

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

3 DEPARTMENT OF LAND CONSERVATION)
AND DEVELOPMENT,)

4 Petitioner,)

5 vs.)

6 YAMHILL COUNTY,)

7 Respondent,)

8 and)

9 MAX and JOYCE MORROW, FRED.W.)

10 and SHERON A. HARSHMAN,)

11 Intervenors-Respondent.)

LUBA No. 88-089

ORDER ON
MOTION TO DISMISS

12 Intervenors-respondent (intervenors) move to dismiss this
13 appeal for lack of jurisdiction. Intervenors argue that
14 petitioner Department of Land Conservation and Development
15 (DLCD) did not file its notice of intent to appeal within 21
16 days after the challenged decision of respondent Yamhill County
17 (county) became final, as required by ORS 197.830(7).

18 On September 21, 1988, the county board of commissioners
19 approved and signed Yamhill County Ordinance No. 469, amending
20 the acknowledged county comprehensive plan and zoning map
21 designations for a 13.75 acre parcel. Also on September 21,
22 1988, the county mailed letters notifying intervenors and 1000
23 Friends of Oregon of the decision. On September 23, 1988, the
24 county mailed notice of the decision to petitioner DLCD. DLCD
25 filed its notice of intent to appeal with LUBA on October 13,
26 1988, 20 days after it was mailed notice of the decision, but

1 22 days after the decision became final.

2 ORS 197.830(7) provides, in relevant part:

3 "A notice of intent to appeal a land use decision
4 shall be filed not later than 21 days after the date
5 the decision sought to be reviewed becomes final. A
6 notice of intent to appeal plan and land use
7 regulation amendments processed pursuant to
8 ORS 197.610 to 197.625 shall be filed not later than
9 21 days after the decision sought to be reviewed is
10 mailed to parties entitled to notice under ORS
11 197.615. * * * " (Emphasis added.)

12 The plan and zone changes appealed in this case were
13 postacknowledgment amendments processed pursuant to ORS 197.610
14 to 197.625. Intervenors argue that the portion of
15 ORS 197.830(7) underlined above was added to this subsection by
16 Oregon Laws 1987, chapter 729, section 16 to codify the court
17 of appeals decision in Ludwick v. Yamhill County, 72 Or App
18 224, 229-230, 696 P2d 536, rev den 299 Or 443 (1985). In that
19 case the Court of Appeals ruled the 21 day period for filing a
20 notice of intent to appeal a postacknowledgment amendment to
21 LUBA is tolled until notice of the decision is mailed to an
22 appealing party entitled to notice under ORS 197.615(2).
23 Intervenors contend that this 1987 statutory amendment does not
24 apply to mailing of the decision to the DLCD director pursuant
25 to ORS 197.615(1).¹

26 In support of their argument, intervenors point out that in
27 League of Women Voters v. Coos County, 82 Or App 673, 678, 729
28 P2d 588 (1986), the court in discussing its ruling in Ludwick
29 v. Yamhill County, stated:

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1 "Our reasoning in Ludwick was directed solely to
2 ORS 197.615(2); * * *

3 Intervenor also contend it makes sense to interpret the
4 provision added to ORS 197.830(7) as applying to parties
5 entitled to notice of a decision under ORS 197.615(2), but not
6 the DLCD director entitled to notice under ORS 197.615(1),
7 because of (1) differences between DLCD and other parties; and
8 (2) differences between the contents of the notice required to
9 be given to DLCD and other parties.

10 Intervenor suggest that most parties to a land use
11 proceeding, other than DLCD, are unfamiliar with the procedures
12 involved and how to get information concerning the adoption of
13 a final decision. Thus, such parties might not find out a
14 final decision had been made or might let the appeal period
15 expire after receiving notice of the decision. According to
16 intervenors, that is why ORS 197.830(7) tolls the 21 day appeal
17 period until such parties are mailed written notice of the
18 decision and why ORS 197.615(2)(b) requires notice to such
19 parties to explain the requirements for appealing the decision.

20 According to intervenors, DLCD is in a different position
21 in that it has knowledge of land use law and the procedures to
22 appeal a land use decision and has a staff and lawyers who can
23 review the decision and decide whether to appeal. Intervenor's
24 argue there is little or no chance that DLCD would not receive
25 the notice required by ORS 197.615(1) in time to file a notice
26 of intent to appeal within 21 days after the decision is signed.

1 Furthermore, ORS 197.615(1) requires only that the DLCD
2 director be sent the text of and findings supporting the
3 amendment, but not information about the appeal procedure.
4 According to intervenors, this distinction is further
5 indication that the 1987 amendment to ORS 197.830(7) applies
6 only to parties entitled to notice of the decision under ORS
7 197.615(2), and not to DLCD.

8 DLCD replies that the language of the 1987 amendment to
9 ORS 197.830(7) clearly makes no distinction among the persons
10 entitled to notice under ORS 197.615. DLCD argues that under
11 ORS 197.830(7), the mailing of notice begins the 21 day appeal
12 period for everyone entitled to notice under ORS 197.615.
13 According to DLCD, the 1987 amendment was not adopted to codify
14 the court's ruling in Ludwick v. Yamhill County, supra, but
15 rather was drafted by DLCD to clarify the appeal deadline for
16 DLCD and other parties and allow adequate opportunity for
17 review by DLCD prior to its filing an appeal.²

18 DLCD also argues, in the alternative, that even if
19 intervenors' interpretation of the 1987 amendment is correct,
20 DLCD was also entitled to notice under ORS 197.615(2), because
21 it participated in writing in the local proceedings. Record 60.

22 In this case, DLCD was not entitled to notice of the
23 county's decision under ORS 197.615(2). Although DLCD did
24 participate in the county's proceedings, as required by
25 ORS 197.615(2)(a)(A), it did not request of the county that it
26 be given notice in writing, as required by ORS 197.615(2)(a)(B).

1 and setting out his views on the amendment's intent. However,
2 we note that testimony from persons interested in legislation
3 concerning their observations of what the legislators intended
4 when they enacted legislation is incompetent for the purpose of
5 determining legislative intent. Murphy v. Nilsen, 19 Or App
6 292, 296, 527 P2d 726 (1974); Barbee v. Josephine County, ___
7 Or LUBA ___ (LUBA No. 88-004, May 13, 1988), slip op 12.

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6 We need not determine in this case whether DLCD's 21 day
7 period for filing a notice of intent to appeal a
8 postacknowledgment plan or land use regulation amendment is
9 tolled until written notice of the decision is mailed to DLCD
10 if DLCD is not a party to the proceeding below.