BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEPARTMENT OF LAND
CONSERVATION AND DEVELOPMENT,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

JOHN ARNETT,
Intervenor-Respondent.

LUBA No. 2007-095

ORDER ON MOTION TO DISMISS

On May 16, 2007, John Arnett (intervenor) moved to dismiss the appeal. On May 29, 2007, intervenor filed an amended motion to dismiss requesting a telephonic conference pursuant to OAR 661-010-0065(3). On May 29, 2007, the Oregon Department of Land Conservation and Development (DLCD) filed a response to intervenor's motion to dismiss. On June 12, 2007, intervenor filed a reply to DLCD's response to intervenor's motion to dismiss. On June 7, 2007, we suspended the appeal pending our resolution of intervenor's motion to dismiss.

OAR 661-010-0065(3) provides that the Board may conduct telephone conferences on motions at its discretion. We do not see that a telephone conference is necessary to resolve the motion to dismiss, and intervenor's request is denied. We now resolve the motion to dismiss.

A. Background

The decision that is the subject of the appeal is a decision by the Deschutes County Board of Commissioners approving a tentative plan for a 41-lot subdivision on a 108-acre

parcel zoned Exclusive Farm Use –Terrebonne Subzone (EFU-TE). Prior to applying for tentative plan approval, intervenor received waivers of certain land use regulations from the state and the county, pursuant to ORS 197.352 (Measure 37). Thereafter, on August 16, 2006, intervenor submitted his application for tentative subdivision plan approval, and on October 6, 2006, intervenor modified the application. Sometime after the application was modified, a hearing was held before the county hearings officer, and thereafter, on March 19, 2007, the board of commissioners held a *de novo* hearing on the application. On April 2, 2007, the board of commissioners approved the application, subject to the adoption of written findings. On April 23, 2007, the county adopted the written decision that is the subject of the appeal.

Intervenor moves to dismiss the appeal, arguing that DLCD does not have standing to bring the appeal. Intervenor argues that DLCD did not appear during the local administrative proceedings leading to the final decision that is the subject of the appeal, and thus, under ORS 197.830(2), DLCD lacks standing to appeal that decision.[1]

DLCD responds that it has standing to appeal the decision because it was entitled to notice of the underlying land use application and did not receive such notice, and that upon receiving notice of the decision, it filed a timely notice of intent to appeal pursuant to ORS 197.830(2) and OAR 661-010-0015(1)(a). In support of its argument, DLCD cites and relies on OAR 660-041-0030, an administrative rule that became effective on February 20, 2007. That rule requires that local governments provide DLCD with notice of all applications and

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[1] ORS 197.830(2) provides:

> "Except as provided in ORS 197.620 (1) and (2), a person may petition the board for review of a land use decision or limited land use decision if the person:
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> "(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section; and
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> "(b) Appeared before the local government, special district or state agency orally or in writing."

decisions on "Measure 37 Permits" (as defined in the rule).[2] The notice required by the rule must be given at least ten days before any deadline for comment, and if there is no comment period, at least ten days before the decision becomes final. The rule also requires local governments to send DLCD notice of a final decision and a copy of the decision within ten days after the date of the final written decision.[3]

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[2] OAR 661-041-0010(11) defines Measure 37 Permit as:

> "'Measure 37 Permit' means a final decision by a city, a county, or by Metro to authorize the development, division or other use of Property pursuant to a Measure 37 Waiver. A Measure 37 Permit may be a land use decision, a limited land use decision, an expedited land use decision, a permit (as that term is defined in ORS 215.402 and ORS 227.160), a zone change, or a comprehensive plan amendment."

[3] OAR 660-041-0030 provides:

> **"Notice of Applications and Decisions**
>
> "(1) Except for a building permit that is not a 'land use decision' under ORS 197.015(11)(b)(B), cities, counties and Metro must provide written notice to the department of all applications for a Measure 37 Permit, and all final written decisions on a Measure 37 Permit, filed with or made by the city, county or Metro after February 20, 2007.
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> "(2) Notice of an application for a Measure 37 Permit required under section (1) of this rule must be mailed to the department's Salem office at least ten calendar days before any deadline for comment on the application for a Measure 37 Permit. If there is no opportunity for comment, then the notice must be sent ten days before the decision becomes final. The notice must include:
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> "(a) A copy of the applicable Measure 37 Waiver issued by the city, county, or by Metro;
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> "(b) A copy of any notice provided under ORS 197.195, 197.365, 197.615, 197.763, 227.175 or 215.416;
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> "(c) The claim number of the Measure 37 Waiver issued by the State of Oregon (if any);
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> "(d) The terms of the State's Measure 37 Waiver as applicable criteria in the subject land use application; and,
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> "(e) The name of the present owner of the property.
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> "(3) Notice of a final decision on a Measure 37 Permit required under section (1) of this rule must be mailed to the department's Salem office within ten calendar days of the

Intervenor argues that ORS 197.763(2)(c) renders the rule invalid because, intervenor argues, the rule is inconsistent with that statute. Intervenor also argues that ORS 215.427(3)(a) prevents DLCD from relying on the rule to establish that it was entitled to notice. We address each of these arguments below.

B. ORS 197.763(2)(c)

ORS 197.763(2) provides in relevant part:

> "(a) Notice of the hearings governed by this section shall be provided to the applicant and to owners of record of property [within specified distances of the property] on the most recent property tax assessment roll where such property is located:
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> " * * * * *
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> "(b) Notice shall also be provided to any neighborhood or community organization recognized by the governing body and whose boundaries include the site.
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> "(c) At the discretion of the applicant, the local government also shall provide notice to the Department of Land Conservation and Development."

Intervenor argues that "the discretion of the applicant is the equivalent of a veto by the applicant as to whether the county needs to provide notice to [DLCD]," and that "[i]ntervenor would never give consent to provide notice to DLCD of the pending land use application." Intervenor's Reply to Petitioner's Response to Motion to Dismiss and Amended Motion to Dismiss 2.

The dispute between intervenor and petitioner does not concern the ORS 197.763(2)(c) requirement for notice of quasi-judicial land use *hearings.* Because ORS 197.763(2)(c) applies to notices of quasi-judicial land use *hearings* and does not apply to notices of *applications* or notices of *decisions*, ORS 197.763(2)(c) has no bearing on whether

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> date of the final written decision. The notice must include a copy of the final written decision."

the county was obligated to give DLCD notice of intervenor's application or the county's decision on that application under OAR 660-041-0030.

C. ORS 215.427(3)(a)

ORS 215.427(3)(a), commonly known as the "fixed goal post statute" applicable to counties, provides:

> "If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

Intervenor argues that because OAR 660-041-0030 became effective February 20, 2007, after the application in this case was first submitted on August 16, 2006, ORS 215.427(3)(a) precludes application of the rule in this case. Intervenor misreads the statute. The statute requires that county approval or denial of an application be based on *standards and criteria* that were in effect at the time the application was first submitted. A rule promulgated by the Land Conservation and Development Commission requiring notice of an application or decision on a Measure 37 Permit is not an approval standard or criteria. Thus, ORS 215.427(3)(a) has no bearing on the applicability of OAR 660-041-0030 to intervenor's application.

D. Analysis

OAR 660-041-0030 took effect on February 20, 2007. If it applies, under OAR 660-041-0030(2), the county was required to provide notice of intervenor's application "at least ten calendar days before any deadline for comment on the application* * *." That notice requirement presumably was adopted to permit DLCD to appear and take a position regarding Measure 37 Permits. If DLCD's position is ignored or inadequately addressed, that notice requirement also ensures that DLCD will have had an opportunity to make the appearance that is necessary to have standing to seek review of the Measure 37 Permit. In

this case, the county held a *de novo* hearing on the application on March 19, 2007, and therefore the deadline for comment on the application did not expire until that March 19, 2007 hearing. The county was obligated to provide notice of the application under OAR 660-041-0030(2), and failed to do so. DLCD argues that it was the county's failure to provide the notice required by OAR 660-041-0030(2) that excuses DLCD's failure to make a timely appearance before the county rendered its Ballot Measure 37 Permit decision on March 19, 2007.

In an analogous circumstance, the Court of Appeals explained it would not dismiss a LUBA appeal on the grounds that the petitioner did not make the appearance required under ORS 197.830(2)(b), where the petitioner's failure to make the appearance required by statute could be attributed to the local government's failure to comply with statutory notice and hearing requirements:

> "We have repeatedly held that counties must comply with the requirements of ORS 215.416 and related statutes and have consistently rejected arguments that counties may modify or deviate from those requirements. *See Doughton v. Douglas County*, 88 Or App 198, 744 P2d 1299 (1987); *League of Women Voters v. Coos County*, 82 Or App 673, 729 P2d 588 (1986); *Overton v. Benton County*, 61 Or App 667, 658 P2d 574 (1983). County's present improvisation on that theme posits that, although the statutory notice and hearing requirements are mandatory, the violation of the statute makes itself impervious to review, because the failure to provide notice and a hearing substantially defeats the ability to achieve standing to challenge the failure to provide them.
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> "* * * * *
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> "ORS 197.830(3) governs appeals to LUBA from quasi-judicial land use decisions. Its appearance provision presupposes that required quasi-judicial procedures were followed and that there was something to appear at. In keeping with the suggestion in *Warren v. Lane County*, [297 Or 290, 686 P2d 316 (1984)] we conclude that a local government's failure to abide by the statutory procedures, a failure that bears directly on a petitioner's ability to appear, obviates the necessity for making a local appearance in order to have standing to challenge the government's noncompliance with the procedural requirements." *Flowers v. Klamath County*, 98 Or App 384, 388-89, 780 P2d 227 (1989).

In this case, the county's failure was a failure to provide *notice of the application* under OAR 660-041-0030(2), rather than a failure to provide *notice of hearing* under ORS 215.416. However, in both cases the notice requirement is in place to ensure a right to make the appearance required to seek review of an adverse decision. And in this case, as in *Flowers*, it was the county's failure to provide the legally required notice that prevented DLCD from appearing. As in *Flowers*, the county's failure to provide the legally required notice obviates the appearance required by ORS 197.830(2)(b).

E. Conclusion

Intervenor's motion to dismiss is denied. The county shall file the record in this appeal within 21 days of the date of this order.

Dated this 12th day of July, 2007.

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Melissa M. Ryan
Board Member