BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOHN ALLAN PETERSEN and TIDE CREEK ROCK, Petitioners,	LUBA No. 96-205
vs.	FINAL OPINION AND ORDER
COLUMBIA COUNTY, Respondent.	

Appeal from Columbia County.

Agnes M. Petersen, St. Helens, represented petitioners.

John K. Knight, County Counsel, St. Helens, represented respondent.

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

DISMISSED 05/30/97

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

Opinion by Livingston.

NATURE OF THE DECISION

Petitioners appeal the county's ORS 197.615 notice of adoption of amendments to its surface mining ordinance.

INTRODUCTION

On September 30, 1992, the county board of commissioners adopted Ordinance No. 92-8 (the Ordinance). The Ordinance amended the county's surface mining ordinance to establish a two-cent per ton regulatory fee to pay the costs of regulating surface mining. The Ordinance was appealed to this Board and then to the Court of Appeals, which remanded to us. Oregon City Leasing, Inc. v. Columbia County, 25 Or LUBA 129 (1993) (Oregon City Leasing I); and Oregon City Leasing, Inc. v. Columbia County, 121 Or App 173 (1993) (Oregon City Leasing II). The Court of Appeals affirmed our second order without opinion, and the Oregon Supreme Court denied review. Oregon City Leasing, Inc. v. Columbia County, 26 Or LUBA 203, aff'd 126 Or App 314, rev den 318 Or 661 (1994) (Oregon City Leasing III).

We do not repeat here the discussion in Oregon City Leasing III of the issues that were presented and decided in Oregon City Leasing I and II. See 26 Or LUBA at 204-06. In Oregon City Leasing III, we concluded that the Ordinance amended, but did not replace, an earlier surface mining ordinance. We also concluded that, consistent with the opinion of the Court of Appeals in Oregon City Leasing II,

notice of the adoption of amendments to the earlier ordinance must be given to the Department of Land Conservation and Development (DLCD). In our remand order we stated:

> "[T]he challenged ordinance is an amendment to an acknowledged land use regulation and, therefore, is subject to the requirements of ORS 197.610 and 197.615. There is no dispute the county did not provide notice to DLCD, as required by ORS 197.610 and 197.615. This means the county improperly construed substantive provisions of the applicable law and, under ORS 197.835(7)(a)(D), the challenged decision must be remanded." Oregon City Leasing III, 26 Or LUBA at 208.

Pursuant to our order, the county, using the notice of adoption form prescribed by DLCD, sent notice of the amendments to DLCD on April 21, 1994, together with a copy of the Ordinance, a copy of our final opinion and order in Oregon City Leasing III, and copies of the order of the Court of Appeals affirming our order without opinion and of the order of the Oregon Supreme Court denying review. Record 12-28. The county also sent a copy of the notice of adoption to the attorney for Oregon City Leasing, Inc. Supplemental Record 1.

ORS 197.610(2) permits a local government to forgo the 45-day notice required under ORS 197.610(1) when the local government determines that the Statewide Planning Goals (goals) do not apply to a particular proposed amendment or

new regulation.[1] The notice of adoption sent to DLCD under ORS 197.615 indicated that the goals do not apply to the Ordinance. Record 13.[2] Because the goals do not apply to the Ordinance, the county did not give the 45-day notice to DLCD.

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[1]ORS 197.610 provides, in relevant part:

> "(1) A proposal to amend a local government acknowledged comprehensive plan or land use regulation or to adopt a new land use regulation shall be forwarded to the director at least 45 days before the final hearing on adoption. The proposal forwarded shall contain the text and any supplemental information that the local government believes is necessary to inform the director as to the effect of the proposal. The director shall notify persons who have requested notice that the proposal is pending.
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> "(2) When a local government determines that the goals do not apply to a particular proposed amendment or new regulation, notice under subsection (1) of this section is not required. In addition, a local government may submit an amendment or new regulation with less than 45 days' notice if the local government determines that there are emergency circumstances requiring expedited review. In both cases:
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> "(a) The amendment or new regulation shall be submitted after adoption as provided in ORS 197.615(1) and (2); and
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> "(b) Notwithstanding the requirements of ORS 197.830(2), the director or any other person may appeal the decision to the board under ORS 197.830 to 197.845.
>
> "* * * * *"

[2]OAR 660-18-022 restates the substance of ORS 197.610(2). OAR 660-18-040(2) provides, "The local government shall clearly indicate in its transmittal which provisions of OAR 660-18-022 are applicable where the adopted amendment was not submitted for review 45 days prior to the final hearing on adoption." Thus OAR 660-18-040(2) states the requirement that a local government inform DLCD of its determination that the goals do not apply.

On October 24, 1996, more than two years after the county submitted the notice of adoption to DLCD under ORS 197.615, petitioners appealed the notice of adoption, but not the Ordinance, to this Board. Petitioners state in an affidavit that they did not receive notice that the notice of adoption had been mailed to DLCD until after October 4, 1996. Petitioners' notice of intent to appeal to this Board notes the county's determination that the goals do not apply to the Ordinance. Petitioners contend that the notice of adoption contains the first expression of this determination.

MOTION TO DISMISS

After petitioners filed a petition for review, the county filed a motion to dismiss which responds to certain contentions in the petition for review.

A. Timeliness of Motion to Dismiss

Petitioners contend the county's motion to dismiss is untimely because it was not filed within 10 days of the date the city received petitioners' notice of intent to appeal to LUBA. Petitioners rely on our rule addressing motions, which states, in relevant part:

> "Time of Filing: A party seeking to challenge the failure of an opposing party to comply with any of the requirements of statutes or Board rules shall make the challenge by motion filed with the Board and served on the adverse party within 10 days after the moving party obtains knowledge of such alleged failure. * * *" OAR 661-10-065(2).

We reject petitioners' argument. A challenge to our

jurisdiction may be brought at any time and is not subject to the ten-day requirement of OAR 661-10-065(2). See No Casino Association v. City of Lincoln City, 30 Or LUBA 79, 82 (1995); Elliott v. Lane County, 18 Or LUBA 871, 874 (1990).

B. Nature of Decision

The county contends petitioners' appeal is untimely and should be dismissed on that basis. The county mentions, almost in passing, that the challenged decision is a ministerial act that reflects an earlier determination, made at the time the Ordinance was considered and adopted, that the goals do not apply to the Ordinance. Because we agree the challenged decision was a ministerial act without independent significance, we conclude it is not a land use decision subject to our jurisdiction.

The adoption of the Ordinance itself was a land use decision, and, as the Court of Appeals stated in Oregon City Leasing III, notice of that decision to DLCD was required by ORS 197.615. A determination that the goals do not apply to an amendment of a comprehensive plan or land use regulation must be made at the time the amendment is adopted. In this case, the determination that the goals do not apply was made when, at the time of adopting the Ordinance, the goals were found not to apply (or at least were not applied) and hence were not a factor in shaping the Ordinance. Whether the determination was correct is not before us. The notice of

adoption does not state a new determination. DLCD or any persons, including petitioners, could have appealed the decision to adopt the Ordinance to LUBA under ORS 197.830 to 197.845, and contended the goals did apply. ORS 197.615(2)(b). The appeal could have addressed inadequacies in the Ordinance with respect to the application of the goals.

C. Timeliness of Appeal

We now turn to the county's challenge to petitioners' standing. We agree with the county that were the challenged decision a land use decision, petitioners' appeal would be untimely. ORS 197.830(8) governs the time for appeals to LUBA and provides, as material:

> "A notice of intent to appeal a land use decision or limited land use decision shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final. 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. * * *"

Petitioners do not contend they were entitled to notice under ORS 197.615. Nevertheless, relying on ORS 197.830(3)(b), they contend that notwithstanding ORS 197.830(8), they are entitled to file an appeal more than two years after the decision to adopt the Ordinance was perfected by filing the notice of adoption with DLCD under ORS 197.615. ORS 197.830(3) provides, in relevant part:

> "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 [LUBA] 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." (Emphasis added.)

We have construed the emphasized language to apply where a local government is required to provide a hearing under state or local law, but fails to do so. Tarjoto v. Lane County, 29 Or LUBA 408, 412, aff'd 137 Or App 305 (1995); Leonard v. Union County, 24 Or LUBA 362 (1992). Petitioners do not show or argue that a required hearing was not held in connection with the adoption of the Ordinance. With respect to the challenged decision, i.e., filling out the notice of adoption and placing an "X" in the square labeled "The Statewide Planning Goals do not apply," they contend a hearing was required by either Columbia County Zoning Ordinance (CCZO) 1606.2 or 1603, or by ORS 215.060.

CCZO 1606 addresses "[r]equests to amend the text of the Zoning Ordinance or to change a large area of the Zoning Map of Columbia County to bring it into compliance with the Comprehensive Plan." It clearly does not apply to the statement on the notice of adoption that the goals do not

apply to the Ordinance.

Petitioners argue that if CCZO 1606.2 does not apply, then CCZO 1603 must apply. CCZO 1603 applies to quasi-judicial decision making. We disagree with petitioners that CCZO 1603 applies in this case, because the statement on the notice of adoption that the goals do not apply to the Ordinance was not a quasi-judicial decision. See Strawberry Hill 4-Wheelers v. Benton Co. Bd. of Comm., 287 Or 591, 602-03, 601 P2d 769 (1979).

ORS 215.060 requires noticed public hearings prior to "[a]ction by the governing body of a county regarding the plan." Assuming "the plan" refers to the county comprehensive plan, ORS 215.060 does not apply to the statement on the notice of adoption that the goals do not apply to the Ordinance.[3]

We are not persuaded by petitioners' arguments that a public hearing was required before the county indicated on the notice of adoption that the goals do not apply to the adoption of the Ordinance.

D. Notice of Decision

Petitioners do not contend that ORS 197.615(2) entitled

[3]Notwithstanding the fact that it is the notice of adoption itself that petitioners challenge, their arguments from time to time address alleged errors in the adoption of the Ordinance itself. CCZO 1603 and CCZO 1606 do not apply to the adoption of the Ordinance, which is clearly not a quasi-judicial decision and which neither amends the text of the CCZO nor changes a large area of the county zoning map. ORS 215.060 does not apply to the adoption of the Ordinance, which amends a surface mining ordinance that is not part of the county comprehensive plan.

them to notice of either the adoption of the Ordinance or of the challenged decision. They were not participants in the proceedings leading to the adoption of the Ordinance and, as far as we can tell, they did not make a written request for notice either before or after our remand in Oregon City Leasing II. In Orenco Neighborhood Organization v. City of Hillsboro, 135 Or App 428, 432, 899 P2d 720 (1995), the Court of Appeals made clear that under ORS 197.610 to ORS 197.625, only state notice requirements must be followed to avoid tolling, under ORS 197.830(3), the 21-day appeal period stated in ORS 197.830(8). Pursuant to our remand in Oregon City Leasing III, the county gave DLCD and the participating party, Oregon City Leasing, Inc., the notice required by ORS 197.615(1).[4] No more was required.[5]

We reject petitioners' argument that a statement on the notice of adoption that the goals do not apply is itself a separate decision that requires separate notice. If that were true, it would be impossible to complete the process of adopting amendments to plans and land use regulations

[4]Under ORS 197.615(3) and OAR 661-18-055, DLCD in turn was required, within five working days, to provide notice of the county's adoption of the amendment to those who requested notice and paid the fee established under OAR 660-18-140.

[5]Petitioners contend they were entitled to notice of the challenged decision under ORS 203.045, which pertains to the adoption of proposed ordinances. However, the actual decision challenged in this appeal -- the notice of adoption, with its statement that the goals did not apply to the adoption of the Ordinance -- was not itself an ordinance to which ORS 203.045 applies.

because each such statement would require a separate notice, ad infinitum.

ORS 197.830(3) operates to extend the appeal period when a local government is required to provide a hearing under state law, but fails to do so. Leonard v. Union County, 24 Or LUBA at 374. ORS 197.830(3) also operates to extend the appeal period when required notice of a land use decision is not provided. Lloyd Dist. Comm. Assn. v. City of Portland, 141 Or App 29, 30, 916 P2d 884 (1996); League of Women Voters v. Coos County, 82 Or App 673, 729 P2d 588 (1986). Because petitioners have shown neither that a hearing was required under state or local law nor that they were entitled to notice of the challenged decision, they cannot rely on ORS 197.830(3) to lengthen the 21-day appeal period established by ORS 197.830(8).

Finally, we reject petitioners' argument that because the notice to DLCD and Oregon City Leasing, Inc. was untimely under ORS 197.615, which requires notice not later than five working days after the final decision, the county was required to repeat the process of adopting the Ordinance from the beginning. Our remand order in Oregon City Leasing III gave the county an opportunity to provide proper notice under ORS 197.610 and ORS 197.615 to the appropriate parties. It did not require the county to start over. The county complied with our order.

This appeal is dismissed.