BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SHELLEY WETHERELL,
Petitioner,

vs.

DOUGLAS COUNTY,
Respondent,

and

TIMOTHY FOLEY, and MERYLUTZ FOLEY,
Intervenors-Respondent.

LUBA No. 2007-073

ORDER

MOTION TO INTERVENE

On April 10, 2007, Timothy Foley and Merylutz Foley (the Foleys), who own the property at issue in this appeal, filed a motion to intervene in this appeal, pursuant to OAR 661-010-0050(1).[1] The motion to intervene was signed by Timothy Foley and Valynn

[1] OAR 661-010-0050 provides, in relevant part:

> "(1) Standing to Intervene: The applicant and any person who appeared before the local government, special district or state agency may intervene in a review proceeding before the Board. Status as an intervenor is recognized when a motion to intervene is filed, but the Board may deny that status at any time.
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> "(2) Motion to Intervene: A motion to intervene shall be filed within 21 days of the date the notice of intent to appeal is filed pursuant to OAR 661-010-0015, or the amended notice of intent to appeal is filed or original notice of intent to appeal is refiled pursuant to OAR 661-010-0021. When two or more intervenors join in a motion to intervene and are unrepresented by an attorney, a lead intervenor shall be designated as the contact person for the purpose of receiving documents from the Board and other parties. The motion to intervene (see Exhibit 3) shall:
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> > "(a) List the names, addresses, and telephone numbers of all persons moving to intervene. If an attorney represents the intervenor(s), the attorney's name, address and telephone number shall be substituted for that of the intervenor(s);

Currie (Currie). Currie is identified as "Intervenor-Representative Applicant." On April 16, 2007, LUBA received a second motion to intervene, signed by Timothy Foley, Merylutz Foley and Valynn Currie, the latter of whom is again identified as the Foleys' representative.

Petitioner objects to the motions to intervene, arguing that Currie is not an attorney and cannot represent the Foleys before LUBA. OAR 661-010-0075(6).[2] In addition, petitioner argues that Currie appeared during the local proceedings only as a representative of the Foleys, and did not appear on her own behalf. Therefore, petitioner contends, Currie does not have standing to intervene in this appeal under OAR 661-010-0050(1).

The Foleys and Currie respond that Currie was the "applicant of record" during the proceedings below, and therefore she has standing to intervene under OAR 661-010-0050(1). The Foleys and Currie argue that Currie is the "lead intervenor" under OAR 661-010-0050(2). *See* n 1. Further, the Foleys state that they elect to accept all correspondence directed to them in this appeal proceeding at Currie's address. We understand the Foleys and Currie to argue that Currie is not representing the Foleys before LUBA in contravention of OAR 661-010-0075(6), but instead simply intervening on her own behalf, based on her status as the "applicant," and volunteering to be lead intervenor.

Valynn Currie is not member of the Oregon State Bar, and therefore cannot represent the Foleys before LUBA. OAR 661-010-0075(6). With respect to her standing as

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> "(b) State whether the party is intervening on the side of the petitioner or the respondent;
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> "(c) State the facts which show the party is entitled to intervene, supporting the statement with affidavits or other proof;
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> "(d) On the last page, be signed by each intervenor, or the attorney representing that intervenor, on whose behalf the motion to intervene is filed[.]"

[2] OAR 661-010-0075(6) provides, in relevant part:

> "Appearances Before the Board: An individual shall either appear on his or her own behalf or be represented by an attorney. A corporation or other organization shall be represented by an attorney. In no event may a party be represented by someone other than an active member of the Oregon State Bar. * * *"

intervenor, Currie does not claim that she has any personal or property interest in the underlying land use application or the subject property, such as that of a contract purchaser or lessee. As far as we can tell, the record reflects that Currie's only role during the proceedings below was as an agent or representative of the Foleys. For example, the challenged decision states that "Valynn Currie, representing Timothy & Merylutz Foley," requested the plan and zoning amendments approved in the decision. Record 3. If there is any place in the record where Valynn Currie appeared on her own behalf, and not just as an agent or representative of the Foleys, no party cites us to it.

OAR 661-010-0050 implements ORS 197.830(7), which provides:

> "(a) Within 21 days after a notice of intent to appeal has been filed with [LUBA] 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.
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> "(b) Notwithstanding the provisions of paragraph (a) of this subsection, persons who may intervene in and be made a party to the review proceedings, as set forth in subsection (1) of this section, are:
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> "(A) The applicant who initiated the action before the local government, special district or state agency; or
>
> "(B) Persons who appeared before the local government, special district or state agency, orally or in writing."

LUBA has held that, with respect to the "appearance" requirement of ORS 197.830(7)(b)(B) and similarly worded requirement of ORS 197.830(2), an appearance before the local government by an attorney, representative, hired expert or similar agent on behalf of another person does not necessarily, in itself, constitute an appearance by that agent on his or her own behalf. *Doob v. Josephine County*, 49 Or LUBA 724, 727 (2005) (appearance as an expert on behalf of a participant to the local proceedings is not sufficient to satisfy the appearance requirement to intervene); *Friends of Douglas County v. Douglas County*, 39 Or LUBA 156, 162-63 (2000) (LUBA will not presume that a person representing an organization has appeared on her own behalf, where the local code requires participants to

declare their status and at no point did the person advise the local government that she was appearing on her own behalf as well as on behalf of the organization). Thus, to the extent Currie relies on the appearance prong of ORS 197.830(7)(b)(B), Currie has not established that she "appeared" before the local government within the meaning of that statute.

However, it is less clear whether an agent or representative who submits an application on behalf of the property owner thereby has standing to intervene as the "applicant" under ORS 197.830(7)(b)(A). The only case we find on point is *McConnell v. City of West Linn*, 17 Or LUBA 502, 504 (1989), in which LUBA allowed a consulting firm that represented a group of investors that allegedly owned the subject property to intervene as the "applicant," under ORS 197.830(5)(b), the then applicable version of ORS 197.830(7)(b)(A). The petitioners argued that the group of investors had no standing to intervene because they did not own the subject property, and thus the consulting firm that represented the investors also had no standing to intervene. However, LUBA noted that the petitioners did not dispute that the consulting firm had filed the underlying land use application, and therefore we allowed the firm to intervene as the "applicant" under ORS 197.830(5)(b).

Here, we understand petitioner to dispute that Currie was the "applicant" for purposes of ORS 197.830(7)(b)(A). If Currie were not the "applicant," she does not have standing to intervene as applicant under that statute. ORS 197.830(7) does not define "applicant" and there is no applicable statutory definition that we are aware of. If, as we have held, the legislature did not intend that someone who appears before the local government solely on behalf of another has "appeared" on their own behalf for purposes of ORS 197.830(7)(b)(B) and ORS 197.830(2), it seems reasonable to assume that the legislature also did not intend that a hired agent or planning consultant who files a land use application solely on behalf of the property owner is the "applicant" for purposes of ORS 197.830(7)(b)(A), and thus has

standing to intervene in an appeal before LUBA under that statute. However, the text of ORS 197.830(7) does not clarify that point either way.

We need not resolve that issue in the present case, because the record does not reflect that Currie was the "applicant" under any reasonable definition of that term. To intervene as the applicant, the person must at a minimum have "initiated the action before the local government." ORS 197.830(7)(b)(A). The two applications at issue in this appeal are found in the original record, at 145 through 160.[3] Both applications are signed by the Foleys, and nowhere do they bear Currie's signature. Original Record 150, 153. Further, the Foleys signed as the "Applicant" in a section of the applications that waives the 150-day rule. Original Record 160. We note also that both application forms state that an "agent of the property owner may sign this application [if] written permission from the property owner is attached." Original Record 150, 153, 160. No such written permission is attached to either application.[4] It is true that the first page of both applications includes a typewritten notation

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[3] As explained below, the present appeal is on remand of an earlier decision, and the record on remand includes the original record.

[4] Presumably, that language reflects Douglas County Land Development Ordinance 2.040(1), which limits who may initiate an application for development approval:

> "Applications for development approval may be initiated by one or more of the following:
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> "a. One or more owners of the property which is the subject of the application; or
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> "b. One or more purchasers of such property who submits a duly executed written land sales contract or copy thereof which has been recorded with the Douglas County Clerk; or
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> "c. One or more lessees in possession of such property who submits written consent of one or more owner's to make such application; or
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> "d. Person or entity authorized by resolution of the Board or Commission; or
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> "e. A Department of Douglas County when dealing with land involving public works or economic development projects; or
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> "f. A public utility or transportation agency, when dealing with land involving the location of facilities necessary for public service. *Any of the above may be*

that identifies Currie as the "applicant." However, it seems reasonably clear that it was the Foleys who initiated, signed, and filed the applications. The only apparent effect of designating Currie as the "applicant" was to notify the county that Currie would represent the Foleys during the proceedings below. Notwithstanding the label of "applicant" placed on Currie, it seems apparent that the Foleys "initiated the action before the local government" and thus were the applicants for purposes of ORS 197.830(7)(b)(A), while Currie was simply their representative during the proceedings below. Accordingly, we conclude that Currie is not the "applicant" under ORS 197.830(7)(b)(A), and has no standing to intervene under that statute, or any other provision cited to us.

The Foleys' motion to intervene is granted; Currie's motion to intervene is denied.

RECORD OBJECTION

The challenged decision is on remand from LUBA. *Wetherell v. Douglas County*, 52 Or LUBA 677 (2006). The county filed the record on the remand decision on May 1, 2007. On May 4, 2007, the county filed a "supplemental record" that is essentially a revised table of contents including a statement that the original record in LUBA No. 2006-122 is included in the record of the present appeal, pursuant to OAR 661-010-0025(4)(b).[5]

On May 7, 2007, petitioner filed an objection to the record, requesting that (1) the record be supplemented with the original record in LUBA No. 2006-122, and (2) petitioner be served a copy of the original record.

The county's May 4, 2007 supplemental record moots petitioner's first request. The record in this appeal includes the original record in LUBA No. 2006-122, in conformance

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> *represented by an agent who submits written authorization by his principal to make such application*." (Emphasis added).

[5] OAR 661-010-0025(4)(b) is part of the specifications for the record, and states that:

> "Where the record includes the record of a prior appeal to this Board, the table of contents shall specify the LUBA number of the prior appeal, and indicate that the record of the prior appeal is incorporated into the record of the current appeal."

with OAR 661-010-0025(4)(b). In addition, petitioner requests that the county serve on her a copy of the original record in LUBA No. 2006-122. Petitioner was also the petitioner in LUBA No. 2006-122, and presumably retains the copy of the original record in that appeal that the county mailed to her in that appeal. Absent circumstances not present here, a local government is not required to re-serve a petitioner with another copy of a record from a previous appeal. *Foland v. Jackson County*, __ Or LUBA ___ (LUBA No. 2006-206/211, Order, February 15, 2007), slip op 3. Petitioner's request for an additional copy of the original record is denied.

The record is settled as of the date of this order. The petition for review is due 21 days, and the response briefs are due 42 days, from the date of this order. The Board's final opinion and order is due 77 days from the date of this order.

Dated this 23rd day of May, 2007.

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Tod A. Bassham
Board Member