

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 MOUNTAIN WEST INVESTMENT CORP.,

4 *Petitioner,*

5 vs.

6 CITY OF SILVERTON,

7 *Respondent,*

8 and

9 NORTH WATER STREET, LLC,

10 *Intervenor-Respondent.*

11 LUBA No. 2000-078

12 FINAL OPINION

13 AND ORDER

14 Appeal from City of Silverton.

15 Mark D. Shipman, Salem, appeared on behalf of petitioner.

16 Richard D. Rodeman, Corvallis, appeared on behalf of respondent.

17 Christopher P. Koback, Portland, appeared on behalf of intervenor-respondent.

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

20 DISMISSED

21 07/18/2000

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

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NATURE OF THE DECISION

Petitioner appeals a city decision approving an application for site review for an assisted living facility.

MOTION TO INTERVENE

North Water Street, LLC (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

Intervenor filed an application for site review for an assisted living facility within the city’s MF-R zone. Assisted living facilities are permitted in the zone, subject only to site review. Under the city’s code, site review is conducted by a reviewer appointed by the city manager. The reviewer evaluated the application and, on March 9, 2000, issued a decision approving the application, subject to conditions, including a requirement that the applicant obtain a lot line adjustment.

The city approved the lot line adjustment through a separate process that was appealed to the planning commission by Milton Robinson (Robinson).¹ Petitioner’s attorney attended the May 9, 2000 planning commission appeal hearing, and heard testimony from Robinson’s attorney regarding the site review application approval. Petitioner’s attorney investigated and obtained a copy of the city’s site review decision. Petitioner filed a notice of intent to appeal the March 9, 2000 site review decision with LUBA on May 30, 2000.

MOTION TO DISMISS

Intervenor moves to dismiss this appeal. Intervenor argues that there are four bases for dismissal: (1) the site review decision is not a land use decision; (2) petitioner does not have standing to appeal the subject decision because it has not demonstrated that it is

¹Robinson appealed the city’s site review decision to LUBA on May 26, 2000 (LUBA No. 2000-075).

1 “adversely affected” by the city’s decision; (3) petitioner has failed to exhaust local
2 administrative remedies; and (4) petitioner’s appeal was not timely filed. We need not
3 resolve all of intervenor’s allegations because, for the following reasons, we agree with
4 intervenor that petitioner’s notice of intent to appeal was not timely filed.

5 **A. LUBA Jurisdiction**

6 Intervenor argues that the city’s process for reviewing site designs such as the
7 application challenged here falls under one of two exceptions to the statutory definition of
8 “land use decision.”² ORS 197.015(10)(b) establishes that the definition of “land use
9 decision” does not include a local government decision:

10 “(A) Which is made under land use standards which do not require
11 interpretation or the exercise of policy or legal judgment; [or]

12 “(B) Which approves or denies a building permit issued under clear and
13 objective land use standards[.]”

14 Petitioner argues to the contrary, contending that the city’s site review ordinance
15 requires that in making decisions to approve or deny a proposed site design,

16 “the Reviewer shall consider the requirements of [the Site Review Ordinance]
17 and the policies of the Comprehensive Plan as well as accepted design
18 principles, and the Reviewer shall specify such conditions as findings in
19 support of the decision.” Silverton Site Review Ordinance (SRO) 18.8.7.

²LUBA has exclusive jurisdiction to review “land use decisions.” ORS 197.825(1). ORS 197.015(10)(a)(A) defines “land use decision” to include, in relevant part:

“A final decision or determination made by a local government * * * that concerns the adoption, amendment or application of:

“(i) The goals;

“(ii) A comprehensive plan provision; [or]

“(iii) A land use regulation[.]”

1 At the very least, petitioner argues, the subject decision is a “limited land use decision”
2 because it involves an application for site review.³

3 The SRO is a part of the Silverton Zoning Ordinance.⁴ As such, it is a land use
4 regulation because it establishes “standards for implementing a comprehensive plan.” ORS
5 197.015(11). According to the SRO, the site review “regulations, along with the
6 *discretionary and public process* of the site review, are designed to preserve Silverton’s
7 unique character, and enhance the City’s beauty.” SRO 18.2.2 (emphasis added). The
8 decisions adopted under the SRO are discretionary decisions “designed to regulate the
9 physical characteristics of a use permitted outright, including * * * site review.” Therefore,
10 the city’s decision is a limited land use decision subject to our jurisdiction.⁵

11 **B. Deadlines for Filing the Notice of Intent to Appeal**

12 ORS 197.830(9) provides that

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

³ORS 197.015(12)(b) defines a “limited land use decision,” in relevant part, as:

“[A] final decision or determination made by a local government pertaining to a site within an urban growth boundary which concerns * * * [t]he approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review.”

LUBA has exclusive jurisdiction to review “limited land use decisions.” ORS 197.825(1).

⁴The SRO was adopted as Ordinance No. 96-126. Section 1 of Ordinance 96-126 provides that “[s]ection 18 of the Silverton Zoning Ordinance (#498), as amended, is hereby amended to [include the provisions of the SRO.]”

⁵ORS 197.195(3)(b) provides that notice of a limited land use decision must be given to owners of property within 100 feet of the site of the proposed development. The notice must, among other things, provide for a 14-day comment period prior to the decision; list the applicable criteria for the decision; identify the property by street address or by geographical reference to the property; and include the name and phone number of a local government contact person. ORS 197.195(3)(c)(A), (C), (D) and (G). Notice of the local government’s decision must be given to all those who submitted comments on the application. ORS 197.195(3)(c)(H).

1 The decision at issue in this appeal became final on March 9, 2000. The notice of
2 intent to appeal was filed on May 30, 2000. If ORS 197.830(9) applies, petitioner’s notice of
3 intent to appeal is not timely filed and this appeal must be dismissed.

4 ORS 197.830(5) provides an exception to the deadline provided for in ORS
5 197.830(9), in certain circumstances. ORS 197.830(5) provides, in relevant part:

6 “If a local government makes a limited land use decision which is different
7 from the proposal described in the notice to such a degree that the notice of
8 the proposed action did not reasonably describe the local government’s final
9 actions, a person *adversely affected* by the decision may appeal the decision to
10 [LUBA] under this section:

11 “(a) Within 21 days of actual notice where notice is required; or

12 “(b) Within 21 days of the date a person knew or should have known of the
13 decision where no notice is required.” (Emphasis added.)⁶

14 Petitioner argues that it is “aggrieved” by the city’s decision and, therefore, it is
15 “adversely affected.” The Oregon Supreme Court has held that a party demonstrates that it is
16 “aggrieved” when (1) the local land use decision making body has recognized the party’s
17 interest in the decision; (2) the party has asserted a position on the merits; and (3) the local
18 governing body’s decision was contrary to the position the party asserted. *Jefferson Landfill*
19 *Comm. v. Marion Co.*, 297 Or 280, 284, 686 P2d 310 (1984). A party is “adversely affected”
20 if the party asserts that the decision made impinges on that party’s use and enjoyment of its
21 property, or otherwise detracts from interests personal to the party. *Id.* at 283.

22 Petitioner’s response to the motion to dismiss provides the following explanation to
23 demonstrate how it was adversely affected by the city’s site review decision:

24 “In this case, the Petitioner had previously filed an application for an assisted
25 living facility in the City of Silverton which the City had approved, and which
26 Intervenor had contested. * * * The City of Silverton has recognized
27 Petitioner’s interest in the lot line adjustment decision and in the [site] review

⁶No party disputes that the notices failed to comply with the provisions of ORS 197.195 and we assume, without deciding, that any notices provided were defective in the manner described in ORS 197.830(5).

1 decision. * * * Petitioner has asserted a contrary position to the city’s decision
2 on the merits in the lot line adjustment matter. * * * Therefore, under the test
3 developed in *Jefferson Landfill Comm.*, Petitioner is an adversely affected,
4 aggrieved party in this matter that has standing to bring this appeal.”
5 Petitioner’s Response to Intervenor-Respondent’s Motion to Dismiss 5.⁷

6 Petitioner’s response does not demonstrate how the city’s decision to approve the site
7 design for intervenor’s assisted living facility impinges on petitioner’s use and enjoyment of
8 *its* property. Petitioner does not allege that it owns property adjacent to or within sight and
9 sound of the subject property. *See Kamppi v. City of Salem*, 21 Or LUBA 498, 501 (1991)
10 (“the reference * * * to persons who are adversely affected is intended to refer, at a
11 minimum, to persons who are within sight and sound of a development proposal”); *Wilbur*
12 *Residents v. Douglas County*, 151 Or App 523, 526-27, 950 P2d 368 (1997) (persons who are
13 within sight and sound of the subject property provide a “facially tenable basis” for showing
14 adverse effects caused by the operation of proposed sewer lagoons). Nor does petitioner
15 explain how its status as a business competitor is affected by the establishment of this facility
16 at this particular location.

17 Petitioner seeks to establish standing as an “adversely affected” party by attempting
18 to satisfy the requirements for showing that it is “aggrieved” by the city’s decision.⁸ The
19 standards are not interchangeable. A petitioner claiming to be adversely affected by a land
20 use decision must allege facts showing how the decision impacts the petitioner and what
21 injury flows from that impact. *Graap v. City of Portland*, 11 Or LUBA 1, 7 (1984). Petitioner

⁷Petitioner alleges that the city acknowledged petitioner’s interest in the site review decision; however, petitioner does not explain or demonstrate how the city acknowledged petitioner’s interest in that decision.

⁸This situation is unlike the case in *Flowers v. Klamath County*, 98 Or App 384, 780 P2d 227 (1989). There, the Court of Appeals held that the petitioners were not obligated to demonstrate that they appeared before the local government to satisfy the aggrievement requirement that petitioners appear during the proceedings before the local government, when the local government failed to follow notice and hearing requirements. In that case, the Court of Appeals did not reach the question of whether the petitioners had satisfied the “adversely affected” standard because, at that time, the applicable statute provided that a party must demonstrate that it was “adversely affected” *or* “aggrieved” in order to demonstrate standing to appeal a decision to LUBA.

1 has failed to demonstrate how it is adversely affected. Because ORS 197.830(5) does not
2 apply, the deadline for filing the notice of intent to appeal is established by ORS 197.830(9).
3 The notice of intent to appeal was not timely filed, and therefore this appeal is dismissed.