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

ANDREW D. BIGLEY, SHELLY M. KELSO BIGLEY,
WEST HILLS STREAMS, and LIZ CALLISON,
Petitioners,

vs.

CITY OF PORTLAND,
Respondent,

and

METRO,
Intervenor-Respondent.

LUBA No. 99-089

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Andrew H. Stamp, Portland, represented petitioners.

Frank Hudson, Deputy City Attorney, Portland, and Peter A. Kasting, Senior Deputy
City Attorney, Portland, represented respondent.

Kenneth D. Helm, Portland, represented intervenor-respondent.

HOLSTUN, Board Chair; BASSHAM, Board Member; BRIGGS, Board Member,
participated in the decision.

DISMISSED

01/21/2000

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city council decision approving a conditional use master plan for
4 the Metro Washington Park Zoo.

5 **MOTION TO INTERVENE**

6 Metro, one of the applicants below, moves to intervene on the side of respondent.
7 There is no opposition to the motion, and it is allowed.

8 **INTRODUCTION**

9 This appeal is one of three LUBA appeals concerning a parking lot at the Metro
10 Washington Park Zoo. LUBA No. 99-088 challenges a May 19, 1997 hearings officer's
11 decision approving changes to the Metro Washington Park Zoo Master Plan (Zoo Master
12 Plan). We dismissed that appeal on August 11, 1999, because we concluded that the
13 hearings officer's decision was not the city's final decision.¹ In this appeal (LUBA No. 99-
14 089), petitioners appeal the city council's August 8, 1997 decision that affirmed the hearings
15 officer's May 19, 1997 decision. For the reasons explained below, we agree with the city
16 that this appeal was not timely filed; and, for that reason, we dismiss this appeal. The third
17 appeal challenges an April 1, 1999 decision by the city hearings officer. That decision grants
18 conditional use approval to convert the disputed parking lot from a temporary parking lot to a
19 permanent parking lot and grants an adjustment to reduce interior landscaping and the
20 required number of trees. That April 1, 1999 decision is challenged in LUBA No. 99-071
21 and is pending before LUBA.

¹As defined by ORS 197.015(10)(a) a land use decision must be a "final" decision.

1 **FACTS**

2 On April 28, 1993, the City of Portland Land Use Hearings Officer approved
3 amendments to the Zoo Master Plan.² With the amendments approved on April 28, 1993, the
4 Zoo Master Plan included, among other things, a temporary 129-space parking lot.
5 Condition F of the April 28, 1993 decision stated that if a new Zoo Master Plan “provides for
6 the 129 space parking lot to become permanent,” interior landscaping would be required as
7 provided in the PCC. Boley Supplemental Record 61.³ In that event, Condition G requires
8 “[a] detailed [landscape] plan must be submitted and approved through a Type II process.”
9 *Id.*

10 On February 12, 1997, Metro applied for approval of amendments to the Zoo Master
11 Plan. The application that was submitted on February 12, 1997, included a proposal to
12 convert the temporary parking lot to a permanent parking lot. Bigley Record 158. On April
13 1, 1997, the city provided notice of an April 22, 1997 hearing before the land use hearings
14 officer to consider the proposed amendments to the Zoo Master Plan. The April 1, 1997
15 notice explained:

²Portland City Code (PCC) 33.820.010 explains the purpose of conditional use master plans:

“A conditional use master plan is a plan for the future development of a use that is subject to the conditional use regulations. Expansions of the use may have impacts on surrounding neighborhoods and on public services that are better addressed through the review of the master plan than through reviewing the expansions individually over time. In addition, by creating long term plans, some impacts may be prevented that would have occurred with uncoordinated piecemeal expansions. The development of a master plan is intended to provide the surrounding neighborhoods and the City with information about, and an opportunity to comment on, the use’s plans for future development. The plan also enables the operator of the use and the City to address the effects of the future development. Finally, an approved master plan is intended to ensure that the use will be allowed to develop in a manner consistent with the plan. Master plans may be completed at various levels of detail. Generally, the more specific the plan, the less review that will be required as the future uses and development are built.”

³LUBA Nos. 99-088 and 99-089 were consolidated and a three-volume record was filed in that consolidated appeal. We cite that record as the “Bigley Record.” A two-volume record was filed in LUBA No. 99-071. We refer to that record as the “Boley Record.” Following our dismissal of LUBA No. 99-088 and consolidation of LUBA No. 99-089 with LUBA No. 99-071, the city filed a supplemental record in that consolidated appeal. We refer to that record as the “Boley Supplemental Record.”

1 “The plan includes many individual projects, listed below, some of which will
2 increase building area, while others are modifications to or replacements for
3 existing facilities. The following list is a summary of the proposed
4 projects[.]” Bigley Record 524.

5 Following the above-quoted portion of the notice, 12 separately described projects and
6 improvements are identified.⁴ Conversion of the 129-space temporary parking lot to a
7 permanent parking lot is not among the projects and improvements that are specifically
8 identified in the notice.

9 On April 7, 1997, a second notice was issued to provide notice of requested
10 adjustments to landscaping requirements for an unrelated parking lot. Both the April 1, 1997
11 and April 7, 1997 notices included the following statement:

12 “The Planning Bureau will be making a recommendation on this proposal; our
13 report and recommendation will be available 10 days before the hearing. If
14 you call * * * the receptionist can mail you the report, or you may pick it up at
15 our office * * *.” Bigley Record 525, 543 (emphasis in original deleted).

16 Petitioners received the April 1, 1997 and April 7, 1997 notices.

17 On April 21, 1997, one day before the April 22, 1997 hearing, the application was
18 amended to add the following changes to the Zoo Master Plan with respect to the disputed
19 parking lot:

20 “[Metro] has met with Parks & Recreation, World Forestry Center,
21 neighborhood organization representatives and directly affected neighbors
22 regarding the Temporary Parking Lot. Since upgrading this lot as a
23 permanent resource will avoid greater spillover parking in the neighborhood
24 and surrounding park areas, these parties are supportive of its retention, with
25 the following additional comments:

26 “[The Zoo Master Plan] is amended to stipulate that:

27 “a. Neighborhood association and league will have representatives on the
28 Traffic & Parking Committee,

⁴Actually 23 separate projects or improvements are identified. Two of the 12 proposed projects and improvements are the new “Oregon Exhibits,” and “Miscellaneous improvements.” Under Oregon Exhibits four new exhibits are listed. Nine individual miscellaneous improvements are listed.

1 “b. Abutting property owners will participate in implementation planning
2 for required lighting, landscaping / screening, and security/fence
3 improvements at such time as the lot is designated permanent,

4 “c. The parking management plan will designate this lot for use only when
5 the main lot is nearing capacity,

6 “d. The drywell storm drainage system of the adjacent World Forestry
7 Center will be repaired where impacted by original construction of this
8 parking lot.

9 “Final design of improvements to the lot will be reviewed through a Type II
10 conditional use review.” Bigley Record 626.

11 The staff report to the hearings officer that was issued prior to the April 22, 1997 hearing
12 explains that the temporary parking lot will be converted to a permanent lot. The staff report
13 notes that objections had been received by the city regarding the proposal to convert the
14 temporary lot to a permanent lot. The staff report also notes receipt of complaints that some
15 neighbors may not know that the temporary lot is to be converted to a permanent lot. The
16 staff report goes on to provide the following recommendation:

17 “Given the expected increases in visitors for all the facilities that use the lot, it
18 appears certain that in the long term, the spaces will be needed even if other
19 transit modes are used heavily. Therefore, there appears to be little value in
20 postponing this decision any longer. Given the sensitivity of this issue and
21 previous commitments, it seems appropriate to require a further Type II
22 review to ensure that the necessary improvements are made and that all the
23 issues of concern to neighbors are adequately addressed, as required by
24 previous conditions F and G of [the April 28, 1993 hearings officer’s
25 decision].” Boley Supplemental Record 19.

26 Following the April 22, 1997 hearing, the hearings officer approved the amended Zoo
27 Master Plan on May 19, 1997. Because petitioners did not appear in writing or orally at the
28 April 22, 1997 hearing, petitioners did not receive notice of the May 19, 1997 hearings
29 officer’s decision or the subsequent appeal of the hearings officer’s decision to the city
30 council. Because petitioners did not participate before the city council, petitioners did not
31 receive notice of the city council’s August 7, 1997 decision granting approval of the
32 amended Zoo Master Plan.

1 On May 25, 1999, petitioners filed their notice of intent to appeal challenging the city
2 council's August 7, 1997 decision.

3 **MOTION TO STRIKE**

4 Petitioners correct several factual mistakes in the motion to dismiss and move to
5 strike portions of the motion to dismiss. Based on our review of the record, we agree that the
6 cited references in the motion to dismiss confuse the disputed parking lot with a different,
7 employee parking lot. We also agree with petitioners' ultimate argument that a circle that is
8 drawn around the disputed parking lot on the map that appears at Bigley Record 547 was not
9 sufficient to provide specific notice that the parking lot was being converted to permanent
10 status. It is therefore unnecessary to determine how that circle came to be drawn on the map.
11 However, we simply note that we agree with petitioners' view of the facts and the legal
12 import of the circle. It is not necessary to strike those portions of the motion to dismiss, and
13 the motion to strike is denied.

14 **MOTION TO DISMISS**

15 The city and Metro move to dismiss this appeal, arguing that the notice of intent to
16 appeal was filed long after the 21-day deadline established by ORS 197.830(8).⁵ Petitioners
17 oppose the motion, arguing that the city failed to provide notice of the proposal to convert
18 the temporary parking lot to a permanent parking lot prior to the April 22, 1997 hearing
19 before the hearings officer. Based on that failure by the city, petitioners argue their notice of
20 intent to appeal was timely filed under ORS 197.830(3).⁶

⁵As relevant, ORS 197.830(8) provides:

“A notice of intent to appeal a land use decision * * * shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final.”

⁶ORS 197.830(3) provides:

“If a local government makes a land use decision without providing a hearing 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*

1 As an initial point, we agree with petitioners that the notices of hearing that preceded
2 the April 22, 1997 hearing in this matter did not specifically identify conversion of the
3 disputed parking lot to permanent status as part of the proposal. However, the critical
4 question is whether that failure means the approved proposal differs “from the proposal
5 described in the notice to such a degree that the notice of the proposed action did not
6 reasonably describe the local government’s final actions.” *See* n 6. We conclude that it does
7 not.

8 Petitioners’ central theory is that because the April 1, 1997 notice of hearing does not
9 specifically identify the parking lot as part of the detailed description of the proposal they
10 reasonably could assume the parking lot was not part of the proposal and elect not to attend
11 the April 22, 1997 hearing. In *Kevedy Inc. v. City of Portland*, 28 Or LUBA 227 (1994) we
12 considered a similar challenge concerning the adequacy of the notice that preceded a land use
13 hearing. We explained the competing legislative policies that underlie ORS 197.830(3) and
14 the obligations imposed by that statute as follows:

15 “Where the notice of public hearing given by the local government is
16 inadequate, such that it does not ‘reasonably describe the local government’s
17 final [decision],’ ORS 197.830(3) potentially provides a person adversely
18 affected by the inadequate notice a right to file an appeal at LUBA long after
19 the local decision is reduced to writing, notice of the decision is given, and the
20 decision otherwise becomes final. In that circumstance, the statutory rights of
21 the individual to receive adequate notice of the public hearing, participate
22 fully in the public hearing and challenge the local decision prevail over the
23 right of other parties to a speedy, final decision. This makes the notice of
24 public hearing an extremely important document, from the standpoint of all
25 parties.

26 “In view of the above legislative policies, we believe ORS 197.830(3)
27 imposes a requirement that a reasonable person be able to tell from the notice

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.” (Emphasis added.)

1 of public hearing that the local government might take the action that the local
2 government ultimately takes. In this regard, a reasonable person recognizes
3 that the detail with which a proposal is described in a notice of public hearing
4 is related to the length of the notice. A reasonable person also recognizes that
5 proposals for land use approval may change somewhat after the notice of
6 public hearing is given, either because the applicant modifies the proposal or
7 the local decision maker imposes conditions of approval that change the
8 nature of the proposal in some respect. A reasonable person who recognizes
9 that his or her interests may be affected by the proposal, participates in the
10 local proceedings to protect his or her interests. While changes in the
11 proposal described in a notice of public hearing can be of such a degree that
12 the notice 'did not reasonably describe the local government's final
13 [decision],' it is clear that not every change in the proposal described in the
14 notice of public hearing necessarily implicates ORS 197.830(3)." *Kevedy*
15 *Inc.*, 28 Or LUBA at 232-33 (footnote omitted).⁷

16 Applying these principles in this case, the proposal that is described in the April 1,
17 1997 notice is a multifaceted, conditional use master plan proposal for future development of
18 the zoo.⁸ While the disputed parking lot is not specifically mentioned in the notice, even a
19 casual reading of the notice discloses that a large number of potential projects were
20 envisioned by the proposal. A reasonable person reading that notice would realize that plans
21 for a number of changes in zoo facilities and improvements were proposed and that the
22 notice might not completely describe all the proposed projects and improvements. As we
23 noted in *Kevedy Inc.*, a reasonable person would also realize that the proposal might be

⁷In that case the question was whether property that had received a historic landmarks designation was adequately described in the notice of hearing. The petitioner in that appeal argued that the notice was not adequate to describe certain property that was included in the designation. Based on that inadequacy, the petitioner in *Kevedy, Inc.* argued its appeal was timely filed under ORS 197.830(3) even though it was filed more than 21 days after the decision became final. LUBA disagreed, concluding that the notice was adequate to put the petitioner on notice that the property was included. The current appeal concerns the adequacy of the notice to describe the approved use; *Kevedy Inc.* concerned the adequacy of the notice to describe the affected property. Although petitioners argue this factual difference is significant and that *Kevedy, Inc.* is therefore inapposite, we do not agree. Just as a notice of hearing need not perfectly describe the property that may be affected, it need not perfectly describe the uses that are contemplated.

⁸Although the notice of hearing purported to describe the proposal as 23 separate projects and improvements, the master plan shows a total of 54 separate new facilities. Bigley Record 494.

1 modified during the review process.⁹ Had petitioners requested a copy of the staff report, as
2 the notice invited, they would have learned of the proposal to convert the parking lot to
3 permanent status. Had petitioners attended the hearing, they would have learned of the
4 parking lot proposal. Petitioners did neither.

5 We conclude that ORS 197.830(3) only requires that the April 1, 1997 notice
6 *adequately* describe the *proposal*. The proposal is the Zoo Master Plan, a multi-project,
7 multi-phase plan for development of the zoo over 10 years. We do not believe that ORS
8 197.830(3) requires that the notice of hearing precisely describe every detail of such a
9 proposal. The April 1, 1997 notice was adequate to provide notice that the proposed Zoo
10 Master Plan included many new projects. The omission of any specific mention of the
11 parking lot does not, in our view, mean the proposal that was approved is “different from the
12 proposal in the notice to such a degree that the notice of the proposed action did not
13 reasonably describe the local government’s final action.” We believe ORS 197.830(3)
14 requires that the approved proposal differ from the proposal that is described in the notice in
15 some “significant” way. *Leonard v. Union County*, 24 Or LUBA 362, 375 (1992).
16 Petitioners have simply not shown that a multifaceted Zoo Master Plan *with* the temporary
17 parking lot converted to a permanent parking lot so differs from a Zoo Master Plan *without*
18 the permanent parking lot that the notice of hearing “did not reasonably describe the local
19 government’s final action.”

20 Finally, we note that petitioners argue we should find that wherever a conditional use
21 master plan includes a project that itself would require conditional use approval, failure to
22 identify that project in the notice should render the notice inadequate to “describe the local
23 government’s final action,” within the meaning of ORS 197.830(3). The entire Metro

⁹Conditional use master plans are reviewed following the city’s Type III procedures. PCC 33.820.040. Under Type III review, the hearings official may adopt the staff recommendation, modify the recommendation or reject it. PCC 33.730.030. Similarly, if the hearings officer’s decision is appealed to the city council, it may adopt, modify or reject the hearings officer’s decision. *Id.*

1 Washington Park Zoo is a conditional use in the Open Space zone. All of the facilities and
2 improvements included in the conditional use master plan require conditional use approval.
3 The test petitioners would apply would mean that any failure to identify a facility or
4 improvement specifically in the notice of hearing would violate ORS 197.830(3). A logical
5 extension of such a rule would be that any time a proposed conditional use master plan is
6 amended or conditioned in a way that adds or deletes a project after the initial notice is given,
7 a new notice would be required and the review process would have to be repeated. ORS
8 197.830(3) does not require such precision and detail in the notice of hearing.

9 The notice of intent to appeal was filed after the deadline established by ORS
10 197.830(8). Therefore, the city's and Metro's motion to dismiss is granted.¹⁰

11 This appeal is dismissed.

¹⁰In view of our conclusion that the notice of hearing reasonably described the final action, we need not consider the city's and Metro's suggestion that petitioners have failed to demonstrate that they are "adversely affected" by the challenged decision, as required by ORS 197.830(3).