

**BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON**

ROGUE ADVOCATES, and)	
CHRISTINE HUDSON,)	LUBA No. 2014-015
Petitioners,)	
)	
v.)	
)	
JACKSON COUNTY,)	PETITION FOR REVIEW
Respondent, and)	
)	
PAUL MEYER and KRISTEN MEYER,)	
Intervenor-Respondents.)	
)	

PETITION FOR REVIEW

SUBMITTED BY PETITIONERS

Maura Fahey
Courtney Johnson
Crag Law Center
917 SW Oak, Ste 417
Portland, OR 97205

Attorneys for Petitioners

Joel Benton
Jackson County Counsel
10 S Oakdale, Room 214
Medford, OR 97501

Attorney for Respondent

Daniel O'Connor
Huycke O'Connor Jarvis & Lohman LLP
823 Alder Creek Drive
Medford, OR 97504

Attorney for Intervenor-Respondents

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1 **I. PETITIONERS' STANDING**

2 Petitioners Rogue Advocates and Christine Hudson have standing to petition
3 the Land Use Board of Appeals (“LUBA”) to hear this appeal. Both Petitioners
4 filed a timely notice of intent to appeal the Jackson County decision on February
5 13, 2014. In addition, Petitioner Rogue Advocates attempted, but was denied,
6 appearance before the local government by submitting written testimony to
7 Planning Staff, which Respondent rejected. Rec. 14; ORS 197.830(2). Petitioner’s
8 attempt to appear satisfies the appearance requirement in ORS 197.830(2)(b). *See*
9 *South Gateway Partners v. City of Medford*, 53 Or LUBA 593 (2006).

10 Petitioner Christine Hudson has standing to petition the Land Use Board of
11 Appeals under ORS 197.830(4)(a) because Respondent made a land use decision
12 without a hearing and did not provide notice of the decision. Ms. Hudson was
13 entitled to receive notice of the decision under ORS 215.416 as a person who is
14 adversely affected or aggrieved by the permit application decision. Ms. Hudson
15 owns property in the vicinity of the subject property. Ms. Hudson is adversely
16 affected because the “decision impinges upon [her] use and enjoyment of [] her
17 property or otherwise detracts from interests personal to the petitioners.” *Burke v.*
18 *Crook County*, 46 Or LUBA 413 (2004). Failure of Respondent to provide notice
19 to “adversely affected” parties as required by ORS 215.416(11)(a) confers standing

1 on those persons to appeal the decision to LUBA. *See Wilbur Residents v.*
2 *Douglas County*, 34 Or LUBA 643, 14 (1998).

3 **II. STATEMENT OF THE CASE**

4 **A. Nature of Decision and Relief Requested**

5 The decision under review is Respondent Jackson County's Planning Staff
6 Decision entitled Type 1 Land Use Authorization in File No. ZON2013-01427_FP,
7 Floodplain Development Permit, Staff Report, which became final on February 5,
8 2014. The decision approved a floodplain development permit with conditions for
9 existing development at the property indentified as Tax lot 600, Township 38
10 South, Range 1 West, Section 24 in Jackson County. A copy of the challenged
11 decision is included with this petition as Appendix A.

12 Petitioners respectfully request reversal of the decision because the
13 floodplain permit decision is moot, or otherwise invalid, for the same reasons
14 articulated in LUBA No. 2013-102/103. Alternatively, Petitioners request that the
15 decision be remanded because Respondent committed procedural error in
16 processing the application under the Type 1 review process, rather than Type 2,
17 and prejudiced Petitioners' substantial rights by not providing notice and
18 opportunity for a public hearing for a land use decision. Additionally, Respondent
19 acted outside its authority in processing the floodplain development permit
20 application while its predecessor was on appeal to LUBA.

1 **B. Summary of Arguments**

2 In the first assignment of error, Petitioners argue that the floodplain
3 development permit decision is moot, or otherwise invalid, for the same reasons
4 that Respondent found, and LUBA confirmed, the prior floodplain development
5 permit to be moot in LUBA No. 2013-102. Because the prospect of the
6 development on which the floodplain development permit was predicated has been
7 eliminated, the decision should be reversed and the permit vacated. If LUBA
8 should determine that the decision is not moot or otherwise invalid, Petitioners’
9 request that LUBA remand the decision for the reasons set forth in the second and
10 third assignments of error.

11 In the second assignment of error, Petitioners challenge Respondent’s
12 processing of the floodplain development permit as a Type 1 land use
13 authorization. Petitioners argue that Respondent erred because the Jackson County
14 Land Development Ordinance (LDO) Chapter 7 required the floodplain
15 development permit to be reviewed under the Type 2 process. Respondent also
16 erred in processing the permit as a Type 1 authorization because the decision
17 involved more than the simple application of clear and objective standards and
18 required the exercise of policy or legal judgment. Because Respondent processed
19 the application improperly it also committed procedural error by failing to provide
20 notice and an opportunity for a hearing, which prejudiced Petitioners’ substantial

1 rights. Petitioners request that LUBA reverse or remand the decision to
2 Respondent for processing in compliance with the LDO and the Type 2 review
3 procedures.

4 In the third assignment of error, Petitioners argue that Respondent acted
5 outside of its jurisdictional authority to process the floodplain development permit
6 application in this case. A local government lacks jurisdiction to modify a decision
7 that is pending on appeal before LUBA or an appellate court. Respondent's
8 decision effectively replaced and re-issued the floodplain development permit
9 decision subject to LUBA's jurisdiction in LUBA No. 2013-102/103. Because
10 Respondent exceeded its jurisdiction, LUBA should reverse or remand the
11 decision.

12 **C. Summary of Material Facts**

13 This appeal is closely related to the appeals in *Rogue Advocates v. Jackson*
14 *County*, ___ Or LUBA ___ (LUBA No. 2013-102/103 (consolidated), April 22,
15 2014) (*Rogue Advocates I*); detailed facts of this case are set out in the Order
16 LUBA No. 2013-102/103. A timeline of relevant events in this case and additional
17 facts are set out here.

18 The Applicant, Paul Meyer, has operated an asphalt batch plant at the
19 subject property since 2001. Rec. 83. The property is developed with an asphalt
20 batch plant, a crusher, a stockpile of aggregate materials and other accessory

1 structures. *Id.* The property is adjacent to Bear Creek to the west. Rec. 84. The
2 entire property is located within the mapped flood hazard overlay of Bear Creek.
3 Rec. 83–84, 90. A substantial portion of the property is located within the
4 designated Bear Creek floodway with the remainder of the property located within
5 the 100-year floodplain. Rec. 84, 90.

6 Mountain View Estates is a mobile home park located directly across Bear
7 Creek from the subject property. Portions of Mountain View Estates are also
8 located within the Bear Creek flood hazard zone. *See* map at Rec. 9. Petitioner
9 Rogue Advocates’ members include residents of Mountain View Estates.
10 Petitioner Chris Hudson is the manager and owner of the Mountain View Estates
11 property. Mountain View Estates is located within 300 feet of the subject property
12 at the northern end of the parcel.

13 The floodplain development permit at issue in this appeal is the third in a
14 series of land use actions on the subject property seeking retroactive approval for
15 existing development in the Bear Creek floodplain. *See* Rec. 1. The property is a
16 10.98-acre parcel zoned since 1982 as Rural Residential-5 (RR-5). Rec. 84. The
17 RR-5 zone does not allow aggregate mining or batch plants. The Applicant first
18 applied for nonconforming use verification for the asphalt batch plant, ZON2011-
19 01142_NC, and a floodplain development permit, ZON2011-01037_FP, in 2011.
20 Rec. 1. Petitioner Rogue Advocates appealed the nonconforming use application,

1 but the Applicant withdrew both the nonconforming use application and the
2 floodplain development application prior to a final decision by the hearings officer.
3 *Id.* The county subsequently initiated a county code enforcement proceeding for
4 the nonconforming use. *See Rogue Advocates I*, at 5. Following the code
5 enforcement, the Applicant again applied for verification of the asphalt batch plant
6 as a lawfully established nonconforming use as it existed in 2012, ZON2012-
7 01173_NC. *Id.* The Applicant also applied for a floodplain permit, ZON2012-
8 01172_FP. *Id.*; Application attached as Appendix B. County planning staff
9 administratively approved both permits under the county's Type 2 review process
10 for land use decisions. *Id.* Petitioner Rogue Advocates appealed both decisions to
11 the county hearings officer. *Id.*

12 The hearings officer determined that the asphalt batch plant was a lawfully
13 established nonconforming use, but found that some of the accessory structures on
14 the property were unapproved alterations or expansions and thus denied the
15 application to verify any of those alterations or expansions. *Id.*; Rec. 2. The
16 practical effect of this decision was to verify nonconforming use status for a
17 limited asphalt batch plant operation, as it existed in 2001. *Rogue Advocates I*, at
18 5. The hearings officer denied the floodplain permit application as moot on the
19 basis that the denial of the nonconforming use application eliminated the
20 development on which the floodplain permit was based. *Id.* at 5-6; Rec. 1. The

1 hearings officer's decisions became final on September 26, 2013. Petitioner Rogue
2 Advocates appealed both decisions to this board in LUBA No. 2013-102/103
3 (consolidated) by filing notices of intent to appeal on October 17, 2013.

4 Following the hearings officer's decisions, a Jackson County Code
5 Enforcement Officer issued Citation Nos. COD2013-00559 and COD2013-00560
6 on October 15, 2013. Rec. 66. Citation No. COD2013-00559 was for violation of
7 the floodplain overlay ordinance for failure to obtain a floodplain development
8 permit as required by LDO 7.2.2(C). *Id.* Citation No. COD2013-00560 was for
9 violations of Jackson County Code 1420 for commercial structures constructed
10 without building permits (i.e. the expansion or alteration of the verified
11 nonconforming asphalt batch plant). *Id.* Respondent and the Applicant then
12 entered into a Stipulated Order to resolve the code enforcement actions; the Order
13 was signed on October 18, 2013, three days after the citations were issued and one
14 day after Petitioner Rogue Advocates filed its Notice of Intent to Appeal in LUBA
15 No. 2013-102/103. Rec. 66-68. No public notice of the Stipulated Order was
16 provided.

17 Pursuant to the Stipulated Order, the Applicant was required to remove
18 certain structures from the property and to apply for the floodplain development
19 permit at issue in this appeal. Rec. 68. The Stipulated Order includes a diagram of
20 the property detailing those improvements, fixtures or portions of the property that

1 were determined by the hearings officer in the code enforcement action to be
2 lawful preexisting nonconforming uses and thus could remain on the property.
3 Rec. 69.¹ The Applicant then applied for the current floodplain development
4 permit, ZON2013-01427_FP, on October 25, 2013, seeking approval for the
5 improvements, fixtures and portions of the property in the floodplain that were
6 deemed to be valid nonconforming uses by the code enforcement decisions and
7 Stipulated Order. Rec. 15-35, 65, 81-93. Respondent processed and approved the
8 floodplain development permit with conditions on January 23, 2014. Rec. 7.
9 Respondent provided no public notice of the decision or opportunity for a hearing.

10 Meanwhile, Petitioner's appeals of the prior hearings officer decisions on the
11 nonconforming use verification and the floodplain development permit for the
12 subject property were pending review in LUBA No. 2013-102/103. LUBA issued
13 its final order and opinion in No. 2013-102/103 on April 22, 2014. In its order,
14 LUBA remanded the nonconforming use verification decision, finding that the
15 hearings officer erred in its verification of the nonconforming use by considering
16 unapproved alterations or expansions of the use that occurred in 2001. *Rogue*
17 *Advocates I*, at 22. LUBA ordered Respondent to determine the nature and extent
18 of the use as it existed in 1992. *Id.* LUBA affirmed the floodplain permit decision

¹ Petitioners note that the nonconforming use determination made in ZON2012-01173_NC, and the determination of lawful preexisting nonconforming uses for purposes of the Stipulated Order were made by two separate hearings officers.

1 by agreeing with the hearings officer that the floodplain permit appeal was mooted
2 by the fact that the development on which it was based was not verified. LUBA
3 concluded, “the only possible disposition of the first floodplain permit is to vacate
4 [it].” *Id.* at 27.

5 III. LUBA’S JURISDICTION

6 Under ORS 197.825(1), LUBA has exclusive jurisdiction to review land use
7 decisions. Land use decisions include final decisions by a local government
8 concerning the amendment or application of statewide planning goals, local
9 comprehensive plans, or land use regulations. ORS 197.015(10)(a)(A). The
10 challenged decision applies and interprets provisions of the Jackson County Land
11 Development Ordinance. *See* Rec. 2. Because the decision required interpretation
12 or the exercise of policy or legal judgment it is a land use decision and this appeal
13 is subject to LUBA’s jurisdiction. ORS 197.015(10)(b)(A); *see infra* Part IV.A.2.

14 The decision on appeal is the final decision of the county as it was processed
15 under the Type 1 review procedure for which no local appeal process is provided.
16 LDO Table 2.7-1. Where there is no procedure available for a local appeal of a
17 land use decision, it is appropriate to appeal that decision directly to LUBA. *See*
18 *Tarjoto v. Lane County*, 29 Or LUBA 408 (1995). LUBA also has jurisdiction
19 over land use decisions made without a hearing. ORS 197.830(2).

1 7.2.2(C) states, “A Floodplain Development Permit will be required prior to
2 initiating development activities in any Area of Special Flood Hazard....” Bear
3 Creek is designated such an area by the Federal Emergency Management Agency
4 Flood Insurance Rate Maps for Jackson County. Rec. 9.

5 The LDO defines development as “[a]ny many-made change to improved or
6 unimproved real estate, including but not limited to buildings or other structures,
7 mining, dredging, filling, grading, paving, excavation or drilling operations or
8 storage of equipment or materials.” LDO 13.3(65). As the hearings officer stated,
9 “[t]he denial of the Nonconforming Use Application eliminates the prospect of the
10 development upon which the Floodplain Permit application is predicated....”
11 *Rogue Advocates I*, at 25. Based on this result, the hearings officer determined that
12 the floodplain development permit was moot and vacated the permit approval. *Id.*
13 LUBA affirmed this determination, finding that because “the development the first
14 floodplain permit application was predicated on...was not verified, * * * the only
15 possible disposition of the first floodplain permit is to vacate that permit....” *Id.*, at
16 26-27.

17 Because the new floodplain permit is predicated on the same development as
18 the prior floodplain permit, and because LUBA confirmed that denial of the
19 nonconforming use verification mooted the permit and required vacatur, the
20 current floodplain permit is also moot and must be vacated. The reissued

1 floodplain permit stands on the same, or perhaps even shakier ground, as the prior
2 permit. As stated above, the current floodplain permit was processed and approved
3 in conformance with the hearings officer’s nonconforming use decision in
4 ZON2012-01173_NC and the resulting code enforcement actions and Stipulated
5 Order. Rec. 1-2. While the hearings officer in the nonconforming use decision
6 denied the nonconforming use verification application, the decision had the
7 practical effect of verifying the asphalt batch plant operation, as it existed in 2001.
8 *Rogue Advocates I*, at 5. LUBA further limited that verification by determining
9 that the asphalt batch plant installed in 2001 is an unapproved alteration or
10 expansion of the lawful nonconforming use and remanded the decision to the
11 county for verification of the nature and extent of the original nonconforming use.
12 *Id.* at 18-22.

13 “The practical effect of [the denial of nonconforming use verification and
14 LUBA’s order] is that intervenors must apply for and obtain a new floodplain
15 permit for *any* development in the floodplain.” *Id.* at 26. In sum, the Applicant
16 must apply for a new floodplain permit that is based on the remaining development
17 that has yet to be determined to be lawful in light of the nonconforming use
18 verification and LUBA’s remand order. Any permit decision made prior to the
19 determination of the lawfulness of the use can no longer be considered valid.

1 For the same reasons LUBA affirmed the hearings officer’s decision in
2 LUBA No. 2013-102, the only possible disposition of the floodplain permit is to
3 reverse Respondent’s decision approving the permit and order that the permit be
4 vacated. *Id.* at 27.

5 **B. SECOND ASSIGNMENT OF ERROR: Respondent Erred in**
6 **Processing the Floodplain Development Permit under a Type 1**
7 **Nondiscretionary Ministerial Review Procedure and Prejudiced**
8 **Petitioners’ Substantial Rights by Failing to Provide a Hearing.**

9 In the previous floodplain development permit review, ZON2012-
10 00172_FP, Respondent processed a floodplain development permit application for
11 the subject property under the Type 2 review procedures, providing notice and an
12 opportunity for a hearing to Petitioners. *See* LDO 3.1; LDO Table 2.7-1. For the
13 current floodplain permit Respondent processed the application under the more
14 limited Type 1 review procedures, which offers no opportunity for public
15 participation. *Id.*

16 The Jackson County Land Development Ordinance (LDO) provides for
17 different levels of land use permits and application review procedures. *See* LDO
18 Chapter 3.1; Appendix C. LDO 3.1.2 describes the Type I process:

19 “Type 1 uses are permitted by-right, requiring only nondiscretionary staff
20 review to demonstrate compliance with the standards of this Ordinance. A
21 Zoning Information Sheet may be issued to document findings or to track
22 progress toward compliance. Type 1 permits are limited to situations that do
23 not require interpretation or the exercise of policy or legal judgment.”
24

25 LDO 3.1.3 describes the Type 2 process:

1
2 “Type 2 uses are subject to administrative review. These decision are
3 discretionary and therefore require notice of a decision and opportunity for
4 hearing.”

5
6 Respondent processed the floodplain development permit application as a Type 1
7 land use authorization, instead of a Type 2 land use permit, which precluded
8 Petitioners’ participation. Respondent committed procedural error requiring
9 reversal or remand because the decision is classified by the LDO as one that
10 requires Type 2 review, it involved the exercise of policy or legal judgment, and
11 Petitioners’ substantial rights were prejudiced as a result of the error.

12 **1. The LDO Requires Type 2 Process**

13 The LDO Chapter 7 contains specific permit review and processing
14 requirements for development within the Floodplain Overlay District. LDO 7.2.
15 Section 7.2.2(C) provides a list of different Floodplain Development Permit
16 activities and specifies whether those activities are subject to Type 1 or Type 2
17 review procedures. LDO 7.2.2(C)(2) provides that a Type 2 floodplain
18 development permit is required for development projects not identified in LDO
19 7.2.2(C)(1) that occur “within the floodway where an Oregon registered
20 professional engineer is required to complete a no-rise certification (excluding
21 exceptions in 7.2.10)[.]” 7.2.2(C)(2)(c).

22 Respondent’s findings state “[p]ursuant to LDO 7.2.10 (C), a no-rise
23 certification will be submitted along with 7.2.10 (D); an Engineers statement of fill

1 allowed to be placed in the floodway will be designed to be stable under conditions
2 of flooding....” Rec. 2. Condition 5 of the floodplain development permit requires
3 that “the Applicant’s engineer shall submit the No-Rise Certification and
4 Engineers Statement pursuant to LDO 7.2.10 (C) and (D) for fill associated with
5 the septic tank removal.” Rec. 6. LDO sections 7.2.10(C) and (D) are provisions
6 governing fill material placed within the floodway; subpart (C) explicitly requires
7 an Oregon registered professional engineer to provide a no-rise analysis and
8 certification for fill in the floodway. LDO 7.2.10(C).

9 Respondent was required to review the floodplain development application
10 under the Type 2 review process because it permits development within the
11 floodway that requires a no-rise certification. LDO 7.2.2(C)(2)(c). Respondent
12 erred in processing the permit application as a Type 1 land use authorization.

13 **2. The Decision Required Exercise of Policy or Legal Judgment**

14 Pursuant to LDO 3.1.2, “Type 1 permits are limited to situations that do not
15 require interpretation or the exercise of policy or legal judgment.”² In this case,
16 Respondent’s approval of the floodplain permit involved the exercise of policy or
17 legal judgment, making the Type 1 process inapplicable.

² LUBA’s jurisdiction over land use decisions does not include decisions of a local government that are “made under land use standards that do not require interpretation or the exercise of policy or legal judgment[.]” ORS 197.015(10)(b)(A). For the same reasons that the Respondent improperly used the Type 1 process, LUBA has jurisdiction over this appeal. *See Johnson v. Jackson County*, 59 Or LUBA 94, 96 (2009)

1 In approving the floodplain development permit application Respondent
2 determined that the development was a lawfully established use. The Stipulated
3 Order identified portions of the subject property that do not qualify as lawful
4 preexisting nonconforming uses and required certain improvements and fixtures to
5 be removed as unlawful extensions of a lawful preexisting nonconforming use.
6 Rec. 68, 69. Respondent’s findings provide; “[a]lthough the asphalt operation was
7 lawfully established prior to the development of FEMA’s flood Insurance Study
8 model which established the Floodway boundary and pre-existing
9 ‘encroachments,’ the applicant propose[s] to locate all equipment, stockpiles and
10 buildings outside the floodway.” Rec. 2.³

11 Determining whether an improvement or fixture on the property was
12 lawfully established prior to zoning restrictions such that it can be verified as a
13 lawfully established nonconforming use requires a significant exercise of policy or
14 legal judgment. *See* LDO Chapter 11. For example, an applicant seeking
15 nonconforming use verification must provide facts demonstrating that the use was
16 lawfully established prior to the zoning ordinance that prohibits the use, it must
17 demonstrate the nature and extent of the use, and it must prove that the use has not
18 been discontinued or abandoned. LDO 11.8.1. In order for the hearings officer in

³ Petitioners dispute the accuracy of this finding. For purposes of this appeal, Petitioners limit their discussion of the finding to demonstrate that the finding required the exercise of legal judgment.

1 the code enforcement action and Stipulated Order to make findings as to what
2 improvements or fixtures were not lawful preexisting nonconforming uses, each of
3 the above elements would have to be considered and decided. The Stipulated
4 Order required that the Applicant “immediately cease and desist the use of any part
5 of the Premise, including improvements, fixtures or real property not found to be a
6 lawful pre-existing no[n] conforming use pursuant to the Order of this Hearings
7 Officer in Case No. COD2013-00559.” Rec. 68; *See also* Rec. 69.

8 Respondent also exercised legal judgment in finding that the Applicant had
9 complied with the Stipulated Order and code enforcement actions COD2013-
10 00559/COD2013-00560. The decision states that the Applicant complied with the
11 “Floodplain Development standards for new construction, accessory structures,
12 and development pursuant to Stipulated Order COD2013-00559/COD2013-00560,
13 and as stated in the application.” Rec. 2. Based on the Applicant’s site plan and the
14 hearings officer’s determination in the Stipulated Order, Respondent determined
15 which structures and fixtures were “development” for purposes of the floodplain
16 permit. *See* Rec. 3; *compare* Site plans at Rec. 8, “new construction proposed,”
17 and Rec. 9, “the Site Plan”.

18 These findings required the exercise of legal judgment. “[D]etermining
19 what structures or modifications on nearby properties constitute ‘development’ is
20 likely to require either interpretation or the exercise of some legal judgment.”

1 *Johnson v. Jackson County*, 59 Or LUBA at 98. In order to determine what
2 “development” the floodplain development permit would apply to, Respondent
3 was required to refer to and carry out the prior nonconforming use determination
4 that was on appeal in LUBA No. 2013-103, the code enforcement actions, and the
5 Stipulated Order. Rec. 1-2. “At the very least, the county was required to exercise
6 significant ‘legal judgment’ in deciding to rely on the [prior decisions], making the
7 ORS 197.015(10)(b)(A) exception to the statutory definition of land use decision
8 inapplicable.” *Hardesty v. Jackson County*, ____ Or LUBA ____, at 11 (LUBA
9 No. 2010-028/048 (consolidated), Nov. 16, 2010).

10 Respondent’s approval of the floodplain development permit during the
11 pending LUBA appeal and on the basis of an unsettled nonconforming use
12 verification determination required the exercise of policy or legal judgment.
13 Deciding what development was subject to the permit required an interpretation of
14 which portions of the property were lawful and which were not. The floodplain
15 permit decision was a land use decision for which the LDO mandates a Type 2
16 review process.

17 **3. Respondent’s Procedural Error Prejudiced Petitioners’ Substantial**
18 **Rights**

19
20 ORS 197.835(9)(a)(B) provides in relevant part:

21
22 “(9) In addition to the review under subsections (1) to (8) of this
23 section, the board shall reverse or remand the land use decision
24 under review if the board finds:

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“(a) The local government or special district:

* * *

“(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]”

Type 2 land use permits are discretionary decisions that require a notice of decision and opportunity for a hearing. LDO 3.1.3. As set out above, the floodplain development permit application was required to undergo a Type 2 review process and thus required Respondent to provide notice of the decision and an opportunity for a hearing. However, Respondent failed to provide any public notice of the decision or hearing opportunities. Contrary to the Staff Report statement that notice of the decision would be sent to property owners in the vicinity of the subject property, Petitioner Hudson, a property owner of land just 300 feet from the subject property, did not receive notice. *See* Rec. 7. There is also no indication in the record that Respondent sent notice to any party that was entitled to it under LDO 2.7.5(B), other than the Applicant.

If Respondent had provided notice of the decision, Petitioners would have requested a public hearing and would have offered evidence and testimony in opposition to the application. In fact, Petitioner Rogue Advocates attempted to submit comments to Respondent for consideration during the permit application review but Respondent rejected those comments as irrelevant to the permit

1 authorization. Rec. 14. Failure to provide notice and an opportunity for a hearing
2 required by the Type 2 process constitutes procedural error that provides a basis for
3 remand where that failure prejudiced petitioners' substantial rights. *Johnson v.*
4 *Jackson County*, 59 Or LUBA 94, 99-100 (2009); ORS 197.835(9)(a)(B).

5 Petitioners' substantial rights under ORS 197.835(9)(a)(B) include the
6 opportunity to participate locally by submitting testimony and to a full and fair
7 hearing. *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988). Petitioners were
8 not given any opportunity to participate in the local floodplain permitting decision
9 and thus had their substantial rights prejudiced. *See Krieger v. Wallowa County*,
10 35 Or LUBA 305, 308 (1998) (failure to provide code-required notice of
11 application and decision); *Casey Jones Well Drilling, Inc. v. City of Lowell*, 34 Or
12 LUBA 263, 282 (1998) (failure to provide code-required notice of final hearing).

13 Because Respondent failed to review the floodplain development permit
14 under the required Type 2 review procedure and therefore failed to provide notice
15 of the decision and an opportunity for a hearing, Respondent committed procedural
16 error that prejudiced Petitioners' substantial rights. The decision approving the
17 floodplain development permit should be reversed or remanded.

18 **C. THIRD ASSIGNMENT OF ERROR: Respondent Acted Outside its**
19 **Authority in Processing the Floodplain Development.**

20 ORS 197.835(9)(a)(A) provides that the board shall reverse or remand the
21 land use decision under review if the board finds that the local government

1 exceeded its jurisdiction. A local government has no jurisdiction to modify a land
2 use decision that is before LUBA or the Court of Appeals. *Rose City of Corvallis*,
3 49 Or LUBA 260 (2005); *Standard Insurance Co. v. Washington County*, 17 Or
4 LUBA 647, 660, *rev'd on other grounds*, 97 Or App 687 (1989). Here, the
5 challenged decision was submitted, reviewed, and became final all while the
6 floodplain permit decision and nonconforming use decision for the same property
7 were subject to appeals before LUBA in LUBA No. 2013-102/103. The
8 challenged decision effectively re-issued the floodplain permit while that permit
9 was on appeal before this Board and subject to the exclusive jurisdiction of LUBA.

10 In *Rose*, this Board reviewed a local government's decision that was issued
11 while a prior decision was under appeal to the Court of Appeals. LUBA found
12 that:

13 [T]he challenged decision does not simply *modify* the city's previous
14 decision; it *reissues* the entire decision appealed in *Staus*, with some
15 additional findings. In other words, the challenged decision purports
16 to re-adopt the same rezoning, development plans, tentative
17 subdivision plat and sign variance adopted by the city's earlier
18 decision. Arguably, the effect of the challenged decision is to *replace*
19 the city's earlier decision – the decision that is before the Court of
20 Appeals – with the challenged decision. While there may be
21 circumstances where a local government can effectively moot an
22 appeal before LUBA or the court by adopting a new decision that
23 nullifies or withdraws the decision on appeal, we have never held that
24 a local government can modify a decision on appeal and then readopt
25 or reissue that decision. Whatever the effect of the challenged
26 decision on the decision at issue in *Staus*, it is not accurate to say that
27 the challenged decision simply *modifies* the city's earlier decision.

1 *Rose*, 49 Or LUBA at 271. In other words, a local government lacks jurisdiction to
2 replace and re-issue a decision that is subject to the jurisdiction of this Board or an
3 appellate court.

4 Here, the challenged decision is substantially the same as the prior
5 floodplain permit application under LUBA’s jurisdiction at the time the challenged
6 decision was issued. Notably, the only meaningful difference between the prior
7 floodplain permit and the current floodplain permit is that the Applicant changed
8 the applicable permit review requirements under the LDO from a Type 2 Review
9 to a Type 1 Review. Compare Rec. 83-93 and Appendix B. Both permits sought
10 approval for floodplain development associated with the asphalt batch plant and
11 both proposed to “locate all equipment, stockpiles and buildings outside of the
12 Floodway.” Rec. 86 and Appendix B at 3.

13 The current floodplain permit served only as a reissuance of the floodplain
14 permit that was on appeal to LUBA, a reissuance that was made without any
15 opportunity for public participation. The permit did not act to “nullify or
16 withdraw” the floodplain permit that was on appeal to LUBA. In fact, Intervenors-
17 Respondent argued that this permit mooted the prior Floodplain Permit appeal, but
18 LUBA stated, “[i]t is not clear to us that the second floodplain decision moots the
19 appeal of the hearings officer’s decision vacating the first floodplain decision, as
20 intervenors argue.” *Rogue Advocates I*, at 26. Respondent’s action on the current

1 floodplain permit was nothing more than a modification of review procedures to
2 exclude the public and an attempt to replace the permit decision that was on appeal
3 to this Board. Such an action is outside Respondent's jurisdictional authority.
4 Because the challenged decision exceeded Respondent's jurisdiction, LUBA
5 should reverse or remand the decision.

6 **V. CONCLUSION**

7 For the above reasons, Petitioners respectfully request reversal of the
8 decision because the floodplain permit is moot or otherwise invalid for the same
9 reasons adopted by LUBA in its Order in LUBA No. 2013-102. In the alternative,
10 Petitioners request remand of the decision because Respondent erred in processing
11 the application under its Type 1 review procedures which prejudiced Petitioners'
12 substantial rights, and because Respondent acted outside of its jurisdictional
13 authority in processing the application.

14 Dated: June 2, 2014 Respectfully Submitted,

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Maura C. Fahey, OSB No. 133549
Of Attorneys for Petitioners
Rogue Advocates and Christine Hudson