhorn, Inc. (Grabhorn), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

MOTION TO SUSPEND APPEAL

The challenged decision is a letter dated February 6, 2002, from a senior county planner to intervenors, refunding the application fee "for withdrawal" of Grabhorn's application for nonconforming use verification of an existing landfill on a 126-acre tract. The events surrounding issuance of that letter are recounted in *Grabhorn v. Washington County*, __ Or LUBA __ (LUBA Nos. 2004-065/125, 2005-039/055, October 10, 2005), *appeal pending* (A130348).

> "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 On March 6, 2001, Grabhorn submitted the requested NCU application, on condition that the application could be withdrawn if Grabhorn so elected.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opposition to the NCU application had arisen, Grabhorn requested in writing that both applications be withdrawn.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. 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 County staff apparently also wrote 'Withdrawn' across the file folder for the applications.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. The letter cites allegations by neighbors that there are existing code violations on the property. 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.

"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).

"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." Slip op 4-6 (footnote and record citations omitted).

Grabhorn appealed the hearings officer decision to LUBA, as did the opponents of the NCU application (who are the petitioners in the present appeal). Grabhorn argued in relevant part that on its face the February 6, 2002 letter is a final decision allowing withdrawal of the NCU application, and therefore the county lost jurisdiction over the application. We agreed that

"[u]nless [the February 6, 2002] 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.

> "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. * * * Instead, at some undetermined point the county elected to proceed as if the February 6, 2002 letter did not exist. 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." Slip op 11-12 (footnotes omitted).

Because the county lacked jurisdiction to render a decision on the NCU application, we reversed the hearings officer's decision on that application. We dismissed LUBA No. 2004-125, the appeal filed by the present petitioners that challenged the merits of the hearings officer's decision approving the NCU application.

On October 31, 2005, 21 days from the date of our decision in *Grabhorn*, petitioners appealed the February 6, 2002 letter to LUBA. On November 16, 2005, Grabhorn moved to dismiss this appeal, arguing that it was not timely filed, even under ORS 197.830(3), which allows appeals of decisions made without a hearing within 21 days of the date a person adversely affected by the decision is (1) provided actual notice of the decision or (2) knew or should have known of the decision.[1] Grabhorn argues that February 6, 2002 letter is part of the record in *Grabhorn*, and that petitioners, as parties to that appeal, received a copy of that letter long before October 31, 2005. Therefore, Grabhorn argues, petitioners failed to file the appeal within 21 days of the date

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[1] ORS 197.830(3) provides, in relevant part:

> "If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416 (11) or 227.175 (10), * * * a person adversely affected by the decision may appeal the decision to the board under this section:
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> "(a) Within 21 days of actual notice where notice is required; or
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> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

that they received actual notice of the decision or knew or should have known of the decision. The county and petitioners respond, arguing that the appeal was timely filed under ORS 197.830(3)(a) and cases construing that statute.

The county's response includes a request to suspend resolution of the motion to dismiss until the Court of Appeals issues its decision in the pending appeal of LUBA's *Grabhorn* decision. According to the county, the issue on appeal of LUBA's decision in *Grabhorn* is whether LUBA correctly found that the February 6, 2002 letter was a land use decision allowing withdrawal of the NCU application. The county argues that the court's disposition of that issue may potentially moot or otherwise affect resolution of this appeal. Therefore, the county argues, it is appropriate to suspend further proceedings in this appeal until the court issues its decision in *Grabhorn*.

Grabhorn opposes the county's motion, arguing that the only statutory authority to stay an appeal is pursuant to ORS 197.845, and the county has not shown that a stay is warranted under that statute. Further, Grabhorn argues that any stay or suspension of this appeal is contrary to the statutory policy that "time is of the essence" in resolving land use appeals. ORS 197.805.[2] Finally, Grabhorn argues that suspension would serve no purpose, and that if the county is dissatisfied with LUBA's resolution of the motion to dismiss in this appeal, it may appeal LUBA's decision dismissing the appeal to the Court of Appeals.

ORS 197.845 authorizes LUBA to stay the effectiveness of a land use decision or limited land use decision during the pendency of LUBA's review under certain circumstances. That statute has nothing to do with suspending LUBA's review proceedings. The statute that governs suspension or delay in LUBA's review proceedings is ORS 197.840.[3] ORS 197.840(1)(b) allows

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[2] ORS 197.805 provides:

> "It is the policy of the Legislative Assembly that time is of the essence in reaching final decisions in matters involving land use and that those decisions be made consistently with sound principles governing judicial review. It is the intent of the Legislative Assembly in enacting ORS 197.805 to 197.855 to accomplish these objectives."

[3] ORS 197.840 provides, in relevant part:

LUBA to delay issuing a final opinion based on a "motion, including but not limited to" a motion to take evidence authorized under ORS 197.835(2)(b). In addition, ORS 197.840(1)(d) allows LUBA to grant a continuance based on findings that the ends of justice served by granting the continuance outweigh the best interest of the public and the parties in having a decision within the statutory deadlines. These statutory bases for delaying or suspending LUBA's review are consistent with ORS 197.805, which provides not only that "time is of the essence" in reaching finality in matters involving land use, but also that LUBA's review must be made "consistently with sound principles governing judicial review."

> "(1) The following periods of delay shall be excluded from the 77-day period within which the board must make a final decision on a petition under ORS 197.830 (14):
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> "* * * * *
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> "(b) Any period of delay resulting from a motion, including but not limited to, a motion disputing the constitutionality of the decision, standing, ex parte contacts or other procedural irregularities not shown in the record.
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> "* * * * *
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> " (d) Any reasonable period of delay resulting from a continuance granted by a member of the board on the member's own motion or at the request of one of the parties, if the member granted the continuance on the basis of findings that the ends of justice served by granting the continuance outweigh the best interest of the public and the parties in having a decision within 77 days.
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> "(2) No period of delay resulting from a continuance granted by the board under subsection (1)(d) of this section shall be excludable under this section unless the board sets forth in the record, either orally or in writing, its reasons for finding that the ends of justice served by granting the continuance outweigh the best interests of the public and the other parties in a decision within the 77 days. The factors the board shall consider in determining whether to grant a continuance under subsection (1)(d) of this section in any case are as follows:
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> "(a) Whether the failure to grant a continuance in the proceeding would be likely to make a continuation of the proceeding impossible or result in a miscarriage of justice; or
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> "(b) Whether the case is so unusual or so complex, due to the number of parties or the existence of novel questions of fact or law, that it is unreasonable to expect adequate consideration of the issues within the 77-day time limit."

We agree with the county that suspension of the present appeal until the Court issues its decision in *Grabhorn* is more consistent with "sound principles of judicial review" than would be proceeding with the appeal. The issue squarely before the court is the status and nature of the decision now before us, and the court's resolution of the issues before it could, at least potentially, moot this appeal or otherwise affect its disposition. For example, if the court in reviewing our *Grabhorn* decision disagrees with our understanding of the February 6, 2002 letter, and remands *Grabhorn* to us to address the remaining assignments of error challenging the merits of the hearings officer's decision, then it is likely that the present appeal of the February 6, 2002 letter would be dismissed, either as moot or because that letter is not a land use decision subject to our jurisdiction.

Further, Grabhorn's arguments against suspension assume that we will grant the motion to dismiss. It is true that if the appeal of the February 6, 2002 letter was untimely filed, it is difficult to see why LUBA should delay dismissing this appeal pending the court's decision in *Grabhorn*. That is because LUBA would lack jurisdiction over the February 6, 2002 decision for a reason that would seem to be entirely unrelated to the issue before the court. However, it is not obvious that the appeal of the February 6, 2002 letter was untimely filed under ORS 197.830(3). While we need not and do not consider that question, it is apparent from the parties' arguments that resolution of that issue will require a complex legal and factual analysis, addressing what seem to be novel issues, and that the outcome of that analysis is by no means a foregone conclusion. If we ultimately deny the motion to dismiss and allow this review proceeding to continue to the merits, it is possible that our efforts will conflict with or be rendered nugatory by the court's disposition in *Grabhorn*. That potential waste of judicial and party resources counsels against proceeding further in this appeal, until the court has issued a decision in *Grabhorn*.

Consequently, we grant the county's request to suspend this review proceeding, pursuant to ORS 197.840(1)(b), and pursuant to the state policy that LUBA's review be conducted consistently with sound principles of judicial review. ORS 197.805.

Further events in this review proceeding are suspended until the Court of Appeal issues its appellate judgment in *Grabhorn*, or until further order of this Board.[4]

Dated this 15th day of December, 2005.

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Tod A. Bassham, Board Member

[4] On December 5, 2005, Grabhorn filed a precautionary object to the record, stating that Grabhorn has conferred with the county and believes that the objection can be resolved with a supplemental record. Nothing in this order should be read to preclude the parties from continuing to resolve privately any record objections or other outstanding issues during the period in which this appeal is suspended.