BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, Petitioner, vs. POLK COUNTY, Respondent, and CRAIG HANNEMAN and KATHLEEN HANNEMAN, Intervenors-Respondent.	LUBA No. 96-192 FINAL OPINION AND ORDER

Appeal from Polk County.

Celeste J. Doyle, Assistant Attorney General, Salem, filed the petition for review and argued on behalf of petitioner. With her on the brief was Theodore R. Kulongoski, Attorney General, Thomas A. Balmer, Deputy Attorney General, and Virginia L. Linder, Solicitor General.

No appearance by respondent.

Wallace W. Lien, Salem, filed the response brief and argued on behalf of intervenors-respondent.

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

DISMISSED 03/25/97

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

Petitioner (DLCD) appeals the county's August 1, 1996 lot line determination.

MOTION TO INTERVENE

Craig and Kathleen Hanneman (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

Intervenors applied to the county for a legal lot line determination to establish the legal status of intervenors' five contiguous parcels. Based on a 1994 county policy, on July 2, 1996, the planning director determined that four of the five parcels were recombined when intervenors acquired them under one instrument with one perimeter legal description (the July 2 decision). The county provided DLCD notice of the July 2 decision, although DLCD acknowledges the county was not required to provide that notice.

Intervenors appealed the July 2 decision. The county provided DLCD notice of that appeal, which specified an appeal hearing date of August 28, 1996. An affidavit submitted by a DLCD Rural Lands Specialist (DLCD Affidavit) states that "DLCD was contemplating appearing before the [Board of County Commissioners] BOC in support of the July 2 decision of the Planning Director." DLCD Affidavit 1.

However, DLCD does not contend and the record does not indicate that DLCD expressed its intent to the county or otherwise had further contact with the county regarding intervenors' application.

After the July 2 decision, in a separate proceeding the board reviewed the policy upon which that decision had been made, and on July 31, 1996 the board adopted a new policy that voided the 1994 policy.[1] According to intervenors, DLCD was aware of this proceeding, but did not participate in it. DLCD does not dispute its knowledge of this separate proceeding.

Based on the new policy, on August 1, 1996 the county issued a revised decision on intervenors' application, which reversed the July 2 decision and recognized the five tracts as separate lots (the August 1 decision). A handwritten statement on the county's administrative actions "control sheet" states that the revised decision was mailed to the same parties to whom the July 2 decision was mailed. Record 9. DLCD is listed as a party to whom notice was sent. However, DLCD contends it did not receive that notice.

The August 1, 1996 decision was not appealed to the board and became final on August 12, 1996. Intervenors

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[1]As intervenors describe the new, 1996 policy,

> "the ex post facto re-combining of lots simply because they were acquired under a single perimeter legal description was eliminated in order to conform the 'policy' to the mandates of ORS 92.017."

subsequently withdrew their appeal of the July 2 decision, canceling the August 28, 1996 hearing. No notice was provided of that withdrawal. The board conducted an unrelated hearing on August 28, 1996, at the time set for the originally scheduled July 2 decision appeal. DLCD did not appear at that hearing, either orally or in writing.

The DLCD affidavit states that in late September the DLCD Rural Lands Specialist contacted the county regarding other, unrelated matters, and was informed that the July 2 decision had been withdrawn, and that a new decision had been issued. The affidavit also states that the county employee with whom Rural Lands Specialist spoke told him that "the county counsel had advised him that DLCD was not entitled to notice and not to mail [DLCD] a copy." DLCD then requested and received a copy of the August 1 decision on September 25, 1996.

On October 15, 1996 the county faxed to DLCD counsel the administrative action control sheet, a notice map and a notice list. The control sheet faxed to DLCD states DLCD was sent notice of the August 1 decision. (Record 9). However, the record also includes another copy of the control sheet, on which a notation is parenthetically added below the statement "New decision out to same [as 7-2-96 decision]" which states "(not DLCD)". Record 34. The record does not indicate when this notation was added. Intervenors' counsel states that he "reviewed the complete

Polk County file on October 22, 1996, and made copies of all that file information. At that time, the reference to '(not DLCD)' was not on that sheet." Intervenors' Motion to Dismiss 3-4.

DLCD appealed the August 1 decision to this Board on October 15, 1996.

MOTION TO DISMISS

Intervenors move to dismiss this appeal on the grounds that petitioner has no standing, did not file a timely appeal, and failed to exhaust local administrative remedies.

A. ORS 197.830(2)

ORS 197.830(2)(b) requires that in order to petition this Board for review of a local land use decision, a person must have "[a]ppeared before the local government * * * orally or in writing."

DLCD argues the appearance requirement of ORS 197.830(2)(b) does not apply here because it was given no opportunity to participate in the local proceedings on intervenors' application. DLCD reasons that since it agreed with the July 2 decision, it had no reason to appear to appeal it; since it did not learn of the August 1 decision within the 10-day local appeal period, it could not appear to appeal that decision locally; and because the appeal on the July 2 decision was withdrawn, there was no hearing at which it could appear.

In Flowers v. Klamath Falls, 98 Or App 384, 780 P2d 227

(1989), the Court of Appeals described the circumstance in which the appearance requirement in inapplicable. The court concluded:

> "[A] local government's failure to abide by the statutory procedures [requiring notice and a hearing on permit applications], a failure that bears directly on a petitioner's ability to appear, obviates the necessity for making a local appearance in order to have standing to challenge the government's noncompliance with the procedural requirements. Petitioner's contentions that no hearing was held and that no notice was given, which [respondent] does not dispute, are therefore sufficient to establish that the appearance requirement of ORS 197.830[(2)](b) is inapplicable. Id. at 765.

In Citizens Concerned v. City of Sherwood, we also found the appearance requirement of what is now ORS 197.830(2) inapplicable when

> "[t]he city's failure to provide either the statutorily required notice of hearing and hearing or the notice of decision and opportunity for local appeal effectively denied anyone, other than the applicant, the opportunity to appear and take a position on the applications." Id. at 527.

See Ramsey v. City of Portland, 28 Or LUBA 763, 765 (1994) (similar provision of ORS 197.830(6)(b), requiring that a person wishing to intervene in a LUBA appeal must have appeared below is also obviated when failure of local government to provide required notice effectively prevents a potential intervenor from complying with appearance requirements).

As an initial matter, we reject DLCD's contention that it did not have the opportunity to appear in conjunction

with intervenors' application. The parties dispute whether DLCD received notice of the August 1 decision.[2] However, even assuming the county did not send DLCD notice of that decision, DLCD acknowledges it did receive notice of the July 2 decision, received notice of the appeal of that decision, and had no notice that the appeal had been withdrawn. Although the DLCD affidavit states that the agency contemplated appearing before the board in support of the July 2 decision, there is no evidence in the record that the agency actually attempted to do so, either orally or in writing. It did, nonetheless, have an opportunity to participate.[3]

A more fundamental problem with DLCD's argument, however, is that it was not entitled to notice of the August 1 decision. DLCD does not argue the county did not provide the notice required by statute or local ordinance.[4] Thus,

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[2]The fact that the county "control sheet" initially indicated that DLCD had been sent notice of the August 1 decision, and that the parenthetical notation of "not DLCD" was added to the control sheet sometime after DLCD received a copy of it on October 15, 1996, renders the probative value of the added notation questionable at best.

[3]We do not reach the question of whether DLCD would have had standing to appeal the county's decision on intervenors' application had it appeared after the appeal deadline for the August 1 decision but at or before the August 28 appeal hearing date.

[4]DLCD is statutorily required to receive notice of hearing under ORS 197.610 and notice of decisions under ORS 197.615 for proposed comprehensive plan amendments or new land use regulations. In all other cases, unless otherwise required by local ordinance, local governments are under no obligation to provide DLCD notice of proposed actions. See Heceta Water District v. Lane County, 24 Or LUBA 402 (1993) (where no notice is

the exception to the ORS 197.830(2) appearance requirement described above is not present in this case.[5] DLCD's failure to appear in this case necessarily precludes its standing under ORS 197.830(2) to appeal the county's decision.

ORS 197.830(3)

DLCD argues that notwithstanding its failure to appear below, it is entitled to appeal the decision under ORS 197.830(3)(b) because it did not have the opportunity to appear below, and because it is adversely affected by the decision and appealed within 21 days of when it learned of the decision. DLCD's argument appears to presume that if no hearing was held at the local level, the appearance requirement of ORS 197.830(2) does not apply, and instead ORS 197.830(3) both allows an appeal and controls the timing of the appeal. We disagree with DLCD's presumption. ORS 197.830(3) neither obviates the ORS 197.830(2) appearance requirement or tolls the time for filing an appeal in this case.

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required under ORS 197.610, DLCD's failure to appear before the county during the local proceedings precludes it from intervening in appeal of local decision).

[5]DLCD infers that because the county provided it notice of the July 2, 1996 decision, the county was obligated to keep DLCD informed of further activity on that application. To the extent DLCD suggests that the county should be estopped or that the county was otherwise legally responsible to inform DLCD of the actions on this matter, we reject that suggestion. The fact that the county gratuitously provided DLCD notice of one or both of those decisions does not obligate the county to provide further notices, or to keep DLCD apprised of events transpiring with regard to those decisions.

ORS 197.830(3) provides:

> "(3) If a local government makes a land use decision without providing a hearing or the local government makes a land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:
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> "(a) Within 21 days of actual notice where notice is required; or
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> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

Intervenor argues that ORS 197.830(3) does not apply to this case because the county did not "fail to provide a hearing" and that even if it did apply, the latest DLCD should have known of the August 1 decision would have been August 28, 1996, the date of the originally scheduled appeal hearing.

We need not reach the question of when DLCD should have known of the August 1 decision because we agree with intervenor that ORS 197.830(3) is inapplicable in this case. As we stated in Leonard v. Union County, 24 Or LUBA 362, 374 (1992), "we construe ORS 197.830(3) to apply where a local government is required to provide a hearing under state or local law, but fails to do so."[6] In the situation

[6]In Leonard we explained the three circumstances in which the time limits specified in ORS 197.830 apply, as follows:

before us, where the local government is not required to conduct a hearing, we determined in Tarjoto v. Lane County, 29 Or LUBA 408, aff'd 137 Or App 305 (1995), that ORS 197.830(3) does not apply. As we explained there:

> "[W]e conclude that where a local government 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 as 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 215.416911) 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 a local appellant is provided the notice of decision to which he or she is entitled." Id. at 413.

> "(1) The local government was required to hold a hearing, and did not do so.
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> "(2) The local government held a hearing, but failed to give one or more persons the notice of hearing they were entitled to receive under applicable provisions of state or local law.
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> "(3) The local government held a hearing and gave the required notice of that hearing, but the action taken in the decision is significantly different from the proposal described in the hearing notice." Leonard, 24 Or LUBA at 375.

None of these three situations is present in this case. The county was not required to conduct a hearing on intervenors' application. Its obligation under ORS 215.416(11) and PZO 122.260 required only that it provide the opportunity for an appeal, which it did.

In this case, there is no dispute that the county provided the statutorily required notice to those who were entitled to it, and that DLCD was not entitled to notice. Thus, not only is ORS 197.830(3) inapplicable, the time for filing an appeal was not tolled by DLCD's failure to learn of the decision.

This appeal is dismissed.[7]

[7]Because we find DLCD lacks standing to bring this appeal, we need not reach intervenors' argument that DLCD failed to exhaust local administrative remedies before appealing to this Board.