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

AMY DOBSON,
Petitioner,

vs.

CITY OF HINES,
Respondent.

LUBA No. 2019-018

FINAL OPINION
AND ORDER

Appeal from City of Hines.

Caleb S. Leonard, Canby, filed the petition for review and reply brief. With him on the briefs was Tyler Smith & Associates, P.C.

Brian DiFonzo, Ontario, filed the response brief. With him on the brief was Yturri Rose, LLP.

RUDD, Board Member; ZAMUDIO, Board Chair; RYAN, Board Member, participated in the decision.

DISMISSED 10/3/2019

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

Opinion by Rudd.

NATURE OF THE DECISION

Petitioner appeals an ordinance adopted by the city council in April 2015 that (1) adopted flood damage prevention regulations as part of the city's comprehensive plan, and (2) rezoned six properties.

BACKGROUND

On April 28, 2015, the city council adopted Ordinance 309 (the Ordinance), which amended the Hines Comprehensive Plan to adopt flood damage prevention regulations and change the zoning of six properties.[1] Record 90-91. The Ordinance is a post-acknowledgement plan amendment (PAPA).[2] Petitioner owns property adjacent to a parcel that was rezoned by the Ordinance.

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[1] The Ordinance described the zone changes to the six properties as follows:

> "from Commercial to Single Family Residential, 1.5 acres identified as Map #23S30E26-00-00115, from Single Family Residential to Commercial only, a small portion of 1.02 acres within #23S0E23-DD-03700; from Commercial to Single Family Residential only, a portion of #23S30E23-DD-04300; from Commercial to Single Family Residential only, a portion of .79 acres within #23S30E23-DD-04600; from Commercial to Single Family Residential only, a small portion of #23S30E23-DD-05000; and from Industrial and Commercial to Single Family Residential only, 2.57 acres within #23S30E24-BB-02100." Record 91.

[2] On May 14, 2015, the city sent the Department of Land Conservation and Development (DLCD) notice that the city had adopted a change to its land use regulations. Record 2-3.

More than four years later, on January 31, 2019, petitioner filed her Notice of Intent to Appeal (NITA) the city's land use decision.

MOTION TO DISMISS

In its response brief, filed June 21, 2019, the city moves to dismiss the appeal on the basis that (1) the appeal was not filed within the time required by ORS 197.830(9), and (2) petitioner did not appear below, and therefore petitioner lacks standing under ORS 197.830(2).[3] We discuss those statutes below, after we resolve pending motions to take evidence.

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[3] ORS 197.830(9) provides in relevant part that:

> "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. *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 notice of the decision sought to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS 197.615.* Failure to include a statement identifying when, how and to whom notice was provided under ORS 197.615 does not render the notice defective. Copies of the notice of intent to appeal shall be served upon the local government, special district or state agency and the applicant of record, if any, in the local government, special district or state agency proceeding. The notice shall be served and filed in the form and manner prescribed by rule of the board and shall be accompanied by a filing fee of $200 and a deposit for costs to be established by the board. If a petition for review is not filed with the board as required in subsections (10) and (11) of this section, the filing fee and deposit shall be awarded to the local government, special district or state agency as cost of preparation of the record." (Emphasis added,)

A. Motions to Take Evidence

Prior to the city's filing its June 2019 motion to dismiss the appeal, on March 11, 2019, petitioner filed a motion to take evidence not in the record that seeks to have LUBA consider an affidavit by petitioner and a declaration by one of petitioner's neighbors stating that they did not receive notice of the land use proceedings related to the Ordinance.[4] In response, along with its response brief, the city filed a motion to take evidence in the form of an affidavit of mailing that

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ORS 197.830(2) provides in relevant part that:

> "Except as provided in ORS 197.620, a person may petition the board for review of a land use decision or limited land use decision if the person:
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> " * * * * *
>
> "(b) Appeared before the local government, special district or state agency orally or in writing."

[4] Petitioner's affidavit states:

> "At no time prior to the hearings or decision in early 2015 was I mailed any notice of any kind regarding the land use application cited above or of any public meetings to be held on the issue; [and]
>
> "I did not attend any of the public hearings that commenced in March and April of 2015 or submit any evidence because I had not been given notice and did not know there was a hearing or a land use application on this matter." Petition for Review, App 80.

Petitioner's neighbor's declaration contains the same statement. Petition for Review, App 82.

is executed by a city staff member.[5] Petitioner objects to the city's motion to take evidence, arguing that it is an impermissible attempt to amend the record after it has been settled.

OAR 661-010-0045(1) provides that the Board may take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning, among other subjects, "standing."[6] In her petition for review, petitioner asserts that she has standing to appeal the decision. In its response brief, the city disputes that petitioner has standing to appeal the decision. Accordingly, we conclude that the Board may consider the evidence sought to be considered

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[5] OAR 661-010-045(9) provides that a motion to take evidence shall suspend the time limits for all other events in the proceeding unless the board rules otherwise. On May 13, 2019, we issued an order directing the parties to proceed to briefing and on May 31, 2019, petitioner filed her petition for review.

[6] OAR 661-010-0045(1), Grounds for Motion to Take Evidence Not in the Record, provides:

> "The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, *standing*, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its discretion take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845." (Emphasis added.)

in both motions in order to resolve a factual dispute regarding petitioner's standing, and both motions are granted.[7]

B. Jurisdiction

Petitioner has the burden to establish that LUBA has jurisdiction to consider this appeal. *Billington v. Polk County*, 299 Or 471, 475, 703 P2d 232 (1985). Among the things petitioner must do to establish that LUBA has jurisdiction is demonstrate that this appeal was timely filed. Under the second sentence of ORS 197.830(9), the deadline for filing an appeal of a PAPA is "not later than 21 days after notice of the decision sought to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS 197.615."

Petitioner's theory for why the appeal is timely has evolved somewhat with the pleadings, but we understand petitioner to provide three alternate theories for why the appeal was timely filed. In her NITA, petitioner states that she was not provided notice of the initial evidentiary hearing that was required under ORS 197.763(2). NITA 2. In the petition for review, petitioner argues that she filed the

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[7] Petitioner's response to the motion to dismiss includes a request for an evidentiary hearing on the city's motion to dismiss. A motion for evidentiary hearing must set forth with particularity the facts the movant plans to present at the hearing and how those facts will affect the appeal's outcome. *Citizens Concerned v. City of Sherwood*, 21 Or LUBA 515, 532 (1991). Petitioner does not state in her request what additional evidence would be presented at an evidentiary hearing on the motion to dismiss or how that evidence would affect the outcome of the proceeding. The motion for evidentiary hearing is denied.

appeal within 21 days of obtaining actual notice of the decision pursuant to ORS 197.830(3)(a).[8] Petition for Review 1.

In her response to the motion to dismiss, petitioner sets out a new legal theory for why the appeal was timely filed. That theory is that the city did not give petitioner notice of the final decision that petitioner was entitled to "under ORS 197.830," and that the city's failure to give her notice of the decision means that the deadline for filing an appeal is tolled. Response to Motion to Dismiss 3-4. We address those theories below.

1. Petitioner Was Not Entitled to Notice of the Decision

Petitioner's theory for why she was entitled to notice of the decision and why the city's failure to send her that notice tolled the deadline in ORS

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[8] ORS 197.830(3) provides:

> "If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416(11) or 227.175(10), or the local government makes a land use decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, 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
>
> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

197.830(9) for filing her appeal is developed for the first time in response to the motion to dismiss, and is not at all well developed. In her response to the motion to dismiss, petitioner argues that the city did not give petitioner notice of the final decision that petitioner was entitled to "under ORS 197.830." Response to Motion to Dismiss 3. ORS 197.830 is a section of ORS Chapter 197 that addresses myriad subjects including "[r]eview procedures; standing; fees; *deadlines*; rules; issues subject to review; attorney fees and costs; publication of orders; mediation; tracking of reviews." ORS 197.830. ORS 197.830 itself contains nineteen different subsections, many of which also contain subsections of their own, and several of which include deadlines for appealing different types of land use decisions to LUBA. (ORS 197.830(3), (4), (5) and (9)). Accordingly, an argument that petitioner was entitled to notice of the adoption of the Ordinance "under ORS 197.830" is not sufficiently developed for us to address it. *Grapp v. City of Portland*, 11 Or LUBA 1, 15 (1984) (LUBA will not provide a theory for a petitioner in order to make petitioner's case) (citing *Deschutes Development v. Deschutes County*, 5 Or LUBA 218 (1982)). However, we will address petitioner's tolling argument to the extent we understand it.

As noted, the challenged decision is a PAPA, and accordingly the second sentence of ORS 197.830(9) controls the timeline for filing an appeal. ORS 197.830(9) provides in part that "[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 notice of the decision sought to be reviewed is

mailed or otherwise submitted to parties entitled to notice under ORS 197.615."

ORS 197.615(1) and (4) provide that:

> "(1) When a local government adopts a proposed change to an acknowledged comprehensive plan or a land use regulation, the local government *shall submit the decision to the Director of the Department of Land Conservation and Development within 20 days after making the decision.*
>
> " * * * * *
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> "(4) On the same day the local government submits the decision to the director, the local government shall *mail, or otherwise deliver*, notice to persons that:
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> "(a) Participated in the local government proceedings that led to the decision to adopt the change to the acknowledged comprehensive plan or the land use regulation; and
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> "(b) Requested in writing that the local government give notice of the change to the acknowledged comprehensive plan or the land use regulation." (Emphases added.)

Petitioner does not argue that she participated in the proceedings below and that she was entitled to notice of the decision from the city under ORS 197.615(4)(a), and does not argue that she requested in writing that the local government give her notice of the city's PAPA adoption under ORS 197.615(4)(b). Petitioner also does not identify anyone to whom the city was required to send a copy of its final decision as a party who had participated below (ORS 197.615(4)(a)), and who had requested a copy of the decision (ORS

197.615(4)(b)).[9] The record demonstrates that the city submitted a copy of its final decision to the Department of Land Conservation and Development (DLCD), as required by ORS 197.615(1), on May 14, 2015. Record 2. The record does not indicate that the city mailed or otherwise delivered a copy of its final decision to any persons other than DLCD. Petitioner was not a person "entitled to notice under ORS 197.615," within the meaning of ORS 197.830(9), and accordingly, the time for appealing the PAPA is measured from the date that the notice was submitted to DLCD, which was May 14, 2015.[10] Record 2.

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[9] The record indicates that the city received no written testimony and the only verbal comment was a question concerning whether the action would change whether or not a given property was located within the flood zone. Record 94-95.

[10] In *ODOT v. City of Oregon City*, 153 Or App 705, 959 P2d 615 (1998), the Court of Appeals noted that even where no person is entitled to notice from the local government under ORS 197.615, the version of ORS 197.615(1) in effect at the time required notice of a PAPA to a comprehensive plan or land use regulation to be mailed to the Director of DLCD. The court held "[s]tated another way, there is *always* a mailing requirement under ORS 197.615, from which the time for appealing post-acknowledgment plan and regulation amendments is to be measured under ORS 197.830(8) [since renumbered to (9)]." *Id.* at 708 (emphasis in original).

Accordingly, where no party is entitled to notice from the local government under ORS 197.615(4), as is the case here, the time for appealing a PAPA is measured from the date that the notice was "mailed or otherwise submitted" to DLCD, as provided in ORS 197.830(9), because DLCD is a party "entitled to notice under ORS 197.615."

ORS 197.830(2) also requires that in order to appeal a land use decision, the petitioner must have "[a]ppeared" during the proceedings that led to the decision.[11] There is no dispute that petitioner did not "[a]ppear[]" during the proceedings that led to the appealed decision, as required by ORS 197.830(2), and petitioner does not argue that any of the circumstances set out in ORS 197.620(2) apply to obviate the requirement that she "[a]ppeared."[12]

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[11] ORS 197.830(2) provides in relevant part:

> "Except as provided in ORS 197.620, a person may petition the board for review of a land use decision or limited land use decision if the person:
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> " * * * * *
>
> "(b) Appeared before the local government, special district or state agency orally or in writing."

[12] ORS 197.620 in turn provides circumstances under which a person who did not appear before the local government may appeal a decision to LUBA:

> "(2) Notwithstanding the requirements of ORS 197.830(2) that a person have appeared before the local government orally or in writing to seek review of a land use decision, the Director of the Department of Land Conservation and Development or any other person may appeal the decision to the Land Use Board of Appeals if:
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> "(a) The local government failed to submit all of the materials described in ORS 197.610 (3) or, if applicable, ORS 197.610 (6), and the failure to submit the materials prejudiced substantial rights of the Department of Land Conservation and Development or the person;

Accordingly, the only possible statutory authority that petitioner has cited for treating this appeal as timely filed is ORS 197.830(3)(a).

2. ORS 197.830(3) Does Not Allow Petitioner to File a Delayed Appeal

Petitioner argues that her appeal is timely filed under ORS 197.830(3)(a) because the city failed to provide her with notice of the hearings before the planning commission and city council as required by ORS 197.763(2). Petition for Review 1. ORS 197.830(3) provides that:

> "If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416 (11) or 227.175 (10), or the local government makes a land use decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:
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> "(a) Within 21 days of actual notice where notice is required; or

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> "(b) Except as provided in subsection (3) of this section, the local government submitted the materials described in ORS 197.610 (3) or, if applicable, ORS 197.610 (6), after the deadline specified in ORS 197.610 (1) or (6) or rules of the Land Conservation and Development Commission, whichever is applicable; or
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> "(c) The decision differs from the proposed changes submitted under ORS 197.610 to such an extent that the materials submitted under ORS 197.610 do not reasonably describe the decision."

"(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

In *Aleali v. City of Sherwood*, 262 Or App 59, 76, 325 P3d 747 (2014), the court affirmed LUBA's dismissal of an appeal of a city decision approving a site plan that was filed later than 21 days after the decision became final. The court held that the right to a delayed appeal under ORS 197.830(3) is "solely by the operation of state — as opposed to local — law." *See also Phillips v. City of Corvallis*, 75 Or LUBA 315, 323 (2017) ("[t]he Court of Appeals [in *Aleali*] concluded that [the without providing a hearing] prong of ORS 197.830(3) included (1) cases where a local government held no hearing at all, and also (2) cases where the local government held a hearing but failed to provide the petitioner a notice of hearing that the petitioner was entitled to under state law.").

Here, there is no dispute that the city held a hearing, so the only circumstance in which ORS 197.830(3) will allow petitioner to file a delayed appeal is if the city failed to provide petitioner a statutorily required notice of hearing. Petitioner argues that ORS 197.763(2) required the city to provide her with notice of the hearings before the planning commission.[13] We understand

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[13] We note that the Ordinance both adopted the city's floodplain regulations, and rezoned six properties. Thus, the Ordinance is something of a hybrid legislative land use decision and quasi-judicial land use decision. The notice requirements in ORS 197.763(2) apply to "quasi-judicial land use hearings[.]" For purposes of this opinion, we assume that ORS 197.763(2) applied to the city's proceedings on the Ordinance because they were a "quasi-judicial land use hearing[]."

petitioner to argue that the city did not provide her with the required notice and that, pursuant to ORS 197.830(3)(a), the 21-day deadline for her to appeal the decision did not begin to run until she received "actual notice" of the decision. Petitioner never provides a date on which she asserts she received actual notice.[14]

The city agrees that petitioner was entitled to notice pursuant to ORS 197.763(2), and responds that the city provided the notice to petitioner that ORS 197.763(2) requires.[15] Accordingly, the city argues, petitioner may not rely on ORS 197.830(3) to file her appeal. We agree with the city.

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[14] In her personal affidavit, petitioner states both that she did not receive notice of the proceedings, and that "[a]t no time prior to the hearings or decision in early 2015 was I mailed notice of any kind regarding the land use application * * * or of any public meetings to be held on the issue." Petition for Review, App 79-80.

[15] ORS 197.763 provides in relevant part:

> "The following procedures shall govern the conduct of quasi-judicial land use hearings conducted before a local governing body, planning commission, hearings body or hearings officer on application for a land use decision and shall be incorporated into the comprehensive plan and land use regulations:
>
> "* * * * *
>
> "(2)(a) Notice of the hearings governed by this section shall be provided to the applicant and to owners of record of property on the most recent property tax assessment roll where such property is located:
>
> (A) Within 100 feet of the property which is the subject of the notice where the subject property is wholly or in part within an urban growth boundary[.]"

Petitioner owns property adjacent to a parcel that was rezoned by the Ordinance, and accordingly she was entitled to notice as the owner of property within 100 feet of property which was the subject of the notice. ORS 197.763(2)(a)(A). The record includes evidence that notices of hearing were mailed to affected property owners, including petitioner. The March 13, 2015 staff report includes the following statement: "Sec. 7.5 requires a series of notices, which were accomplished: * * * Printed notices and a copy of the full Ordinance 309 were sent by U.S. First Class Mail to the last known address of all affected property owners[.]" Record 114. Petitioner's name appears twice on the list of property owners following the item titled "Notice of Evidentiary Hearing to Affected Property Owners" as both the seventh and the twenty-third name on the list. Record 123-24. Thus, the record includes evidence that notice of the hearings was mailed by the city to petitioner by first-class mail.[16] The affidavit submitted by the city provides additional support for that conclusion.

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[16] The legislature has also provided in ORS 197.763(8) that petitioner's failure to receive notice will not invalidate proceedings if the city is able to prove by affidavit that such notice was given:

> "The failure of the property owner to receive notice as provided in [ORS 197.763] shall not invalidate such proceedings if the local government can demonstrate by affidavit that such notice was given. The notice provisions of this section shall not restrict the giving of notice by other means, including posting, newspaper publication, radio and television."

Conversely, petitioner's statement in the NITA and in her affidavit that she was not *mailed* "any notice of any kind regarding the land use application cited above or of any public meetings to be held on the issue" is not supported by evidence in the record. Petition for Review, App 80. That statement is also not supported by the affidavit itself, because petitioner has not established that she has any knowledge of whether the notice of hearing was or was not *mailed* by the city.

Even accepting as true petitioner's statement in her affidavit that she failed to receive the notice, that affidavit is not sufficient to establish that the city did not mail the notice. In other words, even assuming that petitioner is correct that she did not receive the notice, that does not answer the question of whether the city mailed the notice to petitioner. We find that the city mailed notice to petitioner as ORS 197.763(2)(a)(A) required, and accordingly, petitioner is not entitled to rely on ORS 197.830(3) to file a delayed appeal.

The record does not contain an affidavit of mailing or other "affidavit [demonstrating] that such notice was given." ORS 197.763(8). However, ORS 197.763(8) does not require that an affidavit be included in the record. The city's motion to take evidence consists of an affidavit of mailing, albeit one executed almost four years after the decision. Accordingly, the evidence submitted by the city with its motion to take evidence provides additional support for the statements in the record that the notice was mailed.

3. ORS 197.830(6) Provides a Three-Year Statute of Repose for Appealing the Decision

ORS 197.830(6) provides an additional reason for concluding that LUBA lacks jurisdiction over petitioner's appeal. ORS 197.830(6) provides a statute of repose for appealing a land use decision to LUBA:

> "The appeal periods described in subsections (3), (4) and (5) of this section:
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> "(a) May not exceed three years after the date of the decision, except as provided in paragraph (b) of this subsection.
>
> "(b) May not exceed 10 years after the date of the decision if notice of a hearing or an administrative decision made pursuant to ORS 197.195 or 197.763 is required but has not been provided."

ORS 197.830(6) in its current form was enacted by the legislature in 2011. *See Jones v. Douglas County*, 247 Or App 56, 67, 270 P3d 264 (2011) (explaining that while the appeal of LUBA's decision was pending before the court of appeals, the legislature enacted House Bill (HB) 3166 (2011), which sets a maximum period of 10 years after which certain land use decisions can no longer be challenged, no matter how unfair to a party). The statute caps the appeal period for an appeal filed under ORS 197.830(3) at three years, unless "notice of a hearing or administrative decision made pursuant to ORS * * * 197.763 is required but has not been provided."

Here, as we explain above, a hearing was required and was also provided. We rejected petitioner's argument that petitioner was not provided with a hearing because the city did not provide her with notice of the hearing, and concluded

that it did. Accordingly, ORS 197.830(6)(a) applies, and the appeal period for appealing the challenged PAPA may not exceed three years after the date of the decision. Petitioner's notice of intent to appeal was not filed until January 31, 2019, over four years after the decision became final.

The appeal is dismissed.