BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ALAN L. WAITE and RAYE J. WAITE,

Petitioners,

vs.

CITY OF LA GRANDE,

Respondent,

and

RONALD LARVICK,

Intervenor-Respondent.

LUBA No. 95-218

FINAL OPINION AND ORDER

ALAN L. WAITE and RAYE J. WAITE,

Petitioners,

vs.

UNION COUNTY,

Respondent,

and

RONALD LARVICK,

Intervenor-Respondent.

LUBA No. 95-219

Appeal from City of La Grande and Union County.

Jonel K. Ricker, La Grande, represented petitioners.

Stephen P. Riedlinger, City Attorney, La Grande, represented respondent City of La Grande.

Russell B. West, County Counsel, La Grande, represented

respondent Union County.

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

DISMISSED 03/29/96

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

Opinion by Livingston.

NATURE OF THE DECISION

Petitioners appeal (1) a city ordinance that, among other things, amends La Grande Land Development Code (LDC) 31.011 to permit solid waste transfer facilities as an outright use in the city's Heavy Industrial (M-2) zone; and (2) a county ordinance that adopts the city ordinance.

MOTION TO INTERVENE

Ronald Larvik moves to intervene on the side of the respondent in this appeal. There is no opposition to the motion, and it is allowed.

FACTS

This is an appeal of both a city decision and a county decision, both of which affect property located in the area outside the city limits, but within the city's urban growth boundary. Union County has adopted the city's land use plan and LDC for this area, and has delegated to the city administrative authority for land use actions within it. Any changes to the LDC that affect the area must be adopted by both local governments. County Record 7.[1]

The city adopted the LDC on June 16, 1993. City Record 87. On July 12, 1994, the city planning department initiated an LDC amendment request application for several revisions intended to address needs identified by staff or

[1]There is both a city record and a county record in this appeal.

members of the community during the preceding year. City Record 75, 87.[2] After publication of a notice of hearing in the local newspaper (The Observer) on July 6, 1994, the city planning commission addressed the proposed code revisions at a public hearing and recommended approval. City Record 76, 95. After publication of a notice of hearing in The Observer on August 24, 1994, the city council reviewed the planning commission's recommendation, and on October 5, 1994, adopted Ordinance Number 2858, Series 1994 (the city ordinance), which accepted the recommendation. City Record 1-3.

After publication of a notice of hearing in The Observer on October 14, 1994, the county planning commission reviewed the city's decision to amend the LDC and recommended to the county board of commissioners that the county approve the decision. County Record 6, 9a.[3] A notice of proposed amendment was prepared and mailed to the Department of Land Conservation and Development (DLCD). City Record 63; County Record 1. The board of commissioners adopted the proposed amendments on November 2, 1994 by Ordinance 1994-8 (the county ordinance). The county mailed a notice of adoption to the DLCD on November 7, 1994. Id.

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[2]In addition to the amendment that is the subject of this appeal, the proposed revisions concerned nonconforming uses and permits for temporary uses.

[3]The page following County Record 9 is not numbered, and has been designated "9a."

On October 23, 1995, almost one year later, petitioners filed notices of intent to appeal the adoption of the city and county ordinances.

MOTION TO DISMISS

The city and county (respondents) move to dismiss these consolidated appeals on the ground that they are untimely, since they were not filed within 21 days of the date the decision sought to be reviewed became final.[4] See ORS 197.830(3) and(8); OAR 661-10-015. We agree with respondents that the notices of intent to appeal were not timely filed, and we grant the motion to dismiss.

Petitioners describe the course of events leading to the LDC amendments and explain their delay in filing a notice of intent to appeal:

> "a) Petitioners, at all times material herein, were residents of the City of Weiser, Idaho.
>
> "b) Petitioners own property in La Grande, Union County, Oregon.
>
> "c) Back in late 1994 both Respondents attempted to amend their land use zoning ordinances to provide for the siting of a solid waste transfer facility within the M-2 (Industrial) Zone as an outright use.

[4]On January 2, 1996, LUBA received a stipulated motion, dated December 28, 1995 and signed by petitioners and respondents, for an order suspending the briefing schedule until petitioners' motion to dismiss is decided. Also on January 2, 1996, petitioners delivered a petition for review. On January 8, 1996, upon receiving intervenor's stipulation, we ordered a suspension of the briefing schedule. Based on the stipulation, we have not considered the petition for review.

> "d) The proposed changes were done at the specific request of Intervenor herein * * * who is a provider of solid waste disposal in La Grande and Union County; Intervenor * * * also filed for a siting and zone permit under the said ordinances in 1995.
>
> "e) Petitioners, herein, have received no specific, written, or actual notice of either the zoning changes or the zoning permit application until approximately October 2, 1995.
>
> "f) Respondents claim to have given notices, through public notice in The Observer newspaper, a newspaper of local circulation in the City of La Grande, on July 6, 1994, August 4, 1994 and October 14, 1994. All notices were insufficient to give these Petitioners notice that a proposed land use zoning amendment was pending that could affect their LaGrande property. Therefore, there was no notice specific enough to either actually notify Petitioners of the proposed zoning changes or to put a reasonable person on notice that a proposed change could [a]ffect their property." Response to Motion to Dismiss 2.

As a starting point, we observe that neither the statutes governing notices and hearings nor any local code provisions of which we are aware require actual notice of proposed legislative zoning ordinance amendments or even notice sufficient to alert reasonable persons whose property could be affected.[5] If the statutory requirements are

[5]Respondents refer to notice provisions in LDC 95.001 and state the county notice requirements are "somewhat different * * * but the same result is obtained." Respondents' Memorandum 3-4. However, none of the parties has provided LUBA with a copy of the relevant provisions in the local ordinances.

satisfied, the desired result is that reasonable persons will be notified, but the failure of certain persons to get notice for some reason does not mean the notice is legally inadequate.[6]

The statutes governing required notices and hearings establish different requirements for "legislative" land use decisions, "permit" decisions and "quasi-judicial" land use decisions. See Leonard v. Union County, 24 Or LUBA 362, 366-69, 374-80 (1992). The challenged decisions clearly are not actions on a "permit," as that term is defined in ORS 215.402(4) and ORS 227.160(2). Therefore, the notice requirements of ORS 215.402 to 215.431 and 227.175(10)(a) do not apply.

Respondents contend, and we agree, that the challenged decisions are legislative land use decisions. That determination is based upon consideration of the three factors identified by the Oregon Supreme Court in Strawberry Hill 4-Wheelers v. Benton Co. Bd. of Comm., 287 Or 591, 602-03, 601 P2d 769 (1979), and summarized as follows:

1. Is "the process bound to result in a decision?"

2. Is "the decision bound to apply preexisting criteria to concrete facts?"

3. Is the action "directed at a closely circumscribed factual situation or a

[6]We assume without deciding that petitioners have standing because they were adversely affected by the challenged land use decisions.

relatively small number of persons?"

The more definitely these questions are answered in the negative, the more likely the decision under consideration is a legislative land use decision. Each of the factors must be weighed, and no single factor is determinative. Estate of Paul Gold v. City of Portland, 87 Or App 45, 740 P2d 812, rev den 304 Or 405 (1987).

The first factor is not present in this appeal, at least with respect to the city, which was the local government initiating the proposed amendments. Even if the county was required to act on the city's request for approval, so that the county's process was "bound to result in a decision," we understand the term "process," as it is used in describing the first factor, to comprise the combined city/county process from inception to finish. Since the process of considering the amendments ultimately adopted in the city ordinance could have been terminated by the city at any time without any action, it was not "bound to result in a decision."

The second factor is present to some extent in nearly all land use decisions, which almost invariably apply preexisting criteria to concrete facts. See Churchill v. Tillamook County, 29 Or LUBA 68, 71 (1995); Friends of Cedar Mill v. Washington County 28 Or LUBA 477, 482 (1995). In this case, which involves an amendment to the city zoning ordinance, the Statewide Planning Goals and local

comprehensive plan apply.

The third factor is difficult to consider, in view of the limited information available. Intervenor's letter apparently prompted consideration of the LDC amendment to permit solid waste transfer facilities as an outright use in the city's M-2 zone. However, that fact alone is hardly decisive. See Andrews v. City of Brookings, 27 Or LUBA 39, 41 (1994); McInnis v. City of Portland, 27 Or LUBA 1, 6 (1994). The amendment affects an entire zone and may well reflect a policy determination that there is a need to site waste transfer facilities somewhere within the city's urban growth boundary. Even if a relatively small area is presently zoned M-2, that area could be expanded in the future. Therefore, it seems unlikely, if not impossible, that the amendment should be viewed as "directed at a closely circumscribed factual situation or a relatively small number of persons."

Because only the second question can be answered in the affirmative, we conclude the decisions to adopt the city and county ordinances were legislative land use decisions. The notice and hearing requirements of ORS 197.763, which governs quasi-judicial decisions, therefore do not apply.

Both the city and the county gave the notice to DLCD required by ORS 197.615(1). The only statutory individual notice requirements applicable to legislative decisions that amend a local zoning ordinance are set forth in ORS

197.615(2), which provides, in relevant part:

> "(a) Not later than five working days after the final decision, the local government also shall mail or otherwise submit notice to persons who:
>
> "(A) Participated in the proceedings leading to the adoption of the amendment to the comprehensive plan or land use regulation or the new land use regulation; and
>
> "(B) Requested of the local government in writing that they be given such notice.
>
> "* * * * *"

The appeal period from such decisions is delimited by ORS 197.830(8), which provides:

> "* * * A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed not later than 21 days after the decision sought to be reviewed is mailed to parties entitled to notice under ORS 197.615. * * *"

Petitioners have not shown that they were entitled to individual notice of the challenged decisions under ORS 197.615. However, they contend their appeal is still timely under ORS 197.830(3)(b), which allows appeals "[w]ithin 21 days of the date a person knew or should have known of the decision where no notice is required."

As ORS 197.830(3) makes clear, ORS 197.830(3)(b) applies only when a local government

> "makes a land use decision <u>without providing a hearing</u> or the local government makes a 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 * * *" (Emphasis added.)

ORS 197.830(3) has been interpreted broadly to apply when a local government holds a hearing, but fails to give appropriate persons the notice of the hearing they were entitled to receive under applicable provisions of state or local law. See Leonard, supra, 24 Or LUBA at 375. However, it still does not apply to this appeal because the city and county provided properly noticed hearings. Nothing more is required.

This appeal is dismissed.