

1 Opinion by Gustafson.

2 **NATURE OF DECISION**

3 Petitioner appeals a city council limited land use
4 decision, which the city approved October 5, 1993. The
5 approval allowed Willamette & Pacific Railroad (intervenor)
6 to construct an approximately 13,000 square foot locomotive
7 repair facility on a site in the city's industrial zone.
8 Intervenor subsequently constructed the facility, which has
9 been operational since sometime prior to November 13, 1994.

10 Petitioner filed a notice of intent to appeal the
11 city's decision to this Board on October 24, 1995. In the
12 notice petitioner states, summarily, that he was not aware
13 of the city's decision until October 4, 1995.

14 **MOTION TO DISMISS**

15 The city and intervenor (respondents) both move to
16 dismiss petitioner's appeal as untimely filed.

17 Under ORS 197.830(8), a notice of intent to appeal a
18 land use decision or limited land use decision must be filed
19 within 21 days after the decision becomes final. ORS
20 197.830(4) tolls the time period in which an appeal of a
21 limited land use decision must be filed in certain
22 situations not relevant here. In addition, although ORS
23 197.830 does not expressly allow extensions for filing a
24 notice of intent to appeal where notice is not provided, the
25 filing requirements under that statute presuppose a
26 situation where the required notice was provided. Where the

1 city fails to provide the required notice, the time for
2 filing the notice of intent to appeal is tolled until actual
3 notice is received. See Strawn v. City of Albany, ___ Or
4 LUBA ___ (LUBA No. 95-128, November 20, 1995); Flowers v.
5 Klamath County, 98 Or App 384, 780 P2d 227 (1989).

6 In support of its motion to dismiss, intervenor
7 explains that, following construction of intervenor's
8 locomotive repair facility, in late 1994 intervenor
9 reconfigured various rail lines at its rail yard to better
10 serve the facility. That reconfiguration included removing
11 an unused section of track leading to petitioner's business.
12 Based on contacts between intervenor and petitioner or
13 petitioner's attorney regarding the track removal,
14 intervenor asserts that, at the very latest, petitioner knew
15 or should have known of the decision allowing construction
16 of the facility no later than late 1994.

17 To support its assertions, intervenor provides
18 affidavits from two employees. Intervenor's manager
19 explains that in December, 1994 he corresponded with
20 petitioner's attorney regarding the reasons for the track
21 removal. The letter, a copy of which is attached to the
22 affidavit, mentions the locomotive repair facility. Another
23 then-employee explains that in late 1994, he spoke with
24 petitioner at the location of the track removal. As stated
25 in the affidavit,

26 "I cannot recall whether I specifically mentioned
27 the locomotive repair building in that discussion

1 [about the track removal], but we held our talk
2 approximately 500 feet from the building. The
3 building was in plain view. It would have been
4 difficult for [petitioner] not to have been aware
5 of the building." Affidavit of Anthony W.
6 Mogytych, in support of Intervenor's Motion to
7 Dismiss.

8 Petitioner did not respond to the motions to dismiss.
9 Petitioner's notice of intent to appeal does not explain how
10 he first learned of the challenged decision on October 4,
11 1995. Nor does he allege he was entitled to, but did not
12 receive notice of the decision.

13 Petitioner has the burden to establish our
14 jurisdiction. Petitioner has not alleged he was entitled to
15 notice of intervenor's limited land use application under
16 ORS 197.195(3)(b). Moreover, even if he had been entitled
17 to notice of the proposal, he would have been required to
18 file his notice of intent to appeal within 21 days of
19 receiving actual notice of the decision. Petitioner has not
20 provided any explanation to substantiate his allegation that
21 he first learned of the challenged decision October 4, 1995,
22 nor has he refuted the intervenor's supported statements
23 that petitioner learned of the decision no later than late
24 1994.

25 Petitioner's notice of intent to appeal, filed October
26 24, 1995, is untimely.

27 Petitioner's appeal is dismissed.