

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

3
4 PAMELA STRAWN,)
5)
6 Petitioner,)
7)
8 vs.)
9) LUBA No. 95-128
10 CITY OF ALBANY,)
11) FINAL OPINION
12 Respondent,) AND ORDER
13)
14 and)
15)
16 WILLAMETTE & PACIFIC RAILROAD,)
17)
18 Intervenor-Respondent.)

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21 Appeal from City of Albany.

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23 Pamela Strawn, Albany, represented herself.

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25 James V. B, Delapoer, Albany, represented respondent.

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27 Mark Dodson and Roberto Berry, Portland, represented
28 intervenor-respondent.

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

32
33 DISMISSED 11/20/95

34
35 You are entitled to judicial review of this Order.
36 Judicial review is governed by the provisions of ORS
37 197.850.

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 **MOTION TO DISMISS**

11 The city and intervenor (respondents) move to dismiss
12 petitioner's appeal as untimely filed.

13 Petitioner contends she did not receive the notice of
14 intervenor's proposal to which she was entitled, and that
15 she filed her notice of intent to appeal within 21 days of
16 the date she received notice of the city's approval of
17 intervenor's application. Petitioner contends the decision
18 became final June 5, 1995, but does not explain how or why
19 it became final on that date. Nor does petitioner establish
20 she lives within the 100-foot notice area for limited land
21 use decisions under ORS 197.195(3)(b).

22 Respondents explain that petitioner's reference to June
23 5, 1995 as the date the decision became final presumably
24 relates to a letter the city sent to area residents,
25 including petitioner, responding to citizen concerns
26 regarding the operation of intervenor's facility. In that

1 letter the city affirmed that it approved intervenor's
2 application in October, 1993. Respondents also contend that
3 notice of the application for limited land use approval was
4 sent to all property owners within 100 feet of the proposed
5 development. Respondents support their contention with an
6 affidavit from the city's community development director.
7 Finally, respondents attach an affidavit from intervenor's
8 general manager, explaining that he received a letter, dated
9 November 13, 1994, from neighborhood residents concerning
10 the operation of intervenor's facility. Petitioner signed
11 that letter, a copy of which is attached to the affidavit.

12 Under ORS 197.830(8), a notice of intent to appeal a
13 land use decision or limited land use decision must be filed
14 within 21 days after the decision becomes final. ORS
15 197.830(4) tolls the time period in which an appeal of a
16 limited land use decision must be filed in certain
17 situations.¹ In addition, although ORS 197.830 does not

¹ORS 197.830(4) tolls the period for filing a notice of intent to appeal when the "local government makes a limited 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." In that case, a person adversely affected by the decision may appeal the decision to the LUBA within 21 days after actual notice where notice is required, or within 21 days of when the party knew or should have known of the decision when notice is not required.

Although petitioner's responses to respondents' motion to dismiss include arguments that the facility should not have been a limited land use decision, and that the facility as approved violates numerous code and comprehensive plan provisions, we do not read her responses as indicating that the decision approved is different from the proposal as described in the notice provided under ORS 197.195.

1 expressly allow extensions for filing a notice of intent to
2 appeal where notice is not provided, the filing requirements
3 under that statute presuppose a situation where the required
4 notice was provided. Where the city fails to provide the
5 required notice, the time for filing the notice of intent to
6 appeal is tolled until actual notice is received. See
7 Flowers v. Klamath County, 98 Or App 384 (1989).

8 Petitioner has not established she was entitled to
9 notice of intervenor's limited land use application under
10 ORS 197.195(3)(b). Moreover, even if she had been entitled
11 to notice of the proposal, she would have been required to
12 file her notice of intent to appeal within 21 days of
13 receiving actual notice of the decision.

14 When petitioner obtained actual knowledge of the city's
15 approval of intervenor's facility is unclear. However, the
16 latest it occurred was November 13, 1994, when a letter
17 bearing her signature and complaining of intervenor's
18 operations at the facility, was sent to intervenor. Even
19 if it could be argued that the date she signed that letter
20 was the date she first had actual knowledge of the decision,
21 the notice of intent to appeal would have been due within 21
22 days of that letter.

23 Petitioner's apparent reliance on the city's June 5,
24 1995 letter responding to citizen complaints about the
25 facility's operations, as the date the approval of the
26 facility became final, is incorrect. Petitioner's notice of

1 intent to appeal, filed June 26, 1995 is untimely.

2 Petitioner's appeal is dismissed.