

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

3
4 HARRIS WATERS,)
5)
6 Petitioner,)
7)
8 and)
9)
10 FLORENCE RYAN,)
11)
12 Intervenor-Petitioner,)
13) LUBA No. 97-138
14 vs.)
15) FINAL OPINION
16 MARION COUNTY,) AND ORDER
17)
18 Respondent,)
19)
20 and)
21)
22 RAYMOND RIVOLI and INA RIVOLI,)
23)
24 Intervenors-Respondent.)

25
26
27 Appeal from Marion County.

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29 Wallace W. Lien, P.C., Salem, represented petitioner
30 and intervenor-petitioner.

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32 Jane Ellen Stonecipher, Assistant County Counsel,
33 Salem, represented respondent.

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35 Donald M. Kelley, Silverton, represented intervenors-
36 respondent.

37
38 LIVINGSTON, Administrative Law Judge; GUSTAFSON, Chief
39 Administrative Law Judge; HANNA, Administrative Law Judge,
40 participated in the decision.

41
42 DISMISSED 12/15/97

43
44 You are entitled to judicial review of this Order.
45 Judicial review is governed by the provisions of ORS

1 197.850.

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the county board of
4 commissioners which changes the zoning of two parcels and
5 partitions one of the two parcels.

6 **MOTIONS TO INTERVENE**

7 Raymond and Ina Rivoli (the Rivolis), the applicants
8 below, move to intervene on the side of the respondent.
9 There is no opposition to the motion, and it is allowed.

10 Florence Ryan (Ryan) moves to intervene on the side of
11 the petitioner. The Rivolis object to Ryan's motion on the
12 ground that this appeal must be dismissed because of
13 petitioner's lack of standing.

14 ORS 197.830(6)(b) permits intervention by "[p]ersons
15 who appeared before the local government, special district
16 or state agency, orally or in writing." ORS
17 197.830(6)(b)(B). Since there is no dispute that Ryan
18 appeared before the county, Ryan's motion to intervene is
19 allowed.

20 **FACTS**

21 The subject property consists of two parcels,
22 comprising 4.0 acres and 6.0 acres, which are located in the
23 county's Acreage Residential-5 (AR-5) zone. Intervenors
24 applied to rezone the two parcels to Acreage Residential
25 (AR), and to partition the 4.0-acre parcel into two parcels,
26 of 1.5 and 2.5 acres.

1 After a properly noticed hearing on April 2, 1997, the
2 county hearings officer recommended approval of the
3 application on May 29, 1997. Ryan, a neighbor, opposed the
4 application in a letter delivered to the county prior to the
5 hearing. On July 9, 1997, the board of commissioners
6 adopted Ordinance 1065, which approved the requested zone
7 change and partition.

8 Prior to the adoption of Ordinance 1065, Ryan sold her
9 property to petitioner. On July 28, 1997, petitioner filed
10 a notice of intent to appeal the adoption of Ordinance 1065
11 to LUBA. Ryan filed her motion to intervene on September
12 10, 1997.

13 **MOTION TO DISMISS**

14 The Rivolis move to dismiss this proceeding on two
15 grounds: (1) petitioner lacks standing to appeal because he
16 did not appear below orally or in writing, as required by
17 ORS 197.830(2)(b); and (2) Ryan, who did appear below, lacks
18 standing because she failed to file a timely notice of
19 intent to appeal.

20 According to petitioner, the right to receive notice,
21 appear and oppose the land use application runs with the
22 property. Petitioner contends that when an owner of a piece
23 of property appears below, a subsequent owner of that
24 property must be deemed to have appeared below for purposes
25 of standing to appeal to LUBA. Petitioner relies on City of
26 Pendleton v. Kerns, 294 Or 126, 653 P2d 992 (1982), in which

1 the court held that a proposed change in a major
2 thoroughfare was a land use decision subject to LUBA's
3 jurisdiction because it had significant impacts on present
4 and future land uses. Petitioner contends that in Kerns,
5 the Oregon Supreme Court "acknowledged LUBA's authority to
6 accept jurisdiction where explicit statutory direction is
7 lacking." Petitioner's Response to Motion to Dismiss 5.

8 Petitioner's reliance on Kerns is misplaced. The issue
9 is not whether we have jurisdiction to review the county's
10 decision; we clearly do, assuming petitioner has standing.
11 The issue is whether petitioner has standing when he did not
12 appear below, but purchased his property from someone who
13 did appear below.

14 ORS 197.830(2), which governs standing before LUBA,
15 provides as follows:

16 "(2) Except as provided in ORS 197.620(1) and (2),
17 a person may petition the board for review of
18 a land use decision or limited land use
19 decision if the person:

20 "(a) Filed timely notice of intent to appeal
21 the decision as provided in subsection
22 (1) of this section; and

23 "(b) Appeared before the local government,
24 special district or state agency orally
25 or in writing." (Emphasis added).¹

26 Since petitioner himself did not appear below, he does not

¹ORS 197.015(18) defines "person," in relevant part, as "any individual, partnership corporation, association, governmental subdivision or agency or public or private organization of any kind."

1 satisfy the appearance requirement stated in ORS
2 197.830(2)(b), and his appeal must be dismissed.

3 Ryan's appearance as an intervenor-petitioner,
4 represented by the same attorney as petitioner, may have
5 been intended to validate petitioner's appeal by joining a
6 person without standing who filed a timely notice of intent
7 to appeal with a person with standing who did not file a
8 timely notice of intent to appeal. If that is the purpose
9 of Ryan's appearance, it must fail. We have held that when
10 a notice of intent to appeal is jurisdictionally defective,
11 is defective for other reasons which result in prejudice or
12 unfairness to a respondent, or is withdrawn, the appeal must
13 be dismissed, notwithstanding the presence of an intervenor-
14 petitioner. Gross v. Washington County, 17 Or LUBA 640,
15 645-46 (1989). Ryan, as intervenor-petitioner, chose to
16 file a motion to intervene rather than a timely notice of
17 intent to appeal. By doing so, she made the continuation of
18 her appeal dependent on the validity of petitioner's notice
19 of intent to appeal. National Advertising Company v. City
20 of Portland, 20 Or LUBA 79, 85 (1990). Because petitioner
21 lacks standing to appeal, Ryan's appeal must be dismissed as
22 well.

23 This appeal is dismissed.