BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MILTON ROBINSON,
Petitioner,

vs.

CITY OF SILVERTON,
Respondent,

and

NORTH WATER STREET, LLC,
Intervenor-Respondent.

LUBA No. 2000-075

FINAL OPINION
AND ORDER

Appeal from City of Silverton.

Donald M. Kelley and Patrick Doyle, Silverton, represented petitioner.

Richard D. Rodeman, Corvallis, represented respondent.

Christopher P. Koback, Portland, represented intervenor-respondent.

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

DISMISSED 10/10/2000

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

Opinion by Briggs.

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

On February 22, 2000, intervenor filed an application for site review for an assisted living facility. 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 petitioner appealed to the planning commission. The planning commission hearing on the lot line adjustment was held on May 9, 2000. During the course of the hearing, petitioner's attorney presented arguments that included references to the proposed design of the facility, contending that the lot line adjustment and site design would not conform to the city's lot line adjustment criteria.[1]

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[1]Silverton Zoning Ordinance (SZO) Section 12.04 establishes the following criteria for approving lot line adjustments:

> "A. Each parcel shall meet the minimum lot and dimension standards of the applicable zone district. In no instance shall a * * * lot line adjustment [be] made which will be inconsistent with any lot requirement of the applicable zone district * * *.
>
> "B. Adequate public facilities shall be available to serve the existing and the newly created parcels or shall be made part of the conditions of approval.

On May 26, 2000, petitioner filed his notice of intent to appeal the site review decision to LUBA. On the same day, he filed a request for a local review of the site review decision. The planning director denied petitioner's request for a local appeal on June 2, 2000.[2]

MOTION TO DISMISS

Intervenor moves to dismiss this appeal. Intervenor first contends that the site review process adopted by the city does not result in a land use decision. Even if the city's decision may be construed to be a land use decision or a limited land use decision, intervenor argues that petitioner's appeal is not timely, because it was filed more than 21 days after petitioner received actual notice of the city's decision approving the site review application. ORS 197.830(3) and (5).[3] According to intervenor, the testimony prepared by petitioner's attorney

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> "C. [The p]roposal shall be compatible with all applicable policies within the Silverton Comprehensive Plan, if any, and with the requirements of the underl[ying] zone district.
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> "D. A 'redevelopment plan' shall be required for any application which leaves a portion of the subject property capable of being replatted.
>
> "E. With the exception of one parcel, each parcel shall have direct access onto a public street. * * *"

[2]Petitioner appeals the city's decision to deny an appeal of the site review decision in LUBA No. 2000-114.

[3]ORS 197.830(3) provides, in relevant part:

> "If a local government makes a land use decision without providing a hearing, except as provided under ORS * * * 227.175(10), or the local government makes a land use decision that is different from the proposal described in the notice of hearing 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 [LUBA]:
>
> "(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."

ORS 197.830(5) provides, in relevant part:

for the lot line adjustment appeal clearly demonstrates that the attorney, as petitioner's agent, if not petitioner himself, actually knew of the site review decision before May 9, 2000.[4] Intervenor also contends that it is aware of at least one occasion in March 2000 where one of petitioner's attorneys came to the city offices and reviewed documents pertaining to the subject property.[5]

In the alternative, intervenor contends that if petitioner believed that the site review application was in fact a land use decision, he should have filed his local appeal within 10 days of actual notice of the decision, as provided for in Ordinance No. 95-104, Chapter 4, Sections 3 and 4.[6] Intervenor argues that petitioner's delay in filing the local appeal

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> "If a local government makes a limited 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 [LUBA]:
>
> "(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."

[4]The motion to dismiss includes as an attachment an excerpt from the May 9, 2000 lot line adjustment appeal hearing minutes where petitioner's attorney argues that the city's site review decision should have been subject to notice and hearing requirements.

[5]The affidavit from intervenor's attorney states:

> "I spoke with Sam Litke, Planning Director for the City of Silverton. Mr. Litke informed me that on a date in March 2000, one of Mr. Robinson's attorneys was at the Public Works Department reviewing some of the plans associated with Intervenor's proposals. I do not include this information in my affidavit for the purpose of establishing conclusively that Mr. Robinson [or] his attorneys gained any specific knowledge of the [site review] decision * * * but only to illustrate the existence of an issue of fact over when those attorneys learned of the decision." Affidavit of Christopher P. Koback 2.

[6]Ordinance 95-104 amended portions of the SZO. Chapter 4 establishes the process for local land use appeals. It provides, in relevant part:

> "**Section 3. - PROCEDURES**
>
> "Appeals shall be filed in accordance with the following procedures:
>
> "**1. - General Provisions**

precludes LUBA's review because petitioner failed to timely exhaust local remedies. We need not consider this alternative argument because, for the following reasons, we agree with intervenor that petitioner's notice of intent to appeal was not timely filed with LUBA.

We have already determined that the application of the city's site review criteria results in a limited land use decision.[7] *Mountain West Investment Corp. v. City of Silverton*, ___ Or LUBA ___ (LUBA No. 2000-078, July 18, 2000), slip op 4. Therefore, the provisions of ORS 197.195 apply to local decisions regarding site review. ORS 197.195(3)(b) provides, in relevant part:

> "For limited land use decisions, the local government shall provide written notice to owners of property within 100 feet of the entire contiguous site for which the application is made. * * *"

Appeals of limited land use decisions are governed by ORS 197.830(9) and ORS 197.830(5). ORS 197.830(9) provides that

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> "a. Every decision relating to the provision of this zoning ordinance substantiated by findings of every board, commission, committee, hearings officer, and official of the City is subject to review by appeal in accordance with the provisions of this chapter.
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> "b. Filing of an appeal to a higher level City hearings authority, in accordance with the provisions of this chapter, shall initiate the appeal process * * *. The process shall include adequate public notice, a public hearing, and preparation of findings by the authority that either affirms, amends, or reverses the decision appealed.
>
> "* * * * *
>
> "**4. - Appeal Periods**
>
> "Appeals shall be filed within 10 days from the date that a notice of disposition is mailed. * * *"

[7]ORS 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).

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

The decision at issue in this appeal was reduced to writing and mailed to the applicant, pursuant to local notice requirements, on March 9, 2000. The decision thus became final on March 9, 2000.

Petitioner's notice of intent to appeal was filed with LUBA on May 26, 2000. If ORS 197.830(9) applies, petitioner's notice of intent to appeal is not timely filed and this appeal must be dismissed. ORS 197.830(5) provides an exception to the deadline provided for in ORS 197.830(9) in certain circumstances. *See* n 3. If petitioner demonstrates that (1) he is entitled to notice of the limited land use decision as provided for in ORS 197.195(3)(b); and (2) he is adversely affected by the decision, petitioner may file an appeal with LUBA within 21 days of receiving actual notice of the decision, notwithstanding the fact that the notice of intent to appeal was filed more than 21 days after the date the decision became final. ORS 197.830(5)(a).

Petitioner argues that his notice of intent to appeal was timely filed because petitioner has not yet received written notice of the city's action, as is required by ORS 197.195(3)(b). However, petitioner has not presented any focussed allegation, much less identified evidence to demonstrate, that he is entitled to notice of a limited land use decision, as required by that statute. Further, petitioner's reliance on the receipt of a written decision as the only means to demonstrate compliance with the "actual notice" requirement of ORS 197.830(5) is misplaced. As we found in *Willhoft v. City of Gold Beach*, ___ Or LUBA ___ (LUBA No. 99-170, July 13, 2000), actual notice may be inferred in other ways. In *Willhoft*, we concluded that, depending on the circumstances,

> "it is * * * 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[, t]he circumstances themselves must be sufficient * * * to inform the petitioner of both the *existence and substance of the decision*." Slip op 15 (emphasis added).

Petitioner does not directly respond to intervenor's arguments that evidence is available to show that petitioner or his agents received actual notice of the decision prior to May 9, 2000. Petitioner does nothing to dispute intervenor's factual contentions at all. Instead, petitioner relies solely on the argument that it is *legally impossible* for petitioner to receive actual notice of the city's site review decision in the absence of actually being mailed a copy of that notice. As we have explained, petitioner's sole reliance on that legal argument is misplaced.

It is petitioner's burden to demonstrate that LUBA has jurisdiction to hear his appeal. *Leonard v. Union County*, 24 Or LUBA 362, 377 (1992) (where petitioner seeks to file a notice of intent to appeal more than 21 days from the date the decision became final, it is petitioner's burden to demonstrate that the notice of intent to appeal is timely filed); *Sparrows v. Clackamas County*, 24 Or LUBA 318, 326 (1992) (same). Petitioner has not shown that he is entitled to the tolling provisions of ORS 197.830(5). Petitioner's notice of intent to appeal was not filed within 21 days of the date the decision became final, as is required by ORS 197.830(9). Therefore, the appeal is dismissed.[8]

[8]Because we dismiss this appeal, we do not address intervenor's alternative request for LUBA to receive evidence not in the record to support intervenor's contention that petitioner received actual notice of the city's site review decision prior to May 9, 2000.