1	BEFORE THE LAND USE BOARD OF APPEALS
2	OF THE STATE OF OREGON
3 4 5	SBA TOWERS, INC., Petitioner,
6 7 8	VS.
9 10 11	LINN COUNTY, Respondent.
12 13	LUBA Nos. 2000-011 & 2000-014
14	ORDER ON MOTION TO INTERVENE
15	Connie Clark, Carl Clark and All West Communications (intervenors) move to
16	intervene on the side of respondent in these consolidated appeals.
17	ORS 197.830(6)(a) (1997) provides, in relevant part:
18 19 20	"Within 21 days after a notice of intent to appeal has been filed with [LUBA], any person may intervene in and be made a party to the review proceeding upon a showing of compliance with [ORS 197.830(2)]."
21	ORS 197.830(2)(b) provides that a person has standing to appear before LUBA provided the
22	person "[a]ppeared before the local government * * * orally or in writing." <sup>1</sup>
23	LUBA No. 2000-011 involves an appeal of the board of commissioners' decision to
24	decline review of a decision of the planning commission regarding the matter on appeal in
25	LUBA No. 2000-014. The board of commissioners' decision was made on January 5, 2000,

"(2) \* \* \* A motion to intervene shall be filed within 21 days of the date the notice of intent to appeal is filed \* \* \*. The motion to intervene \* \* \* shall:

··\* \* \* \* \*

"(b) State the facts which show the party is entitled to intervene, supporting the statement with affidavits or other proof[.]"

Page 1

<sup>&</sup>lt;sup>1</sup>OAR 661-010-0050 provides, in relevant part, that

<sup>&</sup>quot;(1) \* \* \* The applicant and any person who appeared before the local government \* \* \* may intervene in a review proceeding before [LUBA].

15 days *before* the planning commission's final decision was issued. The planning
 commission's decision denied petitioner's application for a communications tower. Petitioner
 appealed the planning commission's decision in LUBA No. 2000-014.

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## A. LUBA No. 2000-014

5 Intervenors allege that they appeared before the planning commission in this appeal 6 and that they filed a timely motion to intervene. Petitioner does not object to the motion to 7 intervene in LUBA No. 2000-014 and it is allowed.

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## B. LUBA No. 2000-011

9 Petitioner opposes the motion to intervene in LUBA No. 2000-011, arguing that none 10 of the parties appeared orally or in writing before the board of commissioners during the 11 proceedings resulting in the land use decision that is the subject of this appeal. Petitioner 12 contends that while the planning commission's and board of commissioners' decisions are 13 closely related, they are not identical. Therefore, petitioner argues, intervenors must 14 demonstrate that they appeared before the board of commissioners before they may be 15 allowed to intervene in LUBA No. 2000-011.

- 16 The board of commissioners' decision was made pursuant to ORS 215.422(1) and 17 provisions of the Linn County Ordinance (LCO) implementing that statute. ORS 215.422(1) 18 provides, in relevant part:
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- "(a) A party aggrieved by the action of a hearings officer or other decisionmaking authority may appeal the action to the \* \* \* county governing body[.] \* \* \* The procedure and type of hearing for such an appeal \* \* \* shall be prescribed by the governing body \* \* \*.
- "(b) Notwithstanding [ORS 215.422(1)(a)], the governing body may
  provide that the decision of a hearings officer or other decision-making
  authority is the final determination of the county."
- 26 LCO 921.220(C) provides:
- "Notwithstanding any provision in this Code to the contrary, if a time
  limitation is about to expire and a final decision has not been made, or if the
  Commission has made a decision and a time limit is about to expire, the Board

1 2 may enter an order affirming the findings and conclusion of the Commission without conducting any further hearings."

According to the board of commissioners' order, the deadline for making a decision to avoid the mandamus proceedings authorized under *former* ORS 215.428(7) (1997), *renumbered as* ORS 215.429 (1999), was January 11, 2000.<sup>2</sup> Therefore, the county exercised its right to determine that the planning commission's decision would be the final decision for the county. The board of commissioners' order was adopted during a regular board meeting, but was not subject to notice or an opportunity for hearing.

9 We have not had the opportunity to rule on whether participation in a planning 10 commission proceeding provides standing to intervene in an appeal of a board of 11 commissioners' decision that *precedes* the final land use decision of the local government. 12 As intervenors point out, the Oregon Supreme Court has held that appearance before a 13 planning commission at an earlier phase of a local proceeding satisfies the requirement for an 14 appearance before the local government. Warren v. Lane County, 297 Or 290, 297-98, 686 15 P2d 316 (1984). However, in *Warren*, the planning commission's decision preceded the 16 board of commissioners' final decision on a plan amendment and zone change. The court 17 relied on the fact that the petitioners had appeared before the planning commission, and that 18 the proceedings of the planning commission were forwarded to the board of commissioners 19 for its review and consideration. According to the court, the conclusion that the petitioners in 20 *Warren* appeared during the course of the local proceedings and therefore had satisfied the 21 appearance requirement for standing before LUBA furthered the legislature's goal of

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<sup>&</sup>lt;sup>2</sup>Former ORS 215.428(7) (1997) provides, in relevant part:

<sup>&</sup>quot;\* \* \* [I]f the governing body of the county or its designee does not take final action on an application for a permit \* \* \* within 120 days after the application is deemed complete:

<sup>&</sup>quot;(b) The applicant may apply in the circuit court of the county where the application was filed for a writ of mandamus to compel the governing body or its designee to issue the approval. \* \* \*"

encouraging participation at the local level, rather than waiting until the local land use
 decision had been made, and then appealing.

<ul> <li>made in response to a pending deadline. Nevertheless, we believe that where proceedings at</li> <li>pending before a lower body, a decision of the governing body to decline review of the lower</li> <li>body's decision in advance of that lower body's decision either (1) is not properly viewed at</li> <li>a separate land use decision, making a separate appearance unnecessary, or (2) is so integra</li> <li>to the permit decision, that appearing before the planning commission satisfies the OR</li> <li>10 197.830(6) (1997) appearance requirement.<sup>3</sup></li> <li>The motion to intervene in LUBA No. 2000-011 is allowed.</li> <li>Dated this 13th day of March, 2000.</li> </ul>	3	We do not have the same consideration here. The decision of the board of
<ul> <li>pending before a lower body, a decision of the governing body to decline review of the lower</li> <li>body's decision in advance of that lower body's decision either (1) is not properly viewed a</li> <li>a separate land use decision, making a separate appearance unnecessary, or (2) is so integra</li> <li>to the permit decision, that appearing before the planning commission satisfies the OR</li> <li>197.830(6) (1997) appearance requirement.<sup>3</sup></li> <li>The motion to intervene in LUBA No. 2000-011 is allowed.</li> <li>Dated this 13th day of March, 2000.</li> </ul>	4	commissioners was not dependent on the record of the planning commission. Rather, it was
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13 14 15 16 17 18	11	The motion to intervene in LUBA No. 2000-011 is allowed.
20 Board Member	13 14 15 16 17 18 19	Anne Corcoran Briggs

 $<sup>^{3}</sup>$ We have some question as to whether the board of commissioners' decision is a final land use decision, because it has the effect of making the planning commission decision *the* final decision with respect to petitioner's application. However, that issue is not before us.