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

ANDREW D. BIGLEY, SHELLY M. KELSO )  
BIGLEY, WEST HILLS STREAMS, and LIZ )  
CALLISON, )  
Petitioners, )  
vs. )  
CITY OF PORTLAND, )  
Respondent, )  
and )  
METRO, )  
Intervenor-Respondent. )

LUBA No. 99-088  
FINAL OPINION  
AND ORDER

Appeal from City of Portland.  
Andrew H. Stamp, Portland, represented petitioner.  
Peter Kasting, Senior Deputy City Attorney, Portland, represented respondent.  
Kenneth D. Helm, Assistant General Counsel, Portland, represented intervenor-respondent.  
HOLSTUN, Board Chair; BASSHAM, Board Member; BRIGGS, Board Member, participated in the decision.

DISMISSED 08/11/99

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

1 Opinion by Holstun.

2 **FACTS**

3 On May 19, 1997, the city's land use hearings officer approved a conditional use  
4 master plan for the Washington Park Zoo and also granted other approvals. As provided by  
5 the Portland City Code (PCC) 33.730.030(F), the hearings officer's decision would have  
6 become the city's final decision in this matter had it not been appealed to the city council.  
7 However, two appeals of the hearings officer's decision were filed. The city council  
8 conducted a hearing on July 16, 1997, and denied both appeals on August 8, 1997. Under  
9 PCC 33.730.030(H)(9), the city council's decision on appeal is the city's final decision. On  
10 May 25, 1999, petitioners filed notices of intent to appeal in LUBA Nos. 99-088 and 99-089.  
11 Those appeals challenge the hearings officer's and city council's decisions, respectively.  
12 LUBA consolidated LUBA Nos. 99-088 and 99-089 on June 9, 1999.

13 **MOTION TO DISMISS**

14 Respondent moves to dismiss petitioners' challenge of the hearings officer's decision  
15 in LUBA No. 99-088, arguing that the hearings officer's decision is not a "final" decision and  
16 therefore cannot be a "land use decision" subject to LUBA's jurisdiction. ORS  
17 197.015(10)(a). We agree with the city. See CBH Company v. City of Tualatin, 16 Or  
18 LUBA 399, 405 n 7 (1988) (under either ORS 197.015(10) or the significant impacts test, a  
19 land use decision must be a final decision).

20 Petitioners argue that there were certain defects in the notices that were provided  
21 prior to the hearing conducted by the hearings officer that excuse petitioner's failure to  
22 appear during those hearing.<sup>1</sup> Petitioners also claim this defect in the hearings officer's

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<sup>1</sup>Although petitioners received written notice of the hearing before the hearings officer, they contend that notice was not adequate to advise them that a proposal to convert a temporary parking lot to a permanent parking lot was before the hearings officer.

1 notice gives them a right to appeal the hearings officer's decision directly to LUBA, under  
2 ORS 197.830(3).<sup>2</sup>

3 We do not consider the merits of petitioners' arguments concerning the adequacy of  
4 the hearings officer's notice of hearing. However, even if that notice was inadequate, such  
5 inadequacy did not operate in this appeal to make the hearings officer's decision the city's  
6 final decision in this matter. Other participants in the hearing before the hearings officer  
7 appealed the hearings officer's decision to the city council, and the city council rendered its  
8 own decision in this matter. The city council's decision is the city's final decision in this  
9 matter and for that reason is the reviewable land use decision. The hearings officer's decision  
10 never became a final decision and, therefore, is not a land use decision subject to our review.

11 Petitioners' attempt to rely on ORS 197.830(3) and our decision in Beveled Edge  
12 Machines, Inc. v. City of Dallas, 28 Or LUBA 790 (1995), as a basis for LUBA jurisdiction  
13 to the review the hearings officer's decision, is misplaced. In Beveled Edge, the petitioner at  
14 LUBA had not been given the written notice of planning commission hearing that it was  
15 entitled to under statute.<sup>3</sup> The city in that case argued that the petitioner's appeal of the  
16 planning commission's decision to LUBA should be dismissed because the petitioner failed  
17 to appeal the planning commission's decision to the city council. We rejected the city's

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<sup>2</sup>ORS 197.830(3) provides:

"If a local government makes a land use decision without providing a hearing or the local government makes a land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:

"(a) Within 21 days of actual notice where notice is required; or

"(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

<sup>3</sup>Due to the failure to provide notice, the petitioner in Beveled Edge did not participate in the planning commission hearing and did not receive notice of the planning commission's decision at the time it was adopted. The petitioner learned of the planning commission's decision several months after it became final.

1 argument because the deadline for filing a local appeal of the planning commission decision  
2 had expired long before the petitioner learned of the planning commission's decision. In that  
3 circumstance, we concluded, the petitioner had no local remedy to exhaust and a direct  
4 appeal to LUBA within 21 days after the petitioner "knew or should have known" of the  
5 planning commissions decision was available under ORS 197.830(3)(b).

6 The obvious and dispositive factual difference between Beveled Edge and the current  
7 appeal is that in Beveled Edge the planning commission's decision was the city's final  
8 decision, because no local appeal was filed. Here, appeals were filed that led to a later  
9 decision by the city council. The errors petitioners allege in the hearings officer's notice may  
10 have some bearing on whether petitioners have standing to appeal the city council's decision  
11 and whether their appeal of the city's council's decision was timely filed. Those alleged  
12 errors may even have some ultimate bearing on whether the city council's decision must be  
13 reversed or remanded. However, those errors provide no basis for LUBA to review the  
14 hearings officer's decision.

15 LUBA No. 99-088 is dismissed.<sup>4</sup>

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<sup>4</sup>A separate order bifurcating LUBA Nos. 99-088 and 99-089 is issued this date.