BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

THOMAS LESTER, Petitioner, vs. CITY OF EUGENE, Respondent, and HALLMARK CORPORATION, Intervenor-Respondent.	LUBA No. 93-165 FINAL OPINION AND ORDER

Appeal from City of Eugene.

Thomas Lester, Eugene, represented himself.

No appearance by respondent.

Bill Kloos, Eugene, represented intervenor-respondent.

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

DISMISSED 01/26/94

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 challenges a hearings official's decision that a nonconforming radio transmitter and building which were destroyed by fire may be rebuilt without obtaining a conditional use permit.

MOTION TO INTERVENE

Hallmark Corporation, the applicant below, moves to intervene on the side of respondent in this appeal. There is no opposition to the motion, and it is allowed.

FACTS

In response to a June 22, 1993 inquiry from intervenor, the city building official determined that reconstruction of the radio transmitter and building would require a conditional use permit. Intervenor appealed that decision to the city hearings official. On July 15, 1993, the city gave notice that a hearing would be held before the city hearings official on August 5, 1993, to consider intervenor's appeal of the building official's decision.[1]

Intervenor requested that the August 5, 1993 hearing be postponed. Apparently no further written notice of hearing was provided in this matter. However, at 5:00 p.m. on

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[1]Eugene City Code (ECC) 2.391(2)(d) and ORS 197.763(3)(d) require that notices of local quasi-judicial land use hearings must "[s]tate the date, time and location of the hearing * * *." ECC 2.391(3) and ORS 197.163(3)(f)(A) require that such notice be mailed at least 20 days before the hearing. Petitioner does not challenge the adequacy of the July 15, 1993 notice to give notice of an August 5, 1993 public hearing.

August 30, 1993, petitioner received a telephone message from the city that the hearing before the hearings official would be held two days later, on September 1, 1993. Petitioner attended that public hearing, but contends he was unable to prepare and submit testimony at that hearing.[2] Petitioner submitted no oral or written testimony at the September 1, 1993 hearing and did not request that the record be left open so that he could have additional time to do so. ORS 197.763(6).

On September 10, 1993, nine days after the hearings official concluded the public hearing and closed the evidentiary record, petitioner submitted a letter objecting to the city's failure to provide him with more than two days notice of the hearings official's hearing in this matter. Petitioner explains in his September 10, 1993 letter that during the week of August 23, 1993 he had requested the city to provide him notice of the postponed hearing. Petitioner complains in his September 10, 1993 letter that the city provided less than 48 hours notice of its September 1, 1993

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[2]ECC 2.391(1) requires written notice of hearing be given to owners and occupants of property within 100 feet of the property subject to the notice. Where any portion of the subject property is inside an urban growth boundary, ORS 197.763(2)(a)(A) requires notice of hearing be given to owners of record of property within 100 feet of the property subject to the notice. Petitioner does not contend that he is a property owner or occupant who is entitled to written notice of the hearings official's hearing in this matter under ORS 197.763(2)(a)(A) or ECC 2.391(1). Rather, petitioner argues that had respondent issued notice of the September 1, 1993 hearing at least 20 days before the hearing, as required by ECC 2.391(3) and ORS 197.763(3)(f)(A), he would have learned of the hearing in time to adequately prepare for the hearing.

hearing. Petitioner submitted a second letter dated September 10, 1993, in which petitioner argues the hearings official's decision was incorrect on the merits. The hearings official rejected the September 10, 1993 letters because they were submitted after the close of the evidentiary hearing.[3]

DECISION

Intervenor moves to dismiss this appeal, arguing petitioner failed to appear during the local proceedings, as required by ORS 197.830(2). In order to have standing to appeal the hearings official's decision in this matter, petitioner must have "[a]ppeared before the local government * * * orally or in writing." ORS 197.830(2)(b). Intervenor contends that although petitioner was present at the September 1, 1993 hearing, he did not appear orally or in writing at that hearing. Rather, intervenor argues petitioner allowed the hearings official to close the public hearing, without expressing any objection to the notice of that hearing or the amount of time petitioner had to prepare for the September 1, 1993 hearing after he learned of the hearing. Further, petitioner did not exercise his right

[3]Neither of petitioner's September 10, 1993 letters is included in the record submitted by respondent, and petitioner has not objected to the record. The letters are attached to petitioner's answer to the motion to dismiss. The letters are also attached to intervenor's motion to dismiss, along with a memorandum from the hearings official to the building official explaining the letters were received by the hearings official after the record was closed.

under ORS 197.763(6) to request that the evidentiary record remain open so that petitioner could make those objections. Because petitioner failed to do so, intervenor contends the record closed without petitioner having ever made the "appearance" required by ORS 197.830(2)(b). Intervenor contends the letters submitted after the close of the evidentiary record were rejected and were submitted too late to constitute the required local appearance.

We agree with intervenor. In Flowers v. Klamath County, 98 Or App 384, 780 P2d 227, rev den 308 Or 592 (1989), the court of appeals explained that the county could not challenge a petitioners' standing on the basis of petitioners' failure to make the required local appearance, where petitioners' failure to appear was caused by the local government's failure to provide the notice required by statute. However, Flowers is distinguishable from the situation presented in this appeal. In Flowers, the petitioners could not have appeared at the local hearing, because the county did not hold one. See also Weeks v. City of Tillamook, 22 Or LUBA 797 (1991); Tuality Lands Coalition v. Washington County, 22 Or LUBA 787 (1991); Citizens Concerned v. City of Sherwood, 21 Or LUBA 515, 527 (1991).

Here the county did hold a public hearing. Moreover, petitioner received prior notice of the hearing and attended the hearing. Even if the city did err by not providing 20 days prior notice of the hearings official's hearing, as

petitioner alleges, that error did not prevent petitioner from learning about and attending the September 1, 1993 public hearing. Because petitioner failed to submit any oral or written testimony at that hearing, and failed to request that the record be held open to allow him time to submit oral or written testimony, the record closed without petitioner making an appearance.

Petitioner cites ECC, statutory and constitutional provisions which he claims guarantee him the right to appear before the hearings official and challenge the building official's decision. However, as intervenor-respondent points out, the city did not deny petitioner the right to appear locally. The city may have committed procedural errors that precluded petitioner from having as much time to prepare for the September 1, 1993 hearing as petitioner would have liked. Petitioner may also be correct that those errors could provide a basis for reversal or remand. Petitioner may even be correct that the challenged decision incorrectly construes and applies applicable law. However, ORS 197.830(2) requires that petitioner make an appearance locally in order to have standing to bring those arguments to this Board. Any errors committed by the city did not preclude petitioner from making a local appearance sufficient to establish standing. Had petitioner made even a brief oral statement objecting to the notice of hearing or any aspect of the appealed building official's decision, or

requested that the record be left open so that he could do so, he would have made an appearance sufficient to have standing to bring this appeal. Petitioner did not do so and, therefore, lacks standing to bring this appeal.

This appeal is dismissed.