BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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| HARRIETT SPARROWS, Petitioner, vs. CLACKAMAS COUNTY, Respondent, and EDWARD C. NIEDERMEYER, Intervenor-Respondent. | LUBA No. 92-107 FINAL OPINION AND ORDER |

Appeal from Clackamas County.

Jacqueline Tommas, Estacada, filed the petition for review and argued on behalf of petitioner.

Michael E. Judd, Oregon City, filed a response brief and argued on behalf of respondent.

Timothy V. Ramis and James M. Coleman, Portland, filed a response brief on behalf of intervenor-respondent. With them on the brief was O'Donnell, Ramis, Crew & Corrigan. Timothy V. Ramis argued on behalf of intervenor-respondent.

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

DISMISSED 12/07/92

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**

Petitioner appeals a county order approving (1) a comprehensive plan map change from Forest and Agriculture to Rural, (2) a zone change from Exclusive Farm Use 20 Acre (EFU-20) and Transitional Timber (TT-20) to Farm Forest 10 Acre (FF-10), and (3) an exception to Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), for approximately 130 acres.

**MOTION TO INTERVENE**

Edward C. Niedermeyer, the applicant below, moves to intervene in this proceeding on the side of respondent. There is no opposition to the motion, and it is allowed.

**MOTION TO FILE REPLY BRIEF**

On November 6, 1992, seventeen days after respondents' briefs were filed and six days before the scheduled oral argument in this appeal, petitioner filed a motion to file a reply brief, accompanied by a seven page reply brief. Petitioner's reply brief responds to issues concerning standing and jurisdiction raised by respondents' briefs and objects to the attachment of documents not in the record to respondents' briefs.

Intervenor objects to petitioner's motion to file a reply brief, arguing it was not timely filed under OAR 661-10-065(2). Intervenor argues he is prejudiced because he received the reply brief only four days before

oral argument. Intervenor also contends the standing and jurisdictional issues addressed in the reply brief are not "new matters" raised in a respondent's brief, as required by OAR 661-10-039.

We agree with petitioner that under OAR 661-10-039, it is appropriate to allow a reply brief to respond to the issues concerning standing, jurisdiction, and attachment of documents not in the record raised in respondents' briefs. Additionally, while petitioner certainly could have filed her motion to file a reply brief and reply brief sooner, we believe that having to review and prepare to respond to a seven page reply brief received four days before oral argument does not prejudice respondents' substantial rights. OAR 661-10-005.

The motion to file a reply brief is granted.

**FACTS**

On January 28, 1985, intervenor-respondent (intervenor), the property owner, filed the subject application. On May 22, 1985, after public hearings before the planning commission and board of commissioners, at which petitioner appeared, the county approved the proposed plan and zone change and goal exceptions. The county's decision was appealed to this Board by the Department of Land Conservation and Development (DLCD). The county's decision was remanded pursuant to a stipulation of the parties. DLCD v. Clackamas County, ___ Or LUBA ___ (LUBA No. 85-048,

August 27, 1985).[1]

The county scheduled hearings on remand concerning the subject application for December 8, 1976 before the planning commission and for December 17, 1986 before the board of commissioners. The county published notice of these hearings in a newspaper and mailed written notice of the hearings to DLCD[2] and to owners of property within 250 feet of the subject property.[3] Record II 59-61. The December 17, 1986 hearing before the board of commissioners was postponed to January 14, 1987. Notice of the postponement was mailed to owners of surrounding property in a manner similar to notice of the original hearing. Record II 62-65. On January 14, 1987, the board of commissioners continued the hearing to January 21, 1987. Record II 50. Petitioner did not appear at either the December 8, 1986 hearing before the planning commission or the January 21, 1987 hearing before the board of

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[1]The local record submitted in LUBA No. 85-048 is included in the local record of the county decision challenged in this proceeding, and is cited in this opinion as "Record I ___." The local record compiled after remand of the county's first decision is cited as "Record II ___."

[2]The county's comprehensive plan and land use regulations were acknowledged by the Land Conservation and Development Commission (LCDC) in 1985. Under ORS 197.610(1), a local government is required to notify the DLCD director of proposed amendments to its acknowledged comprehensive plan and land use regulations. Additionally, as noted in the text, DLCD was a party to the initial county proceedings on the subject application.

[3]However, whether the county mailed the hearing notice to petitioner, an owner of property within 250 feet of the subject property, is a matter of dispute between the parties.

commissioners.

On April 15, 1987, the board of commissioners adopted the order challenged in this appeal. The county did not mail or otherwise submit to the DLCD director a copy of its postacknowledgment comprehensive plan and land use regulation amendment, within five working days after adoption of the final decision, as required by ORS 197.615(1).[4] However, the county submitted a notice of adoption and a copy of the challenged decision to the DLCD director on May 5, 1992. Petitioner filed her notice of intent to appeal with this Board on May 26, 1992.

**JURISDICTION**

Respondent and intervenor (respondents) contend this Board lacks jurisdiction over this appeal because the notice of intent to appeal was not timely filed. Respondents argue the notice of intent to appeal was filed over five years after the county adopted the challenged decision, whereas ORS 197.830(8) requires a notice of intent to appeal to be filed within 21 days after the decision sought to be reviewed becomes final. Respondents concede this Board and the appellate courts have held that in certain instances a local government's failure to provide a petitioner with notice of a hearing or notice of the challenged decision, to

[4]Intervenor contends that on April 15, 1987, his attorney sent a letter to the DLCD director notifying him of the county's decision. However, there is no dispute that the county did not notify or submit a copy of the adopted decision to the DLCD director until May 5, 1992.

which the petitioner is entitled, has the effect of tolling the running of the 21 day period to file a notice of intent to appeal. However, respondents contend the time is not tolled here, because (1) the county did provide written notice of its hearings to petitioner, and (2) petitioner was not entitled to notice of the challenged decision. Respondents also contend petitioner filed her notice of intent to appeal more than 21 days after she received actual notice of the challenged decision.

Petitioner relies on two arguments to establish the timeliness of her notice of intent to appeal. First, petitioner argues that under ORS 197.830(8) and Ludwick v. Yamhill County, 72 Or App 224, 696 P2d 536, rev den 299 Or 443 (1985), the 21 day period for filing the notice of intent to appeal did not begin to run until the county mailed to DLCD the notice required by ORS 197.615(1). Second, petitioner contends the county failed to provide her with written notice of its December 8, 1986 and January 21, 1987 hearings after remand, to which she is entitled under the Clackamas County Zoning and Development Ordinance (ZDO). According to petitioner, if she had received such notice, she would have appeared at the hearings and would have taken the steps necessary to become entitled to notice of the challenged decision. Under these circumstances, petitioner argues her notice of intent to appeal is timely if it was filed within 21 days after she received actual notice of the

decision. Petitioner claims the notice of intent to appeal was filed within 21 days after she received such actual notice. We address each argument separately below.

**A. Notice of Challenged Decision to DLCD**

Since it was originally enacted in 1981, ORS 197.615(1) has required a local government that amends its acknowledged comprehensive plan or land use regulations to mail or otherwise submit to the director of DLCD, within five working days, a copy of the amendment and supporting findings.[5] Additionally, at all times relevant to this appeal, ORS 197.615(2) has required that a local government, within five working days, mail notice of a decision adopting a postacknowledgment amendment to persons who (1) participated in the local proceedings, and (2) requested in writing that they be given such notice.[6] When the challenged decision was adopted ORS 197.830(7)(1985) provided, as relevant to the timeliness of a notice of intent to appeal, simply that a notice of intent to appeal must be filed "not later than 21 days after the date the decision sought to be reviewed becomes final."

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[5]Also, ORS 197.615(3) requires DLCD, within five working days after receipt of a postacknowledgment plan or land use regulation amendment submitted pursuant to ORS 197.615(1), to notify persons who have requested such notification from DLCD.

[6]In this case, since petitioner did not participate in the county proceedings after remand, or request notice of the county decision in writing, there is no dispute that petitioner is not a person entitled to notice of the decision under ORS 197.615(2).

In Ludwick, supra, 72 Or App at 229-30, the Court of Appeals held that "the legislature intended to make the running of the time for filing a notice of intent to appeal under ORS 197.830(7) contingent upon the giving of notice to an appealing party who is entitled to notice under ORS 197.615(2)." (Emphasis added.) The court affirmed a decision of this Board holding that a notice of intent to appeal, although filed more than 21 days after the challenged postacknowledgment amendment became final, was timely because petitioners had not been given the notice to which they were entitled under ORS 197.615(2). Subsequently, the legislature amended ORS 197.830(7) (now ORS 197.830(8)) to add the following statement:

> "A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed not later than 21 days after the decision sought to be reviewed is mailed to parties entitled to notice under ORS 197.615." Or Laws 1987, ch 729, § 16.

We understand petitioner to argue DLCD is a party entitled to notice of the challenged decision under ORS 197.615(1) and, therefore, that under the above quoted statutory language, petitioner's notice of intent to appeal is timely if filed not later than 21 days after the required notice was mailed to DLCD.

We previously addressed the effect of local government failure to provide notice of an adopted postacknowledgment amendment to DLCD in Kellogg Lake Friends v. City of

Milwaukie, 16 Or LUBA 755, 759 (1988). We explained that in Ludwick, supra:

> "[T]he court held that the '21-day period set out in ORS 197.830(7)' for appealing to LUBA does not expire until 21 days after the appealing party has been given the notice required by ORS 197.615(2). However, the 21-day period for initiating an appeal of a postacknowledgment amendment to LUBA is not stayed if the petitioner himself cannot claim statutory entitlement to notice of the decision. Ore. State Homebuilders Assoc. v. City of Medford, 15 Or LUBA 410 (1987)." (Emphasis in original; footnotes omitted.)

We also noted that in decisions concerning the effect of a local government's failure to give notice of land use decisions required by other statutes, the Court of Appeals and this Board have held that the period for filing a notice of intent to appeal begins to run only after the party seeking to appeal is given the notice to which he is entitled by statute. Kellogg Lake Friends, supra, 16 Or LUBA at 768 n 5 (citing League of Women Voters v. Coos County, 82 Or App 673, 681, 729 P2d 588 (1986); Pienovi v. City of Canby, 16 Or LUBA 604 (1988)).

The language added to what is now ORS 197.830(8) in 1987, quoted above, is intended to codify the Court of Appeals decision in Ludwick. As explained in Kellogg Lake Friends, that language tolls the running of the time for filing a notice of intent to appeal for a petitioner who did not receive notice to which that petitioner is entitled under ORS 197.615. It does not toll the time for the filing of all notices of intent to appeal simply because DLCD, or

any other person entitled to notice under ORS 197.615, was not given such notice. Accordingly, the fact that notice was not given to DLCD until May 5, 1992 does not toll the 21 day time period for petitioner to file a notice of intent to appeal the challenged decision.[7]

**B. Notice of County Hearings to Petitioner**

In Citizens Concerned v. City of Sherwood, 21 Or LUBA 515, 527-28 (1991), we identified two circumstances in which the time for filing a notice of intent to appeal may extend beyond 21 days after the challenged decision is reduced to writing and otherwise becomes final:

> "* * * The first circumstance is where the local government has failed to provide statutorily required written notice of the decision to a party entitled to receive such written notice of the decision. The 21 day period to appeal to LUBA does not begin to run until such parties are given the written notice of the decision to which they are entitled. League of Women Voters v. Coos County, [supra]; Tournier v. City of Portland, 16 Or LUBA 546, 550 (1988).
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> "The second circumstance is where there is no appeal available under the local code and the local government failed to provide the notice of hearing and hearing which ORS 227.175(3) and (5), or ORS 215.416(3) and (5), require prior to making a decision on a permit. Such permit decisions may

[7]Petitioner does not claim to be a person who specifically requested notice of postacknowledgment plan and land use regulation amendments from DLCD pursuant to ORS 197.615(3). Accordingly, we express no opinion concerning the effect of a local government's failure to notify DLCD pursuant to ORS 197.615(1) on the running of the time for persons entitled to notice from DLCD under ORS 197.615(3) to file notices of intent to appeal.

> be appealed to LUBA within 21 days after a person receives actual notice of the permit decision. Flowers v. Klamath County, 17 Or LUBA 1078, 1103 (1989); Kunkel v. Washington County, 16 Or LUBA 407, 415 (1988)."[8] (Emphasis in original; footnote omitted.)

We explain in the preceding section why the first circumstance, failure to give statutorily required notice of the challenged decision, does not apply here. We have previously addressed the second circumstance, failure to give statutorily required notice of hearing or provide a statutorily required hearing, in the context of permit applications, rather than comprehensive plan and land use regulations and goal amendments. However, the principle underlying our previous rulings with regard to required notice of hearings is that if (1) a person is entitled by statute to notice of a local government hearing on a land use application, and (2) the local government fails to provide such notice, (3) that person may file a notice of intent to appeal challenging the land use decision resulting from such proceeding within 21 days after that person receives actual notice of the decision. Thus, even if petitioner were entitled under state statute to notice of

[8]In Citizens Concerned, supra, we did not consider the effect of ORS 197.830(3). ORS 197.830(3) may establish some additional circumstances in which the time for filing a notice of intent to appeal can extend beyond 21 days after the challenged decision otherwise becomes final, where a local government fails to provide a hearing or give required notice of the proposed action. However, this statute was enacted in 1989, long after the county hearings on remand were held and the challenged decision was adopted, and therefore is not applicable here. Or Laws 1989, ch 761, § 12.

the county's hearings on remand, and the county failed to provide that notice, a point which respondents dispute, petitioner's notice of intent to appeal would only be timely if it was filed within 21 days after petitioner received actual notice of the challenged decision.

As the party seeking review by LUBA, petitioner has the burden of establishing that LUBA has jurisdiction. Billington v. Polk County, 299 Or 471, 475, 703 P2d 232 (1985); Hamby v. City of Jefferson, ___ Or LUBA ___ (LUBA No. 91-075, September 3, 1991); Portland Oil Service Co. v. City of Beaverton, 16 Or LUBA 255, 260 (1987). When a petitioner argues her notice of intent to appeal is timely because it was filed within 21 days after she received actual notice of the challenged decision, and that the time for filing petitioner's notice of intent to appeal was tolled because the local government did not provide petitioner with the required notice of the hearing below, the petitioner must support her argument with affidavits, citations to the record or other evidence. Flowers v. Klamath County, 17 Or LUBA 1078, 1103 (1989).

In this case, petitioner simply alleges in her reply brief that her notice of intent to appeal was filed within 21 days after she received actual notice of the challenged decision. Petitioner's Reply Brief 3, 6. Respondents dispute petitioner's allegation. Petitioner's allegation is not supported by citations to the record, affidavits or

other evidence.[9] Petitioner has not filed a motion for an evidentiary hearing seeking to introduce proof to support her allegation.[10] Consequently, petitioner has not established that her notice of intent to appeal was timely filed.

This appeal is dismissed.

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[9]The affidavit by petitioner attached to the petition for review makes no representation as to when petitioner received actual notice of the decision. Petition for Review Exhibit 1.

[10]Petitioner filed a motion for evidentiary hearing on November 6, 1992, but withdrew that motion on November 9, 1992. At oral argument on November 12, 1992, the Board informed the parties that in view of the facts that there are disputed allegations of fact concerning jurisdiction and standing, and that both petitioner and respondents object to the others' citation of facts not in the record, if any party wishes the Board to consider facts not in the record in support of that party's allegations, such party must file a motion for evidentiary hearing pursuant to OAR 661-10-045. The Board asked that such motions be filed no later than November 23, 1992. On November 23, 1992, intervenor filed a motion for evidentiary hearing seeking to introduce evidence to establish (1) the county provided notice of the hearings on remand to petitioner, and (2) petitioner obtained actual knowledge of the challenged decision more than 21 days prior to the date her notice of intent to appeal was filed. Because petitioner provides no factual support for her allegation concerning when she received actual notice of the challenged decision, it is unnecessary to allow intervenor to introduce evidence to disprove petitioner's unsupported allegation. Accordingly, intervenor's motion for evidentiary hearing is denied.