

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 ERNEST J. MAZOROL III and

4 SHELLEY L. JOHNSON,

5 *Petitioners,*

6 vs.

7 CITY OF BEND,

8 *Respondent,*

9 and

10 MIKE KNOELL,

11 *Intervenor-Respondent.*

12 LUBA No. 2006-026

13 FINAL OPINION

14 AND ORDER

15 Appeal from City of Bend.

16 Ernest J. Mazorol III and Shelley L. Johnson, Bend, represented themselves.

17 James Forbes, Bend, represented respondent.

18 Tia M. Lewis, Bend, represented intervenor-respondent.

19 DAVIES, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,  
20 participated in the decision.

21 DISMISSED

22 06/20/2006

23 You are entitled to judicial review of this Order. Judicial review is governed by the  
24 provisions of ORS 197.850.

1 **INTERVENOR’S STATUS**

2 In an order dated April 6, 2006, we granted intervenor’s motion to intervene.  
3 Petitioners now seek to revoke intervenor’s status and bar his participation in this appeal.  
4 Petitioners argue that because intervenor sold his interest in the subject property he “no  
5 longer has legal authority to proceed” in the appeal.

6 Pursuant to ORS 197.830(7) and OAR 661-010-0050, in order to participate as an  
7 intervenor in a LUBA appeal, a person must only have appeared below and filed a timely  
8 motion to intervene. Intervenor satisfied both of those requirements. The fact that intervenor  
9 has sold the property does not change either of those facts. Petitioners have provided no  
10 authority, and we are aware of none, that petitioner’s sale of the subject property has the  
11 legal effect of barring his right to participate in this appeal.

12 Petitioners’ motion to revoke intervenor’s status is denied.

13 **MOTION TO DISMISS**

14 The city issued intervenor a building permit to renovate the subject property on June  
15 24, 2005. Petitioners heard about the building permit by word of mouth, and by January 6,  
16 2006 they obtained a copy of the building permit and application. The decision apparently  
17 bothered petitioners for a number of weeks, and they eventually measured structures on the  
18 subject property. Upon measuring the structures on the property, petitioners became  
19 convinced that the application violated the 35% lot coverage standard because of a detached  
20 shed that was not included in the calculations. Petitioners took their concerns to the planning  
21 director on February 2, 2006, and asked that the building permit be revoked and intervenor  
22 be required to obtain a variance. The planning director apparently denied petitioners’ request  
23 to revoke the building permit but instead suspended the building permit until intervenor  
24 could obtain a demolition permit for the shed. Petitioners then filed this appeal on February  
25 23, 2006. Intervenor moves to dismiss the appeal because (1) the challenged decision is not  
26 a land use or limited land use decision, (2) petitioners did not exhaust their administrative

1 remedies below, and (3) the appeal was not timely filed. We address only one of  
2 intervenor's arguments for dismissing the appeal because it is dispositive: the timeliness of  
3 the appeal.<sup>1</sup>

4 If the general 21-day appeal deadline set forth in ORS 197.830(9) applied, then  
5 petitioners' appeal would be untimely.<sup>2</sup> However, the building permit was issued without  
6 notice or a hearing. Accordingly, depending upon whether the challenged decision is a land  
7 use decision or a limited land use decision, ORS 197.830(3) or ORS 197.830(5) might  
8 apply.<sup>3</sup>

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<sup>1</sup> For purposes of determining whether the appeal is timely, we assume that the challenged decision is a land use decision or a limited land use decision.

<sup>2</sup> As relevant, ORS 197.830(9) provides that "[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 sought to be reviewed becomes final."

<sup>3</sup> 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:

"(a) Within 21 days of actual notice where notice is required; or

"(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(5) provides:

"If a local government makes a limited land use decision which is different from the proposal described in the notice 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:

"(a) Within 21 days of actual notice where notice is required; or

"(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

1           Regardless of whether ORS 197.830(3)(a) or (b) or ORS 197.830(5)(a) or (b) applies,  
2 petitioners had both actual and constructive notice of the decision by January 6, 2006.  
3 Petitioners did not appeal the decision until February 23, 2006. Although petitioners discuss  
4 the planning director’s apparent suspension of the building permit until a demolition permit  
5 could be obtained, the challenged decision is the building permit itself, not any action by the  
6 planning director refusing to revoke the building permit or suspending the building permit  
7 subject to conditions.<sup>4</sup> Because the notice of intent to appeal was filed more than 21 days  
8 after petitioners had actual and constructive notice of the decision, the appeal was not timely  
9 filed.

10   **MOTION TO TRANSFER TO CIRCUIT COURT**

11           Petitioners also filed a motion to transfer to circuit court in the event LUBA  
12 determines that the decision is not a land use decision. When an appeal is dismissed as  
13 untimely, however, a transfer to circuit court is not appropriate. *Miner v. Clatsop County*, 46  
14 Or LUBA 467, 479 (2004).

15           Accordingly, this appeal is dismissed.

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<sup>4</sup> Although there are materials in the record post-dating any such decision by the planning director indicating that the building permit was suspended, there is nothing in the record that would constitute a final decision by the planning director to that effect.