BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROBERT FLOWERS, NANCY ROEDER and 1000 FRIENDS OF OREGON, Petitioners, vs. KLAMATH COUNTY, Respondent, and BIO-WASTE MANAGEMENT CORPORATION, Intervenor-Respondent.	LUBA Nos. 88-112, 88-113 and 88-124 FINAL OPINION AND ORDER

Appeal from Klamath County.

D. Michael Wells, Eugene, filed the petition for review and argued on behalf of petitioners Robert Flowers and 1000 Friends of Oregon. With him on the brief was Hutchinson, Anderson, Cox, Parrish & Coons, P.C.

No appearance by petitioner Nancy Roeder.

Michael Spencer, Klamath Falls, filed a response brief and argued on behalf of respondent.

Steven R. Schell and Stark Ackerman, Portland, filed a response brief and Steven R. Schell argued on behalf of intervenor-respondent. With them on the brief was Rappleyea, Beck, Helterline & Roskie.

SHERTON, Referee; HOLSTUN, Chief Referee, participated in the decision.

DISMISSED 06/02/89

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

Opinion by Sherton.

NATURE OF THE DECISIONS

The appealed county decisions concern a proposed bio-medical waste incinerator facility. In LUBA No. 88-112, petitioners appeal an October 14, 1987 land use compatibility statement which indicates that the proposed incinerator is allowed outright by the Klamath County Comprehensive Plan. In LUBA No. 88-124, petitioners appeal a November 14, 1988 decision granting site plan approval for the proposed incinerator. In LUBA No. 88-113, petitioners appeal a November 16, 1988 building permit for the proposed incinerator.

MOTIONS TO DISMISS LUBA NOS. 88-112 AND 88-113

We grant the motions of respondent Klamath County (county) to dismiss LUBA Nos. 88-112 and 88-113, for the reasons stated in our Interlocutory Order on Motions to Dismiss (interlocutory order), issued February 28, 1989.

STATUS OF PETITIONER ROEDER

ORS 197.830(9) provides that a petition for review of the land use decision appealed shall be filed with the Board as required by Board rule. OAR 661-10-030 provides in relevant part:

> " * * * Failure to file a petition for review within the time required by this section, and any extensions of that time under OAR 661-10-045(7) or OAR 661-10-067(2), shall result in dismissal of the appeal * * * ."

Pursuant to our January 10, 1989 Order on Consolidation and Extensions of Time, petitions for review in this case were due

on or before 21 days after we issued our interlocutory order, i.e., on or before March 21, 1989. Petitioner Nancy Roeder has not filed a petition for review in this proceeding. We, therefore, dismiss the appeal of petitioner Nancy Roeder in LUBA No. 88-124.[1]

MOTION TO INTERVENE

Bio-Waste Management Corporation moves to intervene on the side of respondent in this proceeding. This motion was filed 17 days after the petition for review of petitioners Robert Flowers and 1000 Friends of Oregon (1000 Friends) was filed. Petitioners Flowers and 1000 Friends (petitioners) oppose the motion only if granting it would result in delaying the resolution of their appeals.

Since Bio-Waste Management Corporation does not request any extension of time in this proceeding, and filed its response brief within the time set for the filing of respondents' briefs, its participation in this proceeding will not cause any delay in the resolution of petitioners' appeals. The motion to intervene is granted.

FACTS

Intervenor-respondent Bio-Waste Management Corporation (intervenor) proposes to construct and operate a bio-medical waste incinerator on property zoned Heavy Industrial (IH) in the unincorporated community of Worden. The proposed facility will receive bio-medical waste material, temporarily store it on-site and burn it in an incinerator. The combustion residues

will be removed from the site for disposal in a landfill.

On November 14, 1988, the county planning department granted site plan approval for the proposed use.[2] This appeal followed.

JURISDICTION

In its motion to dismiss LUBA No. 88-124, the county argued that we lack jurisdiction over petitioners' appeal of the site plan approval because (1) petitioners failed to exhaust all remedies available by right, as required by ORS 197.825(2)(a); (2) the decision appealed is not a land use decision, as defined by ORS 197.015(10); or (3) the appeal was not timely filed, as required by ORS 197.830(7). In our interlocutory order we considered and rejected each of the bases argued by the county for dismissal of this case.[3]

A. Applicability of "Law of the Case" Doctrine

In the petition for review, petitioners assert that LUBA determined, in its interlocutory order, that it has jurisdiction to review the county's site plan approval decision. Petitioners argue that "[u]nder the doctrine of 'law of the case,' a point of law decided at an earlier stage of the same case cannot be relitigated or reconsidered," citing Koch v. Southern Pacific Transportation Co., 274 Or 499, 547 P2d 589 (1976). Petition for Review 4.

In their response briefs, the county and intervenor (respondents) contend that we lack jurisdiction for some or all of the reasons advanced by the county in its motion to

dismiss. In effect, the respondents ask us to reconsider the determinations on jurisdictional issues made in our interlocutory order.

Intervenor contends that petitioners' interpretation of the "law of the case" doctrine is much too broad. Intervenor argues that in R.L.K. and Co. v. Tax Commission, 249 Or 603, 438 P2d 987 (1968), the Oregon Supreme Court held the "law of the case" doctrine is not properly applied to a segment of a case, but rather only to a final judgment covering all the issues of a case. Intervenor also argues that the court has stated that the "law of the case" doctrine does not bar a court from changing a ruling it believes incorrect, so long as no party is prejudiced other than simply by ending up on the wrong side of the ruling. State ex rel Harmon v. Blanding, 292 Or 752, 644 P2d 1082 (1982). In this case, intervenor maintains the "law of the case" doctrine does not prevent our reconsideration of matters ruled on in our interlocutory order because (1) that order was not a final judgment on all the matters of the case, and (2) a change in our ruling would not prejudice any party.

Both the Court of Appeals and LUBA have determined that the doctrine of "waiver," which the court found to be a more useful term than "law of the case," applies to LUBA proceedings. Under the doctrine of waiver, after a land use decision is remanded by LUBA and a local government adopts a decision on remand, LUBA may limit the issues in a subsequent LUBA appeal

of the decision on remand to issues that could not have been raised in the first LUBA appeal. Mill Creek Glen Protection Assoc. v. Umatilla Co., 88 Or App 522, 526-527, 746 P2d 728 (1987); Hearne v. Baker County, 89 Or App 282, 288, 748 P2d 1016, rev den 304 Or 576 (1988); Portland Audubon v. Clackamas County, 14 Or LUBA 433, 436-437, aff'd 80 Or App 593 (1986). However, neither the appellate courts nor LUBA has had occasion to rule on whether this doctrine applies within a single LUBA appeal proceeding, to preclude parties from seeking reconsideration of issues decided adversely to them at an earlier stage of the same LUBA review proceeding, as petitioners argue here.

We are mindful that our reviews should be conducted "consistently with sound principles governing judicial review." ORS 197.805. The Oregon Supreme Court has held that the "law of the case" doctrine applies to give binding effect to "an adjudication of issues which have culminated in a final decree." R.L.K. and Co. v. Tax Commission, 249 Or at 608. The court also held that the "law of the case" doctrine does not bar a court from changing a ruling which it believes to be wrong, at least if "neither party has been prejudiced beyond simply ending up on the losing side of the ruling." State ex rel Harmon v. Blanding, 292 Or at 756; see also Office Services Corp. v. CAS Systems, Inc., 63 Or App 842, 845, 666 P2d 297 (1983).

In Portland Audubon v. Clackamas County, supra, we

concluded that application of the "law of the case" doctrine to preclude review in subsequent appeals of issues which could have been raised in earlier appeals would further the statutory goal of resolving land use disputes in a timely fashion by avoiding unending appeals in disputes involving land use decisions.[4] On the other hand, our reconsideration, within a single review proceeding, of a possibly erroneous ruling will not result in generating endless appeals of land use decisions and is consistent with sound principles of judicial review. We conclude the "law of the case" or "waiver" doctrine does not bar us from reconsidering, in the same appeal proceeding, rulings made in an interlocutory order when no party's substantial rights are prejudiced by such action.[5]

In this case, petitioners themselves raise the applicability of, and explicitly rely on, the "law of the case" doctrine in their petition for review. Petitioners had opportunity to respond to the arguments in respondents' briefs regarding applicability of the "law of the case" doctrine and jurisdictional issues at oral argument. Petitioners also could have requested the opportunity to file a reply brief pursuant to OAR 661-10-038, but chose not to do so. We conclude petitioners' substantial right to an adequate opportunity to present their case is not prejudiced by our reconsidering, in the subsections below, whether we have authority to review the appealed site plan approval.

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B. Exhaustion of Remedies

ORS 197.825(2)(a) provides that our jurisdiction "[i]s limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review." In its motion to dismiss, the county argued that an appeal of the planning department's approval of the site plan was available by right to petitioners under either LDC 33.002.A or 90.004. However, in ruling on the county's motion, we concluded that there was no appeal of the site plan approval decision available to petitioners under the LDC; and, therefore, petitioners did not fail to exhaust remedies available to them by right. Interlocutory Order at 13-21.

In its brief, the county asks us to reconsider our conclusion with regard to the availability to petitioners of an appeal of the site plan approval decision under LDC 90.004. However, the county's argument presents no points not already considered by us in ruling on the motion to dismiss. We, therefore, adhere to our ruling that "the appeal process of LDC 90.004 was not available to petitioners to challenge the appealed site plan approval," for the reasons stated in the interlocutory order. (Emphasis in original.) Interlocutory Order at 21.

C. Definition of Land Use Decision

Our jurisdiction to review local government decisions is limited to "land use decisions." ORS 197.825(1). In its motion to dismiss, the county argued its decision to consider

the proposed bio-medical waste incinerator as a permitted use in the IH zone was a ministerial decision governed by clear and objective standards in its acknowledged LDC and, therefore, comes under the exemption from the statutory definition of "land use decision" provided by ORS 197.015(10)(b).[6] The county contended that, since the proposed incinerator has some of the characteristics of "scrap operations," LDC 90.003.C mandates that it be classified within the "scrap operations" category, a permitted use in the IH zone.[7]

In their response to the county's motion to dismiss, petitioners argued that the county's decision to classify the proposed use as "scrap operations" required the exercise of significant legal and factual judgment. Petitioners also argued the proposed incinerator use has none of the characteristics of "scrap operations," and its appropriate classification is probably "extensive impact services and utilities."

In the interlocutory order, we described the system established in LDC Article 90 for classifying uses into categories and types. We interpreted the provision of LDC 90.003.C relied upon by the county as applying only to choosing between two or more use types within the commercial category in classifying a proposed use. We stated that whether the proposed incinerator should be classified as "scrap operations" (commercial category) or as "extensive impact services and utilities" (civic category), or both, is not

governed by LDC 90.003.C at all. Under the applicable provision, LDC 90.003.B,[8] this determination simply depends on the definitions of those use types and on the characteristics of the proposed use. Relying on Doughton v. Douglas County, 82 Or App 444, 449, 728 P2d 887 (1986), rev den 303 Or 74 (1987), we concluded that if either of these determinations requires the exercise of significant legal or factual judgment, the use classification decision is discretionary and, therefore, is not a "ministerial decision * * * made under clear and objective standards" which is excluded from the statutory definition of "land use decision" by ORS 197.015(10)(b). Interlocutory Order at 23-26.

We concluded in the interlocutory order that a determination of whether the proposed incinerator should be classified under "extensive impact services and utilities" does involve significant legal and factual judgment, and therefore is discretionary, based on the following reasoning:

> "* * * The definition of 'extensive impact services and utilities' provides:
>
> "'The Extensive Impact Services and Utilities use type refers to public services and utilities which have substantial impact on surrounding land uses. Such uses may be conditionally permitted in any zone when the public interest supersedes the usual limitations placed on land use and transcends the usual restraints of zoning for reasons of necessary location and community-wide interest. * * * '[9] (Emphasis added.) LDC 92.009.
>
> "In Hudson v. City of Baker, [15 Or LUBA 650, 655 (1987)], we held the determination of whether a proposed use should be classified as a 'use which may create a nuisance because of dust, noise, smoke, odor,

> gas, or other adverse effect' involved the exercise of considerable discretion, due to both the subjective nature of what constitutes a nuisance and the open ended listing of factors to be considered. In this case, the required determination of whether the proposed use constitutes a public service is similarly subjective, and the required determination of whether the proposed use will have significant impacts on surrounding land uses is not circumscribed by any listing of factors to be considered." Interlocutory Order at 26-27.

In their briefs, respondents argue that we should reconsider our conclusion that a decision on whether the proposed incinerator should be classified under "extensive impact services and utilities" is discretionary. Respondents argue that the definition of "extensive impact services and utilities," quoted above, clearly provides that such uses must be "public services" or "public utilities." According to respondents, the proposed incinerator facility is neither, but rather is a commercial operation being constructed by a private corporation to provide a service (disposal of bio-medical waste) to a limited clientele (hospitals and doctors' offices).

Intervenor further argues the proposed facility is clearly not a "public utility" because it does not involve communication, transportation, power or water service to the general public, citing the definition of "public utility" in ORS 757.005. Intervenor also argues the proposed use is not a "public service" because that term is normally interpreted as "referring to certain enterprises which provide services that are needed or desired by the community, but which are incapable of being furnished by private, competitive business," citing

Black's Law Dictionary, 4th ed. 1951. Intervenor's Brief 12. Intervenor concludes that because the proposed use is not a public service or public utility, there is no reason to consider whether it has any of the other characteristics of the "extensive impact services and utilities" use type.

We agree with respondents that under LDC 92.009 "extensive impact services and utilities" must be either "public utilities" or "public services." The LDC defines "public utility" as follows:

> "Any corporation, including municipal or quasi-municipal corporation, service district, company, individual, or association that owns or operates any plant or equipment:
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> "A. For the conveyance of telegraph or telephone messages, with or without wires;
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> "B. For the transportation of water, gas, or petroleum products by pipeline;
>
> "C. For the production, transmission, delivery or furnishing of heat, light, water, or electricity;
>
> "D. For the transmission and delivery of television pictures and sound by cables;
>
> "E. For the transportation of persons or property by street railroads or other street transportation or common carriers;
>
> "F. For the treatment and disposal of sewage; or
>
> "G. For the disposal of storm water runoff." LDC Article 11.

The proposed incinerator facility will not provide any of the services described in A through G above; and, therefore, the proposed incinerator is not a "public utility" as defined in the LDC.

The issue remaining is whether making a determination that the proposed facility is not a "public service" under the LDC involves discretion. The LDC does not contain a definition of "public service." Although the uses listed as examples of "extensive impact services and utilities" in LDC 92.009, see n 9, supra, do not include "incinerators," they do include a form of solid waste disposal - "sanitary landfills."

Other provisions of the LDC can also aid us in interpreting the intended scope of the "extensive impact services and utilities" use type. The LDC's commercial and industrial zoning districts simply list "civic: extensive impact," "extensive impact services," or "extensive impact" as conditional uses. LDC 51.009.C.8, 51.010.C.4, 51.011.C.2, 51.013.C.2, 51.014.C.1, 51.015.C.3, 51.016.C.1. However, the LDC's resource zones generally provide that the "extensive impact services" allowable as conditional uses are limited to the following:

> " * * * commercial power generating facilities, utility substations and transmission lines, solid waste disposal sites, personal use airports, mineral exploration and extraction, public and private parks, playgrounds, hunting and fishing preserves and campgrounds, golf courses, and fire stations." (Emphasis added.) LDC 51.017.C.e.6, 51.018.C.e.6, 51.019.C.e.6. See also LDC 51.020.D.2, 51.021.C.1.

"Solid waste" is defined by the LDC as all putrescible and non-putrescible wastes other than hazardous wastes and materials used for fertilizer. LDC Article 11. "Disposal site" is defined in relevant part as:

> "Land and facilities used for the disposal, handling or transfer of * * * solid waste, including but not limited to * * * incinerators for solid waste delivered by public [sic] or by a solid waste collection service * * * ." LDC Article 11.

Thus, it seems clear that the LDC envisions that at least some solid waste incinerators could be within the scope of the "extensive impact services and utilities" use type.

Furthermore, we note that there are several uses listed as examples of "extensive impact services and utilities" in LDC 92.009, or in the provisions of the resource zoning districts which limit allowable "extensive impact services" to certain uses, which may be operated by private corporations and may not be available to the general public. These include sanitary landfills, airports, private parks, playgrounds, hunting and fishing preserves, campgrounds and golf courses. It is apparently envisioned by the code that such uses are or could be "extensive impact services and utilities," although they might well not satisfy the dictionary definition of "public services," which intervenor argues should be applied in this case.[10]

Thus, the LDC (1) does not define "public services," (2) recognizes that uses which may be privately owned and serve a private, selected clientele can be included in the "extensive impact services" category, and (3) recognizes that some solid waste incinerators may be "extensive impact services." In view of these facts, we conclude that a determination of whether the proposed bio-medical waste incinerator facility constitutes a

"public service" involves "significant legal and factual judgment." See Doughton v. Douglas County, 82 Or App at 449; Kunkel v. Washington County, ___ Or LUBA ___ (LUBA No. 87-060, February 18, 1988) slip op 9-10. Therefore, the county's determination of whether the proposed use should be classified as an "extensive impact services and utilities" use involves discretion,[11] and the subject site plan approval decision was not a ministerial decision made under clear and objective standards. The exemption from the definition of "land use decision" provided by ORS 197.015(10)(b) does not apply to the appealed site plan approval.

D. Timely Filing of Notice of Intent to Appeal

1. Petitioner 1000 Friends

In our interlocutory order, we stated that because we determined the county's decision on the subject site plan approval required the exercise of discretion, the site plan approval is a discretionary "permit" as defined by ORS 215.402(4). Interlocutory Order at 28-29. We found that the county did not provide the opportunity for public hearing or notice required by ORS 215.416(3) and (5). Relying on the Court of Appeals' reasoning in League of Women Voters v. Coos County, 82 Or App 673, 680-681, 729 P2d 588 (1986) and Bryant v. Clackamas County, 56 Or App 442, 643 P2d 649 (1982), and our opinions in Kunkel v. Washington County, supra, slip op at 12 and Doughton v. Douglas County, 15 Or LUBA 576, 581 (1987), we concluded that petitioners' notice of intent to appeal is

timely if it was filed not more than 21 days after petitioners received actual notice of the county's decision to grant the challenged site plan approval. Interlocutory Order at 29-30. We also determined that the notice of intent to appeal of petitioner 1000 Friends in LUBA No. 88-124 was timely filed, because petitioner 1000 Friends provided adequate support for the allegation that it received actual notice of the subject site plan approval less than 21 days before its notice of intent to appeal was filed. Interlocutory Order at 30-31.

In its brief, the county concedes that petitioner 1000 Friends may have received actual notice of the subject site plan approval less than 21 days before filing its notice of intent to appeal. However, the county contends that the filing was nevertheless untimely because 1000 Friends was not entitled to notice of the county's decision under ORS 215.416(10),[12] or to notice of any hearing on the site plan approval, if a hearing were required to be held.

The county's argument presents no points not already considered by us in ruling on the county's motion to dismiss. The county, in effect, asks us to reconsider our ruling in Kunkel v. Washington County, supra, and the interlocutory order, that when a county has not provided the hearing and notice of hearing required by ORS 215.416(3) and (5),[13] a notice of intent to appeal is timely if it is filed within 21 days of when the petitioner obtained actual notice of the county's decision. We decline to do so. We, therefore, adhere

to our ruling that petitioner 1000 Friend's notice of intent to appeal was timely filed. Interlocutory Order at 31.

2. Petitioner Flowers

In our interlocutory order, we deferred ruling on the county's motion to dismiss with regard to petitioner Flowers, for the same reasons we deferred such a ruling with regard to petitioner Roeder. See n 1. However, petitioners attach to the petition for review an affidavit from petitioner Flowers containing allegations indicating that his notice of intent to appeal was filed within 21 days of when he received actual notice of the site plan approval.

The county attaches to its brief an affidavit of the chairman of the Board of County Commissioners for Klamath County (board of commissioners). The affidavit alleges that petitioner Flowers appeared at a board of commissioners meeting on November 23, 1988, and made statements indicating that he was aware the incinerator had been approved by the county based on a determination that the use is a "scrap operation." The county argues the affidavit establishes that petitioner Flowers had actual notice of the site plan approval on November 23, 1988, more than 21 days before his notice of intent to appeal in this case was filed.

In our interlocutory order, we stated that petitioner Flowers is required to present allegations of when he received actual notice of the county's site plan approval. Interlocutory Order at 32. The affidavit submitted by the

county establishes only that petitioner Flowers was aware that some form of county approval for the incinerator had been granted. Petitioner Flowers concedes that on November 23, 1988, he was aware that a building permit had been issued for the incinerator, but contends he was not aware that a site plan approval had been granted. The county's affidavit does not establish that petitioner Flowers was aware of the site plan approval on November 23, 1988. We find that petitioner Flowers has satisfied the requirement in our interlocutory order that he present clear allegations that he received actual notice of the site plan approval not more than 21 days before his notice of intent to appeal that decision was filed. We, therefore, conclude that petitioner Flowers' notice of intent to appeal in LUBA No. 88-124 was timely filed.

For the reasons stated in subsections B through D above, and in the interlocutory order at 13-32, we reject respondents' challenges to our jurisdiction to review the appealed county site plan approval decision.

STANDING OF PETITIONERS

Respondents contest the standing of petitioners Flowers and 1000 Friends. Under ORS 197.830(3), a person may petition the Board for review of a quasi-judicial land use decision if that person:

> "(a) Filed a notice of intent to appeal the decision * * *;
>
> "(b) Appeared before the local government * * * orally or in writing; and

"(c) Meets one of the following criteria:

"(A) Was entitled as of right to notice and hearing prior to the decision to be reviewed; or

"(B) Is aggrieved or has interests adversely affected by the decision."

Respondents argue that petitioners fail to meet the requirements of paragraphs (b) and (c) of ORS 197.830(3) quoted above.

A. Petitioner Flowers

The petition for review presents the following allegations to establish the standing of petitioner Flowers:

> "Petitioner Flowers is a farmer and rancher whose property is approximately one-quarter mile from the incinerator. He cultivates approximately 1,000 acres in oats, hay and wheat. He also milks about 120 head of dairy cattle. He filed a notice of intent to appeal, was entitled to notice prior to the decision, Respondent Klamath County held no hearing and Petitioner is aggrieved and has interests adversely affected by the decision. The operation of an incinerator burning up to 11 tons a day of contaminated waste within one-quarter mile of his ranch and home will materially and adversely affect his home and business. See also Interlocutory Order on Motions to Dismiss (Order) at 12."[14] Petition for Review 1.

Intervenor argues petitioner Flowers does not meet the "appearance" requirement of paragraph (b) above because he did not appear before the county in this matter.

Intervenor also argues that petitioner Flowers does not satisfy any of the three alternative requirements for standing set out in paragraph (c) above. According to intervenor, petitioner Flowers was not entitled to notice and hearing prior

to the appealed decision because the LDC provides that planning director action on site plan approvals be carried out without notice and hearing. LDC 22.003. Intervenor contends that even if the county were required to provide notice to nearby property owners, the most the LDC requires is mailed notice to owners of property within 250 feet of the subject property. Intervenor points out that petitioner Flowers alleges that his property is one-quarter mile from the subject property. Intervenor argues that to satisfy ORS 197.830(3)(c)(A) the notice one is entitled to as of right must be individual, written notice, not merely newspaper publication, citing Jefferson Landfill Comm. v. Marion Co., 297 Or 280, 686 P2d 310 (1984).

According to intervenor, petitioner Flowers was not "aggrieved" by the county's decision because he did not appear before the county and express a position contrary to the decision. Intervenor also argues that petitioner Flowers has not satisfied the "adversely affected" test because he supplies no allegations of fact to support his contention that operation of the proposed incinerator will adversely affect his home and business. The county similarly contends that petitioner Flowers does not demonstrate that he is "adversely affected" by its decision because he fails to allege how operation of the proposed incinerator would adversely affect his home or ranch.

The facts showing petitioners are entitled to standing are required by statute and administrative rule to be stated in the

petition for review. ORS 197.830(9)(a); OAR 661-10-030(3)(a). Graap v. City of Portland, 11 Or LUBA 1, 4 (1984); Corbett/Terwilliger/Lair Hill Legal Fund, 9 Or LUBA 245, 250 (1983).

With one exception not relevant to this case,[15] ORS 197.830(3)(b) requires that a person seeking our review of a quasi-judicial local government land use decision have appeared before the local government. The petition for review contains no allegation that petitioner Flowers appeared before the county in this matter. Petitioners do not argue that, under the circumstances of this case, the appearance requirement of ORS 197.830(3)(b) is inapplicable to petitioner Flowers or is unenforceable.[16] The petition for review simply ignores the statutory appearance requirement. This deficiency alone is sufficient grounds for dismissal of petitioner Flowers' appeal. Citizens to Save the Willamette Waterfront v. Portland, 12 Or LUBA 244, 248 (1984).[17]

However, even if petitioner Flowers were somehow excused from complying with the appearance requirement of ORS 197.830(3)(b), he would still have to meet at least one of the three alternative requirements for standing under ORS 197.830(3)(c). We consider each in turn.

Petitioner Flowers alleges he was entitled to notice and hearing prior to the appealed decision. Although petitioner Flowers was not entitled to a hearing prior to the decision under the LDC, a public hearing prior to the county's decision was required under ORS 215.416(3).[18] What remains to be

determined is whether petitioner Flowers was entitled as of right to notice of such hearing.

In Jefferson Landfill Comm. v. Marion Co., 297 Or at 288, the court said that identical language in the precursor of ORS 197.830(3)(c)(A) referred to "'special' or individual notice, not notice by publication in a newspaper * * *." Under ORS 215.416(5), quoted at n 13, the county was required to give notice of such a hearing to the applicant and "other persons as otherwise provided by law." Under the LDC, the county is required to give individual notice of applications for planning director approval, other than site plan approvals, only to owners of property within 100 feet of the proposed use. LDC 22.003. The LDC requires the county to give individual, mailed notice of public hearings on quasi-judicial land development applications only to owners of property within 250 feet of the subject property, or to owners of property within 100 feet for minor partitions. LDC 32.001, 32.002.B. Petitioners identify no provision of statute, plan or ordinance which entitles the owner of property one-quarter mile[19] from the subject property to individual notice of a county hearing on a site plan approval for the subject property. We conclude petitioner Flowers was not entitled as of right to individual notice prior to the appealed site plan approval decision.

Petitioner Flowers also alleges he is "aggrieved" by the county's decision. In Jefferson Landfill Comm. v. Marion Co., 297 Or at 284, the court set out the following three-part test

for establishing that a person is "aggrieved," under ORS 197.830(3)(c)(B), by a local government decision:

> "1. The person's interest in the decision was recognized by the local land use decision-making body;
>
> "2. The person asserted a position on the merits; and
>
> "3. The local land use decision-making body reached a decision contrary to the position asserted by the person." (Footnotes omitted.)

The petition for review does not state facts demonstrating that petitioner Flowers meets the above three-part test for aggrievement. Petitioners do not argue that, under the circumstances of this case, the above test for aggrievement is inapplicable to petitioner Flowers or there is some other way in which petitioner Flowers has established his standing as a person "aggrieved" by the decision.[20] We conclude petitioner Flowers has not demonstrated that he is "aggrieved" by the county's decision.

Finally, petitioner Flowers alleges he is "adversely affected" by the county's decision. Petitioner Flowers alleges in the petition for review (1) he owns property approximately one-quarter mile from the proposed incinerator; (2) he cultivates 1,000 acres in oats, hay and wheat; (3) he milks 120 head of dairy cows; and (4) the proposed incinerator burning up to 11 tons per day of contaminated waste will adversely affect his home and business. We have consistently held that petitioners seeking to establish that they have interests adversely affected by an appealed decision must allege facts

showing how the decision impacts them, and what injury flows from that impact. Kellogg Lake Friends v. City of Milwaukie, supra, slip op at n 7; Graap v. City of Portland, 11 Or LUBA at 7; Owyhee Conservationists v. Malheur County, 6 Or LUBA 244, 247 (1982); Parsons v. Josephine County, 2 Or LUBA 343, 345 (1981). Petitioner Flowers' allegations are insufficient to establish that his interests are adversely affected by the county's decision because they do not set out facts demonstrating how the proposed incinerator would adversely affect him, his home or his business.

The petition for review does not contain facts establishing that petitioner Flowers meets any of the three alternative tests to establish standing of ORS 197.830(3)(c). We conclude petitioner Flowers does not have standing to seek review of the site plan approval decision appealed in LUBA No. 88-124.

B. Petitioner 1000 Friends

The allegations presented in the petition for review to establish the standing of petitioner 1000 Friends, in their entirety, are as follows:

> "In 1000 Friends of Oregon v. Wasco County Court, 80 Or App 539 [sic 532] (1986), the Court of Appeals held that 1000 Friends has an interest in ensuring that local governments comply with the state's land use law. Accordingly, 1000 Friends has standing under the 'aggrieved or adversely affected interests' standard to challenge a local government action that violates the land use laws. 80 Or App at 537-38." Petition for Review 1-2.

Intervenor argues that petitioner 1000 Friends did not appear before the county and was not entitled to hearing or

notice prior to the decision. The county argues petitioner 1000 Friends was not "aggrieved" by the decision because it did not assert a position on the merits. Both respondents argue petitioners do not allege sufficient facts to show how the appealed decision affects petitioner 1000 Friends. Respondents also argue that petitioners' reliance on the Court of Appeals opinion in 1000 Friends of Oregon v. Wasco Co. Court, 80 Or App at 537-538, is misplaced because that appeal did not involve a challenge to petitioner 1000 Friend's standing under ORS 197.830(3)(c)(B). Intervenor further argues that the Oregon Supreme Court held that review of the due process question at issue in the case before the Court of Appeals was allowed only because petitioner 1000 Friends had established its standing to invoke LUBA review under state statute. 1000 Friends of Oregon v. Wasco Co. Court, 304 Or 76, 742 P2d 39 (1987), cert den 108 S Ct 1733 (1988).

Petitioners do not allege in their petition for review that petitioner 1000 Friends "appeared" before the county, as required by ORS 197.830(3)(b). As we stated with regard to petitioner Flowers, in the absence of argument by petitioners explaining why the statute does not apply in these circumstances, this deficiency alone is sufficient grounds for dismissal of petitioner 1000 Friends' appeal. Nevertheless, we will also consider whether petitioner 1000 Friends satisfies any of the three alternative requirements for standing set out in ORS 197.830(3)(c).

Petitioners do not allege that petitioner 1000 Friends meets the "entitlement to notice and hearing" test for standing of ORS 197.830(3)(c)(A). Petitioners do allege that petitioner 1000 Friends has standing under the "aggrieved or adversely affected" test of ORS 197.830(3)(c)(B). However, petitioners do not allege facts demonstrating that 1000 Friends satisfies the three-part test for standing as a person "aggrieved" set out in Jefferson Landfill Comm. v. Marion Co., 297 Or at 284, quoted supra.

With regard to the "adversely affected" test for standing, petitioners simply state the Court of Appeals held 1000 Friends has an interest in ensuring that local governments comply with state land use laws. Petitioners apparently believe the Court of Appeals' decision means that petitioner 1000 Friends automatically satisfies the "adversely affected" test for standing any time it seeks to challenge a local government decision which it contends violates state land use laws.

We agree with respondents that petitioners' reliance on the Court of Appeals' statement in 1000 Friends v. Wasco Co. Court, supra, is misplaced. The standing of 1000 Friends was an issue when the case in question was before this Board. See 1000 Friends of Oregon v. Wasco Co. Court, LUBA No. 81-132 (September 30, 1983) slip op 5-7. However, our determination that 1000 Friends had standing was not challenged in the subsequent appeal to the Court of Appeals.

What was at issue before the Court of Appeals was whether a

county judge's participation in the appealed decision was consistent with procedural due process requirements. The Court of Appeals was required to determine whether the petitioners in that case, 1000 Friends and several other individuals, had either a liberty or property interest in the county's decision which would entitle them to procedural due process protections under the Fourteenth Amendment to the U.S. Constitution. The Court of Appeals stated:

> "Petitioners' interest in the Rajneeshpuram incorporation issue is their interest in ensuring that the county comply with the state's land use laws. By statute, petitioners have standing to challenge the county's action if it violates those laws. Their interest is therefore one to which they have a legitimate claim of entitlement under state law. * * * " 1000 Friends of Oregon v. Wasco Co. Court, supra.

Furthermore, in its review of this aspect of the Court of Appeals decision, the Oregon Supreme Court stated:

> "The Court of Appeals believed that Cantrell's participation tainted the county board's vote on the incorporation petition for failure to meet federal standards of due process under the 14th amendment. The court dealt with a preliminary question whether petitioners could make this claim by holding that they had a 'property interest' * * * in their state-granted right to ensure compliance with the land use laws. We are less confident that the United States Supreme Court would so characterize petitioners' interest. But once petitioners qualified as 'aggrieved' persons under ORS 197.830(2)(b) or 197.830(3)(c)(B) to invoke LUBA's review at all, this review could reach an institutional failure of due process towards anyone's 'property interests,' * * * ." (Emphasis added.) 1000 Friends of Oregon v. Wasco Co. Court, 304 Or at 85-86.

Thus, it can be seen the Court of Appeals statement relied upon by petitioners did not address petitioner 1000 Friends'

ability to satisfy the requirements of state statute for standing to seek LUBA review. In addition, the "petitioners" referred to by the Court of Appeals included individuals, as well as 1000 Friends. If the interpretation of the court's statement by petitioners in this case is correct, the requirements of ORS 197.830(3)(c) are essentially meaningless, as any person would satisfy the "adversely affected" test if that person sought review of a decision which he believed to violate state land use laws. Finally, the Supreme Court's opinion makes it clear that only if petitioners qualify as persons with standing to invoke LUBA review under state law, could such review recognize due process violations of their "property interests." In other words, there is no presumption that 1000 Friends is adversely affected by any local government decision which it believes violates state land use laws.

Petitioner 1000 Friends does not allege facts showing how the subject site plan approval impacts its interests, and what injury flows from that impact. Petitioner 1000 Friends' allegations are insufficient to establish that its interests are adversely affected by the county's decision.

The petition for review does not contain facts establishing that petitioner 1000 Friends meets any of the three alternative tests to establish standing of ORS 197.830(3)(c). We conclude petitioner 1000 Friends does not have standing to seek review of the county decision appealed in LUBA No. 88-124.

LUBA No. 88-124 is dismissed.[21]

FOOTNOTES

1

In our interlocutory order, we deferred ruling on the county's motion to dismiss LUBA No. 88-124 with respect to petitioner Roeder because petitioners did not present, in their response to the motion, clear allegations as to when petitioner Roeder obtained actual knowledge of the site plan approval. We stated that we would not dismiss petitioner Roeder's appeal in LUBA No.88-124 if petitioners established the notice of intent to appeal in LUBA No. 88-124 was filed within 21 days of when petitioner Roeder received actual notice of the site plan approval. We note no further allegations have been submitted to us as to when petitioner Roeder received actual notice of the site plan approval. This provides an additional basis for dismissing petitioner Roeder's appeal in LUBA No. 88-124.

2

The county's site plan approval process is set out in Klamath County Land Development Code (LDC) Article 41. The site plan approval process applies to all uses which are permitted uses in the subject zone. LDC 41.001. All determinations involving application of the LDC or other county land use regulations, including a determination that the proposed use is a permitted use in the subject zone, are made in the site plan approval decision. LDC 41.001 and 41.003.

3

However, we deferred ruling on whether the notice of intent to appeal was timely filed on behalf of petitioners Flowers or Roeder. The timeliness of petitioner Roeder's notice of intent to appeal is addressed in n 1, supra. The timeliness of petitioner Flower's notice of intent to appeal is addressed below, in subsection D.1 of this section.

4

ORS 197.805 states:

> "It is the policy of the Legislative Assembly that time is of the essence in reaching final decisions in matters involving land use and that those decisions be made consistently with sound principles governing judicial review. It is the intent of the Legislative Assembly in enacting ORS 197.805 to 197.855 to accomplish these objectives."

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[5] The "substantial rights" of parties in land use proceedings do not include a right to a particular result, but rather the rights to an adequate opportunity to prepare and submit their case, a full and fair hearing and a timely decision. Muller v. Polk County, ___ OR LUBA ___ (LUBA No. 88-018, June 29, 1988) slip op 6; Kellogg Lake Friends v. City of Milwaukie, ___ Or LUBA ___ (LUBA No. 88-022, Order on Motion to File an Amended Statement of Standing, June 13, 1988).

[6] ORS 197.015(10)(b) provides that the statutory definition of a "land use decision":

> "[d]oes not include a ministerial decision of a local government made under clear and objective standards contained in an acknowledged comprehensive plan or land use regulation and for which no right to a hearing is provided by the local government under ORS 215.402 to 215.438 or 227.160 to 227.185."

[7] The provision of LDC 90.003.C relied on by the county provides as follows:

> " * * * any commercial uses shall be classified within the scrap operations use type if they have any of its characteristics."

[8] LDC 90.003.B provides in relevant part:

> " * * * If the principal uses on a lot by an individual establishment, management, or institution appear to fit under two or more different categories [of] use types -- in effect, Residential, Civic, Commercial, Industrial, Agricultural, or Extensive [sic Extractive] -- the principal uses shall be classified under each appropriate category."

[9] The portion of the description not quoted in our interlocutory order provides:

> "Typical places or uses are sanitary landfills, airports, detention and correction institutions,

fairgrounds, fire stations, parks, public sports arenas, vehicular raceways, microwave relay stations, or other communication structures, electrical transmission lines, substations, and electrical generation facilities."

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[10] We note that not all dictionary definitions of "public service" necessarily require that a "public service" be incapable of being provided by private, competitive business, as does the definition in Black's Law Dictionary, cited by intervenor. For instance, Webster's Third New International Dictionary, 1981, defines "public service" as "a publicly or privately owned enterprise * * * conducted for the benefit of the community as a whole" or "a service rendered in the public interest." (Emphasis added.)

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[11] In addition to being either "public services" or "public utilities," "extensive impact services and utilities" must have "substantial impact on surrounding land uses." LDC 92.009. We previously stated that a determination of whether a proposed use will have significant impacts on surrounding land uses involves significant legal and factual judgment. Interlocutory Order at 27. Respondents do not present further argument on this point in their briefs.

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[12] ORS 215.416(10) requires a county to give "written notice of the approval or denial * * * to all parties to the [discretionary permit] proceeding."

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[13] ORS 215.416(3) and (5) provide in relevant part:

"(3) * * * the hearings officer shall hold at least one public hearing on the [discretionary permit] application."

"(5) Hearings under this section shall be held only after notice to the applicant and also notice to such other persons as otherwise provided by law * * * ."

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[14] Petitioners cite page 12 of our interlocutory order.

Page 12 of that order contains discussion of whether the building permit appealed in LUBA No. 88-113 is a land use decision under the "significant impacts test" recognized by the court in Billington v. Polk County, 299 Or 471, 479, 703 P2d 232 (1985). Petitioners' reference is apparently intended to call our attention to the following statement:

> "Even though the completed project in this case will have significant impacts on land use, we do not believe it serves any purpose to recognize the issuance of a building permit for this project as a 'significant impact test' land use decision." (Emphasis added.)

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15 ORS 197.830(3) provides that the standing requirements of that subsection apply, "except as provided in ORS 197.620(1)." Under ORS 197.620, there are certain circumstances in which a person is authorized to file an appeal of a local government decision to adopt a postacknowledgment comprehensive plan or land use regulation amendment without having participated orally or in writing before the local government.

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16 We note that the Oregon Supreme Court has twice declined to decide whether a person who is prevented from appearing before a local government because of deficient public or individual notice of the local government's proceedings can nevertheless have standing to appeal to this Board under ORS 197.830(3), or its substantially identical precursor, Oregon Laws 1979, chapter 772, section 4(3), as amended by Oregon Laws 1981, chapter 748, section 35. Jefferson Landfill Comm. v. Marion Co., 297 Or at 284, n 2; Warren v. Lane County, 297 Or 290, 299, n 12, 686 P2d 316 (1984).

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17 We recognize the Court of Appeals' admonition in Hilliard v. Lane County, 51 Or App 587, 595, 626 P2d 905, rev den 291 Or 368 (1981) that LUBA is not to invoke "technical requirements of pleading having no statutory basis." However, ORS 197.830(3)(b) requires that a petitioner have "[a]ppeared before the local government" and ORS 197.830(9) requires that the petition for review " * * * state * * * [t]he facts that establish that the petitioner has standing." Accordingly, there is a statutory basis for our requirement that allegations of fact be included in the petition for review to establish satisfaction of the statutory requirements for standing.

Although we will look beyond the section of the petition for review specifically labelled as addressing standing to determine if a petitioner alleges sufficient facts to demonstrate standing, Freels v. Wallowa County, ___ Or LUBA ___ (LUBA No. 88-046, November 14, 1988), we do not believe we may overlook a petitioner's failure to allege any facts in the petition for review to demonstrate the appearance requirement is met or should be waived. In this regard, we note that while the county's failure to hold a hearing in this matter obviously complicated petitioner's ability to satisfy the appearance requirement, we do not believe it made a written or oral appearance impossible. However, even if it did, it is petitioner's obligation to allege facts establishing that the county's actions prevented petitioners from satisfying the appearance requirement.

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[18] Because the site plan approval decision is a "discretionary approval of a proposed development of land," under ORS 215.402(4) the provisions of ORS 215.402 to 215.422 apply to the county's proceedings. Since the county does not make appeals from its planning director's decisions on site plan applications available to persons other than the applicant, the county decision maker is required by ORS 215.416(3) to hold at least one public hearing on the application.

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[19] The county contests petitioner Flowers' allegation that his property is approximately one-quarter mile from the proposed incinerator site. The county submits an affidavit of its planning director stating that his review of maps of the area indicates that, at its closest point, petitioner Flowers' property is at least three-quarters of a mile from the subject site. However, in this case we need not determine whether petitioner Flowers' property is actually located three-quarters of a mile from the subject property. Even assuming his property is only one-quarter of a mile from the subject property, petitioner Flowers still has not demonstrated an entitlement to individual notice of a county hearing on site plan approval.

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[20] In this case, petitioner Flowers does not allege that if he had received notice of a public hearing on the subject site plan approval, he would have participated in the hearing and asserted a position on the subject application contrary to the decision reached by the county. In an instance where petitioners did allege they would have participated in a public

hearing, had adequate notice of the hearing been given by the county, both this Board and the Court of Appeals ruled that defective public or individual notice cannot itself be the basis of aggrievement for the purpose of establishing standing under the precursor of ORS 197.830(3)(c)(B). Warren v. Lane County, 5 Or LUBA 227, 234 (1982); aff'd 62 Or App 682, 662 P2d 755, aff'd on reconsideration, 66 Or App 7, 672 P2d 1213 (1983). The Supreme Court reversed and remanded the case because it found that petitioners had standing on other grounds, but it specifically declined to decide whether defective notice could itself be the basis for aggrievement. Warren v. Lane County, 297 Or at 299.

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[21] We note petitioners do not request that LUBA Nos. 88-112, 88-113 or 88-124 be transferred to circuit court pursuant to ORS 19.230(4).