BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

J.P. FINLEY & SON, an Oregon corporation, dba SUNSET HILLS MEMORIAL PARK, Petitioner, vs. WASHINGTON COUNTY, Respondent, and SPECTRUM DEVELOPMENT CORPORATION, Intervenor-Respondent.	LUBA No. 90-018 FINAL OPINION AND ORDER

Appeal from Washington County.

Edward J. Sullivan, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Mitchell, Lang and Smith.

David C. Noren, Hillsboro, filed a response brief and argued on behalf of respondent.

Peter C. Richter and Jeffrey D. Austin, Portland, filed a response brief, and Jeffrey D. Austin argued on behalf of intervenor-respondent. With them on the brief was Miller, Nash, Wiener, Hager & Carlsen.

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

DISMISSED 06/08/90

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals the county's August 22, 1989 decision approving grading and drainage plans for the Catlin Crest planned unit development (PUD) being constructed by intervenor-respondent.

MOTION TO INTERVENE

Spectrum Development Corporation moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

In August 1987, intervenor-respondent (intervenor) submitted an application to amend and replat the Catlin Crest PUD.[1] On October 7, 1987, the county hearings officer held a public hearing on the application. In considering the August 1987 application, the county followed procedures applicable to Type III actions.[2] The hearings officer

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[1]The August 1987 application indicates the amended Catlin Crest PUD provides for 89 single-family lots rather than 303 single-family and multi-family residential units, as previously approved for the Catlin Crest PUD.

[2]Washington County Community Development Code (CDC) 202-3.1 explains that Type III actions require the exercise of discretion and judgement, may have significant impacts and may present complex development issues. CDC 202-3.3 and 204-4.2 require a public hearing for Type III actions and require that notice of the public hearing be given to the applicant, nearby property owners, and the affected "Citizens Participation Organization." Notice of the decision in a Type III action must be provided to those who make "an appearance of record." CDC 204-4.6. The initial decision on Type III actions is rendered by the county hearings officer or planning commission, and may be appealed to the board of county commissioners by

issued his "Findings, Conclusions and Order" approving the application on October 27, 1987. Record 140.

The August 1987 application included preliminary grading and drainage plans and a report addressing CDC and Washington County Comprehensive Plan (Plan) requirements. The hearings officer's October 27, 1987 decision incorporates findings included in an October 8, 1987 report prepared by county planning staff. The incorporated planning staff findings include a finding that "the proposed [amendment to Catlin Crest PUD] complies with all of the applicable policies of the Cedar Hills/Cedar Mill Community Plan and the applicable regulations and standards of the [CDC]."[3] Record 156.

The hearings officer's October 27, 1987 decision approving the requested amendments to the Catlin Crest PUD includes two conditions to be satisfied prior to carrying out on-site improvements or grading. The first condition states:

> "[The applicant shall submit] and obtain approval for a final grading plan and drainage plan consistent with the standards of [CDC] 410 and 412

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parties who participated before the hearings officer or planning commission. CDC 202-3.3.

[3]The quoted finding is followed by additional findings addressing specific Plan and CDC provisions identified as applicable to the application. Record 156-167. Findings addressing grading and drainage requirements of CDC 410 and 412 appear at Record 164.

(Type I procedure)."[4] Record 168.

Petitioner participated in the public hearing leading to the October 27, 1987 decision and was given written notice of the hearings officer's decision. The October 27, 1987 decision approving intervenor's requested amendment for the Catlin Crest PUD was not appealed to the board of county commissioners or to this Board.

The record discloses a number of communications between the county and intervenor concerning on-site improvements and grading at Catlin Crest PUD. In a letter dated August 22, 1989, addressed to intervenor's representative, the county apparently approved intervenor's grading and drainage plans.[5] The county conducted no additional public hearings concerning the Catlin Crest PUD, after the October 7, 1987 public hearing, and did not provide petitioner an opportunity for a hearing prior to issuing the August 22, 1989 letter approving intervenor's grading and drainage

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[4]The county's Type I procedure, referenced in the condition, is more limited than the Type III procedure followed by the county in reaching its October 27, 1987 decision. According to the CDC, Type I actions are nondiscretionary decisions which are rendered by the planning director "without public notice or a hearing." CDC 202-1.3. Appeals of Type I actions are to the county hearings officer or planning commission, but only the applicant is entitled to notice of the decision or may appeal a decision on a Type I action.

[5]As petitioner correctly notes, the nature and scope of the county's approval is not clear. However, for purposes of this opinion we will assume the August 22, 1989 letter is approval of a final grading plan and drainage plan in accordance with the above-quoted condition in the hearings officer's October 27, 1987 decision.

plans. Neither was petitioner provided with notice or a copy of the August 22, 1989 letter.[6] Petitioner later learned of the letter and, on January 30, 1990, filed a notice of intent to appeal the August 22, 1989 letter with this Board.

DECISION

Respondent and intervenor-respondent (respondents) contend petitioner lacks standing to bring this appeal. Prior to amendments adopted by the 1989 legislature,[7] ORS 197.830(3) provided as follows:

> "* * * [A] person may petition [LUBA] for review of a quasi-judicial land use decision if the person:
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> "(a) Filed a notice of intent to appeal the decision * * *;
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> "(b) Appeared before the local government, special district or state agency orally or in writing; and
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> "(c) Meets one of the following criteria:
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> "(A) Was entitled as of right to notice and hearing prior to the decision to be reviewed; or

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[6]As we explained in n 4, supra, the county's Type I procedures do not require an opportunity for public hearing or notice of the decision to persons other than the applicant.

[7]As intervenor correctly notes, amendments to ORS 197.830 adopted by the 1989 legislature were not effective until October 3, 1989. Because the decision challenged in this appeal is dated August 22, 1989, the 1989 amendments to ORS 197.830 do not apply. The statutory citations in this opinion are to the statutes as they existed when the challenged decision was adopted.

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

Respondent and intervenor contend petitioner's January 30, 1990 notice of intent to appeal was filed with the Board months after the 21 day deadline established by ORS 197.830(7) for filing notices of intent to appeal had passed. Under OAR 661-10-015(1) and 661-10-005, an appeal to this Board must be dismissed if it is not filed within the 21 day period established by ORS 197.830(7).[8]

Petitioner argues the county's August 22, 1989 decision granting grading and drainage plan approval required application of the CDC standards applicable to site grading (CDC 410) and drainage (CDC 412). Petitioner contends these standards are discretionary. See e.g. Kirpal Light Satsang v. Douglas County, ___ Or LUBA ___ (LUBA No. 88-082, January 22, 1990); Kunkel v. Washington County, 16 Or LUBA 407 (1988). Petitioner contends the county failed to observe statutory requirements for rendering discretionary land use decisions by failing to first provide either a public hearing (ORS 215.416(3)) or notice of its decision and an opportunity for a local appeal (ORS 215.416(11)).

Petitioner contends its failure to appear and take a position against the county's decision is excused by the county's failure to provide the statutorily required notice

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[8]Respondent and intervenor also contend petitioner failed to "appear" during the local proceedings concerning the August 22, 1989 decision, as required by ORS 197.830(3)(b).

of hearing or opportunity for a local appeal. Flowers v. Klamath County, 98 Or App 384, 389, 780 P2d 227, rev den 308 Or 592 (1989). Similarly, petitioner contends that had the county either held a public hearing prior to its August 22, 1989 decision or given notice of that decision and provided an opportunity to appeal, as ORS 215.416(3) and (11) require for discretionary land use approvals, it would have participated in such a hearing or filed a local appeal. Therefore, under ORS 215.416(10), petitioner would have become entitled to notice of the August 22, 1989 decision, or of the decision made on its local appeal, and could have filed a timely appeal to LUBA upon receipt of such notice. We understand petitioner to contend that its notice of intent to appeal to this Board is timely in view of the county's failure to give petitioner notice of its decision. League of Women Voters v. Coos County, 76 Or App 705, 712 P2d 111 (1985), rev den 301 Or 76 (1986); Kunkel v. Washington County, supra.

In sum, petitioner contends the county's election to render its August 22, 1989 decision in this matter administratively under its Type I procedures, without hearing or opportunity for hearing and without notice of the final decision, cannot be used by the county to deny petitioner standing to bring this appeal.

Although respondents dispute petitioner's characterization of the challenged decision as

discretionary, they also argue that the county's decision to review and approve final grading and drainage plans through a Type I procedure was made in 1987, when the amended Catlin Crest PUD was approved. Respondents contend the county followed a two stage approval process in this case. The first stage was completed on October 27, 1987, when the hearings officer found applicable Plan and CDC criteria were satisfied by the Catlin Crest PUD.[9] In the October 27, 1987 decision to grant first stage approval, the hearings officer included a condition that (1) required submission of final grading and drainage plans, and (2) determined that approval of those plans would occur through a Type I procedure, without notice or opportunity for further public involvement. Respondents contend the proper time to object to the county's decision to approve final grading and drainage plans in the second stage of the approval process, through a Type I procedure rather than a procedure that would allow additional public involvement, was when the decision to proceed in that manner was made on October 27, 1987.

In Meyer v. City of Portland, 67 Or App 274, 678 P2d 741, rev den 297 Or 82 (1984) (Meyer), the Court of Appeals determined that two stage approval procedures may be

[9]Although we agree with respondents that the hearings officer's October 27, 1987 decision found all Plan and CDC requirements were satisfied by the proposal, that decision was not appealed to this Board and we express no opinion concerning the legal sufficiency of those findings.

followed in reviewing requests for approval of PUD's. Under Meyer, the first stage approval is the critical stage, as it is the stage at which participants must be given a "full opportunity to be heard" in the matter. Id. at 280. As respondents correctly note, the Court of Appeals also determined in Meyer that precise final solutions for every problem that may be presented in developing a PUD need not exist at the time of first stage approval of the PUD. Id. at 282 n 6.

Respondents argue that the county need only find applicable Plan and CDC provisions are met, and that solutions to identified problems are feasible, in order to grant first stage approval of the Catlin Crest PUD. Id. at 280 n 5. Respondents argue this is what the county did on October 27, 1987. Having done so, respondents contend it was entirely appropriate for the county to delegate final approval of the technical plans needed to arrive at precise grading and drainage solutions to a later stage, and respondents argue that such second stage approval may occur without public hearings or notice of the final decision to persons other than the applicant.

Petitioner is correct that this Board has remanded local government decisions for failure to observe statutory notice and hearing requirements. Flowers v. Klamath County, ___ Or LUBA ___ (LUBA No. 88-124, January 18, 1990); Dack v. City of Canby, ___ Or LUBA ___ (LUBA No. 88-073, December

16, 1988); Kunkel v. Washington County, supra; Doughton v. Douglas County, 15 Or LUBA 576, aff'd 88 Or App 198 (1987). In addition, failure to observe statutory notice and hearing requirements may excuse a petitioner's failure to appear during local proceedings or to file an appeal with this Board within 21 days of the decision. Flowers v. Klamath County, supra, 98 Or App 384, 389; League of Women Voters v. Coos County, supra; Kunkel v. Washington County, supra; Doughton v. Douglas County, supra. However, a critical difference between the August 22, 1989 decision challenged in this proceeding and the decisions remanded by the Court of Appeals and this Board for failure to observe statutory notice and public hearing requirements is that the August 22, 1989 decision was preceded by a public hearing satisfying statutory requirements. It is not important that the public hearing occurred over two years before the decision challenged in this matter, because the county made a decision following the October 7, 1987 public hearing to approve final grading and drainage plans without additional public hearings, through a Type I process.

If approval of final grading and drainage plans involves the kind of discretion that requires notice and opportunity for public hearings under ORS 215.416, the time to challenge the county's decision to proceed without additional notice or public hearings was when the decision to proceed in that manner was made. The October 27, 1987

decision could have been appealed to the board of county commissioners and the hearings officer's determination that final grading and drainage plans would be reviewed through Type I procedures could have been challenged.[10] If the decision to proceed through Type I procedures had been sustained by the board of county commissioners, an appeal to this Board would have been available.

Having elected not to pursue the appeals that were available in 1987, petitioner may not now challenge the county's decision to grant final approval for the grading and drainage plans without additional public hearings and notice. Neither may petitioner claim that the county's failures to provide an opportunity for a public hearing or notice of the August 22, 1989 decision excuse its failure to appear or file an appeal to this Board within 21 days after the August 22, 1989 decision, as required by ORS 197.830(7). Because petitioner neither appeared during the second stage proceedings that led to the August 22, 1989 decision nor filed an appeal with this Board of that decision within 21 days, as required by ORS 197.830(3) and (7), this appeal is dismissed.

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[10]CDC 202-5.1 specifically provides that the county's selection of a particular "Type" procedure may be challenged in a local appeal.