

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 SOUTH GATEWAY PARTNERS,

4 *Petitioner,*

5 and

6 WENDY SIPOREN, SHAREEN VOGEL,

7 CHRISTINE LACHNER and MEDFORD

8 CITIZENS FOR RESPONSIBLE DEVELOPMENT,

9 *Intervenor-Petitioners,*

10 vs.

11 CITY OF MEDFORD,

12 *Respondent,*

13 and

14 WAL-MART STORES, INC.,

15 *Intervenor-Respondent.*

16 LUBA No. 2006-112

17 SOUTH GATEWAY PARTNERS,

18 *Petitioner,*

19 and

20 WENDY SIPOREN, SHAREEN VOGEL,

21 CHRISTINE LACHNER and MEDFORD

22 CITIZENS FOR RESPONSIBLE DEVELOPMENT,

23 *Intervenor-Petitioners,*

24 vs.

25 CITY OF MEDFORD,

26 *Respondent,*

27 and

28 WAL-MART STORES, INC.,

29 *Intervenor-Respondent.*

1 LUBA No. 2006-113

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3 WENDY SIPOREN, SHAREEN VOGEL,  
4 CHRISTINE LACHNER and MEDFORD  
5 CITIZENS FOR RESPONSIBLE DEVELOPMENT,  
6 *Petitioners,*

7  
8 vs.

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10 CITY OF MEDFORD,  
11 *Respondent,*

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13 and

14  
15 WAL-MART STORES, INC.,  
16 *Intervenor-Respondent.*

17  
18 LUBA No. 2006-124

19 ORDER

20 **UNCONTESTED MOTION TO INTERVENE**

21 Wal-Mart Stores, Inc. moves to intervene on the side of respondent in LUBA Nos.  
22 2006-112, 2006-113 and 2006-124. There is no opposition to the motion, and it is allowed.

23 **CONTESTED MOTION TO INTERVENE**

24 **A. The Parties**

25 The parties in this consolidated appeal are the City of Medford, Wal-Mart Stores, Inc.  
26 (Wal-Mart), South Gateway Partners (SGP), Medford Citizens for Responsible Development  
27 (MCRD), Wendy Siporen (Siporen), Shareen Vogel (Vogel), and Christine Lachner  
28 (Lachner). Although the issue we must resolve in this order is whether MCRD, Siporen,  
29 Vogel and Lachner met the statutory requirements to intervene in LUBA Nos. 2006-112 and  
30 2006-113, for convenience we sometimes refer to MCRD, Siporen, Vogel and Lachner  
31 collectively as intervenor-petitioners.

1           **B.       Wal-Mart I**

2           On April 2, 2004, the city’s site plan and architectural commission granted Wal-  
3 Mart’s application for site plan and architectural review approval for a 206,533-square foot  
4 retail store on 20.51 acres. That decision was appealed to the city council. Although the city  
5 council rejected SGP’s arguments that Wal-Mart’s transportation impact analysis (TIA) was  
6 inadequate, the city council ultimately denied Wal-Mart’s application, concluding that “the  
7 proposal was incompatible with uses and development on adjacent land.” That city council  
8 decision was appealed to LUBA by Wal-Mart (LUBA No. 2004-095) and by SGP (LUBA  
9 No. 2004-096). Wal-Mart, SGP, Siporen, Vogel and Lachner all participated in the city  
10 proceedings that led to this city council decision. MCRD apparently did not participate in  
11 those initial proceedings.

12           The Wal-Mart and SGP appeals were consolidated for LUBA review. Siporen  
13 intervened in the Wal-Mart appeal on the side of the city, but did not file a brief. LUBA  
14 sustained one of Wal-Mart’s assignments of error and three of SGP’s assignments of error.  
15 LUBA remanded the city council’s decision on March 11, 2005. *Wal-Mart Stores, Inc. v*  
16 *City of Medford*, 49 Or LUBA 52 (2005)(*Wal-Mart I*).

17           **C.       The City’s Proceedings on Remand**

18           At a November 17, 2005 meeting, the city council heard argument from Wal-Mart  
19 and SGP regarding how the city should proceed to respond to LUBA’s remand. The city told  
20 Siporen that she did not have standing to participate in the city’s proceedings on remand. On  
21 December 1, 2005, the city council approved Resolution 2005-270. In that resolution, the  
22 city council, among other things, remanded the matter to the site plan and architectural  
23 commission for “notice and a public hearing on the limited compatibility elements; and only  
24 additional argument from WalMart, SGP and staff on the traffic issues[.]” In effect, the city  
25 bifurcated its proceedings on remand into two separate efforts—one to address what the  
26 parties refer to as the “site compatibility” issues that resulted in LUBA sustaining Wal-

1 Mart's first assignment of error and a second to address what the parties refer to as "traffic  
2 issues."

3 The site plan and architectural commission held a public hearing on February 21,  
4 2006. That public hearing was limited to consideration of site compatibility issues. Siporen,  
5 Vogel and MCRD submitted written testimony. Record 506-36. The site plan and  
6 architectural commission held a public meeting on March 3, 2006, to consider legal  
7 arguments concerning the traffic issues. Only the city, Wal-Mart and SGP were permitted to  
8 present legal arguments. Lachner attempted to submit written arguments regarding traffic  
9 issues on behalf of herself, Siporen, Vogel and MCRD. Record 476, 483-86. Lachner was  
10 informed that the city would not consider that testimony, because none of them had standing  
11 to address traffic issues. Record 476. The site plan and architectural commission later  
12 issued two orders—one order to resolve site compatibility issues and one order to resolve  
13 traffic issues. Record 460-63. Both orders are supported by the same findings. Record 464-  
14 72. In those findings the site plan and architectural commission found that Siporen, Lachner  
15 and MCRD did not have standing to submit oral or written testimony on the traffic issues.  
16 Record 464. Intervenor-petitioners appealed the site plan and architectural commission  
17 orders to the city council. Record 281-94. In that appeal, intervenor-petitioners asserted,  
18 among other things, that the city was improperly denying them standing to participate  
19 regarding the traffic issues. Record 281-83.

20 The city council similarly denied petitioners standing to participate with regard to the  
21 traffic issues. Record 81-82. Intervenor-petitioners objected to the city's refusal to  
22 recognize their standing to participate in the city's consideration of the traffic issues. Record  
23 166. The city council adopted two nearly identical resolutions to resolve the site

1 compatibility and traffic issues. Resolution 2006-141 (site compatibility); Resolution 2006-  
2 141 (traffic issues). Record 79-106.<sup>1</sup>

3 **D. The Second Round of LUBA Appeals**

4 Resolutions 2006-141 and 2006-142 generated three LUBA appeals. In LUBA No.  
5 2006-112, SGP appeals Resolution No. 2006-141. In LUBA No. 2006-113, SGP appeals  
6 Resolution No. 2006-142. In LUBA No. 2006-124, Siporen, Vogel, Lachner and MCRD  
7 appeal Resolution No. 2006-141. For some reason, Siporen, Vogel, Lachner and MCRD did  
8 not file their own LUBA appeal to challenge Resolution 2006-142.

9 Although Siporen, Vogel, Lachner and MCRD did not file their own LUBA appeal to  
10 challenge Resolution 2006-142, Siporen, Vogel, Lachner and MCRD move to intervene on  
11 the side of petitioner SGP in LUBA Nos. 2006-112 and 2006-113. The city opposes the  
12 motion to intervene. Under ORS 197.830(7) there are only two requirements for standing to  
13 intervene in a LUBA appeal. First, an intervenor must file a timely motion to intervene.  
14 ORS 197.830(7)(a) and (c). There is no dispute that intervenor-petitioners' motion to  
15 intervene was timely filed. Second, an intervenor must have "appeared before the local  
16 government[.]" ORS 197.830(7)(b). The city contends that intervenor-petitioners did not  
17 appear below.

18 The parties have remarkably different views regarding the city's authority to limit a  
19 person's standing to participate in city proceedings that are conducted to address a LUBA  
20 remand. We need not and do not decide here whether the city committed legal error in  
21 denying Siporen, Vogel, Lachner and MCRD standing in this matter to present arguments

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<sup>1</sup> As far as we can tell, the same findings support both resolutions. There are three very minor differences in the text of the one-page resolutions. The first paragraph of Resolution 2006-141 includes the parenthetical (AC-03-182 Remand and Revision) and the otherwise identical first paragraph of Resolution 2006-142 includes the parenthetical (AC-03-182 Remand Traffic). "Remand and Revision" presumably refers to the revisions Wal-Mart made to its proposal to address site compatibility issues. The second numbered paragraph of Resolution 2006-142 includes a reference to "reconsideration of traffic issues by Site Plan and Architectural Commission," whereas the same paragraph in Resolution 2006-141 omits that reference.

1 concerning the traffic issues. We also need not decide here whether any such error on the  
2 city's part would require remand so that the city could allow them an opportunity to  
3 participate in the city's consideration of the traffic issues before rendering a decision on  
4 those issues.

5 However, we agree with intervenor-petitioners that they satisfy the ORS  
6 197.830(7)(b) appearance requirement. As intervenor-petitioners correctly point out,  
7 Resolution No. 2006-141 and Resolution No. 2006-142, together, constitute the city's  
8 decision following our remand in *Wal-Mart I*. Resolution No. 2006-141 and Resolution No.  
9 2006-142 are therefore part of the same land use proceeding. *See Rice v. City of Monmouth*,  
10 \_\_\_ Or LUBA \_\_\_ (LUBA No. 2006-137, August 29, 2006) (*citing DLCD v. Klamath*  
11 *County*, 25 Or LUBA 355, 357-61 (1993)). In *DLCD*, petitioner asserted that its appearance  
12 in the county's initial proceeding that led to the remanded decision was sufficient to satisfy  
13 the ORS 197.830(2)(b) requirement that a petitioner at LUBA must have "appeared" before  
14 the county. We agreed, concluding that it did not matter in that case that DLCD did not  
15 make a separate appearance in the county's second round of proceedings following LUBA's  
16 remand. 25 Or LUBA at 361.

17 The ORS 197.830(7)(b) requirement that an intervenor must have "[a]ppeared before  
18 the local government" and the ORS 197.830(2)(b) requirement that a petitioner at LUBA  
19 must have "[a]ppeared before the local government" are worded identically. We conclude  
20 the same rule applies under both statutes. The city does not dispute that Siporen, Vogel and  
21 Lachner appeared in the city proceedings that led to our decision in *Wal-Mart I*. It follows  
22 that Siporen, Vogel and Lachner "[a]ppeared before the local government," within the  
23 meaning of ORS 197.830(7)(b), and therefore have standing to intervene in LUBA Nos.  
24 2006-112 and 2006-113. MCRD apparently did not exist at the time of the city's  
25 proceedings that led to *Wal-Mart I* and did not appear in those proceedings. However,  
26 MCRD did attempt to make an appearance in the city's proceedings that led to the

1 resolutions that are before us in LUBA Nos. 2006-112 and 2006-113. The city refused to  
2 allow the requested appearance. At the very least, MCRD has standing to assign error in this  
3 appeal to the city refusal to grant it standing to participate in the city’s proceedings regarding  
4 traffic issues. *See Hugo v. Columbia County*, 34 Or LUBA 577, 582, *aff’d* 157 Or App 1,  
5 967 P2d 895 (1998) (“the [ORS 197.830(2)] appearance requirement is obviated where the  
6 local government fails to abide by the statutorily mandated procedures in a way that  
7 precludes petitioner’s ability to appear”).

8 Finally, we note one difference between the petitioners in *Rice* and *DLCD* and the  
9 intervenor-petitioners in this appeal. In *Rice* and *DLCD*, the petitioners in the LUBA appeal  
10 of the local government decision following LUBA’s remand had also been petitioners in the  
11 LUBA appeals that led to the initial LUBA remand. As we note above, Siporen intervened  
12 in the Wal-Mart appeal *on the side of respondent*, and Siporen did not file a brief. Vogel,  
13 Lachner and MCRD did not appear in the Wal-Mart or SPG LUBA appeals as a party. The  
14 city assigns great significance to Siporen’s failure to file a brief in the Wal-Mart LUBA  
15 appeal and to Vogel’s, Lachner’s and MCRD’s failure to participate as parties in those  
16 LUBA appeals. For purposes of determining whether intervenor-petitioners satisfy the ORS  
17 197.830(7)(b) requirement that intervenor-petitioners must have “[a]ppeared before the local  
18 government,” we assign no legal significance to those failures. Those failures with regard to  
19 the *LUBA proceedings* have no bearing at all on whether intervenor-petitioners appeared in  
20 the *city’s proceedings*.

21 For the reasons set out above, we conclude that Siporen, Vogel, Lachner and MCRD  
22 satisfy the ORS 197.830(7)(b) requirement that they must have “[a]ppeared before the local  
23 government.” Their motion to intervene in LUBA Nos. 2006-112 and 2006-113 is granted.

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Dated this 3<sup>rd</sup> day of November, 2006.

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Michael A. Holstun  
Board Member