

1 Opinion by Livingston.

2 **INTRODUCTION**

3 Petitioner appeals an amendment to Wasco County Land
4 Use and Development Ordinance (WCDO) 3.815, which became
5 final on January 4, 1995. WCDO 3.815 sets forth the
6 procedure for applying the county's Mineral and Aggregate
7 Overlay Zone and also establishes the location, quality and
8 quantity factors which must be considered for determining
9 the significance of a Goal 5 resource under OAR 660-16-
10 000(1).¹ The county moves, for the second time, to dismiss
11 this appeal for lack of jurisdiction under ORS 197.644(2)
12 and ORS 197.825(2)(c) on the grounds that the amendment

¹WCDO 3.815(A) (original version) provides, in relevant part:

"* * * * *

"Information to demonstrate the significance of a resource shall include:

- "1. A survey map, or other legal description that identifies the location and perimeter of the mineral and aggregate resource; and
- "2. Information demonstrating that the resource meets or can meet two of the following minimum requirements:

"* * * * *

"Information may consist of laboratory test data or the determination of a certified, licensed or registered geologist, or other qualified person; and

- "3. Information demonstrating that the quantity of the resource indicates at least 250,000 cubic yards of reserve.

"* * * * *"

1 which petitioner appeals is subject to the review authority
2 of the Department of Land Conservation and Development
3 (DLCD) as part of the periodic review process.²

4 The procedural history of this appeal is set forth in
5 this Board's order dated November 13, 1995. In that order,
6 we denied the county's first motion to dismiss, based on the
7 possibility that petitioner might raise issues in his
8 petition for review that were unrelated to compliance with
9 the Statewide Planning Goals (goals):

10 "OAR 660-25-040(1) and (2) make clear that LUBA
11 retains jurisdiction over matters that do not
12 involve compliance with the Statewide Planning
13 Goals. Although it appears likely that
14 petitioner's appeal pertains to the county's
15 determination of resource significance, which
16 involves compliance with the Statewide Planning
17 Goals, we cannot tell from petitioner's notice of
18 intent to appeal exactly what issues he intends to
19 raise. Because of the possibility petitioner
20 might raise issues unrelated to compliance with
21 the Statewide Planning Goals, it is premature to
22 dismiss this appeal." Mazeski v. Wasco County,
23 ___ Or LUBA ___ (LUBA No. 95-021, Order on Motion
24 to Dismiss, November 13, 1995), slip op 7.

25 Following upon our November 13, 1995 order, petitioner

²ORS 197.644(2) provides, in relevant part:

"[LCDC] shall have exclusive jurisdiction for review of the evaluation, work program and completed work program tasks as set forth in ORS 197.628 to 197.646."

ORS 197.825(2)(c) provides, in relevant part:

"[LUBA jurisdiction] does not include those matters over which the Department of Land Conservation and Development or the Land Conservation and Development Commission has review authority under * * * ORS 197.628 to 197.644 * * *."

1 filed a petition for review containing a single assignment
2 of error: "The Zoning Ordinance Amendment * * * is not
3 consistent with the Statewide Planning Goal 5 nor the
4 applicable implementing Administrative Rule, OAR 660-16-
5 000(2) and (3)." Petition for Review 6.

6 **MOTION TO STRIKE**

7 Petitioner moves to strike two exhibits attached to the
8 county's motion to dismiss, which is discussed below. The
9 first exhibit is a notice dated January 4, 1996 that makes
10 clear the county has submitted the challenged ordinance to
11 DLCD under a periodic review work task. The second exhibit
12 is a letter dated January 12, 1996 from petitioner to DLCD,
13 stating his objections to the challenged ordinance.

14 On at least two occasions in the past we have
15 considered material not included in the record, but attached
16 to the parties' briefs, to determine whether we had
17 jurisdiction. In doing so we relied on either the absence
18 of any objection by the parties to the proceedings, see
19 Leonard v. Union County, 24 Or LUBA 362, 377 (1992); or the
20 conduct of the objecting party, who had also submitted
21 documents outside the record. See Hemstreet v. Seaside
22 Improvement Comm., 16 Or LUBA 630, 631-33 (1988). The
23 appropriate means of introducing evidence outside the record
24 is through a motion for an evidentiary hearing under ORS
25 197.835(2)(b) and OAR 661-10-045. See Sparrows v. Clackamas

1 County, 24 Or LUBA 318, 327 n 10.³ Respondent has not
2 requested an evidentiary hearing. Since petitioner objects
3 to our consideration of the materials attached to the
4 county's motion, we allow petitioner's motion and do not
5 consider them.

6 **MOTION TO DISMISS**

7 The county moves a second time to dismiss, arguing that
8 DLCD has exclusive jurisdiction over the Goal 5 compliance
9 issue as part of its periodic review authority. On August
10 9, 1994, DLCD approved the county's periodic review work
11 program, which includes a work task addressing the "Mineral
12 and Aggregate Resources Element" and compliance with Goal 5.
13 Motion to Dismiss (February 8, 1995), Exhibit 1.

14 In response, petitioner does not argue that DLCD
15 jurisdiction is improper. Rather, petitioner asserts that
16 LUBA should retain jurisdiction because the county's notice
17 of adoption of the amendment to WCDO 3.185(A), dated January
18 10, 1995, contained a statement of appeal rights instructing

³Neither ORS 197.835(2)(b) nor OAR 661-10-045 expressly provides for evidentiary hearings to allow this Board to accept evidence to determine whether we have jurisdiction. However, neither do they expressly preclude our receipt of evidence to determine jurisdiction. See Hemstreet, supra, 16 Or LUBA at 638 n 1. One purpose of evidentiary hearings is to allow the receipt of evidence outside the record in certain circumstances, with procedural safeguards. The same policies that justify evidentiary hearings in connection with standing challenges, for example, also justify them in connection with jurisdictional challenges.

Jurisdictional challenges may be made at any time. Therefore, motions for evidentiary hearings to challenge jurisdiction may be made even after oral argument. See Sparrows, supra, 24 Or LUBA 318, 327 n 10.

1 that an appeal of that decision may be made by filing a
2 notice of intent to appeal with LUBA. Petitioner asserts
3 that the notice and statement of appeal rights provided by
4 the county "conferred jurisdiction" upon LUBA. Response to
5 Motion to Dismiss 2. Petitioner is mistaken. This Board
6 has only the jurisdiction conferred by applicable statutes.
7 Local governments cannot confer jurisdiction.

8 Petitioner further argues that the county improperly
9 explained the appeals procedure in its notice, and that
10 "[t]he county has deceived the petitioner into appealing to
11 the wrong jurisdiction in order to avoid review of its land
12 use decision." Response to Motion to Dismiss 1. As
13 explained in this Board's order of November 13, 1995, the
14 notice provided by the county was not incorrect. Had
15 petitioner desired to appeal issues unrelated to compliance
16 with the goals, LUBA would have been the appropriate forum.
17 OAR 660-25-040(1).

18 Petitioner is confused by ORS 197.610(2)(b), which
19 provides for appeals to this Board from post-acknowledgment
20 plan and land use regulation amendments. As we explained in
21 our November 13, 1995 order, ORS 197.825(2)(c) excludes such
22 appeals from our jurisdiction when they concern matters
23 addressed during periodic review, which is described by ORS
24 197.633 as "a process to systematically review and revise
25 such plans and regulations." DLCD has exclusive periodic
26 review jurisdiction over the Goal 5 compliance of the

1 county's Mineral and Aggregate Overlay Zone ordinance.

2 The county's motion to dismiss is granted. This appeal

3 is dismissed.