

NATURE OF THE DECISION

Petitioner seeks review of a decision by the board of county commissioners (commissioners) denying his appeal of a planning director's decision approving a tentative subdivision plan.

FACTS

From 1978 until 1993, the county recognized a number of neighborhood associations and similar community organizations as Citizen Advisory Committees (CACs), including the Hugo CAC. In 1993, the county adopted Ordinance 93-13, which amended its Citizen Involvement Program (CIP). Ordinance 93-13 sets forth certain requirements for CACs, such as adoption of a charter and bylaws, public elections, etc. Ordinance 93-13 included the Hugo CAC on a list of CACs that “have been mapped and have boundaries delineated on the map officially adopted in 1978 and incorporated by reference” into the ordinance. Record 30. Ordinance 93-13 provides that CACs are entitled to notice of land use or land division applications within their boundaries.

On March 22, 1994, the commissioners sent a memorandum to all neighborhood associations, including the Hugo CAC. The memorandum states that:

“The [CIP] will be implemented as follows:

“All groups which follow all of the requirements contained in the Citizen Involvement Program will be certified as Citizen Advisory Committees (CAC). The CAC will be entitled to formal notice and will be considered a party in all land use proceedings for which it receives formal notice.

“All groups which do not follow all of the requirements contained in the Citizen Involvement Program will not be considered CACs but will be considered as Neighborhood Association. A Neighborhood Association will receive a letter notifying them of an application. They will also receive a copy of the application and the staff report. The Neighborhood Association will be entitled to testify as a witness but will not have party status. The Neighborhood Association will not receive formal notice.

1 “Any Neighborhood Association may become certified as a CAC at any time
2 and will receive the full rights as a party from the date of certification.
3 Maintaining CAC status will be accomplished by providing a yearly report
4 detailing compliance with the requirements of the [CIP] and the Bi-Laws
5 within 30 days after the election of new CAC Board Members. * * * ” Record
6 38.

7 In addition, the county assistant planning director sent a letter to the chair of the
8 Hugo CAC stating that the county’s policy is that neighborhood associations “will receive
9 letter notice for land use decisions affecting lands within each association’s boundary.”
10 Record 39.

11 The Hugo CAC never complied with the requirements of Ordinance 93-13 or became
12 certified as a CAC under the terms of the memorandum, although the group continued to
13 exist as a neighborhood association (henceforth, the Hugo Neighborhood Association, or
14 HNA). Petitioner is the chair and representative of the HNA.

15 On May 13, 1998, the planning director approved the tentative plan for the Sugarpine
16 Subdivision (subdivision), which is located within the HNA’s boundaries. The planning
17 director sent notice of the application and decision to all persons and entities listed in Rural
18 Land Development Code (RLDC) 32.030. RLDC 32.030 requires that notice be sent to “the
19 Citizen Advisory Committee, if any are certified in the area the application is located,” but
20 does not require that notice be sent to neighborhood associations, such as the HNA. No
21 certified CAC exists in the area of the application. The planning director did not notify the
22 HNA of either the application or the decision.

23 On October 3, 1998, petitioner learned of the tentative approval decision and, on
24 October 13, 1998, appealed that decision to the commissioners on behalf of the HNA. Under
25 RLDC 33.030(A), only “a party” to the planning director’s decision has standing to appeal a
26 decision to the commissioners. RLDC 11.030(240) defines “party” in relevant part to
27 include only those persons or organizations entitled to notice under RLDC 32.030 or who
28 would be adversely affected by the final decision. The applicant objected to the

1 commissioners' jurisdiction on the grounds that the HNA lacked standing to bring the appeal,
2 because it was not a certified CAC and thus not entitled to notice under RLDC 32.030. The
3 commissioners agreed with the applicant, concluding that because the HNA was not a
4 certified CAC, it was not entitled to notice and thus lacked standing to appeal the decision.
5 Accordingly, the commissioners dismissed the HNA's appeal.

6 This appeal followed.

7 **ASSIGNMENT OF ERROR**

8 Petitioner contends that the county's decision denying the HNA's local appeal is
9 erroneous, because as a matter of law the HNA is entitled to notice of the director's decision
10 and thus is a party with standing to file a local appeal of that decision.¹

11 **A. ORS 197.763(2)(b)**

12 Petitioner argues, first, that the HNA is entitled to notice of the decision pursuant to
13 ORS 197.763(2)(b), which requires that the county provide notice to "any neighborhood or
14 community organization recognized by the governing body and whose boundaries include
15 the site." We understand petitioner to contend that the Hugo CAC was "recognized" for
16 purposes of ORS 197.763(2)(b) both prior to and according to the terms of Ordinance 93-13,
17 and that the 1994 memorandum from the commissioners also had the effect of "recognizing"

¹Petitioner filed this appeal before LUBA as an individual, not as representative of the HNA. The county does not challenge petitioner's standing to appeal to LUBA, or argue that the absence of the HNA in this proceeding has any consequences. Petitioner "appeared" before the commissioners below, apparently both as a representative of the HNA and on his own behalf, and filed a notice of intent to appeal within 21 days of the commissioners' decision. Thus petitioner has standing to bring this appeal under ORS 197.830(2). Petitioner's principal argument, that the county erred in concluding that the HNA is not entitled to notice and local appeal, can be characterized as an allegation of procedural error under ORS 197.835(9)(a)(B). If so, petitioner must demonstrate that the county's procedural error prejudiced *petitioner's* substantial rights; petitioner cannot prevail by demonstrating that the county prejudiced the *HNA's* substantial rights. *Skrepetos v. Jackson County*, 29 Or LUBA 193, 197 (1995). As discussed below, petitioner did not allege to the county, and does not allege to us, that he was *personally* entitled to notice or was adversely affected by the county's decision. However, it is also possible to characterize petitioner's arguments as an allegation that the county misconstrued the applicable law. ORS 197.835(9)(a)(D). Because the parties' briefs do not recognize the issue, and because the county does not challenge petitioner's arguments on this basis, we presume that petitioner's principal arguments are brought under ORS 197.835(9)(a)(D) rather than 197.835(9)(a)(B).

1 the HNA for purposes of the statute. In that memorandum, petitioner argues, the
2 commissioners formally committed the county to providing notice to neighborhood
3 associations such as the HNA, even though the HNA had not become a certified CAC. *See*
4 *also* Record 48 (the county’s 1998 list of certified CACs and neighborhood associations,
5 which includes the HNA).

6 The county’s brief does not respond to petitioner’s arguments under
7 ORS 197.763(2)(b). For the following reasons, we agree with petitioner that if the county
8 has “recognized” the HNA for purposes of ORS 197.763(2)(b), then the county erred in
9 failing to provide notice to the HNA and also in failing to provide the HNA opportunity for a
10 local appeal.

11 The planning director’s decision was a decision made without a hearing, pursuant to
12 ORS 215.416(11)(a), which provides:

13 “The [county] may approve or deny an application for a permit without a
14 hearing if the [county] gives notice of the decision and provides an
15 opportunity for appeal of the decision to those persons who would have had a
16 right to notice if a hearing had been scheduled or who are adversely affected
17 or aggrieved by the decision. Notice of the decision shall be given in the
18 same manner as required by ORS 197.763. * * *”

19 ORS 215.416(11)(a) allows the county to make a decision on a permit application
20 without a hearing, as long as notice of the decision *and* an opportunity for local appeal are
21 provided to persons who would have had the right to notice if a hearing had been scheduled.
22 ORS 197.763(2) sets forth a list of persons to whom the local government must send notice if
23 a hearing is scheduled. As noted above, ORS 197.763(2)(b) requires that the local
24 government send notice to any neighborhood association “recognized” by the local
25 government, whose boundaries include the site. Thus, if the HNA is a recognized
26 neighborhood association for purposes of ORS 197.763(2)(b), the county must provide the
27 HNA with notice and an opportunity for local appeal of decisions such as the director’s
28 action in this case. In that circumstance, that the RLDC does not provide for notice (and

1 hence an opportunity for local appeal) to neighborhood associations is immaterial; the county
2 cannot apply its ordinance to deny notice and appeal rights to persons who are entitled to
3 those rights under the statute. *See Wilbur Residents v. Douglas County*, 151 Or App 523,
4 529-30, 950 P2d 368 (1997) (county cannot provide notice of decision only to persons
5 entitled to notice, but must also provide notice to persons adversely affected or aggrieved by
6 the decision).

7 The challenged decision does not address whether the HNA is a recognized
8 neighborhood association under ORS 197.763(2)(b), or whether Ordinance 93-13 or the 1994
9 memorandum had the effect of recognizing the HNA for purposes of the statute.² As
10 petitioner points out, county planning staff advised the commissioners that, in staff's opinion,
11 "certified was equivalent to recognized." Record 12. In addition, we note that the staff
12 report to the commissioners indicates in a footnote that "[u]nder the county's scheme, only
13 organizations that meet the certification requirements of Ordinance 93-13 are recognized,
14 and therefore entitled to notice." Record 21. Thus, the county planning staff, at least,
15 believes that the county "recognizes" a neighborhood association for purposes of
16 ORS 197.763(2)(b) only when that neighborhood association becomes a certified CAC.
17 However, the commissioners did not adopt the staff report or adopt findings expressing
18 agreement with staff's view on that point.

19 ORS 197.763(2)(b) does not indicate how local governments "recognize"
20 neighborhood associations for purposes of that statute, nor do the parties identify any other
21 applicable standards governing the relationship between local governments and
22 neighborhood associations. It may well be, as the county planning staff opined, that the CAC
23 certification process is the means by which the county has chosen to "recognize"

²We presume, because the county does not contend otherwise, that petitioner raised before the commissioners the issues addressed in this assignment of error, and thus has not waived those issues. ORS 197.763(1).

1 neighborhood associations for purposes of ORS 197.763(2)(b). However, the challenged
2 decision does not take that position, or adopt an express or implicit interpretation of its local
3 legislation to that effect.

4 Where a local government fails to adopt an essential interpretation of a local
5 provision, LUBA may make its own determination of whether the local government's
6 decision is correct, or remand the decision for the local government to make that
7 interpretation in the first instance. ORS 197.829(2); *Opp v. City of Portland*, 153 Or App 10,
8 14, 955 P2d 768 (1998). In the present case, we deem it more appropriate to remand the
9 decision to allow the county to adopt any essential interpretations. The county's brief does
10 not dispute petitioner's argument that Ordinance 93-13 or the 1994 memorandum had the
11 effect of "recognizing" the HNA for purposes of ORS 197.763(2)(b), and the county's intent
12 on this point as expressed in the ordinance and memorandum is sufficiently unclear that it is
13 a matter more appropriately resolved by the county than by LUBA.

14 This subassignment of error is sustained.

15 **B. RLDC Provisions**

16 Petitioner also argues that, for essentially the same reasons described above, the HNA
17 was entitled to notice of the decision under relevant provisions of the RLDC, and the county
18 erred in concluding to the contrary. That is, petitioner contends that Ordinance 93-13 and the
19 1994 memorandum conferred upon the HNA an entitlement to notice and hence standing to
20 appeal under the RLDC, and thus the county erred in concluding that the HNA lacked
21 standing to appeal the director's decision under the RLDC.

22 The county rejected petitioner's argument below, concluding that "the Hugo
23 Neighborhood Association has not been certified as a citizen advisory committee, and that as
24 such, was not entitled to notice by reason of [RLDC] 32.030[(A)(2)]* * *." Record 6. The
25 county argues in its response brief that its interpretation of RLDC 32.030(A)(2) and
26 33.030(A) is not inconsistent with the text of those provisions or "clearly wrong," and thus

1 must be affirmed. ORS 197.829(1)(a); *Goose Hollow Foothills League v. City of Portland*,
2 117 Or App 211, 217, 843 P2d 992 (1992). We agree. RLDC 32.030(A)(2) lists the persons
3 to whom the county will provide notice, including CACs, but not including neighborhood
4 associations. RLDC 33.030(A) limits the right to local appeal of a planning director’s
5 decision to a “party,” which RLDC 11.030(240) defines in relevant part to include only those
6 persons entitled to notice under RLDC 32.030(A)(2) or those adversely affected by the final
7 decision.³ Because the HNA is not a CAC, it was not entitled to notice under RLDC
8 32.030(A)(2) and hence is not a “party” entitled to local appeal as defined by RLDC
9 11.030(240). The commissioners’ interpretation to that effect is consistent with the text of
10 the relevant RLDC provisions, and we affirm that interpretation.⁴

11 This subassignment of error is denied.

12 **C. Number of Units in the Subdivision**

13 Finally, petitioner argues that the county erred in failing to provide either a planning
14 commission review hearing on the subject land use application or renotification of an
15 amended application. Petitioner explains that the original notice of the proposed application
16 was for a 10-unit subdivision, although the planning director ultimately approved a nine-unit
17 subdivision. Under the RLDC, a subdivision of 10 or more units requires a hearing before
18 the planning commission. RLDC 51.040(B)(1). Petitioner contends that the change from 10
19 to nine units requires that the county provide a new notice.

³The commissioners found, and petitioner does not dispute, that the only asserted basis for a right to local appeal was the HNA’s alleged entitlement to notice. The commissioners noted that petitioner did not argue that he personally would be adversely affected by the final decision. Record 6.

⁴Although we sustain the county’s decision that the HNA is not entitled to notice under the RLDC, as explained in our discussion of the first subassignment of error, Ordinance 93-13 and the 1994 memorandum are sufficiently ambiguous that we cannot determine whether the HNA is a recognized neighborhood association for purposes of ORS 197.763(2)(b) and hence entitled to notice under the statute. The county must address that issue on remand.

1 The county responds that the reference in the original notice to a 10-unit subdivision
2 was a scrivener's error, and that throughout the proceedings below the tentative plan for the
3 subdivision proposes only nine lots. Record 76, 84, 93. We agree with the county that any
4 error in the original notice was harmless. Therefore, despite the erroneous description as a
5 10 instead of a nine-lot subdivision, the county provided the notice of the review and
6 decision procedures that the application required.

7 This subassignment of error is denied.

8 The county's decision is remanded.