BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MULTNOMAH COUNTY,
Petitioner,

vs.

MULTNOMAH COUNTY,
Respondent,

and

JAMES J. ZOLLNER,
Intervenor-Respondent.

LUBA No. 2003-175

FINAL OPINION
AND ORDER

Appeal from Multnomah County.

Sandra N. Duffy, Assistant County Attorney, Portland, filed the petition for review and argued on behalf of petitioner.

No appearance by respondent.

Andrew H. Stamp, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Martin Bischoff Templeton Langslet and Hoffman LLP.

BASSHAM, Board Chair; BRIGGS, Board Member; HOLSTUN, Board Member, participated in the decision.

DISMISSED 02/04/2004

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

1 Opinion by Bassham.

2 **NATURE OF THE DECISION**

3 Petitioner (the county) appeals a county hearings officer's decision approving a partition and
4 single-family dwelling.

5 **MOTION TO FILE REPLY BRIEF**

6 Pursuant to a ruling of the Board at oral argument, the county was given leave to file a reply
7 brief up to 20 pages in length by January 12, 2004, later extended by one day, to respond to issues
8 raised in the response brief regarding standing and the Board's jurisdiction. The county filed a reply
9 brief January 13, 2004, that conforms to our ruling, and it is allowed.

10 **MOTION TO TAKE EVIDENCE**

11 On January 13, 2004, the county filed a motion to take evidence under OAR 661-010-
12 0045, asking the Board to consider an affidavit of the county planning director, and portions of the
13 county code, the county charter, two county resolutions, and two recently passed county
14 ordinances.[1] The proffered documents relate to the issue of standing raised in the response brief.
15 There is no opposition to the motion, and it is allowed.

16 **MOTION TO FILE SURREBUTTAL BRIEF**

17 On February 2, 2003, intervenor-respondent (intervenor) filed a motion allow a surrebuttal
18 brief, accompanied by the proposed brief. Intervenor argues that it was not until the reply brief,
19 submitted some time after oral argument as allowed by the Board, that petitioner made an effort to
20 establish that petitioner had standing to bring this appeal. Under these unusual circumstances,
21 intervenor argues, it is appropriate to allow surrebuttal.

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[1] OAR 661-010-0045(1) allows the Board to "take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning * * * standing[.]"

1 Although the proposed surrebuttal brief offers little that is new to the parties' dispute over
2 standing, we agree that under the unusual circumstances of this case surrebuttal is appropriate. The
3 surrebuttal brief is allowed.

4 **FACTS**

5 The subject property is a 10.13-acre parcel that is zoned Rural Residential (RR) five-acre
6 minimum, and is developed with an existing dwelling. Intervenor filed an application with the county
7 to partition the property into two 5.06-acre parcels and build a single-family dwelling on one of the
8 new parcels.

9 On July 30, 2003, the county planning director administratively approved the partition, as a
10 permit decision without a hearing under ORS 215.416(11) and as a "Type II" decision under
11 Multnomah County Code (MCC) Chapter 37. Intervenor appealed the planning director's decision
12 to the county hearings officer, challenging several conditions of approval related to transportation
13 improvements.

14 The hearings officer held a *de novo* hearing pursuant to ORS 215.416(11) and code
15 procedures at MCC 37.0610. Intervenor, intervenor's attorney, and others in support of the
16 application testified. No person appeared in opposition to the application. Two county planning
17 staff members presented a staff report in which they defended the planning director's decision to
18 impose the disputed conditions.

19 Under MCC 37.0540(B), the hearings officer's decision on a Type II permit application is
20 the county's final decision, appealable to LUBA.[2] On October 15, 2003, the hearings officer

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[2] MCC 37.0540 provides:

The following County entity or official shall decide the following types of applications:

"(A) Type I Decisions. The Planning Director shall render all Type I decisions. The Planning Director's decision is the County's final decision on a Type I application.

"(B) Type II Decisions. The Planning Director shall render the initial decision on all Type II permit applications. The Planning Director's decision is the County's final decision unless appealed to the Hearings Officer. The Hearing Officer decision on such an

1 issued a final decision on the application and appeal. In relevant part, the hearings officer concluded
2 that (1) the planning director did not have authority to require off-site improvements as a condition
3 of approval, and (2) it would be unconstitutional to require on-site frontage dedications and
4 improvements. The hearings officer approved the partition without any road dedication or
5 improvement conditions.

6 On October 31, 2003, the county planning director authorized county counsel to appeal the
7 hearings officer's decision to LUBA, on behalf of the county.[3] This appeal followed.

8 **STANDING**

9 This case presents a novel question: can a local government appeal its own land use
10 decision to LUBA? The county relies on MCC 37.0640(G) for express authority to do so.[4] In the
11 response brief, intervenor argues that LUBA lacks jurisdiction over this appeal because petitioner

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appeal is the County's final decision on a Type II application and is appealable to [LUBA].

"(C) Type III Decisions. The Hearings Officer shall render all Type III decisions. The Hearings Officer decision is the County's final decision on a Type III application and is appealable to [LUBA].

"(D) Type IV Decisions. The Planning Commission shall render the initial decision on all Type IV permit applications. If the Planning Commission denies the Type IV application, that decision is final unless appealed to the Board of Commissioners in accordance with MCC 37.0640. If the Planning Commission recommends approval of the application, that recommendation is forwarded to the Board of Commissioners. The Board's decision is the County's final decision on a Type IV application and is appealable to [LUBA].

"(E) PC Actions. The Planning Commission shall review all PC actions. If the Planning Commission adopts by majority vote of the entire Planning Commission a resolution to recommend an action, the Planning Commission refers the resolution to the Board for final action. The Board's decision is the County's final decision on a PC application and is appealable to [LUBA]."

[3] The caption on the notice to intent to appeal indicated that intervenor and intervenor's consultant are the "respondents." In an order dated November 21, 2003, we corrected the caption to reflect Multnomah County as the respondent. That same order granted intervenor's motion to intervene on the side of the respondent.

[4] MCC 37.0640(G) provides::

"The County has the standing to appeal to LUBA any Hearings Officer decision. The County also has standing to intervene in any appeal to LUBA from a County Hearings Officer decision."

1 lacks standing to appeal. Specifically, intervenor argues that (1) the county did not "appear" before
2 the hearings officer within the meaning of ORS 197.830(2)(a);[5] (2) the county is not "aggrieved" by
3 its own decision, within the meaning of ORS 215.422(2);[6] and (3) there is a lack of adversity
4 between the petitioner and the respondent in this case. According to intervenor, standing to appeal
5 to LUBA is a matter of state law, and a county code provision, such as MCC 37.0640(G), that
6 purports to alter or add to statutory standing requirements may not provide the county standing to
7 appeal a land use decision to LUBA where the county would not have standing under
8 ORS 197.830(2).

9 The county responds that nothing in the statutes governing LUBA's review expressly
10 prohibits a local government from delegating final decision-making authority to a hearings officer, but
11 reserving the right, and establishing standing, to appeal that hearings officer's decision to LUBA, as

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[5] ORS 197.830(2) provides:

> "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
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> "(b) Appeared before the local government, special district or state agency orally or in writing."

[6] ORS 215.422 provides, in relevant part:

> "(1) (a) A party aggrieved by the action of a hearings officer or other decision-making authority may appeal the action to the planning commission or county governing body, or both, however the governing body prescribes. The appellate authority on its own motion may review the action. The procedure and type of hearing for such an appeal or review shall be prescribed by the governing body * * *
>
> (b) Notwithstanding paragraph (a) of this subsection, the governing body may provide that the decision of a hearings officer or other decision-making authority is the final determination of the county.
>
> "* * * * *
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> "(2) A party aggrieved by the final determination may have the determination reviewed in the manner provided in ORS 197.830 to 197.845."

1 the county has done in adopting MCC 37.0640(G). The only pertinent statutory requirement for
2 appeal to LUBA, the county argues, is that the petitioner "appear" before the local government
3 "orally or in writing." The county contends that it "appeared" before the local government when
4 county planning staff presented oral and written testimony on behalf of the county during the
5 proceedings before the hearings officer. In that appearance, the county argues, staff presented the
6 county's "position" with respect to the disputed conditions of approval. According to the county, it
7 then became "aggrieved" by the hearings officer's decision within the meaning of ORS 215.422(2),
8 and thus entitled to file an appeal to LUBA. With respect to adversity, the county argues that it has
9 two conflicting "positions" in this case, one represented by the hearings officer's decision and one
10 represented by the planning staff.

11 As intervenor points out, LUBA is a creature of statute, and as relevant here our jurisdiction
12 can be invoked only by persons that satisfy the standing requirements of ORS 197.830(2).[7] In
13 adopting and applying MCC 37.0640(G), the county cannot enlarge or diminish the scope of
14 standing to appeal to LUBA as provided by ORS 197.830(2). We agree with intervenor that, in
15 adopting the standing requirements at ORS 197.830(2) the legislature did not contemplate that a
16 local government could "appear" before itself and thereby satisfy the statutory requirements to
17 appeal its own decision to LUBA. No cases are cited to us that recognize participation by local
18 government employees in the proceedings before the final decision maker as an "appearance" on
19 behalf of the local government, for purposes of ORS 197.830(2) or the similar statute at
20 ORS 197.830(7).[8] Indeed, to the extent reported cases have a bearing on that question, they are

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[7] ORS 197.015(18) defines the term "person" as used in ORS chapter 197 to include a "governmental subdivision." The county is clearly a "person" within that broad definition. There is no question that the county is a "person" who could "appear" in another local government's land use proceedings and thereby gain standing to appeal that local government's decision to LUBA under ORS 197.830(2). However, as explained below, we do not believe that the legislature intended ORS 197.830(2) to allow a local government to appear before itself and gain standing to appeal its own land use decision.

[8] ORS 197.830(7) provides, in relevant part:

1 to the contrary. *See Roe v. City of Union*, __ Or LUBA __ (LUBA No. 2003-130, Order,
2 October 8, 2003) slip op 2 (dissenting member of final decision making body has not "appeared"
3 before the local government for purposes of intervention under ORS 197.830(7)); *Cecil v. City of*
4 *Jacksonville*, 19 Or LUBA 446, 449 (1990), *aff'd* 104 Or App 526, 800 P2d 1090, *rev den*
5 311 Or 166 (1991) (participation of planning commission chair in planning commission decision did
6 not constitute "appearance" before the local government for purposes of intervening in appeal of city
7 council decision reversing planning commission decision).[9]

8 The county is correct that nothing in the statutes governing appeal to LUBA *expressly*
9 prohibits a local government from appealing its own decision. However, that does not mean that a
10 code provision such as MCC 37.0640(G) authorizing such an appeal is consistent with the statutes
11 governing appeal to LUBA. In our view, the statutory scheme as a whole does not contemplate
12 that a local government can "appear" before itself and thus satisfy the ORS 197.830(2) standing
13 requirement to appeal the local government's final decision to LUBA. It follows that, in adopting
14 MCC 37.0640(G) to grant the county "standing" to appeal its own decisions, the county has
15 impermissibly altered or expanded statutory requirements for appeal to LUBA.

"(7)(a) Within 21 days after a notice of intent to appeal has been filed with the board under subsection (1) of this section, any person may intervene in and be made a party to the review proceeding upon a showing of compliance with [ORS 197.830(2)].

"(b) Notwithstanding the provisions of paragraph (a) of this subsection, persons who may intervene in and be made a party to the review proceedings, as set forth in subsection (1) of this section, are:

"(A) The applicant who initiated the action before the local government, special district or state agency; or

"(B) Persons who appeared before the local government, special district or state agency, orally or in writing."

[9] S*ee also Grey v. Clatsop County*, 22 Or LUBA 270, 274-75 (1991) (appearance before final decision maker by a consultant hired by the county was sufficient to allow the consultant to assert standing under ORS 197.830(2) to appeal the county's decision on his own behalf). At most, *Grey* suggests that local government staff members could "appear" on their own behalf and file an appeal on their own behalf to LUBA; it does not support the notion that a staff presentation constitutes an "appearance" on behalf of the local government within the meaning of ORS 197.830(2).

1 As intervenor points out, there are several statutes governing LUBA's review that clearly
2 contemplate that the petitioner and the respondent will be different, and at least nominally adverse
3 parties.[10] Intervenor contends that such statutes will not function as the legislature intended if the
4 petitioner and respondent can be the same party. Intervenor cites in particular to
5 ORS 197.830(13)(b), which allows the local government to withdraw its decision for
6 reconsideration at any time subsequent to the filing of the notice of intent to appeal and prior to the
7 date set for filing the record.[11] That statute contemplates that the local government will make an
8 independent judgment whether the challenged decision should be reconsidered, as an alternative to
9 proceeding before LUBA to resolve the petitioner's challenges to that decision. Intervenor argues,
10 and we agree, that the statute is undermined to a considerable extent if the petitioner and respondent
11 can be the same party, as it would allow what are essentially sham appeals to LUBA involving non-
12 adverse "parties," contrary to the legislative policy that "time is of the essence in reaching final
13 decisions in matters involving land use" and that land use decisions "be made consistently with sound
14 principles governing judicial review." ORS 197.805.[12] The possibility is more than hypothetical in

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[10] *See, e.g.,* ORS 197.830(9) (requiring petitioner to serve the local government with the notice of intent to appeal); ORS 197.830(10)(b) (requiring LUBA to notify "the petitioner and the respondent of their option to enter into mediation"); ORS 197.830(15)(a) (LUBA may award to a prevailing local government the cost of preparing the record, taken from the deposit for costs paid by petitioner).

[11] ORS 197.830(13)(b) provides:

> "At any time subsequent to the filing of a notice of intent and prior to the date set for filing the record, the local government or state agency may withdraw its decision for purposes of reconsideration. If a local government or state agency withdraws an order for purposes of reconsideration, it shall, within such time as the board may allow, affirm, modify or reverse its decision. If the petitioner is dissatisfied with the local government or agency action after withdrawal for purposes of reconsideration, the petitioner may refile the notice of intent and the review shall proceed upon the revised order. An amended notice of intent shall not be required if the local government or state agency, on reconsideration, affirms the order or modifies the order with only minor changes."

[12] ORS 197.805 provides:

> "It is the policy of the Legislative Assembly that time is of the essence in reaching final decisions in matters involving land use and that those decisions be made consistently with

the present case. The county states that, "in hindsight," it should have sought reconsideration of the hearings officer's decision prior to filing the record. Reply Brief 9.

We do not intend to foreclose the possibility that the county could adopt a code provision consistent with ORS 197.830(2) that would allow a county department or other county subdivision or employee to "appear" as a party before the county decision maker and establish standing for that department or entity to appeal the county's final decision to LUBA. As the county points out, a county department may sometimes be the applicant before the hearings officer or county decision maker. As an applicant, a local government department may intervene in an appeal to LUBA. *Choban v. Washington County*, 20 Or LUBA 508, 510 (1990) (allowing the applicant county planning and transportation department to intervene on the side of respondent under *former* ORS 197.830(6)). It is noteworthy that in *Choban* the county appointed special counsel for the department both during the local proceedings and before LUBA, and in all other pertinent ways the department was treated as a separate entity from the county. By extension of the reasoning in *Choban*, we see no reason why a county could not explicitly authorize a county department or another county entity to "appear" as a party during the proceedings before the county decision maker within the meaning of ORS 197.830(2), and further authorize that department or entity to appeal the county's decision to LUBA, as long as the petitioner and the county were in a meaningful sense different and at least nominally adverse parties.

However, that is not the case here. MCC 37.0640(G) authorizes "the county" to appeal final county land use decisions, and in fact "the county" filed the notice of intent to appeal and is both the petitioner and the respondent in this case. For the reasons explained above, that broad grant of standing for the "the county" to appeal its own decisions to LUBA is not consistent with the statutes governing standing before LUBA. Because the county does not have standing under ORS 197.830(2), this appeal must be dismissed.

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sound principles governing judicial review. It is the intent of the Legislative Assembly in enacting ORS 197.805 to 197.855 to accomplish these objectives."

1 The county's appeal is dismissed.