

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

3
4 LLOYD DISTRICT COMMUNITY)
5 ASSOCIATION,)
6)
7 Petitioner,)
8)
9 vs.)
10)
11 CITY OF PORTLAND,)
12)
13)
14 Respondent,)
15)
16 and)
17)
18 LEGACY HEALTH SYSTEM,)
19)
20 Intervenor-Respondent.)

LUBA No. 95-102
FINAL OPINION
AND ORDER

21
22
23 Appeal from City of Portland.

24
25 A. Richard Vial, Lake Oswego, represented petitioner.

26
27 Michael A. Holstun, Senior Deputy City Attorney,
28 Portland, represented respondent.

29
30 Jack L. Orchard, Portland, represented intervenor-
31 respondent.

32
33 HANNA, Referee; LIVINGSTON, Chief Referee; GUSTAFSON,
34 Referee, participated in the decision.

35
36 DISMISSED 02/16/96

37
38 You are entitled to judicial review of this Order.
39 Judicial review is governed by the provisions of ORS
40 197.850.

1 Opinion by Hanna.

2 **NATURE OF DECISION**

3 Petitioner appeals a May 9, 1995 "Notice of Use
4 Determination" issued by the city planning bureau.

5 **MOTION TO INTERVENE**

6 Legacy Health System (intervenor) moves to intervene on
7 the side of respondent. There is no opposition to the
8 motion, and it is allowed.

9 **FACTS**

10 On February 21, 1995, the city planning bureau issued a
11 memorandum regarding a "proposed intermediate psychiatric
12 hospital at the former Holladay Park Hospital site." Record
13 20. That memorandum begins:

14 "The purpose of this memorandum is to notify you
15 that the proposed intermediate psychiatric
16 hospital at the former Holladay Park Hospital site
17 is classified as a Medical Center use under
18 [Portland City Code] 33.920.450 and is permitted
19 under previously approved land use reviews. This
20 memorandum includes a summary of the pertinent
21 facts and assumptions upon which this conclusion
22 is based. * * *

23 "* * * * *"

24 The memorandum then describes previous conditional use
25 approvals for the site, and the applicable code provisions.

26 The memorandum concludes:

27 "Staff has received a letter from the Lloyd
28 District Community Association expressing concern
29 about this facility and stating the belief that a
30 review through the Type III procedure is

1 appropriate.^[1] While staff is supportive of
2 citizen participation in land use reviews and
3 decision-making, the conclusion that no further
4 land use review is required at this time is based
5 upon the application of a set of facts to existing
6 law. There is no discretion on this matter. It
7 is based upon a set of facts and to a specific
8 description of the proposal. The conclusion of
9 this memorandum will no longer apply if the facts
10 change or if the proposal is altered." Record 23.

11 The memorandum closes with a notation that a copy of it was
12 provided to petitioner.

13 On March 29, 1995, petitioner's attorney sent a letter
14 to the planning director requesting that the proposed use be
15 evaluated through a Type III review. On May 1, 1995, the
16 planning director responded to the March 29, 1995 letter,
17 informing petitioner that the city was denying the "request
18 that the proposed intermediate psychiatric hospital be
19 reviewed through the Type III procedure." Record 3.

20 On May 9, 1995, the planning bureau issued a "Notice of
21 Use Determination" regarding the proposed use. It is
22 addressed to property owners and states:

23 "On April 7, 1995 the City of Portland Bureau of
24 Buildings issued building permits to allow tenant
25 improvements at the former Holladay Park Hospital
26 at 220 NE Multnomah and 1225 NE 2nd Avenue to use
27 a part of this site for the Oregon State Mental
28 Hospital * * *.

29 "The City of Portland Bureau of Planning has
30 determined that the proposed 68-bed hospital use

¹A Type III review is a decision making process under the Portland City Code that provides for a public hearing.

1 which includes psychiatric patients is a use
2 permitted under CU 6-79, a conditional use for a
3 hospital expansion which was granted in 1979. The
4 reasons for this decision have been communicated
5 to the Lloyd District Association. Any parties
6 interested in a copy of this letter may contact
7 [the city planning bureau.]

8 "If you wish to appeal this determination, you
9 must do so within 21 days of the date of this
10 letter. Such an appeal must be filed with the
11 State of Oregon Land Use Board of Appeals (LUBA) *
12 * *." Record 1.

13 On May 25, 1995, petitioner filed a notice of intent to
14 appeal the May 9, 1995 notice.

15 **MOTIONS TO DISMISS**

16 The city and intervenor (respondents) each move to
17 dismiss this appeal. Respondents contend the challenged
18 decision is not a land use decision subject to our
19 jurisdiction and consequently, the city made no appealable
20 land use decision on this matter. They further contend
21 that, if any land use decision was made, it was made on
22 February 21, 1995, and petitioner has not timely challenged
23 that decision.

24 Petitioner responds that the May 9, 1995 notice was a
25 land use decision or a limited land use decision because it
26 was the city's final determination on the matter.
27 Petitioner further responds that, if that notice was not a
28 land use decision, the May 1, 1995 letter from the planning
29 director was the final land use decision. According to
30 petitioner, it did not receive the May 1, 1995 letter until

1 May 4, 1995, and, therefore, its notice of intent to appeal
2 was timely. Petitioner contends the February 21, 1995
3 memorandum was not the final decision on this matter because
4 of the acknowledgment in the final sentence that the
5 conclusion was based on the particular set of facts
6 proposed. Finally, petitioner contends that, regardless of
7 when a decision was made, the decision was not final until
8 May 9, 1995, because that is the only document in which
9 petitioner was provided notice of its appeal rights.

10 We first address petitioner's final argument, that the
11 May 9, 1995 notice was the final decision, since that was
12 the date on which the city provided notice of appeal rights.
13 For purposes of this argument, petitioner's reliance on the
14 May 9, 1995 notice rests on the city's having made a limited
15 land use decision in connection with this matter. See
16 Forest Park Neigh. Assoc. v. City of Portland, 27 Or LUBA
17 215 (1995) (under 197.195(3)(c)(H), the time for appealing a
18 limited land use decision is tolled until notice of appeal
19 rights is provided).

20 ORS 197.015(12) defines a limited land use decision as
21 follows:

22 "'Limited land use decision' is a final decision
23 or determination made by a local government
24 pertaining to a site within an urban growth
25 boundary which concerns:

26 "(a) The approval or denial of a subdivision
27 or partition, as described in ORS
28 chapter 92.

1 "(b) The approval or denial of an application
2 based on discretionary standards
3 designed to regulate the physical
4 characteristics of a use permitted
5 outright including but not limited to
6 site review and design review."

7 The city's determination on February 21, 1995, to allow
8 use of the Holladay Park Hospital as a continuation of an
9 existing conditional use permit does not meet the
10 substantive criteria for a limited land use decision in
11 either ORS 197.015 (12)(a) or (b). Nor do the city's May 1,
12 1995 and May 9, 1995 confirmations of that initial
13 determination satisfy any of those substantive criteria.
14 Since the city did not make a limited land use decision, the
15 statement of appeal rights in the May 9, 1995 notice is not
16 dispositive of whether the appeal was timely filed.

17 Petitioner's other arguments rest on either the May 1,
18 1995 letter or the May 9, 1995 notice being a timely filed
19 final land use decision.

20 ORS 197.015(10) states, in relevant part, that a land
21 use decision:

22 "(a) Includes:

23 "(A) A final decision or determination made
24 by a local government or special
25 district that concerns the adoption,
26 amendment or application of:

27 "(i) The goals;

28 "(ii) A comprehensive plan provision;

29 "(iii) A new land use regulation; or

1 "(B) A final decision or determination of a
2 state agency other than the commission
3 with respect to which the agency is
4 required to apply the goals; and

5 "(b) Does not include a decision of a local
6 government:

7 "(A) Which is made under land use standards
8 which do not require interpretation or
9 the exercise of policy or legal
10 judgment;

11 "(B) Which approves or denies a building
12 permit issued under clear and objective
13 land use standards;

14 "(C) Which is a limited land use decision[.]

15 "* * * * *

16 Citing DLCD v. Benton County, 27 Or LUBA 49, 57 (1994),
17 petitioner asserts the May 9, 1995 notice is a final land
18 use decision because the director "has clearly referred to
19 land use regulations, made findings of fact regarding what
20 the proposed uses for the Holladay site were, and decided
21 that the regulations did not apply." Opposition to Motions
22 to Dismiss 2.

23 Even if those actions by the planning director
24 constitute a land use decision, they did not occur through
25 the May 9, 1995 notice. That notice does no more than
26 reiterate a determination the city previously made. Other
27 than a statement of appeal rights, the May 9, 1995 notice
28 contains no new analysis, information or decision. It is
29 not an independently appealable decision. Even assuming
30 that the city's February 21, 1995 determination was a land

1 use decision, an affirmation of a previous land use decision
2 does not create a new appealable decision. Smith v. Douglas
3 County, 17 Or LUBA 809, 817, aff'd 98 Or App 379, rev den
4 308 Or 608 (1989). See also Caraher v. City of Klamath
5 Falls, ___ Or LUBA ___ (LUBA No. 95-090 November 20, 1995);
6 Kalmiopsis Audubon Society v. Curry County, 27 Or LUBA 640,
7 aff'd 131 Or App 308, 884 P2d 894 (1994).

8 Nor does the inclusion of a statement of appeal rights
9 convert the May 9, 1995 notice into a separate land use
10 decision. The city asserts that it included the notice of
11 appeal rights in the May 9, 1995 notice in the event the
12 notice constituted a recipient's first notice of the city's
13 earlier determination. In that case, the city reasons that,
14 if the determination were found to be a land use decision,
15 an appeal within 21 days of the notice would have been
16 timely.

17 The city is correct that, had the May 9, 1995 notice
18 been an individual's or group's first notice of the earlier
19 determination, an appeal would have been timely if it had
20 been filed within 21 days of that actual notice. However,
21 that would have been true regardless of whether the city
22 included the statement of appeal rights in the May 9, 1995
23 notice.

24 Moreover, the statement of appeal rights in the May 9,
25 1995 notice cannot extend the deadline for appealing a
26 previous final land use decision in contravention of state

1 law. ORS 197.830(8) requires that the notice of intent to
2 appeal a land use decision must be filed within 21 days
3 after the decision becomes final. For a land use decision
4 for which a required hearing is not provided, that date may
5 be tolled until either actual notice is received, or a party
6 knew or should have known of the decision. ORS
7 197.830(3)(b). However, a local government cannot extend
8 the deadline for filing a notice of intent to appeal on its
9 own initiative. Unless the May 9, 1995 notice constituted
10 actual notice of the city's determination, the date of that
11 notice cannot be used to calculate the appeal period under
12 ORS 197.830(8). In petitioner's case, that notice did not
13 constitute such actual notice.

14 Petitioner also argues that the appeal is timely, since
15 the May 1, 1995 letter is also a final land use decision,
16 and petitioner filed the notice of intent to appeal within
17 21 days of when it received a copy of it on May 4, 1995.²

18 Petitioner's argument fails in both respects. The date
19 for computing when an appeal period allowed by OAR 661-10-
20 015(1)(a) begins to run is not the date the notice of
21 decision is received. Rather, it is the date the decision
22 becomes final. ORS 197.830(8). If the May 1, 1995 letter

²The fact that the May 1, 1995 letter was not identified in the notice of intent to appeal does not provide a basis for dismissing the appeal, so long as the appeal is filed within 21 days of the actual final decision. See Caraher, supra; Kalmiopsis, supra. Accordingly, if petitioner had filed the notice within 21 days of the city's May 1, 1995 letter, that appeal would have been timely.

1 were a final land use decision, the appeal period for the
2 May 1, 1995 letter would have expired before petitioner's
3 May 25, 1995, notice of intent to appeal was filed with
4 LUBA.

5 Moreover, the May 1, 1995 letter is not a final land
6 use decision. It is the planning director's response to the
7 March 29, 1995 letter from petitioner's attorney. That
8 letter reiterated both petitioner's previous objection to
9 the February 21, 1995 memorandum and petitioner's request
10 that the proposed use be evaluated through a Type III
11 proceeding. The March 29, 1995 letter is, essentially, an
12 incomplete and untimely local appeal of the February 21,
13 1995 memorandum. The city's May 1, 1995 letter of response
14 to an incomplete and untimely appeal does not constitute a
15 separate land use decision.

16 If the city made a land use decision, it did so on
17 February 21, 1995 through its determination that the
18 proposed use is allowed pursuant to the existing conditional
19 use permit. However, we need not decide whether the
20 February 21, 1995 memorandum was a land use decision, since
21 petitioner did not file a timely appeal of that memorandum.

22 The motions to dismiss are granted.

23 This appeal is dismissed.