

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 HAL ANTHONY and WAYNE McKY,
5 *Petitioners,*

6
7 and

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9 HOLGER T. SOMMER,
10 *Intervenor-Petitioner,*

11
12 vs.

13
14 JOSEPHINE COUNTY,
15 *Respondent.*

16
17 LUBA No. 2005-028

18 ORDER

19 **MOTION TO DISMISS INTERVENOR-PETITIONER**

20 On February 4, 2005, Holger T. Sommer (Sommer) filed a motion to intervene in this
21 appeal, alleging that he was “a participant during the public hearing in front of Josephine County’s
22 Board of Commissioners on December 22, 2004.” Motion to Intervene 1. There was no objection
23 to Sommer’s motion to intervene, and on May 26, 2005, we issued an order granting the motion.
24 On June 3, 2005, the county filed a Motion to Dismiss Holger Sommer as Intervenor-Petitioner.¹
25 For the reasons discussed below, based on the county’s motion, we dismiss Sommer as Intervenor-
26 Petitioner.²

27 A person has standing to intervene in a LUBA appeal if that person “appeared before the
28 local government * * * orally or in writing.” ORS 197.830(7)(b)(B); *see also* OAR 661-010-

¹ The county cites to OAR 661-010-0050(1), which provides that “the Board may deny [intervention] status at any time.”

² The county requests a telephone conference hearing on its motion. The written briefing on this motion is sufficient, and we deny the county’s request for a telephone conference.

1 0050(1).³ The county argues that Sommer did not “appear” for purposes of standing to intervene.

2 The county asserts:

3 “The Record in this case closed on February 18, 2004. The hearing on December
4 22, 2004 did not involve public testimony because the record was closed.
5 Although the minutes reflect Sommer’s attendance, they do not reflect any
6 ‘participation’ on his part. In fact, Sommer was informed that he could not
7 participate because the hearing was not open for public testimony, as the Record
8 had been closed for over ten months.” County’s Motion to Dismiss Holger
9 Sommer as Intervenor-Petitioner 2 (citations omitted).⁴

10 Sommer responds:

11 “During the December 22, 2004 public hearing Sommer appeared before the local
12 government and voiced his concern about the land use matter on the agenda in a
13 point of order. His request of being heard further was rejected by Chair, but he had

³ ORS 197.830(7) provides, in pertinent part:

“(a) Within 21 days after a notice of intent to appeal has been filed with the board under subsection (1) of this section, any person may intervene in and be made a party to the review proceeding upon a showing of compliance with subsection (2) of this section.

“(b) Notwithstanding the provisions of paragraph (a) of this subsection, persons who may intervene in and be made a party to the review proceedings, as set forth in subsection (1) of this section, are:

“(A) The applicant who initiated the action before the local government, special district or state agency; or

“(B) Persons who appeared before the local government, special district or state agency, orally or in writing.”

OAR 661-010-0050(1) provides:

“Standing to Intervene: The applicant and any person who appeared before the local government, special district or state agency may intervene in a review proceeding before the Board. Status as an intervenor is recognized when a motion to intervene is filed, but the Board may deny that status at any time.”

⁴ The minutes of the December 22, 2004 meeting provide, in relevant part:

“Point of Order was called by **Mike Walker** regarding the hearing process. Commissioner Riddle stated that he would not be recognized because the hearing was for discussion and action only. The hearing is not open for public testimony. * * * **Holger Sommer** (sic), stated that he has the same point of order. Commissioner Riddle stated that he has the same ruling. * * *. He said they did notice all people who participated in the hearing and under public meeting law everyone has a right to be at the hearing when they make a decision.” Record 91.

1 already appeared and spoken.” Intervenor-Petitioner’s Response to County’s
2 Motion to Dismiss Holger Sommer as Intervenor-Petitioner 1-2.

3 There appears to be no dispute that Sommer did not appear at a public hearing while the
4 evidentiary record was open. His only basis for claiming status as an intervenor is his attempt to
5 speak at the December 22, 2004 hearing, ten months after the evidentiary record was closed.
6 There also appears to be no dispute that the December 22, 2004 hearing was a meeting conducted
7 for the sole purpose of deliberation and final action by the board of commissioners. *See* n 4.

8 Sommer’s motion to intervene can only be granted if he demonstrates that (1) he in fact
9 appeared, or (2) he attempted to appear and the local government erred in rejecting his attempt to
10 appear at the hearing. *See Hugo v. Columbia County*, 34 Or LUBA 577, *aff’d* 157 Or App 1,
11 967 P2d 895 (1998) (“appearance” requirement is obviated where the local government “fails to
12 abide by the statutorily mandated procedures in a way that precludes [intervenor’s] ability to
13 appear”). Sommer does not argue that the county wrongly rejected his attempt to appear, only that
14 his attempt to participate at the hearing was sufficient to satisfy the “appearance” requirement.
15 Accordingly, we address only the argument presented in Sommer’s response to intervenor’s motion
16 to dismiss; *i.e.*, that he in fact appeared before the local government, orally or in writing. *See*
17 *Ramsey v. City of Portland*, 28 Or LUBA 763 (1994) (If a person moving to intervene in a
18 LUBA appeal does not contend (1) the local government failed to follow statutorily required
19 procedures in making the challenged decision and such failure prevented movant from being able to
20 appear below, or (2) the local government improperly refused to allow movant to appear below, the
21 appearance requirement is not obviated.).⁵

⁵ We note that if a request to participate is erroneously denied by the decision maker, and the person whose request is denied argues that such denial is erroneous, then the alleged error, if proven, would likely obviate the appearance requirement. *See Hugo, supra*; *see also McKenzie v. Multnomah County*, 26 Or LUBA 619 (1993); *Sorte v. Newport*, 25 Or LUBA 828 (1993) (both holding movant has standing to challenge a local government’s denial of a right to present testimony in the local proceedings). However, as noted above, Sommer does not argue that he had a right to participate that was erroneously denied. Accordingly, we need not determine whether the county board of commissioners in this case committed procedural error in refusing Sommer’s request to address the board of commissioners.

1 Sommer's contention seems to be that his mere attendance at the December 22, 2004
2 hearing and *attempt* to participate satisfies the "appearance" requirement for standing to intervene
3 in a LUBA appeal. He argues that "participation" is not required and that he did in fact "appear,"
4 which is reflected by the minutes that demonstrate his attendance. We disagree with Sommer's
5 understanding of the "appearance" requirement.

6 We agree with Sommer that he "appeared" at the December 22, 2004 hearing in the literal
7 sense, because he was present in the room, he presumably was visible to those around him and he
8 requested a right to address the board of commissioners.⁶ Public participation was not allowed at
9 the December 22, 2004 hearing, however, because the record had already closed. Sommer's
10 request was therefore denied. The "appearance" requirement demands more than that a person
11 merely attend a public hearing and request to participate.

12 Where a local government conducts a public hearing at which public participation is not
13 allowed, a person cannot claim to have "appeared" for purposes of ORS 197.830(7)(b)(B) and
14 OAR 661-010-0050(1) by merely attending the hearing and asserting a right to participate, where
15 such participation is subsequently denied. Accordingly, Sommer did not satisfy the "appearance"
16 requirement when he attempted to testify at the December 22, 2004 hearing meeting ten months
17 after the evidentiary record was closed, and he does not have standing to intervene in this appeal.

18 The county's motion to dismiss Holger Sommer as Intervenor-Petitioner is granted.

19 **RECORD OBJECTIONS**

20 On May 18, 2005, Sommer filed objections to the record. Because we grant the county's
21 motion to dismiss Sommer as a party to this appeal, Sommer does not have standing to file a record
22 objection. We therefore do not address the record objection further.

23 The record is settled as of the date of this order. The petition for review shall be due 21
24 days after the date of this order. The respondent's brief shall be due 42 days after the date of this

⁶ Webster's Third International Dictionary defines "appearance" as "the act of coming into view or being visible."

1 order. The Board's final opinion and order shall be due 77 days after the date of this order.

2 Dated this 4th day of August, 2005.

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Anne C. Davies
Board Chair