

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 LOLA WALTON, MAX HEIKEN and)
5 RICHARD PERRY,)
6)
7 Petitioners,)
8)
9 vs.)
10)
11 CLACKAMAS COUNTY,)
12)
13 Respondent,)
14)
15 and)
16)
17 ERNEST L. WHITED,)
18)
19 Intervenor-Respondent.)

LUBA No. 96-139
FINAL OPINION
AND ORDER

20
21
22 Appeal from Clackamas County.

23
24 Stuart A. Sugarman, Portland, filed the petition for
25 review and argued on behalf of petitioners.

26
27 Michael E. Judd, Chief Assistant County Counsel, Oregon
28 City, filed a response brief and argued on behalf of
29 respondent.

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31 David B. Smith, Tigard, filed a response brief and
32 argued on behalf of intervenor-respondent.

33
34 HANNA, Chief Referee; GUSTAFSON, participated in the
35 decision.

36
37 DISMISSED 02/19/97

38
39 You are entitled to judicial review of this Order.
40 Judicial review is governed by the provisions of ORS
41 197.850.

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the county's administrative approval
4 of a five lot residential subdivision.

5 **MOTION TO INTERVENE**

6 Ernest L. Whited (intervenor), the applicant below,
7 moves to intervene in this proceeding on the side of
8 respondent. There is no opposition to the motion, and it is
9 allowed.

10 **FACTS**

11 Intervenor applied to the county for approval of a
12 five-lot residential subdivision on a 54,000 square foot
13 parcel zoned urban low density residential (R-10). The R-10
14 zone requires a 10,000 square foot minimum lot size.
15 Intervenor's proposal included the use of flexible lot
16 sizes, allowed under Zoning and Development Ordinance (ZDO)
17 1014.04, with the result that four of the five proposed lots
18 are less than 10,000 square feet in size.

19 The county notified property owners within 300 feet of
20 the proposed subdivision of the application for a limited
21 land use decision. The notice identified the approval
22 criteria as ZDO 301, 1000 and 1105.¹ None of the
23 petitioners submitted comments to the county in response to

¹ZDO section 1000, entitled "Development Standards," is the title page and index for sections 1001 through 1021.

1 that notice. On October 18, 1994, the county
2 administratively approved the subdivision proposal, with
3 conditions. The county mailed its notice of decision, which
4 consisted of the actual decision, to the same persons to
5 whom it mailed its notice of application. Petitioners do
6 not dispute that they received the notice of decision.
7 Petitioners did not appeal the administrative decision to
8 the county hearings officer.

9 In July 1996, petitioners learned that intervenor
10 planned to use the flexible lot size provisions of ZDO
11 1014.04 to create four lots of less than 10,000 square
12 feet. On July 25, 1996, petitioners appealed the county's
13 1994 decision to LUBA.²

14 **JURISDICTION**

15 The county and intervenor challenge LUBA's jurisdiction
16 to consider this appeal.³ The county challenges our
17 jurisdiction under two different bases: (1) petitioners do
18 not have standing because they failed to exhaust their local

²On August 22, 1996, on petitioners' motion, LUBA stayed the county's decision until resolution of this appeal.

³Petitioners contend that the county's and intervenor's challenges to LUBA's jurisdiction, which were made in their response briefs, should be rejected as untimely, since neither was made within 10 days of the date the county and intervenor knew of petitioners' alleged failure to meet the requirements of ORS 197.830(4). Challenges to LUBA's jurisdiction may be made at anytime during the course of the appeal, and are not subject to the 10-day filing requirement for motions specified in OAR 661-10-065(2). Bowen v. City of Dunes City, 28 Or LUBA 324 (1994); Tourier v. City of Portland, 16 Or LUBA 546 (1988).

1 remedies when they did not seek a local appeal hearing
2 before a county hearings officer as allowed under ZDO
3 1305.02(E);⁴ and (2) petitioners failed to file a notice of
4 intent to appeal with LUBA within 21 days of receiving
5 notice of the decision. We address only the county's first
6 jurisdictional challenge.⁵

7 Petitioners argue that they were not required to exhaust
8 their administrative remedies because neither the county's
9 notice of proposed action nor the decision reasonably
10 describe the county's decision. Specifically, petitioners
11 argue that because the notice of proposal did not state that
12 flexible lot sizes are allowed under ZDO section 1000, they
13 were not adequately apprised of the actual proposal.⁶

⁴ZDO 1305.02(E) states:

1. The action of the planning director shall become final unless appealed in writing within ten (10) days of the notice of decision.
- "2. If appealed, the application shall be reviewed by the Hearings Officer under subsections 1301-1304, * * *
- "3. An appeal stays proceedings in the matter appealed until the determination of the appeal."

⁵Because we resolve this appeal based the county's argument under ORS 197.825(2), it is not necessary for us to reach intervenor's argument that petitioners lacked standing to bring this appeal under ORS 197.830(4) because none of the petitioners is adversely affected by the county's decision.

⁶Petitioners also argue that, because the county notice of proposal did not specifically state that flexible lot sizes could be allowed, they were entitled to appeal to LUBA under ORS 197.830(4) that allows appeals within 21 days of notice of the actual decision, if the notice of decision did not accurately describe the proposal. Petitioners argue that neither the

1 The county responds:

2 "ORS 197.825(2) provides that this Board does not
3 have jurisdiction unless petitioners have
4 'exhausted all remedies available by right'.
5 Under the Clackamas County Zoning and Development
6 Ordinance, a staff decision may be appealed to the
7 County Land Use Hearings Officer. The
8 availability of that appeal was clearly stated in
9 the 'Notice of Decision' (Rec., p. 14). Because
10 petitioners did not exhaust that available remedy,
11 the Board lacks jurisdiction over this appeal."
12 Respondent's Brief 3.

13 This Board's jurisdiction is limited "to those cases in
14 which the petitioner has exhausted all remedies available by
15 right before petitioning the board for review."
16 ORS 197.825(2)(a); see also Portland Audubon Society v.
17 Clackamas County, 77 Or App 277, 712 P2d 839 (1986) (holding
18 that the exhaustion requirement in ORS 197.825(2)(a)
19 required an applicant to seek all remedies from a higher
20 decision-making level for which there is a right to ask);
21 Lyke v. Lane County, 70 Or App 82, 688 P2d 411 (1984)
22 (exhaustion requirement of ORS 197.825(2)(a) requires that
23 petitioners use all available local remedies before invoking
24 state jurisdiction.) Shaffer v. City of Salem, 29 Or LUBA
25 479 (1995) (explaining that the purpose of ORS 197.825(2)(a)
26 is to assure a local government decision is reviewed by the
27 highest-level local decision-making body that the local code
28 makes available).

notice of proposal nor the actual decision alerted them that flexible lot sizes were approved. Because we dismiss petitioners' appeal on the county's first basis, we do not reach this argument.

1 Petitioners do not explain why the county's alleged
2 notice deficiency excuses them from exhausting their local
3 appeal remedy. ZDO 1305.02(E) provides the opportunity to
4 appeal planning director decisions to the local hearings
5 officer. To the extent petitioners argue they were not
6 adequately apprised of the nature of the local decision, ORS
7 197.825(2) requires that argument to be made first through
8 the local appeals process.

9 As the party seeking review, petitioners bear the
10 burden of establishing LUBA's jurisdiction. Sparrows v.
11 Clackamas County, 24 Or LUBA 318, 326 (1992). Petitioners
12 have not established why the county's alleged failure to
13 adequately describe the proposed subdivision excuses them
14 from their obligation to exhaust local remedies before
15 appealing to this Board. Petitioners failed to exhaust
16 local appeal remedies available by right as required by ORS
17 197.825(2)(a). See Tarjoto v. Land County, 29 Or LUBA 408,
18 413 (1995).

19 With the issuance of this decision, LUBA's August 22,
20 1996 stay order is dissolved.

21 This appeal is dismissed.