BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NEIGHBORS 4 RESPONSIBLE GROWTH and JOAN MARINER,
Petitioners,

vs.

CITY OF VENETA,
Respondent,

and

KAY LARSON,
Intervenor-Respondent.

LUBA No. 2005-109

ORDER

INTRODUCTION

This is an appeal of a joint city council/planning commission decision that grants a variance to the Veneta Wetland Protection Ordinance. Intervenor moves to dismiss the appeal, arguing that neither petitioner appeared below. Petitioners object to the record filed by the city. We turn first to the motion to dismiss.

MOTION TO DISMISS

Intervenor contends that neither petitioner Neighbors 4 Responsible Growth (N4RG) nor petitioner Mariner appeared during the local proceedings.[1] Their dispute centers on a June 30, 2005 letter signed by Jim Just, Executive Director of the Goal One Coalition. The first paragraph of that letter is set out below:

> "The Goal One Coalition (Goal One) is a nonprofit organization whose mission is to provide assistance and support to Oregonians in matters affecting their communities.

[1] Petitioner Mariner is a member of N4RG and its president.

> Goal One is appearing in these proceedings at the request of and on behalf of its membership residing in the Veneta area. This testimony is presented on behalf of Mona Linstromberg, Neighbors 4 Responsible Growth and N4RG's membership in the Veneta and surrounding area, the Goal One Coalition, and Jim Just as an individual." Record 49.

Although intervenor's arguments and counter arguments are colorful and lengthy, intervenor's central theory in her motion to dismiss presents a fairly narrow question. We set out the relevant statutory provisions below, which establish that a person must appear before the city to achieve standing to appeal a city land use decision to LUBA, before turning to intervenor's central argument.

A. ORS 197.830(2)

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:
>
> "(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section; and
>
> "(b) *Appeared* before the local government, special district or state agency orally or in writing." (Emphasis added.)

As relevant here, ORS 197.830(2) establishes two requirements for a potential appellant at LUBA. First, the appellant must be a person. Second, the appellant must have made an appearance before the city, orally or in writing. Although the parties' arguments focus exclusively on the appearance requirement, it is worth noting the broad statutory definition of "person" that is set out at ORS 197.015(18):

> "'Person' means any individual, partnership, corporation, association, governmental subdivision or agency or public or *private organization of any kind*. The Land Conservation and Development Commission or its designee is considered a person for purposes of appeal under ORS chapters 195 and 197." (Emphasis added.)

In defining "person" to include a "private organization of any kind," it appears that almost any organized group of individuals would have standing to appeal to LUBA if the group satisfies the statutory appearance requirement.

As far as we can tell, petitioner Joan Mariner is an "individual" and Neighbors 4 Responsible Growth is "a private organization." They are both "persons" as ORS 197.015(18) defines that term. We do not understand intervenor to contend otherwise. There were two additional players in the local proceedings that led to this appeal, Jim Just and the Goal One Coalition. Jim Just is an individual and the executive director of the Goal One Coalition. The Goal One Coalition is, at the very least, a private organization. Again, we do not understand petitioner to contend otherwise. Therefore, petitioner Mariner, petitioner N4RG, Jim Just and the Goal One Coalition are all "persons," as ORS 197.015(18) defines that term. The only real dispute is whether petitioners Joan Mariner and N4RG made an appearance in this proceeding, as ORS 197.830(2) requires.

B. Persons May Appear on Behalf of Other Persons

The June 30, 2005 letter quoted in part above states that the author of the letter—Mr. Just—is appearing on behalf of petitioner N4RG, N4RG's membership and others. Clearly if Mr. Just was their attorney, he could appear in a local land use proceeding on behalf of petitioner N4RG and any other persons mentioned in the letter who are adequately identified. *Dowrie v. Benton County*, 37 Or LUBA 998, 1000 (1999); *League of Women Voters v. Coos County*, 15 Or LUBA 447, 457 n 9. LUBA's administrative rules require that individuals appear on their own behalf or be represented by an attorney. OAR 661-010-0075(6). Artificial entities wishing to participate in an appeal at LUBA *must* appear through and be represented by an attorney admitted to practice in this state. However, we are aware of no such requirements for appearances in local land use proceedings, and intervenor cites no City of Veneta requirement to that effect.

In fact, as petitioners point out, it is common for individuals in local land use proceedings (applicants and opponents alike) to appear through other individual persons. Applicants for land use approval frequently appear through and are represented by engineers, planners and other nonlawyer professional individuals. Individual supporters or opponents of land use applications often appear on behalf of other individual supporters or opponents. Intervenor argues that

organizations like N4RG must be represented by an attorney in local land use proceedings, but cites no legal authority for such a requirement. Because no statute, administrative rule or applicable local requirement we know of requires that artificial entities such as N4RG appear through an attorney, we reject intervenor's argument that LUBA should impose such a requirement here. We are aware of no prohibition on Jim Just, an individual, appearing for and representing others before the city in this matter.

The June 30, 2005 letter can be read to say that the Goal One Coalition organization, rather than Jim Just the individual, is appearing on behalf of the persons mentioned in the letter. Even if the June 30, 2005 letter can be interpreted in that manner, we know of no legal prohibition on an artificial person appearing for and representing other persons in a local land use proceeding.

With the issue of whether Mr. Just legally *could* make an appearance on behalf of petitioners Mariner and N4RG resolved, we turn to the issue of whether the June 30, 2005 in fact constituted an appearance for both petitioners.

C. Petitioner N4RG

Turning first to N4RG, the June 30, 2005 clearly identifies the organization and clearly states that Mr. Just is appearing on its behalf. Intervenor assigns significance to the phrasing in the third sentence of the June 30, 2005 letter quoted above. Because Mr. Just says the testimony is presented "on behalf of" petitioners and others and does not also say that it is being presented "at the request of" petitioners and the others, intervenor questions whether Mr. Just was actually authorized to present testimony on behalf of N4RG. Intervenor moves to strike the affidavits that petitioners submitted to establish that Mr. Just acted with authority in appearing for N4RG and moves for an evidentiary hearing to establish that Mr. Just did not actually have such authority.

We find it unnecessary to decide intervenor's motion to strike and motion to take extra-record evidence because we generally agree with intervenor that the question of whether Mr. Just made an appearance on behalf of N4RG in this case should be decided based on the record. However, we reject intervenor's argument that Mr. Just was obligated in this case to submit proof

of his authority in order to make an appearance on behalf of N4RG. We cannot imagine that an attorney appearing on behalf of N4RG would first be required to prove that an attorney-client relationship actually existed between the attorney and N4RG, and we see no reason why such a requirement should be imposed on one individual person seeking to make an appearance for an artificial person. Unless some challenge is made and some reason presented to question a person's claim that he or she is appearing on behalf of another person, an allegation to that effect is sufficient, provided the allegation sufficiently identifies the person he or she is appearing for. Mr. Just clearly identified N4RG, alleged that he was appearing on its behalf, and no challenge was raised by any party or the city to that allegation during the local proceedings. N4RG "appeared" during the local proceedings, within the meaning of ORS 197.830(2).[2]

D. Petitioner Mariner

Mr. Just did not claim that he was appearing on behalf of petitioner Mariner. Rather, Mr. Just alleged that he was appearing on behalf of the Goal One Coalition's "membership residing in the Veneta area" and "Mona Linstromberg, Neighbors 4 Responsible Growth and N4RG's membership in Veneta and surrounding area, the Goal One Coalition, and Jim Just as an individual." Petitioner Mariner contends Mr. Just's reference to "N4RG's membership in Veneta and surrounding area" is sufficient to constitute an appearance on her behalf because she is a member of N4RG.

The June 30, 2005 letter is sufficient to identify and constitute an appearance for Mona Linstromberg, N4RG, the Goal One Coalition and Jim Just. The two individuals and the two organizations are identified with sufficient precision to inform the city that Mr. Just was appearing on behalf of those two individuals and two organizations. With that knowledge, the city or any other party could have challenged those appearances, if there were grounds for challenge. But the

[2] There does not appear to be anything in the record that describes N4RG, its organizational structure or mission. Even if these particulars are not well known to the city or other parties, N4RG is adequately identified in the June 30, 2005 letter so that the city or any other party interested in learning those particulars could have asked Mr. Just to provide that information.

references to "the Goal One Coalition's membership residing in the Veneta area" and to "N4RG membership in Veneta and surrounding area" are not sufficient. Like intervenor, we think it is unlikely that Mr. Just actually had express authorization from all the individual members of the Goal One Coalition and N4RG to make an appearance on their behalf in this matter. However, even if he did, he cannot make an effective appearance for what we assume are numerous unnamed individuals residing in an ambiguously described "surrounding area." A more precise delineation of the persons he is representing is required to identify those persons adequately so that the city or any other party who might have grounds for challenging those appearances could do so.

The June 30, 2005 letter was not sufficient to constitute an appearance for petitioner Mariner.

E. Notice of the July 5, 2005 Hearing

Finally, petitioner Mariner argues there were notice defects associated with the July 5, 2005 hearing in this matter that obviated the ORS 197.830(2) requirement for an appearance. Petitioner is correct that city procedural errors that operate to prevent a person from making an appearance could provide a basis for waiving the ORS 197.830(2) "appearance" requirement. *See Flowers v. Klamath County*, 98 Or App 384, 389, 780 P2d 227 (1989) (a local government's failure to follow statutory procedures "that bears directly on a petitioner's ability to appear, obviates the necessity for making a local appearance"). We understand petitioner Mariner to contend that there was such a failure in this case that prevented her from appearing at the July 5, 2005 hearing in this matter.

The written notice of the July 5, 2005 joint city council/planning commission hearing in this matter and the published notice correctly stated that the public hearing would begin at 6 p.m. As far as we know, the written notice was sent to persons who were entitled to receive that written notice and the published notice was published in accordance with all legal requirements. The city was not required to send written notice of the July 5, 2005 hearing to petitioner Mariner, because she is not among the persons who are entitled to receive such written notice. The July 5, 2005 public hearing

was concluded and the city had adopted its decision when petitioner Mariner arrived at 6:45 p.m. Petitioner Mariner apparently relied on the city's website, which states that city council meetings are held at 7 p.m.

Intervenor responds that the information on the city's website does not provide any justification for petitioner Mariner's failure to make an appearance in this matter:

> "* * * The record is clear that the hearing was held at the time stated in the mailed and the published notices. Petitioners' complaint is that the city website says that city council hearings are held at 7 p.m. The city's website, which is available to everyone, says generally that city council meetings are held on alternate Mondays at 7 pm. That may be the case for general city council decisions. Posting such general information on the city's website does not entitle persons who are interested in a quasi-judicial proceeding, but who are not among those entitled to individual notice, to assume that every quasi-judicial proceeding involving the City Council will be convened at 7 p.m. ** *" Intervenor's Response to Affidavits 3-4 (footnote omitted).

We agree with intervenor that there was no procedural error here that would excuse petitioner Mariner's failure to appear in this matter. The written and published notices of the July 5, 2005 public hearing accurately stated the hearing on the variance would begin at 6 p.m. As far as we know the city's website accurately states that city council meetings generally begin at 7 p.m. While petitioner Mariner's error in relying on the website to learn the starting time of the July 5, 2005 hearing may be understandable, the city's website did not purport to state the starting time for the public hearing before the city council and planning commission on the disputed variance that is at issue in this appeal.

F. Conclusion

Because we conclude that petitioner N4RG appeared below, we deny intervenor's motion to dismiss. Because we agree with intervenor that petitioner Mariner did not appear below, she is dismissed from this appeal.

RECORD OBJECTION

Petitioners initially raised several objections to the record. Petitioners and the city have resolved most of those record objections. The only remaining unresolved record objection

concerns a July 2, 2005 e-mail message to Denise Walters, a city planner.[3] Attached to the July 2, 2005 e-mail message was a one-page letter to the city planning commission, dated July 5, 2005. The July 2, 2005 e-mail message asks that the city planner enter the attached letter into the record in this matter. July 2, 2005 was a Saturday and the e-mail message was sent at 11:24 p.m. Monday July 4, 2005 was a holiday. The city's hearing in this matter was held on Tuesday July 5, 2005. The city planner was absent on July 5, 2005, and for some reason the city recorder did not receive the July 2, 2005 e-mail message until after the July 5, 2005 hearing was complete and the city had taken action on the proposed variance. Because the July 2, 2005 e-mail message and attachment were never placed before the city council and planning commission, the city contends the e-mail message is not part of the record in this matter. Petitioners contend that because the e-mail message was sent to the person the city designated for receipt of comments before the July 5, 2005 hearing, it cannot rely on its own failure to include the message and attachment into the record to argue that the message and attachment were not placed before the city council and planning commission.

OAR 661-010-0025(1)(b) provides that the local record includes:

> "All written testimony and all exhibits, maps, documents or other written materials specifically incorporated into the record or *placed before, and not rejected by, the final decision maker*, during the course of the proceedings before the final decision maker." (Emphasis added.)

We have had a number of occasions to consider whether particular efforts were sufficient to place written material before the final decision maker. We summarized the three most common ways to place documents before a decision maker in *ONRC v. City of Oregon City*, 28 Or LUBA 775, 778 (1994):

> "Items are placed before the local decision maker if (1) they are physically placed before the decision maker prior to the adoption of the final decision; (2) they are

[3] A copy of the e-mail message was also sent to the city recorder. However, it is undisputed that city planner Walters was the person the city had previously designated as the person who parties were to submit written comments to.

> submitted to the decision maker through means specified in local regulations or through appropriate means in response to a request by the decision maker for submittal of additional evidence; or (3) local regulations require that the item (*e.g.*, record of a lower level decision maker's proceeding) be placed before the decision maker."

The second of the above-described methods is potentially applicable here. The city apparently does not have generally applicable rules that govern pre-hearing submittal of comments to the city in its land use proceedings. But both the written and published notice of the July 5, 2005 hearing specified how comments were to be submitted, who they were to be submitted to and the deadline for submitting such written comments:

> "Written comments may be submitted at Veneta City Hall; * * * mailed to City of Veneta, * * * sent by FAX (541) 935-1838; or sent by e-mail to dwalters@lane.cog.or.us. Written comments must be received by 5:00 p.m. on Friday, July 1st. * * *" Record 74 and 75.

If the disputed e-mail message had been sent to and received by the city before 5:00 p.m. on Friday, July 1, 2005, and city staff thereafter failed to provide that e-mail message to the city council and planning commission, we likely would agree with petitioners that the e-mail message would nevertheless have been placed before the final decision maker, within the meaning of OAR 661-010-0025(1)(b). In that circumstance, the sender would have followed the instructions in the notice of hearing and therefore would have placed the e-mail message before the final decision maker under the second method described in *ONRC*. In this case, however, the sender did not submit the e-mail message before the Friday, July 1, 2005 deadline specified in the notice of hearing. Therefore, the July 2, 2005 e-mail message and attachment could only have been placed before the decision maker if city staff or petitioner physically placed the e-mail message and attachment before the final decision maker. That did not happen.

Petitioners' record objection is denied.

The record in this appeal is settled as of the date of this order. The petition for review is due 21 days from the date of this order. The respondents' brief is 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 November, 2005.

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Michael A. Holstun
Board Member