

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

3  
4 JONATHAN O. YANTIS,  
5 *Petitioner,*

6  
7 and

8  
9 HOLGER T. SOMMER,  
10 *Intervenor-Petitioner,*

11  
12 vs.

13  
14 JOSEPHINE COUNTY,  
15 *Respondent,*

16  
17 and

18  
19 HORACE R. PATRICK and  
20 RANDOLPH ESTATES, LLC,  
21 *Intervenor-Respondents.*

22  
23 LUBA No. 2007-109

24  
25 FINAL OPINION  
26 AND ORDER

27  
28 Appeal from Josephine County.

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30 Christian E. Hearn, Ashland, filed the petition for review and argued on behalf of  
31 petitioner. With him on the brief was Davis Hearn Saladoff & Bridges, PC.

32  
33 Holger T. Sommer, Merlin, represented himself.

34  
35 No appearance by Josephine County.

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37 Duane Wm. Schultz, Grants Pass, filed the response brief and argued on behalf of  
38 intervenor-respondents.

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40 RYAN, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,  
41 participated in the decision.

42  
43 AFFIRMED

01/24/2008

44  
45 You are entitled to judicial review of this Order. Judicial review is governed by the

1 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner appeals a decision by the county approving a 14-lot subdivision.

**FACTS**

Intervenor-respondents (intervenor) applied for subdivision approval for a 14-lot subdivision on land zoned Rural Residential – 5 acre minimum. The planning commission approved the application.

Petitioner appealed the planning commission’s decision to the Board of Commissioners by submitting an “Appeal Application” on the form prescribed by the county for appeals of planning commission decisions. That appeal application listed the appellant’s name as Jonathan Yantis (Yantis), and was signed on November 30, 2006 by the appellant’s attorney. Yantis also signed the appeal application on the second page of the form, in the space for the appellant’s signature. On the Yantis application, the line next to the space for the appellant’s signature that indicates the place where a co-appellant should sign is crossed out. Record 80, 377-380.

Intervenor-petitioner Sommer (Sommer) also appealed the planning commission’s decision by submitting a separate appeal application on the prescribed county form. The top of that form lists the appeal fee as \$1,550. On Sommer’s application, the appeal fee is crossed out and a hand written statement is included that reads “Join appeal by Mr. Yantis (Chris Hearn).” That appeal application lists the appellant’s name as “Holger Sommer.” Sommer signed the appeal application in the space for co-appellant’s signature on the second page of the form. No appeal fee accompanied Sommer’s appeal application.

Prior to the hearing before the board of commissioners, intervenors moved to dismiss the Sommer appeal. At the Board of Commissioners’ hearing on the appeal, the board granted intervenors’ motion to dismiss Sommer’s appeal. The board then affirmed the decision of the planning commission approving the 14-lot subdivision. This appeal followed.

1    **ASSIGNMENT OF ERROR**

2           Petitioner’s single assignment of error argues that the county committed a procedural  
3 error that prejudiced his substantial rights in dismissing Sommer’s appeal. Petitioner asks  
4 that LUBA remand the challenged decision in order to allow Sommer to participate as a co-  
5 appellant. ORS 197.835(9)(a) authorizes us to reverse or remand a land use decision if, as  
6 relevant, the Board finds that the local government “[f]ailed to follow the procedures  
7 applicable to the matter before it in a manner that prejudiced the substantial rights of the  
8 petitioner.” Thus, the threshold question is whether the county failed to follow procedures  
9 applicable to the appeal.

10           Josephine County Rural Land Development Code (RLDC) 33.040 contains the  
11 procedures applicable to appeals of planning commission decisions, and provides in relevant  
12 part:

13           “33.040 - STATEMENT OF APPEAL

14           “A.    A statement of appeal shall be on a form supplied by the Planning  
15                 Director and shall contain the following information:

16           “\* \* \*

17           “C.    The statement of appeal shall be accompanied by the following:

18                 1.    The required filing fee;

19           “\* \* \* \* \*

20           “E.    Failure to submit a statement of appeal in conformance with the  
21                 requirements of this Section shall be considered a jurisdictional defect,  
22                 and the appeal shall be dismissed.”

23    As explained above, petitioner and Sommer filed appeals of the planning commission’s  
24 decision, and intervenors moved to dismiss Sommer’s appeal. The board of commissioners  
25 ruled on intervenors’ motion at its February 14, 2007 hearing and dismissed Sommer’s  
26 appeal. The challenged decision contains the following summary of the board’s decision on  
27 intervenors’ motion to dismiss:

1           “The Board opened the Hearing by asking if anyone objected to this matter  
2 being heard. Duane Schulz, attorney for the applicant, objected to the  
3 adequacy of the appeal filed by [Sommer]. Duane Schulz filed a motion to  
4 dismiss the appeal filed by [Sommer] on the basis that his appeal application  
5 did not include the requisite fee, and his name did not appear on the  
6 Yantis/Hearn application. After reviewing the Motion and considering  
7 arguments of the Parties, the Board concluded that [Sommer’s] application  
8 was defective, and rendered null and void, and that [Sommer] was therefore  
9 not a party or a witness to the appeal. The Board therefore voted 3-0 to  
10 dismiss the [Sommer] appeal.” Record 20-21.

11       Intervenors argue that the board’s decision to dismiss the Sommer appeal should be upheld  
12 because Sommer’s failure to include the filing fee for his appeal was a jurisdictional defect  
13 that required dismissal under RLDC 33.040(E), and that the board of commissioners was  
14 correct in determining that Sommer was not a co-appellant with petitioner.

15           Although the reasons for the county’s decision to dismiss the Sommer appeal could  
16 be clearer, we understand the county to have found that Sommer’s appeal application did not  
17 comply with RLDC 33.040 governing appeals because his appeal application did not include  
18 the filing fee required by RLDC 33.040(C)(1). We also understand the county to have found  
19 that because the Yantis appeal form did not contain any reference to the Sommer appeal or  
20 otherwise indicate that Sommer was a co-appellant with Yantis, Sommer was not a co-  
21 appellant with Yantis.<sup>1</sup> The appeal application at Record 80 and 377-82 does not contain  
22 any reference to a co-appellant. In fact, the application is signed by Yantis and the word “co-  
23 appellant” next to the “appellant” signature line is crossed out.

24           In support of his argument that the county committed a procedural error in dismissing  
25 Sommer’s appeal, petitioner cites *Dead Indian Memorial Road Neighbors v. Jackson Cty.*,  
26 188 Or App 503, 72 P3d 648 (2003). In *Dead Indian Memorial Road*, a party appealed an  
27 administrative decision approving a permit. A local appeal hearing was held, and the  
28 petitioners on appeal to LUBA participated in that local appeal hearing and submitted written

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<sup>1</sup> Planning staff testified at the board of commissioners’ hearing that the Yantis application does not reference the Sommer appeal or otherwise indicate that Sommer is a “co-appellant” with Yantis. Record 33.

1 comments on the administrative decision. The original appellant ultimately withdrew her  
2 local appeal one day after the appeal hearing was held. The hearings officer then dismissed  
3 the appeal. Petitioners appealed the original administrative decision to LUBA, and the  
4 county moved to dismiss the petitioners' appeal on the basis that those petitioners failed to  
5 exhaust their administrative remedies as required by ORS 197.825(2)(a) because those  
6 petitioners did not themselves appeal the administrative decision.

7 LUBA rejected the county's argument, and the Court of Appeals affirmed. LUBA  
8 held:

9 "We see no reason to interpret ORS 197.825(2)(a) to require, in these rare  
10 circumstances, that a petitioner must file its own local appeal in order to  
11 satisfy the exhaustion requirement, when the result of announcing such a  
12 requirement would be that many parties in more ordinary circumstances will  
13 file multiple, and probably unnecessary and redundant, local appeals. A local  
14 appeal was filed in the present case, and petitioner Mitchell appeared at the  
15 hearing on that appeal, which resulted in a decision by the county's highest  
16 decision maker. That decision effectively adopts the tentative decision as the  
17 county's final decision. Under these circumstances, we do not interpret ORS  
18 197.825(2)(a) to require more." 43 Or LUBA 597, 611, *aff'd* 188 Or App 503,  
19 72 P3d 648 (2003).

20 To the extent petitioner argues that, based on the language quoted above, *Dead Indian*  
21 *Memorial Road* stands for the broad proposition that a local government may not collect  
22 separate appeal fees for separate appeals of local decisions, we reject that argument. *Dead*  
23 *Indian Memorial Road* did not hold that a local government may not collect separate, and  
24 multiple, local appeal fees for separately filed appeals. Rather, *Dead Indian Memorial Road*  
25 held that multiple appeals are not required to be filed in order to exhaust local appeal  
26 remedies prior to filing an appeal with LUBA. In the present appeal, the county dismissed  
27 Sommer's appeal because his failure to comply with the requirements of RLDC 33.040  
28 governing appeals resulted in a jurisdictional defect that required dismissal under that local  
29 code provision. No party argued before the county, and petitioner does not argue before  
30 LUBA, that dismissal of Sommer's appeal was due to his failure to exhaust his  
31 administrative remedies at the local level.

1           Petitioner does not explain why the county’s interpretation of RLDC 33.040  
2 governing appeals is incorrect or why its conclusion based on that interpretation and the  
3 evidence in the record that Yantis and Sommer were not co-appellants is incorrect. We think  
4 the county’s interpretation of its local code provisions governing appeals in a manner that  
5 requires “co-appellants” to either submit the same appeal form and sign in the spaces  
6 provided on the appeal form as “appellant” and “co-appellant,” or otherwise indicate on  
7 separate appeal forms that each appeal is a co-appeal, is reasonable. The Yantis appeal  
8 application does not identify a co-appellant and in fact, indicates that there was no co-  
9 appellant. Record 80. Based on that appeal application, it was reasonable for the county to  
10 view the Sommer application as a separate appeal application from the Yantis application  
11 and to require the Sommer application to be accompanied by a separate filing fee as required  
12 by RLDC 33.040.

13           Because petitioner has not demonstrated that the county committed any procedural  
14 error in dismissing the Sommer appeal, we need not consider petitioner’s arguments that the  
15 county’s actions in dismissing the Sommer appeal resulted in prejudice to petitioner’s  
16 substantial rights. ORS 197.835(9)(a).

17           The assignment of error is denied.

18           The county’s decision is affirmed.