BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON, Petitioner, vs. JEFFERSON COUNTY, Respondent, and DOUG STILLS, dba THREE RIVERS MARINA, Intervenor-Respondent.	LUBA No. 97-183 FINAL OPINION AND ORDER

Appeal from Jefferson County.

Tia M. Lewis, Bend, filed the petition for review and argued on behalf of petitioner. With her on the brief was Karnopp, Petersen, Noteboom, Hansen, Arnett & Sayeg.

No appearance by county.

Greg Hendrix, Bend, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Hendrix & Brinich.

HANNA, Board Member; GUSTAFSON, Board Chair, participated in the decision.

REMANDED 06/11/98

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

Opinion by Hanna.

NATURE OF THE DECISION

Petitioner appeals the county's denial of petitioner's appeal, as untimely, of the county's approval of an application to expand docks and support facilities for an additional 100 boats at the Three Rivers Marina on Lake Billy Chinook.

MOTION TO INTERVENE

Intervenor-respondent Doug Stills (intervenor), the applicant below, moves to intervene on the side of the county. There is no opposition to the motion, and it is allowed.

FACTS

The subject property includes approximately 53 acres bordering the Metolius arm of Lake Billy Chinook, zoned Three Rivers Recreation Area Waterfront (TRRAW). The property borders the southern boundary of the Warm Springs Indian Reservation (reservation), and currently supports a 226-boat slip marina and a houseboat rental operation. The area has no sewer or septic system, and all sewage disposal is handled by vault toilets. Water is carried into the site, and power is provided by on-site generators.

Intervenor filed an application to expand the marina and conduct bank stabilization, including placement of fill material. After extensive consultations with affected parties, including petitioner's employees, county planners, Portland General Electric, the Oregon Department of Fish and

Wildlife, Division of State Lands, and the U.S. Army Corps of Engineers, the parties reached agreement on the conditions of approval for what was termed the Master Plan. One condition of the Master Plan was that dock expansion would be limited to boats smaller than 24 feet in length. The county planning department conditionally approved the Master Plan.

Intervenor appealed the planning department's approval of the Master Plan to the county commissioners, and, on March 10, 1997, filed a new application for the conditional use approval at issue in this appeal.[1] The new application sought approval for dock spaces for 100 boats greater than 24 feet in length. On April 14, 1997, the county mailed notice of the conditional use application to affected parties, including petitioner. The notice to petitioner was sent to petitioner's attorney (Lewis), who is the designated agent for receipt of notice for petitioner.[2] The notice instructed interested persons to return comments to staff no later than April 21, 1997. Lewis submitted comments opposing the application, and requested a hearing.

On May 29, 1997, the county planning department approved the application without conducting a hearing. The county

---

[1]The county commissioners apparently held the Master Plan appeal in abeyance pending resolution of the conditional use application.

[2]Petitioner's law firm has been petitioner's designated agent for service of notice by the county for well over a decade. Petitioner is a large governmental entity consisting of three tribes and a number of departments, organizations, corporations and governmental levels, all with different addresses.

mailed a one-page "Public Notice" directly to petitioner rather than to Lewis.[3] The "Public Notice" notifies the recipient that the county has made a final decision to approve intervenor's application, provides a brief explanation of appeal rights and procedures, and states that any appeal must be filed by June 13, 1997.[4] On the same day, the county mailed to Lewis a copy of an 18-page document labeled "Staff Report" dated May 29, 1997. The "Executive Summary" on the first page states at the bottom that "[s]ubject to the conditions listed in Appendix A, Jefferson County Planning Staff approves this request." Also at the bottom of the first page is the date mailed, May 29, 1997, and a statement that the "Appeal Period Ends: June 13, 1997." In the body of the staff report, a final section entitled "Decision" states that "it is the Staff's recommendation to adopt the findings from the Criteria provided herein and approve" the application. The staff report contains no signatures nor otherwise states that it approves the application, or that a decision has been

---

[3]The record does not reflect to which of the numerous addresses or subentities within the Confederated Tribes the county sent the "Public Notice," or whether that document was received and, if so, by whom.

[4]The "Public Notice" states, in relevant part:

> "If you feel that not all the facts have been presented or the information is incorrect, this decision may be appealed to the [county] planning commission. If you desire to appeal this decision, you must file by June 13, 1997 (15 days from the date this notice was mailed), and you must have raised the issue at the local level prior to this decision. This appeal must be filed on the form available from the [county] Community Development Department and the fee must be submitted. For further information, please contact our office at [the address and phone number provided]." Record 24.

made. The county did not send Lewis a copy of the one-page "Public Notice."

On June 13, 1997, Lewis mailed to the county petitioner's appeal of the county's approval. The county received the appeal on June 16, 1997. On June 25, 1997, the planning director denied the appeal as untimely, because it was not received by the county on or before June 13, 1997. Petitioner appealed that decision to the county planning commission, which upheld the denial. Petitioner then appealed that decision to the county board of commissioners (commissioners), who conducted a hearing limited only to the timeliness of petitioner's appeal, and upheld the planning commission's affirmance of the planning director's decision denying the appeal.

Petitioner appeals the commissioners' decision denying its local appeal as untimely.

FIRST AND FOURTH ASSIGNMENTS OF ERROR

Intervenor disputes our jurisdiction to review the challenged decision, at least insofar as petitioner raises arguments directed at the county's approval of the conditional use permit rather than at the county's decision denying petitioner's local appeal as untimely. Intervenor argues that petitioner's first and fourth assignments of error are directed exclusively at the conditional use permit approval itself, and that we have no jurisdiction to review that

decision.[5] According to intervenor, the challenged decision in this case, and the only decision that we have jurisdiction over, is the commissioners' decision denying petitioner's local appeal of the conditional use approval as untimely.

Petitioner responds that we have jurisdiction over any issue that is raised before the close of the evidentiary hearing below, and that, because it raised the issues addressed in the first and fourth assignments of error during the proceedings below, those issues can be raised on appeal, citing Laurance v. Douglas County, ___ Or LUBA ___ (LUBA No. 96-180, June 20, 1997), and Davenport v. City of Tigard, 25 Or LUBA 67, aff'd 121 Or App 135 (1993). Both Laurance and Davenport involved planning commission decisions that were appealed to the local government under provisions restricting the local government's review to the matters specified in the local appeal. We held in both cases that local provisions narrowing the scope of review in local appeals do not narrow LUBA's statutory scope of review set out at ORS 197.763(1).

However, the rule expressed in Laurance and Davenport does not extend to allowing a petitioner to challenge a different decision than the decision appealed to us. Petitioner's notice of intent to appeal identifies only the

[5]The first assignment of error is directed at alleged procedural errors in the county's processing of intervenor's conditional use application. The fourth assignment of error is directed at the merits of the county's approval of intervenor's conditional use application. We perceive nothing in either assignment of error that is pertinent to any issue raised with respect to the challenged decision in this case denying the timeliness of the appeal.

commissioners' denial of petitioner's local appeal, which appealed the planning director's decision that petitioner's local appeal of the conditional use approval was untimely. Our jurisdiction extends solely to the commissioners' decision, which affirms the planning director's decision denying petitioner's appeal as untimely. The planning staff's approval of intervenor's conditional use application is a separate, albeit related, decision that was not before the commissioners and was not appealed to us.

Accordingly, we agree with intervenor that we have no jurisdiction to review any assignments of error directed at decisions other than the one before us. We also agree that the first and fourth assignments of error are directed exclusively at alleged procedural and substantive errors with respect to the planning staff's approval of the conditional use application. Accordingly, we do not address those assignments of error.

The first and fourth assignments of error are denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the county erred in denying its appeal of the conditional use approval as untimely, because the county failed to provide adequate notice of that approval. Because the county failed to give adequate notice of the decision, petitioner argues, the local appeal period is tolled until the county provides the required notice, citing Tarjoto

v. Lane County, 29 Or LUBA 408, 413, aff'd 137 Or App 305 (1995).

In Tarjoto, the county failed to provide the notice to which petitioner was entitled pursuant to ORS 215.416(11)(a). Petitioner learned of the decision and filed a local appeal with the county, as well as a separate appeal with LUBA. We dismissed the appeal to this Board, holding that petitioner was required in that circumstance to exhaust the local appeal granted him by the county. In reaching that conclusion, we reasoned that

> "under ORS 215.416(11) and [its analog applicable to cities] 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) * * * it cannot rely on that failure to prevent it from providing the opportunity for a de novo local appeal required by that 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." Tarjoto, 29 Or App at 413 (emphasis added).

Petitioner alleges three aspects in which the notice provided in the present case was inadequate: (1) the county failed to send the "Public Notice" to Lewis, petitioner's designated agent; (2) the staff report sent to Lewis is ambiguous about whether a decision has even been made; and (3) the staff report sent to Lewis does not contain information required by ORS 215.416(11)(a) and ORS 197.763, in particular the information necessary to perfect a local appeal of the decision.

The commissioners did not address any of the above arguments, but focused on whether the "Public Notice" sent directly to petitioner was adequate to satisfy its obligations under ORS 215.416(11)(a) and ORS 197.763. The commissioners quoted the explanation of appeal rights on the "Public Notice" and concluded that:

> "Assuming without deciding that the Public Notice of 5.29.97 was insufficient in some manner, the procedural error, if any, did not cause prejudice to [petitioner's] substantial rights. The Public Notice stated the deadline for filing an appeal and where the appeal must be filed." Record 22.

Petitioner contends first that pursuant to ORS 215.416(11)(a) and Jefferson County Development Procedures Ordinance (JCDPO) 5.2(4) and (5), the county is required to send notice of the decision to Lewis, both in her capacity as petitioner's designated agent for notice, and as a person who commented on the application, independently of the notice sent directly to petitioner.[6] The county's failure to send notice to Lewis in either capacity prejudiced petitioner's substantial rights, petitioner argues, because notice sent generally to a large governmental body such as petitioner rather than to its designated agent is not calculated or sufficient to give the notice required by ORS 215.416(11)(a).

Petitioner contends that when a large governmental entity composed of numerous departments and units with multiple

[6]JCDPO 5.2(4) and (5) require that notice of an administrative decision be given to all "parties," including persons who commented on the application.

addresses is a "person entitled to notice" under ORS 215.416(11)(a), the local government must send the notice directly to the person or department authorized to receive such notice, in this case, to Lewis. Petitioner analogizes the county's action in this case to sending 15-day notice to the State of Oregon via general delivery, Salem. Accordingly, petitioner concludes, the commissioners erred in finding that the county had satisfied its obligations under ORS 215.416(11)(a) and ORS 197.763 to provide notice of the decision to petitioner.

ORS 215.416(11)(a) provides that:

> "The hearings officer, or such other person as the governing body designates, may approve or deny an application for a permit without a hearing <u>if the hearings officer or other designated person gives notice of the decision and provides an opportunity for appeal of the decision to those persons who would have had a right to notice if a hearing had been scheduled or who are adversely affected or aggrieved by the decision</u>. Notice of the decision shall be given in the same manner as required by ORS 197.763. * * *[.]" (Emphasis added.)

ORS 197.763(2) describes the persons who are entitled to notice of a hearing and hence, pursuant to ORS 215.416(11)(a), to notice of decision. The scheme of notice provided by ORS 197.763(2) is linked to tax addresses, an unserendipitous provision in the present case. Petitioner, as a tribal government with exclusive jurisdiction over tribal territory, is not assessed property taxes and does not have a county-designated tax address.

We agree with petitioner that the county's actions failed

to provide the notice required by ORS 215.416(11)(a)and ORS 197.763. In Fletcher v. Douglas County, 31 Or LUBA 204, 208 (1996), we held that providing notice to the petitioners at their tax address satisfies local notice provisions similar to ORS 197.763, even if the local government fails to send additional notice to the petitioners' attorney as requested.

However, our reasoning in Fletcher does not apply to the present facts. Petitioner has no property tax address, nor, as far as we can tell from this record, any particular address to which notice of land use decisions affecting it can be sent with any likelihood of providing actual notice, other than the address of its designated agent and attorney, Lewis.[7] We conclude under these circumstances that the county was obligated by ORS 215.416(11)(a) and ORS 197.763(2) to send notice of the decision to petitioner's designated agent, Lewis. Furthermore, the county was required by JCDPO 5.2(4) and (5) to send notice of the decision to Lewis because she commented on the application.

Intervenor responds that, even if the county erred in not sending notice of the decision to Lewis, the county did send Lewis a copy of what turned out to be the actual decision. Intervenor argues that Lewis, and hence petitioner, had actual notice of the decision, which was indeed, more "notice" than

[7]For well over a decade, the county has sent land use notices affecting petitioner consistently to Lewis or the law firm with which Lewis is associated.

could be obtained from the "Public Notice," because Lewis received the decision itself. Intervenor notes that Lewis evidently understood that the county had made a final decision because Lewis ultimately filed an appeal, albeit an untimely appeal, of that decision. Absent some evidence that the county's procedural error caused Lewis to file an untimely appeal, intervenor contends, petitioner cannot show that the county's procedural error caused prejudice to its substantial right. ORS 197.835(9)(a)(B).[8]

Petitioner rejoins that the notice the county did provide to Lewis, the decision itself, was inadequate to give "notice" and "provid[e] an opportunity for appeal" of that decision within the meaning of ORS 215.416(11)(a). Petitioner contends that the decision fails to clearly identify itself as the decision, or even that a decision had been made. The decision does not contain the word "notice" or anything similar to it. Further, the text of the decision itself merely recommends approval. Even read together with the statement in the "Executive Summary" that staff approves the application, and

---

[8]ORS 197.835(9) states, in relevant part:

> "In addition to the review under subsections (1) to (8) of this section, the board shall reverse or remand the land use decision under review if the board finds:
>
> "(a) The local government or special district:
>
> "* * * * *
>
> "(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]"

the warning at the bottom of the first page that the appeal period ends June 13, 1997, petitioner argues that the staff report does not clarify that a decision has been made and that the appeal clock is ticking, but instead creates a large degree of ambiguity inconsistent with adequate notice.

In addition, petitioner emphasizes that the notice fails to explain petitioner's appeal rights or provide the information necessary to perfect a local appeal. In particular, petitioner argues that the county's failure to clarify that an appeal must be filed by June 13, 1997, meaning physically delivered to the county by that date, directly resulted in petitioner's untimely appeal. Unlike the explanation of appeal rights in the "Public Notice," nothing in the decision states that an appeal must be "filed" by a certain date, that appeal is limited to issues raised below, that the appeal must be filed on a form supplied by the county, or who to contact for further information. Petitioner argues further that nothing in the county's zoning ordinance (JCZO) or JCDPO defines what filing an appeal means, or specifies that an appeal be physically received in order to be filed.

We agree with petitioner that giving "notice" and "providing an opportunity for appeal" as required by ORS 215.416(11)(a) means, at a minimum, that the notice provided must unambiguously state that a particular decision has been made, and must either provide sufficient information to allow

the recipient to exercise the opportunity for local appeal, or direct the recipient to where that information can be obtained. See Harvard Medical Park, Ltd. V. City of Roseburg, 19 Or LUBA 555, 558 (1990) (providing petitioner a copy of the proposed decision is not adequate notice that the local government has made a final decision). The notice provided in this case fails on both accounts. We conclude that the county failed to provide adequate notice to Lewis and hence to petitioner. As a consequence, the local appeal period is tolled until the county provides the notice to which petitioner is entitled. Tarjoto, 29 Or LUBA at 413. It follows that petitioner's appeal was timely filed, and thus the county erred in concluding to the contrary.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the commissioners' interpretation of JCZO 904 to require physical receipt of a document to be considered "filed" with the county is inconsistent with ORS 215.416(11)(a) and ORS 197.763. Petitioner contends that JCZO 904 implements statutory requirements, and thus we owe no deference to the commissioners' interpretation of the local provision. ORS 197.829(1)(d).

JCZO 904 provides that written notice of an appeal "must be filed with the county within 15 days after the decision or requirement is made." We need not decide whether JCZO 904 implements statutory requirements and hence the county's scope

of discretion in interpreting that provision, because we disagree with petitioner that ORS 215.416(11)(a) and ORS 197.763 state any requirements regarding what constitutes "filing" a local appeal. While ORS 215.416(11)(a) and ORS 197.763 impose various requirements regarding notice of the decision, we perceive nothing in any of the statutes cited to us that prohibits the county from requiring timely local appeals to be physically delivered to the county within a stated appeal period. On the contrary, ORS 215.422(1)(a) grants local governments a wide range of discretion in determining local appeal procedures.[9]

The third assignment of error is denied.

The county's decision is remanded.

[9]ORS 215.422(1)(a) provides:

> "A party aggrieved by the action of a hearings officer or other decision-making authority may appeal the action to the planning commission or county governing body, or both, however the governing body prescribes. The appellate authority on its own motion may review the action. The procedure and type of hearing for such an appeal or review shall be prescribed by the governing body, but shall not require the notice of appeal to be filed within less than seven days after the date the governing body mails or delivers the decision to the parties." (Emphasis added.)