BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LUCYLLE L. SMITH, Petitioner, vs. CITY OF BEND, Respondent, and GARY WOLFE, Intervenor-Respondent.	LUBA No. 95-189
	FINAL OPINION AND ORDER

Appeal from City of Bend.

Peggy Hennessy, Portland, represented petitioner.

Ronald L. Marceau, Bend, represented respondent.

David M. Jaqua, Redmond and Anne C. Davies, Eugene, represented intervenor-respondent.

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

DISMISSED 02/21/96

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

Gustafson, Referee.

Petitioner appeals a limited land use decision which the city approved on March 22, 1995, granting tentative plan approval for a 40-lot subdivision. Intervenor-respondent (intervenor) moves to dismiss this case on the grounds that (1) petitioner failed to exhaust her administrative remedies, and (2) petitioner did not timely file her notice of intent to appeal. In the alternative, intervenor moves for an evidentiary hearing and for the deposition of petitioner in order to resolve a factual dispute regarding the date on which petitioner obtained actual notice of the challenged decision.

BACKGROUND

On January 6, 1995, intervenor filed an application with the city for tentative plan approval of a 40-lot subdivision. The city provided written notice to surrounding property owners of its intent to conduct an administrative review of the application. However, the city failed to provide written notice to petitioner and 10 other property owners in the area who should have been provided with notice of the pending decision because they owned property within 100 feet of the proposed development.[1]

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[1]Under Section 3 of City of Bend Ordinance No. NS-1556, tentative subdivision plan approvals are classified as Type II Activities. Section 12 of that Ordinance provides, in relevant part:

> "(1) Notice to affected parties of an administrative review of a Type II development application shall be mailed within

After receiving comments from the neighboring property owners who were properly notified of the proceeding, the city administratively reviewed the subdivision application, and granted tentative plan approval on March 22, 1995.

Petitioner became aware that the development of the subdivision would come within 100 feet of her property in August of 1995. On September 7, 1995, petitioner filed a notice of intent to appeal the March 22, 1995 decision to LUBA. On September 8, 1995, the city provided petitioner with formal notice of its March 22, 1995 decision, and invited petitioner to comment on the subdivision application. Petitioner submitted written comments to the city on September 25, 1995 indicating her opposition to the proposed subdivision. On October 10, 1995, the city's development services director issued a report concluding that the comments submitted by petitioner did not warrant any changes to its March 22, 1995 decision. Petitioner then requested that the city council review the development

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ten (10) days after receipt of a complete application. The notice shall provide at least fourteen (14) days time to comment on the application.

"* * * * *

"(4) Written notice required under subsections (1) and (2) of this Section shall be sent by mail to the following persons:

"* * * * *

"(c) All property owners within at least 100 feet of the property which is the subject of a Type II development permit application."

services director's determination on its own motion, as allowed by ordinance, but on October 18, 1995, the city council voted not to review the decision. On October 20, 1995, petitioner filed a formal appeal to the city council of the March 22, 1995 decision. The city has not yet taken action on that appeal.

MOTION TO DISMISS

Intervenor contends this appeal should be dismissed for lack of jurisdiction pursuant to ORS 197.825(2)(a) because petitioner has not exhausted her local administrative remedies. Intervenor argues that petitioner must pursue the appeal which she filed with the city on October 20, 1995 before appealing to LUBA.

Petitioner responds that LUBA jurisdiction is appropriate because the city failed to provide her with the requisite notice, thereby precluding her from submitting comments on the application prior to the March 22, 1995 decision. Under the applicable section of the city code, only those people who submit written comments on an application are entitled to a local appeal of the resulting decision, and the decision becomes final unless appealed within 10 days.[2] Therefore, petitioner argues, as a result

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[2]Section 8 of Bend Ordinance No. NS-1556 provides, in relevant part:

> "(1) An application for a Type II activity may be processed by the Director without a public hearing following the procedures in this section.

of the city's failure to provide her with notice of the proceeding, she has no available administrative remedies to exhaust, and her exclusive right of appeal is to LUBA under ORS 197.830(4).

Petitioner is correct that, under a strict interpretation of the city's ordinances, the city's failure to provide timely notice of the proposed decision would effectively deny petitioner the requisite standing to file a local appeal. However, as we recently explained in Tarjoto v. Lane County, 29 Or LUBA 408 (1995), aff'd 137 Or App 305, ___ P2d ____ (1995):

> "If the local government fails to provide the notice of decision required by ORS 215.416(11) or 227.175(10), it cannot rely on that failure to prevent it from providing the opportunity for a de novo local appeal required by statute. Therefore, in such a situation, the time for filing a local appeal does not begin to run until a local appellant is provided the notice of decision to which he or she is entitled. Because a local appeal is available to such an individual, under ORS 197.825(2)(a) that appeal must be exhausted before appealing to LUBA." Tarjoto, supra, 29 Or

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"* * * * *

"(4) The Director's decision shall be in writing with notice to the applicant and all persons who filed written comments or requested notice in writing. Unless appealed, the written decision shall become effective ten days after it is mailed.

"(5) The applicant or any person commenting in writing on the Development Permit shall constitute parties to the Type II administrative decision. Any party may appeal the Director's decision in accordance with Section [20] of this Ordinance."

LUBA at 413-414.

ORS 227.175(10) allows that certain decisions may be made by local governments without holding a hearing provided that notice of the decision is given "in the same manner as required by ORS 197.195 or 197.763, whichever is applicable."[3] ORS 197.195 is the statute establishing the procedures for limited land use decisions. Thus, ORS 227.175(10) protects an individual's right to participate in the limited land use decision process by requiring that notice of the decision be given to affected persons and requiring that the opportunity for a de novo local appeal be provided. The subdivision plan application at issue in this case was approved without a public hearing as allowed by the city code (see footnote 2) and ORS 227.175(10). As required by statute, the city code further provides that affected

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[3]ORS 227.175(10), which applies to cities, is substantively identical to ORS 215.416(11), which applies to counties. ORS 227.175(10) provides, in relevant part:

> "(a) The hearings officer, or such other person as the governing body designates, may approve or deny an application for a permit without a hearing if the hearings officer or other designated person gives notice of the decision and provides an opportunity for appeal of the decision to those persons who would have had a right to notice if a hearing had been scheduled or who are adversely affected or aggrieved by the decision. Notice of the decision shall be given in the same manner as required by ORS 197.195 or 197.763, whichever is applicable. An appeal from a hearings officer's decision shall be made to the planning commission or governing body of the city. An appeal from such other person as the governing body designates shall be to a hearings officer, the planning commission or the governing body. In either case, the appeal shall be a de novo hearing.

parties are entitled to de novo review of that decision at the local level.[4]

Under the rule expressed in Tarjoto, because the city failed to provide petitioner with the required notice of the decision on intervenor's permit application, the city cannot rely on that failure to deny petitioner the opportunity for a de novo appeal required by statute. See Flowers v. Klamath County, 98 Or App 384, 388, 780 P2d 227, rev den 308 Or 592 (1989) (a local government may not rely on its own "failure to provide notice and a hearing to defeat petitioner's ability to achieve standing to challenge the failure to provide them"). As in Tarjoto, petitioner in this case has a local appeal of the contested decision pending before the city, and that is an available appeal which must be exhausted before appealing to LUBA.

Petitioner's formal appeal of the March 22, 1995 decision was filed with the city on October 20, 1995. The

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[4]Section 20 of Bend City Ordinance No. NS-1556 provides, in relevant part:

> "(1) An affected party may appeal a decision of the Director to the hearings body, or may appeal a decision of the hearings body to the City commission, by filing a "Notice of Appeal" with the Director. The "Notice of Appeal" shall be as provided in Section 20 of this ordinance, and filed within ten (10) days of mailed notice of the decision.
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> "(2) Within the appeal period, the City Commission, acting upon the recommendation of the City Manager or upon its own motion, may order a de novo review of any lower level decision. * * * "

city has not yet taken action on that appeal. Because a local appeal remains available to petitioner, under ORS 197.825(a)(2) she must exhaust that appeal before appealing to LUBA.

Because we agree that petitioner has not exhausted her available local appeal, we do not rule on intervenor's alternative motions.

Intervenor's motion to dismiss is granted.