BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GREG WAIBEL, DENISE WAIBEL, WILLIAM
BREWER, DON KRIDER and MICHEIL BROWN,
Petitioners,

vs.

CROOK COUNTY,
Respondent,

and

THOMAS M. BURKE, BRENDA BLAKENSHIP,
MIKE BRIDGES, PATRICIA B. BURRELL, H. CURTISS BURRELL,
JORENE BYERS, MARION S. de POLO, TERRY DORVINEN,
L. SUSAN DUNN, J. MICHAEL DUNN, JEANNE FRENCH,
DONALD L. HANNA, NANCY KNOCHE, KEITH KNOCHE,
DOROTHY MCCALL, LAWRENCE MCCALL, BEVERLY A. PARRISH,
JANET ROBERTS, PHILIP ROBERTS, LANCE STEINMETZ,
MARY KAY WALKER, J.R. WENDT, BECKY WRIGHT,
BRUCE WRIGHT, DUANE BALCOM, SONDA BALCOM,
JIM JOHANSEN, SHELLEY JOHANSEN, MIKE ROONEY,
KAREN ROONEY, ROBERT PRINCEHOUSE, JUDITH PRINCEHOUSE,
DIETER KOEHLER and MIKE UMBARGER,
Intervenors-Respondent.

LUBA Nos. 2000-126, 2000-127, 2000-128, 2000-129,
2000-130, 2000-131 and 2000-132

ORDER

Intervenors-respondent and respondent (hereafter respondents) move to dismiss this appeal. For reasons explained below, we deny the motion.

FACTS

In 1998, three appeals were filed with LUBA challenging three county ordinances that approved exceptions to Statewide Planning Goal 3 (Agricultural Lands) for a number of Exclusive Farm Use (EFU)-zoned properties (hereafter exception ordinances). These appeals were consolidated for LUBA review. In 1999, five more appeals were filed challenging five county ordinances that determined that the soils located on certain properties are not

1 "Agricultural Land," as defined by Goal 3 (hereafter nonresource land ordinances).[1] These
2 five appeals also were consolidated for LUBA review. At the parties' request, both
3 consolidated appeals were suspended, pursuant to ORS 197.860, to permit the parties to enter
4 into mediation.[2]

5 The parties entered into a settlement agreement. Record 89-101. The county
6 approved the settlement agreement on May 24, 2000. Pursuant to that settlement agreement,
7 the parties submitted a stipulated motion requesting that LUBA (1) dismiss one of the
8 appeals challenging one of the nonresource land ordinances, (2) remand the other
9 nonresource land ordinances for adoption of amended ordinances, and (3) remand the
10 exception ordinances for adoption of amended ordinances. To carry out the parties' intent
11 regarding the second and third requests, the parties attached the seven amended ordinances
12 that the county was to adopt and requested that LUBA order the county to adopt the amended
13 ordinances that were attached to the stipulated motion, pursuant to ORS 197.860.[3]

14 In *Burke v. Crook County*, ___ Or LUBA ___ (LUBA Nos. 99-037, 99-038, 99-039,
15 99-040 and 99-041; June 20, 2000) (*Burke I*), LUBA granted the first two requests and
16 dismissed petitioners' appeal of one of the nonresource land ordinances (Ordinance 130) and

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[1]Both appeals concerned an area of the county that is referred to as the Powell Butte Study Area.

[2]ORS 197.860 provides:

> "All parties to an appeal may at any time prior to a final decision by the Court of Appeals under ORS 197.855 stipulate that the appeal proceeding be stayed for any period of time agreeable to the parties and [LUBA] or court to allow the parties to enter mediation. Following mediation, [LUBA] or the court may, at the request of the parties, dismiss the appeal or remand the decision to [LUBA] or the local government with specific instructions for entry of a final decision on remand. If the parties fail to agree to a stipulation for remand or dismissal through mediation within the time the appeal is stayed, the appeal shall proceed with such reasonable extension of appeal deadlines as [LUBA] or Court of Appeals considers appropriate."

[3]The seven amended ordinances all include provisions in which the county promises that it will "not initiate additional exceptions or nonresource designations within the Powell Butte Study Area until the next periodic review." Record 109-10, 115, 120, 125, 128, 133, 136. Those amended ordinances also provide that "land north of Highway 126 shall be retained as exclusive farm use * * *." Record 110, 115, 120, 125, 129, 133, 136. The original exception ordinances and nonresource land ordinances did not include such language.

1 remanded nonresource land Ordinances 131-134.[4] In *Burke v. Crook County*, ___ Or LUBA
2 ___ (LUBA Nos. 98-220, 98-221, 98-222, 98-223, 98-224 and 98-225; June 20, 2000)
3 (*Burke II*), LUBA granted the third request and remanded the exception ordinances.[5]
4 Following our remand in *Burke I* and *Burke II*, the county conducted two public
5 hearings on the ordinance amendments that were attached to our decisions: one on July 12,
6 2000, and one on July 26, 2000. At least three of the five petitioners in the current appeal
7 appeared and objected to the proposed ordinance amendments. Record 35.[6] At the
8 conclusion of the July 26, 2000 public hearing, the county adopted the seven ordinance
9 amendments that were attached to our decisions in *Burke I* and *Burke II*. Seven separate
10 appeals were filed challenging those ordinances. Those seven appeals have been
11 consolidated for review and are the subject of this appeal.

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[4]Our decision in *Burke I* explains:

> "In accordance with the parties' stipulated motion and ORS 197.860, LUBA No. 99-037 is dismissed and the ordinances challenged in LUBA Nos. 99-038, 99-039, 99-040 and 99-041 are remanded to the county. The county is instructed to adopt the amendments set out in Attachment 1 to the parties' stipulated motion. A copy of that attachment is appended to this final opinion and order." Slip op 2.

[5]Our decision in *Burke II* explains:

> "In accordance with the parties' stipulated motion and ORS 197.860, the ordinances challenged in this consolidated appeal are remanded to the county and the county is instructed to adopt the amendments set out in Attachment 1 to the parties' stipulated motion. A copy of that attachment is appended to this final opinion and order."

The stipulation also included the parties' agreement to form a "Farming and Ranching Preservation Association of Powell Butte." Record 103-06. In addition, the stipulation included the parties' agreement that the county would adopt three new ordinances establishing three rural residential districts for the Powell Butte Study Area. Record 138-46. These aspects of the settlement agreement were not included with the stipulated motion that was submitted to LUBA and were not attached to our decisions in *Burke I* and *Burke II*.

[6]The letter that appears at Record 35 is a letter submitted by an attorney on behalf of petitioners Greg Waibel, Denise Waibel and William Brewer.

1 **MOTION TO DISMISS**

2 **A. Nondiscretionary Decision**

3 LUBA has exclusive jurisdiction to review land use decision. ORS 197.825(1). The
4 challenged ordinances apply and amend provisions of the county's comprehensive plan and
5 land use regulations and so they fall within the statutory definition of land use decision
6 unless one of the statutory exceptions to that definition applies.[7] One of those statutory
7 exceptions is provided by ORS 197.015(10)(b)(A) for local government decisions that do not
8 require the exercise of judgment.[8] Respondents argue that because the county did precisely
9 what LUBA ordered it to do in *Burke I* and *Burke II*, the county exercised no judgment and
10 the ordinances therefore do not constitute land use decisions subject to review by LUBA.
11 Were it otherwise, respondents argue, such appeals would constitute an impermissible
12 collateral attack on LUBA's decisions in *Burke I* and *Burke II* and would effectively require
13 that LUBA review its own decisions in *Burke I* and *Burke II*. According to respondents,
14 petitioners were free to participate in the appeals that led to *Burke I* and *Burke II*, but elected
15 not to do so.[9] Had they done so, respondents argue, LUBA's decisions in those cases could
16 have been appealed to the Court of Appeals. ORS 197.850(1). Because petitioners in the
17 current appeal elected not to intervene as parties and remain parties in *Burke I* and *Burke II*,
18 respondents argue they may not now appeal the ordinances that were adopted by the county
19 on remand in strict accordance with LUBA's decisions in those appeals.

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[7]ORS 197.015(10)(a) defines "land use decision" to include a decision that "concerns the adoption, amendment or application of" "[a] comprehensive plan provision" or "[a] land use regulation."

[8]ORS 197.015(10)(b)(A) provides that land use decisions do not include decisions "[w]hich [are] made under land use standards which do not require interpretation or the exercise of policy or legal judgment."

[9]Petitioner Brewer intervened on the side of respondent in *Burke I*, but withdrew from those appeals before the settlement agreement was entered.

Respondents go on to argue that the above result is required to ensure that the mediated settlement of appeals that ORS 197.860 contemplates is not frustrated. *See* n 2. Respondents argue:

> "[P]etitioners in the instant appeals attack the legislatively endorsed outcome of the mediation by appealing the natural and foreseeable result of that mediation. With ORS 197.860, the legislature granted to all parties, including counties, the right and power to reach mediated resolutions of land use disputes. The legislature did not limit those outcomes in any way. The parties are free to negotiate and manifest any results [that] please them. Further, the legislature did not limit LUBA's authority to give the local government specific instructions for a final decision on remand. In fact, this grant of power is essential to ensure that mediated decisions are unassailable upon implementation. Otherwise, the grant of power to mediate a given result is meaningless, as it would be here if these appeals are not dismissed." Motion to Dismiss 7.

We believe respondents seriously overstate the power and authority that ORS 197.860 grants parties in a land use appeal to agree privately to "any results [that] please them." Respondents also overstate the legal effect of our decisions in *Burke I* and *Burke II*.

Potential parties in *Burke I* and *Burke II* could reasonably foresee that those appeals might lead to the challenged ordinances being affirmed, reversed or remanded, in whole or in part. Potential parties could foresee that those results might obtain through a LUBA decision on the merits or through a stipulated settlement among the parties. However, we do not believe such potential parties can reasonably be held to foresee that the county would be ordered by LUBA to adopt different ordinances without observing any procedural requirements, including any right of public participation, that are mandated by state or local law to adopt new or amended comprehensive plans and land use regulations. Neither do we agree that our decisions in *Burke I* and *Burke II* ordered the county not to follow any procedural requirements that apply when the county adopts ordinances such as the ones that are at issue here. At most, our decisions in *Burke I* and *Burke II* are silent as to whether the county must follow any required local or statutory procedures in adopting the amended ordinances.

The parties in this appeal appear to agree that the stipulation required that the county adopt the agreed-to ordinances without change, even if legal issues were raised concerning those ordinances in the proceedings following our remand. We express no view here on whether we agree with that understanding of the stipulation. However, even if the parties are correct, we do not believe the parties' decision to tie the county's hands in its proceedings on remand means that persons seeking to raise issues concerning those new and amended ordinances may not raise them in this consolidated appeal. If the parties in *Burke I* and *Burke II* wished to ensure that the new and amended ordinances would be adopted by the county without change and would not be appealed to LUBA, we see no reason why they could not have been adopted first. Had the parties proceeded in that manner, the appeals challenging the prior ordinances could have been dismissed if there were no appeals filed challenging the new and amended ordinances.[10]

Respondents are certainly correct that allowing persons who were not parties in *Burke I* and *Burke II* to participate in the proceedings on remand introduces the possibility that the mediated settlement will be upset. That possibility introduces an element of uncertainty that would not be present under respondents' view of ORS 197.860. However, the certainty that is achieved under respondents' view of ORS 197.860 comes at the expense of the persons who will be affected by the new ordinances in ways that they would not have been affected by the initial ordinances. Under respondents' view of ORS 197.860, the only way such persons could be sure to protect their rights would be to join in every LUBA appeal of a county land use decision. Otherwise, the parties might mediate and stipulate to county adoption of a quite different decision that pleases them.[11] If the legislature intended to

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[10]If appeals of one or more of the new and amended ordinances had been filed, the parties would have had the option of withdrawing the new and amended ordinances. ORS 197.830(13)(b). In that way the parties to the mediation would retain the option of proceeding with any required review on the merits of either the prior ordinances or the new and amended ordinances.

[11]For example, under respondents' reading of ORS 197.860, the successful applicant for rezoning and a conditional use permit for a quarry in location X, on appeal to LUBA, might reach agreement with the quarry

1 extend such extraordinary power to private litigants to agree to enactment of land use
2 decisions without first observing any relevant statutory notice and hearing requirements, we
3 do not see that intent expressed in the words of ORS 197.860.

4 Our decisions in *Burke I* and *Burke II* simply directed the county to do what all the
5 parties in those appeals agreed that LUBA should direct the county to do. The remand was
6 based solely on the parties' stipulation, and we did not review the challenged exception and
7 nonresource land ordinances on their merits. More importantly for purposes of the motion to
8 dismiss, we did not review the new and amended ordinances that the parties agreed the
9 county should adopt.[12] Petitioners in this appeal may have waived their right to raise any
10 issues that could have been raised in *Burke I* and *Burke II*.[13] *See Beck v. City of Tillamook*,
11 313 Or 148, 153 n 2, 831 P2d 678 (1992) (parties and persons who could have intervened as
12 parties but fail to do so, waive their right to raise issues that were resolved or could have
13 been raised in a prior appeal). However, to the extent the amended ordinances present issues
14 that could not have been raised in *Burke I* and *Burke II*, those issues have not been waived by
15 petitioners' failure to intervene as parties in *Burke I* and *Burke II*.

16 The exception to the statutory definition of land use decision that is provided by ORS
17 197.015(10)(b)(A) does not apply to the ordinances challenged in this consolidated appeal.

18 **B. Finality**

19 Land use decisions, as defined by ORS 197.015(10)(a), must be "final" decisions.
20 *Hemstreet v. Seaside Improvement Comm.*, 16 Or LUBA 748, 752, *aff'd* 93 Or App 73, 761

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opponents in location X and the local government that approved the rezoning and conditional use permit to abandon that location in exchange for rezoning and a conditional use permit to operate a quarry at location Y, many miles away. Following respondents' reasoning, residents in location Y who did not intervene and participate in the LUBA appeal concerning location X would not be able to appeal the rezoning and conditional use permit at location Y.

[12]Because we never reviewed the new and amended ordinances on their merits, respondents' positions that allowing this appeal to go forward will constitute a collateral attack on our decisions in *Burke I* and *Burke II* and require that we directly review our prior decisions are without merit.

[13]For example, to the extent the challenged amendments do not change the previously-adopted exception and nonresource land ordinances, any arguments concerning that unchanged language have likely been waived under *Beck*.

P2d 533 (1988); *CBH Company v. City of Tualatin*, 16 Or LUBA 399, 405 n 7 (1988). Respondents suggest that this appeal should be dismissed because any discretion that the county exercised in this matter was exercised at the time the county approved the stipulation, and the time to appeal the stipulation expired without any appeal being filed challenging the stipulation.

The stipulation, on its face, is not the county's final decision in this matter. The parties specifically agree in the stipulation to seek a decision from LUBA remanding the original ordinances and ordering the county to adopt the agreed-to new and amended ordinances. In the stipulation, the parties specifically agree that they will not appeal those new and amended ordinances, provided the new and amended ordinances that the county adopts are not materially different from the amended ordinances that are attached to the stipulation. Record 92, 95. An agreement not to appeal would not be necessary if the stipulation was the final appealable decision in this matter. The stipulation and the proposed amended ordinances that implement that stipulation in part did not become final for purposes of review by this Board until the amended ordinances were adopted by the county.

C. Standing

To have standing to appeal a land use decision to LUBA, a petitioner must have "[a]ppeared before the local government * * * orally or in writing." ORS 197.830(2)(b). Respondents contend that petitioners lack standing to bring this appeal because the written appearances they made during the hearing that the county held before adopting the disputed ordinances on remand should not be viewed as sufficient to constitute an appearance under ORS 197.830(2)(b).

Respondents' argument relies on their theory that all the county's proceedings following our decisions in *Burke I* and *Burke II* were ministerial. We have already rejected that theory. Petitioners' attorney submitted letters to the county opposing the new and

amended ordinances. Those letters suffice to constitute an appearance under ORS 197.830(2)(b).

D. Conclusion

For the reasons explained above, respondents' motion to dismiss is denied.

RECORD OBJECTION

Petitioners object to the supplemental record filed by the county in this appeal. The supplemental record indicates "[t]he record from LUBA Nos. 98-220, 98-221, 98-222, 98-223, 98-224, 98-225, 99-037, 99-038, 99-039, 99-040 and 99-041 is included within the record for these appeals." Supplemental Record 1. Petitioners do not object to incorporating the records from *Burke I* and *Burke II* as part of the record in this appeal, but petitioners do object to the county's failure to include copies of those records in the copy of the supplemental record that was served on petitioners.

Our rules specifically provide that the record from a prior appeal may be incorporated into the record of a subsequent appeal. OAR 661-010-0025(4)(b). That rule is not entirely clear whether the prior record may be incorporated by reference or whether the prior record must be physically included in the record in the subsequent appeal. We now clarify that a record from a prior appeal may be incorporated by reference in the record of a subsequent appeal under OAR 661-010-0025(4)(b). In that circumstance, respondent need not serve a copy of the record of the prior appeal on any party who was served with a copy of the record in the prior appeal pursuant to OAR 661-010-0025(3).[14] However, where the parties in the two appeals are not identical, any party who is entitled to be served with a copy of the record in the subsequent appeal under OAR 661-010-0025(3) must also be served with a copy of the incorporated record from the prior appeal if that party was not previously served with a copy of the record in the prior appeal.

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[14]Under OAR 661-010-0025(3), the county is required to serve a copy of the record on petitioners. The county is not required to serve a copy of the record on intervenors unless intervenors pay the cost of copying the record.

1 With one exception, petitioners in this appeal were not parties in the prior appeal.[15]
2 Respondent was not required to serve a copy of the records in *Burke I* and *Burke II* on any of
3 the petitioners in this appeal, and, as far as we can tell, it did not do so. Because the county
4 has incorporated the records from *Burke I* and *Burke II* into the record in this appeal by
5 reference, the county must serve a copy of those records on petitioners in this appeal.

6 The county shall have 21 days from the date of this order to serve petitioners with a
7 copies of the records in *Burke I* and *Burke II*. The Board will issue an order settling the
8 record when petitioners have been served with copies of those records.

9 Dated this 21st day of December, 2000.
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15 ______________________________
16 Michael A. Holstun
17 Board Member

[15]As previously noted, petitioner Brewer in this appeal did intervene on the side of respondent in *Burke I*, but he did not intervene in *Burke II*. As an intervenor in *Burke I*, he was not entitled to receive a copy of the record in *Burke I* unless he paid the cost of copying the record, and we understand petitioners to take the position that petitioner Brewer did not receive a copy of the record in *Burke I*.