BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MORTEZA ABADI, Petitioner, vs. WASHINGTON COUNTY, Respondent, and FRED BALL, ROBERT GEHRTS and TIM JOHNS, Intervenors-Respondent.	LUBA No. 98-031 FINAL OPINION AND ORDER

Appeal from Washington County.

Daniel Kearns, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Preston, Gates & Ellis.

Alan A. Rappleyea, Senior Assistant County Counsel, Hillsboro, filed a response brief and argued on behalf of respondent.

Lawrence R. Derr, Portland, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief was Josselson, Potter & Roberts.

GUSTAFSON, Board Chair; HANNA, Board Member, participated in the decision.

DISMISSED 08/19/98

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

Opinion by Gustafson.

NATURE OF THE DECISION

Petitioner appeals the county's approval of a grading permit for a 123-lot subdivision.

MOTION TO INTERVENE

Intervenors-respondent Fred Ball, Robert Gehrts and Tim Johns (intervenors), move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

In June 1996, intervenors submitted to the county an application for preliminary subdivision approval for a 123-lot subdivision. The county conducted an evidentiary hearing in September 1996. Petitioner's property adjoins the northeastern boundary of the proposed subdivision. Petitioner received notice of the 1996 evidentiary hearing but did not participate in the proceedings.

The preliminary grading plan submitted along with the application showed an open area designated Tract A next to petitioner's property, sloping moderately up from the common property line to a detention pond. In response to criticism regarding drainage issues, the county allowed the applicants to submit a revised subdivision plat that removed the detention pond, designated Tract A as two residential lots, and changed the road alignment in the area to extend the

nearest street up a slope to the east of Tract A. The applicants did not submit a revised grading plan.

In November 1996, the county granted preliminary subdivision approval on the basis of the revised preliminary plat, conditioned on submission of a grading and drainage plan that is consistent with the county's standards for a grading permit. The preliminary approval requested that a geologic study accompany the grading plan to address the presence of slopes in excess of 20 percent in the northeastern corner of the property. The county's approval contemplated that the application for a grading permit would be evaluated under a "Type I" administrative review process, a process that does not provide for notice or a hearing.

On June 3, 1997, intervenors submitted an application for a grading permit, supported by a geologic study and a final grading plan. The county approved the challenged decision, the application for a grading permit, on June 12, 1997. The county approved the permit administratively without notice to any persons other than the applicants, pursuant to its Type I procedure.

The final grading plan submitted along with intervenors' application for a grading permit is consistent with the revised preliminary plat in depicting former Tract A as two residential lots rather than an open area with a detention pond, and in showing the road alignment approved in November 1996. However, instead of moderate slopes rising up from the

property line as depicted in the preliminary grading plan, the final grading plan shows a steep retaining wall rising up from the property line.

Pursuant to the approved grading permit, the applicants began grading the area around former Tract A, constructing the retaining wall, and placing fill behind it. Sometime on or before January 6, 1998, petitioner learned about the retaining wall and the grading permit approved in June 1997. On January 6, 1998, petitioner wrote a letter to the county asking various questions about the wall, the grading permit and the subdivision approval. Petitioner asked questions about the fill approved by the grading permit:

> "Why and what transpired such an amount of fill (76,000 cubic yards according to the grading permit)? The land was very much buildable and didn't need this much fill." Record 5.

Further, petitioner asked questions regarding the retaining wall:

> "How may 7 feet walls on top of one another are legal? Are we not defeating the purposes of the law (418-4.1)?
>
> "* * * * *
>
> "What assurances do we have that the wall will not collapse on our home in the event of an earthquake?" Record 9.

The county replied in a letter dated January 16, 1998, making reference to the final grading plan that was submitted along with the application for a grading permit, and explaining that the retaining wall and fill was necessary to bring the grade for the realigned road within required

parameters. Petitioner filed a notice of intent to appeal the issuance of the grading permit on February 6, 1998, within 21 days of the January 16, 1998 county letter but more than 21 days from petitioner's January 6, 1998 letter.

JURISDICTION

The county and intervenors challenge our jurisdiction over this appeal, on two grounds: (1) petitioner failed to file his notice of intent to appeal within 21 days of the date he knew or should have known of the challenged decision, and thus petitioner's appeal is untimely under ORS 197.830(3)(b); and (2) the challenged decision is not a land use decision subject to our jurisdiction as that term is defined at ORS 197.015(10)(a) but is rather a nondiscretionary decision as defined at ORS 197.015(10)(b)(A).[1]

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[1]ORS 197.015(10) provides, in relevant part:

"'Land use decision':

"(a) Includes:

"(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

"(i) The goals;

"(ii) A comprehensive plan provision;

"(iii) A land use regulation; or

"(iv) A new land use regulation; * * *

"(B) A final decision or determination of a state agency other than the commission with respect to which the agency is required to apply the goals;

"(b) Does not include a decision of a local government:

We agree with respondents that petitioner's appeal is untimely. Petitioner's asserted basis for standing and timely appeal lies under ORS 197.830(3)(b), which provides:

> "If a local government makes a land use decision without providing a hearing * * *, a person adversely affected by the decision may appeal the decision to [LUBA] under this section:
>
> "* * * * *
>
> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

Petitioner argues that the earliest date at which he "knew or should have known of the decision" is January 16, 1998, when he received the county's letter responding to his January 6, 1998 letter. Petitioner concedes that by January 6, 1998 he knew about the retaining wall and had learned about the grading permit approval, and knew in particular that the permit approved 76,000 cubic yards of fill.[2] Nonetheless, petitioner contends that he did not know, and a reasonable person would not have known, that the grading permit authorized the retaining wall and associated fill until the county's letter informed him of that fact, with reference to the final grading plan submitted along with the application for a grading permit.

> "(A) Which is made under land use standards which do not require interpretation or the exercise of policy or legal judgment[.]"

[2]The parties inform us that the 76,000 cubic yards of fill mentioned in the grading permit applies to the subdivision as a whole, not necessarily to the lots adjacent or near to petitioner's property.

Petitioner argues that a person does not know or a reasonable person could not have known about the decision unless the person knows or should have known that the decision authorizes the specific adverse impact that renders that person "adversely affected" within the meaning of ORS 197.830(3). According to petitioner, the adverse impact here is the retaining wall, and the grading permit itself does not mention or describe the retaining wall. Petitioner contends that the only document in the record depicting the retaining wall is the final grading plan, and petitioner did not see or know about the final grading plan until January 16, 1998.

We disagree that the scope of the knowledge or putative knowledge described by ORS 197.830(3)(b) is as narrow as petitioner contends. We are not required here to delimit the boundaries of the scope of knowledge and putative knowledge stated in ORS 197.830(3)(b), because we conclude that the present case falls well within that scope. Petitioner had received notice of the subdivision application, including the preliminary grading plan. Had petitioner attended the 1996 evidentiary hearing for which he received notice, he would have learned that the initially proposed open area and detention pond had been eliminated in favor of new residential lots and a new road alignment climbing the slopes to the east of Tract A. Petitioner knew on or before January 6, 1998 that the applicant was building the retaining wall and placing fill behind it, that the county had approved a grading permit for

the subdivision and that the permit approved 76,000 cubic yards of fill. A person with that knowledge knows or, at least, should know that the county had made a decision, the grading permit, that authorizes the retaining wall and fill.

For the foregoing reasons, we conclude that petitioner filed his appeal more than 21 days from the date he knew or should have known about the challenged decision, and thus his appeal was untimely filed. Accordingly, we do not have jurisdiction over this appeal.[3]

The appeal is dismissed.[4]

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[3]Our conclusion that the appeal was untimely filed makes it unnecessary to reach the respondents' alternative argument that we lack jurisdiction because the challenged decision is a nondiscretionary decision not subject to our jurisdiction.

[4]On August 18, 1998, five days after oral argument, petitioner filed a motion to strike several oversized exhibits that the county brought to oral argument pursuant to OAR 661-10-025(2). Petitioner contends that those oversized exhibits are not part of the record. Petitioner also contends that the county failed to bring to oral argument the original Modified Grading Plan dated June 3, 1996, as required by our March 9, 1998 order. A copy of the June 3, 1996 Modified Grading Plan was attached to petitioner's notice of intent to appeal.

Petitioner moves to strike from LUBA's record the exhibits improperly supplied to LUBA, and moves for an order requiring the county to supply LUBA with the original June 3, 1996 Modified Grading Plan.

We determined above that petitioner's appeal was untimely filed and thus we lack jurisdiction. Our disposition did not rely on or involve any of the disputed documents. Given that disposition, we perceive no necessity to resolve petitioner's motions respecting the state of the record.