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BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

MARY WARRICK and SHARON MORRIS,	)	
	)	
Petitioners,	)	
	)	LUBA No. 98-165
vs.	)	
	)	FINAL OPINION
JOSEPHINE COUNTY,	)	AND ORDER
	)	
Respondent.	)	

Appeal from Josephine County.

Christopher P. Koback, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Davis Wright Tremaine.

Marc Kardell, Assistant County Counsel, Grants Pass, filed the response brief and argued on behalf of respondent.

HOLSTUN, Board Chair, participated in the decision.

REMANDED 03/25/99

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the county's approval of a 22-lot subdivision on a 120-acre parcel  
4 zoned rural residential five-acre minimum (RR-5).

5 **MOTION TO INTERVENE**

6 Gary and Linda Wallace, the applicants below, move to intervene on the side of the  
7 county. Petitioners argue that the applicant's motion must be denied pursuant to OAR 661-  
8 010-0050(2) and ORS 197.830(6), because the applicants' motion was filed more than 21  
9 days after the date the notice of intent to appeal was filed.<sup>1</sup>

10 The notice of intent to appeal was filed in this case on September 23, 1998. The  
11 applicants' motion was filed October 22, 1998. Accordingly, we deny the applicants' motion  
12 to intervene. ORS 197.830(6)(c).

13 **FACTS**

14 The applicants' property is a 120-acre rectangular-shaped parcel with its length  
15 running north-south. Access to the property is at its northeast corner from Azalea Drive.  
16 Immediately south of the applicants' property is a large parcel owned by the federal  
17 government and managed by the Bureau of Land Management (BLM). The BLM parcel is  
18 designated and zoned for forest uses. South of the BLM parcel is an existing rural  
19 subdivision with a street, Pinon Road, that enters the rural subdivision from the south and

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<sup>1</sup>OAR 661-010-0050(2) implements ORS 197.830(6), which provides in relevant part that:

"(a) Within 21 days after a notice of intent to appeal has been filed with the board under subsection (1) of this section, any person may intervene in and be made a party to the review proceeding upon a showing of compliance with subsection (2) of this section.

"\* \* \* \* \*

"(c) Failure to comply with the deadline set forth in paragraph (a) of this subsection shall result in denial of a motion to intervene."

1 ends at the southern border of the BLM parcel in a "street plug." The rural subdivision is  
2 approximately 1,300 feet from the southern border of the applicants' property. Petitioner  
3 Warrick owns the northernmost lot in the rural subdivision; petitioner Morris owns an  
4 adjacent lot south of Warrick's lot.

5 On June 4, 1997, the applicants filed an application to subdivide their parcel. The  
6 tentative site plan showed a road, North Pinon Drive, coming off Azalea Drive at the  
7 northeast corner of the applicant's parcel and running south, where it ends in a cul-de-sac  
8 near the BLM property. A county staff report recommended denial of the June 4, 1997  
9 subdivision application, on the grounds that the proposed subdivision did not have a loop  
10 road to ensure adequate access for safety, as required by the county's Rural Land  
11 Development Code (RLDC) 81.080. The applicants then withdrew their application.

12 In February 1998, the applicants reapplied for subdivision approval. The amended  
13 tentative plat showed a road running south from the applicant's property over the BLM  
14 parcel, and connecting to Pinon Road within the rural subdivision in which petitioners own  
15 property. The county scheduled a hearing on applicants' amended application and issued  
16 written notice to the owners of property within 250 feet of the subject property, pursuant to  
17 ORS 197.763(2)(a)(B). The county did not send notice to petitioners, even though the  
18 proposed extension of North Pinon Drive connected with Pinon Road immediately adjacent  
19 to petitioner Warrick's property and within 500 feet of petitioner Morris' property.

20 On April 24, 1998, the county approved the amended application for a subdivision,  
21 with the following pertinent condition:

22 "Pinon Road shall be extended through the property to the south in a 50-foot  
23 minimum right-of-way to connect with the existing Pinon Road. The road  
24 shall be dedicated and constructed to Rural Road Standards. The road right-  
25 of-way shall be sufficient to contain the entire road structure including cut and  
26 fill slopes. All required BLM permits to establish the road to the satisfaction  
27 of Public Works and its construction shall be the developers' responsibility.  
28 (Goal 3, Policy 3; Goal 6, Policy 3; [RLDC] 51.050(1), (3), (4), (9); 51.080;  
29 81.080)." Record 14.

1 On September 10, 1998, petitioners learned about the county's approval. This appeal  
2 followed.

### 3 JURISDICTION

4 The county moves to dismiss this case for lack of jurisdiction, arguing that the  
5 challenged decision is not a land use decision. The county argues that its decision to require  
6 the applicants to connect North Pinon Drive and Pinon Road falls within one of the  
7 exceptions to LUBA's jurisdiction at ORS 197.015(10)(b)(D), which provides that a land use  
8 decision does not include a decision of a local government:

9 "Which determines final engineering design, construction, operation,  
10 maintenance, repair or preservation of a transportation facility which is  
11 otherwise authorized by and consistent with the comprehensive plan and land  
12 use regulations[.]"

13 The county contends that its decision regarding the connection of North Pinon Drive  
14 and Pinon Road is a decision determining the "construction \* \* \* of a transportation facility"  
15 within the meaning of ORS 197.015(10)(b)(D), and thus is not a land use decision subject to  
16 LUBA's jurisdiction. In support, the county cites Leathers v. Washington County, 31 Or  
17 LUBA 43 (1996), where we held that a county's decision to remove gates crossing a public  
18 road and paving a portion of that road fell within the exemption at ORS 197.015(10)(b)(D).  
19 The county argues that, like the decision at issue in Leathers, the challenged decision in this  
20 case "deals solely with transportation issues." Respondent's Brief 5.

21 Petitioners respond, and we agree, that the county's motion mischaracterizes the  
22 challenged decision. The challenged decision is plainly a decision approving a subdivision  
23 pursuant to the county's comprehensive plan and land use regulations, and is thus a land use  
24 decision under ORS 197.015(10)(a).<sup>2</sup> That the county's decision conditions its approval on

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<sup>2</sup>ORS 197.015(10)(a)(A) defines a land use decision to include:

"A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

1 construction of road access for the subdivision does not convert that decision or any part of  
2 the decision into a decision of the type described in ORS 197.015(10)(b)(D). Nor is the  
3 present case similar to Leathers. In Leathers, the county did not apply any comprehensive  
4 plan provisions or land use regulations in making its decision to open and improve the road.  
5 In the present case, not only did the county apply a number of comprehensive plan provisions  
6 and land use regulations in approving the subdivision, it applied several land use provisions  
7 in requiring the applicants to connect North Pinon Drive to Pinon Road. Accordingly, the  
8 challenged decision is a land use decision.

9 Respondent's motion to dismiss is denied.

#### 10 **ASSIGNMENT OF ERROR**

11 Petitioners argue that, pursuant to ORS 197.763(2)(a), the county was required to  
12 provide notice of the hearing on applicants' application to petitioners, and that the county's  
13 failure to provide that notice is a procedural error warranting remand of the challenged  
14 decision. ORS 197.835(9)(a)(B).<sup>3</sup> ORS 197.763(2)(a) requires that

15 "Notice of the hearings governed by this section shall be provided to the  
16 applicant and to owners of record of property on the most recent property tax  
17 assessment roll where such property is located:

18 " \* \* \* \*

19 "(B) Within 250 feet of the property which is the subject of the notice  
20 where the subject property is outside an urban growth boundary and  
21 not within a farm or forest zone; or

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"(i) The goals;

"(ii) A comprehensive plan provision;

"(iii) A land use regulation[.]"

<sup>3</sup>Petitioners assert that failure to provide notice deprived them of the opportunity to participate in the local proceedings and to raise a number of issues regarding the proposed subdivision's compliance with applicable law. The county does not dispute that, if petitioners were entitled to notice, the county's failure to provide that notice "prejudiced the substantial rights" of petitioners within the meaning of ORS 197.835(9)(a)(B).

1           "(C) Within 500 feet of the property which is the subject of the notice  
2           where the subject property is within a farm or forest zone."

3           Petitioners concede that they had no right to notice of the proceedings concerning  
4 applicants' initial application, which did not propose connecting North Pinon Drive and  
5 Pinon Road or any development on property within 500 feet of petitioners' properties.  
6 However, petitioners submit that when the applicants withdrew their application and  
7 submitted a new application that proposed obtaining a right-of-way over the BLM property  
8 to connect North Pinon Drive and Pinon Road at a point within 500 feet of both petitioners,  
9 the county was required by ORS 197.763(2)(a)(C) to provide notice to petitioners.  
10 Petitioners contend that the "property which is the subject of the notice" for purposes of  
11 ORS 197.763 encompasses all property on which development is proposed, including the  
12 proposed expansion of North Pinon Drive across the BLM property.

13           The county does not respond directly to petitioners' assignment of error, but we  
14 understand from its argument regarding jurisdiction that it regards the phrase the "property  
15 which is the subject of the notice" to mean in the present context the property that will be  
16 subdivided, not adjoining property in which the applicants propose to acquire a right-of-way  
17 to provide access to that subdivision. Accordingly, we understand the county to argue that it  
18 was only required to provide notice of the proceedings on the amended application to  
19 property owners within 250 feet of the applicants' parcel, pursuant to ORS 197.763(2)(a)(B).

20           We disagree with the county's understanding of ORS 197.763(2)(a). The property  
21 that is the "subject of the notice," within the meaning of ORS 197.763(2)(a), depends on the  
22 proposal before the county. If the application proposes development on more than one parcel  
23 of property, then all those parcels of property are, or should be, property which is the  
24 "subject of the notice," and property owners within the specified distances of such property  
25 are entitled to notice. In the present case, the applicants proposed development on their

1 parcel and on part of the BLM parcel.<sup>4</sup> Accordingly, we conclude that, under the  
2 circumstances presented in this case, the county was required to provide notice to property  
3 owners within

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<sup>4</sup>Petitioners contend the right of way across the BLM parcel will be "an easement, which is a property interest." Amended Petition for Review 8. The county does not dispute petitioners' contention.

1 the appropriate distance from the applicants' parcel, pursuant to ORS 197.763(2)(a)(B), and  
2 the BLM parcel, pursuant to ORS 197.763(2)(a)(C).<sup>5</sup>

3 The assignment of error is sustained.

4 The county's decision is remanded.

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<sup>5</sup>We emphasize that our conclusion is based on the circumstances of this case, in particular that the applicants proposed as part of their application to acquire property rights in the BLM parcel (a right of way) and develop part of that parcel to satisfy land use requirements related to the subdivision. We leave open the question of whether the county would be required to provide notice under other circumstances, for example, if the applicants had not proposed to acquire property rights in the BLM parcel, or if their proposal involved the BLM parcel in some way but did not propose acquisition or development of part of that property.