BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MITCHELL GENSMAN, Petitioner-Cross-Respondent, vs. CITY OF TIGARD, Respondent-Cross-Respondent, and TACO BELL, INC., Intervenor-Respondent-Cross-Petitioner.	LUBA No. 94-211 FINAL OPINION AND ORDER

Appeal from City of Tigard.

Gregory G. Lutje, Portland, filed the petition for review and argued on behalf of petitioner.

Pamela J. Beery, Portland, filed a response brief and argued on behalf of respondent. With her on the brief was O'Donnell Ramis Crew Corrigan & Bachrach.

Michael C. Robinson, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Stoel Rives Boley Jones & Grey.

LIVINGSTON, Chief Referee; GUSTAFSON, Referee, participated in the decision.

REMANDED 08/14/95

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

Opinion by Livingston.

NATURE OF THE DECISION

Petitioner appeals a planning commission order denying petitioner's local appeal of a planning director's decision approving a site development review for a fast food restaurant.

MOTION TO INTERVENE

Taco Bell, Inc. (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

On June 24, 1994, the city's planning director issued a notice of decision approving intervenor's application for a site development review and lot line adjustment. As described in the city's notice of decision, intervenor's proposal called for

> "a single joint use driveway on the westerly side of the property to serve the proposed development and the businesses on the adjacent property located to the west. In addition, the * * * plan shows a curb barrier to separate the proposed commercial use from the 14 foot wide [right-of-way] located on the easterly edge of the site, that serves the residential properties to the rear of the site. This [right-of-way] will connect to the 'jug-handle' drive-through on Pacific Highway that serves as refuge for the southbound left-turn traffic entering the cinema across the street." Record 284.

On July 13, 1994, petitioner filed an appeal of the planning director's decision, accompanied by a $235 filing

fee. On September 12, 1994, the city planning commission held a public hearing on petitioner's appeal. Petitioner requested the record be held open for seven days, as allowed by ORS 197.763(6). Intervenor requested it be given seven additional days to respond to any materials submitted by petitioner. The planning commission granted both requests and decided to close the public hearing and conduct its deliberations when it reconvened on September 26, 1994.

On September 19, 1994, intervenor delivered a letter to the city, addressed to the chairman of the planning commission. In the letter, which was accompanied by photographs and other materials not already in the record, intervenor presented its arguments in support of denying petitioner's appeal.

On September 24, 1995, petitioner sent a letter to the planning commission, noting the submission of intervenor's letter on September 19, 1994, and requesting a 20-day continuance pursuant to ORS 197.763(4)(b). Petitioner also objected to the city's appeal fee of $235. At its September 26, 1994 meeting, the planning commission refused to grant the continuance, considered intervenor's September 19, 1994 submission, and voted to deny petitioner's appeal. The planning commission's decision became final on October 24, 1994.

ASSIGNMENT OF ERROR (CROSS PETITION)/ MOTION TO DISMISS

In its cross-petition, intervenor moves to dismiss

petitioner's appeal for lack of jurisdiction. Intervenor contends petitioner's local appeal was untimely under Tigard Community Development Code (TCDC) 18.32.300(A), which states, in relevant part:

> "In computing the length of the appeal period and the effective date for a Director's decision, the day the notice is published in the newspaper shall be excluded and the last day for filing the appeal, and the effective date, the tenth day, shall be included unless the last day falls on a legal holiday for the City or on a Saturday, in which case, the last day shall be the next business day. The Director may extend the appeal period and the effective date to the day following a Council meeting when the computed appeal period would not otherwise provide an opportunity for interested parties to appear before Council regarding the decision. The appeal period thus computed shall not be greater than 20 days. * * *" (Emphasis added.)

Intervenor contends further that because petitioner's appeal was untimely, petitioner failed to exhaust his local administrative remedies below, as required by TCDC 18.32.310(C).[1] Finally, intervenor contends that because petitioner failed to exhaust his administrative remedies below, this Board lacks jurisdiction to hear petitioner's appeal. See ORS 197.825(2)(a).

To support its contention that petitioner's appeal was

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[1]TCDC 18.32.310(C) states:

> "Failure to file an appeal or petition for review shall be deemed a failure to exhaust administrative remedies. It is the purpose of this section to provide the parties every remedy possible. The filing of an appeal or petition for review is a condition precedent to litigation."

untimely, intervenor notes that the city council met on June 28, 1994 and argues that the "computed appeal period" therefore did provide an opportunity for interested parties to appear before the council. In response, the city argues the city council meeting followed too closely upon the mailing of notice to give the parties an opportunity to prepare. The city argues further that the city council's own rules would have delayed the inclusion of the appeal on the council's agenda before July 12, 1994.

We do not understand why both respondents discuss the city council's schedule or why the language of TCDC 18.32.300(4) emphasized above applies to this case. We understand petitioner to have appealed from the planning director to the city planning commission, and from the city planning commission directly to LUBA. Record 2; Petitioner's Brief 1; Intervenor's Brief 1 (accepting petitioner's summary of material facts); Respondent's Brief 1. The challenged decision expressly rejects petitioner's attempt to appeal from the planning commission to the city council. Record 44B.[2] Moreover, in determining if petitioner missed a local appeal deadline, the focus must be primarily on the content of the notice to petitioner, and only secondarily on the schedules of the city's public bodies.

[2]The record contains two pages numbered "44." We refer to these as "44A" and "44B."

The planning director's notice of decision was mailed on June 24, 1994. Record 281. In the section dealing with procedure, the notice of decision states:

> "* * * * *
>
> "2. Final Decision: THE DECISION SHALL BE FINAL ON 7-13-94 UNLESS AN APPEAL IS FILED.
>
> "3. Appeal: Any party to the decision may appeal this decision in accordance with Section 18.32.290(A) and Section 18.32.370 of the [TCDC] which provides that a written appeal must be filed with the City Recorder within 10 days after notice is given and sent. * * *
>
> "**The deadline for filing of an appeal is 3:30 p.m. 7-13-94.**
>
> "* * * * *" Record 291. (Emphasis in original.)

The published notice contains the same language as paragraph 3 of the mailed notice of decision.

Intervenor argues that because the director's decision was mailed June 24, 1994, the last day allowed by TCDC 18.32.300(A) for filing an appeal was July 5, 1994.[3] Intervenor relies on Century 21 Properties, Inc. v. City of Tigard, 99 Or App 435, 783 P2d 13 (1989), and Rochlin v. Multnomah County, 25 Or LUBA 637 (1993), to support its assertion the city could not extend the appeal period to July 13, 1994.

Both Century 21 and Rochlin involved local governments

[3]Petitioner notes the tenth day was July 4, a holiday, and acknowledges the deadline would therefore be July 5.

that had missed deadlines set by their own land use ordinances. In Century 21, the Court of Appeals held the local government to its deadline because it could not claim the remoteness from or presumption of unfamiliarity with city decisions which might apply to parties. Century 21, 99 Or App at 438. Our decision in Rochlin followed the precedent of Century 21.

In this case, the city sent a notice to the parties which expressly stated one appeal deadline and simultaneously provided a way to calculate another, earlier appeal deadline. The inconsistency is easy to miss. The city acted properly in processing petitioner's appeal in accordance with the deadline expressly stated in the notice, rather than requiring petitioner to calculate and then be bound by a shorter deadline.

Intervenor's motion to dismiss is denied.

FIRST ASSIGNMENT OF ERROR

Petitioner contends the city planning commission should have allowed his request for a continuance of the planning commission's September 12, 1994 public hearing. Petitioner argues that since new materials were accepted into the record after the public testimony was closed on September 12, 1994, the city had an obligation under ORS 197.763(4) to reopen the public hearing and grant a continuance. Respondents answer that the challenged decision is a limited land use decision, and is not subject to the procedural

safeguards of ORS 197.763. See ORS 197.195(2).

Petitioner does not dispute that the challenged decision could have been a limited land use decision if the city had chosen to treat it as one. However, petitioner contends the city acted during the local proceedings as if it were making a land use decision.[4] Petitioner argues that the city did not follow the notice requirements set forth in ORS 197.195(3)(c) for a limited land use decision. Record 276, 291.

The city argues it followed its own procedures for limited land use decisions, in accordance with ORS 197.195(3)(a), which states:

> "In making a limited land use decision, the local government shall follow the applicable procedures contained within its acknowledged comprehensive plan and land use regulations and other applicable legal requirements."

The statutory requirements for limited land use decisions are set forth in ORS 197.195(3)c):

> "The notice and procedures used by local government shall:
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> "(A) Provide a 14-day period for submission of written comments prior to the decision;
>
> "(B) State that issues which may provide the basis for an appeal to [LUBA] shall be raised in writing prior to the expiration of the comment period. Issues shall be raised with

[4]Petitioner did not file a reply brief, but replied at oral argument to respondents' characterization, in their response briefs, of the challenged decision as a limited land use decision.

sufficient specificity to enable the decision maker to respond to the issue;

"(C) List, by commonly used citation, the applicable criteria for the decision;

"(D) Set forth the street address or other easily understood geographical reference to the subject property;

"(E) State the place, date and time that comments are due;

"(F) State that copies of all evidence relied upon by the applicant are available for review, and that copies can be obtained at cost;

"(G) Include the name and phone number of a local government contact person;

"(H) Provide notice of the decision to the applicant and any person who submits comments under subparagraph (A) of this paragraph. The notice of decision must include an explanation of appeal rights; and

"(I) Briefly summarize the local decision making process for the limited land use decision being made."

The city's actions in this case did not satisfy the requirements of ORS 197.195(3)(c)(A), (B), (E), and (F). The city did not give notice of the application prior to its decision, it did not establish a 14-day period for the submission of written comments, it did not mention the need to raise issues with sufficient specificity to enable the decision maker to respond to the issue, and it did not then make a final decision appealable directly to LUBA. The city instead gave the type of notice appropriate when providing interested parties an opportunity to request a hearing under

ORS 227.175(10)(a). It then provided a hearing before the planning commission.

Through the date of the planning commission's final deliberations, the city appeared to treat the challenged decision as a land use decision, not a limited land use decision. It denied petitioner the requested continuance, apparently on the advice of counsel, who wrote petitioner's attorney on September 23, 1994:

> "* * * I interpret ORS 197.763 differently than you do. I do not believe material submitted by parties during a period in which the record is left open by the hearing body under ORS 197.763(6) entitles a party to an additional continuance as contemplated by ORS 197.763(4)(b). I believe the two to be mutually exclusive remedies." Record 72.

Our decision in ONRC v. City of Seaside, 29 Or LUBA ___ (LUBA No. 93-228, March 13, 1995), slip op 15-20, makes clear that the submission of material by parties during a period in which the record is left open by the hearing body under ORS 197.763(6) does entitle a party to an additional continuance as contemplated by ORS 197.763(4)(b).

If the city intends to process limited land use decisions differently from land use decisions, it must make that clear at the outset of the process. ORS 197.195(2)(c)(I). It did not do so in this case. Therefore, it must provide all of the procedural safeguards required by ORS 197.763.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioner contends the city improperly charged $235 for his appeal from the planning director's decision to the planning commission. Petitioner asserts the proper fee is $100, as stated in ORS 227.175(10)(b), which limits the amount a local government may charge for an initial hearing. Petitioner requests LUBA to compel the city to return the difference between $235 and $100.

Respondents argue ORS 227.175 applies only to decisions involving "permits," which, by definition, excludes limited land use decisions. Respondents contend that because petitioner did not object to the amount of the fee until after the September 12, 1994 hearing, he waived his objection. Finally, respondents argue that if there was an error in calculating the fee, it was only a procedural error.

As discussed under the first assignment of error, the city chose to treat intervenor's application as one for a land use decision and petitioner's local appeal as one under ORS 227.175. The city was therefore limited to charging a $100 fee.[5]

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[5]If respondents had cited to any place in the record where the city explained that it was charging $235 instead of $100 because it was processing a limited land use decision rather than a land use decision, we might view the matter differently. However, the only indication that the city distinguished between the two types of decision is in a letter dated September 30, 1994, four days after the planning commission's final vote on petitioner's appeal, which petitioner has attached as an exhibit to his

Petitioner raised his objection to the fee in a letter submitted prior to the close of the record, within the period specifically allowed by the planning commission for the submission of additional evidence and argument, and before the planning commission adopted the challenged decision. The objection was timely.

The city's error was not merely procedural. ORS 227.175(10)(a) gives the city the option of deciding an application for a permit without a hearing; ORS 227.175(10)(b) protects the citizens' right to participate by setting a maximum fee of $100 for appeals from such decisions. The two provisions reflect a legislative balancing of expediency against public participation. To allow overcharging would undermine the statutory scheme and violate a substantial right.

The city challenges our authority to order a refund. While LUBA itself cannot order a refund, it may decide land use matters and leave to the courts the authority to award damages arising out of violations. Dunn v. City of Redmond, 303 Or 201, 206 n5, 735 P2d 609 (1987). In Friends of Lincoln Cty. v. Newport, 5 Or LUBA 346, 352 (1982), we decided that fee payment issues are part of the city's "land use appeals structure," capable of violating applicable legal standards.

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brief. The city specifically objects to our consideration of this letter, as it is not part of the record.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Petitioner contends the city's findings of compliance with TCDC 18.108.070(A) are inadequate.[6] Petitioner asserts that at least three properties are dependent on an existing 14-foot right-of-way across the subject property for ingress and egress, and TCDC 18.108.070(A) sets a minimum width of at least 15 feet.

The city found TCDC 18.108.070(A) is inapplicable because it applies only to property which is being developed, not adjacent properties.[7] Petitioner's right-of-way is presently nonconforming.[8] If and when petitioner's property or any other property reliant upon the right-of-way is developed, it will be up to the property owner to meet the access standards set forth in TCDC 18.108.070(A).

The third assignment of error is denied.

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[6]TCDC 18.108.070(A) sets minimum standards for number of driveways, access width, and pavement width for vehicular access and egress for individual residential lots.

[7]TCDC 18.108.025, which governs the applicability of TCDC chapter 18.108 states, in relevant part:

> "A. The provisions of this chapter shall apply to all development including the construction of new structures, the remodeling of existing structures * * *, and to a change of use which increases the on-site parking or loading requirements or which changes the access requirements.
>
> "* * * * *"

[8]See TCDC ch 18.132.

FOURTH ASSIGNMENT OF ERROR

Petitioner contends the city erred in concluding TCDC 18.164.030(I) does not require expansion of the right-of-way over the subject property.[9] TCDC 18.164.030(I) states:

> "1. Whenever existing rights-of-way adjacent to or within a tract are of less than standard width, additional rights-of-way shall be provided at the time of subdivision or development."

TCDC 18.26.030 defines "right-of-way" as "a strip of land occupied or intended to be occupied by a street * * *." It defines "street" as "a public or private way that is created to provide ingress or egress for persons to one or more lots, parcels, areas or tracts of land * * *."

If the TCDC governed, we would agree with petitioner. However, under Dolan v. City of Tigard, ___ US ___, 114 S Ct 2309, 129 LEd 2d 304 (1994) and J.C. Reeves Corp. v. Clackamas County, 131 Or App 615, 887 P2d 360 (1994), the city has an obligation to show that any exaction of right-of-way from intervenor is roughly proportional to the impact of the proposed development. Dolan, 114 S Ct at 2320 n8. The city found that the proposed development would not require increased access to petitioner's property. Record 46. For the city to require a dedication of additional

[9]TCDC 18.120.180(A)(1)(m) makes TCDC chapter 18.164 (Street and Utility Improvement Standards) applicable to site development approvals.

right-of-way would be unconstitutional.

The fourth assignment of error is denied.

The city's decision is remanded.