BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROY COMRIE,
Petitioner,

and

J. VAL TORONTO and REX MOREHOUSE,
Intervenors-Petitioner,

vs.

CITY OF PENDLETON,
Respondent,

and

OREGON DEPARTMENT OF TRANSPORTATION,
Intervenor-Respondent.

LUBA No. 2003-096

ORDER

Before the board is a precautionary record objection, a motion opposing intervention, a motion to dismiss, a motion to take evidence not in the record, and a motion for an evidentiary hearing.[1] The motion to dismiss, motion to take evidence, and motion for an evidentiary hearing all revolve around the same issue, the standing of petitioner.

INTRODUCTION

This case involves a permit application by the Oregon Department of Transportation (ODOT) to construct a bridge and overpass on Cold Springs Highway (also known as Highway 37) in the City of Pendleton. The city planning commission held a hearing on the application February 20, 2003. Petitioner attended the planning commission meeting and

[1] Petitioner requests a telephone conference regarding the various motions. We do not believe a conference is necessary to resolve the motions, and the request is denied. OAR 661-010-0065(3) (oral argument on motions at discretion of Board).

addressed a prayer that referenced ODOT's application to the planning commission before leaving. Intervenors-petitioner attended and appeared at the hearing, speaking in opposition to the application. At the planning commission hearing, intervenors-petitioner submitted documents prepared by petitioner. Petitioner and intervenors-petitioner are part of the Pendleton Taxpayers Association (PTA), which also opposed the application.

The planning commission approved the application at the conclusion of its February 20, 2003 hearing, and on February 21, 2003, notice of the decision was mailed to persons who appeared before the commission. The Pendleton Zoning Ordinance (PZO) provides that planning commission decisions may be appealed to the city council within seven days after notice of the decision is mailed.[2] The city mailed notice of the decision to intervenors-petitioner, among others, but not to petitioner, under the belief that petitioner had not appeared before the planning commission. Within seven days of May 29, 2003, petitioner learned of the planning commission decision and filed a local appeal of the commission decision to the city council on that date. On June 9, 2003, the city attorney rejected petitioner's local appeal, on the ground that petitioner had not appeared before the planning commission and thus was not entitled to file a local appeal.[3] On June 20, 2003, petitioner appealed the planning commission decision to LUBA.

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[2] PZO 3250, § 156B provides:

> "An action or ruling of the Planning Commission pursuant to this ordinance may be appealed to the City Council within seven (7) days after the Planning Commission has mailed its decision. Persons who may file an appeal are: (1) The applicant who initiated the action before the Planning Commission; or (2) Persons who appeared before the Planning Commission orally or in writing. Written notice of the appeal shall be filed with the City Manager. If the appeal is not filed within the seven (7) day period, the decision of the Planning Commission shall be final. If the appeal is filed, the City Council shall receive a report and recommendation thereon from the Planning Commission and shall hold a public hearing on the appeal."

[3] The June 9, 2003 letter states, in relevant part:

> "Enclosed is the filing fee you submitted in connection with [petitioner's] appeal of the [ODOT] application considered at the February 20, 2003 planning commission meeting.
>
> "* * * * *

MOTIONS TO INTERVENE

ODOT, the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed. J. Val Toronto and Rex Morehouse (collectively intervenors) move to intervene on the side of petitioner. The city opposes their motions to intervene on three bases: (1) intervenors failed to exhaust administrative remedies below; (2) intervenors only appeared below in a representative capacity; and (3) intervenors' interests are adequately represented by petitioner.

A. Exhaustion of Administrative Remedies

There is no question that intervenors appeared at the planning commission meeting. There is also no question that intervenors received notice of the planning commission decision and no party appealed the decision to the city council. Intervenors would therefore be precluded from filing their own LUBA appeal for failure to exhaust all administrative remedies below. ORS 197.825(2)(a).[4] The city argues that because intervenors are precluded from filing their own appeal in this case, they are similarly precluded from intervening on the side of petitioner.

ORS 197.825(2)(a) requires that a *petitioner* exhaust all remedies below before appealing to LUBA. There is nothing in ORS 197.825(2)(a), however, that applies to intervenors. ORS 197.830(7) and OAR 661-010-0050 provide the applicable requirements

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> "Your appeal letter asserts that [petitioner] participated in the hearing. We do not find that to be the case. * * *
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> "* * * * *
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> "We can only accept [petitioner's] appeal if you can state with specificity the way that [petitioner] participated in the hearing or other grounds for his right to have received notice of the decision and of his right to appeal." Record 4-5.

[4] ORS 197.825 (2) provides:

> "The jurisdiction of the board:
>
> "(a) Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review. * * *"

for intervention.[5] They merely require that, in addition to filing a motion to intervene within 21 days of the notice of intent to appeal being filed, an intervenor have "appeared before the local government." It is undisputed that intervenors filed timely motions to intervene and that they appeared before the local government. There is no requirement that they personally have exhausted all remedies below before they can intervene in this appeal.[6]

B. Individual Appearance

We have held that a petitioner who appears on behalf of an organization has satisfied the appearance requirement of ORS 197.830(2)(b) to appeal as an individual even when that person has not expressly stated that he or she was also appearing or submitting testimony as an individual, when the record reflects that petitioner was personally involved in the local proceedings and offered individual views as well as those of the organization. *Rochlin v. City of Portland*, 31 Or LUBA 509, 510 (1996); *Terra v. City of Newport*, 24 Or LUBA 579, 584-85 (1992).

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[5] ORS 197.830(7) provides:

> "(a) Within 21 days after a notice of intent to appeal has been filed with the board under [ORS 197.830(1)], any person may intervene in and be made a party to the review proceeding upon a showing of compliance with [ORS 197.830(2)].
>
> "(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 [ORS 197.830(2)], are:
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> "* * * * *
>
> "(B) Persons who appeared before the local government * * *."

OAR 661-010-0050(1) provides:

> "Standing to Intervene: The applicant and any person who appeared before the local government * * * 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."

[6] As a practical matter, intervenors' standing is dependant on petitioner's standing. If petitioner is found to lack standing then the case must be dismissed, and intervenor would have no appeal to intervene in. *Waters v. Marion County*, 33 Or LUBA 751, 754 (1997).

While intervenors could have made it clearer that they were appearing on their own behalf as well as members of the PTA, we believe it is reasonably clear that they were personally involved and offered their individual views as well as those of the PTA. Although written submissions were signed individually as members of the PTA, both intervenors personally testified before the planning commission and offered their personal views. This is sufficient to demonstrate that they appeared individually for purposes of intervention in this appeal.

C. Intervenors' Interests Adequately Represented

The city also argues that we should deny intervenors' motions to intervene because petitioner would adequately represent their interests. While that may or may not be the case, the city does not direct us to any authority, nor are we aware of any, that would allow us to deny an otherwise proper motion to intervene, simply because the moving party's interests may be represented by other parties. The city's argument does not provide a basis for denying intervenors' motions to intervene.

J. Val Toronto's and Rex Morehouse's motions to intervene are allowed.

MOTION TO DISMISS

The city argues that this appeal must be dismissed because petitioner: (1) did not appear below, or if he did appear, it was not in an individual capacity; (2) failed to exhaust administrative remedies; and (3) did not timely appeal the decision.

A. Appearance Below

At the beginning of the planning commission's public hearing, petitioner asked for and was given the opportunity to offer a prayer. Petitioner essentially asked for guidance for the planning commission in considering the issue of the disputed overpass. Petitioner also added his name and address to the signature list of persons wishing to testify with respect to the overpass proposal.

However, petitioner was unable to stay long enough to testify, and asked intervenor Toronto to submit materials on behalf of petitioner at the ODOT application hearing. As explained in an affidavit from intervenor Toronto, submitted in support of petitioner's response to the city's motion to dismiss:

> " * * *[petitioner] listened for hours through [the planning commission] proceedings, waiting for an opportunity to speak to the application. After some hours, [petitioner] told me that he had to leave the hearing and asked me to submit to the Planning Commission, in his behalf, certain written materials.
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> "When the opportunity presented itself, I presented the written materials to the Planning Commission, specifically mentioning that I was submitting them on behalf of [petitioner]." Affidavit of J. Val Toronto 2.

The city and ODOT do not specifically dispute the above quoted assertions made by intervenor. The city has, however, submitted a partial transcript of the planning commission hearing. The city does not explain what it believes the significance of the transcript to be, nor does the city provide any legal argument in conjunction with the transcript. Presumably, the city believes the transcript refutes the assertions made by petitioner and intervenors regarding standing.

When a party submits an affidavit in response to a jurisdictional challenge and the assertions in that affidavit are unchallenged, absent some other reason to question those assertions we will accept them as true for purposes of resolving a jurisdictional issue. In this case, intervenor asserts that he submitted written materials at the planning commission hearing specifically on behalf of petitioner. Those materials are located in the record. Record 77-79. The city and ODOT do not specifically challenge those assertions, and we therefore accept them as true. Even if the partial transcript is intended to refute those assertions, it contains numerous omissions where the tape was inaudible. The partial transcript is, by itself, insufficient to controvert the affidavit petitioner relies upon.

When a putative party offers a prayer before the planning commission regarding the challenged proposal, signs up to testify with respect to that proposal, and has another person

submit written materials to the governing body specifically on his behalf and those materials are in the record, that is sufficient to constitute an appearance under ORS 197.830(2)(b).[7]

B. Individual Appearance

The city argues that even if petitioner appeared below, he appeared only as a member of the PTA. We have held that a petitioner who appears on behalf of an organization has satisfied the appearance requirement of ORS 197.830(2)(b) to appeal as an individual even when that person has not expressly stated that he or she was appearing or submitting testimony as an individual, when the record reflects that petitioner was personally involved in the local proceedings and offered individual views as well as those of the organization. *Rochlin*, 31 Or LUBA at 509-10; *Terra*, 24 Or LUBA at 584-85.

In this case, intervenor submitted a letter from petitioner addressed to the Division of State Lands (DSL), setting forth various arguments against the overpass proposal. The letter to DSL was signed by petitioner alone and does not mention the PTA. Intervenor also asserted that he specifically submitted the materials on behalf of petitioner, not on behalf of the PTA. That is sufficient to establish that petitioner appeared in an individual capacity.

C. Exhaustion of Remedies; Timely Appeal

The city next argues that petitioner failed to exhaust administrative remedies and, in any case, failed to file a timely appeal of the planning commission decision within the 21-day period specified in ORS 197.830(9).[8]

ORS 197.825(2)(a) requires a petitioner to exhaust all remedies below before appealing to LUBA. *See* n 4. Under PZO 3250, §156, a person who appeared at a planning commission meeting has seven days to appeal the planning commission decision to the city

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[7] Our ruling on this point makes it unnecessary to resolve petitioner's motion to take evidence outside the record. Accordingly, that motion is denied.

[8] ORS 197.830(9) provides in pertinent part:

> "A notice of intent to appeal a land use decision or limited land use decision shall be filed not later than 21 days after the date the decision to be reviewed becomes final."

council. *See* n 2. The planning commission adopted the challenged decision on February 20, 2003. As explained, petitioner was not provided notice of the Highway 34 overpass decision because the city did not believe he had appeared at the planning commission hearing on that matter. Petitioner states that he did not receive actual notice of the planning commission decision until late May, 2003. When petitioner did receive actual notice of the planning commission decision, he filed an appeal of that decision to the city council within seven days, but the city refused to consider his appeal in a letter dated June 9, 2003, on the ground that petitioner had not appeared before the planning commission and therefore had no standing to file a local appeal. Record 4-5.

The question of whether petitioner was required to exhaust local appeals prior to appealing to LUBA under the foregoing circumstances, and the related questions of which if any decision may be appealed directly to LUBA and under what timelines, are particularly vexing ones under the applicable statutes and case law. Some discussion of those statutes and cases is useful in understanding the answer we set out below.

In three 1988 decisions that have been partially superceded by statutory changes and subsequent caselaw, LUBA held that the ORS 197.825(2)(a) exhaustion of local remedies requirement continues to apply in cases where a local government renders a "permit" decision without providing the required notice of decision and right of local appeal under ORS 215.416 and 227.175. *Dack v. City of Canby*, 17 Or LUBA 265 (1988); *Dack v. City of Canby*, 17 Or LUBA 1015 (1988); *Pienovi v. City of Canby*, 16 Or LUBA 604 (1988). In that circumstance, LUBA concluded, a petitioner does not have a right to appeal the permit decision directly to LUBA when the notice defect is corrected. Instead, LUBA concluded, the deadline for seeking the *local* appeal is tolled for persons who are not given the legally required notice and that local deadline does not begin to run until the petitioner is given the legally required notice. Thereafter, the local appeal deadline begins to run, and a petitioner must first seek a local appeal of the permit decision, even though the deadline for seeking

that local appeal has expired for other persons who received the legally required notice at the time the decision was adopted. The local government must toll the local appeal deadline for the period of time that the notice defect remains uncorrected, and provide the local appeal if a timely local appeal is requested following the date the notice defect is corrected.

Both *Dack* and *Pienovi* predate the 1989 enactment of ORS 197.830(3), which in relevant part allows a person adversely affected by a land use decision made without a hearing to appeal that decision to LUBA within 21 days of receiving notice of the decision or within 21 days of the date petitioner knew or should have known of the decision.[9] Following the enactment of ORS 197.830(3), we continued to apply the principles of *Dack* and *Pienovi*, while reserving judgment as to whether and how ORS 197.830(3) might affect the time for filing a local appeal in circumstances where the local government fails to provide required notice to petitioner. *See, e.g., Pautler v. City of Lake Oswego*, 23 Or LUBA 339, 341-42 n3 (1992) (dismissing direct LUBA appeal of permit decision made without a hearing because petitioner failed to file a local appeal, but declining to decide whether ORS 197.830(3) modifies the tolling and exhaustion principles described in *Dack* and *Pienovi*).

In *Beveled Edge Machines, Inc. v. City of Dallas*, 28 Or LUBA 790 (1995), we held that where ORS 197.830(3) applies, it provides a direct appeal to LUBA notwithstanding that the deadline for filing a local appeal has expired. In other words, we declined to apply the tolling and exhaustion principles described in *Dack* and *Pienovi* in circumstances where

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[9] The current version of ORS 197.830(3) provides:

> "If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416 (11) or 227.175 (10), or the local government makes a land use decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:
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> "(a) Within 21 days of actual notice where notice is required; or
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> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

ORS 197.830(3) applies to allow direct appeal to LUBA. Under such circumstances, we held, no local appeal is "available" to petitioners. *Id.* at 795. Conversely, where ORS 197.830(3) does not apply, the petitioner cannot appeal a permit decision directly to LUBA without exhausting local appeals. *Kevedy, Inc. v. City of Portland*, 28 Or LUBA 227 (1994).

As framed by *Beveled Edge* and *Kevedy*, whether the principles described in *Dack* and *Pienovi* (*i.e.*, failure to provide required notice to petitioner does not obviate the requirement to exhaust local appeals, but does toll the time for filing a local appeal) apply or not depends on whether ORS 197.830(3) applies. In *Tarjoto v. Lane County*, 29 Or LUBA 408, *aff'd* 137 Or App 305, 904 P2d 641 (1995), we addressed the interaction between the exhaustion requirement, ORS 197.830(3) and statutory provisions at ORS 215.416(11) or 227.175(10), which allow local governments to make permit decisions without a hearing, if notice and opportunity for a hearing is provided. We held in *Tarjoto* that ORS 197.830(3) does not provide a direct right of appeal to LUBA of a permit decision made without a hearing pursuant to ORS 215.416(11) or 227.175(10), even if the local government failed to provide petitioner with the notice of the application and opportunity for appeal required by those statutes. Instead, we applied the tolling and exhaustion principles in *Dack* and *Pienovi* to that circumstance, and dismissed petitioner's direct appeal of the permit decision, on the grounds that petitioner had not yet exhausted the local appeal that the county was required to give him. *Id.* at 413-14.

The Court of Appeals affirmed, but on the narrower ground that the county had in fact accepted petitioner's belated local appeal. The Court of Appeals' decision reserved judgment over whether a direct appeal to LUBA under ORS 197.830(3) might have been appropriate under other circumstances, for example where the county had not in fact accepted the petitioner's belated appeal. 137 Or App at 310.[10]

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[10] The Court of Appeals' *Tarjoto* opinion states, in relevant part:

In 1999, the legislature amended ORS 197.830(3) to exclude from that statute permit decisions made without a hearing pursuant to ORS 215.416(11) or 227.175(10). The same legislation enacted ORS 197.830(4), which allows direct appeal to LUBA of permit decisions made without a hearing, under prescribed circumstances.[11] The circumstances in *Pienovi* would today likely be analyzed under ORS 197.830(3), while the circumstances in *Tarjoto* would today likely be analyzed under ORS 197.830(4).

Recent LUBA cases have recognized, based on the reserved holding in the Court of Appeals' *Tarjoto* decision, statutory changes to ORS 197.830(3) and the enactment of ORS 197.830(4), that the tolling and exhaustion principles described in *Dack* and *Pienovi*

> "We need not decide and we reserve judgment about the relative effects and applicability of ORS 197.830(3) and ORS 215.416(11)(a) to facts that differ from those here. For example, we do not reach the question of whether petitioner could have appealed directly to LUBA under ORS 197.830(3) after learning of the planning director's decisions, had he not also appealed to the hearings officer and thereby obtained rulings from the county, LUBA and us that the local remedy is 'available' within the meaning of ORS 197.825(2)(a).
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> "Whatever their precise relationship may be, ORS 197.830(3) and ORS 215.416(11) are not designed to foster gamesmanship on the part of parties or decision makers, of the kind that petitioner hypothesizes, *e.g.*, in which 'local remedies' are artificially fabricated or interpreted as being 'unavailable' in an effort to defeat the possibility of timely LUBA appeals. * * *"

[11] ORS 197.830(4) provides:

> "If a local government makes a land use decision without a hearing pursuant to ORS 215.416 (11) or 227.175 (10):
>
> "(a) A person who was not provided mailed notice of the decision as required under ORS 215.416 (11)(c) or 227.175 (10)(c) may appeal the decision to the board under this section within 21 days of receiving actual notice of the decision.
>
> "(b) A person who is not entitled to notice under ORS 215.416 (11)(c) or 227.175 (10)(c) but who is adversely affected or aggrieved by the decision may appeal the decision to the board under this section within 21 days after the expiration of the period for filing a local appeal of the decision established by the local government under ORS 215.416 (11)(a) or 227.175 (10)(a).
>
> "(c) A person who receives mailed notice of a decision made without a hearing under ORS 215.416 (11) or 227.175 (10) may appeal the decision to the board under this section within 21 days of receiving actual notice of the nature of the decision, if the mailed notice of the decision did not reasonably describe the nature of the decision.
>
> "(d) Except as provided in paragraph (c) of this subsection, a person who receives mailed notice of a decision made without a hearing under ORS 215.416 (11) or 227.175 (10) may not appeal the decision to the board under this section."

and LUBA's *Tarjoto* decision no longer apply as broadly as they once did. *See, e.g., Warf v. Coos County*, 42 Or LUBA 84 (2002) (analyzing *Tarjoto* and the exhaustion requirement under the current statutes). In fact, there has been something of a sea change with respect to the options facing a petitioner who belatedly learns of a permit decision made with a hearing due to the failure of the local government to provide that petitioner with required notice of the decision, when the local code or statute provides for local appeal of that decision. Under *Dack* and *Pienovi*, a direct appeal to LUBA under such circumstances would be dismissed. Instead, the only viable option was to file a belated local appeal, which the local government was required to provide, under our view that the time for filing a local appeal is tolled when the local government fails to provide required notice. However, LUBA's current view is precisely the opposite, at least where ORS 197.830(3) or (4) apply: a petitioner in that circumstance is well-advised to file a direct appeal to LUBA rather than to attempt to file a belated local appeal.[12] If such a petitioner fails to file a direct appeal to LUBA, but instead pursues a local appeal that the local government later rejects, the time for filing a direct appeal to LUBA under ORS 197.830(3) or (4) may expire. *See Warf*, 42 Or LUBA at 101 (dismissing direct appeal of permit decision made without a hearing under ORS 197.830(3), where the petitioner pursued a local appeal that the county ultimately rejected and delayed longer than 21 days after receiving notice of the decision in filing an appeal with LUBA).

One additional point must be considered before turning to the present case. All of the foregoing decisions involve decisions made without a hearing or one of the limited circumstances where ORS 197.830(3) applies notwithstanding that a hearing was held.[13] As

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[12] As we have stated many times, where there is any doubt as to whether a right of local appeal exists or whether the only right of appeal is direct appeal to LUBA, the most prudent course is to file immediate appeals with both LUBA and the local government.

[13] ORS 197.830(3) applies to circumstances where a hearing was held, but the decision is different from the proposal described in the notice of hearing. In addition, LUBA has held that ORS 197.830(3) is potentially applicable where the local government holds a hearing but fails to provide notice of the hearing to persons entitled to notice. *Leonard v. Union County*, 24 Or LUBA 362, 374 (1992).

we noted in *Warf*, however, ORS 197.830(3) otherwise does not provide a right to appeal to LUBA from decisions made after a hearing is held. In such circumstances, ORS 197.830(9) applies, and establishes a 21-day deadline for filing an appeal to LUBA, from the date the decision became final or 21 days after notice is mailed, depending on the type of decision, but only after the petitioner exhausts all available local appeals. *See also Ramsey v. City of Portland*, 28 Or LUBA 763, 768 (1994) (a petitioner who appears at a hearing on a permit application and becomes entitled to notice of the decision may not appeal to LUBA under ORS 197.830(3), even if the notice of the proposed development did not reasonably describe the hearings officer's decision). In *Ramsey*, a local appeal of the hearings officer's decision was available, but petitioner's local appeal of that decision was rejected for failure to pay the required appeal fee. Petitioner then appealed both the hearings officer's decision and the decision rejecting his local appeal to LUBA. We agreed with the city that ORS 197.830(3) did not permit direct appeal of the hearings officer's decision to LUBA, and that the only decision properly before LUBA was the decision rejecting his local appeal. In other words, in *Ramsey* we essentially applied the *Dack*/*Pienovi* paradigm and required petitioner to exhaust local appeals.

To summarize, land use decisions appealed to LUBA pursuant to ORS 197.830(3) or (4) are not subject to the ORS 197.830(2)(a) exhaustion requirement, absent circumstances, such as in *Tarjoto*, where the local government voluntarily grants a local appeal. Land use decisions appealed to LUBA pursuant to ORS 197.830(9) *are* subject to the exhaustion requirement. Even in circumstances where the local government failed to provide required notice of the decision to petitioner, petitioner must perfect any local appeal from that decision. Conversely, the local government must accept an otherwise properly filed local appeal, and cannot reject that appeal on the basis of an imperfection that is caused by the local government's own procedural failure. In any case, the petitioner cannot appeal the

underlying decision directly to LUBA, but must instead pursue all local appeals and can only appeal to LUBA the final decision that results from those local appeals.

Turning to the present case, the present circumstances are similar to *Ramsey* in that a hearing was held and, we have determined, petitioner appeared at that hearing. There is no dispute that a local appeal was available from the planning commission decision under the city's code. Petitioner does not argue that either ORS 197.830(3) or (4) provide a right to appeal the planning commission decision directly to LUBA, and we do not see that either does. It follows that petitioner was required to exhaust available local appeals and could not directly appeal the planning commission decision to LUBA.

As noted, petitioner *did* file a local appeal upon learning of the planning commission decision, although the city rejected it under the belief that petitioner had not appeared at the planning commission hearing and was thus not entitled to a local appeal. Petitioner argues that the city's failure to provide him notice of the planning commission decision means that the June 9, 2003 rejection of his local appeal request has the effect of rendering the planning commission *final* as to *him* on that date. Therefore, petitioner argues, his direct appeal to LUBA within 21 days of June 9, 2003 is timely under ORS 197.830(9) and consistent with the exhaustion requirement of ORS 197.825(2)(a). According to petitioner, PZO section 156(B), quoted at n 2, indicates that a planning commission decision does not become "final" until seven days after the city mails notice of the decision to the parties. Because the city failed to mail any notice of the planning commission decision to petitioner, petitioner argues, that decision never became "final" as to petitioner until he received notice.

In the alternative, petitioner argues that even if the planning commission decision became final on February 20, 2003, direct appeal of that decision to LUBA is timely and appropriate under the reasoning in *Flowers v. Klamath County*, 98 Or App 384, 780 P2d 227, *rev den* 308 Or 592 (1989) and *League of Women Voters v. Coos County*, 82 Or App 673, 729 P2d 588 (1986). According to petitioner, those cases stand for the proposition that a

local government's failure of process, such as failure to provide required notice of a decision, should not prevent LUBA or the courts from providing redress to parties prejudiced by the local government's failure of process.

We disagree with petitioner that PZO section 156(B) has the effect of tolling the date the planning commission decision becomes final and directly appealable to LUBA, where the city fails to mail notice of the decision to all the persons entitled to notice. Under PZO Section 156(B), the finality of the planning commission decision depends on whether any local appeals are filed within a prescribed seven day period, not on whether the city actually mailed notice to all of the persons entitled to notice.[14]

The only other authorities petitioner cites for the proposition that failure to provide required notice of a decision tolls the date the decision becomes "final" for purposes of appeal to LUBA under ORS 197.830(9), or otherwise allows direct appeal of the decision to LUBA under that statute, are *Flowers*, *League of Women Voters*, and their progeny.[15] We agree with petitioner that the reasoning in *Flowers* and *League of Women Voters* has a bearing on the present circumstances, but it is not the bearing petitioner urges. Petitioner fails to recognize that, in circumstances where a local appeal is available, we have applied the reasoning of *Flowers* and *League of Women Voters* to hold that the effect of the local government's failure of process may be to toll the deadline to file a local appeal, but such failure does not obviate the exhaustion requirement or provide a right of direct appeal to LUBA. *Dack*, 17 Or LUBA at 269; *Dack*, 17 Or LUBA at 1017; *Pienovi*, 16 Or LUBA at

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[14] In any case, even if petitioner is correct that the planning commission decision did not become "final" and directly appealable to LUBA under ORS 197.830(9) until petitioner received notice, it appears that petitioner received notice of the planning commission decision prior to May 29, 2003, more than 21 days before petitioner filed the notice of intent to appeal with LUBA.

[15] It is worth noting that the Court of Appeals has repudiated the specific holding in *League of Women Voters*, *i.e.*, that the time for filing an appeal to LUBA under ORS 197.830(9) is 21 days from the date the notice of the final decision is mailed to parties entitled to notice, rather than from the date the decision becomes final. *Wicks-Snodgrass v. City of Reedsport*, 148 Or App 217, 223, 939 P2d 625, *rev den* 326 Or 59 (1997). We do not understand *Wicks-Snodgrass* to repudiate the broader principle exemplified by *Flowers*. *See Hugo v. Columbia County*, 157 Or App 1, 6, 967 P2d 895 (1998) (reaffirming the holding in *Flowers*).

607. As explained above, the local government cannot reject such a local appeal on the basis of an imperfection that is caused by the local government's own procedural failure. Petitioner essentially urges us to overturn *Dack*, *Pienovi* and their progeny, and instead hold that failure of process such as failure to provide required notice of a decision obviates the exhaustion requirement and allows direct appeal to LUBA within 21 days of receiving notice of the decision.

We decline to so hold. The overriding concern in *Flowers* and similar cases is that a local government's failure of process should not effectively render its decisions unreviewable by LUBA or the Court of Appeals. However, requiring petitioner to perfect and exhaust a local appeal of the planning commission decision under the present circumstances, and to appeal the city's rejection of that local appeal to LUBA instead of the underlying decision, is consistent with ORS 197.825(2)(a) and allows meaningful review of the city's actions. As explained, the city's failure to provide notice of the planning commission decision means that the city cannot reject petitioner's local appeal for any reason caused by the city's failure of process. If the city grants the local appeal, then petitioner has recourse. If the city rejects the local appeal for an impermissible reason, petitioner still has recourse in an appeal of the city's rejection to LUBA.

To conclude, we agree with the city that petitioner must exhaust all local appeals and may not appeal the planning commission decision directly to LUBA pursuant to ORS 197.830(9). It follows that this appeal must be dismissed unless the notice of intent to appeal filed in this case can be construed to appeal the June 9, 2003 decision rejecting petitioner's local appeal. We raise that issue on our own motion, and resolve it below.

D. Notice of Intent to Appeal

As noted, petitioner filed a notice of intent to appeal (NITA) with LUBA on June 20, 2003. Attached to the NITA are the planning commission's February 21, 2003 decision and the June 9, 2003 decision denying petitioner's local appeal. The NITA states that petitioner

intends to appeal the planning commission decision, "which became final with respect to petitioner on June 9, 2003." NITA 1-2. The NITA then explains:

> "The decision was dated February 21, 2003, but notice thereof was never sent to Petitioner despite the fact that petitioner participated in the hearing both orally and in writing. Within days after learning of the decision, Petitioner filed his appeal to the City Council. On June 9, 2003, the City advised Petitioner that the City considered the [planning commission] decision final and refused to accept Petitioner's appeal. A copy of the [planning commission] decision is attached hereto and marked Exhibit 1. A copy of the City's denial of Petitioner's appeal to the City Council is attached hereto and marked Exhibit 2." NITA 2, n 1.

The clear subject of the NITA is the February 21, 2003 planning commission decision. The June 9, 2003 decision is cited only to support petitioner's theory, which is rejected above, that the planning commission decision did not become final, and appealable to LUBA, until June 9, 2003. However, as the above case discussion shows, identifying the decision appealable to LUBA under the present circumstances is no trivial undertaking. We have held, under somewhat analogous circumstances, that where there is reasonable dispute regarding which of two documents or decisions is appealable to LUBA, the NITA identifies both documents, but mistakenly identifies the wrong document as the appealable decision, LUBA will regard that mistake as a technical pleading error, treat the appealable decision as the subject of the NITA, and not dismiss an otherwise properly filed appeal. *See Kent v. City of Portland*, 39 Or LUBA 455, 459-60 (2001) (petitioners' mistake in locating the appealable land use decision in a letter discussing the actual decision is not a basis to dismiss the appeal, if the appeal of the actual decision is otherwise timely filed). Admittedly, in *Kent*, there was only one land use decision, with reasonable confusion over which of two documents embodied that decision. Here, there are two land use decisions embodied in separate documents, only one of which is within our jurisdiction. Arguably, petitioner's choice of which decision to appeal, under his mistaken theory of finality, should doom his appeal. However, we also recognize that petitioner was influenced in that mistaken choice by the city's rejection of his local appeal, based on the city's earlier error in failing to recognize that

petitioner had appeared at the planning commission meeting and in failing to provide petitioner notice of the planning commission decision. Dismissing this appeal for what is little more than a pleading error would reward the city's compound procedural errors.

There is no dispute that had the June 20, 2003 NITA expressly identified the June 9, 2003 letter as the subject of petitioner's appeal, as *Dack*, *Pienovi* and our cases instruct, then petitioner's appeal of that decision would be timely and properly filed. Accordingly, we elect to treat the NITA as appealing the only appealable decision identified in the NITA: the June 9, 2003 letter.

Several consequences follow from our decision to treat the NITA as appealing the June 9, 2003 letter rejecting petitioner's local appeal. First, the merits of the planning commission's decision are beyond our review. *Ramsey*, 28 Or LUBA at 768. Second, the only issue in the present appeal is whether the city correctly rejected petitioner's local appeal. *Id.*

Third, our resolution of the city's challenges to petitioner's standing appears to have effectively resolved the merits of the only issue before us. We held, above, that petitioner appeared before the planning commission decision, that the city erred in failing to recognize that, and further erred in failing to provide petitioner with required notice of the decision. It follows that the city erred in rejecting petitioner's local appeal on the grounds that petitioner had not appeared before the planning commission. The June 9, 2003 decision does not indicate any other basis for rejecting petitioner's local appeal, or suggest that petitioner had otherwise failed to perfect that appeal. Therefore, it seems that the only conceivable outcome of the present appeal is to remand the city's June 9, 2003 decision to the city, to provide petitioner with the local appeal to which he is entitled.

However, we have ventured in this order considerably beyond the parties' arguments, and there may be some reason unknown to us why this appeal, even limited to the issue of whether the city correctly rejected petitioner's local appeal, should be briefed and argued.

Accordingly, the parties shall have 14 days from the date of this order to advise the Board whether there is any reason to brief and argue the merits of the city's June 9, 2003 decision, or whether LUBA should issue a final order and opinion based on the reasoning in this order.

DATED this 4th day of November, 2003.

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Tod A. Bassham
Board Chair