

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4
5 JIM PLISKA, PLISKA INVESTMENTS, LLC,
6 and SPACE AGE FUELS, INC.,
7 *Petitioners,*
8

9 vs.

10 UMATILLA COUNTY,
11 *Respondent,*
12

13 and

14
15 FLYING J, INC.,
16 *Intervenor-Respondent.*
17

18 LUBA No. 2010-016
19

20 FINAL OPINION
21 AND ORDER
22

23
24 Appeal from Umatilla County.
25

26 Jeffrey L. Kleinman, Portland, filed the petition for review and argued on behalf of
27 petitioners.
28

29 Douglas R. Olsen, Umatilla County Counsel, Pendleton, filed a joint response brief
30 on behalf of respondent. With him on the brief were Roger A. Alfred, Michael C. Robinson
31 and Perkins Coie LLP.
32

33 Roger A. Alfred, Portland, filed a joint response brief on behalf of intervenor-
34 respondent. With him on the brief were Douglas R. Olsen, Michael C. Robinson and Perkins
35 Coie LLP.
36

37 BASSHAM, Board Member; HOLSTUN, Board Chair; RYAN, Board Member,
38 participated in the decision.
39

40 AFFIRMED

07/08/2010

41
42 You are entitled to judicial review of this Order. Judicial review is governed by the
43 provisions of ORS 197.850.

2 **NATURE OF THE DECISION**

3 LUBA remanded the county's initial decision granting conditional use approval for
4 intervenor's proposed travel plaza. *Western Land & Cattle, Inc. v. Umatilla County*, 58 Or
5 LUBA 295, *aff'd* 230 Or App 202, 214 P3d 68 (2009). In this appeal, petitioners challenge
6 the county's decision following that remand.

7 **MOTION TO INTERVENE**

8 Flying J, Inc. (intervenor), the applicant below, moves to intervene on the side of
9 respondent. There is no opposition to the motion, and it is allowed.

10 **FACTS**

11 In *Western Land & Cattle, Inc.*, LUBA remanded the county's first decision
12 approving a conditional use permit for a travel plaza, in part for the county to clarify an issue
13 regarding the traffic impact analysis (TIA) and to address alleged traffic safety issues.
14 Petitioner Pliska Investments, LLC was a named party in that appeal.

15 The main issue in the present appeal is whether the county committed procedural
16 error on remand. Accordingly, we set out in some detail the sequence of events on remand.
17 On October 29, 2009, intervenor requested that the county take post-remand action with 90
18 days, pursuant to ORS 215.435, and indicated that it intended to submit new evidence on the
19 remand issues. On December 18, 2009, the county scheduled a remand hearing for January
20 7, 2010, and provided notice of that hearing to the attorney for Pliska Investments, LLC.
21 Record 222. On December 22, 2009, intervenor submitted (1) a revised TIA dated
22 November 11, 2009, (2) a revised site plan, and (3) proposed findings on the remand issues.
23 County staff prepared a staff report on December 31, 2009.

24 Shortly before the hearing on January 7, 2010, a representative of one or more of the
25 petitioners in this appeal hand-delivered to the county a letter dated January 6, 2010, on the

1 letterhead of petitioner Space Age Fuels, signed by petitioner Jim Pliska. The letter states in
2 relevant part:

3 “I have just received a notice of your proposed hearing on this matter
4 scheduled for January 7, 2010 * * * which leaves me with insufficient time to
5 OBTAIN A COPY OF THE TIA and to adequately evaluate and respond
6 appropriately. I respectfully request that you continue this matter until your
7 next scheduled Board meeting and or the record be left open for 14 days so
8 that I can study the applicants traffic study, of which is quite complex, and
9 can submit additional written evidence pursuant to ORS 197.763(6)(a). I
10 further request additional time so that I can seek professional input from
11 another traffic engineer.

12 “* * * * *

13 “Sincerely,

14 “Jim Pliska

15 “Space Age Fuels.” Record 42.

16 The county board of commissioners opened the hearing and accepted the staff report
17 and eight attachments to the staff report, including the revised TIA, revised site plan, and
18 proposed findings. The commissioners then turned to the January 6, 2010 letter hand-
19 delivered by petitioners’ representative. Intervenor’s counsel objected to the last paragraph
20 of the letter, which is omitted in the quote above, as irrelevant to the remand issues. Record
21 34. It was moved and seconded to strike the last paragraph of the January 6, 2010 letter, and
22 enter the letter as modified into the record as Exhibit 9. *Id.*

23 The commissioners then considered petitioners’ request to continue the hearing or
24 hold the record open for additional written evidence, and after some discussion denied that
25 request.¹ Following that, the commissioners opened the hearing up for testimony, and

¹ The minutes of the January 7, 2010 hearing state, in relevant part:

“Chairman Doherty noted that the request of Exhibit #9 was that the hearing be continued, and if not continued, that the record be left open for 14 days to allow for additional evidence to be provided. He asked if Mr. Pliska was on the notice list. [Staff] replied that he was noticed and that the Affidavit of Mailing and notice list were available to confirm that. The notice was mailed December 18, 2009. Chairman Doherty noted that the letter was dated

1 intervenor’s attorney made additional comments in support of the commissioners’ action in
2 denying the requested continuance, noting that, among other things, “this is not the first
3 evidentiary hearing, and it is only the initial evidentiary hearing that an open record or
4 continuance request must be granted.” Record 35. There was no opposition testimony. The
5 commissioners then closed the hearing, deliberated, and voted to approve the application,
6 with direction to staff to prepare findings on the two remand issues.

7 On February 9, 2010, the commission chair signed the final findings and decision,
8 which include findings explaining why the county denied petitioner Pliska’s request for a
9 continuance or to keep the record open for 14 days. This appeal followed.

10 **STANDING**

11 Intervenor argues that petitioner Pliska Investments, LLC did not appear during the
12 remand proceedings, and therefore lacks standing to appeal to LUBA under ORS 197.830(2).
13 Further, intervenor contends that while petitioner Jim Pliska submitted a letter on behalf of
14 petitioner Space Age Fuels, Inc., Pliska did not appear in his *personal* capacity and therefore
15 does not have standing to appeal. Intervenors request that Pliska Investments, LLC and Jim
16 Pliska be dismissed from this appeal.

17 At oral argument, petitioners conceded that Pliska Investments, LLC made no
18 appearance during the remand proceeding, and did not offer any other basis for standing.
19 Accordingly, Pliska Investments, LLC is dismissed from this appeal. With respect to
20 petitioner Jim Pliska, petitioners argue that the January 6, 2010 letter signed by Jim Pliska
21 was submitted in his personal capacity, as well as on behalf of Space Age Fuels, Inc.

January 6, 2010, but does not advise the Board of any relevant facts from which the Board could make an informed decision as to why the [notice was not received by Mr. Pliska until January 6, 2010].

“It was Commissioner Givens’ inclination to deny the request to continue. Chairman Doherty agreed. Commissioner Givens moved to deny the request by Jim Pliska to continue the hearing and/or keep the record open for 14 days. Chairman Doherty seconded. Motion carried.” Record 34.

1 Absent local regulations that require participants to differentiate between individual
2 and representative standing, *see Friends of Douglas County v. Douglas County*, 39 Or LUBA
3 156 (2000), LUBA generally presumes that an appearance by an active member of an
4 organization on behalf of the organization also constitutes an individual appearance of that
5 member. *Terra v. City of Newport*, 24 Or LUBA 579, 584-85 (1992); *Rochlin v. City of*
6 *Portland*, 31 Or LUBA 509, 510-11 (1996). We believe a similar result should apply here.
7 Petitioner Pliska is apparently a principal or owner in petitioner Space Age Fuels, Inc., and
8 presumably shares the goals and interests of that corporation. Importantly, nothing in the
9 January 6, 2010 letter suggests that Pliska intended to appear solely on behalf of Space Age
10 Fuels, Inc. On the contrary, the January 6, 2010 letter is phrased entirely in the first person
11 singular. Further, the county clearly understood the letter to represent the individual views
12 of Jim Pliska, as the minutes and findings reflect. *See* Record 7 (findings addressing “Mr.
13 Pliska’s substantial rights to a full and fair hearing”). Accordingly, petitioner Jim Pliska has
14 standing to appeal this decision.

15 **ASSIGNMENT OF ERROR**

16 Petitioners contend that on remand the county violated a local code provision,
17 Umatilla County Development Code (UCDC) 152.772(F)(12), and committed procedural
18 error that prejudiced petitioners’ substantial rights.

19 UCDC 152.722(F) sets out the required “Order of Procedure” for all county public
20 land use hearings, with 16 sequential steps. Following the last evidentiary rebuttal of the
21 hearing, UCDC 152.722(F)(12), (13) and (15) requires, in relevant part:

22 “(12) *Request for continuance or keeping the record open.* The Presiding
23 Officer shall inquire of the participants in the public hearing whether
24 anyone wishes to submit a written request for a continuance or, at the
25 first evidentiary hearing only, would like to request that the record
26 remain open for additional testimony, as provided in ORS 197.763 and
27 § 152.771(E), (I) and (J) of this chapter.

28 “(13) *Close of Commission or Board hearing and deliberation.* Unless a
29 continuance or the keeping open of the record is requested per

1 subdivision (12) of this division, the presiding officer shall conclude
2 the hearing and the Commission or Board shall deliberate the proposal.
3 * * *

4 “(15) *Continuance of a hearing.* If a continuance or the keeping open of the
5 record is requested per subdivision (12) of this division, the hearing
6 shall be continued to a future public meeting, the date, time, and place
7 of which must then be announced. Per ORS 197.763, the submittal of
8 further testimony at the continued hearing can result in the request for
9 a further continuance.”

10 Petitioners contend that the county violated UCDC 152.722(F)(12) by failing to
11 “inquire of the participants in the public hearing whether anyone wishes to submit a written
12 request for a continuance” at the close of the evidentiary proceedings. According to
13 petitioners, UCDC 152.722(F)(12) mandates that the presiding officer make that inquiry and,
14 as UCDC 152.722(F)(12) is phrased, that obligation is not limited to the first evidentiary
15 hearing, but applies to all hearings. Petitioners argue that under the plain language of UCDC
16 152.722(F)(12), the county’s obligation to inquire is limited to the initial evidentiary hearing
17 only with respect to requests “that the record remain open for additional testimony.”

18 Relatedly, petitioners argue that the county erred in rejecting petitioners’ written
19 request for a continuance at the beginning of the hearing, and by deciding the matter before it
20 without continuing the hearing, in the face of that written request. We understand petitioners
21 to argue that the county should have treated their January 6, 2010 letter requesting a
22 continuance or to keep the record open under ORS 197.763(6) as a request for a continuance
23 under UCDC 152.722(F)(12).

24 The county and intervenor (respondents) argue, initially, that petitioners failed to
25 object at the hearing to any alleged procedural error, despite opportunity to do so, and further
26 that petitioners waived any issue under UCDC 152.722(F)(12) by failing to cite to UCDC
27 152.722(F)(12) or raise any issue under UCDC 152.722(F)(12) during the proceedings

1 below, pursuant to ORS 197.763(1).² See *Boldt v. Clackamas County*, 107 Or App 619, 813
2 P2d 1078 (1991) (the purpose of the “raise it or waive it” requirement at ORS 197.763(1) is
3 to provide “fair notice” of the issue to the decision maker and other parties, so they have an
4 adequate opportunity to respond and address the issue). On the merits, respondents argue
5 that UCDC 152.722(F)(12) is intended to implement ORS 197.763(6) and should not be
6 construed to offer an unqualified right to obtain a continuance at hearings subsequent to the
7 initial evidentiary hearing.

8 At oral argument, petitioners responded on the waiver issue that their January 6, 2010
9 written request for a continuance was sufficient to give fair notice of the “issue” of a
10 continuance under UCDC 152.722(F)(12), for purposes of ORS 197.763(1). Not only was
11 the issue of a continuance raised in the January 6, 2010 letter, petitioners argue, but the
12 county addressed that issue at the hearing and even adopted findings explaining why the
13 requested continuance was denied.³ Under these circumstances, petitioners argue, the issue

² ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

In addition, ORS 197.835(3) provides that LUBA’s scope of review is limited to the issues “raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.”

³ The county’s findings state, in relevant part:

“The Board notes that a representative for Mr. Pliska was present at the hearing during its discussion of the request for a continuance and did not ask to comment on the request. The Board asked Planning Director Tamra Mabbott whether Mr. Pliska had notice of the public hearing. Ms. Mabbott said yes. The Board notes that the ‘Notice of Public Hearing’ was physically before the Board and had been mailed by the Planning Department on or prior to December 18, 2009 (at least 20 days prior to the date of the public hearing). Further, the Board finds that the mailing list for those receiving the Notice of Public Hearing (those entitled to notice as property owners and those entitled to notice as prior participants at the public hearing) and the affidavit of mailing of the notice required by ORS 197.763(8) and signed by the designated mailing officer for Umatilla County for the notice were physically before them. The Board finds that the County caused notice of the public hearing to be mailed to [the attorney] representing Space Age Fuels, a prior participant in the matter. The

1 was clearly raised with “sufficient specificity” for purposes of ORS 197.763(1). Further,
2 petitioners argue that in the *Boldt* decisions cited by respondents both LUBA and the Court
3 of Appeals held that arguments that the applicant had not demonstrated a “hardship” was
4 sufficient to raise the issue of compliance with a code standard requiring evidence of an
5 “extraordinary, unnecessary and unreasonable hardship,” notwithstanding that no citation to
6 the code standard was made.

7 We agree with respondents that the issue of whether a continuance is required under
8 UCDC 152.722(F)(12), which is the issue that is raised in petitioner’s only assignment of
9 error, was not raised below and is therefore waived under ORS 197.763(1) and 197.835(3).
10 In the relevant portion of the January 6, 2010 letter, quoted above, petitioners specifically
11 invoked a right to a continued hearing or to keep the evidentiary record open “pursuant to
12 ORS 197.763(6)(a).”⁴ Record 42. Based on that letter, the county and intervenor reasonably

Board also takes official notice that neither Mr. Pliska nor Space Age Fuels is an owner of property within the radius area entitled to mailed notice under ORS 197.763(2).

“The Board finds that Mr. Pliska’s letter did not advise the Board of relevant facts as to when he received notice, and why he or a representative could not be present, or how much time Mr. Pliska had to prepare for the hearing. Moreover, the Board finds that because the remand hearing is not the initial evidentiary hearing, no party is entitled to approval of a request for a continuance of a hearing or a right to leave the written record open under ORS 197.763(6). * * *.

The Board herein finds that Mr. Pliska’s substantial rights to a full and fair hearing and an opportunity to make his case were fulfilled. First, the evidentiary record demonstrates that his attorney received notice * * *. Second, even if he did not receive notice but was entitled to it, the County’s affidavit of mailing precludes an appeal based on this issue because it shows that his attorney received timely notice of the hearing and was aware of the hearing date and location. Third, Mr. Pliska had a representative present at the hearing and had the opportunity to present a full and fair case to the Board but chose not to do so. For these reasons, The Board finds that it correctly rejected the request to continue the public hearing or leave the written record open.” Record 7.

⁴ ORS 197.763(6) provides:

“(a) Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing pursuant to paragraph (b) of this subsection or leaving the record open for additional written evidence, arguments or testimony pursuant to paragraph (c) of this subsection.

1 understood the issue raised below to be whether petitioner had a statutory right to a
2 continued hearing or to keep the evidentiary record open as provided in ORS 197.763(6)(a),
3 and responded accordingly to that issue, during the hearing and in the county’s findings.
4 Intervenor specifically argued at the hearing that ORS 197.763(6)(a) is inapplicable to the
5 remand hearing, because it applies only to requests made prior to the conclusion of the
6 “initial evidentiary hearing.” Record 35. In its findings, the county concluded in relevant
7 part that because the remand hearing was not the initial evidentiary hearing, no party was
8 entitled under ORS 197.763(6) to request a continuance or to keep the record open. Record
9 7.

10 On appeal, petitioners do not dispute that conclusion regarding ORS 197.763(6), but
11 argue, for the first time, that UCDC 152.722(F)(12) applies and *differs* from ORS 197.763(6)
12 in offering participants an unqualified right to request and obtain a continuance of any
13 hearing, not limited to the initial evidentiary hearing. In their response brief, respondents
14 dispute that interpretation of UCDC 152.722(F)(12), but we assume without deciding, for
15 purposes of this opinion, that petitioners are correct that, as written, UCDC 152.722(F)(12)
16 grants participants in county land use hearings a right to a continuance that is not limited to
17 the initial evidentiary hearing. That alleged difference between the statute and the code
18 provision is the basis for petitioners’ assignment of error. Given that alleged difference

“(b) If the hearings authority grants a continuance, the hearing shall be continued to a date, time and place certain at least seven days from the date of the initial evidentiary hearing. An opportunity shall be provided at the continued hearing for persons to present and rebut new evidence, arguments or testimony. If new written evidence is submitted at the continued hearing, any person may request, prior to the conclusion of the continued hearing, that the record be left open for at least seven days to submit additional written evidence, arguments or testimony for the purpose of responding to the new written evidence.

“(c) If the hearings authority leaves the record open for additional written evidence, arguments or testimony, the record shall be left open for at least seven days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the hearings authority shall reopen the record pursuant to subsection (7) of this section.”

1 between the statute and the code, we believe that in requesting a continuance under
2 ORS 197.763(1) below petitioner did not give the county and intervenor “fair notice” that
3 petitioners intended to assert a right to a continuance under UCDC 152.722(F)(12). *See*
4 *Greenhalgh v. Columbia County*, 54 Or LUBA 626, 635, *aff’d* 215 Or App 702, 170 P3d
5 1137 (2007) (invoking local code siting standards during the proceedings below was not
6 sufficient to raise the issue of compliance with different administrative rule siting standards
7 found in OAR 660-006-0029).

8 We are not sure what to make of petitioners’ argument that UCDC 152.722(F)(12)
9 requires the presiding officer to inquire at the close of the hearing whether any participant
10 wishes to submit a written request for a continuance, and that the presiding officer failed to
11 make that inquiry. Petitioners can be understood to argue that the presiding officer’s failure
12 to make that inquiry at the hearing was in itself procedural error that prejudiced their
13 substantial rights. Respondents argue that petitioners failed to object during the proceedings
14 below to any procedural error under UCDC 152.722(F)(12). Response Brief 3. The findings
15 note that petitioners’ representative was present at the hearing but “did not ask to comment
16 on the request” for a continuance. Record 7. Further, the findings state that petitioners’
17 representative “had the opportunity to present a full and fair case to the Board but chose not
18 to do so.” *Id.* We understand respondents to argue that petitioners’ representative had the
19 opportunity to object to the presiding officer’s failure to make the inquiry required by UCDC
20 152.722(F)(12), but did not, and that failure to object to the alleged procedural error means
21 that petitioners are foreclosed from challenging that procedural error before LUBA. *Mason*
22 *v. Linn County*, 13 Or LUBA 1, 4, *rev’d on other grounds*, 73 Or App 334, 698 P2d 529
23 (1985).

24 Assuming those are the parties’ arguments, we agree with respondents. Petitioners do
25 not dispute that their representative was present at the hearing, or argue that there was not a
26 reasonable opportunity to raise any and all issues regarding compliance with UCDC

1 152.722(F)(12), including an objection to the presiding officer's failure to inquire whether
2 any participants wished to file a written request for a continuance.

3 In sum, the issue of compliance with UCDC 152.722(F)(12) was not raised below,
4 and is therefore waived. ORS 197.763(1). The assignment of error is denied.

5 The county's decision is affirmed.