

FILED: October 1, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

HOUSING AUTHORITY OF JACKSON COUNTY,
Respondent,

v.

CITY OF MEDFORD,
Petitioner,

and

DAVID FROHNMAYER, MIRA FROHNMAYER, GERALD PRINGLE, HARRIET
PRINGLE, CHRIS HILL, and DEVON FINLEY,
Respondents.

Land Use Board of Appeals
2011089

A151710

Submitted on April 04, 2014.

John R. Huttl filed the brief for petitioner.

Michael C. Robinson, Seth J. King, and Perkins Coie LLP filed the brief for respondent Housing Authority of Jackson County.

No appearance for respondents David Frohnmayer, Mira Frohnmayer, Gerald Pringle, Harriet Pringle, Chris Hill, and Devon Finley.

Before Armstrong, Presiding Judge, and Nakamoto, Judge, and Egan, Judge.

ARMSTRONG, P. J.

Petition for judicial review dismissed as moot.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent Housing Authority of Jackson County

- No costs allowed.
 Costs allowed, payable by
 Costs allowed, to abide the outcome on remand, payable by
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1 ARMSTRONG, P. J.

2 The City of Medford seeks review of a Land Use Board of Appeals
3 (LUBA) decision remanding the city's denial of an application by the Housing Authority
4 of Jackson County to construct a multifamily housing complex in downtown Medford.
5 After the case was submitted to us, we issued an order to the City of Medford to show
6 cause why, in light of a settlement agreement reached among the parties, the petition for
7 judicial review presents a justiciable controversy. For the reasons that follow, we
8 conclude that the case is moot and dismiss the petition for judicial review.

9 The Housing Authority of Jackson County is a public corporation with the
10 mission of providing affordable housing for families in Jackson County. Toward that
11 end, the housing authority sought approval from the City of Medford in March 2011 to
12 construct a 100-unit, multifamily housing complex on a six-acre property that the housing
13 authority owned in downtown Medford. The city's Site Plan and Architectural Review
14 Committee (SPAC) reviewed and approved the housing authority's application, subject to
15 conditions of approval. Thereafter, a group of citizens appealed SPAC's decision to the
16 Medford City Council. The city council held a hearing on the housing authority's
17 application at which the city council voted to uphold the citizens' appeal and deny the
18 housing authority's application. Two weeks later, the city council voted to adopt a
19 written decision denying the application.

20 The housing authority subsequently appealed to LUBA, raising five
21 assignments of error. In a written decision sustaining four of the housing authority's

1 assignments, LUBA remanded the city's decision. *Housing Authority of Jackson County*
2 *v. City of Medford*, 65 Or LUBA 295 (2012). At issue on review is only LUBA's
3 conclusion that the mayor of Medford had violated ORS 277.180 by failing to disclose
4 certain *ex parte* contacts and that that failure--along with other errors by the city council
5 in denying petitioner's application--necessitated a remand.

6 The city petitioned for judicial review, and the parties thereafter moved to
7 hold the case in abeyance while they pursued a settlement. In December 2012, the parties
8 entered into an "Agreement for Disposition and Development of Property and Settlement
9 of Appeals." That agreement provided for the development by the housing authority of
10 100 units of multifamily housing in downtown Medford. Of the 100 units, 50 were to be
11 developed on a portion of the housing authority's six-acre property. The remaining 50
12 units were to be developed on a second downtown property, which the city agreed to
13 convey to the housing authority for that purpose. In exchange for that conveyance, the
14 housing authority agreed to convey a portion of its original six-acre property to the city
15 for use as an undeveloped buffer adjacent to a city park.

16 Regarding the pending applications for the development of the housing
17 authority's downtown property,¹ the agreement provided:

¹ In addition to the dispute before us on review, which the agreement refers to as "SPAC I," the housing authority had filed a second application to develop its downtown property (the SPAC II Application), which is pending before SPAC. The housing authority had also filed an application to partition its downtown property (the Partition I Application), which the city had denied. The housing authority's appeal of that denial is pending before LUBA.

1 "Subject to the terms and conditions of this Agreement, it is the
2 intention of the Parties to fully settle and compromise all claims asserted in
3 ongoing appeals pending before [LUBA] and before the Court of Appeals
4 [involving the petitioner's development of the property]. In furtherance
5 thereof, the Parties specifically agree as follows:

6 "* * * * *

7 "SPAC I Application. *The parties agree to keep the SPAC I Appeal*
8 *in abeyance until after Closing. Within fourteen (14) days after Closing,*
9 *[the parties] shall agree to reactivate the SPAC I Appeal for the limited*
10 *purpose of allowing Citizens and City to file briefs assigning error to*
11 *LUBA's decision to sustain a portion of the fifth assignment of error*
12 *concerning possible ex parte communications between City's Mayor and*
13 *David Frohnmayer ('Factual Issue'). No party shall assign any other error*
14 *to LUBA's decision. Housing Authority shall not oppose any brief by*
15 *Citizens and/or City that is limited to the Factual Issue and shall not appeal*
16 *any decision by the Court of Appeals in favor of Citizens and/or City on the*
17 *Factual Issue. If the SPAC I Appeal is ultimately remanded to City,*
18 *Housing Authority shall withdraw the SPAC I Application in the event*
19 *Housing Authority obtains final approval of the Applications, subject to*
20 *conditions Housing Authority deems acceptable in Housing Authority's sole*
21 *and absolute discretion, without appeal, or if appealed, such appeals have*
22 *been finally resolved in a manner satisfactory to Housing Authority in*
23 *Housing Authority's sole and absolute discretion."*

24 (Emphasis added.)

25 The applications referred to in that provision, on which the housing
26 authority's withdrawal of the SPAC I appeal were premised, are the land use applications
27 required for the development of the two properties contemplated by the agreement. After
28 listing those applications, the agreement provided that "City staff shall review and
29 recommend approval of the Applications." Moreover, the agreement included, as a
30 condition precedent to the closing of the sale of the property under the agreement, that the
31 housing authority would have "obtained final approval of the Applications [that the city
32 had agreed to recommend approving], subject only to conditions Housing Authority

1 deems acceptable in Housing Authority's sole and absolute discretion."

2 As noted, the parties entered into the agreement in December 2012. The
3 following month, January 2013, the parties moved to continue to hold this case in
4 abeyance pending closing of the sales of property under the agreement. One year later, in
5 January 2014, the parties moved to reactivate the case. Thereafter, the city filed its
6 opening brief, in which it argues that, in concluding that the mayor had failed to disclose
7 *ex parte* contacts, LUBA made a factual determination that is not supported by the
8 record--*viz.*, that the mayor was present at the city council meeting at which the city
9 council adopted the written decision denying the housing authority's application. The
10 housing authority filed an answering brief providing only that it "does not oppose the
11 assignment of error or relief sought in [the city's] opening brief." The housing authority
12 also filed a motion to dismiss its cross-petition for judicial review, as "the result of a
13 negotiated settlement or compromise." The case was then submitted on the briefs.

14 In June 2014, we issued an order to the city to show cause why, in light of
15 the agreement, the city's petition continues to present a justiciable controversy. The city
16 thereafter filed a memorandum in response to our order. In it, the city argues that
17 "[r]eversing LUBA will correct the injustice that the Board has meted Medford officials
18 and citizens who engaged in alleged *ex parte* contacts, having a practical effect on those
19 parties' rights." However, notwithstanding that statement, the city did not identify how
20 our resolution of the merits of its petition would affect the rights of the parties. Based on
21 our review of the agreement, we conclude that the case is moot.

1 We have an independent obligation to determine whether a case submitted
2 to us for decision presents a justiciable controversy. *See, e.g., Oregon Medical*
3 *Association v. Rawls*, 281 Or 293, 296, 574 P2d 1103 (1978). Among the "constellation
4 of related issues" that that determination encompasses is whether a case has become
5 moot. *See, e.g., Yancy v. Shatzer*, 337 Or 345, 349, 97 P3d 1161 (2004). In order to
6 avoid mootness, the parties in a given dispute must "have adverse interests and 'the
7 court's decision in the matter [must] have some practical effect on the rights of the parties
8 to the controversy.'" *Blechsmidt v. Shatzer*, 197 Or App 536, 539, 106 P3d 682 (2005)
9 (quoting *Brumnett v. PSRB*, 315 Or 402, 405, 848 P2d 1194 (1993)). Accordingly, even
10 if otherwise justiciable, a case "in which a court's decision no longer will have a practical
11 effect on or concerning the rights of the parties[] will be dismissed as moot." *Brumnett*,
12 315 Or at 406.

13 In its memorandum in response to our order to show cause as to why this
14 matter is justiciable, the city argues, in effect, that LUBA has harmed Medford city
15 officials by concluding that Medford's mayor had failed to disclose *ex parte* contacts that
16 ORS 227.180 required him to disclose and that "LUBA perpetuates its miscarriage of
17 justice by continuing to cite to its decision as precedent in its ongoing published decision[
18]making." However, despite the city's argument to the contrary, the "correction" of the
19 "injustice that [LUBA] has meted Medford officials * * * who engaged in alleged *ex*
20 *parte* contacts" is not the type of practical effect that would prevent dismissal. Instead, to
21 avoid dismissal, the city must demonstrate how that correction would have a real,

1 nonspeculative effect on the rights *of a party*. See, e.g., *Blechsmidt*, 197 Or App at 544
2 ("The 'mere possibility' that petitioner might at some future date apply for assistance and
3 [the issue on review] may or may not affect his eligibility is speculative at best and 'not
4 sufficient to make dismissal inappropriate.'" (quoting *Brumnett*, 315 Or at 407)).

5 In this matter, the city has not identified any practical harm to any of the
6 parties--only a perceived slight to the mayor's reputation. Nor has it identified how any
7 decision we could render would have a practical effect on the rights of any party--viz., the
8 City of Medford, the Housing Authority of Jackson County, or the named citizens who
9 had objected to the housing authority's initial application to develop its downtown
10 property. Nor can it. As set out above, the housing authority has agreed to withdraw the
11 application at the heart of this dispute if two conditions are met: First, the housing
12 authority must obtain final approval of its land use applications for the development
13 contemplated in the agreement. Second, the application must be remanded to the city.

14 By the terms of the agreement, the satisfaction of the first condition was
15 required before this matter could reach us on review. It was a condition precedent to the
16 closing of the property sales under the agreement that the housing authority obtain
17 approval of its land use applications to develop the property that is the subject of the
18 agreement. Likewise, the closing of the agreement necessarily preceded the reactivation
19 of this case:

20 "The parties agree to keep the SPAC I Appeal in abeyance until after
21 Closing. Within fourteen (14) days after Closing, [the parties] shall agree
22 to reactivate the SPAC I Appeal * * *."

1 As to the second condition, given that LUBA remanded the housing
2 authority's application to the city on multiple grounds, all but one of which are not at
3 issue on judicial review, any decision as to the city's sole assignment of error would have
4 the same practical effect: remand of the application to the city and, ultimately,
5 withdrawal of the application by the housing authority. Accordingly, because any
6 decision on review "no longer will have a practical effect on or concerning the rights of
7 the parties," *Brumnett*, 315 Or at 406, we conclude that the petition for review must be
8 dismissed as moot.

9 Petition for judicial review dismissed as moot.