

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 TREADMILL JOINT VENTURE and
5 BOYD IVERSON,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF EUGENE,
11 *Respondent.*

12
13 LUBA Nos. 2010-078 and 2010-107

14 ORDER

15 **INTRODUCTION**

16 In LUBA No. 2010-078, petitioners appeal a city staff action requiring petitioners to
17 pay a \$9,268.46 fee to appeal a hearings officer's decision on their application for a planned
18 unit development (PUD) to the city planning commission. The staff action is reflected in a
19 receipt dated August 11, 2010. The notice of intent to appeal (NITA) states that "[t]his is a
20 placeholder, precautionary appeal, which should be put on hold at LUBA, pending city
21 review of the merits of the land use appeal, which also raises the issue of the appeal fee."
22 2010-078 NITA 1. Petitioners subsequently filed the petition for review and a motion to
23 suspend the appeal pending the outcome of the local appeal on the PUD application, then
24 pending before the planning commission. By order dated October 29, 2010, the Board
25 suspended review deadlines in LUBA No. 2010-078 to allow the parties to brief the motion
26 to suspend. The city subsequently filed a response opposing the motion to suspend, and also
27 filed a motion to dismiss LUBA No. 2010-078.

28 In LUBA No. 2010-107, petitioners appeal the planning commission decision on
29 petitioners' local appeal of the hearings officer's decision. The planning commission
30 decision was rendered on October 25, 2010, and appealed to LUBA on November 12, 2010.
31 One of the issues raised in that local appeal was petitioners' challenge to the local appeal fee.

1 However, the planning commission concluded that it lacked review authority to consider a
2 challenge to the city's appeal fee.

3 **MOTION TO SUSPEND**

4 Petitioners' motion to suspend the review proceeding in LUBA No. 2010-078
5 pending appeal of the planning commission decision at issue in LUBA No. 2010-107 has
6 been overtaken by events, and is denied as moot.

7 **CONSOLIDATION AND MOTION TO DISMISS**

8 Petitioners move to consolidate LUBA Nos. 2010-078 and 2010-107, arguing that the
9 two appeals arise out of the same land use proceeding and are "closely related."¹ The city
10 opposes consolidation, arguing that it is not clear that consolidation would facilitate LUBA's
11 review, noting that the two appeals have different records and were filed at different times,
12 resulting in different appeal schedules. In addition, the city argues that because there is a
13 pending motion to dismiss in LUBA No. 2010-078, LUBA should postpone the issue of
14 consolidation until the motion to dismiss is resolved, because if the motion is granted then
15 consolidation becomes moot.

16 Petitioners reply, and we agree, that simply because the two appeals have different
17 records and were filed at different times does not preclude consolidation, if it would
18 otherwise facilitate LUBA's review. The two decisions arise out of the same land use
19 proceeding, and appear to be closely related. Due to the filing of motions in LUBA No.
20 2010-078, the two review schedules are not so far divergent as to preclude consolidation.
21 Absent other considerations, consolidation would seem to be an appropriate choice.

22 The more difficult question is whether the pending motion to dismiss in LUBA No.
23 2010-078 indicates that the issue of consolidation should be postponed until the motion to

¹ Under OAR 661-010-0055, LUBA:

"* * * may consolidate two or more proceedings, provided the proceedings seek review of the same or closely related land use decision(s) or limited land use decision(s)."

1 dismiss is resolved. The city argues that if LUBA is going to ultimately dismiss LUBA No.
2 2010-078 there is no reason to consolidate the two appeals. Petitioners respond in relevant
3 part that one of the issues to be raised in the appeal of the planning commission's decision at
4 issue in LUBA No. 2010-107 is the planning commission's authority to address appeal fee
5 challenges. Petitioners argue that, depending on how that issue is resolved, it may turn out
6 that LUBA does indeed have jurisdiction over the August 11, 2010 staff action. Therefore,
7 petitioners argue, the prudent course is to consolidate the two appeals, deny the motion to
8 dismiss LUBA No. 2010-078 with leave to renew it later, and address the appeal fee dispute
9 while both decisions are before LUBA.

10 We need not describe in detail the parties' jurisdictional arguments here, but we agree
11 with petitioners that there could be a connection between the jurisdictional question in
12 LUBA No. 2010-078 and some of the likely issues to be raised in LUBA No. 2010-107,
13 specifically (1) whether the city planning commission has review authority to address
14 petitioners' challenge to the fee the city charged to appeal the hearings officer's decision to
15 the planning commission, and (2) whether, regardless of the planning commission's review
16 authority, the appeal fee issue can be raised in an appeal to LUBA of the planning
17 commission decision, or whether that issue must be raised elsewhere. It is clear that in
18 pursuing these two appeals one of petitioners' goals is to challenge application of the city's
19 appeal fee as being contrary to ORS 227.180(1)(c).² Based on the city's pleadings to date, it

² ORS 227.180(1)(c) provides:

"The governing body may prescribe, by ordinance or regulation, fees to defray the costs incurred in acting upon an appeal from a hearings officer, planning commission or other designated person. The amount of the fee shall be reasonable and shall be no more than the average cost of such appeals or the actual cost of the appeal, excluding the cost of preparation of a written transcript. The governing body may establish a fee for the preparation of a written transcript. The fee shall be reasonable and shall not exceed the actual cost of preparing the transcript up to \$500. In lieu of a transcript prepared by the governing body and the fee therefor, the governing body shall allow any party to an appeal proceeding held on the record to prepare a transcript of relevant portions of the proceedings conducted at a lower level at the party's own expense. If an appellant prevails at a hearing or on appeal, the transcript fee shall be refunded."

1 seems clear that the city will take the position that the merits of the appeal fee dispute are not
2 properly before LUBA in either appeal. That position is either right or wrong, but we will
3 not know which until that issue is fully briefed and resolved. It is possible, if perhaps
4 unlikely, that depending on how that issue is briefed and resolved in reviewing the planning
5 commission decision at issue in LUBA No. 2010-107, LUBA could conclude that the appeal
6 fee issue is properly before LUBA in an appeal of the staff action challenged in LUBA No.
7 2010-078, and that we have jurisdiction to hear that appeal. Given that uncertainty, we agree
8 with petitioner that it would be premature to resolve at this time the motion to dismiss LUBA
9 No. 2010-078. We therefore take the motion to dismiss under advisement, and will address
10 that motion at a later juncture.

11 Turning back to the motion to consolidate, for the above reasons it seems both
12 convenient and appropriate to consolidate the two appeals and proceed on the same review
13 schedule. The motion to consolidate is granted.

14 The Board received the record in LUBA No. 2010-107 on December 2, 2010.
15 Barring objections to that record, the petition for review in LUBA No. 2010-107 is due 21
16 days from December 2, 2010. Petitioner shall submit a single consolidated petition for
17 review for both appeals, which may include arguments already made in the petition for
18 review submitted in LUBA No. 2010-078 directed at the August 11, 2010 staff action. The
19 Board will otherwise disregard the petition for review filed in LUBA No. 2010-078. The
20 city's consolidated response brief is due 42 days from December 2, 2010, and the Board's
21 final opinion and order due 77 days from that date.

22 Dated this 3rdth day of December, 2010.
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28 _____
29 Tod A. Bassham
30 Board Member