

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioner appeals a "minute order" of the Washington
4 County Board of Commissioners. The order denies a request for
5 reconsideration of an August 16, 1983 action denying
6 petitioner's application for a residential subdivision approval.

7 FACTS

8 The facts about the proceeding before the county are in
9 dispute. From the record, however, it is clear that an
10 application was made in February, 1983 for a subdivision
11 approval on land in Washington County. In May of 1983, the
12 Washington County hearings officer entered an order denying the
13 application. Petitioner filed a notice of review appealing the
14 hearings officer's decision to the Washington County Board of
15 Commissioners.

16 On August 16, 1983, the board of commissioners affirmed the
17 denial of the hearings officer. Petitioner then filed a
18 petition for rehearing which was denied on September 17, 1983.
19 This appeal followed.

20 PROCEEDINGS BEFORE LUBA

21 The notice of intent to appeal filed herein included a
22 statement that it was filed to preserve petitioner's right of
23 appeal. Petitioner also said a complaint was filed in Circuit
24 Court asking for damages for an uncompensated taking of
25 property. The notice further opined that LUBA lacked
26 jurisdiction to hear the case. Petitioner concluded with a

1 request that LUBA confirm this view.

2 These comments generated a motion to dismiss on the grounds
3 the notice of intent to appeal was a sham and should be
4 considered withdrawn. The Board denied the motion in an order
5 issued November 30, 1983. Our denial was based upon our view
6 the notice of intent to appeal must contain limited information
7 about the decision and the parties. No requirement exists that
8 the notice state a claim or a theory upon which the Board might
9 base a remand or a reversal of the decision. See OAR
10 661-10-015 and Order on Motion to Dismiss of November 30,
11 1983. The Board treated the comments on jurisdiction as
12 surplusage. We added, however, the following:

13 "In the petition for review, the petitioner may make a
14 claim for relief which is beyond the Board's power to
15 consider. In that case, the Board will have to deal
16 with the issue of its authority or the controversy.
17 It merits notice that if the petition itself claims
18 that the Board lacks jurisdiction over a given claim,
19 that claim will be considered by LUBA as withdrawn.
20 Brady v. Douglas County, 7 Or LUBA 251 (1983)."

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Petitioner filed a petition for review which did not heed
our warning. The single assignment of error is as follows:

20 "Respondent's refusal to grant Petitioner's
21 subdivision request due to Petitioner's refusal to
22 grant a 50-foot right-of-way for the light rail transit
23 [sic] route deprives Petitioner of all economically
24 feasible use of the property and constitutes a taking
25 for a public purpose in violation of Petitioner's
26 rights under the Fifth and Fourteenth Amendments to
27 the United States Constitution and in violation of 42
28 USC § 1983. Petitioner must be compensated for this
29 taking." Petition for Review at 6.

30 In the discussion, petitioner does not ask for a reversal

1 or remand of the county's decision. Instead, petitioner
2 explains how it is that it believes its property has been taken
3 and insists

4 "LUBA lacks jurisdiction to decide a taking question
5 in which the requested relief is the payment of
6 damages. Pursuant to Chapter 827, Oregon Laws 198,
7 [sic] LUBA may only affirm, reverse or remand a land
use decision. The courts retain jurisdiction to grant
an award of damages, which is the relief Petitioner is
seeking." Petition for Review at 7-8.

8 Petitioner closes with a request "that LUBA determine that it
9 lacks jurisdiction over this claim."

10 Respondent County argues our Brady v. Douglas County, 7 Or
11 LUBA 251 (1983) controls this case. In Brady, the Board
12 considered an assignment of error to be withdrawn where the
13 petitioner stated that LUBA "probably" does not have
14 jurisdiction over taking questions. Brady, 7 Or LUBA at 263.
15 Respondent adds it is entitled to rely upon the "explicit and
16 unambiguous Order previously issued in this case." Respondent
17 is referring to our order of November 30, 1983. Respondent
18 says the Board must dismiss the case on the grounds that the
19 petitioner has withdrawn his assignment of error. Respondent
20 advised the situation here is as if petitioner failed to file a
21 petition for review. According to respondent, no case or
22 controversy exists. Without a case or controversy, there is
23 nothing for the Board to do but dismiss the matter. See In Re
24 Or Laws 1967, ch 364, §4 Ballot Title, 247 Or 488, 431 P2d 1
25 (1967); Brown v. Oregon State Bar, 293 Or 446, 648 P2d 1289
26

1 (1982).

2 The county goes on to argue that LUBA does have
3 jurisdiction to consider taking claims, notwithstanding the
4 fact that it may not be able to award damages. Respondent
5 cites ORS 197.835(8) which gives the Board authority to review
6 a land use decision to determine whether the decisionmaker has
7 made an unconstitutional decision. See also, Oregon Electric
8 Sign Association Inc. v. Beaverton, 60 Or App 518, 654 P2d 1149
9 (1982).

10 Both sides cite Brady, supra, to support their views.
11 Petitioner argues that Brady holds we lack jurisdiction to
12 consider takings claims. In Brady, however, the matter was
13 clouded by a statement that the Board considered the taking
14 claim to have been withdrawn.

15 "On the basis of petitioners' memoranda of law
16 asserting that LUBA probably has no jurisdiction over
17 takings questions, petitioners' ninth and tenth
18 assignments of error are considered withdrawn. There
19 being no controversy or adversary position on these
20 assignments, they are dismissed." Brady, 7 Or LUBA at
21 263.

22 Notwithstanding this apparent dismissal of petitioners'
23 claims, LUBA went on to consider the claims:

24 "Petitioners' admissions notwithstanding, it should be
25 noted that LUBA probably does not have jurisdiction
26 over takings claims anyway. LUBA's jurisdictional
statute refers only to decisions made by a local
government that can be reversed or remanded. Takings
claims require a determination of damages. LUBA
cannot grant either damages or injunctive relief.

"Even though takings issues are colored with land use
overtones, takings determinations have historically

1 dismiss here.

2 In this case, the subject matter of the appeal is clearly
3 within the Board's jurisdiction. The decision is the denial of
4 a subdivision which is a land use decision under ORS
5 197.015(10). Also, LUBA has the power to grant relief should
6 petitioner request a remand or reversal of the decision. ORS
7 197.835(8). Further, LUBA is empowered to consider claims of
8 constitutional validity of the decision. ORS
9 197.835(8)(a)(E). Petitioner has presented a claim which,
10 though founded in the constitution, demands an act the Board
11 lacks power to perform, the grant of money damages. In both
12 Brady and Martin v. Lake Oswego, ___ Or LUBA ___ (LUBA No.
13 83-016, May 24, 1983) the Board concluded it did not have the
14 power to review a similar taking claim because the Board's
15 power to review a decision for constitutional error is
16 restricted to those situations in which the decisionmaker has
17 the authority to act. We noted the local government is not
18 authorized to make an award of damages for the taking of
19 private property or to consider a claim that its action
20 constitutes a taking. Proceedings to resolve such matters are
21 controlled by ORS Chapters 223, 281 and 35.

22 Respondent invites us to overrule Brady and Martin to the
23 extent we could consider the taking claim as a separate issue
24 from an award of damages. This approach has merit, and there
25 may indeed be some support in case law for the Board's
26 jurisdiction over such a claim. See Oregon Electric Sign

1 Association, Inc. v. Beaverton, supra, and City of Pendleton v.
2 Kerns, 294 Or 126, 653 P2d 992 (1982). In this case, however,
3 petitioner has insisted on stating the assignment of error in
4 such a fashion so as to take the case beyond our power to grant
5 any relief. As noted above, petitioner is not asking for
6 reversal or remand but is asking for money damages. Petitioner
7 has consistently stated that it is not seeking a review of the
8 Washington County decision "but instead expressly seeks the
9 sole remedy of payment of damages." We do not believe we are
10 obliged to redraft a petition for review so as to give us
11 something to review. That is, we do not believe we are under
12 an obligation to separate petitioner's claim in a manner
13 contrary to his stated position. We conclude, therefore, that
14 because we are unable to grant the relief requested, the case
15 must be dismissed.

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