

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CITIZENS CONCERNED WITH MEDICAL)
5 WASTE BURNING IN SHERWOOD, an)
6 unincorporated association, LISA)
7 BRENNER, and DENISE HAGG,)

8)
9 Petitioners,)

10)
11 and)

12)
13 MARY YOUNG and HARRY WILLIAM)
14 GAZELY,)

LUBA Nos. 90-091 and 90-093

15)
16 Intervenors-Petitioner,)

FINAL OPINION

) AND

17 ORDER

18)
19 vs.)

20)
21 CITY OF SHERWOOD,)

22)
23 Respondent,)

24)
25 and)

26)
27 THERM-TEC, INC.,)

28)
29 Intervenor-Respondent.)

30
31
32 Appeal from City of Sherwood.

33
34 Daniel H. Kearns and Mark J. Greenfield, Portland,
35 filed the petition for review on behalf of petitioners and
36 intervenors-petitioner. With them on the brief was Preston
37 Thorgrimson Shidler Gates & Ellis. Mark J. Greenfield
38 argued on behalf of petitioners and intervenors-petitioner.

39
40 Derryck H. Dittman, Tigard, filed a response brief and
41 argued on behalf of respondent.

42
43 Loren D. Podwill and Laura A. Schroeder, Portland,
44 filed a response brief. With them on the brief was
45 Bullivant, Houser, Bailey, Pendergrass & Hoffman. Loren D.

1 Podwill argued on behalf of intervenor-respondent.

2

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

5

6 REMANDED 12/05/91

7

8 You are entitled to judicial review of this Order.
9 Judicial review is governed by the provisions of ORS
10 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners challenge two decisions in this
4 consolidated review proceeding. The first decision
5 determines that intervenor-respondent Therm-Tec's (hereafter
6 Therm-Tec's) proposed incineration operation is a use
7 similar to certain uses allowed in the General Industrial
8 (GI) zoning district. The second decision approves a site
9 plan for construction of a 40 foot by 100 foot building to
10 house the incinerator.

11 **FACTS**

12 Petitioners allege that since 1985, Therm-Tec has
13 operated within the city a facility which manufactures waste
14 incinerators. Petitioners also allege that at some point,
15 Therm-Tec began operating a waste incinerator for commercial
16 burning purposes at the facility without first obtaining
17 city approval for that aspect of the facility.

18 On October 21, 1988, Therm-Tec applied for a "similar
19 use" determination to allow expansion of its on-site
20 incineration operations.¹ On that date, Therm-Tec also
21 applied for site plan approval to allow construction of a 40
22 foot by 100 foot building to house the incinerator. The

¹Under Sherwood Zoning and Community Development Code (ZCDC) §§ 4.600 through 4.603, "Interpretation of Similar Uses," the planning commission may approve a "proposed land use which is not specifically listed or otherwise clearly indicated as allowed, conditionally allowed or prohibited * * *."

1 city planning commission considered Therm-Tec's requests at
2 its November 21, 1988 meeting, and on November 22, 1988, the
3 planning commission granted both requests.²

4 Petitioners allege they first became aware of the
5 "similar use" determination and the site plan approval on
6 June 27, 1990 and July 4, 1990, respectively. Petitioners'
7 notices of intent to appeal the November 22, 1988 "similar
8 use" determination and site plan approval were filed on July
9 2, 1990 and July 5, 1990, respectively.

10 In an order entered earlier in this appeal, we
11 determined that both the similar use determination and the
12 site plan approval decision were "permits" as that term is
13 defined by ORS 227.160(2). Citizens Concerned v. City of
14 Sherwood, ___ Or LUBA ___ (LUBA Nos. 90-091 and 90-093,
15 Order on Motions for Evidentiary Hearing and Depositions,
16 April 2, 1991). We also determined that the city failed to
17 provide a public hearing or notice of the challenged
18 decision and opportunity for appeal, as required by ORS
19 227.175(3) and (10). Id. In view of the city's failures to
20 provide the required public hearing or notice of decision
21 and opportunity for appeal, we also concluded (1)
22 petitioners had no local administrative remedies to
23 exhaust,³ and (2) the statutory "appearance" and

²The building has been constructed.

³ORS 197.825(2)(a) requires that a petitioner first exhaust any remedies available at the local level before appealing a land use decision to LUBA.

1 "aggrievement" requirements of ORS 197.830(3)(c)⁴ for
2 standing to appeal to this Board are satisfied.⁵ Id.

3 Because the petitioners were not provided an
4 opportunity for a public hearing and were not provided
5 notice of the challenged decisions, we concluded in our
6 earlier order that the present appeal is timely filed if the
7 notices of intent to appeal were filed within 21 days after
8 petitioners received actual notice of the permit decisions.
9 See Flowers v. Klamath County, 17 Or LUBA 1078, 1103 (1989);
10 Kunkel v. Washington County, 16 Or LUBA 407, 415 (1988).

11 However, we also concluded in our prior order that
12 Therm-Tec sufficiently disputed petitioners' allegations
13 concerning when petitioners received actual notice of the
14 challenged decisions to warrant an evidentiary hearing. Our
15 order allowed depositions and an evidentiary hearing to

Under the ZCDC, appeals are limited to "aggrieved" parties. Because the ZCDC does not require notice and a local hearing for similar use determinations or site plan review, petitioners were not given an opportunity to become "aggrieved" parties and therefore had no local remedies to exhaust. See Flowers v. Klamath County, 98 Or App 384, 391, 780 P2d 227, rev den 308 Or 592 (1989).

⁴Our review in this appeal is governed by land use statutes as they existed prior to 1989 legislative revisions. The statutory citations in this order are to the statutes as they existed prior to the 1989 legislative revisions.

⁵In Flowers v. Klamath County, supra, the Court of Appeals explained that where a county fails to provide the statutorily required public hearing or notice and opportunity for appeal, the statutory "appearance" and "aggrievement" requirements for standing to appeal to LUBA are obviated. Although Flowers v. Klamath County concerned the statutes requiring that counties provide a public hearing or notice of the decision and an opportunity for an appeal in issuing permits, the statutory requirements applicable to cities are substantially identical.

1 determine whether the notices of intent to appeal were not
2 filed within 21 days after petitioners received actual
3 notice of the disputed decisions. If so, these appeals are
4 untimely and must be dismissed.⁶ Oak Lodge Water Dist. v.
5 Clackamas County, 18 Or LUBA 643 (1990); Karlin v. City of
6 Portland, 13 Or LUBA 21 (1985); McCoy v. Marion County, 9 Or
7 LUBA 214 (1983); Berg v. Coos County, 7 Or LUBA 428 (1983).
8 On the other hand, if the notices of intent to appeal were
9 timely filed, the challenged decisions must be remanded so
10 that the city may provide the public hearing or the notice
11 and opportunity for local appeal required by ORS 227.175(3)
12 and (10).

13 **EVIDENTIARY HEARING**

14 The parties have agreed that LUBA shall make its
15 findings of fact concerning when petitioners received actual
16 notice of the challenged decision based on the depositions
17 of petitioners Brenner and Hagg and the parties' post
18 deposition memoranda. Our findings are set forth below.

⁶Because the notice of intent to appeal the similar use determination (LUBA No. 90-090) was filed on July 2, 1991, the critical date for appealing that decision was June 11, 1991. If petitioners received actual notice of the similar use determination before that date, the notice of intent to appeal is untimely.

The notice of intent to appeal the site plan approval decision (LUBA No. 90-093) was filed on July 5, 1991. Therefore, the critical date in that appeal is June 13, 1991. If petitioners received actual notice of the site plan approval decision prior to that date, the notice of intent to appeal is untimely.

1 **A. Petitioner Brenner**

2 Petitioner Brenner is one of the founding members of
3 petitioner Citizens Concerned with Medical Waste Burning in
4 Sherwood.⁷ Petitioner Brenner learned of the subject city
5 permit decisions following Therm-Tec's applications for
6 approval of air contaminant discharge and solid waste
7 disposal permits from the Oregon Department of Environmental
8 Quality (DEQ). Petitioner Brenner was advised during the
9 course of a May 20, 1990 telephone conversation that permits
10 were pending before DEQ for a waste incinerator in or near
11 Sherwood. Petitioner Brenner may also have learned during
12 the course of that phone conversation that Therm-Tec was the
13 applicant.

14 Several days after the May 20, 1990 phone conversation
15 (before the end of May 1990), petitioner Brenner phoned DEQ
16 and learned that Therm-Tec was the applicant and that the
17 facility was located in the Sherwood area. Petitioner
18 Brenner had subsequent communications with DEQ concerning
19 the pending permit applications before DEQ. Petitioner
20 Brenner requested that she be provided a copy of the 200
21 page DEQ Therm-Tec application. She received a copy of that
22 application on June 14, 1990. One day earlier, on June 13,
23 1990, petitioner Brenner reviewed a copy of the Therm-Tec

⁷Petitioner Citizens Concerned with Medical Waste Burning in Sherwood is an unincorporated association formed in June 1990, after the challenged city permits were approved by the planning commission.

1 DEQ application at the Tualatin Library and copied the
2 summary included in the DEQ application.

3 In reviewing the Therm-Tec DEQ application on June 13
4 and 14, 1991, petitioner Brenner became aware that the City
5 of Sherwood may have granted some type of land use
6 approval.⁸ Petitioner Brenner's husband was informed at a
7 June 13, 1990 city council meeting that the planning
8 commission may have granted permission for an incinerator.
9 Thereafter, petitioner Brenner contacted the city planning
10 office.

11 "* * * I called up the City to try to go in and
12 see what records they had. Carol Connell [the
13 city planner] was not in until the next week. I
14 had to wait until [June 19, 1990] when she was in
15 her office to go in. I copied the materials they
16 had, took them home, read them over. That was
17 about the same time the chance to comment arrived
18 in the mail, and it was at that point that we saw,
19 yes in fact, that the City had issued a permit to
20 Therm-Tec." Brenner Transcript 37.

21 Based on the above, we find that petitioner Brenner
22 learned, as early as June 13, 1990, of the existence of the
23 Therm-Tec incinerator and that the city may have issued the

⁸Although there are suggestions in petitioner Brenner's deposition and one of the exhibits attached to that deposition that copies of the actual decisions disputed in this appeal were included in the the DEQ permit materials, it is reasonably clear that such was not the case. We assume the "permit signed by Jim Rapp [the city manager]," referenced in Brenner's Deposition Exhibit 1, refers to some document other than copies of the actual city permits challenged in this appeal, because both of the challenged city permits are signed by Carol Conner, the Sherwood Planning Director, not Jim Rapp. As explained infra, petitioner Brenner first obtained copies of the challenged city permits on June 19, 1990, when she visited the Sherwood Planning Department.

1 disputed permits. She promptly pursued the matter with the
2 city planning department and, thereafter, obtained copies of
3 the disputed permit decisions on June 19, 1990. Based on
4 these facts, we conclude petitioner Brenner received actual
5 notice of the challenged decisions, such that the deadline
6 for petitioner Brenner to file a notice of intent to appeal
7 with this Board began to run, on June 19, 1990. Both
8 notices of intent to appeal were filed within 21 days of
9 June 19, 1990 and were, therefore, timely filed on behalf of
10 petitioner Brenner.

11 **B. Petitioner Hagg**

12 Although the question is much closer with regard to
13 petitioner Hagg, we conclude she also received actual notice
14 of the disputed decisions, either from petitioner Brenner or
15 at a meeting of Citizens Concerned with Waste Burning in
16 Sherwood held sometime after June 19, 1990, as she testified
17 in her deposition. Petitioner Hagg stated in an affidavit
18 submitted earlier in this appeal that while she had observed
19 the construction of the building which houses the
20 incinerator, she had no reason to believe it was being
21 constructed to house an operational incinerator.⁹ However,
22 in her deposition, petitioner Hagg testified that she had
23 not observed construction of the building and learned about

⁹The affidavit suggests there was nothing about the outward appearance of the building to distinguish it from the larger building where Therm-Tec manufactures incinerators.

1 the building only during the meeting held after June 19,
2 1990.

3 Despite this contradiction in petitioner Hagg's
4 testimony, we conclude the record in this matter and her
5 deposition provide substantial evidence that she did not
6 learn of the planning commission permit decisions until
7 sometime after June 19, 1990. Although she may have been
8 aware of the building constructed to house the incinerator,
9 we do not believe that is a sufficient basis upon which to
10 impute actual notice or knowledge of the city's earlier
11 permit decisions concerning the use and construction of that
12 building. We reach this conclusion because there is nothing
13 about the outward appearance of the building which would
14 reasonably alert a person of the use for which the building
15 was being constructed. It is the permissibility of the use
16 of the building that is the central issue presented in this
17 appeal. Both notices of intent to appeal were timely filed
18 on behalf of petitioner Hagg.

19 **C. Petitioner Citizens Concerned with Medical Waste**
20 **Burning in Sherwood**

21 Because Citizens Concerned with Medical Waste Burning
22 in Sherwood is an unincorporated association, formed after
23 the challenged city permits were issued, it may only assert
24 representational standing to represent the interests of its

1 members.¹⁰ See 1000 Friends of Oregon v. Multnomah County,
2 39 Or App 917, 923-24, 593 P2d 1171 (1979); Tuality Lands
3 Coalition v. Washington County, ___ Or LUBA ___ (LUBA Nos.
4 91-035 and 91-036, Order on Motion for Evidentiary Hearing
5 and Depositions, August 29, 1991), slip op 9-12. Both
6 petitioners Brenner and Hagg are members of Citizens
7 Concerned with Medical Waste Burning in Sherwood. We
8 conclude above that petitioners Brenner and Hagg both have
9 standing to bring this appeal. Therefore petitioner
10 Citizens Concerned with Medical Waste Burning in Sherwood
11 also has standing to bring this appeal.

12 **DECISION**

13 Petitioners' first assignment of error alleges
14 respondent erred by not providing a public hearing prior to
15 reaching the challenged decisions, or, in the alternative,
16 notice of the decisions and an opportunity to appeal.

17 Petitioners are correct, and the city's decisions are
18 remanded so that the city may provide the statutorily
19 required hearing or notice of decision and opportunity to
20 appeal required by ORS 227.175(3) and (10).

21 Petitioners also allege the city erroneously
22 interpreted the ZCDC and that the city's findings concerning

¹⁰Because Citizens Concerned with Medical Waste Burning in Sherwood did not exist until after the challenged permits were issued, it could not itself satisfy the statutory requirements that it appear during the local proceedings and be aggrieved by the decisions granting those permits, even if the city had provided the opportunity to do so.

1 the similar use determination and the site plan approval are
2 inadequate and not supported by substantial evidence. Since
3 remand is required in any event, so that the statutory
4 requirements of ORS 227.175(3) and (10) can be satisfied, we
5 believe it is appropriate for the city to address these
6 contentions in the first instance on remand.

7 The city's decisions are remanded.