BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RODNEY KAMPPI, MARY KAMPPI, JACK FARRIES, LAVERNE FARRIES, DAVID NELITON, JEANNETTE NELITON, JEAN ALTDORFER, DOT SNYDER, and FAYE WRIGHT NEIGHBORHOOD ASSOCIATION, Petitioners, vs. CITY OF SALEM, Respondent, and JOHNNY R. BARTLETT, Intervenor-Respondent.	LUBA No. 91-074 FINAL OPINION AND ORDER

Appeal from City of Salem.

Sandra Smith Gangle, Salem, represented petitioners.

Paul Lee, Salem, represented respondent.

Johnny R. Bartlett, Salem, represented himself.

KELLINGTON, Chief Referee; HOLSTUN, Referee; SHERTON, Referee, participated in the decision.

DISMISSED 08/26/91

1. 24.2.5. Standing - Before LUBA - Adverse Effect.
25.4.7 Local Government Procedures - Compliance with Local Ordinances/Regs - Appeal Requirements.

Persons within sight an sound of a development proposal are presumed to be adversely affected by it.

2. 26.5 LUBA Jurisdiction - Exhaustion of Remedies.

Where local code provides an unqualified right to a local appeal, petitioners must exhaust that local administrative remedy before appealing to this Board.

3. 26.5 LUBA Jurisdiction - Exhaustion of Remedies.

Petitioners are not excused from filing a local appeal on the basis that local government employees asserted that no local appeal was available for challenged decision.

Kellington, Chief Referee.

NATURE OF THE DECISION

Petitioners appeal the city's approval of a building permit.

MOTION TO INTERVENE

Johnny R. Bartlett moves to intervene on the side of respondent in this appeal. There is no objection to the motion, and it is allowed.

FACTS

On May 17, 1991, the city planning department approved intervenor's application for a building permit. The permit allows construction of a pole structure in a residential zone. No hearing was conducted before the challenged decision was made, and no notice of the challenged decision was given to anyone other than intervenor.

On May 31, 1991, petitioner Jeannette Neliton telephoned the city planning department to inquire whether the proposed structure was lawful. She was told that a building permit had been issued for the structure. On June

3, 1991, petitioners Kamppi and Gardener visited the city planning department concerning the proposed structure. In their affidavit they state the following exchange occurred between themselves and a city planner:

> "* * * * *
>
> "We asked [a city planner] if she had any suggestions as to what could be done [regarding the proposed structure].
>
> "The planner told us that as long as a permit had been issued, there was nothing that could be done.
>
> "[We] asked again saying 'you are saying that there is nothing we can do; that we cannot request a hearing or anything?'
>
> "She responded with a shrug of her shoulders * * * She made no comment to [our] second question." Affidavit of Mary L. Kamppi and Ralph Gardener, Second Supplemental Record, Exhibit I.

The next day, petitioners Kamppi and Gardner contacted an attorney who was ultimately retained to represent the petitioners in this appeal proceeding. Petitioners' attorney's affidavit indicates that on June 4, 1991 she visited the planning department and spoke with a city planner. The affidavit states the following:

> "* * * * *
>
> "[The city planner] informed me that the [building permit] had been issued 'administratively' without a hearing and that the decision was not 'appealable'[.]
>
> "I pointed out what I perceived as some obvious errors in the decision to [the planner] * * * . [The planner] shrugged her shoulders. I stated my clients wanted to appeal.

> "* * * * *" Affidavit of Sandra Smith Gangle, Second Supplemental Record, Exhibit D.

On June 6, 1991, petitioners filed a notice of intent to appeal the building permit with this Board. On June 7, 1991, an assistant city attorney contacted petitioner's attorney and inquired about why local administrative remedies had not been exhausted. The assistant city attorney suggested that petitioners should file a local appeal rather than a LUBA appeal. Apparently, the assistant city attorney cited a local appeal procedure which is different from the one which is the basis for the city's motion to dismiss filed on June 28, 1991.

MOTION TO DISMISS

The city moves to dismiss this appeal on the basis that petitioners failed to exhaust their administrative remedies as required by ORS 197.825(2)(a).[1]

Salem Revised Coded (SRC) 114.200(c) provides:

> "Any person adversely affected or owning property within the notification area wishing to appeal a land use decision for which no notice of a hearing is provided in this code, shall file written notice of appeal within 15 city business days of

---

[1]ORS 197.825(2) provides in relevant part:

"The jurisdiction of the [Land Use Board of Appeals]:

"(a) Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the [Land Use Board of Appeals] for review * * *

"* * * * *."

> the date the person knew or should have known of the decision." (Emphasis supplied.)

For purposes of this motion to dismiss, there are two inquiries under this SRC provision. The first question is whether all of the petitioners are "adversely affected" by the challenged decision. The second question is whether the challenged decision is one for which there is no notice of a hearing provided in the SRC. We address these inquiries separately below.

1 The term adversely affected is not defined in the SRC. However, it is a term of art which has been defined in the context of determining standing to appeal to this Board. It is well established that a person within sight and sound of a development proposal is presumed to be adversely affected by it. Stephens v. Josephine County, 14 Or LUBA 133, 135 (1985); Stephens v. Josephine County, 11 Or LUBA 154, 156 (1984); Worcester v. City of Cannon Beach, 9 Or LUBA 307, 311-312 (1983); Kenagy v. Benton County, 6 Or LUBA 406, 407 (1982); see Merrill v. Van Volkinburg, 54 Or App 873, 876, 636 P2d 466 (1981); see also Duddles v. City of West Linn, 21 Or App 310, 328, 535 P2d 583 (1975). We believe the reference in SRC 114.200(c) to persons who are adversely affected is intended to refer, at a minimum, to persons who are within sight and sound of a development proposal.

There is no dispute that all of the individual petitioners live within sight and sound of the proposal. Further, the parties do not dispute that the Faye Wright

Neighborhood Association, which claims standing in its representational capacity, is composed of persons who live within sight and sound of the proposal. Accordingly, all of the petitioners are adversely affected within the meaning of SRC 114.200(c).

The next inquiry under SRC 114.200(c) is whether petitioners had a right under the SRC to a hearing prior to approval of the building permit. Petitioners identify no provision in the SRC, and we find none, giving them any right to a hearing prior to the issuance of a building permit. Petitioners claim in order to approve the building permit, the city necessarily made certain decisions which are not explicitly stated, but which are implicit. Petitioners claim those decisions include approval of a variance and vacation of a platted street. As we understand it, petitioners reason that if the city was required to make decisions regarding a variance and a street vacation to approve the challenged building permit, then the city was required to hold a hearing on such a variance and street vacation, even though such decisions may not be specifically identified in the challenged decision.

We disagree with petitioners. Essentially, petitioners claim that because of specific characteristics of the property on which the subject building is proposed, before the city may lawfully approve the challenged building permit, it is required to approve a variance and street

vacation. Whether or not the city should have approved a variance or should have vacated a platted street to lawfully approve the subject building permit are properly the subjects of an assignment of error in an appeal of the decision to issue the building permit. However, what other decision the city should have made, either contemporaneously with or prior to the adoption of the challenged decision, is not determinative of the nature of the decision actually adopted. As far as we can tell, in the challenged decision the city only approved a building permit. We are cited to nothing indicating the city approved anything other than a building permit, and we are aware of no provision in the SRC which provides for a hearing as a prerequisite to the issuance of a building permit.

2 Because (1) petitioners are adversely affected by the challenged decision, and (2) the SRC provides no right to notice of a hearing prior to the issuance of a building permit, SRC 114.200(c) provides petitioners an unqualified right to appeal the challenged decision within 15 days of the date the petitioners "knew or should have known of the challenged decision." Under these circumstances, petitioners are required to exhaust that local remedy before this Board has jurisdiction to consider an appeal of a city decision to issue the subject building permit. ORS 197.825(2)(a); Lyke v. Lane County, 70 Or App 82, 688 P2d 411 (1984); Pienovi v. City of Canby, 16 Or LUBA 604 (1988);

Cope v. Cannon Beach, 15 Or LUBA 558 (1987).

As we understand it, petitioners alternatively argue that they were entitled to written notice of the challenged building permit decision because it is a decision granting a "permit" as that term is defined in ORS 227.160(2).[2] If the challenged decision is a "permit," then under ORS 227.175(10) petitioners may be entitled to written notice of the challenged decision as persons adversely affected or aggrieved by it.[3] Petitioners assert that under League of Women Voters v. Coos County, 82 Or App 673, 729 P2d 588 (1986), whether they had actual notice of the challenged decision is irrelevant. They argue that the time for appealing the challenged decision to this Board does not begin to run until petitioners are given the written notice to which they are entitled by statute. Petitioners reason that if the written notice of the challenged decision to which they are entitled is not given, they may bypass local administrative remedies and appeal directly to this Board.

---

[2]ORS 227.160(2) defines a "permit" as a "discretionary approval of the development of land * * *."

[3]ORS 227.175(10) provides in relevant part:

> "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. * * *"

Even if we agreed with petitioners that ORS 227.175(10) requires the city to give petitioners written notice of the decision, that would have no bearing on petitioners' duty under ORS 197.825(2)(a) to exhaust the local administrative remedy available under SRC 114.200(c) before appealing to this Board. The question in this appeal is whether petitioners may fail to avail themselves of the right to a local appeal of a decision and, rather, appeal the decision directly to this Board. Under ORS 197.825(2)(a), we conclude they may not.

Petitioners make one additional argument that deserves response. Petitioners and their attorney claim they were told by a city planner that they had no right to a local appeal of the challenged decision. Further, petitioners' attorney advises that an assistant city attorney told her that her clients needed to exhaust administrative remedies before appealing to LUBA. Petitioners' attorney states that in advising her about administrative remedies, the city attorney cited an incorrect appellate body with which such a local appeal should be filed.[4] Petitioners argue that under these circumstances, filing a local appeal would have been a futile act, and the law does not require the performance of a futile act.

We assume for purposes of resolving this issue that (1)

[4]However, petitioners did not file a local appeal with the body suggested by the city attorney.

a city planner erroneously advised certain of petitioners and petitioners' attorney that there was no right to file a local appeal of the building permit, and (2) an assistant city attorney advised petitioners' attorney that her clients needed to exhaust their administrative remedies, but cited an incorrect local appellate body, or a local appellate body other than those identified in SRC 114.200(c), as an example of local exhaustion options.

Intervenor states he is representing himself pro se. He states that he did not make phone calls and the like to determine his rights. Rather, he states he spent time reading the local code and state rules concerning how to protect his rights both below and in this appeal proceeding. He regards it as unfair that an attorney be excused from the performance of a duty required by the local code simply because she is unaware of it, or because she relies upon the statements of city officials rather than reading the code.

3 We do not believe petitioners are excused from filing an appeal of the challenged building permit pursuant to SRC 114.200(c). In Columbia River Television v. Multnomah County, 299 Or 325, 702 P2d 1065 (1985), the petitioner's attorney called the clerk of the county board of commissioners to determine when a local decision had been "filed." The clerk misinformed the attorney that the decision had been filed three days later than it had actually been filed. Relying upon the clerk's misstatement,

the attorney filed a notice of intent to appeal three days after the 21 days for appealing to LUBA had run. The Supreme Court held that reliance upon the clerk's misstatement did not alter the 21 day statutory period for appealing to LUBA. Citing Far West Landscaping v. Modern Merchandising, 287 Or 653, 601 P2d 1237 (1979), the Supreme Court explained:

> "A party who has failed to meet a statutory time limit is not excused merely by reason of a clerk's error in responding to a telephone inquiry." Columbia River Television, 299 Or at 329.

Similarly, this Board stated the following in Kellogg Lake Friends v. City of Milwaukie, 17 Or LUBA 708, 712 n 3 (1989):

> "We understand petitioner and intervenor-petitioner to contend that we are estopped from enforcing the statutory deadline for filing a notice of intent to appeal in this case because the Board's administrative assistant informed petitioner that the filing of an amended notice of intent to appeal * * * would be acceptable. However, regardless of what the Board's administrative secretary may have told petitioner[s], estoppel cannot arise from an action of a Board employee which purports to waive a mandatory statutory requirement." (Citations omitted.)

We believe that the principles articulated in Columbia River Television, supra, and Kellogg Lake Friends, supra, are equally applicable to this proceeding. ORS 197.825(2)(a) requires that local administrative remedies be exhausted before a petitioner may appeal to this Board. Not only is SRC 114.200(c) codified, it is codified in the SRC

section governing local appeals. SRC 114.200(c) provides petitioners with an absolute right to a local appeal of the challenged decision. Petitioners could have at any time simply looked in the SRC to determine for themselves whether a local right of appeal was available.[5] We do not believe petitioners' reliance upon alleged misrepresentations of city employees concerning the availability of a local appeal excuses petitioners from filing a local appeal. Similarly, we do not believe that such alleged misrepresentations show it would have been futile to file a local appeal.

Accordingly, we conclude that petitioners failed to exhaust their local administrative remedies, and that we lack authority over this appeal. ORS 197.825(2)(a).

This appeal is dismissed.

[5]This is particularly the case, where as here, an assistant city attorney told petitioners attorney that petitioners needed to exhaust administrative remedies before filing an appeal with this Board.