BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOSEPH F. CARAHER, RODNEY J. FRIESEN and DOLLY SMITH, Petitioners, vs. CITY OF KLAMATH FALLS, Respondent.	LUBA Nos. 95-089 and 95-090
	FINAL OPINION AND ORDER

Appeal from City of Klamath Falls.

Christian E. Hearn, Ashland, filed the petition for review. With him on the brief was Davis, Gilstrap, Harris, Hearn & Welty. Christian Hearn and Peter Mostow argued on behalf of petitioners.

Jeffrey D. Ball, City Attorney, Klamath Falls, filed the response brief.

GUSTAFSON, Referee; LIVINGSTON, Chief Referee, participated in the decision.

DISMISSED (95-089) 11/20/95
REVERSED (95-090)

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

Opinion by Gustafson.

NATURE OF THE DECISION

Petitioners appeal two city actions. In LUBA No. 95-089, petitioners appeal a 1991 community development director (director) decision extending a conditional use permit and design review approval. In LUBA No. 95-090, petitioners appeal a 1993 director letter clarifying an earlier letter in which the director agreed with owners of the affected property that they were in compliance with the conditions of the conditional use and design review approval.

FACTS

In 1985 the city approved a conditional use permit for an algae harvesting operation on property owned by Omni Nutrient Enterprises (Omni). The record is unclear as to what, if any, progress was made toward commencing operations after the conditional use permit was issued. Petitioners contend no substantial activities occurred during the first year after issuance of the permit. However, they also argue that they were subjected to loud noises, bright lights and late-night disturbances from the conditional use. When these disturbances occurred is unclear, though not essential to our review of these appeals.

In 1990, the city approved a design review for Omni's operations at the conditional use site. In October, 1991, the director issued a decision extending the conditional use

and design review approval, stating:

> "As you requested in your letter of September 30, 1991 a six (6) month extension of the Design Review/Conditional Use Permit for Omni Nutrient Enterprises, Inc is approved. This extension will last until April 11, 1992." Record 7.

In March, 1992, Omni wrote to the city to request another extension. In that letter, Omni stated it planned to initiate harvesting operations by July, 1992. The record does not reflect whether those operations were ever initiated. However, in September, 1992, Omni again wrote to the city, requesting confirmation that the conditional use permit continued in effect. On October, 1, 1992, the director issued a letter, stating:

> "In response to your letter dated September 28, 1992, the Community Development Department agrees that at this time, Omni Nutrient Enterprises is in compliance with the conditions and standards required by the Conditional Use Permit and Design Review. These permits will remain in effect as long as the conditions and requirements are met or significant activity does not continue at the site." Record 3.

Thereafter, Omni requested a clarification from the city, apparently asking the city to correct the obvious misstatement in the last sentence of the October 1, 1992 letter. On February 3, 1993, in response Omni's request, the director issued another letter, stating:

> "In clarification of the City's response to your letter of September 28, 1992, the Community Development Department agrees that at this time, Omni Nutrient Enterprises is in compliance with the conditions and standards required by the

> Conditional Use Permit and Design Review. These permits will remain in effect as long as the conditions and requirements are met. However, if significant activities does [sic] not occur at the project site, the permits may be revoked." Record 1.

Petitioners acknowledge that, "[i]n substance, the February 3, 1993 letter * * * was actually sent to Omni on October 1, 1992" and that its purpose was to correct the error in the last sentence of the October 2, 1992 letter. Petition for Review 6.

Petitioners state they live "adjacent" to the subject property, but never received notice of either the 1991 decision to extend the conditional use permit and design review approval, or the February, 1993 letter. The city disputes petitioners' contention that they live adjacent to the subject property. The city explains that the property is bordered by Bureau of Reclamation land to the south, the Link River to the west, and city-owned property to the north and west. The city concludes on that basis that none of petitioners lives or owns property adjacent to the subject property, within the notice area for administrative decisions. Although petitioners recite the requirement that the city must provide notice to property owners within 250 feet of the site, petitioners do not provide any evidence that they live within that notice area.

Omni is not currently using the conditional use site. As stated in the city's response brief:

> "Omni is not and has not been engaged in algae harvesting at the subject site for a number of years. They are not in operation in Klamath Falls, and have been an inactive corporation since April of 1993." Response Brief 3.

The city also states, and petitioners do not dispute, that "[i]n April [1995] counsel for Petitioners was advised that the [city] deems the 1990 design review to be void pursuant to [Klamath Falls Community Development Ordinance] CDO Section 12.855."[1] Response Brief 3. However, petitioners state they first learned of the two challenged actions on May 10, 1995, and filed appeals with both this Board and the city immediately upon learning of the city's actions.

Petitioners seek a remand to force the city to conduct a hearing on the conditional use permit and design review extension, and on the director's February 3, 1993 letter. Petitioners seek, ultimately, for a declaration from the county that the conditional use permit has been terminated under CDO 12.750.[2]

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[1]CDO 12.855 states:

> "**Validity Period.** Site plans approved by the Director shall remain valid for a period of one year following the date of its approval. At the end of that time, if substantial site excavation or construction has not begun then the site plan approval shall be void and shall become effective only if resubmitted to the Director and again approved. All construction and development initiated under any building permit shall be in accordance with the approved site plan."

[2]CDO 12.750 states:

JURISDICTION

This Board's jurisdiction is limited to review of final land use decisions, as defined in ORS 197.015(10). When a local governing body renders a decision without providing a hearing, under ORS 197.830(3), an adversely affected party must appeal the challenged decision within 21 days of actual notice, when notice is required, or within 21 days of when the party "knew or should have known of the decision where no notice is required." ORS 197.830(3)(a) and (b). However, ORS 197.825 requires that, before appealing to LUBA, an adversely affected party must exhaust all available local appeals.

In reconciling the requirements of ORS 197.825 and ORS 197.830, we have previously determined that ORS 197.830(3) applies only when the local governing body was required to, but did not, provide a local hearing. Leonard v. Union County, 24 Or LUBA 362, (1992); Kevedy v. City of Portland, 28 Or LUBA 227 (1994); Tarjoto v. Lane County, ___ Or LUBA ___ (LUBA Nos. 95-052/95-053, July 11, 1995), aff'd 137 Or App 305 (1995). In Tarjoto, we examined the relationship between ORS 197.830 and ORS 197.825, and concluded:

"**Termination of Conditional Use Permit.** When a conditional use permit is approved, such approval shall become void one year from the date of approval if substantial progress, such as substantial site excavation or substantial structure construction, toward the specified conditional use has not been made. The holder of such a permit may apply for an extension of such approval as may be granted by the Director."

> "[W]here a local governing body makes a permit decision without a hearing, pursuant to local procedures implementing ORS 215.416(11) or 227.175(10), ORS 197.830(3) does not apply, because the local government did not fail to provide a hearing or the notice of such hearing required by state or local law. However, under ORS 215.416(11) and 227.175(10), the local government must provide the opportunity for individuals to obtain a hearing through a de novo local appeal, as required by those statutes. If the local government fails to provide the notice of decision required by ORS 215.416(11) or 227.175(10), it cannot rely on that failure to prevent it from providing the opportunity for a de novo local appeal required by statute. Therefore, in such a situation, the time for filing a local appeal does not begin to run until the local appellant is provided the notice of decision to which he or she is entitled. Because the local appeal is available to such an individual, under ORS 197.825(2)(a) that appeal must be exhausted before appealing to LUBA." Tarjoto, slip op 9-10.

A. LUBA No. 95-089

In this appeal, petitioners challenge a six-month extension of a 1985 conditional use permit and 1990 design review approval, which the director granted in October, 1991. The city acknowledges the director's October, 1991 decision was a land use decision. Response Brief 2. Petitioners state that since they did not receive notice of that decision, under ORS 197.830 the time for appeal did not begin until May 10, 1995, when they first learned of it.

Petitioners bear the burden to establish our jurisdiction. Billington v. Polk County, 299 Or 471, 705 P2d 232 (1985); Bowen v. City of Dunes City, 28 Or LUBA 324, 330 (1994). Petitioners have not asserted whether the city

was required to, but did not, provide a hearing before rendering the decision to which they did not receive notice, or whether the city was authorized to render its decision without a hearing, but failed to provide notice of that decision. Under either scenario, petitioners have not established our jurisdiction.

If the city was required to hold a hearing, but failed to do so, under ORS 197.830(3) petitioners may appeal the decision directly to this Board upon obtaining notice under ORS 197.830(3). However, under ORS 197.830(5)(a) petitioners must appeal within three years of the decision, unless petitioners establish that the required notice was not provided. Petitioners have not done so.

The city asserts petitioners do not live within the notice area and, in fact, lists in its brief the ownerships of all adjacent properties. Petitioners do not refute the city's assertions. While petitioners accurately state in their petition for review that the city is required to provide notice to all property owners within 250 feet of the site, petitioners make no representation that any of them owned property within that 250-foot area.[3] Since

[3]We note that the city inaccurately states in its brief that it was required to provide notice only to adjacent properties and that it was not required to provide notice to non-adjacent properties within 250 feet of the site. CDO Sections 10.805(2), 10.505(3) and 10.620 establish a 250-foot notice area. However, regardless of the size of the notice area, petitioners bear the burden to establish they live within that area. There is nothing in the record or in the petition for review that indicates petitioners live within the 250-foot notice area.

petitioners have not established they were entitled to notice, the fact that petitioners did not receive any notice of the decision is not evidence that the required notice was not provided.

To the extent petitioners base their right to appeal on ORS 197.830, ORS 197.830(5)(a) bars petitioners from challenging the 1991 extensions of the conditional use permit and design review approval.

If, however, the director was authorized to render the decision under ordinances implementing ORS 227.175(10), under ORS 197.825(2)(a) petitioner must exhaust local remedies before appealing to this Board. Consequently, under ORS 197.825(2)(a), we lack jurisdiction to review the decision because petitioner must first exhaust the available local appeal process.[4]

LUBA No. 95-089 is dismissed.

B. LUBA No. 95-090.

In this appeal, petitioners challenge a February 3, 1993, letter from the director to Omni. The February 3, 1993 letter is a clarification of an October 1, 1992 letter to Omni, which corrects a scrivener's error and clarifies, but does not substantively alter, the October 1, 1992 letter.

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[4]We note that, since petitioners have not established here whether they were entitled to notice of the challenged decision, we cannot determine the timeliness of petitioner's local appeal.

A local government order that simply corrects clerical mistakes in an earlier local government order making a land use decision is not itself a separate, appealable land use decision. Kalmiopsis Audubon Society v. Curry County, 27 Or LUBA 640, aff'd, 131 Or App 308, 884 P2d 894 (1994). In Kalmiopsis, the county issued an order captioned "Amended Order" in which it corrected errors made in an earlier order. As in this case, in Kalmiopsis petitioner did not dispute that the substance of the two orders was identical. Rather, the second order added a page of findings that had been omitted from the initial order, and removed an erroneously duplicated page in the initial order. LUBA concluded that the appealable land use decision was adopted by the county in the initial order, and not the second, correcting order.

On appeal in Kalimposis, the Court of Appeals found significant the fact that the second decision had not been appealed within the time for appealing the first decision, leaving open the possibility that, if it had been appealed within the time period for appeal of the first decision, the appeal could stand notwithstanding petitioner appealed only the correction, and not the actual decision. Id. at 311. In this case, if the October 1, 1992 letter was a land use decision, the appeal period did not commence until petitioner learned of the decision and, therefore, the appeal of the clarification letter would be sufficient to

appeal the October, 1992 letter. The question, then, is whether the October, 1992 letter is an appealable land use decision.

The city contends the director's February 3, 1993 letter is not a land use decision because the CDO does not authorize the director to terminate or revoke a conditional use permit, and authorizes the director to extend a conditional use permit only during the first twelve months after approval. The city argues that, because the CDO provides no authority for the director's statements in his February 3, 1993 letter, the statements are meaningless and, therefore, the letter is not a land use decision.

Whether the community development director exceeded the scope of his authority does not determine whether he made a land use decision. See Pilling v. LCDC, 22 Or LUBA 198 (1991). (whether decision maker exceeds his jurisdiction in making the challenged decision is an issue to be considered on the merits.) For purposes of determining LUBA's jurisdiction, the sole question is whether the challenged decision falls within the class of decisions over which LUBA has review authority.

Regardless of the planning director's authority, the October 1, 1992 letter purports to apply the city's land use regulations and, therefore, constitutes a land use decision under ORS 197.015(10). Since the city acknowledges it had no authority to render the decision, it is not a decision of

which petitioners must exhaust their administrative remedies prior to appealing to LUBA under ORS 197.825. Rather, it is appealable under ORS 197.830(3).

The city acknowledges, and we agree, that the planning director had no authority to render the challenged decision.

The city's decision in LUBA No. 95-090 is reversed.