BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CARLTON WOODARD and MARTIN KILMER,
Petitioners,

vs.

CITY OF COTTAGE GROVE,
Respondent,

and

RUSSELL LEACH and LORI LEACH,
Intervenor-Respondents.

LUBA No. 2008-022

ORDER

MOTION TO INTERVENE

Russell Leach and Lori Leach (intervenors), the applicants below, move to intervene on the side of the respondent in this appeal. There is no opposition to the motion and it is granted.

MOTION TO DISMISS

This appeal concerns three ordinances (Nos. 2927, 2928 and 2929) that were re-adopted on remand from LUBA. *Woodard v. City of Cottage Grove*, 54 Or LUBA 176 (2007). The city re-adopted the challenged ordinances on January 14, 2008, and issued a single notice of decision for all three ordinances on January 21, 2008. On February 4, 2008, petitioners filed a notice of intent to appeal (NITA) with LUBA that identifies the three ordinances (Nos. 2927, 2928 and 2929) as the subject of the appeal. The NITA states that the city's "decision" became final on January 14, 2008.

On February 22, 2008, the city filed a single record for this appeal. Petitioners filed record objections, which we address below.

On February 29, 2008, intervenors filed a motion to dismiss two of the three ordinances (Nos. 2928 and 2929) from this appeal, arguing that each of the three ordinances are separate land use decisions, that can be appealed to LUBA only pursuant to separately filed NITAs and appeal fees. OAR 661-010-0015(1).[1] Because the NITA can only appeal one decision, intervenors argue, LUBA should accept the appeal only with respect to the first ordinance named in the NITA (No. 2927), and dismiss the appeal with respect to the other two ordinances.

Intervenors acknowledge that OAR 661-010-0015(1)(c) provides that, where a NITA "identifies more than one final decision as the subject of appeal," the Board shall notify the petitioner and dismiss the NITA if the petitioner fails to either (1) elect to appeal only one decision or (2) submit a separate NITA and separate filing fee and deposit for each additional decision. However, intervenors argue that OAR 661-010-0015(1)(c) is inconsistent with the

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[1] OAR 661-010-0015(1) provides:

> "(a) The Notice, together with two copies, and the filing fee and deposit for costs required by section (4) of this rule, shall be filed with the Board on or before the 21st day after the date the decision sought to be reviewed becomes final or within the time provided by ORS 197.830(3) through (5). A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed with the Board on or before the 21st day after the date the decision sought to be reviewed is mailed to parties entitled to notice under ORS 197.615. A Notice filed thereafter shall not be deemed timely filed, and the appeal shall be dismissed.
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> "(b) The date of filing a notice of intent to appeal is the date the Notice is received by the Board, or the date the Notice is mailed, provided it is mailed by registered or certified mail and the party filing the Notice has proof from the post office of such mailing date. If the date of mailing is relied upon as the date of filing, acceptable proof from the post office shall consist of a receipt stamped by the United States Postal Service showing the date mailed and the certified or registered number. If a Notice is received without payment of the fee and deposit required by section (4) of this rule, the petitioner will be given an opportunity to submit the required fee and deposit. If the filing fee and deposit for costs are not paid within the time set by the Board, the Board will dismiss the appeal.
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> "(c) If the Board determines that a Notice identifies more than one final decision as the subject of appeal, the Board shall notify the petitioner. The Board shall dismiss the Notice if the petitioner fails to submit within the date specified by the Board either a written election to appeal only one decision, or a separate Notice and separate filing fee and deposit, as required by section (4) of this rule, for each additional decision."

statutes that govern LUBA's jurisdiction and review. According to intervenors, under ORS 197.830(1), (2) and (9), in order to invoke LUBA's jurisdiction over a land use decision, the petitioner must file one notice of intent to appeal for each decision.[2] Intervenors note that the Court of Appeals has described these statutes as being "'jurisdictional' in the most basic of senses." *Wicks-Snodgrass v. City of Reedsport*, 148 Or App 217, 224, 939 P2d 625, *rev den* 326 Or 59, 944 P2d 949 (1997) (concluding that the 21-day deadline to file the notice of intent to appeal under ORS 197.830(9) cannot be extended by application of a judicially-derived tolling doctrine). Therefore, intervenors argue, a NITA that purports to appeal more than one decision is not effective to establish LUBA's jurisdiction over more than the first decision named in the notice.

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[2] ORS 197.830 provides, in relevant part:

> "(1) Review of land use decisions or limited land use decisions under ORS 197.830 to 197.845 shall be commenced by filing a notice of intent to appeal with the Land Use Board of Appeals.
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> "(2) Except as provided in ORS 197.620 (1) and (2), a person may petition the board for review of a land use decision or limited land use decision if the person:
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> > "(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section; and
> >
> > "(b) Appeared before the local government, special district or state agency orally or in writing.
>
> "* * * * *
>
> "(9) 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. Failure to include a certificate of mailing with the notice mailed under ORS 197.615 shall not render the notice defective. Copies of the notice of intent to appeal shall be served upon the local government, special district or state agency and the applicant of record, if any, in the local government, special district or state agency proceeding. The notice shall be served and filed in the form and manner prescribed by rule of the board and shall be accompanied by a filing fee of $175 and a deposit for costs to be established by the board. * * *"

Petitioners respond that the city sent only a single notice of "decision" for all three ordinances, and petitioners reasonably assumed that the three ordinances comprised a single "decision" for purposes of appeal to LUBA. In any case, petitioners disagree that OAR 661-010-0015(1)(c) is inconsistent with ORS 197.830 or that the rule expands LUBA's jurisdiction beyond that authorized in the applicable statutes.

As petitioners note, it is sometimes difficult to determine whether a local government's land use action consists of a single "decision" with multiple components that can be appealed as one decision, or multiple "decisions" that must be appealed separately if the petitioner wishes to challenge each decision. The definition of "land use decision" at ORS 197.015(10) provides no particular illumination on that question, and nothing in ORS 197.830 or elsewhere brought to our attention speaks directly to that issue. Nonetheless, it is relatively clear that, where applicable law requires that the local government's proposed land use action be accomplished by ordinance, each ordinance the local government adopts with respect to the proposal is a separate "decision" for purposes of appeal to LUBA. *See McKenzie v. Multnomah County*, 30 Or LUBA 459, 460 (1996) (three ordinances adopted as part of a single package at the end of a single proceeding are nonetheless separate decisions for purposes of appeal to LUBA). We agree with intervenors that the character of the notice of decision the city provided in the present case is not determinative of that question. The city adopted three separate ordinances, albeit as part of a single package and a combined proceeding, and therefore the city adopted three separate "decisions" for purposes of appeal to LUBA.

The more difficult issue is whether ORS 197.830 dictates any particular consequence when an otherwise properly filed notice of intent to appeal identifies more than one decision as the subject of appeal. Or, phrased differently, the question is whether OAR 661-010-0015(1)(c) is inconsistent with ORS 197.830 in providing a process whereby the petitioner who has timely filed a single NITA that erroneously identifies more than one decision as the

subject of appeal may elect either to appeal only one decision or to file separate NITAs and associated fees for each additional decision.

From nearly its inception, LUBA has consistently held that where a notice of intent to appeal identifies more than one decision, dismissal of the appeal is not required as long as the petitioners submit the appropriate additional filing fees and deposits for costs for each additional decision identified in the notice of intent to appeal. *McKenzie*, 30 Or LUBA at 460; *Union Gospel Ministries v. City of Portland*, 21 Or LUBA 557, 558 (1991); *Whitesides v. Corvallis*, 8 Or LUBA 419, 422 (1983); *Seneca Sawmill v. Lane County*, 6 Or LUBA 454 (1982); *Osborne v. Lane County*, 4 Or LUBA 368, 370-71 (1981). In 1998, LUBA adopted OAR 661-010-0015(1)(c), codifying that view. However, we have never had occasion to consider whether the rule or the doctrine on which it is based is consistent with our governing statutes.

In our view, nothing in ORS 197.830(1), (2) or (9) explicitly requires that a notice of intent to appeal identify only one decision as the subject of the appeal. In fact, ORS 197.830(1) states that "[r]eview of land use decision*s* or limited land use decision*s* * * * shall be commenced by filing *a* notice of intent to appeal" with LUBA. (Emphasis added.) It is true that ORS 197.830(2) and (9) speak of *a* notice of intent to appeal in relation to "the decision" or "a decision," which suggests that those statutes contemplate that a single notice will challenge only a single decision. However, the force of that suggestion is undercut by ORS 197.830(1), which appears to suggest to the contrary that an appeal of more than one decision may be commenced by filing a single notice of intent to appeal. The best that can be said with any confidence is that the relevant statutes do not explicitly require that a single notice challenge only one decision or explicitly prohibit filing a single notice that challenges multiple decisions.

The statutes are also silent regarding the consequences of filing a single notice that challenges more than one decision. While timely filing of the notice of intent to appeal is

certainly jurisdictional, we are aware of no authority stating that a petitioner who files an otherwise proper NITA that identifies more than one decision as the subject of the appeal thereby fails to invoke LUBA's jurisdiction over the additional decisions. From our earliest cases, LUBA has approached such circumstances as "technical violations" of our rules, to be remedied by allowing the petitioner to submit the additional filing fee and deposit for costs for each additional appeal, if that can be accomplished without prejudice to other parties' substantial rights. *Osborne*, 4 Or LUBA at 371 (LUBA would be viewed as being "overly technical" were it to dismiss the case without giving petitioners an opportunity to file the additional filing fee), *citing U.S. National Bank v. Lloyd's*, 239 Or 298, 382 P2d 851 (1963) and *Hilliard v. Lane County*, 51 Or App 587, 626 P2d 905 (1980).

In *Hilliard*, the Court of Appeals held that LUBA erred in invoking "technical requirements of pleading" having no statutory basis. Consistent with *Hilliard*, LUBA adopted OAR 661-010-0005 and its predecessors, which provides:

> "These rules are intended to promote the speediest practicable review of land use decisions and limited land use decisions, in accordance with ORS 197.805-197.855, while affording all interested persons reasonable notice and opportunity to intervene, reasonable time to prepare and submit their cases, and a full and fair hearing. The rules shall be interpreted to carry out these objectives and to promote justice. Technical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or limited land use decision. Failure to comply with the time limit for filing a notice of intent to appeal under OAR 661-010-0015(1) or a petition for review under OAR 661-010-0030(1) is not a technical violation."

OAR 660-010-0005 specifies only two rule violations that cannot be viewed as "technical violations," neither of which include filing a notice of intent to appeal that identifies more than one decision as the subject of appeal.

ORS 197.820(4) provides that LUBA shall adopt rules governing the conduct of its review proceedings. More to the point, ORS 197.830(9) provides that the notice of intent to appeal "shall be served and filed in the form and manner prescribed by" LUBA's rules. LUBA has adopted such rules, in OAR 661-010-0015(1). Because no statute cited to our

attention requires that a single notice challenge only one decision, prohibits filing a single notice that challenges more than one decision, or assigns jurisdictional significance to the filing of an otherwise proper notice that challenges more than one decision, the question is ultimately left to LUBA's discretion, as embodied in our rules. Accordingly, we disagree with intervenors that OAR 661-010-0015(1)(c) is inconsistent with our governing statutes.

In sum, the timely filing of the notice of intent to appeal invoked our jurisdiction to review the three ordinances identified in the notice. However, petitioner violated OAR 661-010-0015(1) in submitting a single notice that identifies more than one decision, accompanied only by a single filing fee and deposit for costs. Intervenors do not assert that petitioners' violation prejudices their substantial rights in any regard. Accordingly, that violation is a technical violation of our rules. To comply with our rules, within 14 days of the date of this order petitioners must either elect to appeal only one decision, or submit a separate notice and separate filing fee and deposit for each additional decision. If petitioners choose the latter option, the Board will likely consolidate the appeals together, and treat the single record the city filed as the consolidated record for all appeals.

RECORD OBJECTION

Petitioners filed precautionary objections to the record. On March 13, 2008, the city filed a supplemental record that, petitioners advise us, resolves their objections. We will delay settling the record and establishing a briefing schedule until petitioners have responded to the above paragraph and either elect to appeal only one decision or submit additional notices, fees and deposits for each additional decision.

Dated this 28th day of March, 2008.

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Tod A. Bassham
Board Member