

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 JAMES PHILLIPS,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF HAPPY VALLEY,
10 *Respondent.*

11
12 LUBA No. 2015-064

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from City of Happy Valley.

18
19 James Phillips, Clackamas, represented himself.

20
21 Christopher D. Crean and Ashley O. Boyle, Portland, represented
22 respondent.

23
24 RYAN, Board Member; BASSHAM, Board Chair; HOLSTUN Board
25 Member, participated in the decision.

26
27 DISMISSED 10/01/2015

28
29 You are entitled to judicial review of this Order. Judicial review is
30 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a planning commission decision approving a variance to the city’s minimum floor area ratio (FAR) for a restaurant/retail building.

JURISDICTION

On June 9, 2015, the planning commission issued a final land use decision after holding a hearing on an application for a variance to the city’s minimum floor area ratio (FAR) requirement. The Notice of the Decision was mailed on June 11, 2015. Petitioner filed his notice of intent to appeal on August 25, 2015, 77 days after the challenged decision became final.

ORS 197.830(9) describes the time for filing appeals of land use decisions and limited land use decisions, and provides in relevant 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 sought to be reviewed becomes final. * * *”

Respondent moves to dismiss the appeal, arguing that petitioner’s notice of intent to appeal was not timely filed under ORS 197.830(9), and that additionally petitioner failed to exhaust his local remedies.

Petitioner responds that the delay in filing is excused by ORS 197.830(3), which provides:

“If a local government makes a land use decision without providing a hearing[,] * * * 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

1 “(b) Within 21 days of the date a person knew or should have
2 known of the decision *where no notice is required.*” (Emphases
3 added.)

4 According to petitioner, actual notice of the decision, within the meaning of
5 ORS 197.830(3)(a), was required to be given to him, because under Happy
6 Valley Municipal Code (HVMC) 16.61.040, notice of all type III quasi-judicial
7 decisions is required to be mailed to “[a]ny person who submits a written
8 request to receive notice[.]”¹ According to petitioner, he submitted a written
9 request to a city planner to receive notification of type III quasi-judicial land
10 use decisions for certain properties that included the subject property. That
11 written request for notice was submitted on October 13, 2014, and on October
12 15, 2014 petitioner received email confirmation from that city planner that the

¹ HVMC 16.61.040 provides in relevant part:

“D. Notice of Hearing.

“1. Mailed Notice. The City shall mail the notice of the Type III action. The records of the Clackamas County Assessor’s Office are the official records for determining ownership. Notice of a Type III application hearing or Type II appeal hearing shall be given by the Planning Official or designee in the following manner:

“a. At least twenty-one (21) days before the hearing date, notice shall be mailed to:

“ * * * * *

“vi. Any person who submits a written request to receive notice[.]”

1 city would “endeavor to include [petitioner] in the notice mailings * * * [.]”
2 Response to Motion to Dismiss - Exhibit A at 2. According to petitioner, he
3 never received notice of the planning commission hearing that led to the
4 challenged decision.

5 In *Aleali v. City of Sherwood*, 262 Or App 59, 76 (2014), the court
6 affirmed LUBA’s dismissal of an appeal that was filed later than 21 days after
7 the decision became final. The court held that the right to a delayed appeal
8 under ORS 197.830(3) is “solely a function of whether procedures required by
9 state law were followed or not[:.]”

10 “[T]he legislature intended ORS 197.830(3) to expand the time to
11 file a notice of intent to appeal to LUBA under ORS 197.830(9)
12 *when a hearing is not held in some circumstances or when a party*
13 *is precluded from participating in a quasi-judicial land use*
14 *hearing because the notice of the hearing is defective under state*
15 *law.” Id. at 66 (emphasis added, footnote omitted).*

16 The city asserts that petitioner’s right to notice does not arise from a state law
17 requirement, but arises solely from a local code requirement, and therefore
18 ORS 197.830(3) does not allow petitioner to file his appeal outside of the time
19 allowed by ORS 197.830(9).

20 In response, petitioner filed an amended response conceding that ORS
21 197.830(3)(a) does not allow him to file his appeal, but now argues that ORS
22 197.830(3)(b) applies and allows his late filing.

23 ORS 197.830(3)(a) and (b) apply where a local government makes a
24 decision “without providing a hearing[.]” In *Aleali*, the court explained that the

1 construction of the various statutes governing appeals to LUBA “implies that
2 ‘without providing a hearing’ in ORS 197.830(3) only includes decisional
3 processes where no hearing is held or where prehearing notice is not provided
4 as required by ORS 197.763.” *Id.* at 75-76. ORS 197.830(3)(a) addresses the
5 circumstance where notice of a hearing is required by state law, a hearing is
6 actually held, and a final decision is made, but a person is precluded from
7 participating in the hearing because the “notice of hearing is defective under
8 state law.” In that circumstance, the local government has made a decision
9 “without providing a hearing” to that person within the meaning of ORS
10 197.830(3), and the time limits set out in ORS 197.830(3)(a) apply to an
11 appeal. *Id.* Accordingly, the phrase “without providing a hearing” in ORS
12 197.830(3) includes situations where (1) no hearing is held; or (2) a hearing is
13 held but notice required under state law is not provided.

14 However, where a hearing is held, ORS 197.830(3)(b) cannot operate to
15 expand the time for filing an appeal. That is so because ORS 197.830(3)(b)
16 applies only “where no notice is required.” The “notice” that is “required”
17 refers to notice of a hearing under state law. *Aleali*, 262 Or App at 66. ORS
18 197.763(2) provides for notice of all quasi-judicial land use hearings to various
19 persons, and therefore there will never be a circumstance where a hearing is
20 held but “no notice is required” within the meaning of ORS 197.830(3)(b) for

1 that hearing.² Stated differently, if a hearing is held, then notice is required and
2 ORS 197.830(3)(b) simply does not apply. ORS 197.830(3)(b) can only apply
3 where the local government makes a decision “without providing a hearing” *at*
4 *all*. Accordingly, because the city held a hearing, petitioner has failed to
5 demonstrate that ORS 197.830(3)(b) allows late filing of his appeal.

6 Respondent’s motion to dismiss is granted.

7 The appeal is dismissed.

² ORS 197.763(2) requires notice of the land use hearing to be given to property owners within a specified distance “of the property which is the subject of the notice[.]” generally between 100 and 500 feet of the property.