BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BRENDA WILLHOFT, GARY WILLHOFT,
TOM McCARTHY and ALICE L. SANDERS,
Petitioners,

vs.

CITY OF GOLD BEACH,
Respondent,

and

TURTLE ROCK, LLC,
Intervenor-Respondent.

LUBA No. 99-170

FINAL OPINION
AND ORDER

Appeal from City of Gold Beach.

Corinne C. Sherton, Salem, filed the petition for review and argued on behalf of petitioners. With her on the brief was Johnson and Sherton.

David Dickens, Eugene, filed a response brief and argued on behalf of respondent. With him on the brief was Walters, Romm, Chanti and Dickens.

John C. Babin, Brookings, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Babin and Keusink.

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

REVERSED 07/13/2000

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a city planning commission decision that extends a previously approved conditional use permit.

MOTION TO INTERVENE

Turtle Rock, LLC (Turtle Rock or intervenor) moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS[1]

A 50-space RV park was developed on the 24-acre subject property before it was annexed by the city in 1995. Under the county land use regulations that previously applied to the property, RV parks are an outright permitted use.

JAG Enterprises (JAG), the prior owner of the property, proposed to expand the RV park by developing an additional 50 spaces. That proposed 50-space expansion required city sewer service. To obtain city sewer service, the subject property was annexed to the city and became subject to the city's comprehensive plan and land use regulations. After the property was annexed to the city, JAG applied for a conditional use permit to expand the RV park to 100 spaces. The city planning commission denied the application. On appeal, the city council conducted a hearing on June 25, 1996, and approved the conditional use permit on July 15, 1996. Gold Beach Zoning Ordinance (GBZO) 6.060, which is set out in the July 15, 1996 conditional use permit decision, provides:

> "Authorization of a conditional use *shall be void after one year * * * unless substantial construction has taken place*. The Planning Commission may extend authorization for an additional period not to exceed one year, upon written application to the Planning Commission." Record 5 (emphasis added).

[1]In our statement of the facts, we rely upon the record and undisputed allegations of fact in affidavits that have been submitted by the parties in this appeal.

All four petitioners appeared at the June 25, 1996 city council public hearing. Petitioners Brenda Willhoft, Gary Willhoft and Tom McCarthy opposed the application. Petitioner Alice Sanders testified at the June 25, 1996 city council hearing, but did not take a position for or against the request.

After the July 1996 conditional use permit was approved, JAG lost its permanent financing. The subject property flooded in the fall of 1996, and the RV park closed without developing the 50 additional spaces that were approved by the July 1996 conditional use permit.

On March 20, 1998, JAG submitted a letter to the planning commission stating that it had secured long term financing and noting that "the Conditional Use Permit which allows us to complete construction has now expired and it is my understanding that in order to proceed we need an extension of that permit granted by the Gold Beach Planning Commission." Record 18. JAG's letter goes on to request that the July 1996 conditional use permit be extended.

At its regular meeting on April 20, 1998, the planning commission approved the requested extension. That approval is reduced to writing in an April 21, 1998 letter, which states:

> "[T]he Gold Beach Planning Commission approved your request for an extension of one (1) year[.] This extension is from September, 1997 to September, 1998.[2] This approval will expire unless substantial construction has taken place. Substantial construction is defined as having obtained all permits necessary for development of the proposed RV spaces." Record 1.

No public hearing was held by the planning commission in granting the requested extension, and none of the petitioners attended the planning commission meeting at which the requested

[2]It is not clear why the planning commission selected September 1997 as the starting date for the one-year extension.

extension was granted. None of the petitioners was sent a copy of the April 21, 1998 letter extending the July 1996 conditional use permit.

The subject property was purchased by intervenor in July 1998. Sometime between July 1998 and November 1998, heavy equipment, including a large excavator, appeared on the subject property and began clearing the property.[3] In November 1998, two large commercial signs were installed on the subject property near Highway 101, which adjoins the subject property on the west. Those signs stated in large letters "100+ RV & Tent Sites" on the top of the sign and "Closed; Will Open 99 Season" on the bottom. Reply Brief App 7. Clearing and filling of the property continued from November 1998 through the summer of 1999.

On October 6, 1999, petitioner Brenda Willhoft's attorney advised her "that [the attorney] had received a copy of an April 21, 1998 decision by the Planning Commission extending the [July] 1996 conditional use permit, and later that same day" provided a copy of the April 21, 1998 decision to petitioner Brenda Willhoft. Petition for Review App 20. The other petitioners allege they learned of the April 21, 1998 decision from Brenda Willhoft, on October 6, 1999, or on dates subsequent to October 6, 1999. Petitioners' notice of intent to appeal was filed on October 27, 1999.

JURISDICTION

Respondent and intervenor (respondents) argue that we lack jurisdiction in this appeal and that the appeal should be dismissed. Respondents first argue that the challenged decision is not a land use decision. Next, respondents argue that even if the challenged decision is a land use decision, petitioners knew or should have known about the April 21, 1998 decision long before October 6, 1999. Therefore, respondents argue, petitioners' notice of intent to

[3]The parties take conflicting positions concerning whether the excavation equipment arrived and clearing began in July 1998 or November 1998. For purposes of our resolution of this appeal, the precise month in 1998 that the equipment arrived and clearing began is not important.

appeal was not timely filed, and this appeal must be dismissed.

We first consider whether the challenged decision is a land use decision subject to our jurisdiction.

A. The April 21, 1998 Letter is a Land Use Decision

LUBA has exclusive jurisdiction to review local government land use decisions. ORS 197.825(1). As defined by ORS 197.015(10)(a)(A), land use decisions include:

> "A final decision or determination made by a local government or special district that concerns the * * * application of:
>
> "* * * * *
>
> "(iii) A land use regulation[.]"

There is no dispute that the GBZO is a "land use regulation." The challenged decision applies the GBZO. Therefore, the challenged decision is a land use decision unless one of the exemptions from the statutory definition of land use decision applies. Respondents argue the challenged decision is exempted by ORS 197.015(10)(b)(A), which exempts local government decisions "[w]hich [are] made under land use standards which do not require interpretation or the exercise of policy or legal judgment[.]"

The challenged decision applies GBZO 6.060. GBZO 6.060 provides that conditional use approval "shall be void after one year * * * unless substantial construction has taken place." In applying GBZO 6.060 to extend a conditional use approval that had been granted 20 months earlier, the city was required to determine whether such an approval might be granted or whether the 1996 conditional use permit was "void" and could no longer be extended under GBZO 6.060. The challenged decision also interprets the requirement for "substantial construction" under GBZO 6.060, concluding that requirement will be satisfied in this case when the applicant "obtain[s] all permits necessary for development of the proposed RV spaces." Record 1. Both of these aspects of the decision required "interpretation or the exercise of policy or legal judgment." *See Doughton v. Douglas*

County, 82 Or App 444, 449, 728 P2d 887 (1986) (ORS 197.015(10)(b) does not apply to decisions that require the exercise of "significant factual or legal judgment"); *Thompson v. City of St. Helens*, 30 Or LUBA 339, 343 (1996) ("[t]he exception to [LUBA's] review jurisdiction provided for nondiscretionary decisions is exceedingly narrow"); *Warren v. City of Aurora*, 23 Or LUBA 507, 510 (1992) (same). Accordingly, the exception provided by ORS 197.015(10)(b)(A) does not apply here, and the challenged decision is a land use decision.

B. 1999 Revisions to ORS 197.830(3) and ORS 197.830(4) do not Apply in this Appeal

The current statutory deadlines and requirements for filing appeals of land use decisions that are rendered without providing a hearing are set out at ORS 197.830(3) and (4). The notice of intent to appeal was filed on October 27, 1999, four days after the effective date of 1999 legislation that revised ORS 197.830(3) (1997) and adopted new potentially relevant statutory provisions that are now codified at ORS 197.830(4).[4] However, the appealed decision was adopted and became final on April 21, 1998. We therefore must determine whether the 1997 or 1999 versions of the statutes apply in this appeal.

We conclude the deadline for filing an appeal with LUBA challenging the April 21, 1998 decision is governed by the statutes in effect on April 21, 1998. There is no indication in Oregon Laws 1999, chapter 621, section 3 that the legislature intended that the 1999 amendments regarding land use decisions that are adopted without a hearing should apply

[4]The 1999 legislation amends ORS 197.830(3) (1997) to specifically exclude permit decisions that are rendered without a hearing pursuant to ORS 215.416(11) and 227.175(10). 1999 Or Laws ch 641, § 3. ORS 215.416(11) and 227.175(10) authorize counties and cities to make permit decisions without providing a hearing, so long as the city or county provide (1) notice of the decision and (2) an opportunity for an appeal and *de novo* hearing on the decision. That 1999 legislation adopted other amendments, now codified at ORS 197.830(4), which set out separate statutory deadlines for appealing permit decisions that are rendered pursuant to ORS 215.416(11) and 227.175(10). Because we conclude below that these 1999 amendments do not apply in this appeal, we do not discuss them further.

retroactively to land use decisions that were adopted before the effective date of the 1999 legislation. *See Ritcherson v. State of Oregon*, 131 Or App 183, 187, 884 P2d 554 (1994) ("[w]hen the legislature modifies a Statute of Limitations, such changes have generally been given prospective application in the absence of legislative direction otherwise"). Therefore, the statute that determines the deadline for petitioners' notice of intent to appeal is ORS 197.830(3) (1997).[5]

C. The April 21, 1998 Letter is a Permit

If the challenged decision is a "permit," as defined by ORS 227.160(2) (1997), the city was required to provide a hearing before making its decision or, alternatively, provide notice of the decision and an opportunity for a local appeal with a *de novo* hearing. ORS 227.175(3) and (10) (1997). Assuming the challenged decision is a "permit," the city's failure to observe these statutory hearing and appeal requirements would mean the city made a "land use decision without providing a hearing," within the meaning of ORS 197.830(3) (1997). *See Leonard v. Union County*, 24 Or LUBA 362, 374 (1992) (ORS 197.830(3) applies "where a local government is required to provide a hearing under state or local law, but fails to do so"). We therefore must determine whether the challenged decision is a "permit," within the meaning of ORS 227.160(2) (1997).

ORS 227.160(2) (1997) defines "permit" as follows:

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[5]ORS 197.830(3) (1997) provides:

> "If a local government makes a land use decision *without providing a hearing* or the local government makes a land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, *a person adversely affected by the decision* may appeal the decision to the board under this section:
>
> "(a) Within 21 days of actual notice *where notice is required*; or
>
> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required." (Emphases added.)

> "'Permit' means *discretionary* approval of a *proposed development of land*, under ORS 227.215 or city legislation or regulation. * * *" (Emphases added.)[6]

For the same reasons we concluded that the exemption to the definition of "land use decision" provided by ORS 197.015(10)(b)(A) for certain decisions that are "made under land use standards which do not require interpretation or the exercise of policy or legal judgment" does not apply in this case, we conclude that the April 21, 1998 decision is "discretionary," within the meaning of ORS 227.160(2) (1997). As explained earlier in this opinion, the challenged decision required the exercise of significant legal judgment.

The only remaining question in determining whether the challenged decision is a "permit," is whether it is "approval of a proposed development of land." ORS 227.160(2) (1997). The April 21, 1998 decision challenged in this appeal extends a July 15, 1996 conditional use permit for a 50-space expansion of the existing RV park, which became void on July 15, 1997. In *Heidgerken v. Marion County*, 35 Or LUBA 313, 326 (1998), we explained that a discretionary decision concerning whether to grant or deny an extension of a permit for a campground "is tantamount to a decision reapproving or denying the underlying permit" and therefore constitutes approval of a "proposed development of land." Similarly, here, we conclude that the challenged decision concerns an "approval of a proposed development of land." Because the challenged decision is "discretionary" and approves a "proposed development of land" under city land use regulations, it is a "permit."

In summary, the challenged decision is a "permit," as defined by ORS 227.160(2) (1997), and the permit decision was rendered either without first providing a hearing or without providing notice of the decision and an opportunity for a local appeal. In either case, the city "ma[de] a land use decision without providing a hearing," and ORS 197.830(3) (1997) applies. *Leonard*, 24 Or LUBA at 374-75.

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[6]ORS 227.160(2) (1997) provides a number of exceptions to the statutory definition of "permit," but no party argues that any of those statutory exceptions apply here.

D. Petitioners are Adversely Affected by the Challenged Decision

The right extended by ORS 197.830(3) (1997) to appeal land use decisions that are made without a hearing is limited to persons who are "adversely affected by the decision." *See* n 5. Petitioners Willhoft and Sanders own property that adjoins the subject property. There is no dispute that their property is within sight or sound of the subject property and, for that reason, they are presumptively adversely affected.[7] *Goddard v. Jackson County*, 34 Or LUBA 402, 409 (1998); *Walz v. Polk County*, 31 Or LUBA 363, 369 (1996).

Petitioner McCarthy alleges that his property is located approximately 500 feet from the subject property. There is no dispute that the east end of the subject property is within sight of petitioner McCarthy's property, although intervenor contends the western portion of the property where the RV park expansion is being developed is not within sight of petitioner McCarthy's property. However, petitioner McCarthy also alleges that he observes the subject property on a daily basis. He further alleges that Brooks Road provides the only access to his property. He alleges that the fill that has been and will be placed on the property to allow the proposed development may exacerbate flooding problems on Brooks Road and that the additional traffic that will be generated by the proposal will adversely affect access to his property. Finally, petitioner McCarthy argues that he fishes in adjoining Hunter Creek and that the development has had adverse effects on the fishery.

Intervenor argues that petitioner McCarthy's allegations of adverse effect are too speculative. Petitioner McCarthy disputes that argument and points out that his allegations concerning traffic impacts on Brooks Road are not disputed by intervenor. We agree with petitioner McCarthy that he has sufficiently demonstrated that he is "adversely affected by the decision," within the meaning of ORS 197.830(3) (1997). *See Jefferson Landfill Comm.*

[7]Although intervenor argues that petitioner McCarthy fails to demonstrate that he is adversely affected by the challenged decision, we do not understand either intervenor or respondent to dispute the remaining petitioners' arguments that they are adversely affected.

v. Marion Co., 297 Or 280, 282-83, 686 P2d 310 (1984) (explaining that examples of adverse effects under the "interests are adversely affected" standard in section 4(3) of Oregon Laws 1979, chapter 772, as amended by Oregon Laws 1981, chapter 748, section 35 include "noise, odors, increased traffic or potential flooding").

Because all petitioners have demonstrated that they are adversely affected by the challenged decision, ORS 197.830(3) (1997) applies.

E. Notice of the Decision was Required and Subsection (a) of ORS 197.830(3) (1997) Applies

Determining which subsection of ORS 197.830(3) (1997) applies is the final task that must be completed to determine the statutory filing deadline that applies to petitioners in this appeal. *See* n 5. Answering that question requires that we determine whether petitioners were entitled to notice of the decision. If "notice [of the decision] is required," ORS 197.830(3)(a) (1997) applies and the appeal must have been filed within 21 days after petitioners received "actual notice" of the decision. If "no notice [of the decision] is required," ORS 197.830(3)(b) (1997) applies, and the appeal must have been filed "[w]ithin 21 days of the date [petitioners] knew or should have known of the decision * * *."[8]

All parties appear to argue that the choice between ORS 197.830(3)(a) and (b) (1997) is governed exclusively by the actual procedure that was followed under the GBZO and that no petitioner was entitled to notice of the decision under the GBZO. If the parties are correct, ORS 197.830(3)(b) (1997) would therefore apply to all petitioners. However, as we have already concluded, the challenged decision is a "permit" decision, as that term is defined by ORS 227.160(2) (1997). Where a city renders a permit decision without providing a hearing, as the city did here, ORS 227.175(10)(a) (1997) *requires* that the city

[8]As we explain later in this opinion, ORS 197.830(3)(a) and (b) (1997) impose different appeal deadlines. ORS 197.830(3)(b) (1997) imposes a "discovery" obligation on petitioners; ORS 197.830(3)(a) (1997) does not.

provide notice of its decision and an opportunity for a local appeal.[9] The fact that the city may have mistakenly believed that the decision it rendered on April 21, 1998 without a hearing was not a permit is legally irrelevant. It does not change the fact that the city rendered a permit decision without providing a hearing. Neither does it change the fact that ORS 227.175(10)(a) (1997) requires that the city give notice of such a permit 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." Therefore ORS 197.830(3)(a) (1997) applies, assuming each of the petitioners was entitled to receive notice of the decision under ORS 227.175(10)(a) (1997).

ORS 227.175(10)(a) (1997) requires that the city give notice of such a permit 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."[10] We have already concluded that all petitioners have demonstrated that they are "adversely affected by the decision," and for that reason all petitioners were entitled to notice of the decision under ORS 227.175(10)(a) (1997).[11] ORS 197.830(3)(a) applies to all petitioners in this appeal.

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[9]ORS 227.175(10)(a) (1997) provides:

> "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*. Notice of the decision shall be given in the same manner as required by ORS 197.763. An appeal from a hearings officer's decision shall be made to the planning commission or governing body of the city. An appeal from such other person as the governing body designates shall be to a hearings officer, the planning commission or the governing body. In either case, the appeal shall be a de novo hearing." (Emphasis added.)

[10]The 1999 legislation that was previously mentioned in this opinion also amended ORS 227.175(10)(a) (1997) to eliminate the statutory requirement that cities provide notice to persons who are "adversely affected or aggrieved."

[11]Petitioners Willhoft and petitioner Sanders own property that adjoins the subject property. Under ORS 197.763(2)(a) (1997), as owners of property located "[w]ithin 100 feet of the [subject] property," petitioners Willhoft and petitioner Sanders would have been entitled to notice of hearing, had a hearing been held on the

Our decision that ORS 197.830(3)(a) applies here is arguably inconsistent with our decision in *Tarjoto v. Lane County*, 29 Or LUBA 408, 413-14, *aff'd* 137 Or App 305, 904 P2d 641 (1995), where we concluded that ORS 197.830(3) *did not* apply to a county permit decision that was rendered without a hearing, pursuant to ORS 215.416(11)(a). ORS 215.416(11)(a) permits counties to make permit decision without a hearing, so long as the county provides notice of the decision and an opportunity for a local appeal.[12] However, we reached that conclusion in *Tarjoto* in the context of considering whether the petitioner was required to exhaust an available local remedy before appealing to LUBA.[13] That case was unusual in that there was no dispute that there was an available remedy for the petitioner to exhaust, and the county was willing to allow the local appeal. The Court of Appeals affirmed our decision, but specifically limited its decision to the facts of that case. *Tarjoto v. Lane County*, 137 Or App 305, 310, 904 P2d 641 (1995).

We reached the opposite conclusion regarding the applicability of ORS 197.830(3) to another permit decision rendered without a hearing under ORS 215.416(11)(a) in *Bowlin v. Grant County*, 35 Or LUBA 776, 783 (1998) and *Wilbur Residents v. Douglas County*, 34 Or LUBA 634, 644-45 (1998).[14] The only factual difference between this appeal and *Bowlin* and *Wilbur Residents*, is that the counties in those cases understood that they were

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challenged permit decision. For that separate reason, petitioners Willhoft and petitioner Sanders were entitled to notice of the decision.

[12]ORS 215.416(11)(a) (1997), which applies to counties, is substantively identical to ORS 227.175(10)(a) (1997), which applies to cities. The 1993 statutes that were at issue in *Tarjoto* and the 1997 statutes that are at issue in this appeal are identical in all material respects.

[13]The permit decisions at issue in *Tarjoto* had been issued without a hearing, pursuant to county code provisions that implement ORS 215.416(11)(a). However, the petitioner, who was entitled to written notice of the decision and entitled to a local appeal, was not provided written notice of the decision. After the deadline under the county's code for filing a local appeal of the county's decisions had expired, the petitioner learned of the decisions and, within 21 days after learning of the decisions, filed a local appeal and filed a direct appeal to LUBA. Although the local appeal deadline had expired, the county accepted the petitioner's local appeal and moved to dismiss his separate LUBA appeal.

[14]There was no contention in *Bowlin* or *Wilbur Residents* that the county was willing to provide the petitioners a local appeal.

proceeding under ORS 215.416(11)(a) whereas the city in this case did not believe it was proceeding under ORS 227.175(10)(a) (1997). We have already concluded the city's misunderstanding in this regard is legally irrelevant. ORS 197.830(3)(a) (1997) applies where (1) the city mistakenly fails to realize it should be proceeding under ORS 227.175(10)(a) (1997); (2) the city therefore fails to provide notice to persons who are entitled to receive notice under ORS 227.175(10)(a) (1997); and (3) no local appeal is available that must be exhausted before appealing to LUBA.

We next consider whether petitioners' appeal is timely under ORS 197.830(3)(a) (1997).

F. The Actual Notice Standard Imposed by ORS 197.830(3)(a) (1997)

As we have already noted, ORS 197.830(3)(a) and (b) (1997) impose differently worded standards for begining the 21-day deadline for filing an appeal with LUBA. An understanding of the "knew or should have known of the decision" standard in ORS 197.830(3)(b) (1997) is helpful in understanding the "actual notice [of the decision]" standard of ORS 197.830(3)(a) (1997). *See* n 5. We therefore first consider the meaning of ORS 197.830(3)(b) (1997).

1. ORS 197.830(3)(b) (1997)

The relevant inquiry under ORS 197.830(3)(b) (1997) is not limited to determining when a petitioner actually receives a copy of a land use decision or written notice of that land use decision. It is clear that in adopting ORS 197.830(3)(b) (1997) the legislature did not intend that the deadline for filing a notice of intent to appeal be suspended in all cases until the petitioner actually received a copy of or written notice of the appealed decision. If ORS 197.830(3)(b) (1997) invariably required actual receipt of the decision or written notice of the decision before the 21-day appeal period would begin to run, the words "or should have known" would be surplusage. The "or should have known" language in ORS 197.830(3)(b) (1997) explicitly imposes an objective "discovery rule," and may have the effect of starting

the 21-day appeal period *before* a petitioner receives written notice of or a copy of a decision.[15]

Determining the date a petitioner "should have known" of the decision that is appealed under ORS 197.830(3)(b) (1997) is not complicated where a petitioner has no reason to suspect that the decision was made until the petitioner is given a copy of the decision. However, where there are circumstances that would lead a reasonable person to realize that an appealable land use decision may have been rendered, it is necessary to consider whether a reasonable person would have made appropriate inquiries and thereby discovered the actual decision or confirmed the existence of the decision. We emphasize that the obligation to make reasonable inquires under ORS 197.830(3)(b) (1997) is an objective one, and it turns on what a reasonable person would do rather than what the petitioner actually did. Therefore, if a petitioner observes activity that would reasonably suggest that an appealable land use decision may have been adopted, the petitioner is obligated under ORS 197.830(3)(b) (1997) to make appropriate inquiries with the local government and discover the decision. If the petitioner does so and files an appeal within 21 days after discovering the decision, the appeal is timely under ORS 197.830(3)(b) (1997). However, if the petitioner fails to make such appropriate inquiries, the 21-day appeal period nevertheless begins to run.

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[15]As the Oregon Supreme Court explained in adopting a "discovery rule" for purposes of applying the statutory deadline for commencing actions on negligence claims:

> "It is the opinion of this court that [a] cause of action accrue[s] at the time plaintiff obtain[s] knowledge, or reasonably should have obtained knowledge of the tort committed upon her person by defendant." *Berry v. Branner*, 245 Or 307, 315-16, 421 P2d 996 (1966).

The court explained that its imposition of the discovery rule in *Berry* was based on the need to balance the objectives of (1) protecting medical practitioners "from the assertion of stale claims" and (2) protecting an injured plaintiff from having her cause of action barred before "she has or can reasonably be expected to have knowledge of any wrong inflicted upon her * * *." *Id.* at 312. Presumably similar objectives underlie ORS 197.830(3). *See Kevedy Inc. v. City of Portland*, 28 Or LUBA 227, 230-33 (1994) (discussing the competing policies in ORS 197.805 and 197.830(3) where notice of hearing is inadequate).

2. ORS 197.830(3)(a) (1997)

With the above understanding of the events that may trigger the 21-day deadline for filing an appeal with LUBA under ORS 197.830(3)(b) (1997), we conclude that ORS 197.830(3)(a) (1997) *does not* impose a discovery obligation on petitioners. To conclude that it does impose a discovery obligation on petitioners would require that we ignore the different language in ORS 197.830(3)(a) and (b) (1997). If the legislature intended to impose the same discovery obligation on petitioners under ORS 197.830(3)(a) (1997) that it imposed under ORS 197.830(3)(b) (1997), it would not have required that the petitioner receive "actual notice" of the decision. We conclude that under ORS 197.830(3)(a) (1997), a petitioner receives "actual notice" of the decision when the petitioner is provided (1) a copy of the decision or (2) written notice of the decision. *Bowlin*, 35 Or LUBA at 785. In addition to these two circumstances, we believe it is also possible that a petitioner can be deemed to have received "actual notice" of a decision without being provided a copy of the decision or written notice of the decision. However the circumstances that would lead us to conclude that a petitioner has received actual notice, without having been provided a copy of the decision or written notice of the decision, must go beyond those that would suffice to obligate a petitioner to make inquires under ORS 197.830(3)(b) (1997) to discover the decision. The circumstances themselves must be sufficient to constitute the equivalent of receiving a copy of the decision or written notice of the decision. In other words, the circumstances must be sufficient to inform the petitioner of both the existence and substance of the decision.

G. The Date Petitioners Received Actual Notice of the Decision

1. Petitioner Tom McCarthy

a. Undisputed Facts

According to petitioner McCarthy's affidavit, his property is located within 500 feet of the subject property. Petitioner McCarthy alleges: "I observe the Turtle Rock property on

a daily basis as I drive to and from my property via Hunter Creek Loop Road." Petition for Review App 45. Petitioner McCarthy alleges that he observed that use of the subject property as an RV park began in 1994 with "25 to 30 RV spaces." *Id*. at 46. Petitioner McCarthy appeared at the June 25, 1996 city council hearing on the conditional use permit expansion and "testified against the expansion." *Id*. Although petitioner McCarthy claims he did not receive written notice of the city council's July 15, 1996 decision, he "was aware that the City Council * * * approved the conditional use permit for the RV park expansion in July 1996."[16] *Id*.

Petitioner McCarthy alleges that after the flooding in November 1996 "the only activity I observed on the RV park property was clearing of debris from the 1996 flood." *Id*. Petitioner McCarthy further alleges he saw no development activity on the subject property until July 1998 when "heavy equipment appeared and extensive clearing began." *Id*. Beginning in March 1999 and through the summer of 1999, petitioner McCarthy observed filling on the subject property, first in Hunter Creek and the Hunter Creek Estuary and later in the 100-year floodplain of Hunter Creek.

As noted earlier, petitioner McCarthy claims that he did not receive notice of the requested extension of the 1996 conditional use permit and did not know about the planning commission's April 21, 1998 decision "until sometime after October 6, 1999, when [petitioner] Brenda Willhoft showed me a copy of [the decision]." *Id*.

We note two other relevant, undisputed facts. First, as noted earlier in this opinion, the July 15, 1996 decision sets out GBZO 6.060 which provides that the conditional use permit is void "unless substantial construction has taken place." Record 5. Second, petitioner McCarthy does not dispute that in his daily observations of the subject property he

[16]We understand petitioner McCarthy's affidavit to allege that he was aware of the conditional use permit decision at the time it was issued in July 1996.

saw the large commercial signs that were erected in the fall of 1998 advertising Turtle Rock's plans to open "100+ RV & Tent Sites" during the "99 season."

b. Conclusion

When the allegations in petitioner McCarthy's affidavit are viewed in conjunction with other undisputed facts, we conclude that notwithstanding his allegation to the contrary, he "should have known of the decision," within the meaning of ORS 197.830(3)(b) (1997), before October 6, 1999. With actual or constructive knowledge of the one-year substantial construction requirement, petitioner McCarthy observed the property on a daily basis and saw no substantial construction on the property until at least two years after the July 15, 1996 conditional use permit was issued. After a period of inactivity for over two years, petitioner McCarthy then saw substantial clearing activity commence as early as July 1998 and substantial filling activity begin no later than March 1999. These circumstances are sufficient to obligate a reasonable person to make appropriate inquires with the city. Had such inquiries been made, petitioner McCarthy would have discovered the April 21, 1998 decision.

However, because the 21-day deadline for filing the notice of intent to appeal is governed by ORS 197.830(3)(a) (1997) rather than ORS 197.830(3)(b) (1997), the fact that petitioner McCarthy "should have known" of the April 21, 1998 decision before October 6, 1999 was not sufficient to begin the 21-day appeal period. The things that petitioner McCarthy observed were not sufficient, in and of themselves, to provide "actual notice" of the city's April 21, 1998 decision to extend the July 15, 1996 conditional use permit. Because the October 27, 1999 notice of intent to appeal was filed within 21 days after petitioner Brenda Willhoft showed petitioner McCarthy a copy of the April 21, 1998 decision, this appeal was timely filed on behalf of petitioner McCarthy.

2. Petitioners Willhoft and Sanders

The parties in this appeal dispute whether petitioners Willhoft and petitioner Sanders were specifically told about the April 21, 1998 decision during conversations with persons acting on behalf of Turtle Rock. All parties request an evidentiary hearing to resolve those factual disputes. OAR 661-010-0045(1) (LUBA may "take evidence not in the record in the case of disputed factual allegations * * * concerning * * * standing").

We agree that an evidentiary hearing would be necessary to determine whether petitioners Willhoft and Sanders received actual notice of the April 21, 1998 decision more than 21 days before the notice of intent to appeal was filed on October 27, 1999. There are a number of allegations of fact in the affidavits submitted by intervenor which, if true, would likely suffice to provide petitioners Willhoft and Sanders with *de facto* "actual notice" of the April 21, 1998 conditional use permit extension decision.[17] Because petitioners dispute the relevant allegations in the affidavits submitted by intervenor, an evidentiary hearing would be required to resolve those factual disputes.

However, we nevertheless find it unnecessary to resolve the parties' factual disputes concerning what petitioners Willhoft and Sanders may have been told about the 1998 conditional use permit extensions. There are no disputed allegations of fact concerning

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[17]The clearest example of such an allegation is contained in an affidavit submitted by Julian Starr, the manager of Turtle Rock.

> "* * * Mrs. Willhoft also called Dave Hagood, City Administrator, in February and March of 1999, conversation unknown. In August of 1999, I walked into the city hall and noticed that Gary and Brenda Willhoft and Alice Sanders were having a meeting with the City Administrator, Dave Hagood. City staff told me to walk in.
>
> "* * * Dave Hagood was explaining the conditional use permit extension, the need for a developmental permit, drainage trenches, etc. * * *
>
> "* * * On September 14, 1999, Mrs. Willhoft got from the city a copy of the staff report on JAG Enterprises, Inc., and Turtle Rock LLC, which included the extension order of the conditional use permit. * * *" April 19, 2000 Affidavit of Julian Starr 7-8.

Petitioners argue the meeting described by Mr. Starr took place on December 29, 1999, rather than in August 1999.

contacts with petitioner McCarthy that would have provided actual notice of the decision. Petitioners argue that if "petitioner McCarthy's appeal [is not] dismissed * * * there would be no point in taking additional evidence to determine whether the appeals of the other petitioners were also timely under ORS 197.83[0](3) [1997]." Reply to Intervenor's Response to Petitioners' Motion for Evidentiary Hearing 3. We have already concluded that this appeal was timely filed under ORS 197.830(3)(a) (1997) with regard to petitioner McCarthy. We understand petitioners to withdraw their motion for evidentiary hearing and disputed allegations concerning petitioners Willhoft and Sanders, if petitioner McCarthy is found to have standing to pursue this appeal. Accordingly, this appeal is dismissed with regard to petitioners Willhoft and Sanders and we proceed to address petitioner McCarthy's assignments of error.[18]

THIRD ASSIGNMENT OF ERROR

Petitioner's third assignment of error challenges the city's interpretation that the "substantial construction" requirement in GBZO 6.060 will be met when intervenor obtains "all permits necessary for development of the proposed RV spaces." Record 1. Petitioner argues the city's interpretation is inconsistent with the language of GBZO 6.060.

Intervenor argues the interpretation is not an essential part of the city's decision and that we may ignore it. We do not agree.

Respondent argues the city's decision is consistent with the way Curry County interprets a similar requirement in the county's zoning ordinance.[19] Respondent argues that

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[18]Respondents also moved for an evidentiary hearing on the same matters as petitioners. However, dismissal with respect to petitioners Willhoft and Sanders and our conclusion with respect to petitioner McCarthy make it unnecessary to resolve respondents' motion for an evidentiary hearing. Accordingly, their motion for evidentiary hearing is denied.

[19]Curry County Zoning Ordinance CCZO 7.050(1) provides:

> "Authorization of a conditional use, in general, shall become null and void after one year unless substantial construction has taken place or an extension has been granted * * *. Substantial construction in this case means obtaining all necessary permits required by

> "[o]btaining permits for construction is a necessary, and often time consuming, part of the process of construction. The determination that obtaining permits constitutes substantial construction is reasonable and should be affirmed." Respondent's Brief 11.

We have no doubt that, in particular cases, obtaining all permits that are necessary to complete substantial construction of a conditional use under GBZO 6.060 can be time consuming. The difficulty with the city relying on CCZO 7.050(1) to conclude that obtaining permits without actually constructing anything is "substantial construction," is that Curry County has recognized the potential problem that respondent identifies in its brief and adopted zoning ordinance provisions to define "substantial construction" to address the problem; the City of Gold Beach has not done so.[20] Despite the practical problems conditional use permit holders may have in complying with the requirements of GBZO 6.060, the challenged decision's interpretation of GBZO 6.060 is inconsistent with the language of the code.

The third assignment of error is sustained.

FIRST ASSIGNMENT OF ERROR

In his first assignment of error, petitioner alleges the planning commission improperly construed GBZO 6.060 to allow it to extend a void conditional use permit.

As noted earlier in this opinion, GBZO 6.060 provides:

> "Authorization of a conditional use shall be void after one year * * * unless substantial construction has taken place. The Planning Commission may extend authorization for an additional period not to exceed one year, upon written application to the Planning Commission." Record 5.

> governmental agencies to commence construction of any structures or to commence the principal activity permitted by the conditional use permit." Respondent's Brief App 1.

[20]Respondents do not identify any definition of "substantial construction" in the GBZO. *Webster's Third New International Dictionary*, 489 (unabridged ed. 1981) defines "construction," in relevant part, as "the act of putting parts together to form a complete integrated object * * *."

Under GBZO 6.060, the July 15, 1996 conditional use permit became "void" on July 15, 1997.[21] The application for an extension of that conditional use permit was not submitted until March 20, 1998, over eight months after the permit became void. The requested extension was not granted until April 21, 1998, over nine months after the July 15, 1996 conditional use permit became void.

Petitioner argues:

> "* * * The only reasonable interpretation of GBZO 6.060 is that if, one year after a conditional use permit was approved by the City, substantial construction pursuant to that permit has not occurred, and a request for an extension has not been received by the Planning Commission (much less approved by the Planning Commission), the conditional use permit has no legal, effect, is a nullity, and cannot be revived by requesting an extension thereafter. To allow an applicant to file an extension request eight months after a conditional use permit expired, or [to allow] an extension to be granted nine months after the permit expired, opens the proverbial can of worms. If an extension can be granted nine months after the permit expired, why not after one year, ten years or twenty years?" Petition for Review 16-17 (footnote omitted).

The decision in this matter was quoted earlier in this opinion and states:

> "[T]he Gold Beach Planning Commission approved your request for an extension of one (1) year[.] This extension is from September, 1997 to September, 1998. This approval will expire unless substantial construction has taken place. Substantial construction is defined as having obtained all permits necessary for development of the proposed RV spaces." Record 1.

Had the planning commission interpreted GBZO 6.060 to allow it to approve the requested extension from July 15, 1997 (the date of the first anniversary of the conditional use permit) for an additional period of one year to July 15, 1998, we would be inclined to discount petitioner's "can of worms" argument. Interpreted in that way, the maximum length of the conditional use permit under GBZO 6.060 would be two years and the second year would

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[21] *Black's Law Dictionary* defines "void" as

> "Null; ineffectual; nugatory; having no legal force or binding effect; unable in law, to support the purpose for which it was intended." *Blacks Law Dictionary*, 1745 (4th ed. 1974).

require planning commission approval. While the propriety of accepting a request for an extension after the initial one-year period had expired would remain a question, under the foregoing interpretation of GBZO 6.060, a conditional use permit could not remain potentially valid indefinitely.

However, in this case, the planning commission both accepted the requested extension after the initial one-year period had expired and granted an extension of more than one year past that initial one-year period to September 1998. There is no way to construe GBZO 6.060 to allow the planning commission to grant an extension past July 15, 1998 without making the limitation imposed by GBZO 6.060 illusory. The planning commission's implicit interpretation of GBZO 6.060 to allow it to do so is incorrect as a matter of law.

Respondent attempts to analogize the planning commission's application of GBZO 6.060 to the Oregon Department of Transportation's (ODOT's) application of an administrative rule in *Martin v. Dept. of Transportation*, 122 Or App 271, 857 P2d 225 (1993) to extend a permit that became void, even though the extension request was submitted after the permit became void. However, GBZO 6.060 is worded differently than the rule in that case.[22] In *Martin* the court relied on rule language that "deemed" the permit "null and void" to conclude that the permit was only "considered" or "treated as if" it were null. *Id*. Perhaps more importantly, the court also relied on prior agency construction of the rule to allow applications for extensions to be submitted after the period of time specified in the permit expired and to approve such requests "if the project plans and relevant circumstances have not changed." *Id*. The court explained that it granted "considerable leeway to an agency to interpret its own rules." *Id*. In contrast, here, to the extent we have an

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[22]The rule at issue in *Martin* provided:

> "'If the applicant fails to complete installation of the facility covered by the permit within the period specified in the permit, *the permit shall be deemed null and void* and all privileges thereunder forfeited, unless a written extension of time is obtained from the District * * * Engineer.'" 122 Or App at 274 (emphasis added; emphasis in original deleted).

interpretation it is implicit and it (1) does not explain why the planning commission believes it is appropriate to extend a conditional use permit after it becomes void, (2) does not explain that GBZO 6.060 has been interpreted in that manner in the past, and (3) does not identify the basis upon which such expired permit extension requests may be granted or denied.

The first assignment of error is sustained.[23]

CONCLUSION

The city's interpretation of the "substantial construction" requirement of GBZO 6.060 to be met by obtaining all necessary permits is incorrect as a matter of law. Moreover, the city's interpretation and application of GBZO 6.060 to authorize it to extend the July 15, 1996 conditional use permit past July 15, 1998, to September 1998 is inconsistent with GBZO 6.060 and "is prohibited as a matter of law." OAR 661-010-0071(1)(c). Accordingly, the city's decision is reversed.

[23]Although we need not and do not reach petitioner's second assignment of error we note that neither GBZO 6.060 itself nor any other section of the GBZO identified by respondents provides any criteria for the planning commission to apply in determining whether to revive an expired conditional use permit for an additional one-year period after it has expired. As far as we can tell from the decision and the record, the planning commission's decision applied no standards. As petitioner correctly points out, ORS 227.173(1) directs that city permit decisions must "be based on standards and criteria * * * in the development ordinance * * *." Petitioner argues the lack of standards and criteria governing the challenged decision violates ORS 227.173(1). ORS 227.173(1), which applies to cities, is substantively identical to ORS 215.416(8), which applies to counties. Our decision in *Heidgerken*, where we addressed a similar argument under ORS 215.416(8) in a similar factual context, suggests that petitioner is correct that the city's lack of standards for discretionary approval of extensions for conditional use permits violates ORS 227.173(1). 35 Or LUBA at 327-28.