



1 COX, Referee

2 NATURE OF PROCEEDING

3 Petitioners contest Respondent's land use decision granting  
4 a conditional use permit for a child treatment center in a  
5 residential zone.

6 STANDING

7 Respondent contests standing of petitioners on the ground  
8 that Petitioners did not appear either orally or in writing at  
9 the March 14, 1980 conditional use permit hearing.

10 Petitioners claim standing on the ground that respondent's  
11 zoning ordinance, Article XVI, Section 114(7)(b) requiring:

12 "Notice shall be mailed to all owners of property  
13 within two hundred feet of the external boundaries of  
14 the property affected by the requested conditional use  
15 permit not less than five days before the date set for  
16 hearing."

17 was not complied with by respondents. Petitioners claim they  
18 live within the 200 feet of the property subject to the  
19 conditional use permit. This Board rules that given the facts  
20 set forth infra petitioners have established standing.

21 ALLEGATIONS OF ERROR

22 Petitioners allege basically two assignments of error. The  
23 gravaman of their arguments is that the respondents erred in  
24 allowing the conditional use permit because adjacent property  
25 owners were not properly notified of the hearing.

26 FACTS

Respondent Klamath Child Treatment Center, Inc., an Oregon  
corporation, requested a conditional use permit to allow for

1 the establishment of a day facility for the treatment of  
2 emotionally disturbed children ranging in age from 3 to 12  
3 years. The subject property is zoned R-5 and surrounded  
4 primarily by residential uses. At a March 14, 1980 hearing  
5 testimony was taken from the applicant and witnesses for the  
6 applicant. On March 19, 1980, Respondent issued a decision and  
7 findings which, among other things stated:

8           "Neighboring property owners were notified of the  
9           proposed conditional use permit request. No one from  
10          the neighborhood appeared at the hearing or otherwise  
11          questioned the proposed use."

12          Petitioners contend they are residents and owners of  
13          property within 200 feet of the subject site and that they were  
14          not afforded an opportunity to appear because they did not  
15          receive written notice of the pending hearing. By stipulation  
16          of the parties supported by affidavits from the petitioners  
17          received by this Board pursuant to Land Use Board of Appeals  
18          Procedural Rule 10, it is uncontested that petitioners owned  
19          property within 200 feet of the subject property; that they did  
20          not receive written notice of the hearing prior to its being  
21          held; and that the respondents failed to send such notice to  
22          the petitioners. The evidence does indicate notice of the  
23          hearing was published in a newspaper of general circulation.  
24          Petitioners allege they did not see the published notice.

25          The respondents stipulate that due to an oversight on the  
26          part of the Planning Director and the applicant the petitioners  
27          names were neither included in a list of property owners within

1 200 feet of the subject properties' external boundaries<sup>1</sup> nor  
2 were petitioners sent notices.

3 DECISION

4 Section 114(7) of Article XVI of the City of Klamath Falls'  
5 Zoning Ordinance provides as follows:

6 "Notice of hearing. Notice of public hearing  
7 before the hearings officer shall be given in the  
8 following ways and shall contain the time and place of  
9 the hearing and other data pertinent to the requested  
10 conditional use permit:

11 "(a) Newspaper. Notice shall be published in a  
12 newspaper of general circulation in the city not less  
13 than five days before the date set for hearing.

14 "(b) Mailing. Notice shall be mailed to all  
15 owners of property within two hundred feet of the  
16 external boundaries of the property affected by the  
17 requested conditional use permit not less than five  
18 days before the date set for hearing.

19 "(c) The failure to mail all or any part of the  
20 notices as aforementioned shall not invalidate any of  
21 these proceedings." (Emphasis added).

22 Petitioners allege that since their property is within 200  
23 feet of the external boundaries of the subject property they  
24 should have been provided with notice of the pending hearing  
25 not less than five days before the hearing date. Petitioners  
26 did not receive notice by mail and the facts reveal that  
respondents did not mail notice to petitioners. As such,  
petitioners argue that the contested decision is void.  
Respondents counter, however, that provision (c) supra should  
be controlling. Respondents argue only compliance with  
provision (a) is necessary since provision (c) makes the  
written notice requirement contained in provision (b) optional.

1           The requirement that board action be preceded by notice and  
2 hearing is jurisdictional. Anderson, American Law of Zoning,  
3 2d ed, sec 20.17 (1977) citing Brisco v. Bruenn, 216 NYS2d 799  
4 (1961 Supp). In addition, it was determined in Corporation  
5 Service, Inc. vs. Zoning Board of Review, 330 A2d 402 (1975)  
6 (RI) that proper and adequate notice of a zoning board hearing  
7 is a jurisdictional requisite and action taken by a Board which  
8 has not first satisfied the notice requirement is a nullity.  
9 Where notice to certain property owners is required by law,  
10 failure to give timely notice to such owners invalidates the  
11 action of the Board. Anderson, supra, citing Radick v. Zoning  
12 Board of Review, 83 RI 392, 117 A2d 84 (1955). As the Radick  
13 court stated regarding compliance with an ordinance which  
14 required that notice be given to all property owners within one  
15 hundred feet:

16           "The giving of such notice is not merely  
17 directory, nor a practice, custom or usage of the  
18 Board, but is an applicable provision of the town  
ordinances which establish the jurisdiction of the  
Board."

19           The local jurisdiction in Radick, however, appears not to  
20 have had a notice provision equivalent to that contained in  
21 respondents provision (c), supra. Granted, the existence of  
22 the "escape clause" brings into question the purpose of having  
23 a requirement for mailing or the purpose of Article XVI, sec  
24 114(3) and (5) (see footnote 1) in the first place. The mere  
25 existence of those items, however, when confronted with a  
26 statement that failure to mail all or part of the notice shall

1 not invalidate any of the proceedings, does not provide grounds  
2 upon which this Board can reverse the decision of the  
3 respondent City of Klamath Falls.

4 Petitioner fails to cite this Board to any authority other  
5 than Statewide Goal No. 1 (dealt with infra), which would  
6 prevent a local jurisdiction from adopting an "escape clause"  
7 such as that set forth in item (b) supra. Petitioners merely  
8 state in very general terms without directing this Board to any  
9 specific argument or authority regarding their allegation, that  
10 the failure to give written notice is a violation of due  
11 process. This Board will not guess at what petitioners mean  
12 when they make such broad sweeping assertions.

13 VIOLATION OF STATEWIDE GOAL NO. 1 (CITIZEN INVOLVEMENT)

14 Statewide Goal No. 1 is designed to "develop a citizen  
15 involvement program that insures the opportunity for citizens  
16 to be involved in all phases of the planning process."  
17 Petitioners argue that the existence of the aforementioned  
18 escape clause in respondent's written notice requirements for  
19 conditional use permits violates Statewide Goal No. 1. Goal 1  
20 in pertinent part states:

21 "The citizen involvement program shall  
22 incorporate the following components:

23 \* \* \*

24 "3. Citizen Influence - To provide the  
25 opportunity for citizens to be involved in all phases  
26 of the planning process.

1 "Citizens shall have the opportunity to be  
2 involved in the phases of the planning process as set  
3 forth and defined in the goal and guidelines for Land  
4 Use Planning, including Preparation of Plans and  
Implementation Measures, Plan Content, Plan Adoption,  
Minor Changes and Major Revisions in the Plan and  
Implementation Measures."

5 A review of the goal and guidelines for "land use planning"  
6 contained in Goal 1 does not reveal any requirement which we  
7 interpret as requiring a provision for written notice in a  
8 quasi-judicial conditional use permit hearing.<sup>2</sup>

9 Therefore, petitioners' allegation of violation of  
10 statewide goal no. 1 is denied.<sup>3</sup>

11 Petitioners have not asserted any legal grounds which would  
12 allow this Board to reverse Respondent Klamath Falls'  
13 decision. Therefore, respondent City of Klamath Falls'  
14 decision in this matter is affirmed.

1 FOOTNOTE

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4 Klamath Falls Zoning Ordinance, Article XVI, Section  
5 114(3)(5):

6 " (3) Ownership list. The applicant shall file  
7 along with an application for a conditional use  
8 permit, a list of the names and addresses of all  
9 owners of property situated within two hundred feet of  
10 the external boundaries of the property affected by  
11 the application as such names and addresses are shown  
12 on the last preceding tax roll of the county assessor  
13 of Klamath County. Said list shall be checked and  
14 certified by the planning director or his designated  
15 representative. (Ord. No. 5934)"

16 " (5) Improper application. If it is determined  
17 that the application does not provide the desired  
18 information nor have attached thereto other pertinent  
19 data requested, the application shall not be accepted."

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23 Originally Statewide Goal No. 2 contained language  
24 requiring written notice to neighboring owners. That language  
25 was deleted in 1975 based on an Attorney General's opinion  
26 (Dec. 3, 1975) which stated in part:

27 "It is our opinion that the Land Conservation and  
28 Development Commission (LCDC) does not have the  
29 authority to prescribe the procedural requirements for  
30 notice to property owners who may be directly affected  
31 by a change in the comprehensive plan or by a zone  
32 change. Such matters are covered by statute and  
33 judicial decision. Accordingly, that portion of the  
34 LCDC's Land Use Planning Goal purporting to deal with  
35 such subject matter is defective on this ground."

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38 Petitioners second assignment of error states: "The  
39 conditional use permit violates certain land conservation and  
40 development goals." Petitioners then state in the Argument  
41 portion of their brief, "This assignment of error is not  
42 discussed here in this breif (sic)." Following petitioners'  
43 lead, this Board will give an equal amount of consideration to  
44 their second assignment of error. It will not be discussed.