BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NEAL HAUSAM,
Petitioner,

vs.

CITY OF SALEM,
Respondent,

and

TIMOTHY TEMPLE,
Intervenor-Respondent.

LUBA No. 2001-061

FINAL OPINION
AND ORDER

Appeal from City of Salem.

Paul R.J. Connolly, Salem, filed the petition for review and argued on behalf of petitioner. With him on the brief was Connolly & Doyle, LLP.

Paul A. Lee, Assistant City Attorney, Salem, filed a joint response brief and argued on behalf of respondent.

Gordon Hanna, Salem, filed a joint response brief and argued on behalf of intervenor-respondent.

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

AFFIRMED 07/06/01

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 denying his request for reconsideration of a tentative subdivision plat approval.

MOTION TO INTERVENE

Timothy Temple, (intervenor) one of the applicants below, moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.[1]

FACTS

This is the second time this matter has been appealed to LUBA. In *Hausem v. Salem*, 39 Or LUBA 51 (2000), we remanded the city's decision because it was not supported by substantial evidence in several particulars. After our remand, the applicants amended their subdivision plat proposal to respond to the shortcomings in the city's initial decision. At a hearing held February 6, 2001, the planning commission reviewed the amended plat and approved it. Notice of the planning commission's decision was mailed to petitioner on February 8, 2001. Record 15.

Petitioner was out of town during the week of February 6, 2001. On February 20, 2001, he requested that the planning commission vacate its decision approving the subdivision plat, and reopen the remand hearing, thereby allowing him the opportunity to submit testimony in opposition to the revised plat. In support of his requests, petitioner stated his belief that the notice of hearing was not mailed until January 31, 2001, seven days before the remand hearing. Petitioner claimed that the seven-day notice violated ORS 197.763(3), which requires that notice of quasi-judicial applications be mailed no less than 20 days prior to the hearing. Petitioner argued that, because of the short notice, he was not notified of the hearing in time to either postpone his travel plans or arrange for a representative to appear

[1]The city and intervenor filed a joint response brief. We refer to them jointly as respondents.

before the planning commission. Record 12-14.

On February 21, 2001, in response to petitioner's request for reconsideration, the assistant city attorney wrote a memorandum to the planning commission, explaining why the attorney believed that petitioner's requests should not be granted. In that memorandum, the city attorney opined that ORS 197.763(3) does not apply to hearings held after a remand from LUBA. In addition, the assistant city attorney stated that, even if petitioner was entitled to 20 days' notice of the remand hearing, the city attorney believed that petitioner had not demonstrated how petitioner was prejudiced by the short notice. Record 25-26.

Petitioner's requests were scheduled to be heard by the planning commission on March 6, 2001. The staff report addressing the reconsideration request reiterated the city attorney's opinion that vacation of the February 6, 2001 decision and reopening the remand hearing were not warranted because petitioner had failed to demonstrate that he was entitled to 20 days notice prior to the hearing. In addition, the staff report concluded that petitioner failed to show how he was substantially prejudiced by the city's notice. On March 6, 2001, the city planning commission denied petitioner's request for reconsideration. This appeal followed.

JURISDICTION

Respondents argue that LUBA does not have jurisdiction over this appeal. According to respondents, petitioner's notice of intent to appeal states that petitioner is appealing the

> "Land Use Decision made by the [Salem] Planning Commission * * * at its March 6, 2001 hearing denying Petitioner's Motion to Reopen Remand Hearing and to Vacate Resolution No. PC 04-02 * * * that became final on March 6, 2001." Notice of Intent to Appeal 1.

Respondents argue that the city code does not have a process for vacating land use decisions. Therefore, respondents contend that the planning commission's denial does not fall under LUBA's jurisdiction to review land use decisions because the decision to deny

petitioner's request is not a "land use decision" as that term is defined in ORS 197.015(10).[2] ORS 197.825(1).[3] In respondents' view, the planning commission's decision is not a land use decision because the planning commission did not apply any land use regulations when it denied petitioner's requests.

We disagree with the city's contention that simply because the city has no procedures to address requests to vacate prior decisions, such requests are not land use decisions. The planning commission treated petitioner's requests as a request for reconsideration.[4] In this case, the planning commission denied petitioner's requests because it determined that petitioner had not established any grounds to grant them. Nowhere in the decision itself, in

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[2]ORS 197.015(10)(a) provides, in relevant part, that a "land use decision" includes:

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

[3]ORS 197.825(1) provides that LUBA has "exclusive jurisdiction to review any land use decision * * *."

[4]It appears that the city planning commission has authority to reconsider its land use decisions, although it lacks a particular process to grant such requests. Salem Revised Code (SRC) 6.070, pertaining to the powers of the planning commission, provides, in relevant part, that the planning commission

> "shall hold such hearings as are provided for in this ordinance; and upon any other matters referred to the [planning] commission * * * by any individuals * * * for the handling [of matters] where * * * no particular procedure is provided in this ordinance, the [planning] commission may hold a hearing in its discretion, at such time and place as the commission may select[.]"

SRC 114.140(15), pertaining to the record of proceedings for quasi-judicial land use actions, requires that the local record include:

> "Any written request for reconsideration submitted after the decision maker's final decision."

Rule 10 of the Rules of the Salem Planning Commission, adopted as Resolution 97-8, provides:

> "When a question has been put once and decided, and before the action becomes effective or before the City Council has taken jurisdiction, it shall be in order for any member who voted with the majority to move for reconsideration thereof, and such motion shall take precedence over all other questions * * *. No motion shall be reconsidered more than once."

the assistant city attorney's memorandum, or in the staff report is there an argument that petitioner's requests were invalid because the planning commission lacked authority to grant them.

It is relatively clear that the planning commission exercised its authority under the city land use regulations to deny petitioner's requests to (1) vacate its February 6, 2001 decision and (2) reopen the remand hearing for testimony. Therefore, the planning commission's decision is a land use decision subject to our jurisdiction.

ASSIGNMENT OF ERROR

Petitioner contends that the planning commission erred in denying his request for reconsideration. According to petitioner, the February 6, 2001 hearing was the first and only evidentiary hearing that was held on remand and, therefore, pursuant to ORS 197.763 (2) and (3), petitioner was entitled to notice mailed at least 20 days prior to that hearing.[5] Petitioner

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[5]ORS 197.763 provides, in relevant part, that:

"The following procedures shall govern the conduct of quasi-judicial land use hearings conducted before a local * * * planning commission * * * on application for a land use decision and shall be incorporated into the comprehensive plan and land use regulations:

"* * * * *

"(2)(a) Notice of the hearings governed by [ORS 197.763] shall be provided to the applicant and to owners of record of property on the most recent property tax assessment roll where such property is located:

"(A) Within 100 feet of the property which is the subject of the notice where the subject property is wholly or in part within an urban growth boundary;"

"* * * * *

"(3) The notice provided by the jurisdiction shall:

"* * * * *

"(f) Be mailed at least:

"(A) Twenty days before the evidentiary hearing; or

"(B) If two or more evidentiary hearings are allowed, 10 days before the first evidentiary hearing[.]"

argues that as a matter of law he is entitled to reconsideration because the city failed to provide the requisite 20-day notice. Even if he was not entitled as a matter of law to the 20-day notice, petitioner argues the planning commission should have reconsidered its decision because petitioner was substantially prejudiced by the short notice provided by the city.

We need not decide here the precise extent to which the notice provisions of ORS 197.763(2) and (3) apply to proceedings after remand. ORS 197.835(9)(a)(B) provides that LUBA may reverse or remand a land use decision if the local government "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]" If the city failed to follow the proper procedures, petitioner is not entitled to a remand as a matter of law. Remand is appropriate only if petitioner demonstrates that the notice given prejudiced his substantial rights.[6] *Fechtig v. City of Albany*, 27 Or LUBA 480, 487, *aff'd* 130 Or App 433, 882 P2d 138 (1994). For the reason explained below, we conclude that petitioner has not demonstrated that the notice provided by the city prejudiced his substantial rights.

On January 25, 2001, a city employee signed a certificate of mailing, where she certifies that she

> "caused to be deposited in the post office at Salem, Oregon, 97 separate envelopes the postage of each of which was duly prepaid and which contained a true and correct copy of the notice of hearing to be held before the Salem Planning Commission or Salem Hearings Officer on the Subdivision 97-8 LUBA Remand application of Tim Temple * * *." Record 27.

The statement contained in the certificate of mailing is supported by a copy of a copy-center work order, which shows that 101 copies of a 2-page document (Sub 97-8) were made. Record 23. The notice of hearing is a 2-page document. Record 28-29. Both petitioner and petitioner's attorney were sent the notice of hearing. Record 30, 33. The statement in the

[6]We have explained that the substantial rights of parties referred to by ORS 197.835(9)(a)(B) are an adequate opportunity to prepare and present their case and a full and fair hearing. *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988).

certificate of mailing is corroborated in the city's staff report, dated March 6, 2001, where the city explains that the notice of public hearing was mailed on January 25, 2001, and a copy of the staff report was mailed separately to petitioner and others, on January 31, 2001. Record 10-11.

In an affidavit dated February 20, 2001, petitioner argues that, despite the city's evidence to the contrary, the notice of hearing was mailed to him no earlier than January 31, 2001, six days prior to the remand hearing. Record 14. Petitioner speculates that the notice arrived at his residence no earlier than February 2, 2001, three business days prior to the remand hearing. *Id*. Attached to petitioner's affidavit is a copy of a large postmarked envelope. The postmark is dated January 31, 2001, and indicates that $1.39 postage was paid. *Id.* at 19.

From the date and the amount of postage paid, we believe that it is far more likely that the envelope that petitioner claims contained the notice of hearing actually contained a copy of the city's staff report. Therefore, we conclude that January 25, 2001 was the date the city's notice was mailed. In that case, using petitioner's estimate of mailing time, petitioner received notice of the February 6, 2001 hearing on January 27, 2001, ten days prior to the hearing.

We have held that where a local government fails to provide *any* notice of proceedings on remand, a petitioner's substantial rights are prejudiced. *DLCD v. Crook County*, 37 Or LUBA 39, 43 (1999). Here, petitioner received 10 days notice, which is adequate time to make arrangements to appear in person, in writing or through a representative. The fact that petitioner was out of town part or all of that time does not justify a different result.[7]

[7]We might feel differently if petitioner had advised the city of his planned absence and requested that proceedings on remand be delayed until he returned. Petitioner does not claim that he advised the city of his planned absence.

Petitioner's assignment of error is denied.

The city's decision is affirmed.