BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROBERT FLOWERS and 1000 FRIENDS OF OREGON, Petitioners, vs. KLAMATH COUNTY, Respondent, and BIO-WASTE MANAGEMENT CORPORATION, Intervenor-Respondent.	LUBA No. 88-124 FINAL OPINION AND ORDER ON REMAND

On remand from the Court of Appeals.

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

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 on behalf of intervenor-respondent. With them on the brief was Rappleyea, Beck, Helterline & Roskie. Steven R. Schell argued on behalf of intervenor-respondent.

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

REMANDED 01/18/90

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 DECISION

Petitioners appeal a Klamath County decision granting site plan approval for a bio-medical waste incinerator facility.

FACTS

In our initial opinion dismissing this appeal, we stated:

> "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 the 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. * * *" (Footnote omitted.) Flowers v. Klamath County, ___ Or LUBA ___ (LUBA Nos. 88-112, 88-113 and 88-124, June 2, 1989), slip op 3-4.[1]

Our decision dismissing LUBA No. 88-124 because petitioners lacked standing was appealed to the Court of Appeals. The Court of Appeals concluded petitioners do have standing, and reversed and remanded the appeal to us. Flowers v. Klamath County, 98 Or App 384, ___ P2d ___, rev den 308 Or 592

[1]LUBA Nos. 88-112 and 88-113 challenged a county land use compatibility statement and building permit approval, respectively, for the proposed incinerator. Our June 2, 1989, final opinion and order dismissed these appeals for lack of jurisdiction. Our decisions with regard to these appeals were not appealed to the Court of Appeals.

(1989).[2]

ASSIGNMENT OF ERROR

> "Klamath County erred in granting site plan approval on November 14, 1988, because it did not give notice and hold public hearings as required by ORS 215.416(3) and (5)."

Petitioners argue that the site plan approval is a discretionary approval of a proposed development of land. Petitioners maintain that such an approval is a "permit" and, therefore, the county is required by statute to give notice and a hearing. ORS 215.402(4); ORS 215.416(3) and (5).

Petitioners also argue that among the fundamental attributes of a quasi-judicial land use decision making process are the rights to be heard and to present evidence. Petitioners contend their substantial rights were prejudiced because they were not given notice of the decision and an opportunity to be heard. Petitioners argue the decision should be remanded so the county can provide notice and hearing in compliance with ORS 215.416.

ORS 215.402(4) defines "permit" as a "discretionary approval of a proposed development of land * * *." We previously determined that the county's site plan approval "involves significant discretion," and "is, therefore, a 'permit' as defined by ORS 215.402(4)." Flowers v. Klamath

[2]The court also rejected challenges to our jurisdiction raised by respondent Klamath County in a cross-petition.

County, ___ Or LUBA ___ (LUBA Nos. 88-112, 88-113 and 88-124, Interlocutory Order on Motions to Dismiss, February 28, 1989), slip op 27, 29. The Court of Appeals also concluded that issues determined in the site plan approval "require the exercise of significant and extensive factual or legal judgment." Flowers v. Klamath County, 98 Or App at 392.

The following provisions of ORS 215.416 apply to an application for a "permit," as defined in ORS 215.402(4):

> "* * * * *
>
> "(3) Except as provided in subsection (11) of this section, the hearings officer shall hold at least one public hearing on the application.
>
> "* * * * *
>
> "(5) Hearings under this section shall be held only after notice to the applicant and also notice to other persons as otherwise provided by law * * *
>
> "* * * * *
>
> "(11) The hearings officer, or such other person as the governing body designates, may approve or deny an application for a permit without a hearing if the hearings officer or other designated person gives notice of the decision and provides an opportunity for appeal of the decision to those persons who would have a right to notice if a hearing had been scheduled or who are adversely affected or aggrieved by the decision. * * *"

In acting on an application for a "permit," under the above-quoted statutory provisions, the county may either

(1) give notice of and hold at least one public hearing before acting on the application; or (2) act on the application without a hearing, but give notice of the decision and provide an opportunity to appeal that decision.

In this case, there is no dispute that the county failed to hold a public hearing before it granted the site plan approval. Furthermore, we determined, and the Court of Appeals upheld our determination, that the county did not provide petitioners an opportunity to appeal its site plan approval decision at the county level. Flowers v. Klamath County, 98 Or App at 391; Flowers v. Klamath County, supra (Interlocutory Order), slip op at 21. The county failed to follow either procedural option described above and, therefore, failed to comply with ORS 215.416. See Kunkel v. Washington County, 16 Or LUBA 407, 418 (1988).

The assignment of error is sustained.

The county's decision is remanded.